



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 84- 2

Donald O. Phelps
Consumer Credit Commissioner
217 S.E. Fourth, 4th Floor
Topeka, Kansas 66603

Re: Consumer Credit Code -- Consumer Loans; Maximum Finance Charges -- Loans Secured by Mortgage on Real Estate; Charging of Nonrefundable Origination Fee

Synopsis: K.S.A. 16a-2-401, as amended by L. 1983, ch. 79, §3, sets forth the maximum finance charges which may be imposed by a licensed lender under the Consumer Credit Code, K.S.A. 16a-1-101, et seq. While subsection (8) of the statute exempts real estate loans which are subject to the Code (e.g. those secured by an interest in land subordinate to a prior mortgage and held by a lender other than the lender of the first mortgage) where the interest rate is subject to subsections (b) or (h) of K.S.A. 16-207, as amended by L. 1983, Ch. 74, this exemption extends only the finance charge ceilings and does not affect those portions of the statute which concern other limitations on consumer loans. Cited herein: K.S.A. 16-207, as amended by L. 1983, ch. 74, K.S.A. 1982 Supp. 16a-1-301(13), K.S.A. 16a-2-401, as amended by L. 1983, ch. 79, §3.

* * *

Dear Commissioner Phelps:

As the official empowered with the enforcement of the Kansas Consumer Credit Code (hereinafter Code), K.S.A. 16a-1-101 et seq., you request our opinion regarding the effect of a 1982 amendment to K.S.A. 16a-2-401. This statute, which was subsequently amended during the 1983 legislative session (at

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ch. 79, sec. 3) in a way not relevant to your inquiry, establishes the maximum rate of finance charges which can be imposed by licensed lenders on a consumer credit loan subject to the Code. You inquire concerning the scope of subsection (8) of the statute, which acts to exempt certain loans from these finance charge ceilings.

In order to examine subsection (8) in the context of the entire statute, it would be helpful to set out K.S.A. 16a-2-401, as amended, in its entirety. Although somewhat lengthy, the statute states:

"(1) With respect to a consumer loan, including a loan pursuant to open end credit, a lender may contract for and receive a finance charge, calculated according to the actuarial method, not exceeding 18% per year on the unpaid balance of the amount financed not exceeding \$1,000 and 14.45% per year on that portion of the unpaid balance in excess of \$1,000.

"(2) As an alternative to the rates set forth in subsection (1), with respect to a supervised loan made under a license issued by the administrator, including a loan pursuant to open end credit, a supervised lender may contract for and receive a finance charge, calculated according to the actuarial method, not exceeding the equivalent of the greater of either of the following:

"The total of: (a) Thirty-six percent per year on that part of the unpaid balance of the amount financed which is \$300 or less; and

"(b) twenty-one percent per year on that part of the unpaid balance of the amount financed which is more than \$300, but does not exceed \$1,000; and

"(c) fourteen and forty-five hundredths percent per year on that portion of the unpaid balance of the amount financed which is more than \$1,000; or

"(d) eighteen percent per year on the unpaid balance of the amount financed.

"(3) This section does not limit or restrict the manner of calculating the finance charge, whether by way of add-on, discount, or otherwise, so long as the rate of the finance charge does not exceed that permitted by this section. The finance charge may be contracted for and earned at the single annual percentage rate that would earn the same finance charge as the graduated rates when the debt is paid according to the agreed terms and the calculations are made according to the actuarial method. If the loan is precomputed:

"(a) The finance charge may be calculated on the assumption that all scheduled payments will be made when due; and

"(b) the effect of prepayment is governed by the provisions on rebate upon prepayment (section 16a-2-510).

"(4) The term of a loan for the purposes of this section commences on the date the loan is made. Differences in the lengths of months are disregarded and a day may be counted as 1/30th of a month. Subject to classifications and differentiations the lender may reasonably establish, a part of a month in excess of 15 days may be treated as a full month if period of 15 days or less are disregarded and that procedure is not consistently used to obtain a greater yield than would otherwise be permitted.

"(5) Subject to classifications and differentiations the lender may reasonably establish, the lender may make the same finance charge on all amounts financed within a specified range. A finance charge so made does not violate subsections (1) and (2) if:

"(a) When applied to the median amount within each range, it does not exceed the maximum amount permitted in subsections (1) and (2); and

"(b) when applied to the lowest amount within each range, it does not produce a rate of finance charge exceeding the rate calculated according to paragraph (a) by more than 8% of the rate calculated according to paragraph (a).

"(6) Notwithstanding subsections (1) and (2), a lender may contract for and receive a minimum finance charge of not more than \$5 when the amount financed does not exceed \$75, or not more than \$7.50 when the amount financed exceeds \$75.

"(7) This section shall not apply to a loan secured by an interest in land the interest rate of which is governed by subsection (b) of K.S.A. 16-207, and amendments thereto, unless made subject hereto by agreement.

"(8) This section 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.

"(9) As an alternative to the rates set forth in subsection (1) and subsection (2)(d), during the period beginning on the effective date of this act and ending July 1, 1985, a supervised lender may contract for and receive a finance charge not exceeding 21% per year on the unpaid balance of the amount financed."
(Emphasis added.)

Subsection (8) makes reference to "loan[s] secured by an interest in land subordinate to a prior mortgage and held by a lender other than the lender of the first mortgage." Under the definition of "consumer loan" found at K.S.A. 1982 Supp. 16a-1-301(13), such loans are covered by the Code, and would therefore, in the absence of any language to the contrary, be subject to the finance charge limits of K.S.A. 16a-2-401 as amended. However, subsection (8) provides such language, and instead references the provisions of K.S.A. 16-207(b) and (h). That statute, which was amended by L. 1983, ch. 74, provides for a general interest rate of 15% [at subsection (a)], and numerous exceptions to such general rate.

Two such exceptions are found at subsections (b) and (h), which read as follows:

"(b) The maximum rate of interest per annum for notes secured by all real estate mortgages and contracts for deed to real estate executed on or after the effective date of this act

shall be at an amount equal to 1 1/2 percentage points above the yield of thirty-year fixed rate conventional home mortgages committed for delivery within 61 to 90 days accepted under the federal home loan mortgage corporation's daily offerings for sale on the last day on which commitments for such mortgages were received in the preceding month unless otherwise specifically authorized by law. Such interest rate shall be computed for each calendar month and be effective on the first day thereof. The secretary of state shall publish notice of such maximum interest rate not later than the second issue of the Kansas register published each month. The initial rate of interest upon any conventional loan evidenced by a note secured by a real estate mortgage shall not exceed the rate quoted in the application executed by the borrower on the day on which application for such conventional loan is made.

.....

"(h) The interest rates prescribed in subsections (a) and (b) of this section shall not apply to a note secured by a real estate mortgage or a contract for deed to real estate where the note or contract for deed permits adjustment of the interest rate, the term of the loan or the amortization schedule."
(Emphasis added.)

These are the subsections, it will be recalled, which are referred to in subsection (8) of K.S.A. 16a-2-401, wherein it is stated "[t]his section shall not apply to a loan . . . the interest rate of which is governed by subsection (b) or (h) of K.S.A. 16-207, and any amendments thereto." You inquire whether the reference to "this section" has the effect of removing all of the protections afforded by K.S.A. 16a-2-401 to loans made under the latter two subsections, or merely those concerning the maximum finance charges. A finding of the former would be significant, for subsections (3), (4) and (6) of K.S.A. 16a-2-401 provide for, among other things, refunds of unearned finance charges in the event of prepayment of a precomputed loan. Were that provision not applicable, in the case of a loan secured by real estate in which the interest rate was adjustable a portion of the finance charge could be designated as non-refundable, even if the loan was paid off in full almost immediately after being taken out.

In addressing this question, reference must be made to the principal rules governing the construction of acts of the legislature. The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the language of the statute. Southeast Kansas Landowners Assn. v. Kansas Turnpike Authority, 224 Kan. 357 (1978). In determining legislative intent, one is not limited to a mere consideration of the language employed, but may properly look to the historical background of the enactment, the circumstances attending its passage, the purposes to be accomplished, and the effect the statute may have under the various constructions suggested. Board of Education of U.S.D. 512 v. Vic Regnier Builders, Inc., 231 Kan. 731 (1982). General consideration should be made of the whole act, with effect given, if possible, to every part thereof; to this end different provisions should be reconciled so as to make them consistent, harmonious and sensible. State ex rel. Stephan v. Board of Education of U.S.D. 428, 231 Kan. 579 (1982). However, when interpretation of one section of the statute according to the exact and literal import of its words would contravene the manifest purpose of the legislature, the entire act should be read according to its spirit and reason, disregarding so far as may be necessary the strict letter of the law. Sterling v. Mann, 4 Kan.App.2d 520 (1980).

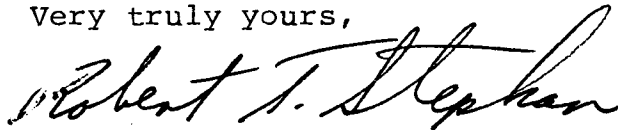
Subsection (8) of K.S.A. 16a-2-401 was added to the statute in 1982, as was noted in Attorney General Opinion No. 82-153. It was approved into law on May 10 of that year, and became effective on July 1. The subsections which it refers to in K.S.A. 16-207 [i.e. (b) and (h)] were amended (or, in the case of the latter subsection, added for the first time) by a measure which became effective earlier during the 1982 legislative session, Senate Bill No. 539 (L. 1983, ch. 89). Both subsections (b) and (h) acted to modify the interest rate ceiling imposed by K.S.A. 16-207(a), with subsection (h) removing it entirely for loans containing certain adjustable features. Subsection (8) of K.S.A. 16a-2-401 had the effect of placing real estate loans subject to the Code on the same footing as those covered by K.S.A. 16-207(b) and (h), insofar as the interest rate is concerned.

A literal reading of subsection (8) would result in all of K.S.A. 16a-2-401 ("this section") being inapplicable in those cases where a real estate loan was secured by a different lender than that holding the first mortgage. This would negate both the finance charge ceilings of subsections (1), (2), (5) and (9), as well as the remaining protections of the other subsections. As mentioned above, this could produce a situation where a consumer was required to pay a sum of money at the outset of the loan (an "origination fee") which could be deemed to be non-refundable in the event the

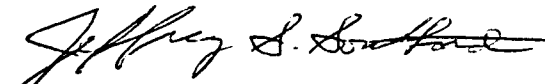
loan was fully paid before the end of the computed period. In the absence of any evidence of a legislative intent to go so far in removing non-finance charge provisions by the enactment of subsection (8), we are not prepared to so conclude. In our opinion, a construction which best reflects legislative intent would find that subsection (8) allows the interest rate provisions of K.S.A. 16-207(b) and (h) to replace the finance charge ceiling provisions of K.S.A. 16a-2-401, as amended, but does not negate other provisions of the statute. This would give lenders the ability to make Code loans on the same basis as subsections (b) and (h) of K.S.A. 16-207, as amended, but would not go beyond the question of finance charges into other, non-related areas such as prepayment rebates.

In conclusion, K.S.A. 16a-2-401, as amended by L. 1983, ch. 79, §3, sets forth the maximum finance charges which may be imposed by a licensed lender under the Consumer Credit Code, K.S.A. 16a-1-101, et seq. While subsection (8) of the statute exempts real estate loans which are subject to the Code (e.g. those secured by an interest in land subordinate to a prior mortgage and held by a lender other than the lender of the first mortgage) where the interest rate is subject to subsections (b) or (h) of K.S.A. 16-207, as amended by L. 1983, Ch. 74, this exemption extends only the finance charge ceilings and does not affect those portions of the statute which concern other limitations on consumer loans.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General