

1981 WL 158228 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

April 7, 1981

***1 SUBJECT: Banks and Banking; Interest; Mortgages and Foreclosures; Property Real; Real Estate.**

(1) Section 34-31-90(2) of the South Carolina Code of Laws (1976) does apply to a real estate mortgage loan subject to the Consumer Protection Code.

(2) Section 34-31-90(2) does apply to a loan from an employer to his employee secured by a real estate mortgage.

Deputy Administrator
Department of Consumer Affairs

I.

DISCUSSION:

You have asked an opinion on the following hypothetical loan transaction. A consumer loan secured by a mortgage on real estate provides for bi-annual changes in the rate of finance charge based upon changes in the National Consumer Price Index. Limitations are that the rate may never exceed the maximum finance charge permissible under the Consumer Protection Code, which in this instance is an eighteen (18%) percent annual rate. Consumer Protection [Code § 37-3-201 \(Cum. Supp. 1980\)](#). The initial rate of interest is thirteen (13%) percent; the agreement provides that the rate may change no more than two (2%) percent at any one time and no more than five (5%) percent from the initial rate. The agreement further provides for prepayment in full without penalty, and the loan will not exceed \$100,000.00.

QUESTION:

Does Section 34-31-90(2) of the South Carolina Code of Laws (1976) prohibit increasing the rate initially agreed upon more than one (1%) percent over the life of the loan?

OPINION:

Yes. Section 34-31-90(2) provides:

It is hereby declared to be the public policy of this State that the lawful initial interest rate on mortgage loans, once agreed upon, may not be raised during the life of the mortgage unless agreed to by the borrower and may not be raised in excess of one percent over and above the interest rate initially agreed upon; provided, such agreed interest rate may not exceed the permitted lawful rate of interest; notwithstanding any other provisions of law to the contrary. Provided, that in any case where the interest on such a loan is permitted to be so increased the borrower shall be permitted to pay off the loan without any penalties or charges except accrued interest. Provided, further, that the provisions of this paragraph shall not apply to loans in excess of one hundred thousand dollars.

The statute includes only one specific exception to its application ('loans in excess of one hundred thousand dollars') and appears otherwise to apply without qualification or limitation to all 'mortgage loans.' In 1980, the General Assembly made

one further exception by permitting state chartered savings and loans, with the approval of the Board of Financial Institutions, to offer variable rate first mortgage real estate loans 'notwithstanding' the provisions of Section 34-31-90. Act No. 379 of 1980. The Administrator of the Department of Consumer Affairs has issued Administrative Interpretation No. 1.108-807 in which he concludes that the Consumer Protection Code does not displace the application of Section 34-31-90(2) to consumer loans. As in the past, we would defer to his opinion on matters involving the application and construction of the Consumer Protection Code; however, we would likewise conclude that no provision in Section 34-31-90(2) would exclude its application to 'consumer loans.' The broad language of Section 34-31-90(2) referring to 'mortgage loans' without restricting its application to first mortgages or second mortgages, or to consumer loans or other type loans, indicates a legislative intent that this section would be all-inclusive for mortgage loans. This legislative intent can further be demonstrated by reference to subsequent amendments to Section 34-31-90(2) which have made limited exceptions, as previously noted, in the case of loans in excess of \$100,000.00 (Act No. 317 of 1973) and first mortgage variable rate real estate loans by state chartered saving and loans (Act No. 379 of 1980). Therefore, this Office is entirely in agreement with Administrative Interpretation No. 1.108-8017 which concludes that a consumer loan transaction such as outlined above would be subject to the provisions of Section 34-31-90(2).

II.

DISCUSSION:

*2 The second loan transaction involves an employer, who is also a lender, making a consumer loan to his employee secured by a real estate mortgage. The terms provide a rate of finance charge of fifteen (15%) percent per annum. The agreement further provides that upon termination of employment for whatever reason, the rate will be increased to eighteen (18%) percent.

QUESTION:

Does Section 34-31-90(2) apply to this loan transaction with the result that the initial rate of fifteen (15%) percent cannot be increased more than one (1%) percent over the life of the mortgage?

OPINION:

Yes. For the same reasons indicated in Section I of this Opinion, Section 34-31-90(2) would apply. As noted in Section I, Section 34-31-90(2) applies to all mortgage loans regardless of the type of loan, mortgage, or lender. Unless the mortgage loan falls within one of the two limited exceptions, the mortgage loan would be subject to this provision.

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