

May 1, 1987

RE: Applicability of §3-311 ["Bring-Your-Own-Lawyer Law"] to All Forms of Real Estate-Secured Lending

A lender has asked whether §3-311 of the Code, as recently amended by P.L. 1985, c. 311, applies only to first lien purchase money transactions, or to all real estate-secured lending. For the reasons set forth below, the Bureau holds that §3-311 applies to all real estate-secured lending.

Section 3-311, permits a prospective mortgagor to choose his or her own attorney to perform title examination work necessary to obtaining a loan, requires the lender to inform the prospective mortgagor in writing of this right and prohibits the lender from charging extra to review the mortgagor's attorney's title work.

The lender posing the question suggested that §3-311 applied only to first-lien purchase money transactions because of the use of the phrase "residential mortgage transaction" in the section's title, notwithstanding the fact that in the body of the statute itself, residential mortgage "loan" is the term that is used. "Residential mortgage transaction" is a term of art defined in both §8-103(1)(H) of the Code and §226.2(24) of Regulation Z as a transaction involving a purchase money-type (first lien) mortgage in a consumer's dwelling to finance the initial purchase or construction of that dwelling. "Residential mortgage loan," on the other hand, is not a defined term. A narrow interpretation of the section's scope would free non-bank lenders from having to comply with §3-311 on all first lien mortgage refinancings, and all lenders offering all junior lien mortgage products, including the increasingly popular home equity credit line.

The original concept of granting consumers the right to choose their own attorney arose in 1979 with the enactment of §439 of Title 9-B, the Maine Banking Code (P.L. 1979, c. 531). That provision, entitled "Attorneys," used the phrase residential mortgage "loan." In 1983, a similar provision was added to the Code as §3-311 (P.L. 1983, c. 150, §1). That early Consumer Credit Code version differed from its model in that it used the phrase residential mortgage "transaction." In 1985, when both 9-A §3-311 and 9-B §439 were repealed and replaced with the current version (P.L. 1985, c. 311), both provisions addressed residential mortgage "loans." [The newest version of this provision in the Banking Code has been reallocated to subsection 4 of §241. Section 241 is captioned "Anticompetitive or Unfair Practices"; subsection 4 continues to be titled "Attorneys."]

The Bureau finds the proffered interpretation unpersuasive (as well as contrary to public policy). Reliance on the title of §3-311 as determinative of its meaning is misplaced for, as a matter of statutory interpretation, the title of an act or provision does not control the plain meaning of the words themselves in that act or provision. City of Atlantic City v. County of Atlantic, 475 A.2d 616 (NJ 1984); Sutherland, Statutory Construction, §47.03, at 121. Further, narrow or technical construction of titles is to be avoided, and a statute is to be read fairly in order not to thwart legislative purpose. Id., §1804, at 35.

The starting point for legislative interpretation is the language of the statute itself. If the language is plain, the statute should be enforced according to its terms. U.S. v. Smith, 614 F. Supp. 454 (D.C. Me. 1985); State v. Laverty, 495 A.2d 831 (Me. 1985).

The words of the statute in question are clear - they address residential mortgage "loans" and not just residential mortgage "transactions." While the phrase "residential mortgage loan" is not defined in the Code as previously noted, the term "loan" is variously defined in §1-301(23); the most general of these definitions is "the creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of the debtor." In none of the various definitions is there any reference to lien status. Consequently, lien status is not material to the existence of a loan under the Code. As a corollary, transactions with any lien status, if meeting the criteria of a loan, are included under that definition. Hence, the phrase "residential mortgage loan" must include any loan secured by real estate, regardless of the priority of the particular security interest in question.

In light of the fact that there is no lien priority limit placed upon transactions subject to §3-311, this section applies to all forms of real estate-secured consumer lending.

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