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ATTORNEY GENERAL OPINION NO. 81-210

Marvin S. Steinert, Commissioner
Savings and Loan Department
503 Kansas Avenue, Room 220
Topeka, Kansas 66603

Re: Contracts and Promises -- Interest and Charges -- Extension of Most Favored Lender Doctrine to State Savings and Loan Associations

Synopsis: Based on essentially the same rationale expressed in Attorney General Opinion No. 81-158, which concluded that section 521 of P.L. 96-221, the Depository Institutions Deregulatory and Monetary Control Act of 1980, accords most favored lender status to state-chartered, federally-insured banks, section 522 of that act accords most favored lender status to state-chartered, federally-insured savings and loan associations. By virtue of that status, state savings and loan associations in Kansas may charge interest (other than in connection with a mortgage of residential real property) at a rate which is the greatest of the following: (1) the rate permitted state savings and loan associations under Kansas law; (2) one percent over the federal reserve ninety-day discount rate; or (3) the highest rate available to lenders generally pursuant to the laws of Kansas. Cited herein: K.S.A. 1980 Supp. 16-207a, 12 U.S.C. §§85, 1724, 1730g, 1831d, P.L. 96-221, §§501, 521, 522, 523, 12 C.F.R. §570.11.

* * *

Dear Commissioner Steinert:

You have requested our opinion as to whether section 522 of the Depository Institutions Deregulatory and Monetary Control Act of 1980 (P.L. 96-221) accords "most favored lender" status to state-chartered savings and loan associations. With your

request, you have submitted copies of the Federal Home Loan Bank Board's Interpretive Rule No. 81-83 and an opinion of that agency's general counsel, both of which have answered this question affirmatively, and you also have noted that, in Attorney General Opinion No. 81-158, we concluded that section 521 of P.L. 96-221 accords such status to state-chartered, federally-insured banks.

Initially, we note that we are concerned here with rates of interest which may be charged by state savings and loan associations other than in connection with notes secured by real estate mortgages. As noted in Opinion No. 81-158, the Kansas Legislature has exempted the state from the operation of section 501(a)(1) of P.L. 96-221, which preempts state law regarding the rates of interest which may be charged in connection with loans, mortgages, credit sales and advances secured by a first lien on residential property (see K.S.A. 1980 Supp. 16-207a), but has taken no action pursuant to the authority granted by section 525 of P.L. 96-221 to exempt the state from the operation of sections 521 to 523 of that act.

Because of our rather exhaustive discussion of the legislative and judicial history of the "most favored lender" doctrine in Opinion No. 81-158, we think it unnecessary to reiterate such discussion here. Suffice it to state that this doctrine has been established through judicial interpretation of congressional intent underlying the National Bank Act. In particular, 12 U.S.C. §85 (and its predecessor statutes) has been construed as permitting a national bank to charge the maximum rate of interest allowed to any competing lender by the laws of the state in which such national bank is situated. The pertinent provisions of 12 U.S.C. §85 are as follows:

> "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, . . . whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter." (Emphasis added.)

It is the emphasized language of the foregoing quoted provisions that has been judicially interpreted as clothing national banks with the "most favored lender" status. See, e.g., Tiffany v. National Bank of Missouri, 18 Wall (85 U.S.) 409, 21 L. Ed. 862 (1873); Northway Lanes v. Hackley Union Bank & Trust Co., 464 F. 2d 855 (6th Cir. 1972); and Fisher v. First Nat. Bank of Omaha, 548 F.2d 255 (8th Cir. 1977).

In Opinion No. 81-158, our conclusion that "most favored lender" status has now been accorded state banks was predicated, for the most part, on a comparison of pertinent language in section 521 of P.L. 96-221 (12 U.S.C. §1831d) with the language in 12 U.S.C. §85 quoted above. Section 521 of P.L. 96-221 provides, in relevant part:

> "In order to prevent discrimination against State-chartered insured banks, including insured savings banks and insured mutual savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater." (Emphasis added.)

Because of the substantial similarity of the language emphasized above with the provisions of 12 U.S.C. §85 previously discussed, we concluded in our prior opinion that the judicial interpretations of said provisions of 12 U.S.C. §85 are equally applicable to section 521 of P.L. 96-221, so that state-chartered, federally-insured banks also now enjoy the "most favored lender" status.

With this in mind, we have considered your inquiry regarding the interpretation to be afforded section 522 of P.L. 96-221 (12 U.S.C. §1730g), which states in pertinent part:

> "If the applicable rate prescribed in this section exceeds the rate an insured institution would be permitted to charge in the absence of this section, such institution may, notwithstanding any State constitution or statute which is hereby preempted for the purpose of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such institution is located or at the rate allowed by the laws of the State, territory, or district where such institution is located, whichever may be greater." (Emhasis added.)

It is apparent from reading the above-quoted provisions that they are substantially the same as the corresponding provisions of section 521 of P.L. 96-221, with the emphasized language in the above-quoted portion of section 522 being virtually identical to the language of section 521 which was construed in Opinion No. 81-158.

Primarily in recognition of this identity of language, the Federal Home Loan Bank Board has interpreted section 522 as imparting the most favored lender status to "insured institutions," which term includes state-chartered savings and loan associations insured by the Federal Savings and Loan Insurance Corporation. See 12 U.S.C. §1724(a). This interpretation is expressed in that agency's Interpretive Rule No. 81-83, which is codified in 12 C.F.R. Part 570 as section 570.11 thereof. In pertinent part, this rule states:

> "(a) Under § 522 of the Depository Institutions Deregulation and Monetary Control Act, insured institutions are authorized to charge on any loan an interest rate equal to the greater of one percentage point above the discount rate on ninety day commercial paper in the institution's Federal Reserve district or 'the rate allowed by the laws of the State . . . where such institution is located' whenever either of these rates exceeds the rate the institution is currently permitted. 12 U.S.C. § 1730g. The stated purpose of this provision

> is to provide insured institutions with competitive equality with national banks. In view of this Congressional purpose and the judicial construction of the phrase 'rate allowed by the laws of the State' in the context of the National Bank Act, it is the opinion of the Board that § 522 allows insured institutions to charge interest at a rate not to exceed the greater of either one percent above the Federal Reserve ninety-day discount rate or the rate allowed to the most favored lender on the particular class of loans under state law whenever the greater of either of these rates exceeds the rate the institution is permitted to charge by state law."

In the "Supplementary Information" accompanying this rule, the Federal Home Loan Bank Board has cited the remarks of U.S. Senators Pryor and Bumpers as supporting the Board's interpretation that the "stated purpose" of the language in question "is to provide competitive equality with national banks." The opinion of this agency's general counsel issued on September 29, 1980, expresses the same interpretation and also cites statements appearing in the Congressional Record as indicative of congressional intent. As stated in the general counsel's opinion:

> "Although the legislative history of §522 is sparse, there is some indication that Congress intended the provision to incorporate a 'most favored lender' concept. In discussing the provision during the Senate debate on H.R. 4986, Senator Bumpers analogized this provisión to 12 U.S.C. §85 and noted that state chartered savings and loans have been at a disadvantage to national banks because of 12 U.S.C. §85. 126 Cong. Rec. S 3177 (daily ed. Mar. 27, 1980). This inequality could only be remedied if §522 also incorporates a 'most favored lender' concept."

We agree with these interpretations. As was the case regarding our opinion concerning state banks, we believe that the phrase "the rate allowed by the laws of the State . . . where such institution is located" found in section 522, being substantially similar to the wording of the comparable provisions of 12 U.S.C. §85, should be given the same construction the courts have given said provisions of 12 U.S.C. §85. We believe the use of identical language in sections 521 and 522 that is substantially the same as the language in 12 U.S.C. §85, which

gives rise to the most favored lender doctrine, is evidence of congressional intent to impart most favored lender status to the financial institutions covered by these sections. Thus, it is our opinion that state savings and loan associations in Kansas (all of which are insured by the FSLIC) are accorded most favored lender status by section 522 of P.L. 96-221. Accordingly, such associations may charge interest at a rate not to exceed the greater of either one percent above the Federal Reserve ninety-day discount rate or the rate allowed by Kansas law to any competing lender on a particular class of loans, whenever the greater of either of these rates exceeds the rate such associations are permitted to charge by Kansas law.

Before concluding, we think it appropriate to note one of the supporting arguments offered in the opinion of the Federal Home Loan Bank Board's general counsel. Paraphrased, that argument is predicated on the fact that section 522 is of force and effect only when the "applicable rate" prescribed by that section "exceeds the rate an insured institution would be permitted to charge" in the absence of section 522, i.e., the rate permitted such institution under state law. The "applicable rate" specified by that section is expressed in the alternative, being the greater of either (a) one percent over the discount rate on ninety-day commercial paper in effect at the federal reserve bank in the federal reserve district where the institution is located, or (b) the rate allowed by the laws of the state where the institution is located.

The latter alternative may be construed as a reference to either the rate permitted the institution under state law or to some other rate allowed by state law, i.e., a rate permitted another lender. However, if the former interpretation is accepted, then the rate tied to the federal reserve discount rate on ninety-day commercial paper will always be the "applicable rate." Since section 522 is "triggered" when the rate permitted a savings and loan association under state law is less than either of the alternative rates specified in that section, if one of those alternative rates is construed as being identical to the rate permitted the association under state law, section 522 does not, in fact, provide alternatives for determining the applicable rate, and that section's authorization to charge "whichever may be [the] greater" of the alternative rates specified is meaningless. Thus, the Federal Home Loan Bank Board's general counsel concludes that, to give meaning to this statute, the "rate allowed by the laws of the state" where the insured institution is located must be a rate other than that specifically prescribed for such institution under state law.

Such rationale, of course, is in harmony with well-established rules of statutory construction, and while it does not directly lead to the conclusion that the "rate allowed by the laws of the State" is the highest rate available to lenders generally in that state, it is certainly consonant with that conclusion; it lends further credence to a finding that such language, being substantially similar to the provisions of 12 U.S.C. §85 that have given rise to the "most favored lender" doctrine, should be construed so as to bring state-chartered savings and loan associations within the purview of that doctrine.

In summary, therefore, it is our opinion that section 522 of P.L. 96-221 accords most favored lender status to state-chartered, federally-insured savings and loan associations, and by virtue of that status, state savings and loan associations in Kansas may charge interest (other than in connection with a mortgage of residential real property) at a rate which is the greatest of the following: (1) the rate permitted state savings and loan associations under Kansas law; (2) one percent over the federal reserve ninety-day discount rate; or (3) the highest rate available to lenders generally pursuant to the laws of Kansas.

Very truly yours,

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