

1980 WL 120616 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

January 21, 1980

*1 The Honorable S. Hunter Howard
Member
House of Representatives
P. O. Box 11867
407 Blatt Building
Columbia, South Carolina 29211

Dear Representative Howard:

You requested an opinion of this office as to the maximum interest rate that may be charged on a new first mortgage real estate loan for an existing home when the lending institution exercised its rights under a 'due on sale' clause in the previous mortgage, thus requiring the new purchaser, as a condition for financing, to enter into a new mortgage loan agreement. As you are no doubt aware, Act No. 7 of 1979 amended Section 34-31-30 of the Code of Laws of South Carolina, 1976, so as to allow the parties to a first mortgage on real estate to contract for any rate of interest. However, once the interest rate has been agreed upon by the parties, Section 34-31-90(2) of the Code would prohibit the rate from being increased during the life of the mortgage unless the borrower agrees to such increase, in which event it may not be raised in excess of one (1) percent.

For purposes of this opinion, I examined the Mortgage Books at the Richland County Courthouse and found that while mortgage agreements were in some respects similar, they varied significantly with regard to 'due on sale' clauses and 'assumption' clauses. Therefore, I cannot provide an opinion that would apply in every situation.

My legal research revealed no statute which dealt specifically with such clauses and, therefore, I would conclude that the wording of such clauses would be a matter of contract to which the parties would have to agree. It is obvious that the purpose of the 'due on sale' clause is to permit the mortgagee to terminate his loan should the mortgagor desire to sell his residence. I do not find such clauses to be either offensive or improper, since clearly a lender should have the right to choose whom he does business with. If after the original mortgage is satisfied a new first mortgage is thereafter executed, Section 34-31-90(2) would not apply since the rate of interest is not being increased 'during the life of the mortgage'. Therefore, if the first contract has a due on sale clause, freely contracted to by the parties, and there are no conflicting provisions within the contract allowing assumption of the mortgage, then it appears that the exercise of the 'due on sale' clause would be valid and that the parties to the new mortgage could contract for any rate of interest. However, if the contract contains conflicting provisions, one which allows the lender to demand satisfaction of the mortgage and one which allows assumption of the mortgage, the question becomes one of construction as to the meaning of the contract. In that situation, a court may find the 'due on sale' clause invalid since ambiguities in contracts are generally construed against the party who prepared the contract. [Mid-Continent Refrigerator Co. v. Way](#), 253 S.C. 101, 208 S.E.2d 31 (1977).

*2 In conclusion, depending on the language of the contract itself, the 'due on sale' clause may be validly exercised, and the parties to the new mortgage may contract for any rate of interest they desire.

I hope this letter has been of some assistance to you. If you should need any further assistance please do not hesitate to contact me.
Very truly yours,

Richard B. Kale, Jr.

Senior Assistant Attorney General

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