

## **CONSUMER CREDIT CODE (Title 9-A)** **Applicability to Mortgages**

- 1) History. Code was originally designed to regulate small loans (unsecured), and then second mortgages. First mortgages were generally considered exempt. (That’s because 1<sup>st</sup>-lien loans were generally made by banks and credit unions.)
  
- 2) Application to Mortgages. Applicability to first-lien mortgages was the result of (A) increase in number of mortgage companies; and (B) enactment of Article IX of the Code in 1987, titled “Consumer Credit Transactions Secured by First-Lien Mortgages”
  
- 3) “Not a model of clear draftsmanship.” Confusing applicability of Code to first-lien mortgages is illustrated by §1-202(8), “Exclusions” (*See below*)
  - (A) 1<sup>st</sup> liens out
  - BUT* (B) Back in for mortgage companies;
  - BUT* (C) back out for Articles II, III, IV and V;
  - AND (D) All of Article VIII applies.

### **§1-202. Exclusions**

This Act does not apply to:

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8. A loan or credit sale made by a creditor to finance or refinance the acquisition of real estate or the initial construction of a dwelling, or a loan made by a creditor secured by a first mortgage on real estate, if the security interest in real estate is not made for the purpose of circumventing or evading this Act, . . .

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C. With respect to a creditor other than a supervised financial organization, the exemption provided by this subsection applies to Articles 2, 3, 4 and 5 only . . .

**§1-202. Exclusions** Continued

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The exclusions set forth in . . . subsections 2, 4, 5, 7 and 8, shall not apply to the Maine Consumer Credit Code, Truth-in-lending, Article VIII.

- 4) Overview. The “big view” of the of Code’s applicability to mortgages includes the following:
- (A) Code requires licensing and bonding of “supervised lenders” (mortgage companies)
  - (B) Code requires licensing and bonding of loan brokers
  - (C) New requirement that all “loan officers” be registered (increased accountability)
  - (D) Article VIII (8) incorporates all of federal Truth-in-Lending, including federal Regulation Z
  - (E) Article IX (9) collects together most of the Code’s provisions regulating mortgage companies, into a single Article
  - (F) Article IX also authorizes the Bureau of Consumer Credit Protection (BCCP) to promulgate a rule on so-called “alternative mortgage transactions” (variable rate and balloon mortgages); this rule is Rule 250.
  - (G) Loan broker (formerly “credit services organization”) laws are found in Article X (10).
  - (H) Brand-new (January 1, 2008) anti-predatory lending laws were inserted into Article VIII (8), converting that article from primarily disclosure to one of limitation.

## Selected Specific Topics

### 5) Article VIII (8); “Truth-in-Lending”

- (A) Existing law is designed to incorporate federal Truth-in-Lending and federal Regulation Z (adopted in Maine as Bureau Regulation 240, a/k/a “Reg Z-2”)
- (B) Maine has an “exemption” from federal Regulation Z. This does not mean that federal law has disappeared in Maine; rather, both state and federal law co-exist, giving lawyers a choice.
- (C) Most powerful tool may be the right to rescind a transaction. Ordinarily available for 3 days with any refinance; however, can survive up to 3 years if the notice of right to rescind is not provided.

(This is a complicated area of the law, so use excellent resources such as the NCLC.)

### 6) Article IX (9), “First Lien Mortgages”

- (A) Rob Burgess’ effort to gather together all actions applicable to mortgage companies (supervised lenders)
- (B) Authorizes “Alternative Mortgage Transaction” rule (*see #7, below*)
- (C) Interesting new sections: *See 9-305-A*

#### **§9-305-A. Timely payments from escrow**

A creditor, assignee or servicer that holds or controls funds of a consumer in an escrow account for the payment of taxes or insurance premiums shall make timely payments from that escrow account for a consumer credit transaction secured by a mortgage on real estate. A creditor, assignee or servicer is liable to the consumer for actual damages resulting from failure to make timely payments from that escrow account. The creditor, assignee or servicer shall also rectify the results of a failure to make timely payments, including causing corrections of the consumer's credit report and causing the discharge of any liens against the consumer's real estate.

. . . and 9-305-B

**§9-305-B. Timely responses to requests for payoff figures**

A creditor, assignee or servicer shall respond to a request for a payoff figure within 3 business days following receipt of such a request from a consumer or an agent of the consumer for a consumer credit transaction secured by a mortgage on real estate. The response must include a precise payoff figure as of a date certain and must contain information permitting the consumer or the consumer's agent to update that figure, such as providing a per diem rate from a date certain. A charge may not be assessed for the first 2 requests in any calendar year, and a charge for each subsequent request may not exceed \$5.

(C) Two other older sections of note involve misrepresentation and unconscionability:

**§9-401. Misrepresentation**

A creditor or a person acting for him may not induce a consumer to enter into a consumer credit transaction by misrepresentation of a material fact with respect to the terms and conditions of the extension of credit. A consumer so induced may rescind the sale, lease or loan or recover actual damages, or both.

**§9-402. Unconscionability; inducement by unconscionable conduct**

1. With respect to a consumer credit transaction, if the court as a matter of law finds:
  - A. The agreement to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement; or
  - B. Any clause of the agreement to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable clause, or may so limit the application of any unconscionable clause as to avoid any unconscionable result.
2. If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.
3. For the purpose of this section, a change or practice expressly permitted by this article is not in and of itself unconscionable in the absence of other practices and circumstances.

- (D) Finally, the effects of violations, and available remedies, are found in the final 3 sections:

**§9-405. Effect of violations on rights of parties**

1. If a creditor, assignee or servicer has violated the provisions of this article applying to timely payments from escrow, section 9-305-A, timely responses to requests for payoff figures, section 9-305-B, misrepresentation, section 9-401, or illegal, fraudulent or unconscionable conduct in an attempted collection of debts, section 9-403, any aggrieved consumer has a right to recover actual damages from that person, or in lieu thereof any consumer named as a plaintiff in the complaint as originally filed has a right to recover from a person violating this article an amount determined by the court not less than \$250 nor more than \$1,000. No action pursuant to this subsection may be brought more than 2 years after the due date of the last scheduled payment.

2. A debtor is not obligated to pay a charge in excess of that allowed by this article and if he has paid an excess charge he has a right to a refund. A refund may be made by reducing the debtor's obligation by the amount of the excess charge. If the debtor has paid an amount in excess of the lawful obligation under the agreement, the debtor may recover the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against debtors arising from the debt.

3. If the creditor has contracted for or received a charge in excess of that allowed by this article, or if a debtor, is entitled to a refund and a person liable to the debtor refuses to make a refund within a reasonable time after demand, the debtor may recover from the creditor or the person liable an amount determined by the court not less than \$250 nor more than \$1,000. No action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement pursuant to which the charge was made or the date the agreement was paid in full, whichever was earlier.

4. If a creditor has violated the provisions of this article applying to authority to make supervised loans, section 9-201, the debtor is not obligated to pay any application fee, prepaid finance charge or closing cost, nor the loan finance charge owed for the first 12 months of the loan. If the debtor has paid any part of the application fee, prepaid finance charge, closing cost or loan finance charge owed for the first 12 months of the loan, the debtor has a right to recover the payment from the person violating this article or from an assignee of that person's

**§9-405. Effect of violations on rights of parties** (*Continued*)

rights who undertakes direct collection of payments or enforcement of rights arising from the debt. No action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement pursuant to which the charge was paid.

5. Except as otherwise provided, no violation of this article impairs rights on a debt.

6. A creditor has no liability under subsections 1 or 3 if, within 60 days after discovering an error and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and corrects the error. If the violation consists of a prohibited agreement, giving the debtor a corrected copy of the writing containing the error is sufficient notification and correction. If the violation consists of an excess charge, correction shall be made by an adjustment or refund.

7. If the creditor establishes by a preponderance of evidence that a violation is unintentional and the result of a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under subsections 1 and 2, the validity of the transaction is not affected, and no liability is imposed under subsection 3, except for refusal to make a refund.

8. In an action in which it is found that a creditor has violated this article, the court shall award the debtor the costs of the action together with reasonable attorneys fees. Reasonable attorneys fees shall be determined by the value of the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the debtor.

9. A creditor has no liability under subsections 1 or 3, or under section 6-113, subsection 2, for any act done or omitted in good faith in conformity with any rule or interpretation thereof by the administrator, notwithstanding that after such act or omission has occurred, the rule or interpretation is amended, rescinded or determined by judicial or other authority to be invalid for any reason.

**§9-406. Refunds and penalties as set-off to obligation**

Refunds or penalties to which the consumer is entitled pursuant to this Part may be set off against the consumer's obligation and may be raised as a defense to a suit on the obligation without regard to the time limitations prescribed by this Part.

**§9-407. Criminal penalties**

Any creditor, any officer or employee of a creditor, or any other person who willfully and knowingly violates this article, or directly or indirectly counsels, aids or abets that violation, shall be punished by a fine of not more than \$2,500 for each offense or by imprisonment for not more than 6 months, or by both.

- 7) Rule 250 – Alternative Mortgage Transactions (available at [www.Credit.Maine.gov](http://www.Credit.Maine.gov) under “Laws, rules”.)
- (A) Governs the making of AMTs (variable-rate loans and balloon loans) by supervised lenders [Note: keep in mind the impact of federal pre-emption]
  - (B) Loans divided into fully-amortizing loans, and partially-amortizing (balloon) loans.
  - (C) Fully-amortizing loans can adjust no more frequently than monthly, and are generally limited to 2% per year rate increase.
  - (D) No prepayment penalty permitted
  - (E) Partially-amortizing loans that are not purchased by Fannie Mae or Freddie Mac must stay at fixed payments for at least 4 years. In addition, borrowers must be initially qualified for a fully-amortizing loan and, at the balloon time, must be offered a refinance at then-existing terms. Also: 2-month warning of pending balloon.
- 8) New anti-predatory lending laws (PL 2007, Ch. 273)
- (A) Incorporates RESPA for supervised lenders and for loan bankers

**§ 3-315. Real estate settlement procedures**

A creditor and its loan officers shall comply with the provisions of the federal Real Estate Settlement Procedures Act of 1974, 12 United States Code, Section 2601 et seq. and its implementing regulation, Regulation X, 24 Code of Federal Regulations, Section 3500 et seq.

**§ 10-307. Real estate settlement procedures**

A loan broker and its loan officers shall comply with the provisions of 12 United States Code, Section 2601 et seq., the federal Real Estate Settlement Procedures Act of 1974 and its implementing regulation and Regulation X, 24 Code of Federal Regulations, Section 3500 et seq.

- (B) Defines 3 types of loans: 1) Residential mortgage loans; 2) Subprime loans; and 3) High-rate, high-fee loans, and establishes different rules for each. For example:
- 1) For subprime loans, lender must be able to demonstrate that consumer has reasonable ability to repay
  - 2) For all residential mortgage transactions that are refinances, lender must document “reasonable tangible net benefit”
  - 3) For high-rate, high-fee loans,
    - a) no prepayment penalties
    - b) assignee liability
    - c) no financing of points and fees
- (C) When determining whether a loan is a “high-rate” or “high-fee,” new rules apply:
1. Creditor must include maximum prepayment penalty dollar amount into “points and fees” calculation.

2. HOEPA trigger of 8% of loan amount, is lowered to 5% (> \$40,000 loan) or 6% (< \$40,000 loan)

(D) Powerful new anti-foreclosure tools

1. For high-rate, high-fee loan, consumer facing foreclosure can assert defenses for up to 10 years:

**§ 8-206-C. High-rate, high-fee mortgages; additional requirements**

2. The following provisions apply to a claim made by a borrower against a purchaser or assignee of a high-rate, high-fee mortgage.

B. A borrower acting only in an individual capacity may assert claims that the borrower could assert against a creditor of the high-rate, high-fee mortgage against any subsequent holder or assignee of the high-rate, high-fee mortgage as follows:

(1) Within 5 years of the closing of a high-rate, high-fee mortgage, the borrower may assert a violation of this section in connection with the loan as an original action; and

(2) Within 10 years of the closing of a high-rate, high-fee mortgage, after an action to collect on the residential mortgage loan or foreclose on the collateral securing the residential mortgage loan has been initiated or the debt arising from the residential mortgage loan has been accelerated or the residential mortgage loan has become 60 days in default, the borrower may assert any defense, claim or counterclaim or action to enjoin foreclosure or preserve or obtain possession of the property that secures the loan.

A claim asserted by a borrower under this paragraph is limited to amounts required to reduce or extinguish the borrower's liability under the high-rate, high-fee mortgage plus amounts required to recover costs, including reasonable attorney's fees.

2. Consumers have a powerful “right to cure” authority under the new law, up to the time of the auction sale:

**§ 8-206-D. Residential mortgage loan requirements**

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**2. The following provisions apply with respect to a right to cure default of a residential mortgage loan.**

**A. If all defaults in connection with a residential mortgage loan are cured after the initiation of any action to foreclose, the creditor or the servicer shall take steps as necessary to terminate the foreclosure proceeding or other action. The borrower shall pay any reasonable costs incurred by the creditor or servicer before the cure of default. Cure of default reinstates the borrower to the same position as if the default had not occurred and nullifies, as of the date of the cure, any acceleration of any obligation under the security instrument or note arising from the default.**

**B. A borrower has the right to cure a default once in a 12-month period.**

- 9) Also note existing assignee liability law, § 8-209(5)

**§8-209. Liability of assignees**

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5. The liability of assignees for consumer credit transactions secured by real property is determined in accordance with the following.

A. Except as otherwise provided in this Title, any civil action against a creditor for a violation of this Title and any proceeding under section 8-108 against a creditor, with respect to a consumer credit transaction secured by real property, may be maintained against any assignee of that creditor only if:

- (i) The violation for which the action or proceeding is brought is apparent on the face of the disclosure statement provided in connection with the transaction pursuant to this Title; and
- (ii) The assignment to the assignee was voluntary.

**§8-209(5). Liability of assignees (Continued)**

B. For the purposes of this subsection, a violation is apparent on the face of the disclosure statement if:

- (i) The disclosure can be determined to be incomplete or inaccurate by a comparison among the disclosure statement, any itemization of the amount financed, the note or any other disclosure of disbursement; or
- (ii) The disclosure statement does not use the terms or format required under this Title.

10) The penalties for violating the new high-rate, high-fee law are so great that we will likely see no such loans being made.

11) Other new laws of note

(A) Duty of good faith and fair dealings by loan broker

**§ 10-303-A. Good faith and fair dealing**

1. A loan broker shall, in addition to duties imposed by other statutes or at common law:

A. Act in good faith and with fair dealing in any transaction, practice or course of business in connection with the brokering or making of any mortgage loan;

B. Safeguard and account for any money handled for the borrower;

C. Follow reasonable and lawful instructions from the borrower;

D. Use reasonable skill, care and diligence;

E. Timely and clearly disclose to the borrower material information that might reasonably affect the borrower's rights, interests or ability to receive the borrower's intended benefit from the residential mortgage loan, including the total compensation the broker would receive from any of the loan options the broker presents to the borrower; and

F. Make reasonable efforts to secure a loan that is reasonably advantageous to the borrower considering all the circumstances, including the rates, charges and repayment terms of the loan.

2. The duties and standards of care created in this section may not be waived or modified.

- (B) Prohibition against “coaching” a consumer to make false statements on an application for credit:

**§ 10-308. False information on application for credit**

A loan broker or any loan officer of a loan broker may not knowingly permit, encourage or assist a consumer to submit false information on any application for credit, nor may a loan broker or loan officer of a loan broker knowingly falsify such information on a consumer’s application.