1981 WL 157831 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
June 23, 1981

***1 Re: Due-on-Sale Clauses**

The Honorable D. L. Aydlette, Jr.
Member
House of Representatives
326-B Blatt Building
Columbia, South Carolina 29211

Dear Representative Aydlette:
You have requested an opinion from this office as to whether House Bill 2973, if enacted, would have the same effect on federally chartered savings and loans associations as on state chartered savings and loans. H. 2973 would make null and void any provision in a mortgage 'prohibiting an assignment or assumption which would result in a forceable refinancing of real estate at a higher interest rate.' Due-on-sale clauses give the lender the option to declare immediately due and payable all of the sums owed to the lender if all or any part of the property is sold or otherwise transferred by the borrower without the lender's prior consent. Therefore, it appears that due-on-sale clauses would be prohibited under the terms of H. 2973. Regulations of the Federal Home Loan Bank Board (FHLBB), on the other hand, have permitted, since 1976, the inclusion of due-on-sale clauses in mortgage loans by federally chartered associations. 12 C.F.R. § 545.8-3(f). The question, therefore, is whether H. 2973 would be preempted by this federal regulation.

In a previous opinion issued by this office with regard to variable interest rates, it was our opinion that state law (which prohibited variable interest rates) had been preempted as to federally chartered savings and loans by another regulation of the FHLBB which permitted variable rates. Opinion No. 79-98, Op.Atty.Gen. 135. We do not wish to overly burden this opinion by again citing the nature and history of federal savings and loan associations or the evolution of the doctrine of federal preemption. Therefore, we are enclosing Opinion No. 79-98 for your review and consideration on the matters presented in this opinion.

In the present case, we must once again make the determination of whether state law conflicts with a particular federal regulation, and if it does, whether such federal regulation is preemptive. Because there is no standard language for due-on-sale clauses and because we do not have a specific factual situation before us (i.e., a specific transaction and mortgage), it is impossible to give a conclusive opinion for every possible situation. Moreover, the opinion process is further complicated by a split in decisions between federal and state courts. In six federal court cases, the courts have held that state laws prohibiting due-on-sale clauses were preempted by the FHLBB's due-on-sale clause regulation. Glendale Fed. Sav. & Loan Ass'n. v. Fox, 459 F.Supp. 903 (C.D. Cal. 1978); partial summary judgment made final, 481 F.Supp. 616 (C.D. Cal. 1979); Conference of Fed. Sav. & Loan Associations v. Stein, 604 F.2d 1256 (9th Cir. 1979), aff. mem., 445 U.S. 921 (1980); Bailey v. First Federal S. &. L. Assn. of Ottawa, 467 F.Supp. 1139 (C.D. Ill. 1979); Williams First Federal S. & L. Ass'n. of Arlington, 500 F.Supp. 307 (E.D. Va. 1980); Nalore v. San Diego Federal Savings & Loan Assn., Civ. Action No. 77-0660-N (S.D. Cal. July 12, 1976); Great Western Union Federal S. &. L. Assn. v. Walters, Civil Action No. 79-906V (W.D. Wash. 1980) (the latter two unpublished opinions were not available to this office). However, more recently the Supreme Court of Minnesota and the California Court of Appeals (First Appellate District) have ruled that the federal regulation permitting due-on-sale clauses did not preempt state laws prohibiting same. Both of the latter decisions were based upon the courts' findings that there was no clear congressional intent to preempt state law. Holiday Acres No. 3 v. Midwest Fed. S. & L. Assn. of Minneapolis, Op. No. 338 (filed April 3, 1981); Panko v. Pan American Fed. S. & L. Assn., First App. District, D.W. One, 1 Civ. 47918 (filed June 1, 1981).

***2** Certainly the preemption issue will ultimately be decided by the United States Supreme Court. However, it is our opinion, based upon our study of the available case law, that the FHLBB's Regulation, 12 C.F.R. § 545.8-3(f), would preempt H. 2973 as to federally chartered savings and loan associations. As we noted initially, there is a clear conflict between H. 2973 and the FHLBB's regulation. Moreover, it is apodictic that federal preemption can be implied by the fact that there is comprehensive federal regulation of a particular area, even though there is no express declaration of such intent by Congress. Myers v. Beverly Hills Fed. S. &. L. Assn., 499 F.2d 1145 (9th Cir. 1974). In this regard, it has been observed that regulations promulgated by the FHLBB under the Home Owners' Loan Act of 1933 govern 'the powers and operations of every Federal Savings and Loan Association from its cradle to its corporate grave.' People v. Coast Federal S. & L. Assn., 98 F.Supp. 311, 316 (S.D. Cal. 1951). We find that the pervasiveness and the comprehensiveness of the federal regulatory scheme governing federal savings and loan associations to establish by implication the preemption of any conflicting state law.

In conclusion, we again state that it is our opinion that H. 2973 would not apply to federally chartered savings and loan associations. However, the matter will not be completely free from doubt until a decision is rendered on the federal preemption issue by the United States Supreme Court.

Very truly yours,

Richard B. Kale, Jr.
Senior Assistant Attorney General

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