Opinion No. 65-09

January 22, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

TO: Senator J. Penrod Toles, New Mexico Legislature, Santa Fe, New Mexico

QUESTION

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May a person or corporation charge a reasonable service charge for servicing a loan of money under the provisions of Section 50-6-15 and 60-6-16 New Mexico Statutes Annotated, 1953 Compilation in addition to the specified interest rates contained in Section 50-6-16.

CONCLUSION

See analysis.

OPINION

*{*17}* ANALYSIS

It appears that unless there is a specific statutory prohibition in addition to Section 50-6-15, N.M.S.A., 1953 Compilation a service charge for servicing a loan, revealed in advance to the borrower, as such, may be charged. Section 50-6-15, supra, provides in part as follows:

"No person, corporation or association, directly or indirectly, shall take, reserve, receive or charge any interest, discount or other advantage for the loan of money . . . except at the rates permitted in this act."

This section, as presently written, has never been interpreted by the New Mexico Supreme Court but there are cases covering the section as it previously appeared. When the New Mexico cases cited below were decided the comparable section read as follows:

"Any rate of interest not exceeding ten per centum per annum agreed to by the parties to the contract, shall be legal, and no person shall directly or indirectly take or receive any money, goods or things in action or in any other way, any greater interest, sum or value for the loan or forebearance of any money, goods or things in action than ten per centum per annum; Provided that a minimum charge of one dollar ($ 1.00) may be

made for interest where the said rate fails to aggregate said sum." Laws of 1919, Ch. 162. Section 1.

In **Priestley v. Law,** 33 N.M. 176 (1928) the court approved certain charges made by the lending bank of the borrower. All of the charges were not set out in the case but two were. These were examination of title and inspections of security to enable the lending bank to rediscount some of the borrower's paper. The court pointed out that the trial court found that the borrowers knew of such charges and consented to them and that there was evidence to support such a view. When **Pristley v. Law,** supra, is read in conjunction with **Anderson v. Beadle,** 35 N.M. 654 (1931) it becomes clear that any charges made must be for services rendered and not a subterfuge to collect excessive interest.

In **Anderson v. Beadle,** supra, it was alleged that the appellee therein had made a charge of $ 300 as a bonus to lend the appellant $ 5,000. The $ 300 charge was in the form *{*18}* of an additional promissory note. The court at page 657 made these remarks:

"If the appellee made the charge of $ 300, under the belief that the law would not in that shape regard it as usuary, his mistake in this respect will not alter the character of the transaction. A profit greater than the lawful rate of interest intentionally charged for the loan or forbearance of money in a violation of the usuary law, and it matters not what form or name it may assume." (Citations omitted).

The question of whether or not reasonable actual service charges are proper is one that has been litigated many times in other jurisdictions. See 91 C.J.S. Usury, Section 48, Pages 630 and 631, footnotes 25, 26, 27, 28 and 29. The black letter rule set out in Section 48, supra, reads as follows:

"A lender may properly exact from a borrower, in addition to interest at the highest lawful rate on the money lent, reasonable fees or compensation for services rendered, or reimbursement of expenses incurred, in good faith, by the lender or his agent in connection with the loan, without thereby rendering the transaction usurious."

Of course, a specific statutory prohibition can prevent the collection of even reasonable service charges. The language of Section 50-6-15, supra, quoted above appears directed only at prohibiting excess profits from lending money and not a prohibition against recovering legitimate reasonable costs of making the loan. There are however some specific New Mexico Statutes that must be covered for a complete answer to your question.

Small loan businesses are specifically prohibited from making service charges. Section 48-17-30, N.M.S.A., 1953 Compilation (P.S.) subsection (d) provided in pertinent part:

"The legislature expressly declares: That the charges which licensee may collect under the provisions of this act, while inclusive of pure interest, are recognized as inclusive also of adequate service fees to the licensees.

The legislature further declares: That the charges established by this act are limiting maximums, fixed after careful study of modernized, adequate, and efficiently functioning small loan statutes of other states, which will permit licensees hereunder to meet the expense and loss hazard incident to the making and servicing of small loans. . . ."

Section 58-17-43 entitled:

"Charges -- Maximum rate -- Method of computation -- Further charges prohibited -- What deemed charges -- Insurance as collateral -- Duty of licensee with respect to insurance."

Provides in Subsection C., in part as follows:

"C. Except as in this act elsewhere provided, no further or other amount whatsoever shall be directly or indirectly charged, contracted for, or received."

The only amounts beside the lawful rates of interest which may be charged are found in Section 48-17-47, N.M.S.A., 1953 Compilation (P.S.) These include filing or recording fees actually and necessarily paid out by the small loan licensee, attorney fees when a note or contract has, in good faith, been turned over to an attorney for collection after diligent effort to collect by the licensee has failed and court costs in accordance with the applicable New Mexico laws.

Credit unions are limited to a stated rate of interest to include all *{*19}* charges. Section 48-19-14, N.M.S.A., 1953 Compilation (P.S.) provides:

"Interest rates on loans made by a credit union **inclusive of all charges incidental to making the loan** shall not exceed one per cent a month on unpaid balances." (Emphasis supplied).

It is significant to note that this section was amended in 1957 to include the underscored language.

In 1959 the legislature enacted the New Mexico Bank Installment Loan Act of 1959. Sections 48-21-1 to 48-21-10, N.M.S.A., 1953 Compilation (P.S.). This act applies to any state or national bank located in and authorized to do business in this state and among other things lending money. The loans covered by the act are any secured or unsecured installment loans which by their terms are repayable in substantially equal installments over a period not exceeding these years. Section 48-21-4 of the act sets out the rates of interest that may be charged. In addition Section 48-21-6 sets out the additional charges that may be made and provides that no other amounts shall be charged or contracted for either directly or indirectly on or in connection with any installment loan. Service charges are not included in Section 48-21-6 so they are therefore prohibited.

The last specific statute we have found controls Building and Loan Associations. Section 48-15-10, N.M.S.A., 1953 Compilation provides as follows:

"The laws of usury shall apply to all building and loan associations doing business in this state, and the total sum received by any such association as interest shall not exceed ten per cent per annum of the money actually borrowed; Provided that no commission fees paid to any agent by parties dealing with the association in securing loans, or the examinations of titles, or the preparation of papers in connection with such loans or any fines imposed shall be construed to be a part of the interest agreed to be paid on such loans, or to be usury as defined by the laws of this state."

As you can see from the foregoing the answer to your question is essentially yes as long as such is a bona fide cost incident to processing such loans and is not a subterfuge to exact a higher interest rate than permitted by law.