CHAPTER 10

Miscellaneous Loan Provisions

**SECTION 37‑10‑101.** Scope.

 Except as otherwise provided in other chapters of this title, this chapter applies to designated loan transactions other than consumer loan transactions (Sections 37‑3‑104 and 37‑3‑105).

HISTORY: 1982 Act No. 385, Section 56; 1984 Act No. 261, Section 7.

CROSS REFERENCES

Inapplicability of the Consumer Protection Code to loans, sales or leases made primarily for agricultural purposes, see Section 37‑1‑202.

**SECTION 37‑10‑102.** Attorney’s fees and other charges on mortgage loans for personal, family or household purposes.

 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 and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 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.

 The creditor may comply with this section by:

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

 The creditor may require the attorney or agent to provide reasonable security to the creditor by way of mortgage title insurance in a company acceptable to the creditor and to comply with reasonable closing procedures. 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. Any legal fees other than for examination and certification of the title, the preparation of all required documents, and the closing of the transaction required or incurred by the creditor in connection with the transaction is the responsibility of the creditor regardless of which party pays for the title work, document preparation, and closing.

 (b) The creditor may contract and receive the following additional charges in a transaction in which the creditor authorizes a transferee of the real estate that serves as security for the transaction to assume the original debtor’s obligation ‑

 (i) except as otherwise provided in subparagraph (iii), the additional charges authorized by Section 37‑3‑202;

 (ii) the charge for any credit report on the debtor required by the creditor, if not paid to the creditor or a person related to the creditor; and

 (iii) a nonrefundable assumption fee in an amount not exceeding the lesser of four hundred dollars or one percent of the unpaid balance of the loan at the time the assumption transaction is consummated.

HISTORY: 1982 Act No. 385, Section 56; 1984 Act No. 355, Section 10; 1989 Act No. 164, Section 3; 1991 Act No. 142, Section 23; 1996 Act No. 355, Section 1.

CROSS REFERENCES

Applicability of items (a) and (c) of this section to a credit sale other than a consumer credit sale, see Section 37‑2‑104.

Attorney’s fees with respect to a consumer credit sale, see Section 37‑2‑413.

Library References

Attorney and Client 78.

Consumer Credit 4, 16.

Westlaw Topic Nos. 45, 92B.

C.J.S. Attorney and Client Sections 254, 260.

C.J.S. Interest and Usury; Consumer Credit Sections 412, 414 to 422, 426 to 429, 437 to 439.

RESEARCH REFERENCES

Encyclopedias

64 Am. Jur. Proof of Facts 3d 273, Tortious Interference With Contractual Relationship Involving Sale of Real Estate.

Treatises and Practice Aids

28 Causes of Action 2d 203, Cause of Action for Class Arbitration of Contract‑Based Disputes.

Res. Mort. Lend. State Reg. Man. South Eastern SC Section 2:3, Application Practices.

Res. Mort. Lend. State Reg. Man. South Eastern SC Section 2:18, Fees and Charges.

Res. Mort. Lend. State Reg. Man. South Eastern SC Section 2:36, Tie‑Ins.

LAW REVIEW AND JOURNAL COMMENTARIES

Recovery of Attorneys’ Fees as Costs or Damages in South Carolina. 38 S.C. L. Rev. 823.

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1. In general

**SECTION 37‑10‑102(a) affords a lender the right to reject any lawyer selected by the borrower who is not approved as a closing attorney by a title insurance company.** Gailliard v. Fleet Mortg. Corp., 1995, 880 F.Supp. 1085. Attorney And Client 78

A lender acted within the borrower preference statute when it asked the borrower to either choose another closing attorney or procure from her attorney a letter of approval from a title insurance company. Thus, the lender had a complete defense to the borrower’s attorney’s claim for interference with a contract for services. Gailliard v. Fleet Mortg. Corp., 1995, 880 F.Supp. 1085.

Providing attorney preference disclosure after the completion of credit application on secured loan for personal, family, or household purpose violated prior version of statute requiring first page of credit application to contain information as is necessary to ascertain borrower’s preferences. King v. American General Finance, Inc. (S.C. 2009) 386 S.C. 82, 687 S.E.2d 321, rehearing denied. Consumer Credit 4

Attorney preference disclosure in connection with secured loan for personal, family, or household purpose must occur contemporaneously with the credit application under prior version of statute requiring first page of credit application to contain information as is necessary to ascertain borrower’s preferences; statute imposes bright‑line approach at odds with notion of substantial compliance, and to permit statutory construction as sanctioning attorney preference disclosure after completion of application would undermine the legislative purpose to protect borrowers. King v. American General Finance, Inc. (S.C. 2009) 386 S.C. 82, 687 S.E.2d 321, rehearing denied. Consumer Credit 4

Seller’s charging fee, no matter how reasonable, triggered the penalties of Consumer Protection Code, where seller failed to ascertain buyers’ attorney/insurance agent preference. Tilley v. Pacesetter Corp. (S.C. 2003) 355 S.C. 361, 585 S.E.2d 292. Consumer Credit 17

Lender does not violate state Consumer Protection Code by using separate piece of paper to ascertain borrower’s preferences of legal counsel and hazard insurance, rather than including preference statement on first page of credit application. Davis v. NationsCredit Financial Services Corp. (S.C. 1997) 326 S.C. 83, 484 S.E.2d 471. Consumer Credit 16

2. Notice

Provision of contract for sale, which gave buyers the option to provide insurance themselves through existing policy or a policy separately obtain, did not constitute substantial compliance with notice of attorney and insurance preference provisions under Consumer Protection Code for consumer credit sales that were secured by lien on real estate and that required buyer to purchase insurance. Tilley v. Pacesetter Corp. (S.C. 1998) 333 S.C. 33, 508 S.E.2d 16, rehearing denied, on subsequent appeal 355 S.C. 361, 585 S.E.2d 292. Consumer Credit 16

Seller was required to give buyers notice of attorney and insurance preference provisions under Consumer Protection Code for consumer credit sales, which were secured by mortgage on buyers’ homes and which required buyers to purchase insurance, even though buyers were permitted to provide insurance themselves through existing policy or a policy separately obtain, and even though contract for sale did not require buyers to pay attorney fees. Tilley v. Pacesetter Corp. (S.C. 1998) 333 S.C. 33, 508 S.E.2d 16, rehearing denied, on subsequent appeal 355 S.C. 361, 585 S.E.2d 292. Consumer Credit 16

3. Civil actions

An attorney, who was discharged after his client had been told by a consumer lender that the attorney was unacceptable to it, stated a cause of action against the lender for tortious interference with an existing contract where he alleged that the client had contracted for his services, that he had begun work, and that he attempted in good faith to resolve his personal dispute with the lender. Camp v. Springs Mortg. Corp. (S.C. 1993) 310 S.C. 514, 426 S.E.2d 304, rehearing denied. Torts 246

An attorney, whose client was told by a consumer lender that the attorney was unacceptable to it, could not maintain a cause of action for violation of the Consumer Protection Code, Section 37‑1‑101 et seq., against the lender since the intent of the act, which provides for the forfeiture of the loan finance charge to the debtor’s benefit, is to protect consumers, not the attorneys who provide services at loan closings. Camp v. Springs Mortg. Corp. (S.C. 1993) 310 S.C. 514, 426 S.E.2d 304, rehearing denied.

4. Arbitration

Class arbitration was not clearly precluded by commercial lending contract’s broad arbitration clause providing that “[a]ll disputes ... arising from or relating to this contract or the relationships which result ... shall be resolved by binding arbitration by one arbitrator selected by [lender] with consent of you”; thus, as long as lender selected arbitrator with consent of named plaintiff/borrower, Federal Arbitration Act (FAA) did not foreclose class arbitration, and question of whether class arbitration was permissible under clause was matter of contract interpretation under state law. (Per Justice Breyer with three Justices concurring and one Justice concurring in judgment.) Green Tree Financial Corp. v. Bazzle (U.S.S.C. 2003) 123 S.Ct. 2402, 539 U.S. 444, 156 L.Ed.2d 414. Alternative Dispute Resolution 251

Arbitrator did not act with “manifest disregard of the law” in allowing class‑wide arbitration of homeowners’ claims that lender violated the attorney and insurance agent preference provisions of the Consumer Protection Code regarding loans secured by real estate, as implied basis under Federal Arbitration Act (FAA) for vacating an arbitrator’s award, where the issue of whether class‑wide arbitration was permissible if the arbitration clause was silent with respect to class‑wide arbitration had not been not settled in the State at the time of arbitration. Bazzle v. Green Tree Financial Corp. (S.C. 2002) 351 S.C. 244, 569 S.E.2d 349, certiorari granted 123 S.Ct. 817, 537 U.S. 1098, 154 L.Ed.2d 766, vacated 123 S.Ct. 2402, 539 U.S. 444, 156 L.Ed.2d 414. Alternative Dispute Resolution 329

5. Class action

Typicality requirement in borrowers’ suit against lender was satisfied for class certification in common feature of lender failing to timely provide the attorney preference disclosure as mandated by prior version of statute requiring first page of credit application to contain information as is necessary to ascertain borrower’s preferences in connection with secured loan for personal, family, or household purpose. King v. American General Finance, Inc. (S.C. 2009) 386 S.C. 82, 687 S.E.2d 321, rehearing denied. Parties 35.71

Circuit court made good practical decision in agreeing to defer mailing of class notice until after conclusion of appeal in action brought by buyers against seller of aluminum windows, awnings, and doors for violation of Consumer Protection Code in connection with consumer credit sales; definition of class had changed since court issued its order, and court did not eliminate requirement that a class notice be mailed to absent class members. Tilley v. Pacesetter Corp. (S.C. 2003) 355 S.C. 361, 585 S.E.2d 292. Parties 35.44

Buyers’ claims against seller of aluminum windows, awnings, and doors were not grounded in fraud and deceit and, accordingly, survived class member’s death; claims for violation of Consumer Protection Code were absolute and did not depend on actual fraud, and Consumer Protection Code did not define “fraud.” Tilley v. Pacesetter Corp. (S.C. 2003) 355 S.C. 361, 585 S.E.2d 292. Abatement And Revival 53

6. Summary judgment

Genuine issue of material fact precluded summary judgment against borrower on basis that loan was not secured by real property in action against lender for violation of statute that required creditor to ascertain preference of borrower as to legal counsel for closing by failing to timely ascertain borrowers’ preference; disclosure statement indicated security interest, and record contained security agreement. King v. American General Finance, Inc. (S.C. 2009) 386 S.C. 82, 687 S.E.2d 321, rehearing denied. Judgment 181(25)

**SECTION 37‑10‑103.** Prepayment of loans of one hundred fifty thousand dollars or less.

 The debtor may prepay in full at any time without penalty the debt represented by a personal, family, or household purpose loan agreement that is secured in whole or in part by a first or junior lien on real estate if the aggregate of all sums advanced will not exceed one hundred fifty thousand dollars.

HISTORY: 1982 Act No. 385, Section 56; 1984 Act No. 355, Section 11; 2003 Act No. 42, Section 2.A, eff Jan. 1, 2004, and applying to loans for which the loan applications were taken on or after that date.

CROSS REFERENCES

Dollar amount cited in Sections 37‑5‑103(2), (3), and (4) as subject to change of dollar amounts used in the Consumer Protection Code, see Section 37‑1‑109.

Library References

Consumer Credit 12.

Westlaw Topic No. 92B.

C.J.S. Interest and Usury; Consumer Credit Sections 429 to 432, 526.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Mortgages Section 147, Application of Payments.

Treatises and Practice Aids

Res. Mort. Lend. State Reg. Man. South Eastern SC Section 2:29, Prepayment.

**SECTION 37‑10‑104.** Agricultural loans under twenty‑five thousand dollars.

 With respect to a loan under which the aggregate of all sums advanced or contemplated by the parties in good faith to be advanced is less than twenty‑five thousand dollars and which is primarily for an agricultural purpose, the maximum loan finance charge that may be contracted for and received shall be eighteen percent per annum, calculated according to the actuarial method.

HISTORY: 1982 Act No. 385, Section 56.

**SECTION 37‑10‑105.** Violations; civil actions.

 (A) If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C). The three‑year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set‑off in such action.

 (B) No creditor may be held liable in an action brought under this section for a violation of this chapter 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.

 (C) If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37‑5‑108 at the time it was made, or was induced by unconscionable conduct, the court may, in an action other than a class action:

 (1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;

 (2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;

 (3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or

 (4) award:

 (a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;

 (b) not more than 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; and

 (c) attorney’s fees and costs.

 An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.

 (D) In an action in which it is found that a creditor has violated this chapter, the court shall award to the debtor the costs of the action and to his attorneys their reasonable fees. In determining attorneys’ fees, the amount of the recovery on behalf of the debtor is not controlling.

HISTORY: 1982 Act No. 385, Section 56; 1997 Act No. 99, Section 1.

Library References

Consumer Credit 17, 18.

Westlaw Topic No. 92B.

C.J.S. Interest and Usury; Consumer Credit Sections 443 to 459, 548 to 551.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Equity Section 18, Right to Trial by Jury‑ Cases With Counterclaims.

S.C. Jur. South Carolina Rules of Civil Procedure Section 13.2, Discussion.

Treatises and Practice Aids

Res. Mort. Lend. State Reg. Man. South Eastern SC Section 2:3, Application Practices.

NOTES OF DECISIONS

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1. In general

Seller’s charging fee, no matter how reasonable, triggered the penalties of Consumer Protection Code, where seller failed to ascertain buyers’ attorney/insurance agent preference. Tilley v. Pacesetter Corp. (S.C. 2003) 355 S.C. 361, 585 S.E.2d 292. Consumer Credit 17

Absent evidence that seller of aluminum windows, awnings, and doors charged “excess” interest on any transaction that was subject of action for violation of Consumer Protection Code, buyers were not entitled to additional penalty for being charged interest rates in excess of statutory maximum. Tilley v. Pacesetter Corp. (S.C. 2003) 355 S.C. 361, 585 S.E.2d 292. Consumer Credit 11

Provision of Consumer Protection Code that allowed consumer to recover actual damages for violations of provision requiring seller to give notice of attorney and insurance preference provisions was not the exclusive remedy for such violation, and buyers could seek damages under Code’s penalties provision. Tilley v. Pacesetter Corp. (S.C. 1998) 333 S.C. 33, 508 S.E.2d 16, rehearing denied, on subsequent appeal 355 S.C. 361, 585 S.E.2d 292. Consumer Credit 17

2. Construction and application

Version of Consumer Protection Code that was in effect when buyers’ claims against seller accrued and were filed and when judgment on the issue of liability was granted, rather than amended version that changed penalties for violations of attorney and insurance preference statutes, applied to determine buyers’ damages. Tilley v. Pacesetter Corp. (S.C. 2003) 355 S.C. 361, 585 S.E.2d 292. Consumer Credit 2

3. Limitations

Three‑year statute of limitations, applicable to buyers’ class action lawsuit against seller for violating notice of attorney and insurance preference provisions under Consumer Protection Code, began to run from each payment made on underlying consumer credit sale. Tilley v. Pacesetter Corp. (S.C. 1998) 333 S.C. 33, 508 S.E.2d 16, rehearing denied, on subsequent appeal 355 S.C. 361, 585 S.E.2d 292. Limitation Of Actions 58(1)

4. Civil action

A cause of action under Section 37‑10‑105 was not stated against a mortgage corporation where an attorney alleged that the corporation advised his client that his services as a loan closer would be unacceptable to it, and the client in consequence hired another attorney; the penalty provision pertaining to Section 37‑10‑105 which provides for the forfeiture of loan finance charges indicates that the intention of the legislature was to protect the borrower rather than the loan closer. Camp v. Springs Mortg. Corp. (S.C.App. 1991) 307 S.C. 283, 414 S.E.2d 784, certiorari granted, affirmed in part, reversed in part 310 S.C. 514, 426 S.E.2d 304, rehearing denied.

5. Interest

Buyers were not entitled to prejudgment interest from date they filed action against seller of aluminum windows, awnings, and doors for violation of Consumer Protection Code in connection with consumer credit sales to date of entry of summary judgment in their favor, where buyers did not plead for prejudgment interest in their original complaint or in their amended complaint. Tilley v. Pacesetter Corp. (S.C. 2003) 355 S.C. 361, 585 S.E.2d 292. Interest 66

6. Class action

Circuit court made good practical decision in agreeing to defer mailing of class notice until after conclusion of appeal in action brought by buyers against seller of aluminum windows, awnings, and doors for violation of Consumer Protection Code in connection with consumer credit sales; definition of class had changed since court issued its order, and court did not eliminate requirement that a class notice be mailed to absent class members. Tilley v. Pacesetter Corp. (S.C. 2003) 355 S.C. 361, 585 S.E.2d 292. Parties 35.44

Buyers’ claims against seller of aluminum windows, awnings, and doors were not grounded in fraud and deceit and, accordingly, survived class member’s death; claims for violation of Consumer Protection Code were absolute and did not depend on actual fraud, and Consumer Protection Code did not define “fraud.” Tilley v. Pacesetter Corp. (S.C. 2003) 355 S.C. 361, 585 S.E.2d 292. Abatement And Revival 53

Seller of aluminum windows, awnings, and doors would be allowed to set off the award to buyers for violation of Consumer Protection Code in connection with consumer credit sales by amount of principal it had written off per class member; setoffs would be applied on an individual class member basis only and would have no effect on the awards to class members not in default and whose principal loan amount was not written off by seller. Tilley v. Pacesetter Corp. (S.C. 2003) 355 S.C. 361, 585 S.E.2d 292. Set‑off And Counterclaim 28(1)

**SECTION 37‑10‑106.** Maximum rate of interest; legal rate of interest.

 (1) No greater interest than six percent per annum shall be charged, taken, agreed upon or allowed upon any contract arising in this State for the hiring, lending, or use of money or other commodity, either by way of straight interest, discount or otherwise, except upon written contracts wherein, by express agreement, any rate of interest may be charged, except as otherwise provided in this title or by law.

 (2) Whenever the term legal rate of interest or lawful rate of interest is used in any contract, judgment or other document, it shall mean the rate specified in Section 34‑31‑20, unless the document otherwise specifically provides.

 (3) No greater interest than eight percent per annum shall be charged on life insurance policy loans unless otherwise provided by law.

HISTORY: 1982 Act No. 385, Section 56.

Library References

Consumer Credit 11.

Westlaw Topic No. 92B.

C.J.S. Interest and Usury; Consumer Credit Sections 428 to 429, 440 to 442, 526.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Assignments Section 18, Consumer Credit Sales Under Consumer Protection Code.

S.C. Jur. Banks and Banking Section 108, Interest on Loans.

Treatises and Practice Aids

Res. Mort. Lend. State Reg. Man. South Eastern SC Section 2:39, Usury.

**SECTION 37‑10‑107.** Certain legal or equitable actions prohibited.

 (1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

 (a) to lend or borrow money;

 (b) to defer or forbear in the repayment of money; or

 (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

 (2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

 (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;

 (b) promissory or equitable estoppel;

 (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or

 (d) negligent misrepresentation.

 (3) Subsections (1) and (2) do not apply to:

 (a) a loan of money used primarily for personal, family, or household purposes;

 (b) an agreement or change in the terms of an agreement relating to a line of consumer credit, lender credit card, or similar arrangement;

 (c) an overdraft on a demand deposit or other bank account; or

 (d) promissory notes, real estate mortgages, security agreements, guaranty and surety agreements, and letters of credit.

 (4) In the event of a conflict between this section and any other provision of law of this State relating to the requirement of a signed writing, the provisions of the other provision of law shall control.

HISTORY: 1991 Act No. 142, Section 24.

Library References

Consumer Credit 18.

Westlaw Topic No. 92B.

C.J.S. Interest and Usury; Consumer Credit Sections 447, 452 to 459, 548 to 550.

NOTES OF DECISIONS

In general 2

Validity 1

1. Validity

Consumer Protection Code’s lender statute of frauds did not violate constitution’s “One subject” mandate; statute’s title, which was “Certain legal or equitable actions prohibited,” gave reasonable notice of the subject matter, statute protected consumers because it excluded from its ambit personal and household loans, as well as small commercial borrowers with loans of less than $50,000, and referenced consumer credit, and Consumer Protection Code was calculated to apprise those seeking loans of the effects of the writing requirement. Sea Cove Development, LLC v. Harbourside Community Bank (S.C. 2010) 387 S.C. 95, 691 S.E.2d 158. Antitrust And Trade Regulation 129; Statutes 1617(4); Statutes 1624(19)

2. In general

Documents, writings, and letters which developer submitted to court in support of its claim against lenders for breach of contract and promissory estoppel did not satisfy the writing requirement of the lender statute of frauds; prequalification letters indicated that proposed loan was not guaranteed, and none of the documents showed that developer had obtained lender’s final approval for the loan. Sea Cove Development, LLC v. Harbourside Community Bank (S.C. 2010) 387 S.C. 95, 691 S.E.2d 158. Frauds, Statute Of 113(3); Frauds, Statute Of 118(1)