



The State of South Carolina

Department of Consumer Affairs

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ADMINISTRATOR
AND
CONSUMER ADVOCATE

Administrative Interpretation No. 10.103(1)-8401

SECTION 10.103(1) DOES NOT APPLY TO LOANS INSURED BY THE FEDERAL HOUSING ADMINISTRATION WHEN SUCH LOANS ARE SUBJECT TO THE PREPAYMENT PROVISIONS OF 24 C.F.R. § 203.22.

Section 10.103(1) [S.C. Code Ann. § 37-10-103(1) (Cum. Supp. 1983)] provides the following restrictions on prepayment penalties:

With respect to a loan agreement which is secured in whole or in part by a first or junior lien on real estate under which the aggregate of all sums advanced or contemplated by the parties in good faith to be advanced will not exceed \$100,000 -

- (1) the debtor has the right to prepay the debt in full at any time without penalty; . . .

Chapter Ten of the Consumer Protection Code applies generally to "designated loan transactions other than consumer loan transactions." S.C. Code Ann. § 37-10-101 (Cum. Supp. 1983).

In 1977, the Federal Housing Administration promulgated regulations which allow, in essence, a prepayment penalty amounting to one month's earned interest. Section 203.22 of Volume 24 of the Code of Federal Regulations requires insured mortgages to contain a provision permitting the mortgagor "to prepay the mortgage in whole or in part upon any interest payment date after giving to the mortgagee 30 days advance notice in writing of intention to prepay" This provision must be used by a financial institution seeking Federal Housing Administration insurance. Although the requirement speaks in terms of written notice, the effect is to require the payment of an additional month's interest over and above the interest accrued at the time the borrower wishes to prepay. The term is therefore a prepayment penalty. See Schmidt v. Interstate Federal S. & L. Ass'n., 421 F.Supp. 1016 (D.D.C. 1976). You have asked whether the restrictions set forth in Section 10.103 apply to these Federal Housing Administration insured loans. In our opinion, Section 10.103(1) does not apply to such loans.

To determine the applicability of Section 10.103(1), a section added by 1982 S. C. Acts 385 Section 56, it is necessary to step back into the morass of usury and credit related law as it existed in South Carolina prior to the 1982 amendments.

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South Carolina Code Annotated § 31-19-10 (1976) provides, in pertinent part:

Banks, savings banks, trust companies, insurance companies, Federal Housing Administration approved mortgagees and other financial institutions subject to the laws of this State may:

- (1) Make such loans and advances of credit as are eligible for insurance by the Federal Housing Administrator and obtain such insurance:
- (2) Make such loans, secured by real property or leasehold, as the Federal Housing Administrator insures or make commitment to insure and obtain such insurance; . . .

These provisions preexisted both the 1982 amendments and the Consumer Protection Code itself. See also S.C. Code Ann. § 34-25-180 (1976) (a similar provision allowing savings and loan associations to make loans insured by the FHA).

The question thus becomes whether there is any provision of law since 1968 (the effective date of the most recent amendment to Section 31-19-10) which would tend to amend or repeal these sections by implication, bearing in mind that repeal by implication is not favored by the courts. Strickland v. State, 276 S.C. 17, 274 S.E.2d 430 (1981); In the Interest of Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980).

In 1974, the South Carolina Consumer Protection Code was enacted by Act 1241 of 1974. At that time the Code applied primarily to consumer credit sales and prohibited prepayment penalties for consumer credit sales. 1974 S.C. Acts 1241 Section 1.

In 1976, the Consumer Protection Code was amended and expanded to apply to consumer loans as well as consumer credit sales. It too prohibited prepayment penalties in consumer loans. 1976 S.C. Acts 686 Section 1.

Not until 1982 did the Consumer Protection Code regulate the prepayment provisions of the general run of first lien home acquisition mortgages. Until 1979, Sections 37-2-104 and 37-3-104 (defining "consumer credit sales" and "consumer loans," respectively) both excluded credit primarily secured by first liens which were purchase money security interests in land.

In 1979, the General Assembly altered this somewhat by amending Section 37-3-104 to temporarily delete the exclusion of first lien purchase money security interests in land [1979 S.C. Acts 7, Section 4], but also amended Section 37-1-202 [Exclusions from the scope of the Consumer Protection Code] to add a subsection (11) to read:

(11) First mortgage loans made to enable the debtor to build or purchase a residence, when made by a lender whose loans are subject to supervision by an agency of this State or the United States or made by a Federal Housing Administration approved mortgagee or made by a lender who is a person other than an organization who makes not more than five consumer loans in a single calendar year. 1979 S.C. Acts 7 Section 5 as amended 1979 S.C. Acts 19 Section 1.

During the 1970's the General Assembly was not entirely silent on the issue of prepayment penalties. By Section 1 of Act 839 of 1973, the General Assembly added certain provisos to S.C. Code § 8-3 (1962), the general usury statute. The second of these provisos stated, inter alia that on first mortgage loans not more than \$100,000, where the interest rate exceeds eight percent, "no penalty or other charge shall be made for prepayment of the loan prior to its full term except for accrued interest on the balance owed." The fourth proviso, however, excluded certain loans:

Provided, further, that the provisions of this section shall not apply to first mortgage real estate loans made by Savings and Loans Associations or other Department of Housing and Urban Affairs or Federal Housing Administration approved mortgagees for which a commitment to purchase has been received and which are subsequently purchased, in whole or in part by the Federal Housing Administration No law of this State prescribing or limiting interest rates upon loans or advances of credit shall be deemed to apply to loans, advances of credit or purchases made pursuant to this paragraph.

This section was amended from time to time regarding rates and sunset dates and other matters not important here. It remained in essentially this form, however, until its repeal in 1982 [1982 S.C. Acts 385 Section 57(d)], and exemplifies the distinct treatment the General Assembly has traditionally given FHA and other "federally related" mortgage loans.

Another limitation on prepayment fees may be found in Section 2 of Act 1155 of 1970 which allowed savings and loan associations to raise the rate of interest one percent over the initial rate if agreed to by the borrower. If that rate were so increased, however, the borrower would be permitted to pay the loan off without penalties or charges except accrued interest. This provision was later codified as S.C. Code Ann. § 34-31-90(2) (1976) (also repealed by 1982 S. C. Acts 385 Section 57). Section 3 of Act 7 of 1979 further provided that in loans of \$100,000 or less, a lender would have to agree to a fixed interest rate and the right to prepay in full at any time without penalty in order to take advantage of the rate deregulation aspects of that Act. Although Section 5 of Act 7 of 1979, as amended by Section 1 of Act 19 of 1979 provides for the exclusion from the Consumer Protection Code of Federal Housing Administration approved mortgagees, there is no indication that the General Assembly sought to regulate Federal Housing Administration insured loans in an alternative manner. Code Section 31-19-10 was not mentioned in any way.

In 1982, the General Assembly passed Act 385 of 1982 which did several things:

- 1.) Section 37-10-103(1) was enacted;
- 2.) Section 34-31-30 was repealed;
- 3.) Section 34-31-90(2) was repealed;
- 4.) Both the rate deregulation provision and the prepayment restrictions of Act 7 of 1979 and its amendments were repealed; and
- 5.) Section 31-19-10 was not repealed.

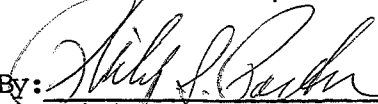
As a corollary to the rule generally disfavoring repeal by implication, it is held that statutes dealing with the same general subject matter should be reconciled if possible, to render both statutes operative. Stone & Clamp General Contractors v. Holmes, 217 S.C. 203, 60 S.E.2d 231 (1950); Bell v. South Carolina State Highway Dept., 204 S.C. 462, 30 S.E.2d 65 (1944); Greg Dying Co. v. Query, 166 S.C. 117, 164 S.E. 588, aff'd 286 U.S. 472 (1932). In fact, the extensive repealer provisions of Section 57 of Act 385 of 1982 lends support to the notion that implicit repeal of any other provision of law was not intended by the General Assembly. See 1A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 23.11 (4th ed. 1972) and cases cited at note 2 thereto. Particularly, it has been held that the naming of a statute to be superceded indicates that the legislature did not consider that another statute was in conflict with the new act. State Land Department v. Tucson Rock & Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971).

Thus, it appears that Sections 31-19-10 and 37-10-103(1) were intended by the General Assembly to coexist. Because the prepayment provisions of 12 C.F.R. § 203.22 are mandatory for FHA insurance, Section 31-19-10 cannot coexist with Section 37-10-103(1) if such loans are considered subject to the prepayment restrictions of 37-10-103(1). Since the passage of the original versions of Section 31-19-10 by Section 1 of Act 61 of 1935, we are aware of no attempt by the General Assembly to carve an exception to the rule that financial institutions may make loans secured by real property under such terms as the Federal Housing Administrator requires for FHA insurance of those loans.

Even though Section 37-10-103(1) on its face contains no restrictions on its scope, because Section 31-19-10 has not been repealed, we conclude that loans made pursuant to Section 31-19-10, and for which FHA insurance is obtained are not subject to the general prepayment penalty prohibition of Section 37-10-103(1).

In conclusion, it is the opinion of this Department that Section 10.103(1) does not apply to loans insured by the Federal Housing Administration pursuant to 24 C.F.R. § 203 (1983).

Steven W. Hamm, Administrator

By: 
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