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exception, is lawful, because of the absence of the element of chance. Another bus tour promotion is not lawful, however, since the bonus there is available to only bus patrons whose names are selected in a drawing and the inference must be that part of the patron's ticket price was staked upon the outcome of the drawing. The promotion is equally unlawful when the payments to the bus operator do not represent the source of the winnings ultimately paid by the casino because that sort of identity is not statutorily required.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

July 5, 1983

PAMELA S. POFF, *Director*
Division on Civil Rights
Room 400
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 7—1983

Dear Director Poff:

You have asked for our opinion as to whether it is unlawful under the Law Against Discrimination for a lending institution to include inquiries in credit applications concerning the marital status of a prospective borrower. The Division on Civil Rights has received numerous inquiries from lending institutions as to whether a designation of marital status may be included on an application for credit when the information is necessary to either enable the institution to obtain an enforceable security interest or to create a valid lien, pass clear title, or waive inchoate rights to property. For the following reasons, it is our opinion that under the Law Against Discrimination a lender may make an inquiry in order to enable it to protect its interest in security provided on account of the loan. A lender, however, may not make an inquiry as to the marital status of a prospective borrower in order to ascertain his or her credit worthiness.

The Law Against Discrimination ("LAD") N.J.S.A. 10:5-12(i), provides that it shall be unlawful:

For any person, bank, banking organization, mortgage company, insurance company or other financial institution, lender or credit institution to whom application is made for any loan or extension of credit. . . .

2. To use any form of application for such loan, extension of credit or financial assistance or to make record or inquiry in connection with applications for any such loan, extension of credit or financial assistance which expresses, directly or indirect-

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ly, any limitation, specification or discrimination as to . . . marital status . . . or any intent to make any such limitation, specification or discrimination; unless otherwise required by law or regulation to retain or use such information.

The evident purpose of this section was to preclude blatant or subtle efforts by lenders to collect information about credit applicants for the purpose of practicing marital status discrimination. It was also designed to preclude lenders from attempting to discourage married or unmarried persons from applying for credit by indicating, directly or indirectly, the lender's intent to discriminate on the basis of marital status. The LAD is "aimed at subtle and covert activities designed to defeat its policy as well as at outright and blatant violations." *Wilson v. Sixty Six Melmore Gardens*, 106 N.J. Super. 182, 185 (App. Div. 1969). See *Passaic Daily News v. Blair*, 63 N.J. 474, 484-488 (1973) (placing job advertisements in sex-segregated advertising columns constitutes the making of a specification, limitation or discrimination based on sex). Where a creditor makes an inquiry as to marital status in a situation where there is no valid business need for that information, or where a valid business need is not obvious and is not explained to the applicant, it is reasonable to infer that the inquiry was actually made for the purpose of excluding or discouraging applicants on the basis of marital status.

On the other hand, there are certain situations in which a lender may have a valid business necessity at an appropriate stage of a credit application process for inquiring about an applicant's marital status. The Federal Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §1691, *et seq.*, for example, generally prohibits inquiries regarding marital status, *Harbaugh v. Continental Ill. Bank and Trust Co.*, 615 F. 2d 1169 (7th Cir. 1980), but allows a creditor:

to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness. [15 U.S. §1691(b)(1)].

The ECOA also permits a creditor to request "the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title, waiving inchoate rights to property, or assigning earnings. . ." 15 U.S.C. §1691d(a). Moreover, in New York, a state having a civil rights statute similar to the LAD,¹ the Division of Human Rights has adopted a regulation which provides that

it shall not be considered an expression of limitation, specification or discrimination on the basis of sex or marital status if

1. The *New York Executive Law*, §296-a(1)(c), provides that it shall be unlawful for a creditor:

To use any form of application for credit or use or make any record or inquiry which expresses, directly or indirectly, any limitation, specification, or discrimination as to . . . marital status, . . .

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2. where application is made for a mortgage and the creditor determines that the signature of the spouse is required in order to pass clear title in the event of a default, a creditor requests information concerning marital status, provided that the information disclosed by such inquiry is used solely for the purpose of perfecting title. [9 N.Y.C.R.R. §466.7.]

The foregoing statutory and regulatory provisions contemplate situations in which a creditor may have valid business reasons for inquiring about the marital status of a credit applicant. These include situations where a loan is to be secured by property in which the applicant's spouse has an ownership interest or in which the spouse may have inchoate rights.

Although the LAD by its literal terms could be read to prohibit all inquiries by creditors regarding marital status, it is fundamental that the statute is to be interpreted sensibly in accordance with its remedial purpose. *N.J. Builders, Owners and Managers Assn. v. Blair*, 60 N.J. 330, 338 (1972). Moreover, "the matter of statutory construction . . . will not justly turn on literalisms . . . it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation." *Id.* at 339, quoting *New Jersey City Chapter Prop. Owner's Assn. v. City Council*, 55 N.J. 86, 100 (1969). It would be inconsistent with common sense to presume that the Legislature intended to preclude creditors from making inquiries regarding marital status in situations where such information is necessary to obtain an enforceable security interest. On the other hand, inquiries should be made only where needed for a valid business purpose and at the stage of the application process where such information is clearly needed. Moreover, to avoid the appearance of an intent to discourage applicants on the basis of marital status, such inquiries should be accompanied by a clearly worded written explanation of their business purpose and by a statement that the applicant's marital status will not be used to determine credit worthiness.²

In conclusion, it is our opinion that there is no absolute impediment under the Law Against Discrimination to an inquiry made by a lender as to the marital status of a prospective borrower provided, however, any inquiry, whether contained in an application for credit or otherwise, must be supported only by valid business concerns of the lender reasonably relating to the ascertainment and protection of the lender's rights and remedies. It is also our opinion that an inquiry should not be made either as a reason or subterfuge for an investigation into the credit worthiness of the applicant.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

2. In order to clearly define the obligations of creditors under N.J.S.A. 10:5-12(i), it is strongly recommended that the Division on Civil Rights and the Department of Banking jointly promulgate regulations setting forth situations in which creditors may make inquiries regarding marital status and specifying procedures to be followed by them.