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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 18, 2000

The Honorable Michael E. Easterday
Member, House of Representatives
23 Wade Hampton Boulevard
Greenville, South Carolina 29609

Dear Representative Easterday:

By your letter of October 10, 2000, you have requested an opinion of this Office concerning arbitration clauses in certain contracts. Specifically you wish to know whether a clause in a contract that limits their recourse to arbitration is valid.

In short, arbitration clauses in contracts between a mortgage broker and a borrower are not invalid per se. In South Carolina neither the courts nor the General Assembly directly prohibit the inclusion of arbitration clauses in mortgage agreements. In fact, both state and federal policy favor arbitration as a means of resolving disputes. See Towles v. United Healthcare Corp., 338 S.C. 29, 524 S.E.2d 839 (S.C. App. 1999). However, to be enforced, arbitration clauses must comply with certain statutory requirements, particularly concerning notice to the parties that such a clause is included in the contract. Both the South Carolina Uniform Arbitration Act, codified at S.C. Code Ann. §15-48-10 et seq., and the Federal Arbitration Act, applicable when the agreement affects interstate commerce and codified at 9 U.S.C. A. § 1 et seq., contain guidelines for the proper inclusion of arbitration clauses in contracts.

In addition to special notice requirements for arbitration clauses, courts will apply laws governing the formation contracts to determine the validity of the clause. See Towles, 338 S.C. at 37, 524 S.E.2d at 844. For example, arbitration clauses have been challenged for lack of consideration and for unconscionability. See Hull v. Norcom, Inc. 750 F.2d 1547 (11th Cir. 1985) (unilaterally binding arbitration provision invalid for insufficient consideration); Lackey v. Green Tree Financial Corp., 330 S.C. 388, 498 S.E.2d 898 (S.C. App. 1998)(arbitration clause challenged as unconscionable but upheld by appellate court).

Thus, although arbitration clauses are not invalid per se, whether an arbitration clause in a particular contract between a mortgage broker and borrower would be enforced must be determined on a case by cases basis. Of course, only the courts could make such a determination.

Request Letter

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This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. Cook', written in a cursive style.

Robert D. Cook
Assistant Deputy Attorney General