



NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

GC/MM:sg
SSIC 3320
89-0329

Office of General Counsel

June 8, 1989

Mary Ann B. Clancy, Esq.
General Counsel
Massachusetts Credit Union Association
304 Turnpike Road
Southborough, MA 01772-1709

Re: Priority of Liens Against A Share Account
(Your February 14, 1989, Letter to NCUA's
Region I Office)

Dear Ms. Clancy:

You have asked whether a Massachusetts child support attachment levied against the shareholdings of a Federal credit union ("FCU") member takes priority over a previous loan to the member that is secured by the same shares. This issue is resolved by Massachusetts law and is not within NCUA's jurisdiction.

ANALYSIS

Share-secured Loan

You have sent us certain provisions of Chapters 119 and 119A of the Massachusetts General Laws ("M.G.L.") pertaining to the enforcement of child support orders. You have asked whether a child support order enforced against an FCU member's share account would take priority over a security interest an FCU has in the member's shares as a result of an existing share-secured loan.

Section 701.21(b)(2) of NCUA's Rules and Regulations (12 C.F.R. 701.21(b)(2)) provides in part:

Except as provided by Section 701.21(b)(1), it is not the Board's intent to preempt state laws that do not affect rates, terms of repayment and other conditions described above concerning loans and lines of credit, for example:

* * *

FOIA Vol. V.K. Preemption

Mary Ann B. Clancy, Esq.
June 8, 1989
Page 2

(ii) laws related to transfer of and security interests in real and personal property. . . .

The issue of lien priority is not preempted by the FCU Act or NCUA's Rules and Regulations. It is resolved by state or other applicable Federal law.

The copy of M.G.L. Chapter 119A:12 that you sent us does not reflect the 1987 amendments to this statute. M.G.L. Chapter 119A:12(j) currently provides "Obligations may also be enforced in accordance with the provisions of section six." M.G.L. Chapter 119A:6 addresses the lien priority and collection procedures.

Statutory Lien

In addition to its share-secured status, an FCU may also have a statutory lien against the member's shares. Section 107(11) of the FCU Act (12 U.S.C. §1757(11)) states that an FCU "shall have the power . . . to impress and enforce a lien upon the shares and dividends of any members to the extent of any loans made to him and any dues or charges payable by him." NCUA's Interpretive Ruling and Policy Statement (IRPS) 82-5 "Statutory Lien" (copy enclosed) provides in part:

If a credit union evidences its intent to do so, it may impress the [statutory] lien when the loan is granted. This may be done, for instance, by noting the existence of the lien in the credit union's records at the same time the loan is granted, by reciting in the loan documents that shares and dividends are subject to the [statutory] lien or are pledged to secure the loan, or by adopting a bylaw or board policy to the same effect. The lien dates from the time it is impressed and applies to all of the member's shares outstanding at the time the loan is made. If during the loan term the member's shares are reduced by withdrawal or increased by deposit or dividend payments, the [statutory] lien will apply to the balance of the same from time to time and may be enforced with respect to any shares in existence at the time of enforcement. The credit union may enforce the lien on the shares and dividends of the members by applying those funds directly to the outstanding indebtedness, which may include the unpaid loan balance together with interest, fees, and other charges. The credit union does not need to obtain a court judgment

Mary Ann B. Clancy, Esq.

June 8, 1989

Page 3

to enforce the lien, even if a court judgment is usually required under state law before a lien can be enforced.

In general, the statutory lien is impressed at the time the loan is granted and is a floating lien on all shares in an amount of the member's outstanding indebtedness. The member may withdraw shares during the term of the loan. The lien will not be enforced (shares applied to loan balance) unless the member defaults on the loan. However, if a third party creditor attempts to reach the member's shares subject to the statutory lien, state law would prevail as to which lien has priority. If, under state law, it is determined that the statutory lien prevails, the member's shares will not be available to a third party creditor. (See Scafidi letter, enclosed.)

Sincerely,

Hattie M. Ulan

HATTIE M. ULAN
Assistant General Counsel

Enclosures

JT:sg

cc: Regional Director
Region I (Albany)



NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

LS/SRB:cch
3600

APR 04 1985

Nicholas J. Scafidi, Esq.
General Counsel
Philadelphia Police and Fire
Federal Credit Union
1211 Chestnut Street
Philadelphia, PA 19107

Dear Mr. Scafidi:

This is in response to your letter dated March 19, 1985, and pursuant to our telephone conversation on March 28 concerning the statutory lien of Federal credit unions (FCU's) established by Section 107(11) of the FCU Act (12 U.S.C. §1757(11)). Specifically, you inquired about the priority rights of an FCU as against the rights of other third party creditors, including the Internal Revenue Service.

As we discussed, the analysis of the priority to be afforded to an FCU's statutory lien is to be found in the appropriate provisions of state law (e.g., the state's adoption of Article 9 of the Uniform Commercial Code (UCC), etc.). Particular reference is made to Article 9-301(1)(b) and (3) of the UCC which states, in pertinent part, that:

"(1) . . . an unperfected security interest is subordinate to the rights of

* * * * *

(b) a person who becomes a lien creditor before the security interest is perfected

* * * * *

(3) A 'lien creditor' means a creditor who has acquired a lien on the property involved by attachment, levy or the like. . . ."

It is our opinion, based upon the above, that to the extent that a third party creditor's lien attaches after an FCU evidences its intent and impresses (at the time of the granting a loan) its lien, the FCU lien would have priority. Of course, an analysis of Pennsylvania's laws must be made to determine whether or not this would hold true in your case.

With respect to the priority status of an FCU's statutory lien as against an IRS tax lien we refer you to 26 U.S.C. §6323 which deals with the validity and priority of tax liens as

Vol II Part K

NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

against other liens and security interests. Our cursory review of this section leads us to conclude that an FCU's statutory lien may not have priority as against a subsequently attaching tax lien unless the FCU's lien is enforced prior to the notice of levy of the tax lien. However, for a more definitive answer, we suggest that you contact IRS for an interpretive opinion of their statute.

I have enclosed a copy of NUCA's Interpretive Ruling and Policy Statement-IRPS 82-5 -- Statutory Lien, dated December 22, 1982. This document should further clarify the issue for you.

If you require additional assistance, please let me know.

Sincerely,



STEVEN R. BISKER
Assistant General Counsel

Enclosure

NATIONAL CREDIT UNION ADMINISTRATION

12 C.F.R. Part 701

Statutory Lien;

Final Interpretive Ruling and Policy Statement

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final Interpretive Ruling and Policy Statement.

SUMMARY: Even if a member's loan is not secured by shares, under the Federal Credit Union Act a Federal credit union has the power to impress and enforce a lien upon that member's shares and dividends. NCUA is interpreting the Federal Credit Union Act to authorize a Federal credit union: (a) to impress a lien at the time the loan is granted, for instance, by noting the existence of the lien in its records at the same time the loan is granted, by reciting in the loan documents that shares and dividends are subject to the lien or are pledged to secure the loan, or by adopting a bylaw or board policy to the same effect; and (b) to enforce the lien by applying the shares and dividends directly to the amount due on the loan without obtaining a court judgment, even if the credit union has allowed the member to make withdrawals and even if a court judgment would be required under state law before a statutory lien could be enforced.

EFFECTIVE DATE: December 16, 1982.

FOR FURTHER INFORMATION CONTACT: Robert M. Fenner, Deputy General Counsel, or John L. Culhane, Jr., Senior Attorney, Department of Legal Services, National Credit Union Administration, 1776 G Street, N.W., Washington, D.C. 20456 or telephone: (202) 357-1030.

SUPPLEMENTARY INFORMATION: Section 107(11) of the Federal Credit Union Act states that a Federal credit union "shall have the power . . . to impress and enforce a lien upon the shares and dividends of any member to the extent of any loan made to him and any dues or charges payable by him." 12 U.S.C. 1757(11). Since 1979, NCUA had taken the position that before a Federal credit union could enforce this lien it had to obtain a court judgment on the debt, unless state law would allow the credit union to enforce the lien without going to court; once the credit union were to obtain a court judgment, it could then apply the member's shares to the outstanding loan balance. Credit Manual for Federal Credit Unions 29 (Dec. 1979 ed.).

A credit union trade association and an attorney who represented several credit unions asked NCUA to reconsider this interpretation, noting that it placed a credit union at a disadvantage with respect to any other financial institution, which can usually offset a borrower's loan without going to court. After examining the legislative history of and prior administrative interpretations of the statute, NCUA proposed to interpret section 107(11) of the Federal Credit Union Act to preempt state law and to authorize a credit union to enforce the lien on the shares and dividends of a member by applying those shares and dividends to the outstanding loan balance, as that interpretation appeared to be more consistent with Congressional intent and with the contemporaneous administrative interpretations of the statutory language. 47 Fed. Reg. 44340 (1982).

Comments on the proposed interpretation were submitted by 31 credit unions, 4 state credit union leagues, 2 national credit union trade associations, and 3 attorneys (two of the attorneys represent state credit union leagues, the other attorney represents a number of credit unions). The commentators unanimously supported NCUA's proposed interpretation, although one of the attorneys and one of the trade associations requested

that rather than limiting the interpretation to enforcement of the lien in the event of default, NCUA expand the interpretation to discuss when the lien may be impressed and to discuss the consequences of permitting withdrawals. The NCUA Board concurs with these commentors that it would be best to address these related issues in one interpretive ruling and policy statement.

Based on an examination of the legislative history and the contemporaneous administrative interpretations of the statutory language, NCUA believes that Congress intended for the statutory lien to be a "floating" lien. That is, a Federal credit union that has impressed a lien on a member's accounts possesses a lien on those accounts at any time to the extent of the unpaid loan balance together with interest, fees, and other charges. The lien "floats" as outstanding obligations, as well as account balances, vary from time to time. The lien enables a credit union to take priority over other creditors when claims are asserted against a member's accounts. See D. Bridewell, Bridewell on Credit Unions 710 (1942 ed.) (quoting from the May-June, 1940 edition of Cooperative Savings, an official publication of the Farm Credit Administration, the agency then charged with administering the Federal Credit Union Act).

If the credit union evidences its intent to do so, it may impress the lien when the loan is granted. This may be done, for instance, by noting the existence of the lien in the credit union's records at the same time the loan is granted, by reciting in the loan documents that shares and dividends are subject to the lien or are pledged to secure the loan, or by adopting a bylaw or board policy to the same effect. See Credit Manual for Federal Credit Unions 16, 17 (May 1972 ed.); Handbook for Federal Credit Unions 18 (July 1947 ed.). Further, even though the lien has been impressed, the credit union may permit routine withdrawals from a member's account without waiving the statutory lien, even if the withdrawals would reduce the account balance to a level below the outstanding indebtedness.

Generally, a credit union may enforce the lien on the shares and dividends of the member by applying those shares to the outstanding indebtedness. Section 107(11) of the Federal Credit Union Act preempts state law; the credit union does not have to obtain a court judgment to enforce the lien, even if a court judgment is usually required under state law before a statutory lien can be enforced. However, if the outstanding indebtedness is the result of extensions of credit under a credit card program, Section 169 of the Truth in Lending Act, 15 U.S.C. 1666h, and Section 226.12(d) of Regulation Z, 12 C.F.R. 226.12(a), will apply; these provisions generally prohibit a Federal credit union from offsetting a borrower's indebtedness arising from a consumer credit transaction under a credit card plan against funds held by the credit union.


Accordingly, the NCUA Board is adopting a final interpretive ruling and policy statement to read as follows.

Interpretive Ruling and Policy Statement (IRPS) 82-5

Section 107(11) of the Federal Credit Union Act states that a Federal credit union "shall have the power . . . to impress and enforce a lien upon the shares and dividends of any member, to the extent of any loan made to him and any dues or charges payable by him." If a credit union evidences its intent to do so, it may impress the lien when the loan is granted. This may be done, for instance, by noting the existence of the lien in the credit union's records at the same time the loan is granted, by reciting in the loan documents that shares and dividends are subject to the lien or are pledged to secure the loan, or by adopting a bylaw or board policy to the same effect. The lien dates from the time it is impressed and applies to all of the member's shares outstanding at the time the loan is made. If during the loan term the member's shares are reduced by withdrawal or

increased by deposit or dividend payments, the lien will apply to the balance of the same from time to time and may be enforced with respect to any shares in existence at the time of enforcement. The credit union may enforce the lien on the shares and dividends of the member by applying those funds directly to the outstanding indebtedness, which may include the unpaid loan balance together with interest, fees, and other charges. The credit union does not need to obtain a court judgment to enforce the lien, even if a court judgment is usually required under state law before a lien can be enforced.

By the National Credit Union Administration Board, December 16, 1982.



Rosemary Brady

Secretary


National Credit Union Administration Board

Accordingly, the NCUA Board is adopting a final interpretive ruling and policy statement to read as follows.

Interpretive Ruling and Policy Statement (IRPS) 82-5

Section 107(11) of the Federal Credit Union Act states that a Federal credit union "shall have the power . . . to impress and enforce a lien upon the shares and dividends of any member, to the extent of any loan made to him and any dues or charges payable by him." If a credit union evidences its intent to do so, it may impress the lien when the loan is granted. This may be done, for instance, by noting the existence of the lien in the credit union's records at the same time the loan is granted, by reciting in the loan documents that shares and dividends are subject to the lien or are pledged to secure the loan, or by adopting a bylaw or board policy to the same effect. The lien dates from the time it is impressed and applies to all of the member's shares outstanding at the time the loan is made. If during the loan term the member's shares are reduced by withdrawal or increased by deposit or dividend payments, the lien will apply to the balance of the same from time to time and may be enforced with respect to any shares in existence at the time of enforcement. The credit union may enforce the lien on the shares and dividends of the member by applying those funds directly to the outstanding indebtedness, which may include the unpaid loan balance together with interest, fees, and other charges. The credit union does not need to obtain a court judgment to enforce the lien, even if a court judgment is usually required under state law before a lien can be enforced.

By the National Credit Union Administration Board, December 16, 1982.



Rosemary Brady
Secretary
National Credit Union Administration Board