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ADVISORY RULING #99

JULY 24, 1991

July 24, 1991

**Re: Public Law 237 (1991); "An Act To Authorize Recovery of Certain Collection Costs"**

Dear

In 1991, the Maine Legislature passed Public Law Chapter 237, enacting a new version of Section 3-402 of the Consumer Credit Code, titled "Limitation on Default Charges."

You have asked two questions regarding the new law: 1) Does the statute's allowance for attorneys' fees in second mortgage and home equity foreclosures constitute a clarification of existing law, or does it provide a new right to reimbursement for fees previously absorbed by the creditor; and 2) In order to collect attorneys' fees in real estate transactions affected by the new language, may a creditor contract with a consumer using general language (for example, a provision in which the consumer agrees "to pay all reasonable costs and expenses allowed by law"), or must more specific language be used (for example, wording whereby the consumer agrees "to pay reasonable attorneys' fees, legal expenses and other reasonable costs incurred in realizing on the property")?

Regarding your first inquiry, our review indicates that no formal or informal ruling has expressed any view different than that reflected in several Advisory Rulings; namely, that neither attorneys' fees nor collection costs were previously considered allowable in real estate transactions encompassed by Articles I through VIII of the Consumer Credit Code (second mortgages and home equity loans). The recent statute, therefore, creates a new prerogative for creditors by allowing those creditors to contract for

recovery of attorneys' fees and collection costs following a default by the consumer. This interpretation is significant to the extent that this new allowance will arise as of the effective date of the statute (October 9, 1991), after which time creditors may enter into contracts with consumers allowing recovery of those costs from consumers. However, the new statute will not impact closed-end consumer credit transactions entered prior to the effective date of the law; nor will it impact existing open-end home equity accounts unless creditors change the terms of such accounts in accordance with applicable law. For any account established prior to November 7, 1989, such a "change in terms" procedure would include allowance for the consumer to repay amounts owed under the existing terms of the account agreement, as required by Section 3-204 of the Maine Consumer Credit Code. For any account established on or after November 7, 1989, the consumer's written agreement to the change is required under the Home Equity Loan Consumer Protection Act and Section 226.5b(f)(3) of Federal Reserve Board Regulation Z and Maine Bureau of Consumer Credit Protection Regulation Z-2.

In response to your second inquiry, I feel that consumers should be provided with an unequivocal statement disclosing the specific new charges which may be levied in cases of default. Many lending products currently in existence call for liability of consumers for "such costs as are allowed by law." I feel that in the case of a new contract entered into after the effective date of the law, and also in the case of a change in terms of existing open-end agreements, explicit wording is required in order to put the consumer on notice as to the significant liability to which the consumer may now be exposed. For that reason, I am of the opinion that specific language (for example, "If I am in default, I agree to pay reasonable attorneys' fees, legal expenses and other reasonable costs incurred in realizing on the property") is appropriate, as a way of clarifying the responsibilities of the parties.

The above discussion focuses on subsection (1)(C) of the new law. In the opinion of the Bureau, subsection (1)(B), dealing with repossession of personal property, constitutes a clarification of existing law and does not establish new precedent. For that reason, reasonable costs of retaking, preparing for resale and selling repossessed personal property may be assessed in existing consumer credit transactions secured by personal property.

I hope this is responsive to your request for the Bureau's positions on the above issues.

Sincerely,

William N. Lund  
Superintendent

WNL/bas