

1979 S.C. Op. Atty. Gen. 135 (S.C.A.G.), 1979 S.C. Op. Atty. Gen. No. 79-98, 1979 WL 29103

Office of the Attorney General

State of South Carolina

Opinion No. 79-98

JULY 19, 1979

***1 SUBJECT: Banks and Banking; Interest; Loans; Mortgages and Foreclosures; Property Real; Real Estate**
Federal Variable Rate Mortgage Regulation, Regulation No. 79-303 (12 C.F.R. 545.6-2, as amended May 30, 1979) preempts Act No. 7 of 1979 by invalidating the restriction on variable rate mortgages, as applicable to federal savings and loan associations.

TO: THE HONORABLE S. HUNTER HOWARD, JR.

Chairman

Banking and Consumer Affairs

Subcommittee, House of Representatives

QUESTION PRESENTED:

Whether or not Act No. 7 of 1979 is preempted by the federal Variable Rate Mortgage Regulation 12 C.F.R. 545.6-2 (as amended May 30, 1979), as relating to the ability or right of federally chartered savings and loan associations to enter into variable rate mortgages?

AUTHORITIES:

S.C. Act No. 7 of 1979 (R16, H2067);

FHLBB Regulation No. 79-303 (12 C.F.R. 545.6-2, as amended May 30, 1979);

Home Owners' Loan Act of 1933, as amended, [12 U.S.C. § 1461](#), et seq.;

[U.S. CONST. Art. VI, cl. 2](#);

[California v. Coast Federal Savings and Loan Association](#), 98 F.Supp. 311 (S.D. Cal. 1951);

[Federal Savings and Loan Ins. Corp. v. Kearney](#), 151 F.2d 720 (8th Cir. 1945);

AUTHORITIES, cont.:

[Glendale Federal Savings and Loan Association v. Fox](#), 459 F.Supp. 903 (C.D. Cal. 1978);

[Meyers v. Beverly Hills Federal Savings and Loan Association](#), 499 F.2d 1145 (9th Cir. 1974);

[Parker v. Brown](#), 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1942);

[Ray v. Atlantic Richfield Company](#), 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978);

[Rettig v. Arlington Hts. Federal Savings and Loan Association](#), 405 F.Supp. 819 (N.D. Ill. 1975);

[Rice v. Santa Fe Elevator Corp.](#), 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947);

[United States v. Harper](#), 241 F.2d 103 (7th Cir. 1957);

91 C.J.S. [United States](#) § 70 (1955).

DISCUSSION:

On February 8, 1979, the Governor signed into law Act No. 7 of 1979 (R16, H2067) which, *inter alia*, permits the parties to a loan secured by a first mortgage on real estate to contract for any rate of interest. The Act does not apply to a loan of one hundred thousand dollars or less unless the agreement provides for a fixed interest rate and the right to prepay the debt in full at any time without penalty.

The Federal Home Loan Bank Board adopted on May 30, 1979, FHLBB Regulation No. 79-303 (12 C.F.R. 545.6-2) which authorized federally chartered savings and loan associations nationwide to make, purchase, and participate in variable rate mortgages, effective July 1, 1979. Such authorization was previously determined on a state-by-state basis.

The question presented is whether the Federal Variable Rate Mortgage Regulation, 12 C.F.R. 545.6-2 (as amended May 30, 1979), relating to the ability or right of federally chartered savings and loan associations to enter into variable rate mortgages, preempts Act No. 7 of 1979, which requires a fixed interest rate.

*2 Federal savings and loan associations are instrumentalities and agencies of the United States, [Federal Savings and Loan Ins. Corp. v. Kearney](#), 151 F.2d 720 (8th Cir. 1945); [United States v. Harper](#), 241 F.2d 103 (7th Cir. 1957); [California v. Coast Federal Savings and Loan Association](#), 98 F.Supp. 311 (S.D. Cal. 1951); [Rettig v. Arlington Hts. Federal Savings and Loan Association](#), 405 F.Supp. 819 (N.D. Ill. 1975), organized and operating under the Home Owners' Loan Act (HOLA) of 1933, as amended, 12 U.S.C. § 1461, *et seq.* These associations were created 'as part of a nationwide network of mutual thrift institutions to provide a safe place for people to invest their money and to acquire financing for homes.' [Rettig v. Arlington Hts. Federal Savings and Loan Association](#), *supra* at 823. Federal savings and loan associations are chartered by the Federal Home Loan Bank Board (Board) under Congressional authority through Section 5(a) of the Home Owners' Loan Act. The responsibility of the Board includes providing for the 'organization, incorporation, examination, operation, and regulation' of federal savings and loan associations. 12 U.S.C. § 1464(a). The Board is 'also empowered to make appropriate bylaws, rules and regulations for the accomplishment of the purpose of the Act, and such rules and regulations [have] the force and effect of law.' 91 C.J.S. [United States](#) § 70 (1955). In [Glendale Federal Savings and Loan Association v. Fox](#), 459 F.Supp. 903, 905 (C.D. Cal. 1978) the Court states that: [T]he language, history, structure, and purpose of the Home Owners' Loan Act evidence a clear Congressional intent to delegate to the Bank Board complete authority to regulate federal savings and loan associations and to preempt state regulation. Whenever the Bank Board, pursuant to that plenary authority, promulgates a regulation governing an aspect of the operation of federal savings and loan associations, that regulation governs exclusively and preempts any attempt by a state to regulate in that area.

The doctrine of federal preemption originates from the supremacy clause of the Constitution: 'This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . ' U.S. CONST. Art. VI, cl. 2. Under that clause, '[o]ccupation of a legislative 'field' by Congress in the exercise of a granted power to suspend state laws.' [Parker v. Brown](#), 317 U.S. 341, 350, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1942). When such

preemption occurs, any state law is inapplicable to an issue which arises in that 'field'. [Meyers v. Beverly Hills Federal Savings and Loan Association](#), 499 F.2d 1145, 1146 (9th Cir. 1974).

In order to determine whether or not S.C. Act No. 7 of 1979 is preempted by the Federal Variable Rate Mortgage Regulation, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' [Rice v. Santa Fe Elevator Corp.](#), 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947); [Ray v. Atlantic Richfield Company](#), 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978).

*3 Congress expressly delegated the duty and authority to the Board to make policy, including the power to make rules and regulations for the organization, incorporation, examination, operation, supervision and regulation of such associations, which delegation of authority is constitutional . . . No provision is made for sharing the Board's delegated authority with state regulatory or supervisory agencies . . . The Board has adopted comprehensive rules and regulations concerning the powers and operations of every federal savings and loan association from its cradle to its corporate grave . . . [California v. Coast Federal Savings and Loan Association](#), *supra* at 316.

Even assuming Congress has not entirely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute (or regulation issued pursuant to that statute). [Ray v. Atlantic Richfield Company](#), *supra*, 55 L.E.2d at 188. A conflict exists 'where compliance with both federal and state regulations is a physical impossibility . . . or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Id.](#) at 188, 189.

FHLBB Regulation No. 79-303 (12 C.F.R. 545.6-2, as amended May 30, 1979) expressly authorizes federal savings and loan associations to 'make, purchase, and participate in variable rate mortgages.' But Act No. 7 of 1979 precludes the making of variable rate mortgages on loans of one hundred thousand dollars or less by financing institutions in South Carolina. Obviously, there is a direct conflict between the Federal Regulation and the State Act. Consequently, as discussed previously, the Federal Regulation preempts the State law, and invalidates the restriction on variable rate mortgages, as applicable to federal savings and loan associations. Moreover, the intent to preempt State laws prohibiting variable rate mortgages was specifically stated by the Board in the Preamble to the Regulation:

The Bank Board promulgates this regulatory amendment pursuant to its plenary, and exclusive authority to regulate all aspects of the operations of federal savings and loan associations, as set forth in subsection 5(a) of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. § 1465). The Board considers this exercise of its authority to be preemptive of any state law addressing the subject of a federal association's ability or right to enter into variable rate mortgages, and any such provision purporting to restrict such right is inapplicable to federal associations.

Therefore, the making, purchasing, and participating in variable rate mortgages by federal savings and loan associations is governed and controlled solely by 12 C.F.R. 545.6-2, as amended May 30, 1979.

CONCLUSION:

The Federal Variable Rate Mortgage Regulation, FHLBB Regulation No. 79-303 (12 C.F.R. 545.6-2, as amended May 30, 1979) preempts the restrictions against variable rate mortgages as may have been imposed on federal savings and loan associations by Act No. 7 of 1979.

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