

DATE: 11-12-92

CITATION: VAOPGCPREC 24-92
Vet. Aff. Op. Gen. Couns. Prec. 24-92

TEXT:

QUESTION PRESENTED:

May discount points paid by the veteran on an interest-rate-reduction refinancing loan (IRRRL) be included in the loan amount if the Secretary elects to permit negotiated interest rates pursuant to 38 U.S.C. § 3703 (c)(4)(A)(i)?

COMMENTS:

1. Prior to the enactment of Public Law 102-547, the Veterans Home Loan Program Amendments of 1992 ("the Act"), which was signed by the President on October 28, 1992, VA was required to set the maximum interest rate on VA guaranteed housing loans. 38 U.S.C. § 3703(c)(1).
2. Most lenders require the payment of discount points in connection with the making of a VA guaranteed loan. One point equals 1 percent of the loan amount. Under VA's long-standing interpretation of prior law, a veteran was not allowed to pay points. This is because, if the veteran paid the points, the effective interest rate on the money actually lent would exceed the VA set interest rate. In most cases, the seller of the home would be required to pay any points charged by the lender.
3. The statute, however, permitted a veteran to pay the points in a limited number of circumstances where there is no seller who could pay the points. 38 U.S.C. § 3703(c)(3). This included refinancing loans (both IRRRLs and debt consolidation, equity cash-out refinancings). 38 U.S.C. § 3703(c)(3)(A).
4. IRRRLs are authorized by 38 U.S.C. §§ 3710(a)(8) and 3710(e). (Separate authority exists for IRRRLs for manufactured homes. We will only discuss IRRRLs for conventional housing, but our conclusion equally applies to manufactured home loans.) The existing law allows veterans to include as part of the amount of the IRRRL "closing costs (including any discount permitted pursuant to section 3703(c)(3)(A) of ... title 38, United States Code)" 38 U.S.C. § 3710(e)(1)(C).
5. Section 10 of the Act amended 38 U.S.C. § 3703(c) by adding a new paragraph (4). This new paragraph gives the Secretary the authority to elect

either to continue the prior practice of setting the maximum interest rate or permitting rates to be negotiated between the veteran and the lender.

6. If the Secretary elects negotiated rates (which the Acting Secretary has now done), the veteran may pay points. 38 U.S.C. § 3703(c)(4)(B). The statute further provides that "discount points may not be financed as part of the principal amount of a loan guaranteed ... under this chapter." *Id.*

7. No exception to the prohibition of financing points is contained in the Act. The law did not, however, amend 38 U.S.C. § 3710(e)(1)(C) which permits veterans to finance such points as part of an IRRRL. Thus, these two provisions of law are in direct conflict.

8. "[R]epeal by implication is disfavored." Izaak Walton League of America v. Marsh, 655 F.2d 346, 366 (D.C. Cir. 1981). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for finding repeal by implication is when the earlier and later statutes are irreconcilable." Morton v. Mancari, 417 U.S. 535, 550 (1974).

See also: Sutherland, *Statutory Construction* § 23.09 (4th Ed.)

("[W]here a consistent body of laws cannot be maintained without the abrogation of a previous law, a repeal by implication of previous legislation ... is readily found in the terms of a later enactment.")

9. We can find nothing in the legislative history of the Act clearly indicating whether or not the Congress intended to permit veterans to finance points as part of IRRRLs under negotiated interest rates. Thus, we cannot state there was a clear intent to repeal the provisions of section 3710(e)(1)(C) which permit veterans to finance points as part of an IRRRL.

10. Notwithstanding the lack of a clear intent to repeal part of the IRRRL statute, we believe these two provisions of law are irreconcilable. Section 3710(e)(1)(C) clearly permits veterans to finance points. But section 3703(c)(4)(B) equally clearly prohibits any loan guaranteed under chapter 37 of title 38, United States Code, from including points as part of the loan balance during any time period when the Secretary has elected to permit negotiated interest rates.

11. We have reviewed a letter dated October 23, 1992, to the Acting Secretary signed by the Chairmen and Ranking Minority Members of the House and Senate Committees on Veterans' Affairs. Although this letter is not part of the official legislative history of the Act, it clearly states the intention of the authors of the legislation "that Congress did not intend to restrict veterans' rights under current law to finance any discount points they pay to obtain a VA guaranteed interest-rate-reduction refinancing loan." This letter does not alter our legal conclusion. Even though this letter makes the intention of the Veterans' Affairs Committees clear, the two laws are still in clear conflict.

There is no ambiguity. It is simply not possible to apply the plain meaning of 38 U.S.C. § 3703(4)(B) in any way that would permit veterans to finance

points. In cases of such clear, unambiguous conflict between two laws, "courts will ... stress the conflict rather than the legislative intent" and hold the earlier law repealed by implication. Sutherland, § 23.09.

12. One issue raised in the congressional letter is that section 6 of the Act, which revised the guaranty on IRRRLs, shows that the Congress intended that veterans will continue to finance points on such loans. Under prior law, the guaranty on the IRRRL was limited to the dollar amount of the guaranty on the original VA loan being refinanced. When the unpaid balance on the old loan was added to closing costs (including points) and the VA loan fee, the percent of guaranty on some IRRRLs fell below 25 percent. As a practical matter, lenders will rarely make VA guaranteed loans if the guaranty is less than 25 percent. Therefore, section 6 of the new law insures the guaranty on IRRRLs will be at least 25 percent.

13. The congressional letter argues "if discount points could not be included in an IRRRL, there would have been little reason for Congress to enact section 6." We do not believe this is necessarily true in all cases. Other closing costs (e.g., title search, lender's title insurance, the 1 percent origination fee, recording fee, and document stamps) when added to the VA loan fee and the old loan balance could result in a new loan amount that in a number of cases would be larger than four times the old guaranty amount.

14. While it is true that there would be a greater need for section 6 of the Act if points were financed, section 6 will still serve a function even if veterans do not finance points. We, therefore, cannot conclude that prohibiting the financing of points is inconsistent with the new guaranty on IRRRLs.

HELD:

Veterans may not finance discount points on VA guaranteed interest-rate-reduction refinancing loans so long as the interest rate on VA loans is negotiated between the veteran and the lender pursuant to 38 U.S.C. s 3703(c)(4)(A)(i).

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