

October 26, 1998

Re: Letter of October 15, 1998 alleging preemption of WV Code 46A-4-107(4).

Dear Ms. _____ :

Your October 15, 1998 letter to Commissioner Bias has been forwarded to me for response. You have asked the Division of Banking to concur with your opinion that the Depository Institutions Deregulation and Monetary Control Act of 1980 (“DIDMCA”) “prevents states from regulating the amount of points and fees (finance charge) that a lender may charge in connection with a first mortgage loan 12 USC 1735f-7(a)(1).” This we cannot do.

_____ is specifically concerned with WV Code 46A-4-107(4) which provides:

where any loan, revolving or nonrevolving, is secured by real estate, the permitted finance charge may include a charge of not more than a total of five percent of the amount financed for any origination fee, points or investigation fee. In any loan secured by real estate, such charges may not be imposed again by the same or affiliated lender in any refinancing of that loan made within twenty-four months thereof, unless these earlier charges have been rebated by payment or credit to the consumer under the actuarial method, or the total of the earlier and proposed charges does not exceed five percent of the amount financed.

_____ is correct when it asserts that West Virginia did not opt out of the DIDMCA preemption on interest rates within the three-year window of opportunity. However, we believe that window applied only to the preemption of interest rates, not to state limitations on points and other fees.

Section USC 1735f-7a(b)(2) created the three-year window within which states can elect to opt out of the preemption of interest rates. However, 12 USC 1735f-7a(b)(4) provides that “[a]t any time after the date of enactment of this Act, any State may adopt a provision of law placing limitations on discount points, or such other charges on any loan, mortgage, credit sale, or advance described in subsection (a)(1).” (emphases added)

I have found two Alabama cases which have addressed this issue. One is a federal court case, *Autrey v. United Companies Lending Corp.*, 872 F.Supp. 925 (S.D. Ala. 1995). In *Autrey*, the District Court granted a motion to remand back to state court a class action against the lender based upon violations of the State's Mini Code, Ala. Code 5-19-4g, which placed a limit of five points on consumer loans and credit sales similar to the cap found at WV Code 46A-4-107. The Court held that "[b]ecause [DIDCMA] does not completely pre-empt Plaintiff's Mini Code claims, which this Court so finds since section 5-19-4g qualifies under DIDCMA's (b)(4) override exception, remand is appropriate."

The second case is *United Companies Lending Corp. v. McGehee*, 686 So. 2d 1171 (Ala. 1996), *cert. den.* 137 L.Ed. 2d 703, 117 S.Ct. 1555 (1997) which involved the same provision of Alabama's Mini Code. In that case, the Alabama Supreme Court pointed out that "[s]ection 1735f-7a(b)(4)...allows states, after March 31, 1980, to *limit discount points* on federally related mortgage loans....Because Congress broadly allowed states to override its preemption of state usury laws *as to discount points*, we see no reason to limit the override enacted by our legislature in 1988 and codified at section 5-19-4(g)" *Id.* At 1177-78 (emphases in original).

Because of the broad language in 12 USC 1735f-7a(b)(4), we also see no reason to limit the override of points, origination and investigation fees enacted by our Legislature in 1996.

I hope this letter adequately explains why we cannot concur that DIDMCA preempted West Virginia's ability to impose a limitation on points and other similar charges for all loans, including first lien mortgages. If you have any questions, please feel free to contact me.

Sincerely,

Robert J. Lamont
General Counsel