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February 17, 1977

Administrative Interpretation No. 1.301-7701

PURCHASE MONEY SECURITY INTEREST IN LAND INCLUDES
A MORTGAGE GIVEN TO PAY OFF A PURCHASE MONEY SECURITY
INTEREST IN LAND.

A real estate mortgage which is both a first lien and a purchase money security interest is excluded from the South Carolina Consumer Protection Code although the loan secured by such mortgage, except for that fact, would be a consumer loan. By virtue of this exclusion such loans are subject to the general usury law [Section 8-3 of the South Carolina Code of Laws] instead of the eighteen percent (18%) ceiling of the South Carolina Consumer Protection Code.

In a variety of fact settings the question has arisen whether a conventional first mortgage real estate loan is subject to the general usury rate if the purpose of such loan is to pay off a purchase money first mortgage on real estate.

The South Carolina Consumer Protection Code is the Uniform Consumer Credit Code (1968 Official Text) with certain South Carolina amendments.

Section 3.105 of the 1968 Text states, in part, that

. . . "Consumer Loan" does not include a loan primarily secured by an interest in land, if at the time the loan is made the loan finance charge does not exceed ten (10) percent per year . . .

The comment under this section states that:

The purpose of this section is to exclude the ordinary home mortgage from all provisions of this Act . . .; however, this Act is intended to include as consumer loans, high rate loans which are characteristic of the second mortgage small loan business. Because the ordinary home mortgage invariably has a loan finance charge below 10%, the exclusion has been based on the amount of the loan finance charge.

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The objective of the 1968 Text was to exclude "the ordinary home mortgage," and include other mortgages. The means of doing this was to exclude mortgages with a loan finance charge of ten percent (10%) or less, upon an assumption that "the ordinary home mortgage" rate would never exceed ten percent (10%). That assumption proved faulty in 1973 and 1974 when even the prime rate exceeded that figure, and "ordinary home mortgages" which the Code drafters intended to exclude, became subject to the Code provisions.

To deal with this problem the Code drafters amended the original (1968 Text) Code by raising the ten percent (10%) threshold to twelve percent (12%) [See the Uniform Consumer Credit Code, Official 1974 Text, Section 1.301(15).]

In South Carolina a bill was introduced early in 1975 (Senate Bill S-119) to deal with this problem by using a criterion other than rate of finance charge to exclude the ordinary home mortgage. See Sections 13, 14, 15, 16, 17 and 18, of Senate Bill S-119 of 1975.

That recommended amendment was based upon the assumption that "the ordinary home mortgage" usually involved a first mortgage and that the lien was a purchase money security interest. Accordingly the amendment would exclude a transaction "secured by a first lien which is a purchase money security interest in land."

The General Assembly, in 1976, enacted those provisions of S-119. Subsection (2) of Section 3.104 of the South Carolina Consumer Protection Code as it was finally enacted in Act 686 of 1976 (S-119) reads as follows:

"Consumer Loan" does not include a loan primarily secured by a first lien which is a purchase money security interest in land.

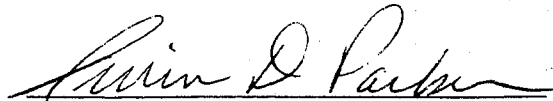
The purpose of this section is the same as it originally was in the 1968 text - to exclude the "ordinary home mortgage" from the provisions of the Code. In order to give effect to this legislative intent, it is necessary to conclude that a real estate mortgage given to secure a loan which is used to pay off a purchase money security interest in land is also a purchase money security interest in land. If this were not the case any "ordinary home mortgage," which must be made at the general usury rate could be converted to a "consumer loan" at a rate up to eighteen percent (18%) by the simple device of a two step loan transaction, e.g., a

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short term nine percent (9%) loan to build or purchase a residence, paid off by a "permanent" loan at a higher rate.

It is the opinion of this office that a conventional first mortgage real estate loan is subject to the usury statute if one purpose of such loan is to pay off a loan primarily secured by a purchase money first mortgage on real estate.



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