1979 WL 43633 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 25, 1979

***1 RE: Equalization Authority of the State Board of Financial Institutions**

Mr. Stephen H. Smith
President
The South Carolina Savings and Loan League
Post Office Box 21215
Columbia, South Carolina 29221

Dear Mr. Smith:
Your letter of June 12, 1979, concerning the equalization authority of the State Board of Financial Institutions has been forwarded to me by Mr. R. C. Cleveland, Commissioner of Banking, for reply.

Section 34-1-110 of the 1976 Code of Laws of South Carolina was amended by Act No. 59 of 1979 to read:
Section 34-1-110. Notwithstanding any other provision of law and in addition to all of the powers granted under Chapters 1 through 15, 21 and 25 of Title 34 of the 1976 Code, the State Board of Financial Institutions may by regulation permit state-chartered banks and state-chartered savings and loan associations to engage in any activities that are authorized for national banks or federally-chartered savings and loan associations by federal law or regulation of the Comptroller of the Currency in the case of national banks and the Federal Home Loan Bank Board in the case of federally-chartered savings and loan associations, and may by regulation permit cooperative credit unions to engage in any activities that are authorized for federally-chartered credit unions by federal law or by regulation of the National Credit Union Administration. Provided, however, that the board may not make any regulation authorizing such institutions to contract for or receive any charge not otherwise authorized by South Carolina law and may not authorize such institutions to charge any finance charge, initial charge, interest, discount or other fee or charge set forth in Chapter 29 of Title 34 or any other South Carolina law not specifically applicable to such institutions; except that state-chartered commercial banks may contract for or receive a finance charge or interest rate not to exceed a rate of one percent in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve District where the institution is located. (Emphasis Added)

Under this statute, the Board's regulatory authority to permit state savings and loan associations to engage in any activities that are authorized for federally chartered savings and loan associations is circumscribed by the proviso which prohibits the Board from making any regulation authorizing financial institutions 'to contract for or receive any charge not otherwise authorized by South Carolina law . . ..' Furthermore, the Board 'may not authorize such institutions to charge any finance charge, . . . interest, . . . or other fee or charge set forth in Chapter 29 of Title 34 or any other South Carolina law not specifically applicable to such institutions . . ..'

Act No. 7 of 1979 requires that in order for parties to a loan of one hundred thousand dollars or less, secured by a first mortgage on real estate, to contract for any rate of interest, the agreement must provide for, inter alia, a fixed interest rate. Therefore, in order for a lender to receive the maximum benefits of this Act, he is prohibited from using a variable interest rate.

***2** The requirement of Act No. 7 for a fixed interest rate is not applicable to federal savings and loan associations because FHLBB Regulation No. 79-303 specifically authorizes federal savings and loan associations to 'make, purchase, and participate in' variable interest rate mortgages. Consequently, this federal regulation preempts Act No. 7, invalidating the fixed interest rate requirement as to federal savings and loan associations. As stated in Glendale Federal Savings and Loan Association v. Fox, 459 F.Supp. 903, 905 (C.D. Cal. 1978), '[w]henever the [Federal Home Loan] Bank Board, pursuant to [its] 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.' (See enclosed Opinion)

Even though the Act's requirement for a fixed interest rate is inapplicable to federal savings and loan associations, it nevertheless applies to state savings and loan associations with the full force and effect of law.

It is therefore my opinion that the Board of Financial Institutions is without authority to promulgate any regulation which provides for a variable interest rate in contradiction to the terms of Act No. 7 of 1979, even though federal savings and loan associations are allowed, by federal regulation, to 'make, purchase, and participate in' variable interest rate mortgages.

If you have any further questions, please do not hesitate to contact me.
Very truly yours,

Richard B. Kale, Jr.
Senior Assistant Attorney General

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