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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

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.

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by: _____
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