Interpretive Letter No. 98-01 (January 16, 1998)

Loans secured by a real estate mortgage are governed by Section 4(1)(l), and not Section 4a(a)(i), of the Interest Act.

This letter responds to your inquiry regarding the Illinois Interest Act ("Act") [815 ILCS 205/0.01 *et seq.*], and in particular whether loans that are secured by a real estate mortgage are governed by Section 4(1)(l) [815 ILCS 205/4(1)(l)] or Section 4a(a)(i) [815 ILCS 205/4a(a)(i)] of the Act. For the reasons set forth in this letter, we conclude that Section 4(1)(l) is the controlling section and therefore, any rate of interest may be charged for loans secured by a mortgage on real estate.

Section 4(1) of the Act, which governs written contracts for "money loaned or in any manner due and owing," generally provides for a 9% interest rate limitation. However, over time, the General Assembly has added numerous exemptions to that limit resulting in 14 types of loan transactions for which it is lawful to charge, contract for, and receive any rate or amount of interest or compensation. The earliest exemptions were obviously business or commercial in nature causing one court to conclude that, "The statute is quite apparently designed to protect only relatively small, personal, non-business borrowers from high interest rates." Koos v. First National Bank of Peoria, 496 F.2d 1162, 1164 (1974).

In 1982, the Illinois General Assembly amended Section 4(1)(l) of the Act to state, "It is lawful to charge, contract for, and receive any rate or amount of interest or compensation with respect to...loans secured by a mortgage on real estate." The legislative intent of 4(1)(l) was "to increase the availability of funds for home financing previously restricted by the statute's limit on interest rates and fees associated with real estate loans." Currie v. Diamond Mortgage Corporation, 859 F.2d 1538, 1543 (1988). To paraphrase Currie, the General Assembly concluded that available credit at higher than statutorily imposed rates is better than having no credit.

Federal law is useful in partially resolving the conflict between Sections 4(1)(l) and 4a(a)(i). Section 501 of the federal Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) invalidates state laws which expressly limit the rate or amount of interest on loans secured by a first lien on residential real property. 12 U.S.C. ' 1735f-7a. The Illinois Attorney General has concluded that DIDMCA has partially preempted 4.1a of the Act [815 ILCS 205/4.1a] which limits, to 3% of principal, the amount of charges a lender may charge on loans secured by residential real estate with an interest rate over 8%. Illinois Attorney General Opinion #96-037 (12-3-96). Similarly, DIDMCA would preempt Section 4a(a)(i) to the extent it applies to loans secured by a first lien on residential property.

Regarding loans not preempted by DIDMCA, the discussion in Currie is instructive. In Currie, the court was asked to reconcile Section 4(1)(l) with Section 4.1a. Discussing U.S. v. Will [449 U.S. 200 (1980)], the court said that although repeal by implication is strongly disfavored by the courts, it will be invoked if "a statute enacted later in time is repugnant to an earlier statute such that the two

acts cannot stand together." Currie, 1542. Using this analysis, the court ruled that the "deregulatory impetus" of Section 4(1)(l) is inconsistent with the limitation on fees contained in Section 4.1a and that Section 4.1a was therefore implicitly repealed. Id., 1543. Similarly, we

believe that this legislative intent of Section 4(1)(l) is equally inconsistent with the interest rate limitations of Section 4a(a)(i), that the two provisions cannot stand together, and that Section 4(1)(l) should apply to installment loans secured by real estate.

Finally, as you stated in your letter, if the Section 4a interest restriction were applied to real estate loans despite the permissive language of Section 4(1)(l), it would be equally applicable to the other types of loans exempted in Section 4(1). Applying the 9% limit to loans such as corporate loans and business loans would be contrary to long standing interpretations that these Aexempt@ loans are limited only by the terms negotiated between the lender and the borrower, and not governed by Section 4a.

Thus, based on the legislative intent of Section 4(1)(l), federal preemption by DIDMCA, the analogous holding of Currie, and the unexpected and unintended results that would otherwise result for other Aexempt@ loans, we conclude that loans secured by real estate are governed by Section 4(1)(l), and not Section 4a(a)(i) of the Act.