Opinion No. 62-50

March 26, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Marvin Baggett, Jr., Assistant Attorney General

TO: Mr. Keith E. Moore, State Bank Examiner, State Capitol, Santa Fe, New Mexico

QUESTION

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1. Does Section 17 of the New Mexico Small Loan Act (Sec. 48 - 17 - 46, N.M.S.A., 1953 Comp. (PS)), prohibit the making of a small loan to a borrower who already has a conventional loan?

2. Does Section 15A-3 of the New Mexico Small Loan Act (Sec. 48-17-44A (3)), require the filing of a termination statement when a note is renewed?

3. If the answer to questions 1 and 2 is "yes", may the Banking Department, by regulation, wave the requirement?

CONCLUSIONS

1. No.

2. Yes.

3. No.

OPINION

ANALYSIS

We begin with the premise that any person or organization may make a conventional loan, at rates not to exceed those set forth in Sec. 50-6-16, et seq., N.M.S.A., 1953 Comp. (PS), generally called the usury statutes. There are no licensing provisions relating to the lending of money at the rate and under the conditions set forth in the aforesaid sections.

The Small Loan Act is, in itself, an exception to provisions of the usury statutes cited above. It allows interest rates substantially higher than the usury laws, but requires the obtaining of a license before money may be loaned at the higher rates. In addition, the Small Loan Act extensively regulates the small loan business. However, it should be

kept in mind that the Small Loan Act, except for the provision quoted below, makes no restrictions on conventional loans.

Section 48-17-46, N.M.S.A., 1953 Comp. (PS), reads as follows:

" **Any licensee hereunder may make loans in accordance with** and not in violation of the **general laws of this state** governing money and usury **to any borrower not having a loan with the lender under this act** [48-17-30 to 48-17-58], Provided no charge authorized to be made under the provisions hereof shall be made, collected or received by the lender in connection with any such loan; and **Provided** further, **that any such loan shall not be converted into a loan under this act** after once made or after it is reduced to a sum less than the maximum herein provided for. (Emphasis added).

The section quoted above clearly prohibits the making of a conventional loan by a small loan licensee where the borrower has already taken out a small loan. We cannot, however, read into this section a prohibition against the granting of a small loan to a person having a conventional loan. Nor is any such restriction contained elsewhere in the Act.

If there be an undesirable inconsistency in the law because of thus forbidding a conventional loan where a small loan exists, while at the same time allowing a small loan where a conventional loan is outstanding, it is a matter for the Legislature to consider.

In **Burch v. Foy,** 62 N.M. 219, 308 P. 2d 199, the Court stated at page 224:

". . . Courts cannot read into an act something that is not within the manifest intention of the Legislature as gathered from the statute itself. This would be judicial legislation. Where the language of a statute is clear and unambiguous, as the act in question, there is no room for construction thereof."

We must conclude, then, that our statutes permit the granting of a small loan licensee where a conventional loan to the same borrower is already on the books.

Your second question involves an interpretation of the pertinent provisions of the Small Loan Act together with Sec. 50A-9-203 (2), N.M.S.A., 1953 Comp. (PS), being a part of the Uniform Commercial Code. This latter section specifically provides that a transaction subject to the Uniform Commercial Code is also subject to the Small Loan Act and that in case of conflict between the Code and the Small Loan Act, that the Small Loan Act provision shall control. Referring then to Sec. 48-17-44 (A) (3), N.M.S.A., 1953 Comp. (PS), we find the provision that the lending agent must:

"Upon payment of the loan in full, mark plainly every note and promise to pay signed by any obligor with the word 'paid' or 'canceled' and promptly file or record a release of any mortgage if the same has been filed or recorded; restore any pledge and cancel and return any note and any assignment given to the licensee."

The Small Loan Act, as quoted above, requires a release of **mortgage,** if one has been filed, upon payment of a note. The act establishing the Uniform Commercial Code, on the other hand, seemingly has abolished "chattel mortgages" by repealing Sec. 61-8-1 to Sec. 61-8-14 which defined and regulated the enforcement of rights under chattel mortgages.

A chattel mortgage, however, is commonly accepted as being a pledge of particular property for the payment of a debt. The financing statements required to be filed under the Uniform Commercial Code are, in effect, mortgages because they create a lien on the property pledged. Concluding then, that financing statements are tantamount to mortgages, we must also conclude that a release of such a lien must be filed whenever a note is paid in full, as provided for in Sec. 48-17-44 (A) (3). Although persuasive authority may be found for the proposition that payment of an existing loan by means of a new loan, absent statutes to the contrary, does not constitute payment as contemplated by Sec. 48-17-44 regarding a release of mortgage upon payment of the loan in full, nevertheless, we must refer to another section of the Small Loan Act to determine the intent of the Legislature.

In **Burch v. Foy,** supra, at page 223, the Court stated:

"A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration . . ."

And in **Cox v. City of Albuquerque,** 53 N.M. 334, it was held:

". . . In arriving at true legislative intent we are not permitted to choose given language, isolate it from other portions of the Act, and make its otherwise emphatic tone controlling. Each and every part of the statute, where possible, must be given some effect in an effort to reconcile it in meaning with every other part . . ."

The Court stated the rule of interpretation thusly, in **George v. Miller & Smith,** 54 N.M. 210:

"In interpreting a statute the intent is to be first sought in the meaning of the words used, and when they are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the legislature, no other means of interpretation should be resorted to . . ."

With these rules in mind we must approach Sec. 48-17-43.1 (A), which states:

"Prepayments and Refunds. If the loan contract is prepaid in full by cash, a new loan, refinancing or otherwise before the final installment date, the borrower shall receive a refund of an amount which shall be at least as great a proportion of the precomputed charges, excluding any adjustment of charges for a first period of more or less than one

[1] month, as the sum of the remaining monthly balances of principal and charges combined scheduled to follow the installment date nearest the date prepayment bears to the sum of all the monthly balances of principal and charges combined originally scheduled by the contract, as computed in accordance with the rule commonly known as the rule of seventy-eights. . . ."

From the foregoing, we can conclude only that the Legislature intended that a new loan or renewal of an existing loan would constitute payment in full of an existing loan. Therefore, a release, now termed a termination statement by the Uniform Commercial Code, must be filed even though the parties will undoubtedly enter into another agreement which also will be filed in instances of renewal or refinancing.

This conclusion is also based upon the assumption that the small loan company will file either:

(a) a note and mortgage combined which complies fully with the statutory definition of a financing statement, (it is our understanding that this has been the common commercial practice), or

(b) some other type of document which complies with the statutory definition, and includes the terms and conditions of the note or debt.

Your third question relates to administrative authority.

In **Vermejo Club v. French,** 43 N.M. 45, 85 P. 2d 90, at page 49, the Court stated the general rule that:

"An administrative body has such authority and only such authority as is given by law."

Section 48-17-40, N.M.S.A., 1953 Comp., gives the examiner authority to make reasonable regulations "consistent" with the Act. Section 48-17-57, N.M.S.A., 1953 Comp., provides criminal penalties for violation of any of the sections of the Act.

To allow the Banking Department, by regulation, to nullify what we consider to be an express provision of the law, would be to allow the Department to exercise authority not given it by law. Therefore, we cannot sanction such a regulation.