

## RESOLUTION 2-06-2002

### DIGEST

#### Usury: Restriction on Real Estate Broker Exemption

Amends Civil Code section 1916.1 to require that, to be exempt from the Constitutional cap on loan interest rates, a real estate broker must be operating within his or her licensed capacity.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### Reasons:

This resolution amends Civil Code section 1916.1 to require that, to be exempt from the Constitutional cap on loan interest rates, a real estate broker must be operating within his or her licensed capacity. This resolution should be disapproved because it conflicts with Article XV Section 1 of the California Constitution by limiting the scope of the broker exemption contained therein and is unnecessary in any event.

Section 1 of Article XV of the California Constitution sets a 10 percent cap on loan interest rates but exempts several different classes of lenders, including "real estate brokers." This resolution would limit that exemption to situations in which brokers are acting within the scope of their license. By imposing such a statutory limitation, this resolution appears to conflict with the Constitution, which contains no such limitation. Additionally the phrase "within the scope" of a real estate license is not defined in the statute, in case law, or in this resolution. Because the meaning of that phrase is not clear and would be difficult to define, the proposed restriction would be equally difficult to enforce.

Even if the resolution did not conflict with the Constitution and was not too vague to be enforced, it would be unnecessary. To qualify for the broker exemption a loan must be secured by liens in real property. (Civ. Code, § 1916.1.) Therefore, casual "loan sharking" is unlikely. Furthermore, real estate brokers are already well regulated by statute. (See, e.g., Bus. & Prof. Code, § 10177 [fraudulent or dishonest dealings, or crimes of moral turpitude]; Corp. Code, § 31000, et seq. [violation of the Franchise Investment Law subjects the broker to penalties].) Those statutes are sufficient to protect the borrowing public from dishonest real estate brokers. (*Del Mar v. Caspe* (1990) 222 Cal.App.3d 1316, 1325-1326, & fn. 3.)

### TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Civil Code section 1916.1 as follows:

- 1     §1916.1
- 2             The restrictions upon rates of interest contained in Section 1 of Article XV of the
- 3 California Constitution shall not apply to any loan or forbearance made or arranged by any
- 4 person licensed as a real estate broker by the State of California, and secured, directly or
- 5 collaterally, in whole or in part by liens on real property. For purposes of this section, a loan or
- 6 forbearance is arranged by a person licensed as a real estate broker when the broker (1) acts
- 7 for compensation or in expectation of compensation for soliciting, negotiating, or arranging the
- 8 loan for another, (2) acts for compensation or in expectation of compensation for selling,
- 9 buying, leasing, exchanging, or negotiating the sale, purchase, lease, or exchange of real
- 10 property or a business for another and (A) arranges a loan to pay all or any portion of the
- 11 purchase price of, or of an improvement to, that property or business or (B) arranges a
- 12 forbearance, extension, or refinancing of any loan in connection with that sale, purchase, lease,
- 13 exchange of, or an improvement to, real property or a business, or (3) arranges or negotiates
- 14 for another a forbearance, extension, or refinancing of any loan secured by real property in
- 15 connection with a past transaction in which the broker had acted for compensation or in
- 16 expectation of compensation for selling, buying, leasing, exchanging, or negotiating the sale,

17 purchase, lease, or exchange of real property or a business. The term "made or arranged"  
18 includes any loan made by a person licensed as a real estate broker as a principal or as an  
19 agent for others, but whether or not only when the person is acting within the course and scope  
20 of such license.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: San Diego County Bar Association

#### STATEMENT OF REASONS

Existing Law: This statute currently allows brokers to essentially act as legal loan sharks. This statute resulted from the adoption of an amendment to the California Constitution in 1979 that exempted real estate broker licensees from the usury restrictions in the Constitution. *In re Lara*, 731 F.2d 1455 (9<sup>th</sup> Cir. 1984). One reported case condoned an annual interest rate of 264%. *Garcia v. Wetzel* (1984) 159 Cal. App.3d 1093. The Legislature's rationale for allowing brokers to make loans at unlimited interest was that brokers were subject to regulation by the Department of Real Estate (DRE). Legislative Findings. Stats. 1983, Ch. 307, §2. The current statute applies even if the broker is not acting in a licensed capacity and loaning his or her own money. *Del Mar v. Caspe* (1990) 222 Cal. App.3d 1316.

The Problem: Brokers cannot be brought back under the usury restrictions without a constitutional amendment. DRE will not intervene in a transaction where the broker is not acting in a licensed capacity unless there is evidence of dishonesty, fraud or deceit with the intent to substantially benefit themselves or substantially injure others.

This Resolution: This amendment would, at a minimum, require that the broker be operating in a licensed capacity, with the enhanced duties of that status, when they loan money at a rate exceeding the current usury law applied to all other California individuals.

#### IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Robert H. Lynn, Lynn, Stock & Stephens, LLP, 2445 Fifth Avenue, St. 330, San Diego, CA 92101, (619) 234-5488, [rlynn@lsslawfirm.com](mailto:rlynn@lsslawfirm.com).

RESPONSIBLE FLOOR DELEGATE: Robert H. Lynn