

What's In a Name? An alternative definition of "lender."

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California maintains a licensing scheme entitled the California Finance Lenders Law ("CFLL"), which applies to "finance lenders" and "brokers." Under the CFLL, a finance lender "includes any person who is engaged in the business of making consumer loans or making commercial loans." The CFLL provides that the business of making consumer loans or commercial loans

"may include lending money and taking, in the name of the lender, or in any other name, in whole or in part, as security for a loan, any contract or obligation involving the forfeiture of rights in or to personal property, the use and possession of which property is retained by other than the mortgagee or lender, or any lien on, assignment of, or power of attorney relative to wages, salary, earnings, income, or commission."

Based on the title of the licensing scheme and the name of one of the parties governed by it - a finance lender, one might reasonably conclude that a finance lender lends money. Even if one were not so astute, one might be tempted to consult a dictionary, such as Investopedia.com, which advises that:

"A lender is an individual, a public group, a private group or a financial institution that makes funds available to another with the expectation that the funds will be repaid, in addition to any interest and/or fees, either in increments (as in a monthly mortgage payment) or as a lump sum."

The CFLL grants the California Department of Business Oversight ("DBO") the authority to make general rules and regulations and specific rulings, demands, and findings for the enforcement of the CFLL. In that capacity, the DBO recently issued a Decision (OAH No. 2016040551) affirming its own Desist and Refrain Order against Financial Services Enterprises, dba Pioneer Capital, which explained that "actually making loans" is one factor, but not a decisive one, in determining whether a person is a "finance lender." Specifically, the DBO explained the activities in the CFLL definition of a "finance lender" (as provided above) "are merely examples of what a finance lender does, but are not mandatory criteria or an exclusive or exhaustive list." In fact, the DBO stated:

"[a]dditional factors would include other activities associated with lending, such as holding oneself out as a lender, gathering and analyzing the kinds of information lenders use in determining whether to loan money, evaluating risk, proposing loan

terms and conditions, and participating in the decision whether to extend credit."

In the particular case subject to the Decision, the DBO states:

"the evidence did not establish respondent actually funded loans, and included communications in which respondent indicated it would not itself provide the proposed funding [. . .], funding loans is not dispositive of whether a person is engaged in the business of making commercial loans."

So there you have it: an alternative definition of lender where "making loans" does not mean "funding loans." If you are perplexed, then the CFLL's definition of a "broker" as "any person who is engaged in the business of negotiating or performing any act as broker" will not sit well. To make matters worse, the DBO explains that the fact that activities "fall within the ambit of brokering does not extract [one] from the definition of a 'finance lender.'"

To clear it all up, according to the DBO, a broker is a broker, except when it is a lender, in which case it can be a broker and a lender regardless of whether the lender actually funds loans. Make sense?

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