1973 WL 26909 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
October 4, 1973

***1** Honorable Robert E. Kneece
1338 Pickens Street
Columbia, South Carolina 29201

Dear Mr. Kneece:
You have asked whether or not lenders of real estate loans subject to Section 8-3, South Carolina Code, can require and receive compensation for making the loan in excess of 8% per annum, by the expedient of requiring the seller of the real estate to pay the excess?

This question has not been answered by the Courts in South Carolina. The practice of the seller paying points to the lender of the purchaser so as to induce the loan, is an accepted cost in FHA and VA financing. These government insured loans are, however, specifically exempted from our usury statutes by Section 8-604, 1962 S. C. Code of Laws. Thus the question becomes whether or not such points can be taken by a lender on conventional loans made under our usury statute, without considering such points as excessive of the 8% allowed and the transaction usurious?

The initial inquiry must be is usury to be determined by examining what the borrower pays or by looking to see what the lender receives. Usury has been defined as 'the reserving, securing, or taking of a greater sum or value for the loan or forebearance of money, goods, or things in action, than is allowed by law.' 152 A.L.R. 585. The same annotation quotes Smith v. Parsons 55 Minn. 520, 57 N.W. 311 in which the Minnesota Court states the test for usury as:
. . . will the contract if performed result it producing to the lender a greater rate of interest than is allowed by law and was that the result intended?

If this standard is used the discount points paid by the seller would have to be added to the interest paid by the borrower-purchaser, in determining whether or not the transaction is usurious. A strict reading of Section 8-3 tends to support this position. The statute is not expressly limited to only what the borrower pays. § 8-3 does, however, create the presumption that there must be a contractual agreement, either written or oral, from which the usurious interest is collected or paid.

Examining the decisions of Courts in other jurisdictions which have considered this problem, one finds a body of law which holds that discount points must be considered when the seller rather than paying the discount directly to the lender, reduces the purchase price of the house in the amount of the discount. The Court reasoned that a buyer is entitled to receive full benefit of any price reduction so that when the bank retained the difference as a 'loan discount fee' the question became not what did the defendants pay for the house but 'what did the plaintiff receive for making this loan . . .'
The Court cannot close its eyes to the pretense between lenders and sellers of real estate who agree on circumstances which will result in the lender's receipt of interest in an amount greater than its legal rate of eight (8) percent. This Court cannot approve a transaction which is merely a shift or device to evade the usury law. Bankers Guarantee v. Fisher 204 N.E. 2d 103 (1964).

***2** In Hall v. Mortgage Security Corp. 192 S.E. 145 (1937), the plaintiff executed two notes, one for a $10,000 loan and six percent interest and a second series of noninterest bearing notes, both of which were retained by the lender. The expenses of the loan, including the property survey, appraisal and attorney's fees, were deducted from the proceeds of the loan. The Court in

answering defense counsel's argument that the discount represented by the second series of notes, was separate and apart from the note securing the loan, held that there was but one consideration for the two notes, the $10,000 loan.
Hence, so long as the notes remained in the hands of the lender, the whole transaction, including each and every note was, under law, tainted with usury . . .

In the enforcement of the statutes for the suppression of usury, courts do not disturb, overthrow, or annul contracts to an extent beyond the necessity of the case; but there is no restraint upon their power to treat principal and collateral transactions, entered into with intent to evade the law against usury, as a single transaction, when the enforcement of the statute, liberally construed, renders such action necessary . . . Hall v. Mortgage Security Corp. 192 S.E. 145 (1937) at page 148.

There is substantial authority supporting the doctrine that a bonus paid by a third person where the borrower neither consents nor knows of the bonus and is not pecuniarily affected thereby, such bonus would not have to be considered in determining whether or not the transaction is usurious. See Madison Univ. v. White 25 Hun. (N.Y.) 490, McArthur v. Schenck 31 Wis. 673, Clarke v. Sheehon 47 N.Y. 188.

In Tucker v. Fouts 76 So. 130, the Court quoted the New York Court's opinion in Clarke v. Sheehon 47 N.Y. 188.
The mere fact that a loan of money on interest is the consideration for another contract is not in all cases, conclusive evidence of usury. If, by the collateral contract, some benefit is secured to the lender, for which the borrower does not receive an equivalent, and which the lender would not have obtained, except for the loan, and which is intended as additional compensation for the loan, it is usury . . .

These decisions including the McArthur v. Schenck 31 Wis. 673 decision which is factually closest to the question presented appear to hold that if the buyer had knowledge of the bonus being paid the transaction would be usurious. See also Restatement of Contracts § 531, Comment A. These decisions, do, however, raise the question of what constitutes knowledge or if payment by a stranger is sufficient to protect the transaction from becoming usurious.

Section 8-3, our usury statute, appears to very clearly express a legislative intent that no more than eight percent may be received by a lender for making a loan of his money, whether it be by interest, discount or bonus.
No greater interest than six percent per annum shall be charged, taken, agreed upon or allowed upon any contract arising in this State for the hiring, lending, or use of money or other commodity, either by way of straight interest, discount or otherwise, except upon written contracts wherein by express agreement, a rate of interest not exceeding eight percent may be charged. S. C. Code of Laws, (1972 Supp.)

***3** 'Interest under our statute, is money charged or paid for the hiring, lending or use of money,' Long Realty Co. v. Breedin 175 S.C. 233, 179 S.E. 47 (1934). He who receives compensation for the use of his money is limited by the usury laws and thus may not 'lawfully collect as commission, or in any other form, any excess.' Mallory v. Columbia Mortgage and Trust. 263 S.W. 68. All transactions which are examined to determine if they are usurious involve a question of fact,
. . . not to be determined by any hard and fast test nor by what the parties represent the transaction to be, but by considering the whole evidence to ascertain whether or not it is in substance a contracting to receive usurious interest for a loan or forbearance of money. The process involves looking through the form to the substance. No device or shift may be employed to conceal the true character of the transaction. Seebold v. Eustermann 152 A.L.R. 585.

The South Carolina Court has stated a very similar policy in examining transactions that may be tainted with usury in Long Realty Co. v. Breedin 175 S.C. 233, 179 S.E. 47 (1934).

It is possible that our Courts would approve the payment of a bonus by a seller and not find such to be usurious. Our research reveals no case in which the S. C. Court has considered this problem, and the ultimate decision in this matter must rest with the Courts. However, such conclusion would probably be reached only if the Court found no evidence of this charge being passed onto the borrower. Consideration should be given to the tendency of our Court to carefully examine a transaction that may be tainted with usury, to determine if the parties are attempting to disguise an additional payment to the lender for making the loan. Statutory authority has been recently granted to lenders the right to collect origination fees, see Section 8-10, (1972 Supp.)

Approval of a bonus or discount fee paid to the lender, the Courts may feel would for all practical purposes negate the intent and purpose of the usury statute, since there would be no limit as to the amount of discount or bonus that could be collected. It is the opinion of this office that our Courts would most probably adopt this view and consider such transaction usurious.
Very truly yours,

Daniel R. McLeod
Attorney General
Patricia O. Brehmer
Assistant Attorney General

1973 WL 26909 (S.C.A.G.)

End of Document