

State of Vermont
Banking Division
Department of Banking, Insurance, Securities
& Health Care Administration

BANKING BULLETIN NO. 19 JULY 23, 1997

PERMITTED CHARGES ON MORTGAGES

Bulletin No. 11, attached hereto, was issued by the Department on June 18, 1984 regarding permitted charges on subordinate lien mortgages. In the introductory paragraph of the bulletin, Commissioner Chaffee stated that the Federal "...Depository Institutions Deregulations and Monetary Control Act of 1980 (hereinafter "DIDMCA") pre-empted provisions of Vermont Law 'limiting the rate or amount of interest, discount points, finance charges or other charges, on mortgage loans secured by a first lien on residential real property or a residential manufactured home..." This federal pre-emption was effective March 31, 1980.

One of the Vermont statutes pre-empted by DIDMCA was 9 V.S.A. 42 which prohibits the charging of any fee not specifically reference therein. Because 9 V.S.A. 42 originally applied to the making of first mortgages as well as other loans, the statute was only pre-empted when applied to first liens and continued to have application to other loans, including subordinate lien mortgages.

Pursuant to the federal law, a state could, between April 1,1980 and March 31, 1983, adopt a law which regulated the amount of interest, discount points, finance charges, or other charges which may be imposed on a first mortgage. In recognition of the federal pre-emption in this area, the Vermont legislature, on March 9, 1982 amended 9 V.S.A. 41a to add section (b)(8) which provides that the interest on a loan or extension of credit secured by a first lien against real estate would be the rate of interest allowed under DIDMCA. The Vermont legislature took no action to renew the application of 9 V.S.A. 42 to first mortgages.

On April 19, 1983, the legislature enacted 8 V.S.A. 2201(a) to expand mortgage lending by non-bank lenders in the State of Vermont. Prior to the adoption of that statute, licensed lenders were only legally authorized to make subordinate lien mortgages and then only if the individual loan exceeded \$3000.00 and was for a term of nor more than 15 years.

The enactment of H.315 on April 18, 1983, which added 8 V.S.A. 2201(a), eliminated a number of the restrictions on mortgage lending by licensed lenders in Vermont. The statement of purpose contained in H.315 provided: "It is the purpose of this bill to remove certain statutory restrictions on mortgage loans made under 8 V.S.A. Chapter 73 by lenders other than Vermont depository institutions..."

The legislative history behind H.315 indicates that the legislature intended, by authorizing licensed lenders to write first and second mortgages under section 2201(a), to increase competition in the Vermont marketplace which would thereby increase and enhance mortgage credit availability. The bill's sponsor, Representative Michael Kimack testified before the Senate Finance Committee:

“So when we talk about what the bill really does, it basically will permit a little bit more competition in the banking area dealing with people (non-bank lenders) who would have the availability of mortgages at perhaps somewhat lesser rates and perhaps somewhat lesser point structures... So, the bill, from the point of view of its intent is to allow the market to be open, to bring these people under the purview of the banking and insurance agency...” (Senate Finance Committee, March 19, 1983, Transcript at p.25.)

To provide parity within the mortgage lending industry in Vermont, licensed lenders were allowed to charge the same interest rates as banks: the interest rates permitted under DIDMCA for first liens, as provided under 9 V.S.A. 41a(b)(8), and the interest rates allowed under 9 V.S.A. 41a(b)(7) for subordinate liens.

As it had in the 1981 statute related to subordinate liens, H.390, the legislature incorporated 9 V.S.A. 42 by reference into section 2201(a). At the time of the enactment of section 2201(a), 9 V.S.A. 42 had been pre-empted by DIDMCA in its application to first liens but not to subordinate liens.

One of the general rules of statutory construction provides that when a legislature incorporates a statute by reference into another statute, it adopts the referenced statute as it exists at the time of the adoption..73 Am. Jur 2d 29; 82 C.J.S. 70; Sutherland on Statutory Construction, Section 51.08. The Vermont Supreme Court has recognized this general rule of statutory construction. Court of Insolvency v. Meldon, 69 Vt. 510, 513 (1897). By incorporating 9 V.S.A. 42 by reference into 8 V.S.A. 2201(a), the legislature incorporated 9 V.S.A. 42 as it stood at the time the 1983 law was passed. On April 19, 1983, section 42 did not apply to first liens because of pre-emption by DIDMCA.

There is also nothing in either H.315 or the legislative history of the enactment of that bill to indicate that the legislature intended to overcome the federal pre-emption of 9 V.S.A. 42 as applied to first liens written by licensed lenders. Although DIDMCA does allow a state, at any time after April 1, 1980, to adopt laws which regulate “discount points or such other charges” on first liens, there is not evidence that the Vermont legislature intended to do so when it simply consolidated existing statute relating to mortgage in H.315. In fact, the legislative intent was the opposite-to place licensed lenders on a level playing field with banks who are not restricted in their charges on first liens.

The legislative history evinces the intent of the legislature that licensed lenders be restricted under 9 V.S.A. 42 in the making of subordinate liens and not first liens. It is important to note that the first incorporation by reference of 9 V.S.A. 42 into the Licensed Lenders' statute was the 1981 enactment of H.390 which applied to subordinate

liens only. The legislative history of the 1983 law, H.315, further substantiates the legislature's intent to provide an open marketplace for mortgage lending in Vermont and to that end, provide the same restrictions on all Vermont lenders related to the permitted charges under 9 V.S.A. 42; in other words, to apply section 42 to subordinate liens only.

Consequently, the Department interprets the inclusion of 9 V.S.A. 42 in 8 V.S.A. 2201(a) as a limitation on the charging of fees by licensed lenders on subordinate liens and not first liens. This interpretation is consistent with Bulletin No. 11 which states the Department's position that, after DIDMCA, subordinate liens continue to be regulated by Vermont law.

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