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CHAPTER 5.

 REMEDIES AND PENALTIES

PART 1. LIMITATIONS ON CREDITORS' REMEDIES

**SECTION 37‑5‑101.** Short title.

 This chapter shall be known and may be cited as South Carolina Consumer Protection Code ‑ Remedies and Penalties.

HISTORY: 1962 Code Section 8‑800.331; 1974 (58) 2879.

**SECTION 37‑5‑102.** Scope.

 This part applies to actions or other proceedings to enforce rights arising from consumer credit sales, consumer leases, consumer loans, and consumer rental‑purchase agreements; and, in addition, to extortionate extensions of credit (Section 37‑5‑107).

HISTORY: 1962 Code Section 8‑800.332; 1974 (58) 2879; 1985 Act No. 121, Section 7.

**SECTION 37‑5‑103.** Restrictions on deficiency judgments in consumer credit sales.

 (1) This section applies to a deficiency on a consumer credit sale of goods or services and on a consumer loan in which the lender is subject to claims and defenses arising from sales and leases (Section 37‑3‑410). A consumer is not liable for a deficiency unless the creditor has disposed of the goods in good faith and in a commercially reasonable manner.

 (2) If the seller repossesses or voluntarily accepts surrender of goods that were the subject of the sale and in which he has a security interest, the consumer is not personally liable to the seller for the unpaid balance of the debt arising from the sale of a commercial unit of goods of which the cash sale price was $1,500 or less, and the seller is not obligated to resell the collateral unless the consumer has paid 60 percent or more of the cash price and has not signed after default a statement renouncing his rights in the collateral.

 (3) If the seller repossesses or voluntarily accepts surrender of goods that were not the subject of the sale but in which he has a security interest to secure a debt arising from a sale of goods or services or a combined sale of goods and services and the cash price of the sale was $1,500 or less, the consumer is not personally liable to the seller for the unpaid balance of the debt arising from the sale, and the seller's duty to dispose of the collateral is governed by the provisions on disposition of collateral in the Commercial Code, Chapter 9 of Title 36.

 (4) If the lender takes possession or voluntarily accepts surrender of goods in which he has a purchase money security interest to secure a debt arising from a consumer loan in which the lender is subject to claims and defenses arising from sales and leases (Section 37‑3‑410) and the net proceeds of the loan paid to or for the benefit of the consumer were $1,500 or less, the consumer is not personally liable to the lender for the unpaid balance of the debt arising from that loan and the lender's duty to dispose of the collateral is governed by the provisions on disposition of collateral in the Commercial Code, Chapter 9 of Title 36.

 (5) For the purpose of determining the unpaid balance of consolidated debts or debts pursuant to a revolving charge account, the allocation of payments to a debt shall be determined in the same manner as provided for determining the amount of debt secured by various security interests (Section 37‑2‑409).

 (6) The consumer may be held liable in damages to the creditor if the consumer has wrongfully damaged the collateral or if, after default and demand, the consumer has wrongfully failed to make the collateral available to the creditor.

 (7) If the creditor elects to bring an action against the consumer for a debt arising from a consumer credit sale of goods or services or from a consumer loan in which the lender is subject to claims and defenses arising from sales and leases (Section 37‑3‑410), when under this section he would not be entitled to a deficiency judgment if he took possession of the collateral, and obtains judgment:

 (a) he may not take possession of the collateral, and

 (b) the collateral is not subject to levy or sale on execution or similar proceedings pursuant to the judgment.

HISTORY: 1962 Code Section 8‑800.333; 1974 (58) 2879; 1976 Act No. 686 Section 37; 2008 Act No. 187, Section 1, eff March 31, 2008.

**SECTION 37‑5‑104.** No garnishment.

 With respect to a debt arising from a consumer credit sale, a consumer lease, a consumer loan, or a consumer rental‑purchase agreement, regardless of where made, the creditor may not attach unpaid earnings of the debtor by garnishment or like proceedings.

HISTORY: 1962 Code Section 8‑800.334; 1974 (58) 2879; 1985 Act No. 121, Section 8.

**SECTION 37‑5‑106.** No discharge from employment for garnishment.

 No employer shall discharge an employee for the reason that a creditor of the employee has subjected or attempted to subject unpaid earnings of the employee to garnishment or like proceedings directed to the employer for the purpose of paying a judgment arising from a consumer credit sale, consumer lease, consumer loan, or a consumer rental‑purchase agreement.

HISTORY: 1962 Code Section 8‑800.336; 1974 (58) 2879; 1985 Act No. 121, Section 9.

**SECTION 37‑5‑107.** Extortionate extensions of credit.

 (1) If it is the understanding of the creditor and the debtor at the time an extension of credit is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person, the repayment of the extension of credit is unenforceable through civil judicial processes against the debtor.

 (2) If it is shown that the creditor then had a reputation for the use or threat of use of violence or other criminal means to cause harm to the person, reputation, or property of any person to collect extensions of credit or to punish the nonrepayment thereof, there is prima facie evidence that the extension of credit was unenforceable under subsection (1).

HISTORY: 1962 Code Section 8‑800.337; 1974 (58) 2879.

**SECTION 37‑5‑108.** Unconscionability; inducement by unconscionable conduct.

 (1) With respect to a transaction that is, gives rise to, or leads the debtor to believe will give rise to, a consumer credit transaction, if the court as a matter of law finds:

 (a) the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement; or

 (b) any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable term or part, or so limit the application of any unconscionable term or part as to avoid any unconscionable result and award the consumer any actual damages he has sustained.

 (2) With respect to a consumer credit transaction, if the court as a matter of law finds that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt arising from that transaction, the court may grant an injunction. In addition, the consumer has a cause of action to recover actual damages and, in an action other than a class action, a right to recover from the person violating this section a penalty in the amount determined by the court of not less than one hundred dollars nor more than one thousand dollars. For purposes of this subsection and subsection (3), the term "collecting a debt" in a consumer credit transaction includes the collection or the attempt to collect any rental charge or any other fee or charge or any item rented to a lessee in connection with a consumer rental‑purchase agreement as described in Section 37‑2‑701(6).

 (3) If it is claimed or appears to the court that the agreement or transaction or any term or part thereof may be unconscionable, or that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt, the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the agreement or transaction or term or part thereof, or of the conduct, to aid the court in making the determination.

 (4)(a) In applying subsection (1), consideration must be given to applicable factors, such as, but without limitation:

 (i) in the case of a consumer credit sale, consumer lease, or consumer rental‑purchase agreement, knowledge by the seller or lessor at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased;

 (ii) in the case of a consumer credit sale, consumer lease, consumer rental‑purchase agreement, or consumer loan, gross disparity between the price of the property or services sold, leased, or loaned and the value of the property, services, or loan measured by the price at which similar property, services, or loans are readily obtainable in consumer credit transactions by like consumers;

 (iii) the fact that the creditor contracted for or received separate charges for insurance with respect to a consumer credit sale, consumer loan, or consumer rental‑purchase agreement with the effect of making the sale or loan unconscionable, considered as a whole, when including the sale of insurance from which the consumer receives no potential benefit as referenced in Section 37‑4‑106(1)(a);

 (iv) the fact that the seller, lessor, or lender knowingly has taken advantage of the inability of the consumer or debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy, inability to understand the language of the agreement, or similar factors;

 (v) taking a nonpurchase money, nonpossessory security interest in household goods defined as the following: clothing, furniture, appliances, one radio and one television, linens, china, crockery, kitchenware, and personal effects, including wedding rings of the consumer and his dependents; except that when a purchase money consumer credit transaction is refinanced or consolidated, the security lawfully collateralizing the previous consumer credit transaction continues to secure the new consumer credit transaction, even if the new consumer credit transaction is for a larger amount or is in other respects a nonpurchase money consumer credit transaction; and further, that a nonpurchase money, nonpossessory security interest may be taken in a work of art, electronic entertainment equipment, except one television and one radio, items acquired as antiques and which are over one hundred years of age, and jewelry, except wedding rings.

 In construing subitem (v), the courts must be guided by the interpretations and rulings of the federal courts and the Federal Trade Commission to the Credit Trade Regulation Rule (16 C.F.R. PART 444).

 (b) In applying subsection (1), consideration may be given to the extension of credit to a consumer if, considering the consumer's current and expected income, current obligations, and employment status, the creditor knows or should know that the consumer is unable to make the scheduled payment on the obligation when due. Rental renewals necessary to acquire ownership in a consumer rental‑purchase agreement are not obligations contemplated in this item (b).

 (5) In applying subsection (2), consideration shall be given to each of the following factors, among others, as applicable:

 (a) using or threatening to use force, violence, or criminal prosecution against the consumer or members of his family, including harm to the physical person, reputation, or property of any person;

 (b) communicating with the consumer or a member of his family at frequent intervals during a twenty‑four hour period or at unusual hours or under other circumstances so that it is a reasonable inference that the primary purpose of the communication was to harass the consumer. The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium. A creditor or debt collector may not:

 (i) communicate with a consumer at any unusual time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, it may be assumed that a convenient time to communicate with a consumer is between 8 a.m. and 9 p.m.; or

 (ii) communicate with a consumer who is represented by an attorney when such fact is known to the creditor or debt collector unless the attorney consents to direct communication or fails to respond within ten days to a communication;

 (iii) contact a consumer at his place of employment after the consumer or his employer has requested in writing that no contacts be made at such place of employment or except as may be otherwise permitted by statute or to verify the consumer's employment;

 (iv) communicate with anyone other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the attorney of the creditor or debt collector, unless the consumer or a court of competent jurisdiction has given prior direct permission;

 (v) use obscene or profane language or language the natural consequence of which is to abuse the hearer or reader;

 (vi) publish a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency;

 (vii) cause a telephone to ring repeatedly during a twenty‑four hour period or engage any person in a telephone conversation with intent to annoy, abuse, or harass any person at the called number;

 (viii) advertise for sale any debt to coerce payment of the debt;

 (ix) communicate with a consumer regarding a debt by postcard;

 (x) deposit or threaten to deposit any postdated check or other postdated payment instrument requested by the creditor prior to the date on such check or instrument;

 (xi) take or threaten to take any nonjudicial action to effect dispossession or disablement of property if:

 (aa) there is no present right to possession of the property claimed as collateral through an enforceable security interest or other ownership interest;

 (bb) there is no present intention to take possession of the property; or

 (cc) the property is exempt by law from such dispossession or disablement; or

 (xii) cause charges to be incurred by any person for communications to the consumer by concealment of the true purpose of the communication, such charges include, but are not limited to, collect telephone calls and telegram fees.

 (c) using fraudulent, deceptive, or misleading representations in connection with the collection of a consumer credit transaction. Such false representations shall include:

 (i) the character, amount, or legal status of any debt;

 (ii) any services rendered or fees which may be received, unless such fees are expressly authorized by law;

 (iii) a claim of an individual that he is an attorney or that any communication is from an attorney;

 (iv) any claim or implication that nonpayment of any debt will result in arrest, imprisonment, garnishment, seizure, or attachment unless the remedy is legally permitted to the creditor and the claim or implication is not used for the purpose of harassment or abuse of process;

 (v) a claim or implication that the consumer committed any crime or other conduct to disgrace the consumer; or

 (vi) any written communication which simulates or appears to be a document authorized, issued, or approved by any state or federal agency or court or creates a false impression as to its source;

 (d) causing or threatening to cause injury to the consumer's reputation or economic status by disclosing information affecting the consumer's reputation for creditworthiness with knowledge or reason to know that the information is false; communicating with the consumer's employer before obtaining a final judgment against the consumer, except as permitted by statute or to verify the consumer's employment; disclosing to a person, with knowledge or reason to know that the person does not have a legitimate business need for the information, or in any way prohibited by statute, information affecting the consumer's credit or other reputation; or disclosing information concerning the existence of a debt known to be disputed by the consumer without disclosing that fact;

 (e) engaging in conduct with knowledge that like conduct has been restrained or enjoined by a court in a civil action by the administrator against any person pursuant to the provisions on injunctions against fraudulent or unconscionable agreements or conduct (Section 37‑6‑111).

 (6) No action at law claiming unconscionable debt collection may be commenced in any court until at least thirty days after the facts and circumstances of any claim of unconscionable conduct in collecting a debt arising out of a consumer credit transaction has been filed in writing with the administrator of the Department of Consumer Affairs. The administrator shall immediately provide to the person or organization complained against with a copy of any complaint alleging unconscionable debt collection practices filed with the Department of Consumer Affairs. The administrator shall immediately provide to the Director of the Consumer Finance Division of the Board of Financial Institutions a copy of any written claim of unconscionable conduct in collecting a debt filed against a supervised lender under this title or a restricted lender under Title 34. A creditor or debt collector may only take such action as is authorized by law to protect its collateral during the thirty‑day state agency review period. The administrator shall take immediate steps to investigate, evaluate, and attempt to resolve such complaints. The administrator and director shall jointly take immediate steps to investigate, evaluate, and attempt to resolve complaints involving supervised and restricted lenders. If in an action, properly filed after the thirty‑day state agency review period with regard to conduct in collecting a debt arising out of a consumer credit transaction, in which unconscionability is claimed the court finds unconscionability pursuant to subsection (1) or (2), the court shall award reasonable fees to the attorney for the consumer or debtor. If the court does not find unconscionability and the consumer or debtor claiming unconscionability has brought or maintained an action he knew to be groundless, the court may award reasonable fees to the attorney for the party against whom the claim is made. In determining attorney's fees, the amount of the recovery on behalf of the consumer is not controlling.

 (7) The remedies of this section are in addition to remedies available for the same conduct under law other than this title.

 (8) For the purpose of this section, a charge or practice expressly permitted by this title is not in itself unconscionable.

 (9) Nothing in this title may be construed to prevent a finding of unconscionability where a creditor assesses an origination charge, prepaid finance charge, service, or other prepaid charge which substantially exceeds the usual and customary charge for the particular type of consumer credit transaction. In such a transaction the court shall consider the relative sophistication of the debtor and the creditor, the relative bargaining power of the debtor and creditor, and any oral or written representations made by the creditor regarding the credit service charge or the loan finance charge of the consumer credit transaction.

HISTORY: 1962 Code Section 8‑800.338; 1974 (58) 2879; 1976 Act No. 686 Section 38; 1982 Act No. 385, Section 43; 1985 Act No. 121, Sections 10, 11; 1985 Act No. 153, Sections 3, 4; 1995 Act No. 135, Section 17; 2003 Act No. 42, Section 4, eff Jan. 1, 2004, and applying to loans for which the loan applications were taken on or after that date.

**SECTION 37‑5‑109.** Default.

 An agreement of the parties to a consumer credit transaction with respect to default on the part of the consumer is enforceable only to the extent that:

 (1) the consumer fails to make a payment as required by agreement; provided, with respect to a consumer rental‑purchase agreement, a lessee defaults when he fails to renew an agreement and fails to return the rented property or make arrangements for its return as provided for by the agreement; or

 (2) the prospect of payment, performance, or realization of collateral is significantly impaired; the burden of establishing the prospect of significant impairment is on the creditor.

HISTORY: 1976 Act No. 686 Section 39; 1985 Act No. 121, Section 12.

**SECTION 37‑5‑110.** Notice of consumer's right to cure.

 (1) With respect to a secured or unsecured consumer credit transaction payable in two or more installments, after a consumer has been in default for ten days for failure to make a required payment and has not voluntarily surrendered possession of goods that are collateral, a creditor may give the consumer the notice described in this section. A creditor gives notice to the consumer under this section when he delivers the notice to the consumer or mails the notice to him at his residence [Section 37‑1‑201(6)].

 (2) The notice shall be in writing and conspicuously state: the name, address and telephone number of the creditor to whom payment is to be made, a brief identification of the credit transaction, the consumer's right to cure the default, and the amount of payment and date by which payment must be made to cure the default. A notice in substantially the following form complies with this subsection:

 (name, address and telephone number of creditor)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 (account number, if any)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 (brief identification of credit transaction)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(date is the LAST DAY FOR PAYMENT,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(amount) is the AMOUNT NOW DUE.

 You are late in making your payment(s). If you pay the AMOUNT NOW DUE (above) by the LAST DAY FOR PAYMENT (above), you may continue with the contract as though you were not late. If you do not pay by that date, we may exercise our rights under the law. These rights include the right to repossess any property held as collateral for this transaction and the right, in many instances, to hold you personally responsible for any difference between the amount the property brings in a sale and the balance due us on the credit transaction in question. If you are late again in making your payments, we may exercise our rights without sending you another notice like this one. If you have questions, write or telephone the creditor promptly."

 (3) Notwithstanding subsections (1) and (2), in consumer rental‑purchase agreements, after a consumer has been in default for three business days and has not voluntarily surrendered possession of the rented property, a lessor may give the consumer the notice provided in subsection (4) of this section. A lessor gives the notice to the consumer under this section when he delivers notice to the consumer or mails the notice to him at his address.

 (4) The notice must be in writing and conspicuously state: the name, address, and telephone number of the lessor to whom payment is to be made, a brief identification of the transaction, the consumer's right to cure the default, and the amount of payment and date by which payment must be made to cure the default. A notice in substantially the following form complies with this subsection:

(name, address, and telephone number of lessor)

(account number, if any)

(brief identification of transaction)

 (\_\_\_\_\_\_\_\_\_\_) is LAST DAY FOR PAYMENT, (\_\_\_\_\_\_\_\_\_\_) is the AMOUNT NOW DUE. You have failed to renew your rental agreement(s). If you pay the AMOUNT NOW DUE (above) by the LAST DAY FOR PAYMENT (above), you may continue with the contract as though you had renewed on time. If you do not pay by that date, we may exercise our rights under the law. You may be required to pay reasonable costs authorized by law. If you are late again in either returning the merchandise or renewing your agreement, we may exercise our rights without sending you another notice like this one. If you have questions, write or telephone the lessor promptly."

HISTORY: 1976 Act No. 686 Section 39; 1982 Act No. 385, Section 44; 1984 Act No. 355, Section 8; 1985 Act No. 121, Section 13.

**SECTION 37‑5‑111.** Cure of default.

 (1) With respect to a secured or unsecured consumer credit transaction payable in two or more installments, except as provided in subsection (2), after a default consisting only of the consumer's failure to make a required payment, a creditor, because of that default, may neither accelerate maturity of the unpaid balance of the obligation, nor take possession of or otherwise enforce a security interest in goods that are collateral until twenty days after a notice of the consumer's right to cure (Section 37‑5‑110) is given. Until expiration of the minimum applicable period after the notice is given, the consumer may cure all defaults consisting of a failure to make the required payment by tendering the amount of all unpaid sums due at the time of the tender, without acceleration, plus any unpaid delinquency or deferral charges. Cure restores the consumer to his rights under the agreement as though the defaults had not occurred.

 (2) With respect to defaults on the same obligation and subject to subsection (1), after a creditor has once given notice of consumer's right to cure (Section 37‑5‑110), this section gives the consumer no right to cure and imposes no limitation on the creditor's right to proceed against the consumer or goods that are collateral or which are rented or the lessor's right to recover the property. For the purpose of this section, in credit extended pursuant to a revolving charge or revolving loan account, the obligation is the unpaid balance of the account and there is no right to cure and no limitation on the creditor's rights with respect to a default that occurs within twelve months after an earlier default as to which a creditor has given a notice of consumer's right to cure (Section 37‑5‑110).

 (3) Notwithstanding subsection (1), with respect to consumer rental‑purchase agreements, with payments or options to renew which are monthly or less frequent than monthly, after a default consisting of failure to renew and failure to return the property, a lessor may not instigate court action to recover rented property until five days after the notice of the consumer's right to cure (Section 37‑5‑110) is given.

 (4) Notwithstanding subsection (1), with respect to consumer rental‑purchase agreements with payments or options to renew more frequently than monthly, after default consisting of failure to renew or return the property, a lessor may not instigate court action to recover rented property until three days after notice of the consumer's right to cure (Section 37‑5‑110) is given.

 (5) With respect to all consumer rental‑purchase agreements until expiration of the minimum applicable period after notice is given, the consumer may cure all defaults consisting of failure to renew and failure to return the property by tendering the amount of all unpaid sums due at the same time of the tender plus any unpaid delinquency charges or other charges authorized by Part 7 of Chapter 2.

 (6) This section and the provisions on waiver, agreements to forego rights, and settlement of claims (Section 37‑1‑107) do not prohibit a consumer from voluntarily surrendering possession of goods which are collateral or which are rented, and the creditor from thereafter accelerating maturity of the obligation and enforcing the obligation and his security interest in the goods at any time after default. In any enforcement proceeding, however, the creditor shall affirmatively plead and prove either that the notice to cure is not required or that the creditor has given the required notice, but the failure to so plead does not invalidate any action taken by the creditor that is otherwise lawful and if the creditor has rightfully repossessed any collateral the repossession does not constitute conversion.

 (7) Any repossession of collateral or rented property in violation of this section is void and the creditor is liable for conversion.

HISTORY: 1976 Act No. 686 Section 39; 1982 Act No. 385, Section 45; 1984 Act No. 355, Section 9; 1985 Act No. 121, Section 14.

**SECTION 37‑5‑112.** Creditor's right to take possession after default.

 Upon default by a consumer with respect to a consumer credit transaction, unless the consumer voluntarily surrenders possession of the collateral or rented property to the creditor, the creditor may take possession of the collateral or rented property without judicial process only if possession can be taken without entry into a dwelling used as a current residence and without the use of force or other breach of the peace.

HISTORY: 1976 Act No. 686 Section 39; 1985 Act No. 121, Section 15.

**SECTION 37‑5‑113.** Venue, complaint, stay of enforcement of or relief from default judgment.

 An action by a creditor against a consumer arising from a consumer credit transaction shall be brought in the county of the consumer's residence [Section 37‑1‑201(6)], unless an action is brought to enforce an interest in land securing the consumer's obligation, in which case the action may be brought in the county in which the land or a part thereof is located. If the county of the consumer's residence has changed, the consumer upon motion may have the action removed to the county of his current residence. If the residence of the consumer is not within this State, the action may be brought in the county in which the sale, lease or loan was made. If the initial papers offered for filing in the action on their face show noncompliance with this section, the clerk of court shall not accept them. The court may change the place of trial as otherwise provided by law.

HISTORY: 1982 Act No. 385, Section 46.

**SECTION 37‑5‑114.** Complaint; proof; entry of default judgment.

 (1) In an action brought by a creditor against a consumer arising from a consumer credit transaction, the complaint shall allege the facts of the consumer's default, the amount to which the creditor is entitled, an indication of how that amount was determined, and either that the notice to cure required by Sections 37‑5‑110 and 37‑5‑111 has been given or is not required.

 (2) A default judgment may not be entered in the action in favor of the creditor unless the complaint is verified by the creditor or sworn testimony, by affidavit or otherwise, is adduced showing that the creditor is entitled to the relief demanded.

HISTORY: 1982 Act No. 385, Section 46.

**SECTION 37‑5‑115.** Stay of enforcement of or relief from default judgment.

 Except as otherwise set forth in this section, at any time after entry of a default judgment in favor of a creditor and against a consumer in an action arising from a consumer credit transaction, the court which rendered judgment, for cause including lack of jurisdiction to render the judgment, and upon motion of a party or its own motion, with notice as the court may direct, may stay enforcement of or relieve the consumer from the judgment by order upon just and equitable conditions; provided, however, that whenever the motion is based on the mistake, inadvertence, surprise or excusable neglect of the consumer, the motion must be filed within one year after the date the judgment is entered in the abstract of judgments pursuant to Section 15‑35‑520.

HISTORY: 1982 Act No. 385, Section 46.

**SECTION 37‑5‑117.** Lien, or submission of debt to credit bureau or reporting agency, by health care services provider; notice required; penalties.

 A provider of health care services must give twenty days prior notice before submitting a debt to a credit bureau or credit reporting agency or filing a lien against real or personal property, and the debtor must be notified by mail of the creditor's intention. Failure to comply with this requirement is punishable by a fine of not less than one hundred dollars for each occurrence.

HISTORY: 1992 Act No. 295, Section 2.

PART 2. DEBTORS' REMEDIES

**SECTION 37‑5‑202.** Effect of violations on rights of parties.

 (1) If a creditor has violated any provisions of this title applying to receipts, statements of account, and evidences of payment (Sections 37‑2‑302 and 37‑3‑302), notice to cosigners and similar parties (Sections 37‑2‑302 and 37‑3‑303), schedule of maximum loan finance charges to be filed and posted (Sections 37‑2‑305 and 37‑3‑305), certain negotiable instruments prohibited (Section 37‑2‑403), assignee subject to claims and defenses (Sections 37‑2‑404(5) and 37‑2‑709), security in sales or leases (Section 37‑2‑407), no assignment of earnings (Sections 37‑2‑410, 37‑3‑403 and 37‑2‑710), referral sales and leases (Section 37‑2‑411), attorney's fees (Sections 37‑2‑413 and 37‑3‑404), limitations on default charges (Sections 37‑2‑414, 37‑2‑706, and 37‑3‑405), authorizations to confess judgment (Sections 37‑2‑415, 37‑2‑713, and 37‑3‑407), consumer rental‑purchase disclosure (Section 37‑2‑702), consumer rental‑purchase reinstatement (Section 37‑2‑714), noncredit term life insurance (Section 37‑3‑202(2)), lender subject to claims and defenses arising from sales and leases (Section 37‑3‑410(4)), card issuer subject to claims and defenses (Section 37‑3‑411(5)), authority to make supervised loans (Section 37‑3‑502), restrictions on interest in land as security (Section 37‑3‑510), limitations on the schedule of payments on loan terms for supervised loans (Section 37‑3‑511), or assurance of discontinuance (Section 37‑6‑109), 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 an amount determined by the court not less than one hundred dollars nor more than one thousand dollars. With respect to violations arising from sales or loans made pursuant to a revolving charge or a revolving loan account no action pursuant to this subsection may be brought more than two years after the violation occurred. With respect to violations arising from other consumer credit transactions, no action pursuant to this subsection may be brought more than one year after the scheduled or accelerated maturity of the debt.

 (2) A consumer is not obligated to pay a charge in excess of that allowed by this title and has a right of refund of any excess charge paid. A refund may not be made by reducing the consumer's obligation by the amount of the excess charge, unless the creditor has notified the consumer that the consumer may request a refund and the consumer has not so requested within 30 days thereafter. If the consumer has paid an amount in excess of the lawful obligation under the agreement, the consumer may recover the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against consumers arising from the debt.

 (3) If a creditor has contracted for or received a charge in excess of that allowed by this title, or if a consumer is entitled to a refund and a person liable to the consumer refuses to make a refund within a reasonable time after demand, the consumer may recover from the creditor or the person liable in an action other than a class action a penalty in an amount determined by the court not less than $100 nor more than $1,000. With respect to excess charges arising from sales or loans made pursuant to a revolving charge or revolving loan account, no action pursuant to this subsection may be brought more than two years after the violation or passage of a reasonable time for refund occurs. With respect to excess charges arising from other consumer credit transactions no action pursuant to this subsection may be brought more than one year after the scheduled or accelerated maturity of the debt. For purposes of this subsection, a reasonable time is presumed to be 30 days.

 (4) Except as otherwise provided, a violation of this title does not impair rights on a debt.

 (5) If an employer discharges an employee in violation of the provisions prohibiting discharge (Section 37‑5‑106), the employee within ninety days may bring a civil action for recovery of wages lost as a result of the violation and for an order requiring reinstatement of the employee. Damages recoverable shall not exceed lost wages for six weeks.

 (6) A creditor is not liable for a penalty under subsection (1) or (3) if he notifies the consumer of a violation before the creditor receives from the consumer written notice of the violation or the consumer has brought an action under this section, and the creditor corrects the violation within sixty days after notifying the consumer. If the violation consists of a prohibited agreement, giving the consumer a corrected copy of the writing containing the violation is sufficient notification and correction. If the violation consists of of an excess charge, correction shall be made by an adjustment or refund. The Administrator and any official or agency of this State having supervisory authority over a supervised financial organization shall give prompt notice to a creditor of any violation discovered pursuant to an examination or investigation of the transactions, business, records, and acts of the creditor (Sections 37‑3‑506, 37‑6‑105 and 37‑6‑106).

 (7) A creditor may not be held liable in an action brought under this section for a violation of this title 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.

 (8) In an action in which it is found that a creditor has violated this title, the court shall award to the consumer the costs of the action and to his attorneys their reasonable fees. In determining attorney's fees, the amount of the recovery on behalf of the consumer is not controlling.

HISTORY: 1962 Code Section 8‑800.352; 1974 (58) 2879; 1976 Act No. 686 Section 40; 1982 Act No. 385, Section 48; 1985 Act No. 121, Section 16; 1999 Act No. 66, Section 24.

**SECTION 37‑5‑203.** Civil liability for violation of disclosure provisions.

 (1) Except as otherwise provided in this section, a creditor who, in violation of the provisions of the Federal Truth in Lending Act or Section 37‑2‑309 or 37‑3‑308, fails to disclose information to a person entitled to the information pursuant to this title is liable to that person in an amount equal to the sum of:

 (a) twice the amount of the finance charge in connection with the transaction, but the liability pursuant to this item must be not less than one hundred dollars or more than one thousand dollars; and

 (b) in the case of a successful action to enforce the liability pursuant to item (a), the costs of the action together with reasonable attorney's fees as determined by the court.

 (2) With respect to disclosures required by Section 37‑2‑301 or 37‑3‑301, a creditor has no liability pursuant to this section if, within sixty days after discovering an error, and before the institution of an action pursuant to this section or the receipt of written notice of the error, the creditor notifies the person of the error and makes necessary adjustments in the appropriate account to assure that the person is not required to pay a finance charge in excess of the amount of percentage rate actually disclosed. With respect to disclosures required by Section 37‑2‑309 or 37‑3‑308, a creditor has the liability stated in subsection (1)(a) if:

 (a) the creditor fails to give the disclosures required by Section 37‑2‑309 or 37‑3‑308; or

 (b) the disclosures required by Section 37‑2‑309(C) or 37‑3‑308(C) are provided but vary from the disclosures given at consummation pursuant to Section 37‑2‑301 or 37‑3‑301; if the cure or correction provisions of this subsection do not apply to those violations; and except that a lender is not liable unless the credit sale or loan transaction is consummated.

 (3) A creditor may not be held liable in any action brought under this section for a violation of this title 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.

 (4) Any action which may be brought under this section against the original creditor in any credit transaction involving a security interest in land may be maintained against any subsequent assignee of the original creditor where the assignee, its subsidiaries, or affiliates were in a continuing business relationship with the original creditor either at the time the credit was extended or at the time of the assignment, unless the assignment was involuntary, or the assignee shows by a preponderance of evidence that it did not have reasonable grounds to believe that the original creditor was engaged in violations of this title and that it maintained procedures reasonably adapted to apprise it of the existence of the violations.

 (5) No action pursuant to this section may be brought more than one year after the date of the occurrence of the violation.

 (6) In this section, creditor includes a person who in the ordinary course of business regularly extends or arranges for the extension of credit, or offers to arrange for the extension of credit. Nothing in this subsection, however, shall be construed to impose civil liability or penalties on an arranger of credit when disclosure constituting a violation of the Federal Truth in Lending Act is actually committed by another person and the arranger of credit has no knowledge of the violation when it occurred. The creditor shall provide a copy of the final closing documents to the arranger of credit.

 (7) The liability of the creditor under this section is in lieu of and not in addition to his liability under the Federal Truth in Lending Act; no action with respect to the same violation may be maintained pursuant to both this section and the Federal Truth in Lending Act.

 (8) The right of a person to sue for a violation of Section 37‑2‑309 or 37‑3‑308 is maintainable only as an individual action.

HISTORY: 1962 Code Section 8‑800.353; 1974 (58) 2879; 1982 Act No. 385, Section 49; 1996 Act No. 430, Section 1; 2003 Act No. 42, Sections 3.C, 3.D, eff January 1, 2004.

**SECTION 37‑5‑205.** Refunds and penalties as setoff to obligation.

 Refunds or penalties to which the debtor is entitled pursuant to this part may be set off against the debtor's obligation, and may be raised as a defense to a suit on the obligation without regard to the time limitations prescribed by this subdivision.

 HISTORY: 1962 Code Section 8‑800.355; 1974 (58) 2879.

PART 3. CRIMINAL PENALTIES

**SECTION 37‑5‑301.** Willful violations.

 (1) A lender who willfully makes charges in excess of those permitted by applicable law is guilty of a misdemeanor and upon conviction may be sentenced to pay a fine not exceeding five thousand dollars, or to imprisonment not exceeding one year, or both.

 (2) A person, other than a supervised financial organization, who willfully engages in the business of making loans without a license, where a license is required, is guilty of a misdemeanor and upon conviction may be sentenced to pay a fine not exceeding five thousand dollars, or imprisonment not exceeding one year, or both.

 (3) A person who willfully engages in the business of making consumer credit sales, consumer leases, or consumer loans, or of taking assignments of rights against debtors arising therefrom and undertakes direct collection of payments or enforcement of these rights, without complying with the provisions of this title concerning notification (Section 37‑6‑202) or payment of fees (Section 37‑6‑203), is guilty of a misdemeanor and upon conviction may be sentenced to pay a fine not exceeding one hundred dollars.

HISTORY: 1962 Code Section 8‑800.361; 1974 (58) 2879; 1976 Act No. 686 Section 41.

**SECTION 37‑5‑302.** Disclosure violations.

 A person is guilty of a misdemeanor and upon conviction may be sentenced to pay a fine not exceeding five thousand dollars, or to imprisonment not exceeding one year, or both, if he willfully and knowingly

 (1) Gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of the Federal Truth in Lending Act,

 (2) Uses any rate table or chart, the use of which is authorized by the provisions of the Federal Truth in Lending Act, in a manner which consistently understates the annual percentage rate determined according to those provisions; or

 (3) Otherwise fails to comply with any requirement of the provisions on disclosure of the Federal Truth in Lending Act.

 (4) The criminal liability of a person under this section is in lieu of and not in addition to his criminal liability under the Federal Truth in Lending Act; no prosecution of a person with respect to the same violation may be maintained pursuant to both this section and the Federal Truth in Lending Act.

HISTORY: 1962 Code Section 8‑800.362; 1974 (58) 2879.

**SECTION 37‑5‑303.** Fraudulent use of cards.

 (1) For the purposes of this section:

 (a) "credit card" means a seller credit card or a lender credit card or similar arrangement as defined in this title; and

 (b) "debit card" means a card or device issued by a supervised financial organization pursuant to an arrangement whereby the card or device enables the customer to obtain cash, goods, services or anything else of value.

 (2) Any person who knowingly uses or attempts or conspires to use any counterfeit, altered, forged, lost, stolen or fraudulently obtained credit or debit card to obtain money, goods, services or anything else of value is guilty of a misdemeanor and shall be fined not more than five thousand dollars or imprisoned not more than one year, or both.

HISTORY: 1976 Act No. 686 Section 42.