



STATE OF KANSAS

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June 11, 1982

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ATTORNEY GENERAL OPINION NO. 82- 128

Donald O. Phelps
Consumer Credit Commissioner
535 Kansas Avenue, Suite 1114
Topeka, Kansas 66603

Re: Consumer Credit Code -- Consumer Loans -- Finance Charge; Exemption of Adjustable Rate Loans From Maximum Finance Charge Limits

Synopsis: Loans secured by an interest in land subordinate to a prior mortgage and held by a lender other than the lender of the first mortgage are subject to the Consumer Credit Code, K.S.A. 16a-1-101 et seq., and may be made by a supervised lender. Pursuant to K.S.A. 16a-2-401 (as amended by 1982 Senate Bill No. 559), after July 1, 1982 a supervised lender may make such loans in which the rate of interest may be periodically adjusted. If such an adjustable rate feature is included, the maximum finance charge limits established by K.S.A. 16a-2-401 are applicable only if the loan is made subject thereto by the parties. Prior to July 1, 1982, however, a lender making such loans pursuant to a license issued under the Code is without the authority to include an adjustable rate provision. Cited herein: K.S.A. 16-207, 16a-1-301 (both as amended by 1982 Senate Bill 539), 16a-2-401 (as amended by 1982 Senate Bill 559), 1982 Senate Bill 539, 1982 Senate Bill 559.

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Dear Mr. Phelps:

As Consumer Credit Commissioner for the State of Kansas, you request our opinion concerning the making of loans secured by an interest in real property in which the interest rate is adjustable, rather than fixed. Specifically, you inquire

whether supervised lenders under the Consumer Credit Code, K.S.A. 16a-1-101 et seq., may make such adjustable rate loans.

Following numerous amendments made in recent years, the Code now includes within its scope only certain types of loans. As provided by K.S.A. 16a-1-301(13) (as amended by 1982 Senate Bill No. 539):

"(13) 'Consumer loan':

"(a) Except as provided in paragraph (b), a 'consumer loan' is a loan made by a person regularly engaged in the business of making loans in which:

"(i) The debtor is a person other than an organization;

"(ii) the debt is incurred primarily for a personal, family or household purpose;

"(iii) either the debt is payable in installments or a finance charge is made: and

"(iv) either the amount financed does not exceed \$25,000 or the debt is secured by an interest in land.

"(b) Unless the loan is made subject to K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, by agreement (section 16a-1-109), a 'consumer loan' does not include:

"(i) A loan secured by a first real estate mortgage; or

"(ii) a loan secured by a second or other subordinate mortgage if the second or other subordinate mortgage is granted to the same lender as the first mortgage; or

"(iii) a loan made by a qualified plan, as defined in section 401 of the internal revenue code, to an individual participant in such plan or to a member of the family of such individual participant."

As can be seen from the above, subsection (b) acts to exclude most types of loans secured by mortgages. Still included, however, are these loans secured by a subordinate mortgage which is held by a lender other than that which holds the first mortgage. If such loans are made with an interest rate

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in excess of 12% per year, they are "supervised loans," as defined by K.S.A. 16a-1-301(39), and may be made only by "supervised lenders". K.S.A. 16a-1-301(38).

Any loan made by a supervised lender is subject to the provisions of K.S.A. 16a-2-401, which sets maximum limits on the amount of finance charges which may be contracted for. As amended by 1982 Senate Bill 559, effective July 1, 1982, the statute includes a new subsection (8), which states:

"This section [K.S.A. 16a-2-401] shall not apply to a loan secured by an interest in land subordinate to a prior mortgage and held by a lender other than the lender of the first mortgage, the interest rate of which is governed by subsection (b) or (h) of K.S.A. 16-207, and any amendments thereto, unless made subject hereto by agreement."

Of the two subsections referred to in subsection (8), K.S.A. 16-207(b) has, since its amendment in 1980, allowed loans with an interest rate 1 1/2% above the prevailing federal home loan mortgage corporation rate, as set on the first day of each month by the secretary of state. Subsection (h) is new, and became effective on April 15, 1982, upon the enactment into law of 1982 Senate Bill 539. Section 1 thereof states thusly:

"The interest rates prescribed in subsections (a) and (b) of [K.S.A. 16-207] shall not apply to a note secured by a real estate mortgage or a contract for deed where the note or contract for deed permits adjustment of the interest rate, the term of the loan or the amortization schedule."

In our opinion, the effect of 1982 Senate Bill Nos. 539 and 559 is to allow supervised lenders to make adjustable rate loans in Kansas as of July 1, 1982. Although such a grant of authority is made indirectly, in the form of exemptions from prescribed interest rates, the effect is made clear by Section 2 of the latter bill, in which it is provided:

"The state bank commissioner, consumer credit commissioner, savings and loan commissioner and credit union administrator shall jointly adopt rules and regulations for the purpose of governing loans made under the provisions of subsection (h) of K.S.A. 16-207, and any amendments thereto, and subsection (8) of K.S.A. 16a-2-401, and any amendments thereto. Such rules and regulations shall be published

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in only one place in the Kansas administrative regulations as directed by the state rules and regulations board."

Accordingly, a lender regulated by your office through the issuance of a license (K.S.A. 16a-2-301 et seq.) may make such second mortgage loans referred to by K.S.A. 16a-2-401(8) with an interest rate that may change through the term of the loan. The extent, type and magnitude of such changes is a matter for your office, in conjunction with the other three agencies named above, to determine, either by the incorporation of federal guidelines or the promulgation of original ones for Kansas. We would note, however, that the latter course could affect the marketability of any notes or mortgages generated by such adjustable rate loans.

Prior to the effective date of 1982 Senate Bill No. 559, however, there exists no express authority in the Code for the making of such loans by supervised lenders. In our opinion, such an express grant is necessary, in that a finance company or other institution which operates pursuant to a license under the Code has no authority to make loans other than that set out therein. This was established as the rule for banks in the case of First State Bank v. Bone, 122 Kan. 493 (1927), wherein it is stated:

"Plaintiff is a banking corporation, organized, existing and doing business under and by virtue of our statutes. The statutory designations of the kinds of business it can do are grants of authority, and constitute its express powers. It has implied authority to do all things necessary or proper, incidental to these statutory grants of authority; these constitute its implied powers. But it has no authority to transact business not expressly granted by statute, or implied therefrom." 122 Kan. at 503.

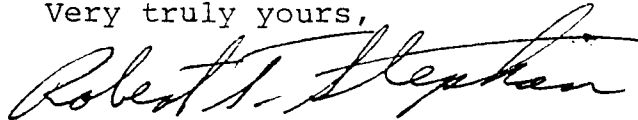
Furthermore, as it must be presumed that the additions made by 1982 Senate Bill No. 559 were intended to make a change in the scope of the Code [Shapiro v. KPERS, 211 Kan. 452,456 (1973)], it cannot be concluded that a supervised lender has implied authority to make adjustable loans prior to the effective date of the change.

In conclusion, loans secured by an interest in land subordinate to a prior mortgage and held by a lender other than the lender of the first mortgage are subject to the Consumer Credit Code, K.S.A. 16a-1-101 et seq., and may be made by a supervised lender. Pursuant to K.S.A. 16a-2-401 (as amended

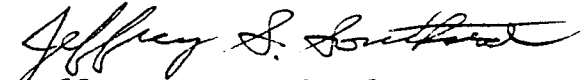
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by 1982 Senate Bill No. 559), after July 1, 1982 a supervised lender may make such loans in which the rate of interest may be periodically adjusted. If such an adjustable rate feature is included, the maximum finance charge limits established by K.S.A. 16a-2-401 are applicable only if the loan is made subject thereto by the parties. Prior to July 1, 1982, however, a lender making such loans pursuant to a license issued under the Code is without the authority to include an adjustable rate provision.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
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