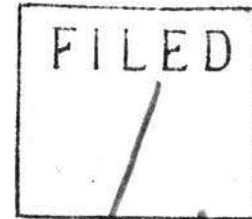


BUILDING AND LOAN: Fund for withdrawal must be divided pro rata among all shareholder. The "receipts" used in Section 5604 means net receipts. Pro rata share determined from amount actually due.

February 24, 1938. 2-26

Mr. Joe C. Acuff, Chief Clerk
Bureau of Building and Loan Supervision
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"Our Bureau is in receipt of numerous inquiries and complaints regarding the manner in which Building and Loan Associations operating under our jurisdiction are handling withdrawals.

"Section 5604 of the Missouri Statutes provides a safeguard for the association in the event of excessive withdrawal demands. It becomes evident to this department that this section of the Statutes is being interpreted by officers of various associations in a manner most convenient to their plan of operation. Our attention has been called to some of these interpretations with the assertion that the withdrawing shareholders are being discriminated against and are denied their rights under Section 5604.

"In order that this department, as guardian of the shareholders' interests, may be in a position to thoroughly instruct the officers of every association in the proper procedure under Section 5604, I would appreciate an opinion on the following:

"1. Can an association arbitrarily set a specific percentage of the withdrawal value of shares on file for withdrawal as the amount to be paid each month?

"2. Section 5604 states in part as follows:

* * * * * At no time, however, shall more than one-half of the receipts of the corporation for any fiscal month, and, when the corporation is indebted on matured shares of an earlier series, not more than one-third of said receipts, be applicable to the demands of the withdrawing shareholders, * * * * *

"Does the word receipts, as underscored, mean gross receipts, all funds accumulated, or net receipts, thereby making allowance for operating expenses necessary for the future continuance of business as an association? If only a portion of the receipts are applicable to withdrawal payments, then what deductions are allowed for operating and other expenses?

"3. Should the pro rata distribution be made on the basis of the original amount filed for withdrawal, or on the balance reduced by previous payments?

Section 5604, Laws of Missouri, 1937, p. 192, provides as follows:

"Section 5604. Any shareholder, or the legal representative of a deceased shareholder, wishing to withdraw from the said corporation, shall, subject to the provisions of the by-laws, and his certificate of stock and the limitations hereinafter mentioned, have power to do so, upon giving one month's written notice of his intention so to do, delivered to the association at or before a stated meeting of the directors, or at such other time as the by-laws may provide. If given before

a stated meeting, the time of such notice shall not be deemed to have commenced to run until the first stated meeting thereafter. The member so withdrawing, or, if deceased, his legal representative, shall, if his stock be withdrawable according to the terms of the certificate and by-laws of the association, be entitled to receive the amount actually withdrawable at the time of making application for withdrawal according to the by-laws of the corporation and the provisions of the certificate of stock. At no time, however, shall more than one-half of the receipts of the corporation for any fiscal month, and, when the corporation is indebted on matured shares of an earlier series, not more than one-third of said receipts, be applicable to the demands of the withdrawing shareholders, or of shareholders whose stock has been forfeited in the manner hereinafter provided, without the consent of the directors; and when the demands of withdrawing shareholders exceed the moneys applicable to their payment, the funds applicable to the payment of the withdrawing shareholders shall be pro-rated among the members who have filed notice of withdrawal upon the following basis: All shares on which notices of withdrawal have been filed for a period of 30 days, shall receive their pro-rata share of the funds available for withdrawal at the end of the preceding fiscal month, based upon the withdrawal value of the shares at the time distribution is made. Such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder. The Board of Directors shall have the absolute right in its

discretion to pay an amount not exceeding \$100.00 of any share account or accounts of any shareholder in any one month in any order, regardless of whether or not such shareholder or other shareholders have on file notices of withdrawal.' "

We shall take your questions up in order.

I

The first question presented is whether an association can arbitrarily set a specific percentage to be paid each month, e. g. can an association state that it will pay five per cent of the amount each shareholder has up for withdrawal?

In 9 C. J. p. 938, it is said:

"The right of withdrawal is a fundamental right evidencing a public policy. The right is an absolute one and can not arbitrarily be withheld."

In *Latimer v. Equitable Loan and Investment Company*, 81 Fed. 776, the Circuit Court of Appeals said:

"The right of withdrawal, by the provisions and clear meaning of the statutes of Missouri in question, appertains to all shareholders, whether holders of installment-paying or full-paid stock."

9 Am. Jur. 113, states:

"Moreover, such right (of withdrawal) does not exist except as conferred by or derived from a by-law or statute, and when so conferred is restricted to the terms of the by-law or statute."

Section 5604, supra, is clear when it says that "the funds applicable to the payment of the withdrawing shareholders shall be prorated among the members who have filed notice of withdrawal."

Under this provision the entire fund on hand must be divided among the shareholders who have filed notice of withdrawal, and the association can not arbitrarily set a certain per cent on which they will pay off withdrawals.

II.

Your second question deals with whether "receipts" as used in Section 5604, supra, means gross receipts or net receipts. The Supreme Court of Louisiana in State ex rel Orlando v. Reliance Homestead Ass'n. 142 So. 146, 174 La. 980, had before it a similar question involving an almost identical statute. The Court said:

"But the term 'receipts' as used in the statute does not mean gross intake or gross collections made by the association.

"It relates rather to net receipts or to those funds coming into the hands of the association which may reasonably be made available for the payment of such claims after paying the primary obligations and necessary expenses of the association. This we think is a sound and reasonable interpretation of the act."

Therefore, "receipts" as used in Section 5604 means net receipts.

III.

The third question in your request is whether the pro rata distribution should be made on the basis of the original amount filed for withdrawal or on the balance remaining after previous payments.

In order to answer this question it must first be determined whether those who have filed notice of withdrawal are entitled to be paid off in full before other shareholders withdrawing subsequently, or are all shareholders who have notices of withdrawal on file entitled to share in the fund on hand.

Section 5604 in the Revised Statutes of Missouri, 1929, provided that the withdrawing shareholders should be paid in the order in which their notices of withdrawal shall have been filed with the association. The entire section was repealed by the laws of 1931, p. 155, and a new section enacted. However, this section was identical with the old section except that part which provided that withdrawing shareholders should be paid in the order in which their notices were filed was changed so as to make all shareholders be paid pro rata. In 1937 Section 5604 was amended by adding that One Hundred Dollars could be paid to any shareholder.

It is a rule of statutory construction that the repeal of a statute and the simultaneous re-enactment with a modification is simply an amendment and is a continuation of the latter as amended. State v. Bradford 314 Mo. 684, 285 S. W. 496; State v. Ward 40 S. W. 2d. 1074.

59 C. J. p. 1097 states:

"It will be presumed that the legislature in adopting the amendment intended to make some change in the existing law and, therefore, the courts will endeavor to give some effect to the amendment."

When the Legislature repealed that part of the Statute which provided that withdrawing shareholders shall be paid in the order in which their notices were filed, it intended some change in the law and, therefore, when it said "the funds applicable to the payment of the withdrawing shareholders shall be prorated among the members who have filed notice of withdrawal" it meant that all withdrawals then on file should participate in the fund and no priority should be shown.

What then should be the basis for the distribution, the original amount filed for withdrawal or the balance left after payments in preceding months?

Bouvier's Law Dictionary defines "pro rata" as "according to a proportion". However, as pointed out in State v. Express Co. 100 M. 278; Brombacher v. Berking, 56 N. J. Eq. 251, and other cases, it has no meaning unless referable to some standard. The standard here is obviously the amount actually due the withdrawing shareholder. If he were to be paid on the basis of the original amount without payments being deducted

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he would not share proportionately or "pro rata" with the other withdrawing shareholders.

CONCLUSION.

It is, therefore, the opinion of this department that the fund on hand for withdrawal must be divided pro rata among the shareholders who have filed notice of withdrawal, and the association can not arbitrarily set a certain per cent upon which it will pay withdrawals. It is also our opinion that "receipts" as used in Section 5604, Laws of Missouri, 1937, p. 192, means net receipts and not gross receipts.

It is the further opinion of this department that all shareholders who have filed notices of withdrawal participate in the withdrawal fund and that only the amount actually due from the association is to be considered in determining the pro rata share.

Respectfully submitted

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APPROVED:

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