



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. 83- 132

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

Re: Consumer Credit Code -- Consumer Credit Transactions -- Prohibition on Prepayment Penalties; Pre-emption as to National Banks

Synopsis: K.S.A. 16a-2-509, contained in the Kansas Consumer Credit Code, provides that a consumer may prepay in full the unpaid balance of a consumer credit transaction at any time without penalty. Such transactions include both consumer credit sales [K.S.A. 1982 Supp. 16a-301(10)] and consumer credit loans [K.S.A. 1982 Supp. 12a-301(13)], with the prohibition binding on any assignee of either the seller's or lender's right to payment. While a regulation of the Comptroller of the Currency [12 C.F.R. §29.6, as amended in 48 Fed. Reg. 9512, 9513] preempts the application of K.S.A. 16a-2-509 to national banks making adjustable-rate mortgage loans, a seller which enters into consumer credit sales cannot avail itself of the pre-emption provisions merely because it subsequently assigns the right to payment to a national bank. Cited herein: K.S.A. 1983 Supp. 16a-1-301, K.S.A. 16a-2-509, 16a-3-402, 12 U.S.C. §§371, 3803, 12 C.F.R. §§29.1, 2916, as amended in 48 Fed. Reg. 9512-13, U.S. Const., Art. 6, cl. 2.

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Dear Mr. Phelps:

As Consumer Credit Commissioner for the State of Kansas, you request our opinion on a question involving the impact of a federal regulation issued by the Comptroller of the Currency upon the Kansas Consumer Credit Code ("Code"), K.S.A. 16a-1-101 et seq. Specifically, you inquire concerning K.S.A. 16a-2-509, which prohibits prepayment penalties in consumer credit transactions, and a recent federal regulation which pre-empts such state statutes as to national banks offering or purchasing adjustable-rate mortgage loans.

K.S.A. 16a-2-509 was contained in the original Code, adopted in Kansas in 1973, and has not been amended since that time. In full, it states:

"Subject to the provisions on rebate upon prepayment (section 16a-2-510), the consumer may prepay in full the unpaid balance of a consumer credit transaction at any time without penalty."

The statute refers to consumer credit transactions, which are defined by K.S.A. 1982 Supp. 16a-1-301(11) to include both consumer credit sales and consumer credit loans. The former is defined at subsection (10) of the latter statute as follows:

"(a) Except as provided in paragraph (b), a 'consumer credit sale' is a sale of goods, services, or an interest in land in which:

"(i) Credit is granted either by a seller who regularly engages as a seller in credit transactions of the same kind or pursuant to a credit card other than a lender credit card,

"(ii) the buyer is a person other than an organization,

"(iii) the goods, services, or interest in land are purchased primarily for a personal, family or household purpose,

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

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"(v) with respect to a sale of goods or services, the amount financed does not exceed \$25,000."

Consumer loan is defined at subsection (13) thusly:

"(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."

In the example you cite in your letter involving the sale of mobile homes, a national bank could become involved under either of the above statutes, for it could make the consumer a loan with which to purchase the unit and take a security interest when the transaction was closed, or purchase from the dealer the contract which the consumer had previously signed. The latter scenario would be defined as a consumer credit sale, for the initial grant of credit is made by the dealer, who regularly engages in the sale of mobile homes which it owns, with the bank becoming involved only as an assignee of the contract of sale. As an assignee, the bank is subject to the same claims and defenses which the consumer could make or raise as to the seller. K.S.A. 16a-3-402.

The federal regulation in question, 12 C.F.R. §29.6, was published in the Federal Register (Vol. 48, No. 45, p. 9512-13) on March 7, 1983, and provides that:

"Banks offering or purchasing adjustable-rate mortgage loans may impose fees for prepayments regardless of any state-law prohibitions of, or limitations on, such fees, which prohibitions or limitations are expressly preempted."

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For the purposes of this Part, prepayments shall not include: [a] Principal payments that would fully amortize the loan over the remaining loan term; or [b] principal payments in excess of those necessary to retire the outstanding debt over the remaining loan term at the then-current interest rate that are made in accordance with rules governing the determination of monthly payments contained in the loan documents." (Emphasis added.)

It is important to note that this pre-emption relates specifically to the offering or purchasing of adjustable-rate mortgage loans, which term is defined in 12 C.F.R. §29.1 (also published on the same day as the above) to mean "any loan made to finance or refinance the purchase of and secured by a lien on a one- to four-family dwelling, including a condominium unit, cooperative housing unit, or a mobile home, where such loan is made pursuant to an agreement intended to enable the lender to adjust the rate of interest from time to time."

Under the situation you present, we have no doubt in concluding that, as to consumer credit loans made on for the purchase of a mobile home, a national bank is no longer subject to the restrictions contained in K.S.A. 16a-2-509 against prepayment penalties. Federal law authorizes the Comptroller to issue regulations governing adjustable-rate mortgage transactions (12 U.S.C. §3803), with the pre-emptive effect of such regulations the same as if by statute. Fidelity Federal Savings and Loan v. de la Cuesta, --- U.S. ---, 73 L.Ed.2d 664 (1982). In that a clear conflict exists between 12 C.F.R. §29.1 and K.S.A. 16a-2-509, under the Supremacy Clause of the United States Constitution, Art. 6., cl. 2, the latter must give way.

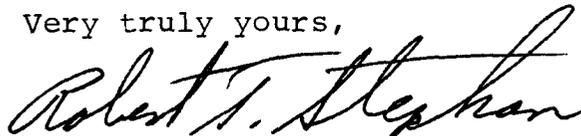
It is further our opinion that the same result would occur if a national bank purchased a consumer sales contract for the sale of a mobile home from a dealer, and then entered into an agreement with the consumer whereby prepayment penalties could be assessed. However, a dealer of mobile homes who sells on credit could not avail itself of the pre-emption regulation issued by the Comptroller, which deals only with national, and to some extent, nonfederally chartered, banks. Accordingly, any contract for sale made by such a dealer would be covered by the restrictions of K.S.A. 12a-2-509.

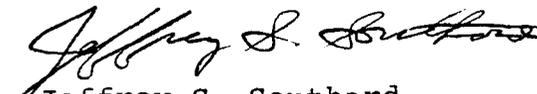
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While it could be argued that any restrictions on the imposition of prepayment fees have been pre-empted, the Comptroller's regulation is limited to the offering or purchasing of loans with an adjustable-rate feature by banks. Although the distinction between a consumer sale and a consumer loan is sometimes overlooked, we must construe the regulation as written, and take the words used therein as having been chosen with a particular intent in mind. In any event, the extension of this regulation to a non-financial institution such as a mobile home dealer would go beyond the scope of the power delegated to the Comptroller by 12 U.S.C. §§371(a), 3801 et seq., and so would be ultra vires. Fidelity Federal Savings and Loan Assn., supra, 73 L.Ed.2d at 679 and following.

In conclusion, K.S.A. 16a-2-509, contained in the Kansas Consumer Credit Code, provides that a consumer may prepay in full the unpaid balance of a consumer credit transaction at any time without penalty. Such transactions include both consumer credit sales [K.S.A. 1982 Supp. 16a-301(10)] and consumer credit loans [K.S.A. 1982 Supp. 12a-301(13)], with the prohibition binding on any assignee of either the seller's or lender's right to payment. While a regulation of the Comptroller of the Currency [12 C.F.R. §29.6, as amended in 48 Fed. Reg. 9512, 9513] preempts the application of K.S.A. 16a-2-509 to national banks making adjustable-rate mortgage loans, a seller which enters into consumer credit sales cannot avail itself of the pre-emption provisions merely because it subsequently assigns the right to payment to a national bank.

Very truly yours,

  
ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS

  
Jeffrey S. Southard  
Assistant Attorney General

RTS:BJS:JSS:hle