LEGISLATIVE COMMITTEE MINUTES

HJR2

Bill as Introduced

HJR 2-FN-A – AS INTRODUCED

2013 SESSION

13-0400
04/10

HOUSE JOINT RESOLUTION ***2-FN-A***

A RESOLUTION making restitution to Jeffrey Frost for inappropriate prosecution.

SPONSORS: Rep. Itse, Rock 10

COMMITTEE: Judiciary

ANALYSIS

This house joint resolution requests that full restitution be made to Jeffrey Frost, Chrétien/Tillinghast LLC and/or Frost Family LLC for expenses, including reasonable attorney's fees, incurred in their defense against the wrongful application of RSA 397-A against them by the New Hampshire banking department and the office of the attorney general; raises and appropriates the sum of $176,448.50 for that purpose; and directs that a warrant be issued to the treasurer of the state of New Hampshire pursuant to NH Const., Pt 2, Art 56 to pay said sum to Jeffrey Frost, Chrétien/ Tillinghast LLC and/or Frost Family LLC.

HJR 2-FN-A – AS INTRODUCED

13-0400
04/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

A RESOLUTION making restitution to Jeffrey Frost for inappropriate prosecution.

Be it Enacted by the Senate and House of Representatives in General Court convened:

Whereas, the general court finds and declares that during the 2012 legislative session, the house committee on redress of grievances received and accepted a petition from Jeffrey Frost, 444 Walnut Street, Manchester, New Hampshire 03103, and docketed the same as Petition #18, Petition of Jeffrey Frost; and

Whereas, following several public hearings and review of extensive documentation, including 3 court decisions, the house committee on redress of grievances found as follows:

I. That the New Hampshire banking department, in re: the Matter of State of New Hampshire Banking Department and Jeffrey Shawn Frost, NHBD #10-013, pursued criminal and civil complaints against the petitioner despite having had ample notice from his attorneys that its assertion of authority over him was wrongful, illegal, and contrary to public policy, and that in any event he had acted pursuant to advice of competent legal counsel and thus lacked the requisite intent; and

II. That as asserted by the petitioner and confirmed by Merrimack district court judge Clifford Kinghorn in State v. Jeffrey Frost, #456-2010-CR-02374 (August 23, 2010), an investigator for the New Hampshire banking department recklessly or intentionally made a materially false representation in an affidavit supporting search warrants for the petitioner's business records, leading to unlawful searches of the petitioner's home and his attorneys' files; and

III. That as asserted by the petitioner, confirmed by Merrimack county superior court judge Richard B. McNamara in Jeffrey Frost, Chrétien/Tillinghast LLC & Frost Family LLC v. New Hampshire Banking Department and Peter Hildreth, Commissioner, #217-2010-CV-00288 (December 21, 2010), and affirmed by the New Hampshire supreme court in Jeffrey Frost, et.al. v. Commissioner, New Hampshire Banking Department, et. al., #2011-121 (March 16, 2012), the Banking Department had and should have known it had no authority over the petitioner or over Chrétien/Tillinghast LLC or Frost Family LLC (limited liability companies of which the petitioner was a member) under RSA 397-A in that none was engaged in the business of making or brokering mortgage loans secured by real estate, each of the 2 mortgage financing transactions in question clearly having been an isolated private one outside the normal scope of the business of the limited liability company concerned; and

IV. That the banking department knew or should have known that its attempted imposition of $525,000 in civil penalties against the petitioner by applying 2009 amendments to RSA 397-A:4 retrospectively violated NH Const., Pt 1, Art 23; and

V. That the office of the attorney general:

(a) Knew or should have known that the banking department's affidavit supporting issuance of its search warrant contained a materially false assertion of fact;

(b) Knew or should have known that the banking department's assertion of authority over the Petitioner and his limited liability companies was wrongful and illegal;

(c) Should have exercised its authority to bring about immediate termination of the banking department's proceedings against the petitioner; and

(d) Should have exercised its prosecutorial discretion to decline to defend in the supreme court the banking department's cross-appeal from Judge McNamara's decision; and

Whereas, the house committee on redress of grievances, having so found, recommended that a bill be introduced and passed providing:

I. That full restitution be made to the petitioner, Chrétien/Tillinghast LLC and/or Frost Family LLC of the expenses, including reasonable attorney's fees, incurred in their defense against the wrongful application of RSA 397-A against them; and

II. That such restitution be made in the form of a line item reduction in the appropriations for each of the banking department and department of justice in such proportion as deemed appropriate by the finance committee; and

III. That a performance audit review be made of the banking department and the department of justice by the legislative budget assistant's office for the purposes of:

(a) Recommending such structural and organizational reforms within and between the 2 departments determined to be necessary to ensure a chain of supervision and authority able to recognize, impede and prevent future such unlawful and oppressive enforcement actions; and

(b) Determining whether cause may exist for disciplinary action, including impeachment as one possible such action, against any one or more individuals within either department; and

Whereas, the petitioner has, agreeably with the request to him from the house committee on redress of grievances, provided the house of representatives with invoices and supporting affidavits from his attorneys to document the petitioner's costs and attorney's fees in his defense against the illegal enforcement actions pursued against him; now, therefore, be it

Resolved by the Senate and House of Representatives in General Court convened:

That the sum of $176,448.50 is hereby raised and appropriated, and a warrant shall forthwith be issued to the treasurer of the state of New Hampshire pursuant to NH Const., Pt 2, Art 56 to pay said sum to the order of Jeffrey Frost of 444 Walnut Street, Manchester, New Hampshire 03103, and/or Chrétien/Tillinghast LLC and/or Frost Family LLC, as may be directed by Jeffrey Frost.

That a copy of this resolution be sent by the house clerk to Jeffrey Frost, Chrétien/Tillinghast LLC, and Frost Family LLC.

Speakers

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HJR2 Date Sept. 14, 2023

Committee Judiciary

** Please Print All Information **

Name	Address	Phone	Representing	(check one) Pro	Con
Ava Voissem	511 Kearsarge Mtn Rd Warner, NH 03278		Warner, NH	X	
Jonathan Camara	511 Kearsarge Mtn Rd. Warner, NH 03278		Warner, NH	X	
GREGORY SORG	EASTON		SELF	X	

Hearing Minutes

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HJR 2

BILL TITLE: making restitution to Jeffery Frost for inappropriate prosecution.

DATE: **February 14, 2013**

LOB ROOM: 208 **Time Public Hearing Called to Order:** **4:05 pm**

Time Adjourned: **5:05 pm**

(please circle if present)

Committee Members: Reps. Marjorie Smith, Wall, P. Sullivan, Horrigan, Watrous, Hackel, Woodbury, Berch, Phillips, Gale, Heffron, Rowe, Luther, Sylvia, Hopper, Peterson, Takesian, D. Thompson, Kappler and Hagan.

Bill Sponsors: Rep. Itse, Rock 10

TESTIMONY

- Use asterisk if written testimony and/or amendments are submitted.

***Rep. Daniel Itse,** sponsor
Introduced the resolution to the committee. Provided a copy of Petition #18 "Grievance of Jeffrey Frost"

***Richard Head, Associate Attorney General** – informational only – no position
Submitted written testimony in lieu of personal appearance on behalf of the New Hampshire Attorney General. Confirming status of current ongoing court action.

***Former Rep. Gregory Sorg, Easton, NH** – support
Does not believe that filing in Superior Court would preclude a legislative remedy being provided. Prior Supreme Court (resolved). Current Superior Court filing (August 2012)

Attorney Ingrid White, New Hampshire Banking Department – no position
Did not provide testimony but will provide documents regarding the current court proceedings.

Respectfully submitted,

Rep. Sylvia E. Gale, Clerk

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HJR 2

BILL TITLE: making restitution to Jeffery Frost for inappropriate prosecution.

DATE: 2/14/13

LOB ROOM: 208 **Time Public Hearing Called to Order:** 4:05

Time Adjourned: 5:05 pm

(please circle if present)

Committee Members: Reps. Marjorie Smith, Wall, P. Sullivan, Horrigan, Watrous, Hackel, Woodbury, Berch, Phillips, Gale, Heffron, Rowe, Luther, Sylvia, Hopper, Peterson, Takesian, D. Thompson, Kappler and Hagan.

Bill Sponsors: Rep. Itse, Rock 10

TESTIMONY

- Use asterisk if written testimony and/or amendments are submitted.

* Rep. D. Itse - prime sponsor of bill - presented to Committee.
- provided copy of petition # 18 "Grievance of Jeffrey Frost"

* Atty Richard Head - written testimony in ~~lieu~~ lieu of personal appearance on behalf of NH Atty General.
- No position on bill - informational only
- confirming status of current ongoing Court action

~~Respectfully submitted,~~

~~Rep. Sylvia E. Gale, Clerk~~

(former Rep.) Gregory Sorg - in support of resolution does not believe that by filing

(2) ↓

in ~~federal~~ Superior court would preclude a legislative remedy being provided.
- prior Supreme Court (resolved)
- Current Superior Court filing (August, 2012)

~~Atty~~ Ingrid White - NH Banking Dept.
- did not provide testimony but will provide documents regarding current Court proceedings.

Testimony

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

MICHAEL A. DELANEY
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

February 14, 2013

Representative Marjorie Smith, Chair
House Judiciary Committee
Legislative Office Building, Room 208
Concord, NH 03301

Re: House Joint Resolution 2 (a resolution making restitution to Jeffrey Frost for inappropriate prosecution)

Dear Representative Smith and Members of the House Judiciary Committee:

I am writing with regard to House Joint Resolution 2 ("HJR 2") which is scheduled for hearing on February 14, 2013. Unfortunately, I will be in a trial in the U.S. District Court, and will be unable to be present during your hearing. Thus, I ask that this letter be accepted in lieu of live testimony before your Committee.

Mr. Frost has filed a civil lawsuit against the State in Superior Court. In his lawsuit, Mr. Frost is seeking damages related to the State's prosecution of Mr. Frost. Mr. Frost has named as defendants officials with the Banking Department and Attorney General's Office. Mr. Frost alleges federal constitutional violations under 42 U.S.C. §1983 and state common law tort claims including malicious prosecution, abuse of process, intentional infliction of emotional distress and defamation. The attorney's fees described in HJR 2 are directly related to the same facts and circumstances that are involved in Mr. Frost's lawsuit against the State. In fact, among the damages he is seeking in Superior Court are the same fees that are at issue in HJR 2.

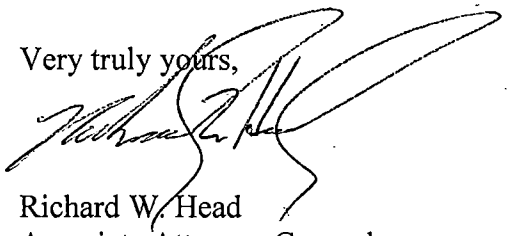
The Attorney General's Office disputes liability in Mr. Frost's civil lawsuit, and a motion to dismiss has been filed with the Court. A response from Mr. Frost regarding the State's motion is expected in the coming weeks, and the motion remains pending before the Superior Court.

In addition, in 2012 the New Hampshire Supreme Court ruled on Mr. Frost's claim for attorney's fees in an appeal of the underlying administrative action taken by the Banking Department. In its order, the Supreme Court acknowledged that the legal issues involved in his case were, in fact, subject to honest dispute. *Frost v. Comm'r, N.H. Banking Dep't*, 163 N.H. 365, 378-79 (2012) ("the complexity of the underlying suit suggests that the petitioners were not forced to litigate a clearly defined right. We agree that the rights at issue were not clearly defined, as is evidenced by the fact that the petitioners filed an expert report to aid the trial court in understanding the statutes involved in this case.") The Supreme Court also upheld the

Superior Court's conclusion that the Department's investigatory tactics did not warrant an award of attorney's fees. In reaching this decision, the Supreme Court referenced the trial court's conclusion that "the theory that the State's conduct in related criminal proceedings and issuing search warrants and administrative actions would authorize an award of attorney's fees ... [cannot] be sustained." *Frost,* 163 N.H. at 378.

This office does not take a position on House Joint Resolution 2. I will, however, apprise the Committee of any future developments in the pending litigation. Please do not hesitate to contact me should you have any questions.

Very truly yours,



Richard W. Head
Associate Attorney General
(603) 271-1221
richard.head@doj.nh.gov

Petition #18: Grievance of Jeffrey Frost, Manchester, New Hampshire.

REPORT
Grievance Founded.

Committee Findings:

The Committee finds, following several public hearings and review of extensive documentation, including three court decisions: (1) that the New Hampshire Banking Department pursued criminal and civil complaints against the Petitioner despite having had ample notice from his attorneys that its assertion of authority over him was wrongful, illegal, and contrary to public policy, and that in any event he had acted pursuant to advice of competent legal counsel and thus lacked the requisite intent; (2) that as asserted by the Petitioner and confirmed by Merrimack District Court Judge Clifford Kinghorn, an investigator for the New Hampshire Banking Department recklessly or intentionally made a materially false representation in an affidavit supporting search warrants for the Petitioner's business records, leading to unlawful searches of the Petitioner's home and his attorneys' files; (3) that as asserted by the Petitioner, confirmed by Merrimack County Superior Court Judge Richard B. McNamara, and affirmed by the New Hampshire Supreme Court, the Banking Department had and should have known it had no authority over the Petitioner or over Chrétien/Tillinghast LLC or Frost Family LLC (limited liability companies of which the Petitioner was a member) under RSA 397-A in that none was engaged in the business of making or brokering mortgage loans secured by real estate, each of the two mortgage financing transactions in question clearly having been an isolated private one outside the normal scope of the business of the limited liability company concerned; (4) that the Banking Department knew or should have known that its attempted imposition of $525,000 in civil penalties against the Petitioner by applying 2009 amendments to RSA 397-A:4 retrospectively violated NH Const., Pt 1, Art 23; and (5) that the Office of the Attorney General (a) knew or should have known that the Banking Department's affidavit supporting issuance of its search warrant contained a materially false assertion of fact; (b) knew or should have known that the Banking Department's assertion of authority over the Petitioner and his limited liability companies was wrongful and illegal; (c) should have exercised its authority to bring about immediate termination of the Banking Department's proceedings against the Petitioner; and (d) should have exercised its prosecutorial discretion to decline to defend in the Supreme Court the Banking Department's cross-appeal from Judge McNamara's decision.

The Committee recommends that a bill be introduced and passed providing (1) that full restitution be made to the Petitioner, Chrétien/Tillinghast LLC and/or Frost Family LLC of the expenses, including reasonable attorney's fees, incurred in their defense against the wrongful application of RSA 397-A against them; (2) that such restitution be made in the form of a line item reduction in the appropriations for each of the Banking Department and Department of Justice in such proportion as deemed appropriate by the Finance Committee; and (3) that a performance audit review be made of the Banking Department and the Department of Justice by the Legislative Budget Office for the purposes of (a) recommending such structural and organizational reforms within and between the two Departments determined to be necessary to ensure a chain of supervision and authority able to recognize, impede and prevent future such unlawful and oppressive enforcement actions; and (b) determining whether cause may exist for disciplinary action, including impeachment as one possible such action, against any one or more individuals within either Department.

Vote 7-3
Rep. Gregory M. Sorg for the Committee

STATE OF NEW HAMPSHIRE

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THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
No. 2011-121

JEFFREY FROST & a.

v.

COMMISSIONER, NEW HAMPSHIRE BANKING DEPARTMENT & a.

Argued: November 10, 2011
Opinion Issued: March 16, 2012

Devine, Millimet & Branch, P.A., of Manchester (Alexander J. Walker and Joshua M. Wyatt on the brief, and Mr. Walker orally), for the petitioners.

Michael A. Delaney, attorney general (Danielle L. Pacik, assistant attorney general, on the brief, and Lisa M. English, assistant attorney general, orally), for the respondents.

CONBOY, J. The respondents, the Commissioner of the New Hampshire Banking Department and the New Hampshire Banking Department (collectively, the Department), appeal an order of the Superior Court (McNamara, J.) permanently enjoining the Department from pursuing an administrative proceeding against Jeffrey Frost on the ground that the Department lacked subject matter jurisdiction. The petitioners, Frost, Chretien/Tillinghast, LLC, and Frost Family, LLC, cross-appeal, arguing that the trial court erred by denying their request for attorney's fees. We affirm.

The statutory backdrop to this case is as follows. RSA chapter 397-A (2006) (amended 2009, 2011) governs the licensing of nondepository first mortgage bankers and brokers. In response to the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the SAFE Act), 12 U.S.C. § 5101, which enhanced consumer protection by requiring states to pass legislation establishing minimum standards for licensing and registration of state-licensed mortgage loan originators, the New Hampshire legislature amended RSA chapter 397-A (Supp. 2009). Accordingly, effective April 1, 2009, it became unlawful for any individual to transact business in New Hampshire as a mortgage loan originator unless such individual obtains a license from the Department. See RSA 397-A:3, I. In addition, effective July 31, 2009, the statute authorizes license suspension and revocation, as well as penalties for violation of the provisions of the chapter.

The following facts are drawn from the record. Frost is a member and designated manager of Chretien/Tillinghast, LLC (Chretien), and a member of Frost Family, LLC (Frost Family). Chretien and Frost Family (collectively, the LLCs) are New Hampshire limited liability companies organized for the purpose of real estate acquisition, holding, and development. The underlying dispute arose as the result of two seller-financed real estate transactions, one conducted by Frost Family and the other by Chretien.

In September 2008, Frost Family sold a condominium to Cheryl Cayer for $137,000. In lieu of third-party financing, Cayer requested $32,000 in seller financing from Frost Family. At closing, Cayer executed a promissory note to Frost Family, secured by a mortgage, for the financed amount. Cayer paid the remaining purchase price in cash. This transaction is the only mortgage loan that Frost Family has ever made.

The second transaction involved a property owned by Chretien. In September 2008, Robert Recio expressed interest in leasing one of Chretien's properties with an option to purchase. The parties agreed on a purchase price of $475,000. After further discussions, Recio and William Secor signed a long-term lease with Chretien. At the time of the lease execution, the parties also executed an option to purchase the property, which, if exercised, obligated Chretien to provide a first mortgage loan for $425,000 at 6.25% interest, which was "fully due and payable on the third anniversary date of the real estate closing and the transfer of title."

In December 2008, Recio and Secor decided to exercise the option to purchase the property. Recio rejected Chretien's suggestions to look for long-term financing, and instead opted to refinance after closing. In addition, Recio represented to Chretien that he was expecting a large insurance settlement, which would help pay down or satisfy the mortgage.

On March 13, 2009, Recio and Secor executed a promissory note secured by a mortgage to Chretien. Under the terms of the note, Recio and Secor promised to pay $425,000 at 6.25% interest, in monthly payments of $300, plus interest, until March 2012, when the remaining balance was fully due and payable. This transaction is the only mortgage loan Chretien has ever made.

In late 2009, Frost, as manager of Chretien, initiated foreclosure proceedings on the property Chretien sold to Recio and Secor. In response, Recio filed for bankruptcy. In the bankruptcy court, Chretien sought and was granted relief from the automatic stay based on fraudulent misrepresentations by Recio that he had not previously filed for bankruptcy protection. Shortly thereafter, Recio filed a complaint with the Consumer Protection Bureau of the Attorney General's Office alleging, among other things, that Frost and Chretien fraudulently induced him to enter into the sale for an inflated price. Subsequently, Frost was charged with four class A misdemeanors alleging criminal violations of RSA chapter 397-A (prohibiting, among other things, unlicensed mortgage banking). The complaint was also forwarded to the Department. Upon receipt of Recio's complaint, the Department initiated an investigation, which disclosed the two seller-financed transactions by the LLCs.

In March 2009, after both instances of seller-financing, Frost submitted a loan originator license application to the Department. On April 1, 2009, Frost became a licensed mortgage loan originator, see RSA 397-A:1, XVII (Supp. 2009) (amended 2011) (defining "Originator"), sponsored by Academy Mortgage, a licensed mortgage banker, see RSA 397-A:1, XII (2006) (defining "Mortgage banker").

In 2010, the Department initiated administrative proceedings against Frost through an "Order to Show Cause with Immediate Emergency Suspension and Cease and Desist Order," as well as a "Staff Petition." In these initiating documents, the Department alleged that although Frost disclosed on his mortgage loan originator's license application that "he was and still is self-employed through" Frost Family, he failed to disclose that Frost Family was a "financial services-related employment." It alleged that "[i]n fact Frost Family served as either the mortgage broker or mortgage banker for [the Cayer] mortgage loan," and that Frost Family was "servicing [the Cayer] mortgage loan without a New Hampshire mortgage servicer registration." See RSA 397-B:4, I (Supp. 2009) (describing registration requirements for mortgage servicing companies). The Department alleged further that "Frost failed to include [on his application] . . . that he is also part owner of [Chretien]," which conducted a mortgage loan transaction with Recio and Secor, and that Chretien "continues to actively service this . . . residential mortgage loan" without a valid mortgage servicer registration or a valid mortgage banker license. See id. Finally, the Department alleged that "Frost, by continuing his employment with both [LLCs]

while employed by mortgage banker licensee, Academy Mortgage, as a licensed Mortgage Loan Originator, work[ed] for more than one mortgage banker or mortgage broker and mortgage servicer and [was] therefore in violation of RSA 397-A:1, XVII(a), RSA 397-A:3, III, and/or RSA 397-B:1, IV-c."

At the time the administrative proceedings were initiated, the Department notified Frost that he could request a hearing with the Department under RSA chapter 541-A (2007). Frost did not file such a request. Instead, the petitioners initiated a declaratory judgment proceeding in superior court, which included a request for a temporary restraining order. The petitioners contended that the respondents lacked subject matter jurisdiction to proceed against Frost and violated the State Constitution's prohibition against retrospective laws by seeking to impose a $25,000 fine for each alleged violation.

After a hearing, the trial court granted the preliminary injunction, concluding that "[w]hile the [Department] may have jurisdiction over Frost because he is now a loan originator, it [could] take no action against him based on the September 2008 or the March 2009 transactions." Further, the trial court concluded that since the Department "may not impose any penalties on Frost," it did not need to consider the issue of the retrospective nature of the sanctions.

Subsequently, the parties agreed to treat the preliminary injunction order as a final order. See Super. Ct. R. 161(b)(2). Prior to entry of the final order, however, the trial court allowed the petitioners to file a motion for attorney's fees. The petitioners filed such a motion, which the trial court denied.

I. The Department's Appeal

The Department first argues that the petitioners "should not have been permitted to bypass the statutory administrative procedures by seeking a preliminary and permanent injunction in the superior court." The Department maintains that under the doctrine of primary jurisdiction, the trial court should have abstained from intervening and required the petitioners to exhaust their administrative remedies.

Conversely, the petitioners maintain that the trial court properly exercised its authority to grant both a preliminary and permanent injunction because the Department lacks subject matter jurisdiction under RSA chapter 397-A to regulate the LLCs. Specifically, they argue that because resolution of this issue requires statutory interpretation, and the superior court has authority to issue declaratory findings on issues of law, the trial court did not err.

The doctrine of primary jurisdiction "provides that a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by the specialized administrative agency that also has jurisdiction to decide it." Wisniewski v. Gemmill, 123 N.H. 701, 706 (1983).

> [The doctrine] is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. It applies to claims that contain some issue within the special competence of an administrative agency. Thus, under the primary jurisdiction doctrine, courts, even though they could decide, will in fact not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision.

2 Am. Jur. 2d Administrative Law § 480, at 407 (2004). "Where[, however,] the issue or issues . . . involve purely questions of law, the matter will not be referred to an agency." 73 C.J.S. Public Administrative Law and Procedure § 77, at 270 (2004). Because the decision to refrain from exercising its jurisdiction "rests in the sound discretion of the trial judge," Dolan v. Utica Mut. Ins. Co., 630 F. Supp. 305, 308 (D. Mass 1986), we review the court's decision under an unsustainable exercise of discretion standard. See Baykeeper v. NL Industries, Inc., 660 F.3d 686, 690 (3d Cir. 2011) ("We review a district court's decision to abstain on primary jurisdiction grounds . . . for abuse of discretion."); GCB Communications v. U.S. South Communications, 650 F.3d 1257, 1262 (9th Cir. 2011) ("We review a district court's denial of a request to refer a case to an agency under the primary jurisdiction doctrine for abuse of discretion."); TON Services, Inc. v. Qwest Corp., 493 F.3d 1225, 1239 (10th Cir. 2007) ("This court applies an abuse of discretion standard to the district court's decisions to invoke the primary jurisdiction doctrine and to either stay or dismiss the action without prejudice."); see also State v. Lambert, 147 N.H. 295, 296 (2001).

In Wisniewski, the defendants diverted the flow of a river abutting the plaintiffs' property and theirs without prior authorization by the New Hampshire Water Resources Board. Wisniewski, 123 N.H. at 704. Upon learning of the defendants' actions, the board ordered them to return the river to its original flow and restore the affected area. Id. Later, however, the board voted to reconsider its order and deferred further action on the issue until the defendants submitted a permit application and detailed plans for the diversion of the river. Id. No plan was ever submitted, but the board took no further action. Id.

The plaintiffs brought an action in superior court for damages caused by the river's diversion. Id. The defendants moved to dismiss the plaintiffs' claim, arguing the trial court lacked jurisdiction over the action because the board had exclusive jurisdiction over matters involving state waters. Id. at 705. The superior court granted the defendants' motion, and the plaintiffs appealed. Id.

On appeal, we reversed, concluding that the legislature, in enacting RSA chapter 483-A, did not intend "to vest exclusive jurisdiction over state waters in the board and to eliminate the common law right of a property owner to bring an action for a violation of its riparian rights when the board has not authorized the filling or dredging in state waters." Id. Moreover, we rejected the defendants' alternative argument that the trial court's order should have been affirmed under the doctrine of primary jurisdiction. Id. at 706. We concluded that the doctrine was "inapplicable . . . because RSA chapter 483-A granted the water resources board no jurisdiction over disputes between private parties involving an infringement of riparian rights when the filling and dredging was not given prior authorization by the board." Id.

Similarly, if RSA chapter 397-A does not grant the Department jurisdiction over the two transactions at issue here, there is no need for the court to await the outcome of the Department's administrative proceedings centered on these transactions. See 5 G. J. MacDonald, Wiebusch on New Hampshire Civil Practice and Procedure, § 62.04, at 62-4, 62-5 (noting agencies' powers "come solely and directly from the statutes that create them or give them authority and from the necessary implications of those statutes"). Because a determination of the Department's jurisdiction requires statutory analysis, the trial court could properly resolve this legal issue. See 73 C.J.S., supra § 77, at 270 (noting no referral to agency where agency lacks jurisdiction over the matter). While the dissent apparently acknowledges that the doctrine of primary jurisdiction is discretionary, it nevertheless maintains that in circumstances such as those here, where agency action is pending, the trial court's discretion is limited. We do not agree that such limitation is warranted here. We conclude, therefore, that the trial court's decision not to refrain from exercising its jurisdiction did not constitute an unsustainable exercise of that discretion.

We note that our decision here does not alter our law regarding exhaustion of administrative remedies. Whenever a statute provides a procedure for appeal or review of an administrative agency's decision, that procedure is exclusive and must be followed. See Nashua v. Public Utilities Commission, 101 N.H. 503, 506-07 (1959); 2 Am. Jur. 2d. Administrative Law § 475, at 403 (2004) ("[W]here a statute requires exhaustion of administrative remedies a court has no jurisdiction to review an interlocutory order and the exhaustion requirement is not a matter for the court's discretion."). Thus, before an agency decision may be reviewed, administrative remedies typically must be exhausted. See Konefal v. Hollis/Brookline Coop. School Dist., 143 N.H. 256, 258 (1998) (requiring plaintiff to exhaust her administrative remedies before the PELRB where her claims required resolution of disputed fact, and were therefore exclusively within administrative discretion).

For example, RSA 397-A:7 provides that an applicant who is denied a mortgage lending license by the banking commissioner may appeal the decision in accordance with RSA chapter 541, the Administrative Procedure Act. See RSA 541:22 (2007) ("No proceeding other than the appeal herein provided for shall be maintained in any court of this state to set aside, enjoin the enforcement of, or otherwise review or impeach any order of the [agency], except as otherwise specifically provided."). Thus, under this section, a petitioner must exhaust administrative remedies before seeking judicial review. 5 G.J. MacDonald, supra § 62.28, at 62-28 ("When review under RSA chapter 541 is authorized, it is the exclusive means of challenging an agency's decision.").

By contrast, RSA 397-A:17 (mortgage license revocation and suspension) does not set forth a similar review procedure. Rather, this section simply outlines the procedural steps in the revocation or suspension process. Accordingly, there is no exclusive review process that Frost was required to exhaust.

Assuming, however, that RSA 397-A:17 implies exclusive administrative review remedies, here, exhaustion is not required. "We have recognized that the exhaustion of administrative remedies doctrine is flexible, and that exhaustion is not required under certain circumstances." Konefal, 143 N.H. at 258; see Metzger v. Brentwood, 115 N.H. 287, 290 (1975). For example, in Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140 (1998), we explained that "[a] party is not required to exhaust administrative remedies where the issue on appeal is a question of law rather than a question of the exercise of administrative discretion." Pheasant Lane Realty Trust, 143 N.H. at 141-42 (quotation omitted); see also Bedford Residents Group v. Town of Bedford, 130 N.H. 632, 639 (1988) (where the issue is a question of law, such as the interpretation of a statute, exhaustion is not necessarily required). Thus, here, where an issue of law is dispositive, the trial court sustainably exercised its discretion to maintain jurisdiction.

Next, the Department contends that the trial court erred in enjoining its administrative proceedings against Frost. Specifically, the Department challenges the trial court's interpretation of RSA chapter 397-A. In reaching its decision to exercise its equitable powers to grant temporary relief, the trial court concluded that the petitioners demonstrated a likelihood of success on the merits. The trial court reasoned that since none of the petitioners could "be said to be in the business of making or brokering mortgage loans, by virtue of a single isolated transaction," RSA chapter 397-A was inapplicable. In addition, the trial court found that without an injunction, the petitioners had no adequate remedy at law and would suffer irreparable harm. We will uphold the issuance of an injunction absent an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact. N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007).

The Department argues that the trial court misinterpreted RSA chapter 397-A. The Department maintains that the chapter applies to all residential mortgage transactions that are not specifically exempt under RSA 397-A:4 (exempting certain classes of persons from licensing requirements). It argues that mortgage loans executed by the LLCs were not exempt "because those companies were not . . . 'natural person[s],'" so licensure was required. See RSA 397-A:4, II (exempting "[a]ny natural person making not more than 4 first mortgage loans within any calendar year with the person's own funds and for the person's own investment without an intent to resell such mortgage loans").

We review the trial court's statutory interpretation de novo. Fog Motorsports #3 v. Arctic Cat Sales, 159 N.H. 266, 267 (2009). We are the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole. Kenison v. Dubois, 152 N.H. 448, 451 (2005). When examining the language of the statute, we ascribe the plain and ordinary meaning to the words used. Fog Motorsports #3, 159 N.H. at 268. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. We also interpret a statute in the context of the overall statutory scheme and not in isolation. Id.

RSA 397-A:2 provides in pertinent part that:

> This chapter shall provide for the department's regulation of persons that engage in the business of making or brokering mortgage loans secured by real property located in the state of New Hampshire, which is or shall be occupied in whole or in part as a place of residence by the borrower and which consists of not more than 4 living units.

RSA 397-A:2, I (emphasis added). Thus, by its plain and unambiguous language, the statute grants the Department jurisdiction only over "persons that engage in the business of making or brokering mortgage loans." The qualification that a person be a natural person relates not to this jurisdictional predicate, but rather to the exemption set forth in RSA 397-A:4, II. Because our analysis focuses on the scope of the Department's subject matter jurisdiction under RSA chapter 397-A, we need not consider, as the dissent suggests, the exemptions delineated in RSA 397-A:4. The question, then, is whether either of the LLCs was a person "engage[d] in the business of making or brokering mortgage loans" by virtue of a single isolated transaction, thereby subjecting Frost, as its agent, to the Department's administrative proceedings. We agree with the trial court's conclusion that the LLCs were not engaged in the business of making mortgage loans.

The statute does not define the phrase "engage in the business." Generally, however, "business" is defined as "transactions, dealings, or intercourse of any nature." Webster's Third New International Dictionary 302 (unabridged ed. 2002) (defining "business"); see also Black's Law Dictionary 226 (9th ed. 2009) (defining "business" as "[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain" (emphasis added)). Thus, to "engage in the business" implies multiple transactions or dealings, rather than a single incident.

Our case law supports the contention that a single mortgage lending transaction does not constitute being "in the business" of making mortgage loans. In Green Meadows Mobile Homes v. City of Concord, 156 N.H. 394, 397 (2007), we held that the petitioners were not "dealer[s]" because "while the petitioners on occasion [sold] manufactured housing units, they [were] not in the business of selling such units, but rather [were] in the business of owning and managing manufactured housing parks." Id. (quotations and brackets omitted). Similarly, in Hughes v. DiSalvo, 143 N.H. 576, 578 (1999), we concluded that the plaintiff, who rented and attempted to sell her real property through a lease and sales agreement, did not violate the Consumer Protection Act because remedies under the Act are not available when the subject transaction is strictly private in nature, and not undertaken in the ordinary course of a trade or business. Thus the plaintiff's involvement in a single transaction was insufficient to constitute engagement in trade or commerce. Id. at 578-79 ("The plaintiff was not a real estate professional engaged in the business of renting or selling properties."); cf. Currier v. Tuck, 112 N.H. 10, 12 (1972) ("It has been held that an occasional isolated act of loaning money as an accommodation to a customer or friend is not engaging in the business of making loans under similar statutes.").

Finally, the subsequent legislative history, while not controlling, supports our construction. See Franklin v. Town of Newport, 151 N.H. 508, 512 (2004). In response to the federal SAFE Act, the New Hampshire legislature initially narrowed the exemptions for seller-financing to exclude from the licensing requirements only "[a]ny individual who offers or negotiates terms of a residential mortgage loan with or on behalf of an immediate family member of the individual," or "[a]n individual who offers or negotiates terms of a residential mortgage loan secured by a dwelling that served as the individual's residence." RSA 397-A:4, III-IV (Supp. 2009).

Subsequently, however, section four was again amended. Effective July 1, 2011, RSA 397-A:4 (Supp. 2011) was amended to provide as follows:

> The provisions of this chapter shall not apply to . . . [a]n owner of real property who in any 12 consecutive month period makes no more than 3 mortgage loans to purchasers of the property for all or

part of the purchase price of the real estate against which the mortgage is secured . . . .

RSA 397-A:4, VI; Laws 2011, 212:1. The purpose of the amendment was to combat the "excessive enforcement of the SAFE Act," see RSA 397-A (2009), and to "restore common sense to New Hampshire law" after the July 2009 amendments "harshly eliminated any legal commerce in most private residential lending." N.H.H.R. Jour. 1579 (2011). With this amendment, the legislature has made clear that the statute applies only to persons who make numerous loan transactions per year.

We conclude, therefore, that in context, "engag[ing] in the business" of mortgage lending requires more than a single isolated transaction. Because each of the LLCs conducted only one mortgage lending transaction, neither "engage[d] in the business of making or brokering mortgage loans," RSA 397-A:2, I, and, thus, Frost had no obligation to disclose the two transactions on his license application. Moreover, neither of the LLCs was a mortgage banker or mortgage broker, see RSA 397-A:1, XII-XIII, so Frost did not "work[ ] for more than one mortgage banker or mortgage broker and mortgage servicer . . . ." Therefore, although Frost became subject to the Department's regulation when he became a licensed mortgage loan originator, after the two seller-financed transactions by the LLCs occurred, he is not subject to disciplinary action by the Department based upon those transactions.

Given our holding herein, and the fact that penalties were not, in fact, imposed on Frost, we need not address the Department's argument that its application of the suspension and penalty provisions set forth in RSA 397-A:14 and RSA 397-A:17 would not have violated Part I, Article 23 of the New Hampshire Constitution. See N.H. CONST. pt. I, art. 23 ("Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.").

We conclude, therefore, that the trial court sustainably exercised its discretion by enjoining the Department from taking disciplinary action against Frost with respect to the LLCs' single mortgage lending transactions. Our decision, however, does not otherwise limit the Department's regulatory authority over Frost as a mortgage loan originator.

II. The Petitioners' Cross-Appeal

Finally, the petitioners challenge the trial court's denial of attorney's fees. Specifically, they maintain that they are entitled to attorney's fees because: (1) the Department acted in bad faith; (2) the Department "intru[ded] upon the protection against retrospective laws"; and (3) "they conferred a substantial benefit on the public through this action." We disagree.

We will not overturn the trial court's decision concerning attorney's fees absent an unsustainable exercise of discretion. Grenier v. Barclay Square Commercial Condo. Owners' Assoc., 150 N.H. 111, 115 (2003). To warrant reversal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party. Arcidi v. Town of Rye, 150 N.H. 694, 704 (2004). In evaluating the trial court's ruling on this issue, we acknowledge the "tremendous deference" given a trial court's decision regarding attorney's fees. Grenier, 150 N.H. at 116. If there is some support in the record for the trial court's determination, we will uphold it. Arcidi, 150 N.H. at 704.

"A prevailing party may be awarded attorney's fees when that recovery is authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees." Tulley v. Sheldon, 159 N.H. 269, 272 (2009) (quotation omitted). "As to judicially-created exceptions, attorney's fees have been awarded in this State based upon two separate theories: bad faith litigation and substantial benefit." Bedard v. Town of Alexandria, 159 N.H. 740, 744 (2010) (quotations and ellipsis omitted). "Under the bad faith litigation theory, an award of attorney's fees is appropriate where one party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, where the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and where it should have been unnecessary for the successful party to have brought the action." Id. (quotations omitted). "Under the substantial benefit theory[,] . . . attorney's fees may be awarded when a litigant's actions confer a substantial benefit upon the general public." Id. (quotations omitted).

Here, the trial court found that the petitioners met none of the standards warranting departure from the general rule. After review of the record, we agree and conclude that the trial court sustainably exercised its discretion. First, the record supports the trial court's finding that the Department did not act in bad faith. The Department neither employed obstinate or unreasonable litigation tactics, nor did it seek "burdensome discovery."

Nevertheless, the petitioners contend that the trial court erred when it failed to consider, in its bad faith analysis, the Department's allegedly "obstinate and unlawful" pre-lawsuit conduct. In particular, the petitioners argue that litigation was "unnecessary" and was prompted only by their need to protect themselves against the Department's "unconstitutional investigatory tactics" and the disputed staff petition. We disagree.

Despite the petitioners' representations to the contrary, the trial court did address their argument regarding the Department's investigatory tactics. The court ruled that "the theory that the State's conduct in related criminal

proceedings and issuing search warrants and administrative actions would authorize an award of attorney's fees . . . [cannot] be sustained." Further, it rejected the petitioners' argument that an award of fees was supported by alleged flaws in the staff petition (i.e., naming Frost individually, creating "illusory" charges by "duplicating" alleged misconduct, and threatening unconstitutional retroactive penalties). The trial court noted that "[the Department] took a legal position which involved complex statutes and their application to a highly regulated industry." Thus, we find no merit in the petitioners' claim that the trial court failed to address the Department's pre-lawsuit conduct.

Moreover, as the trial court noted, the complexity of the underlying suit suggests that the petitioners were not forced to litigate a clearly defined right. We agree that the rights at issue were not clearly defined, as is evidenced by the fact that the petitioners filed an expert report to aid the trial court in understanding the statutes involved in this case.

Finally, the trial court did not err in finding the substantial benefit exception inapplicable. As the trial court noted, the exception is based on promotion of the public benefit, not the petitioners' own benefit. See Bedard, 159 N.H. at 746.

Affirmed.

DALIANIS, C.J., and HICKS, J., concurred; LYNN, J., with whom DUGGAN, J., retired, specially assigned under RSA 490:3, joined, dissented.

LYNN, J., dissenting. Because I conclude that, under the doctrine of primary jurisdiction, the superior court erred in enjoining the ongoing enforcement proceedings before the banking department, I would reverse.

Perhaps the best elucidation of the doctrine of primary jurisdiction is that found in a prominent administrative law treatise:

> The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court. The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will initially

> decide a particular issue, not the question of whether court or agency will finally decide the issue.

3 K. Davis, Administrative Law Treatise § 19.01, at 3 (1958), quoted in Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 199 n. 29 (1978); see also Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S. 644, 673 (2003) (Breyer, J., concurring in part and concurring in the judgment) ("[Primary jurisdiction] seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime."); Konefal v. Hollis/Brookline Coop. School Dist., 143 N.H. 256, 258 (1998) ("Primary jurisdiction in an agency requires judicial abstention until the final administrative disposition of an issue, at which point the agency action may be subject to judicial review." (quotations omitted)). Because primary jurisdiction is a prudential doctrine, rather than one based on the absence of judicial power,[1] there is no "fixed formula" for determining when the doctrine applies. United States v. Western Pac. R. Co., 352 U.S. 59, 64 (1956). However, the following factors are often cited as relevant considerations in making this determination: (1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue in dispute; (2) the need for uniform resolution of the issue; and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities. See II K. Davis & R. Pierce, Jr., Administrative Law Treatise § 14, at 272 (3d ed. 1994); see also Walsh, 538 U.S. at 673 (Breyer, J., concurring in part and concurring in the judgment) ("[The question], in a word, [is] whether preliminary reference of issues to the agency will promote that proper working relationship between court and agency that the primary jurisdiction doctrine seeks to facilitate."); cf. Konefal, 143 N.H. at 258 ("The rule requiring administrative remedies to be exhausted prior to appealing to the courts is based on the reasonable policies of encouraging the exercise of administrative expertise, preserving agency autonomy and promoting judicial efficiency." (quotations omitted)).

While acknowledging the doctrine of primary jurisdiction, the majority holds that the trial court did not unsustainably exercise its discretion in declining to apply the doctrine because the issue addressed by the trial court concerned the banking department's subject matter jurisdiction and was

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[1] Although not grounded in an absence of judicial power, the primary jurisdiction doctrine does implicate separation of powers concerns because it relates to the relationship between the branches of government. See, e.g., Travelers Ins. Co. v. Detroit Edison Co., 631 N.W.2d 733, 741 (Mich. 2001) (noting that one of the justifications for the primary jurisdiction doctrine "relates to respect for the separation of powers and the statutory purpose underlying the creation of the administrative agency, the powers granted to it by the legislature, and the powers withheld[; t]his justification includes the principle that courts are not to make adverse decisions that threaten the regulatory authority and integrity of the agency").

purely a question of law rather than of administrative discretion. I believe the majority takes too narrow a view of the circumstances under which deference is owed to an administrative agency, and that the cases it relies on to support its position are distinguishable in important respects from this case. Accordingly, I would find that the trial court's decision to enjoin the ongoing banking department proceedings did constitute an unsustainable exercise of discretion.

None of the cases relied on by the majority involved an effort to enjoin an ongoing administrative enforcement proceeding, i.e., a proceeding examining whether a licensee had violated a regulatory regime, a circumstance that presents a particularly compelling reason for a court to stay its hand. See Interfaith Community Organization v. PPG, 702 F. Supp. 2d 295, 310 (D.N.J. 2010); accord Dept. of Public Works v. L.G. Indus., 758 A.2d 950, 957 (D.C. 2000) (reversing grant of injunction against agency enforcement proceeding, and admonishing that "the trial court must be especially careful before resorting to that remedy where . . . the requested relief would enjoin agency action pending the outcome of administrative review. In part the reason for this restraint is the very one that underlies the primary jurisdiction doctrine, which is that the court is acting – and risks disruption – in a field that is normally confided to the agency's expertise" (quotations, brackets, and citation omitted)); Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d 74, 78 (Me. 1980) (lifting temporary restraining order that prevented Bureau of Consumer Protection from holding hearing to determine whether bank had violated statute regulating permissible finance charges, explaining that "[w]here the administration of a particular statutory scheme has been entrusted to an agency, the Court will postpone consideration of an action until the agency has made a designated determination if such postponement will protect the integrity of the statutory scheme" (quotation omitted)); Luskins Inc. v. Consumer Protection, 657 A.2d 788, 793 (Md. 1995) (holding that primary jurisdiction doctrine required dismissal of declaratory judgment action filed by merchant subject to agency proceedings for misleading consumer advertising); Zar v. S.D. Bd. of Examiners of Psychologists, 376 N.W.2d 54, 55 (S.D. 1985) (reversing writ of prohibition preventing disciplinary proceedings against licensee; trial court had reasoned that it should make initial decision as to whether Board lacked jurisdiction to discipline licensee because of alleged invalidity of administrative rules; supreme court disagreed, citing Myers v. Bethlehem Corp., 303 U.S. 41, 58 (1938), for proposition that "[u]nder the doctrine of separation of powers, an administrative agency, a branch of the executive department, is empowered to determine its own jurisdiction" in the first instance); cf. Smith v. N.H. Bd. of Psychologists, 138 N.H. 548, 554 (1994) (reversing trial court's entry of injunction that prevented Board of Examiners of Psychologists from conducting disciplinary proceedings involving licensees).

Unlike the instant case, Wisniewski v. Gemmill, 123 N.H. 701 (1983), on which the majority primarily relies, did not involve an action in which the

plaintiff sought an injunction against the regulatory agency itself; indeed, the agency (the former water resources board) was not even a party to that case. Instead, the lawsuit was a common law action for damages between private parties in which the defendant sought dismissal based on the argument that, because the suit concerned the alteration of the course of a public water body, the board had exclusive jurisdiction. Id. at 705. Moreover, unlike this case, where the banking department was actively pursuing administrative proceedings against petitioner Frost and had extended him the opportunity for a hearing at the time he sought judicial relief, in Wisniewski, the agency proceedings had lain dormant for nine months before suit was filed. See id. at 704; cf. Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 586-87 (1989) (expressing concern that requiring exhaustion of administrative remedies would relegate parties to a dispute resolution process the Court described as a "black hole"). Furthermore, none of the parties before the court in Wisniewski was a licensee of the water resources board, nor did the board have the authority to award the type of relief, i.e., monetary damages, that the plaintiff was seeking. See Wisniewski, 123 N.H. at 707. Here, by contrast, Frost was a licensee of the banking department, and, as the majority recognizes, the department therefore unquestionably had "regulatory authority" over him. Thus, even accepting the majority's construction of "engage in the business" as used in RSA 397-A:2 (2006 & Supp. 2011), the department, at worst, had a mistaken view of the scope of its regulatory authority. But no one disputes that this was an issue Frost could have challenged, and the department could have decided, at an administrative hearing, which would have to have been conducted pursuant to the provisions of the Administrative Procedures Act governing adjudicative proceedings. See RSA 397-A:17, III (2006); RSA 541-A:30, III (2007). Collectively, the foregoing considerations demonstrate that this case presents a far more compelling argument for invoking primary jurisdiction than did Wisniewski.

The other cases cited by the majority, Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140 (1998), Bedford Residents Group v. Town of Bedford, 130 N.H. 632 (1988), and Metzger v. Brentwood, 115 N.H. 287 (1975), also are distinguishable. Not only did none of those cases involve agency enforcement proceedings, but the land use and/or property tax statutes at issue in those cases were also not nearly as complex – or the legal position of the governmental body as arguable – as that presented here. It is a well-recognized principle of administrative law that where the legislature has described an agency's powers in broad and ambiguous language, the agency generally is given the first opportunity to rule upon the extent of its jurisdiction. Although we have not gone so far as to adopt the federal rule, which requires courts to defer to an agency's reasonable construction of an agency-administered statute, see Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-45, 866 (1984), we have long taken the view that substantial deference is due to the interpretation placed on a statute of doubtful meaning by the agency charged with its

implementation. See Grand China v. United Nat'l Ins. Co., 156 N.H. 429, 434 (2007); cf. Win-Tasch Corp. v. Town of Merrimack, 120 N.H. 6, 9-10 (1980). The doctrine of primary jurisdiction complements our substantial deference policy by ensuring that an agency is given the first opportunity to construe an ambiguous statute. See Verizon New England v. Maine Public Utilities, 509 F.3d 1, 11-12 (1st Cir. 2007). As Professor Pierce explains:

> The primary jurisdiction doctrine often compels a court to refer an issue to an agency . . . when the issue ultimately is determined not to be within the agency's statutory jurisdiction. The resulting situation – an agency's primary jurisdiction is often broader than its statutory jurisdiction – seems strange at first glance. It makes eminently good sense, however, upon examination of the nature and frequent difficulty of determining the scope of the agency's statutory jurisdiction.

II R. Pierce, Jr., Administrative Law Treatise § 14.2, at 1185 (5th ed. 2010). Put another way, the primary jurisdiction doctrine comes into play when conduct that is the subject of court litigation "is . . . at least arguably protected or prohibited by a . . . regulatory statute" and when agency resolution of an issue is likely to be of "material aid" to judicial resolution of the dispute. Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 299-300, 302 (1973); see Clark v. Time Warner Cable, 523 F.3d 1110, 1115-16 (9th Cir. 2008) (referring matter to agency where issue was novel, agency regarded resolution of issue as important to policies it was required to implement, and agency had issue under active consideration); cf. Leedom v. Kyne, 358 U.S. 184, 188-89 (1958) (declining to require exhaustion of administrative remedies when agency action is plainly ultra vires).

At the times pertinent to this case, RSA chapter 397-A established a comprehensive regulatory scheme for "persons that engage in the business of making or brokering" certain mortgage loans. RSA 397-A:2, I (2006). If the "engage in the business" language found in RSA 397-A:2, I, were the only pertinent section regarding the scope of the statute, I would agree with the majority that the statute does not reach the two isolated mortgage loan transactions conducted by Frost Family and Chretien. However, this is not the case. Instead, RSA 397-A:3, I (2006 & Supp. 2011) provides: "Any person not exempt under RSA 397-A:4 that, in its own name or on behalf of other persons, engages in the business of making or brokering mortgage loans secured by real property located in this state shall be required to obtain a license from the department." (Emphasis added.) And, when these transactions occurred, RSA 397-A:4 (2006) provided, in relevant part, that RSA chapter 397-A was inapplicable to:

> II. Any natural person making not more than 4 first mortgage loans within any calendar year with the person's own funds and for the person's own investment without an intent to resell such mortgage loans.
>
> III. Any natural person who, as seller, receives one or more first or second mortgages or deeds of trust on real estate as security for a purchase money obligation.

(Emphases added.)

Because neither Frost Family nor Chretien is a "natural person," neither was covered by these exemptions.[2] More importantly, the existence of these statutory exemptions results in an ambiguity as to the intended meaning of the "engage in the business" term found in RSA 397-A:2, I, and :3. The effect of the first exemption is to create a safe harbor for natural persons who make fewer than five first mortgage loans within a calendar year. The effect of the second is to exclude any natural person who provides a first or second mortgage as part of seller-financing in connection with even one property he or she sells to another. Contrary to the majority's suggestion, it is not proper to simply ignore these exemptions in construing the scope of the banking department's authority under RSA chapter 397-A. Indeed, failing to consider the exemptions in determining what is meant by the term "engage in the business" of making or brokering loans is inconsistent with a first principle of statutory interpretation – that statutory provisions are not to be considered in isolation but in the context of the entire statutory scheme. State v. Jennings, 159 N.H. 1, 3 (2009). By failing to consider the overall statutory scheme, the majority offers no answer to what is the seminal question that must be addressed in order to properly construe the statute: If the legislature intended "engage in the business" to cover only non-natural persons who regularly or habitually make or broker mortgage loans, why would it have found it necessary to specifically exclude them in the above exemptions?[3] See State v.

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[2] Nor do petitioners argue that any other provisions of RSA 397-A:4 in effect at the relevant times exempt Frost Family or Chretien from the reach of RSA chapter 397-A.

[3] Insofar as the RSA 397-A:4, II exemption is designed to establish a safe harbor for a course of conduct that might otherwise constitute "engaging in the business," it might be contended that the exclusion of non-natural persons from this exemption was merely intended to disqualify entities (non-natural persons) from the safe harbor, not to signify that entities did not have to make or broker mortgages with some level of regularity in order to be engaged in the business. The same argument cannot be made as to the RSA 397-A:4, III exemption. The fact that, with respect to natural persons, the legislature found it necessary to include a specific exemption for a person who makes even one seller-financing mortgage suggests that without the exemption such person could be considered engaged in the business of making mortgages; and, of course, the

Pierce, 152 N.H. 790, 791 (2005) ("All words of a statute are to be given effect, and the legislature is presumed not to use words that are superfluous or redundant."). Reading the statute as a whole, one plausible construction is that the legislature intended non-natural persons, such as Frost Family and Chretien, to be deemed "engaged in the business" of making or brokering mortgages even if they engage in only a single transaction. And, of course, if the statute is construed so as to require Frost Family and Chretien to have been licensed, then there is a basis for the banking department's investigation into whether Frost (1) made misrepresentations in his application for licensure as a loan originator, (2) serviced loans for non-licensed mortgage bankers, and (3) simultaneously represented more than one mortgage banker. See RSA 397-A:1, XVII, :3, III, :17 (2006 & Supp. 2011).[4]

To be clear, it is not my purpose to attempt a definitive construction of RSA chapter 397-A. Given the statute's ambiguity, it may be that ultimately I too would come to the conclusion that the most sensible construction of RSA 397-A:2 and :3 would exclude Frost Family and Chretien from being "engaged in the business" of making or brokering mortgage loans.[5] To me, the critical

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exemption does not apply to non-natural persons even if they make only one seller-financing mortgage.

[4] Both the petitioners and the trial court seemed to recognize that the meaning of the statute was less than completely clear. This is demonstrated by the fact that the petitioners found it necessary to provide the trial court with an expert report from a banking law attorney opining on his interpretation of the scope of activity falling within the reach of the statute. The trial court considered this report and found it "valuable and helpful." It also is demonstrated by the trial court's denial of the petitioners' request for attorney's fees. Rejecting the petitioners' claim that the defendants acted in bad faith, the court found, "[the banking department] took a legal position which involved complex statutes and their application to a highly regulated industry."

[5] I cannot agree with the majority that the legislative history of the 2011 amendment to RSA 397-A:4 supports its construction of the 2005 version of the statute – the version that is controlling with respect to the conduct at issue. On this point, I note initially that the very fact that the majority deems it necessary to reference legislative history confirms my view that, prior to the 2011 amendment, the statute was ambiguous with respect to whether Frost Family and Chretien were engaged in the business of making or brokering mortgages. See Appeal of Cote, 144 N.H. 126, 129 (1999) ("While legislative history may be helpful in the interpretation of an ambiguous statute, it will not be consulted when the statutory language is plain." (quotation omitted)). More importantly, while the actions of Frost Family and Chretien would appear to have been exempt if they had occurred after the 2011 amendment to RSA 397-A:4 had taken effect, that amendment clearly did more than clarify pre-existing law. On the contrary, as its legislative history makes clear, the amendment was intended to change existing law to expand the circumstances in which seller-financing of real estate transactions would be allowed without the need for the seller to be licensed. See Hearing on SB 28 before Senate Commerce Comm. (Jan. 25, 2011) (testimony of Sen. Boutin) ("This de minimis exemption would allow a number of the transactions which cannot be completed now while ensuring that the exemption will not undermine the current law." (emphasis added)); N.H.H.R. Jour. ___ (May 25, 2011) (remarks of Rep. Manuse) ("Current law requires any person to get a mortgage loan originators license from the New Hampshire banking department, even in harmless circumstances when licensing private citizens who intend to make up to three loans is not practical." (emphasis added)). The 2011 amendment is the first time the legislature clearly created a safe harbor exemption that covers non-natural persons such as Frost Family and Chretien.

point is that any such construction of the statute by either the trial court or this court is premature at this time. Rather, in my view, where, as here, the banking department had not obviously overstepped the bounds of its authority, respect for the proper functioning of an agency of a coordinate branch of government that has been given primary jurisdiction to regulate in the field required the trial court to refrain from interfering with the ongoing administrative proceedings.

In closing, I also must note my concern that today's decision may pave the way for future licensees to attempt to circumvent agency enforcement proceedings any time imaginative counsel is able to fashion a plausible argument that the agency has misinterpreted its regulatory authority. Needless to say, such a development would not be consonant with sound public policy.

For the reasons stated above, I respectfully dissent.

DUGGAN, J., retired, specially assigned under RSA 490:3, joins in the dissent.

March 11, 2010

VIA FACSIMILE: 271-2110
& U.S. MAIL

Karen Gorham, Esq.
Office of Attorney General
33 Capitol Street
Concord, NH 03301

RE: Jeffrey Frost

Dear Karen,

As you know, I represent Jeffrey Frost who was arrested by the Manchester Police Department yesterday. As I discussed with you on the phone this morning, while I am just getting involved in this matter, I have a very serious initial concerns relative to the warrants that were obtained to search Mr. Frost's property and files at the law office of Cronin & Bisson.

Judge Ryan evidenced his concern with the sufficiency of the allegations in the warrant affidavit and according to his notes, "inquired of Ms. Shaheen regarding her investigation and what she learned about Frost acting as a mortgage banker. Ms. Shaheen informed the Court that she looked at mortgage registered with Registry of Deeds which listed Chretien/Tillinghast as the mortgage banker. Frost had been the representative of Chretien/Tillinghast."

I have reviewed the documents on file with the Registry of Deeds and do not see any listing of Chretien/Tillinghast as the "mortgage banker." It is listed as the seller or lender on documents which Jeff Frost signed as a member of Cretian/Tillinghast, LLC. If, in fact, Chretien/Tillinghast is listed as a mortgage banker on documents that I have not yet seen, I would ask that you provide these to me immediately. If, in fact, there is no listing of them as a mortgage banker, this raises very serious concerns with respect to the representations that were made to Judge Ryan which led to the issuance of the Warrants. I look forward to hearing back from you promptly on this very important issue.

As I have explained to you, my client did everything in this matter pursuant to advice of very competent counsel. I have been informed by his attorneys that, in their view, he is not a "mortgage banker" and that he did not violate rules or statutes. I expect that you will be hearing from his attorneys or their representatives further on this matter and look forward to discussing this situation with you over the next few days. It is in my view based on everything

that I have seen thus far, that it is a serious injustice that Mr. Frost has been charged with these crimes.

I would ask that you share this letter with Attorney General Delaney. This entire prosecution raises serious policy considerations and impacts hundreds of clients of law firms throughout the state.

I look forward to hearing from you.

Sincerely yours,

Cathy J. Green

CJG/lp

Michael Delaney

April 5, 2010

ALEXANDER J. WALKER, JR.
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Michael Delaney, Attorney General
Office of the Attorney General
33 Capitol Street
Concord, NH 03301-6397

In re the Matter of: State of New Hampshire Banking Department and Jeffrey Shaw Frost
New Hampshire Banking Department, (Case No: 10-013)
State of New Hampshire v. Frost, Manchester District Court (Case No. 10-002925)

Dear Attorney General Delaney:

My office represents Jeffrey Frost in the above-referenced matter which is pending before the New Hampshire Banking Department. Cathy Green represents Mr. Frost in the above-referenced criminal matter. The purpose of my letter is to call your attention to: (1) serious violations of my client's constitutional and civil rights committed within the course of investigating and prosecuting these actions, and (2) the significant public policy issue associated with prosecuting individuals for engaging in the kind of real estate transaction done thousands of times each year in New Hampshire.

By way of background, Mr. Frost is a decorated fighter pilot who courageously and honorably served his country in the United States Marine Corps. Thereafter, Mr. Frost worked for many years as a pilot for American Airlines. For the last several years, he has owned and operated his family's real estate development business. Jeff is also a community leader and has served--until he recently had to resign in shame--as Chairman of the Board of Directors of the American Red Cross in Manchester.

Mr. Frost is now the subject of a twenty-three count Banking Department staff petition and a four-count Criminal Complaint because of his involvement and the involvement of his two LLCs in two completely lawful real estate transactions in 2008 and 2009.

The first transaction occurred in September of 2008, when Frost Family, LLC, acting through Mr. Frost, sold real property on Bridge Street in Manchester. After receiving payment at closing for a portion of the purchase price, the LLC, as the owner and seller of the property, executed a promissory note for the balance of the purchase price, which was secured by a mortgage. The LLC was represented by Attorney Biron Bedard of Ransmeir & Spellman.

The second transaction took place in March 2009, when Chretien/Tillinghast, LLC, acting through Mr. Frost, executed an installment sales contract secured by a mortgage for certain lakeside property in Alexandria, New Hampshire. The sale occurred after the lessees of the property exercised an option to purchase which was contained within the underlying lease. The police prosecutor for the town of Plymouth closed the transaction and recorded the mortgage. John Bisson of Cronin & Bisson represented the LLC.

Mr. Robert Recio was one of two lessees who bought the property from Chretien/Tillinghast, LLC. Mr. Recio is an attorney from Connecticut who has been the subject of professional grievances and reprimanded at least once for, among other things, holding himself out as an attorney and a Commissioner of the Superior Court while suspended. It appears that Mr. Recio is currently suspended from the practice of law in Connecticut due to failure to pay certain client fund fees. He has also filed for personal bankruptcy at least five times. After foreclosure proceedings began on the Alexandria property due to non-payment, Mr. Recio, in an effort to stall the foreclosure, filed bankruptcy yet again in November 2009, this time in New Hampshire. Chretien/Tillinghast, LLC sought relief from the automatic stay based on fraudulent misrepresentations in Mr. Recio's bankruptcy petition, including the statement under oath that he had never before filed for bankruptcy. Shortly thereafter, Mr. Recio filed a complaint with your office's Consumer Protection Bureau alleging, among other things, that he was fraudulently induced to enter into the sale for an inflated value. This complaint was forwarded to the Banking Department for investigation.

ıael Delaney

this point, a simple Google search would have revealed that Mr. Recio had been the subject of prior attorney-discipline ievances. A search on the United States Pacer System would have revealed that Mr. Recio had instituted serial bankruptcy filings. Instead, Mr. Recio's complaint set in motion a series of events that led Kathleen Sheehan, an examiner in the Banking Department, to arrive unannounced at the offices of the LLC's attorney—John Bisson—on Thursday, February 18, 2010 demanding immediate review of Attorney Bisson's confidential client files. Ms. Sheehan lacked any documentation that she was in fact entitled to such a sweeping review of Attorney Bisson's files. The following day, Attorney Maryam Torben-Desfosses, a hearings examiner for the Banking Department, faxed Attorney Bisson a copy of Recio's complaint along with a letter. Attorney Bisson spoke with Ms. Torben-Desfosses concerning whether Mr. Frost was even subject to the Banking Department's jurisdiction given that the sale of the property in question was an isolated and private transaction, which did not involve monies being loaned or returned to Mr. Recio. Ms. Torben-Desfosses insisted that Mr. Frost was subject to the Banking Department's jurisdiction and that Attorney Bisson produce the documents that day. Attorney Bisson declined to produce his confidential client files until having an opportunity to speak with his client who was on vacation out of the country with his family.

On Monday, February 22, Attorney Bisson arrived at his law office around 5:00 p.m. to find three police officers and Assistant Attorney General Karen Gorham surrounding the premises and demanding immediate access to Attorney Bisson's client files without so much as a search warrant. Attorney Bisson was forced to wait until 6:30 p.m., when everyone left due to the evident failure to ultimately obtain a search warrant.

It appears that search warrants for Attorney Bisson's office and Mr. Frost's residence were issued on Tuesday, February 23. The handwritten notes on at least one of the warrants, granted by Judge Ryan, state that he granted the warrant based upon Ms. Shaheen's representation that Chretien/Tillinghast, LLC was listed as the "mortgage banker" in the mortgage on file with the Registry of Deeds. The mortgage, in fact, contains no such designation of the LLC. A cursory examination of the information recorded at the Registry of Deeds would have confirmed that fact.

Armed with the search warrant, four or five police officers came back to Attorney Bisson's office after lunch on February 23 accompanied by Attorney Gorham and Ms. Sheehan. Attorney Bisson provided them with a copy of his documents and a privilege log for documents subject to the attorney-client privilege. The police then proceeded to Mr. Frost's house, where they forcibly entered through his front door, causing damage to the door frame, and seized several items of personal property, including Mr. Frost's cell phone and several personal computers.

Mr. Frost was subsequently arrested after the Attorney General's office brought a four-count Criminal Complaint against him on March 9, 2010 in the Manchester District Court. The Banking Department also commenced a twenty-three count Staff Petition against Mr. Frost on March 23 seeking, among other things, $525,000 in civil penalties. On this same day, the Banking Department issued a Show-Cause and Cease and Desist Order against Mr. Frost. The criminal and administrative proceedings were brought against Mr. Frost individually even though the LLCs were the parties to the transactions in question. Meanwhile, although the Bankruptcy Court dismissed Mr. Recio's petition and the foreclosure process has been completed, Mr. Recio remains in the Alexandria property with seven large dogs, who, upon information and belief, have and continue to cause extensive damage to the property. Mr. Recio is now contesting his eviction in the Plymouth District Court.

The purpose of this letter is to impress upon you the egregiousness of the conduct directed towards an upstanding member of our community. The LLCs and Mr. Frost have simply engaged in the kind of isolated private transactions that take place every day in New Hampshire. Nevertheless, in pursuing Mr. Frost, the Banking Department and Attorney General's Office persist in a course of conduct underscoring the manner in which their officers have already flouted their perceived authority. Putting aside the fact that the Banking Department is impermissibly charging Mr. Frost retroactively under the recently amended version of RSA 397-A (which became effective July 1, 2009), and the fact that Mr. Frost (and not the LLCs) is the only person named in the Staff Petition, the Banking Department has exceeded the scope of its regulatory jurisdiction. At the time of the two transactions and now, neither Mr. Frost nor the LLCs were or are subject to the jurisdiction of the Banking Department with respect to these past transactions for the simple reason that neither Mr. Frost nor the LLCs were or are engaged in "the business of" mortgage loans, RSA 397-A:2, I (2005) (amended 2009); RSA 397-A:2, I (Supp. 2009). Each and every alleged violation in the Staff Petition and Criminal Complaint is fatally premised upon the same unsupportable proposition that the two private mortgage transactions--one in 2008 and one in 2009--each on behalf of separate entities, were and are subject Banking Department regulation.

isolated transactions, the continued prosecution of these matters is unwarranted. I raise these issues and request a meeting with you to discuss what might be done about this matter. Not only does the continued pursuit of these matters have serious and lasting implications for Mr. Frost, it raises a larger policy question impacting hundreds of New Hampshire citizens and businesses who engage in similar private-party real estate sales every day, including law firms throughout the State who have, under the Banking Department's strained and untenable interpretation of its regulatory framework, arguably either aided and abetted in the conduct of criminal activity and/or committed malpractice by allowing clients to take back a mortgage in connection with an isolated sale.

If necessary, and based upon our belief that the Banking Department has ranged far beyond its jurisdiction, we are fully prepared to file an action for immediate injunctive and declaratory relief in Superior Court to remedy this situation. I can assure you that once Mr. Frost prevails in such an action, this will mark the beginning, and not the end, of legal proceedings for violation of Mr. Frost's constitutional and civil rights and to clear his good name and reputation.

I look forward to hearing from you shortly.

Very truly yours,

Alexander J. Walker, Jr.

AJW/ljm

cc: Cathy J. Green, Esquire

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GREEN & UTTER
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764 CHESTNUT STREET
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CATHY J. GREEN
PHILIP H. UTTER

TELEPHONE 603-669-8446
FACSIMILE 603-669-9330

April 8, 2010

VIA FACSIMILE: 271-2110
& U.S. MAIL

Karen Gorham, Esq.
Office of Attorney General
33 Capitol Street
Concord, NH 03301

RE: Jeffrey Frost

Dear Karen,

Thank you for your call Tuesday. Enclosed please find a letter from Attorney John Bisson who represented Jeff Frost in connection with the Chretien/Tillinghast transaction as well as a letter from Attorney Biron Bedard who represented the Frost Family LLC on the Cayer sale. I offer you these letters to demonstrate that Mr. Frost (and the LLC) acted without any intent to commit any crime and relied upon the advice of counsel in both of these transactions and in his response to the Banking Department's request to access his records.

By way of background, Mr. Frost is a decorated fighter pilot who courageously and honorably served his country in the United States Marine Corps. Thereafter, Mr. Frost worked for many years as a pilot for American Airlines. Jeff is also a community leader and has served - until he recently had to resign in shame as a result of his arrest - as Chairman of the Board of Directors of the American Red Cross in Manchester.

Both of Jeff's attorneys firmly believe that the transactions in question are not subject to the provisions of 397-A. They both confirm that the details of these transactions were reviewed by them and had they believed that any of Mr. Frost's or the LLC's activities came within the jurisdiction of 397-A, they would have so advised him. Further, Jeff acted under the instructions of his attorney with respect to the documents that had been requested by the Banking Department as confirmed by Attorney Bisson's letter. Jeff relied upon Attorney Bisson's legal advice that they should wait before producing any documents because the Banking Department had no jurisdiction and that they were waiting for a call back from either Commissioner Hildreth or Councilor Wieczorek. Attorney Bisson told Jeff to go on his vacation with the assurance that he would contact him if need be.

I understand that you may have a dispute with the legal advice given to my client. His attorneys stand by their opinions that 397-A does not apply to the two transactions that are

the subject of your complaints. Jeff was not engaged in the business of making or brokering mortgage loans and, thus, is not subject to the jurisdiction of the statute. Whether your interpretation or that of the attorneys who represented him is correct should not be determinative of whether, as a matter of public policy and justice, these charges should remain lodged against Mr. Frost, who was the client in these matters.

You have also mentioned to me that Jeff was a mortgage loan originator at the time of these transactions. In fact, he submitted his mortgage loan originator MU4 application in March 2009 following the Chretien/Tillinghast transaction and later became licensed with the Banking Department on or about April 1, 2009.

Even a quick review of the Registry of Deeds' listings demonstrates that scores of LLC's have, with appearance of counsel, engaged in the same types of transactions as Chretien/Tillinghast, LLC. If your current view that this is criminal behavior is correct, not only are these LLC's and their principals and agents violating the law, but attorneys all over the state are aiding and abetting criminal behavior. If your interpretation of the law is right, then it would be a more reasonable course to educate the lawyers in the state as to the Banking Department's view of these transactions, than to arrest and prosecute clients.

Perhaps it is naive of me (although after 30+ years of criminal defense practice, I would hope not), but I have been telling Jeff that once the Attorney General's Office understands that he was not intentionally violating any laws and that he acted on advice of counsel, I believed that justice would prevail and the charges would be dropped. Every day that goes by is more and more painful for him to face these criminal charges. His reputation has been damaged, and he cannot believe that he is accused of criminal conduct when well respected attorneys were advising him and he relied on their advice.

I would be pleased to discuss this matter with you and hope that your review of the enclosed letters will enable you to nol pros these charges immediately and return the property that was taken from his residence.

If you do not take this action, then I will begin filing my motions on this case. Included in this lengthy list are challenges to the search and arrest warrants based upon the accuracy of the written and oral averments made to the Court, motions with respect to ex post facto and statute of limitations and multiple challenges to the State's position that 397-A applies to Mr. Frost's activities.

I look forward to hearing back from you on this matter and appreciate what I anticipate will be a careful review of the facts and policy as they relate to my client.

Sincerely yours,

Cathy J. Green

CJG/lp
enclosures

CRONIN & BISSON, P.C.
ATTORNEYS AT LAW

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April 1, 2010

Cathy Green, Esquire
Green & Utter, P.A.
764 Chestnut Street
Manchester, NH 03104-3012

Re: Chretien/Tillinghast, LLC

Dear Cathy:

As you know, our office assisted Chretien/Tillinghast, LLC in connection with a transaction that closed in March, 2009. Marc Chretien and Jeff Frost contacted us and explained that Chretien/Tillinghast, LLC was a party to a lease agreement with an option to purchase for a parcel of property located in Alexandria, New Hampshire. Robert Recio and William Secor had exercised the option to purchase and had set a closing date. Mr. Recio and Mr. Secor agreed to make a payment at closing with the balance of the purchase price due over the course of 36 months. The installments were to be secured by a mortgage on the property transferred. Mr. Frost asked our office to prepare a promissory note and mortgage consistent with the terms and conditions of the purchase option.

Mr. Recio testified in court on March 29, 2010 that he negotiated the terms of the purchase and sales agreement with Chretien/Tillinghast, LLC. As an attorney formerly licensed to practice in Connecticut, he knew what he was doing and was comfortable preparing the documents and negotiating the terms. He also testified that he had significant experience in commercial banking before being suspended from the practice of law.

For the March 2009 transaction, we prepared a note and mortgage consistent with the terms proposed by Mr. Recio. The monthly payment under the note was consistent with a request from Mr. Recio. We prepared and forwarded the documents necessary to secure the payments under the purchase agreement to Mr. Frost who, in turn, provided them to the closing company in the area to complete the closing. The Town of Plymouth part time prosecutor acted as the closing attorney and recorded the mortgage. I believe he also issued a lender's title insurance policy.

The Chretien/Tillinghast, LLC transaction was an installment sales contract. No one advanced any funds to Mr. Recio and Mr. Secor to purchase the property. To my knowledge, Chretien/Tillinghast, LLC has never advanced funds to any party to purchase any asset. Thus, the transaction did not involve a mortgage loan under RSA 397-A. Chretien/Tillinghast, LLC is not a mortgage banker as defined in the act. For a number of reasons including that the chapter does not apply to a single secured installment sale, we did not advise our client that registration with the Banking Commission was required.

The Banking Department's concern first arose on February 18, 2010, when Kathleen Sheehan arrived unannounced as I was leaving the office demanding to review my client files. She did not articulate the Department's position except to assert the right to review all documents in my client file. After I explained the nature of the attorney and client privilege and asked to see a copy of the complaint which she did not have, she left.

On February 19, 2010, I first saw the complaint along with a letter from Maryam Torben Desfossess. She faxed it to me at 11:35 a.m. Specifically, she requested "copies of all documents relating to New Hampshire primary residence mortgages brokered and or funded by Chretien/Tillinghast, LLC - Jeffrey Frost and or Marc Chretien by today, February 19, 2010 at 2:00 p.m." I was somewhat surprised to see that the Banking Department was proceeding based solely on the complaint of Mr. Recio. Apparently, no one from the Banking Department felt it necessary to review publicly available records regarding Mr. Recio. If the Department had made even a cursory review, it would have seen ample reason to question both his motives and his credibility. When I received the letter at approximately noon, I immediately contacted Ms. Desfossess.

I first explained that I did not represent Mr. Chretien or Mr. Frost individually. Then, I attempted to explain to Ms. Desfossess why the Chretien/Tillinghast, LLC transaction was not a loan transaction under RSA 397-A. She would not engage in any cordial discussion. Rather, although I cannot quote her exactly, she made it clear that the discussion would only proceed as she directed. Unless I agreed to relinquish my privileged file, we had little to discuss. She was not interested in explaining her position to me. In addition, she refused to listen to my explanation of the character of the installment sales contract at issue. Finally, she was not interested in hearing any information we had which raised concerns about Mr. Recio's credibility or motivations. She offered to extend her deadline to 4:30 p.m. I explained that I would attempt to compile documents and make them available the following Monday.

Shortly after the conversation, John Cronin from my office initiated a telephone conversation with Executive Councilor Raymond Wieczorek. After speaking with Mr. Wieczorek, John asked me to fill Mr. Wieczorek in on the details of the Chretien/Tillinghast matter. I relayed how Ms. Sheehan had appeared the day before unannounced. In addition, I described the substance of and my impression of the conversation with Ms. Desfossess. I do not recall my exact words. However, I certainly conveyed my opinion that the Banking Department had no jurisdiction over the matter at hand. Mr. Wieczorek told me that he would speak with Commissioner Hildreth and that I should not turn over any documents until I heard from either him or Commissioner Hildreth expected early Monday morning.

I relayed this information to Mr. Frost who was leaving for an out of state vacation the next day. Further, I told him that Mr. Wieczorek said we would hear back by Monday morning and that we should wait to hear before producing any documents. When Mr. Frost expressed concern about leaving for vacation, I assured him that I would contact him as soon as I heard anything further and that he should leave for his scheduled vacation. He told me that I should contact him via email and he would then contact me. I then sent a letter to Ms. Desfosses explaining our position.

I did not hear from anyone at the Banking Commission or Mr. Wieczorek's office before two uniformed Manchester Police Officers appeared at approximately 4:55 p.m. on February 22, 2010 to "secure my office for a search warrant." They reported that a representative of the Attorney General's office would soon appear with the warrant. By approximately 6:30 p.m., they left not having obtained the warrant.

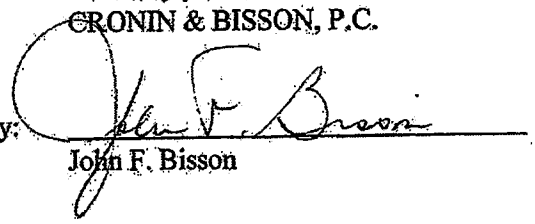
On February 23, 2010, Assistant Attorney General Gorham and Kathleen Sheehan appeared with a number of Manchester Police Officers. This time they had a warrant. We produced non-privileged documents in our Chretien/Tillinghast, LLC file. I also produced a log of privileged documents.

Subsequently, I obtained and reviewed a copy of the affidavit which supported the warrant to search my office. Obviously, I disagree with Ms. Sheehan's conclusion at the heart of the affidavit that she learned that "Chretien/Tillinghast had acted as Mortgage Banker" by reviewing records at the Registry of Deeds. Under the statute, the recording of a document entitled "mortgage" does not bring the transaction into the scope of the statute. Rather, the transaction must be a "mortgage loan" in which the banker's funds are advanced. In my opinion, Ms. Sheehan could not legitimately conclude based on the review of the one and only Chretien/Tillinghast, LLC recorded instrument that the entity is a "Mortgage Banker."

I am disturbed with how the Banking Department has proceeded in this case. Mr. Recio has been allowed to live in a lake side property in Alexandria since July 2009 without making any payment. He misrepresented his ability to complete the installment sales contract in accordance with the terms he proposed and he drafted. He filed bankruptcy to stall a properly noticed foreclosure. He did not tell the truth in his bankruptcy petition. Subsequently, the bankruptcy court dismissed his case and the foreclosure went forward in February. He continues to live rent free in the property and his seven large dogs have destroyed the property. The Alexandria dog officer testified that the smell in the property was "nasty." When Mr. Recio testified earlier this week, he acknowledged he threatened to "be both patient and vindictive" in his response to the foreclosure. Mr. Recio appears to have artfully manipulated the Banking Department to carry through his threat.

I am happy to discuss any other questions that you may have regarding my involvement and the matter at hand and am prepared to assist in any way that I can. In my opinion, the statute does not support any charge against Jeffrey Frost or Chretien/Tillinghast, LLC for unlicensed mortgage banking.

Sincerely yours,
CRONIN & BISSON, P.C.

By: 
John F. Bisson

JFB:bms
cc: Chretien/Tillinghast, LLC

John T. Alexander
Tina L. Annis
Biron L. Bedard [1]
Lisa L. Biklen
Ronald E. Cook [2]
Frank E. Kenison
Garry R. Lane [3]
Lisa M. Lee
Andrew B. Livernois
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[3] Also admitted in Maine and Connecticut

[4] Also admitted in Vermont

[5] Also admitted in Massachusetts

April 7, 2010

Cathy J. Green, Esquire
Green & Utter, P.A.
764 Chestnut Street
Manchester, NH 03104-3012

RE: Frost Family, LLC

Dear Cathy:

I write in follow-up to our conversation regarding Jeff Frost and the Frost Family, LLC. My former firm of Cook & Molan was involved in the acquisition of property located at 313 Bridge Street in Manchester, New Hampshire, back in 2005, by the Frost Family, LLC. Our records show that this was a multi-family residential property that contained at least six units.

In 2007, the Frost Family, LLC obtained approval from the City of Manchester to convert the property into a condominium form of ownership. In conjunction with that, our firm of Cook & Molan reviewed and revised Condominium Declarations and By-Laws for the LLC.

In August of 2008, Jeff Frost contacted our firm of in conjunction with the sale of one of the units to a Cheryl Cayer. He requested that we review and revise a Promissory Note to be used in connection with the sale of the unit, to prepare a Mortgage for the benefit of the LLC in conjunction with the sale of that unit, and to provide such documents as Old Patriot Title (who was conducting the closing on behalf of Ms. Cayer) needed with respect to the condominium.

At no time in 2008 did we believe that this transaction was unlawful or otherwise violated RSA 397-A, and would have advised Jeff Frost if we believed that to be the case.

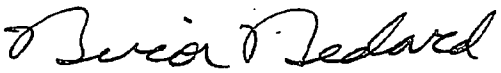
In the many years that Cook & Molan represented Mr. Frost and the Frost Family, LLC, we have never known him to be engaged in the business of making or brokering mortgage loans secured by real property here in the State of New Hampshire. The Cayer transaction does not even constitute a loan as that term is defined under RSA 397-A. If, for some reason, Mr. Frost was considered to be engaged in said business or to have made loans, we had no reason to believe that he was engaged in activity above the *de minimus* level of four loans in any twelve-month period.

Candidly, I am shocked that the State of New Hampshire is pursuing criminal charges for violations of RSA 397-A with respect to two mortgages made by Jeff Frost regarding the sale of his own properties arising out of pass through entities of which he is a member.

If you have any questions, please feel free to call me.

Thank you for your attention to this matter.

Very truly yours,



Biron L. Bedard
Email: bbedard@ranspell.com

BLB/ng

410139

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Jeffrey Frost, et al

v.

New Hampshire Banking Department, et al

NO. 217-2010-CV-288

ORDER

The Court issues the following errata notice with respect to the Court's Order of Dec 21, 2010.

Page 6, line 3-6 should read: "The complexity of the statutes regulating the industry is illustrated by the fact that Petitioners filed an expert report of Attorney W. John Funk, an expert in banking law and regulation, to aid the Court in understanding the statutes at issue in this case", replacing the sentence: " The complexity of the statutes regulating the industry is illustrated by the fact that Petitioners filed an expert report of Attorney W. John Funk, an expert in banking law and regulation, to aid the Court understand the statutes at issue in this case."

SO ORDERED.

1/5/11
DATE

Richard B. McNamara,
Presiding Justice

RBM/

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Jeffrey Frost; Chretien/Tillinghast, LLC; & Frost Family, LLC

v.

New Hampshire Banking Department & Peter Hildreth, Commissioner of the New Hampshire Banking Department

NO. 217-2010-CV-288

ORDER

A preliminary injunction in this matter was granted on June 29, 2010. Following that Order, the parties met, conferred, and agreed that the Court's June 29, 2010 Order on the preliminary injunction, which was based on offers of proof, could be treated as a final judgment so that the Respondents could appeal. Petitioners move for their costs and attorney's fees. For the reasons stated in this Order, the motion is DENIED.

I

The facts established by the parties' offers of proof are set forth in detail in the June 29, 2010 Order and are briefly summarized here. Jeffrey Frost ("Frost") is a Manchester businessperson and a member and designated manager for Chretien/Tillinghast, LLC. ("Chretien"). Frost is also a member of Frost Family, LLC ("Frost Family"). Prior to this dispute, Frost served as Chairman of the Board of Directors at the American Red Cross in Manchester, New Hampshire. Chretien is a New Hampshire Limited Liability Company organized for the purpose of real estate acquisition, holding, and development. Frost Family is a New Hampshire Limited Liability Company focused on estate management and development. Frost Family performs capital improvements,

leases real estate, and on occasion, liquidates real estate.

This dispute arose as the result of two owner-financed real estate transactions, one conducted by Chretien and one conducted by Frost Family. In September 2008, Frost Family sold a condominium to Cheryl Cayer ("Cayer"). In lieu of third-party financing, Cayer chose to proceed with owner financing. At closing, Cayer paid all but $32,000 of the purchase price in cash, and Cayer and Frost Family executed a promissory note, secured by a mortgage, for the $32,000 remaining balance. This transaction is the only mortgage loan that Frost Family has ever made, and it has no present intention to transact any mortgage loans in the future. Previous units sold by Frost Family were sold through a third-party lender, and current units for sale are advertised stating the buyer must have a third-party lender.

The second transaction involved a property owned by Chretien. In September 2008, Robert Recio ("Recio") approached Chretien and expressed his interest in leasing one of Chretien's properties with the option to purchase and a seller-financed second mortgage. After discussions, Recio and his housemate, William Secor ("Secor"), signed a long-term lease with Chretien, and an option to purchase the property, which if exercised, obligated Chretien to provide a first mortgage for $425,000 at 6.25% "fully due and payable on the third anniversary date of the real estate closing and the transfer or title." In December 2008, Recio and Secor decided to purchase the property, ignoring Chretien's suggestion to look for long-term financing, stating that after closing, he would seek to refinance. Attorney John Bisson prepared a note and mortgage for Chretien based on the terms provided by Recio. Recio told Chretien that he was expecting a large insurance settlement that would pay down/off the mortgage. On March 13, 2009,

Chretien executed a promissory note secured by a mortgage for the property Recio and Secor were purchasing. Recio and Secor promised to pay $425,000 at 6.25%, in installments of $300 per month plus interest for the period between April 13, 2009 and March 12, 2012 at the time the balance remaining was due and payable. This transaction is the only mortgage loan that Chretien has ever made, and it does not intend to make any mortgage loans in the future.

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On February 5, 2010, the NHBD received Recio's complaint and learned that Frost executed and completed the transactions for the above referenced mortgages in the name of the LLCs. NHBD began investigating Frost. Subsequently, Frost was served with four Class A misdemeanor criminal complaints on March 9, 2010. On April 1, 2009, Frost became a licensed mortgage loan originator. The NHBD instituted administrative proceedings against Frost in 2010 to determine if Frost's loan originator license should be suspended or revoked, and if any penalties should be imposed, based on the two real estate transactions that occurred before he obtained his license. On March 23, 2010, the NHBD filed a twenty-three count Staff Petition against Frost, which

included an order for him to show just cause why his loan originator licensed should not be revoked. The Order to Show Cause informed Frost that he could request a hearing under RSA 541-A and that an expedited hearing would be scheduled within ten days of that request. The Staff Petition sought penalties under statutes that became effective on July 31, 2009, which is after the date of the relevant transactions.

Frost did not file a request for a hearing with the NHBD, and instead filed Petition for a Preliminary Injunction with this Court. A hearing was held on June 10, 2010, based upon offers of proof. After taking the matter under advisement, the Court granted the motion for a preliminary injunction, finding that RSA 397-A did not give the Banking Department jurisdiction over Mr. Frost, since he was not engaged in the business of making or brokering mortgage loans secured by real property and that the Banking Department could not take action against Mr. Frost for conduct which occurred before April 2009, the date he became a licensed mortgage broker. Following denial of the Defendant's motion to reconsider, the parties agreed that the June 29, 2010 Order would be treated as a final judgment on the merits so that Petitioners could move for attorney's fees and the Defendants could appeal, without delay. On September 27, 2010, the Court approved the parties' agreement.

Petitioners' motion for attorney's fees includes a lengthy section involving investigation of the criminal charges against Frost, and includes a discussion of a motion to suppress granted by Judge Clifford Kinghorn of the Merrimack District Court. Judge Kinghorn's order is dated August 23, 2010, almost 2 months after the preliminary injunction was granted in this case. Only through this post order motion is the Court aware that the search warrant was suppressed and criminal charges brought by the State

have been dismissed.

I

The prevailing rule in New Hampshire is that attorney's fees do not automatically flow in favor of a prevailing civil litigant. See, e.g., Guaraldi v. Trans-Lease Group, 136 N.H. 457, 462 (1992). New Hampshire follows the so-called American Rule; each party is generally responsible for payment of his or her own attorney's bill. Adams v. Bradshaw, 135 N.H. 7, 16 (1991). The American rule allows individuals and small businesses to litigate against larger institutions and the government without fear of financial ruin if they are unsuccessful and allows the legislature, as it has on many occasions, to enact statutes which allow recovery of attorneys' fees to vindicate important state interests. See, e.g., MacDonald, Weibusch on New Hampshire Civil Practice and Procedure, § 52.02 (3rd Ed. 2010).

Under New Hampshire, law attorney's fees may be awarded only by virtue of statutory authorization or agreement between the parties, absent an established exception to the general rule. McGuire v. Merrimack Mut. Ins. Co., 133 N.H. 51, 55 (1990). Exceptions include cases where an individual is forced to seek judicial assistance to secure a clearly defined and established right if bad faith can be established, Harkeem v. Adams, 117 N.H. 687, 691 (1977); where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct; St. Germaine v. Adams, 117 N.H. 659, 662 (1977); or as "compensation for those who are forced to litigate in order to enjoy what a court has already decreed" or who are forced to litigate against an opponent who's position is patently unreasonable. Keenan v. Fearon, 130 N.H. 494, 502 (1988).

Petitioners meet none of these standards. First, the Court cannot find that the Defendants acted in bad faith. They took a legal position which involved complex statutes and their application to a highly regulated industry. The complexity of the statutes regulating the industry is illustrated by the fact that Petitioners filed an expert report of Attorney W. John Funk, an expert in banking law and regulation, to aid the Court in understanding the statutes at issue in this case.

Second, the Court cannot find that the litigation tactics of the Defendants were obstinate or unreasonable. When attorneys' fees are sought, a court must consider whether a litigant engaged in "unjustifiable belligerence or obstinacy" and whether an action is commenced, prosecuted or defended without any reasonable basis in the facts provable by evidence. Grenier v. Barclay Square Commercial Condo. Owner's Ass'n, 150 N.H. 111, 118 (2003). Here, once the Petitioners filed a petition for preliminary injunction, the parties cooperated to conduct the hearing on offers of proof so that a lengthy evidentiary hearing was not necessary. Defendants did not seek burdensome discovery or a trial once the Court ruled against them in the June 29, 2010 Order. Rather, the Defendants essentially stipulated to the factual record so that it could be treated as a judgment on the merits from which they could appeal and the Petitioners could seek attorneys' fees. Compare Allstate Ins. Co. v. Aubert, 129 N.H. 393 (1987); LaMontagne Builders v. Bowman Brook Purchase Group, 150 N.H. 270 (2003).

Third, because of the complexity of the underlying suit, the Court cannot find that the Respondents were forced to litigate a clearly defined right. Again, the fact that Petitioners produced an expert report from Attorney Funk to aid the Court in understanding the statutory scheme and the industry belies that claim.

Petitioners also argue that they are entitled to attorney's fees on the ground that they provided a "substantial benefit" to the public. Bedard v. Town Alexandria, 159 N.H. 740, 744 (2009). However, the New Hampshire Supreme Court has determined that fees should not be awarded pursuant to this exception when the primary purpose of litigating the case is for the Petitioners' own benefit. See, e.g., Simonsen v. Town of Derry, 145 N.H. 382, 387-88 (2000); Taber v. Town of Westmoreland, 140 N.H. 613, 615-16 (1996); compare Claremont Sch. Dist. v. Governor of State of N.H., 144 N.H. 590, 598 (1999). This exception is not applicable to the instant case.

II

Petitioners also seek to recover attorneys' fees on the theory that the State's conduct in related criminal proceedings and issuing search warrants and administrative actions would authorize an award of attorney's fees.

This argument cannot be sustained. In the first place, none of the criminal charges were relied on as a basis for the Court's June 29, 2010 Order. To the extent that Mr. Frost complains that he was served with Class A misdemeanor complaints by an Assistant Attorney General on behalf of the State of New Hampshire, an action against the State for fees or damages would be barred by the doctrine of prosecutorial immunity. See, e.g., Everitt v. Gen. Electric, 156 N.H. 202, 215 (2008); Belcher v. Paine, 136 N.H. 137, 146 (1992). Moreover, the New Hampshire Supreme Court has specifically held that prosecutorial immunity also shields the entity that employs the prosecutor. State v Dexter, 136 N.H. 669, 672 (1993). Under these circumstances, attorney's fees cannot be awarded.

III

Petitioners also seek costs pursuant to Superior Court Rule 87. In particular, they seek costs for Attorney John Funk's expert analysis which was submitted to the Court as an exhibit at the preliminary hearing. The Court agrees that Mr. Funk's analysis was not an unreasonable expense. It was valuable and helpful, and since the case was submitted on offers of proof, it was the functional equivalent of Mr. Funk's testimony at trial. Under the prevailing interpretation of Rule 87(c), expert witness fees directly related to the witness's appearance and testimony in court may be recovered. Martinez v. Nicholson, 154 N.H. 402 (2006); Flannigan v. Prudhomme, 138 N.H. 561 (1994). However, the New Hampshire Supreme Court has consistently refused to award costs against the State of New Hampshire or its agencies and employees. N.H. Motor Transport Ass'n v. State, 150 N.H. 762, 770 (2004); Claremont Sch. Dist., 144 N.H. 590, 593-94 (1999); Foote v. State Personnel Comm., 118 N.H. 640, 644-45 (1978). Under these circumstances, although an award of costs would certainly be justified if Petitioner's opponent were not the State of New Hampshire, costs cannot be awarded.

SO ORDERED.

12/21/10
DATE

Richard B. McNamara,
Presiding Justice

RBM/mrs

The State of New Hampshire

MERRIMACK, SS SUPERIOR COURT

Jeffrey Frost; Chretien/Tillinghast, LLC; & Frost Family, LLC

v.

New Hampshire Banking Department & Peter Hildreth, Commissioner of the New Hampshire Banking Department

NO. 217 2010 CV 288

ORDER

The Petitioners' Motion for a Preliminary Injunction is GRANTED, to the following extent, for the reasons stated in this Order. The Respondents shall not proceed with Banking Department Administrative Proceeding 10-013 against Petitioner Jeffrey Frost.

I. Facts

Based on the parties' offers of proof, the following facts do not appear to be in dispute. Jeffrey Frost ("Frost") is a Manchester businessperson and is a member and designated manager for Chretien/Tillinghast, LLC. ("Chretien"). Frost is also a member of Frost Family, LLC ("Frost Family"). Prior to this dispute, Frost served as Chairman of the Board of Directors at the American Red Cross in Manchester, NH. Chretien is a New Hampshire Limited Liability Company organized for the purpose of real estate acquisition, holding, and development. Frost Family is a New Hampshire Limited Liability Company focused on estate management and development. Frost Family performs capital improvements, leases real estate, and on occasion, liquidates real estate.

This dispute arose as the result of two owner-financed real estate transactions, one conducted by Chretien and one conducted by Frost Family. In September 2008, Frost Family sold a condominium to Cheryl Cayer ("Cayer"). In-lieu of third-party financing, Cayer chose to proceed with owner financing. At closing, Cayer paid all but $32,000 of the purchase price in cash, and Cayer and Frost Family executed a promissory note, secured by a mortgage, for the $32,000 remaining balance. This transaction is the only mortgage loan that Frost Family has ever made, and it has no present intention to transact any mortgage loans in the future. Previous units sold by Frost Family were sold through a third-party lender, and current units for sale are advertised stating the buyer must have a third-party lender.

The second transaction involved a property owned by Chretien. In September 2008, Robert Recio ("Recio") approached Chretien and expressed his interest in leasing one of Chretien's properties with the option to purchase and a seller-financed second mortgage. After discussions, Recio and his housemate, William Secor ("Secor"), signed a long-term lease with Chretien, and an option to purchase the property, which if exercised, obligated Chretien to provide a first mortgage for $425,000 at 6.25% "fully due and payable on the third anniversary date of the real estate closing and the transfer or title." In December 2008, Recio and Secor decided to purchase the property, ignoring Chretien's suggestion to look for long-term financing, stating that after closing, he would seek to refinance. Attorney John Bisson prepared a note and mortgage for Chretien based on the terms provided by Recio. Recio told Chretien that he was expecting a large insurance settlement that would pay down/off the mortgage. On March 13, 2009, Chretien executed a promissory note secured by a mortgage for the

property Recio and Secor were purchasing. Recio and Secor promised to pay $425,000 at 6.25%, in installments of $300 per month plus interest for the period between April 13, 2009 and March 12, 2012, at the time, the balance remaining was due and payable. This transaction is the only mortgage loan that Chretien has ever made, and it does not intend to make any mortgage loans in the future.

In late 2009, Chretien began foreclosure proceedings for non-payment. Recio then filed for bankruptcy, and Chretien sought, and eventually obtained, relief from the automatic stay in Bankruptcy Court based on fraudulent misrepresentations by Recio that he never filed bankruptcy before. Around December 2009, Recio filed a complaint with the Attorney General's Consumer Protection Bureau alleging, among other things, that he was fraudulently induced to enter into the sale with Chretien for an inflated value. This complaint was forwarded to the New Hampshire Banking Department ("NHBD") for investigation.

On February 5, 2010, the NHBD received Recio's complaint and learned that Frost executed and completed the transactions for the above referenced mortgages in the name of the LLCs. NHBD began investigating Frost. Subsequently, Frost was served with four Class A misdemeanor criminal complaints on March 9, 2010. The complaints are for: 1) unlicensed mortgage banking for the 2008 transaction; 2) unlawfully servicing the loan for the 2008 transaction; 3) unlicensed mortgage banking for the March 13, 2009 transaction; and 4) violating the Banking Commissioner's November 13, 2006 Order, Guidance on Nontraditional Mortgage Product Risks, by accepting a $50,000 payment and issuing a mortgage to Recio for the terms discussed previously.

On April 1, 2009, Frost became a licensed mortgage loan originator. The NHBD

instituted administrative proceedings against Frost in 2010 to determine if Frost's loan originator license should be suspended or revoked, and if any penalties should be imposed, based on the two real estate transactions that occurred before he obtained his license. On March 23, 2010, the NHBD filed a twenty-three count Staff Petition against Frost, which included an order for him to show just cause why his loan originator licensed should not be revoked. The Order to Show Cause informed Frost that he could request a hearing under RSA 541-A and that an expedited hearing would be scheduled within ten days of that request. The Staff Petition seeks penalties under statutes that became effective on July 31, 2009, which is after the date of the relevant transactions.

Frost did not file a request for a hearing with the NHBD, and instead filed the instant Petition. Frost alleges that the NHBD does not have jurisdiction over this matter, and that the NHBD's penalties and sanctions are unconstitutional because the statute, RSA 397-A:17, VIII, IX, is being applied retroactively, in violation of Part I, Article 23 of the New Hampshire Constitution. In the alternative, he argues that RSA 397-A is void for vagueness.

II. The Preliminary Injunction Standard

An injunction is an extraordinary remedy. N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). In order to obtain an injunction, the Petitioners must establish: 1) likelihood of success on the merits; 2) immediate danger of irreparable harm; and 3) that they have no adequate remedy at law. Id. Further, an injunction must be in the best interest of the public. See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13-14 (1987). An injunction is an equitable remedy which is discretionary. Mottolo, 155 N.H. at 63.

A. Likelihood of Success on the Merits.

The version of RSA 397-A relied on by the State grants jurisdiction to the NHBD over a person who engages "*in the business* of making or brokering mortgage loans secured by real property." RSA 397-A:2, I (emphasis added). Neither Frost nor either LLC can be said to be in the business of making or brokering mortgage loans, by virtue of a single isolated transaction. The statute does not contain a definition of the phrase "in the business." However, "business" is commonly defined as "a commercial enterprise carried on for profit, a particular occupation or *employment habitually engaged in* for livelihood or gain." Black's Law Dictionary, 192 (7th ed. 1999) (emphasis added). The New Hampshire Supreme Court recently upheld a trial court's determination that "while the petitioners on occasion sell manufactured housing units, they are not in the business of selling such units, but rather are in the business of owning and managing manufactured housing parks." Green Meadows Mobile Homes, Inc. v. City of Concord, 156 N.H. 394, 397 (2007). In Currier v. Tuck, 112 N.H. 10, 12 (1972) the Court held that an occasional act of loaning money as an accommodation to a customer or friend does not constitute engaging in the business of making loans.

This analysis of the phrase "in the business" is supported by the definitional parts of the statute. RSA 397-A:1 defines the terms "mortgage banker," "mortgage broker," and "originator."

> "Mortgage banker" means a person not exempt under RSA 397-A:4 who for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly: (a) Makes or originates mortgage loans as payee on the note evidencing the loan. (b) Advances, or offers to advance, or makes a commitment to advance the banker's own funds for **mortgage loans**, or closes **mortgage loans** with the banker's own funds. (c) Otherwise engages in the business of **funding mortgage loans.**

RSA 397-A:1, XII (emphasis added).

> "Mortgage broker" means a person not exempt under RSA 397-A:4 who for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly: (a) Acts as an intermediary, finder, or agent of a lender or borrower for the purpose of negotiating, arranging, finding, or procuring **mortgage loans**, or commitments for **mortgage loans.** (b) Offers to serve as agent for any person in an attempt to obtain a mortgage loan. (c) Offers to serve as agent for any person who has money to lend for a mortgage loan.

RSA 397-A:1, XIII (emphasis added).

> "Originator" . . . means an individual who for direct or indirect compensation or gain or in the expectation of direct or indirect compensation or gain, takes a mortgage application or offers, negotiates, solicits, arranges, or finds a mortgage loan or who assists a consumer in obtaining or applying to obtain a mortgage loan by, among other things, advising on loan terms (including rates, fees, and other costs), preparing loan packages, or collecting information on behalf of the consumer with regard to a mortgage loan or who offers or negotiates terms of a residential mortgage loan. No individual may act as an originator for more than one [licensee].

RSA 397-A:1, XVII(a).

A person must be engaged in the business of mortgage lending in order for the Act to apply. Based on the single and plural uses of the word "loan" in the statutes, a single transaction is not intended to be covered by the Act. There is no dispute that the LLCs were not acting as an agent, intermediary, or finder for the mortgage loans in question, but instead acted on their own behalf. Therefore, the LLCs were not mortgage brokers. Since the LLCs were not mortgage brokers, Frost could not be an originator for a mortgage broker while acting in his capacity of manager/member of the respective LLCs.

The State argues that it has jurisdiction over Frost because he became a licensed mortgage originator in April 2009. The Court agrees that the NHBD would have jurisdiction over Frost after the date he became a mortgage originator. NHBD would also have jurisdiction to penalize Frost if he had submitted a false application. Here,

however, based on the Court's interpretation of the statute and the apparently undisputed facts, there is no doubt that Frost did not violate RSA 397-A. Further, because he did not violate the statute, he had no obligation to disclose those transactions. While the NHBD may have jurisdiction over Frost because he is now a loan originator, it may take no action against him based on the September 2008 or the March 2009 transactions.[1] Therefore, the Petitioners have established that they are likely to succeed in their claim for injunctive relief.

B. Immediate Threat of Irreparable Harm

The Petitioners have each alleged that they continue to suffer reputational harm based on NHBD's allegations, which have been publicized through NHBD's press releases. The Petitioners allege that this reputational harm is continuing to threaten their ability to do business. Mr. Frost, specifically, has suffered damage to his reputation, which resulted in his resignation as Chairman of the Board of Directors for the American Red Cross. The NHBD has suspended Frost's originator license, which he claims has caused severe hardship to his ability to derive income from his business. Petitioners have filed a sealed memorandum, buttressing their claim of irreparable harm, which the Court credits, but which is not necessary to this decision.

[1] The Respondents seek to impose penalties against Frost on transactions that occurred prior to the effective date of RSA 397-A. The statutes did not become effective until July 31, 2009. There is a presumption that a statute will apply prospectively when it affects substantive rights. Estate of Sharek, 156 N.H. 28, 30 (1986). Where legislation expressly states what date it shall take effect it is assumed to apply as of that date. In re Goldman, 151 N.H. 770, 772 (2005). Considering the express language regarding the effective date of the statute and the general rules of statutory interpretation, there is little doubt that the penalties the NHBD seeks to impose on Frost cannot be applied. Indeed if any other interpretation were made, then the legislation would violate Part I, Article 23 of the New Hampshire Constitution. It is well settled that unconstitutionally retrospective legislation is that which takes away or impairs vested rights, acquired under existing laws, or creates new obligations or imposes a new duty or attaches a new disability in respect to transactions past. See, e.g., Burrage v. N.H. Police Standards and Training Council, 127 N.H. 742, 746 (1986); Woart v. Winnick, 3 N.H. 473, 475-76 (1826). However, since the NHBD may not impose any penalties on Frost, the retrospective nature of the proposed sanction is not necessary to the Court's decision.

Petitioners have met their burden of showing irreparable harm. First, "[b]ecause injuries to goodwill and reputation are not easily quantifiable, courts often find this type of harm irreparable." See, e.g., Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 217 F.3d 8, 13 (1st Cir. 2000); K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989); Camel Hair & Cashmere Inst. v. Associated Dry Goods Corp., 799 F.2d 6, 14-15 (1st Cir. 1986). The Court agrees that harm to reputation is irreparable harm.

Second, "[n]o proceeding at law can afford an adequate remedy for the destruction of one's business." Dingley v. Buckner, 11 Cal. App. 181, 183 (1909). See e.g., Engine Specialties, Inc. v. Bombardier, Ltd., 454 F.2d 527, 531 (1st Cir. 1972) ("An injunction is proper to prevent the threatened extinction of a business."); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (recognizing that the destruction of a business is an irreparable injury which can be appropriately remedied with injunctive relief). Requiring the Petitioners to exhaust administrative remedies before seeking judicial review is unreasonable. As a practical matter, since the entire issue is apparently interpretation of RSA 397-A, there is no reason for this Court to defer to an administrative agency. See Thompson v. N.H. Bd. of Medicine, 143 N.H. 107, 110-11 (1998). Failure to exercise the Court's equitable jurisdiction could lead to the destruction of the business of both LLCs and cause irreparable harm to all involved.

C. Adequate Remedy at Law

"Generally, parties must exhaust their administrative remedies before appealing to the courts." McNamara v. Hersch, 157 N.H. 72, 74 (2008). However, the exhaustion of remedies rule "is flexible, and recognizes that exhaustion is not required [in] some circumstances." Id. (citing Metzger v. Town of Brentwood, 115 N.H. 287, 290 (1975). The New Hampshire Supreme Court has established that "[a]dministrative remedies

must be exhausted when the question involves the proper exercise of administrative discretion." Konefal v. Hollis/Brookline Coop. Sch. Dist., 143 N.H. 256, 259 (1998).

> When a constitutional question is implicated in an administrative context, courts often require exhaustion based on the important prudential principle that a court should not resolve a constitutional question if a dispute could be resolved on another basis that avoids the need to resolve the constitutional question.

Id. (internal quotation omitted). Here, the parties do not dispute the facts. There is no question as to agency discretion because the only question to be resolved one of statutory interpretation.

The Superior Court may exercise its equitable powers in place of an administrative hearing if allowing the case to continue through the administrative process would result in severe repercussions for petitioners. Thompson, 143 N.H. at 111 (holding that the Superior Court had equitable jurisdiction to review a Board of Medicine decision prior to the imposition of sanctions because the petitioner would suffer severe repercussions and "most likely would be unable to recover lost income and a decreased patient base during the appeal period"). Given the grave harm to Petitioners if the NHBD proceeding continues, it is appropriate for the Superior Court to intervene.

An administrative appeal is not required where the action raises a question that is "peculiarly suited to judicial rather than administrative treatment and no other adequate remedy is available." McNamara, 157 N.H. at 74 (citing Olson v. Town of Litchfield, 112 N.H. 261, 262, (1972)). "Judicial treatment may be particularly suitable when the constitutionality or validity of an ordinance is in question. . . ." Id. (citation omitted). The issues in this case focus on the meaning of RSA 397-A, the applicability of RSA 397-A, and whether or not the RSA 397-A applies retroactively. Because these

issues are primarily legal, rather than factual, determinations, they are particularly suited for judicial review. Issues, such as those presented in this case, do not require "specialized administrative understanding". See McNamara, 157 N.H. at 74.

D. Public Interest

It is in the public interest to have disputes resolved promptly. Here, because the only question before the Court is one of law, the Superior Court is best situated to resolve the dispute. If the Court fails to act pending an administrative hearing, a resolution would be delayed significantly, with correlative harm to the petitioners, which would be inconsistent with their right to due process of law. UniFirst, 130 N.H. at 14.

III. Conclusion

Petitioners have established a reasonable likelihood of success on the merits, irreparable harm, and that there is no adequate remedy at law. The grant of injunctive relief is in the public interest. Accordingly, the Motion for a Order and Preliminary Injunction must be granted.

SO ORDERED.

6/29/10
DATE

Richard B McNamara
Richard B. McNamara,
Presiding Justice

THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
No. 2011-121

JEFFREY FROST & a.

v.

COMMISSIONER, NEW HAMPSHIRE BANKING DEPARTMENT & a.

Argued: November 10, 2011
Opinion Issued: March 16, 2012

Devine, Millimet & Branch, P.A., of Manchester (Alexander J. Walker and Joshua M. Wyatt on the brief, and Mr. Walker orally), for the petitioners.

Michael A. Delaney, attorney general (Danielle L. Pacik, assistant attorney general, on the brief, and Lisa M. English, assistant attorney general, orally), for the respondents.

CONBOY, J. The respondents, the Commissioner of the New Hampshire Banking Department and the New Hampshire Banking Department (collectively, the Department), appeal an order of the Superior Court (McNamara, J.) permanently enjoining the Department from pursuing an administrative proceeding against Jeffrey Frost on the ground that the Department lacked subject matter jurisdiction. The petitioners, Frost, Chretien/Tillinghast, LLC, and Frost Family, LLC, cross-appeal, arguing that the trial court erred by denying their request for attorney's fees. We affirm.

The statutory backdrop to this case is as follows. RSA chapter 397-A (2006) (amended 2009, 2011) governs the licensing of nondepository first mortgage bankers and brokers. In response to the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the SAFE Act), 12 U.S.C. § 5101, which enhanced consumer protection by requiring states to pass legislation establishing minimum standards for licensing and registration of state-licensed mortgage loan originators, the New Hampshire legislature amended RSA chapter 397-A (Supp. 2009). Accordingly, effective April 1, 2009, it became unlawful for any individual to transact business in New Hampshire as a mortgage loan originator unless such individual obtains a license from the Department. See RSA 397-A:3, I. In addition, effective July 31, 2009, the statute authorizes license suspension and revocation, as well as penalties for violation of the provisions of the chapter.

The following facts are drawn from the record. Frost is a member and designated manager of Chretien/Tillinghast, LLC (Chretien), and a member of Frost Family, LLC (Frost Family). Chretien and Frost Family (collectively, the LLCs) are New Hampshire limited liability companies organized for the purpose of real estate acquisition, holding, and development. The underlying dispute arose as the result of two seller-financed real estate transactions, one conducted by Frost Family and the other by Chretien.

In September 2008, Frost Family sold a condominium to Cheryl Cayer for $137,000. In lieu of third-party financing, Cayer requested $32,000 in seller financing from Frost Family. At closing, Cayer executed a promissory note to Frost Family, secured by a mortgage, for the financed amount. Cayer paid the remaining purchase price in cash. This transaction is the only mortgage loan that Frost Family has ever made.

The second transaction involved a property owned by Chretien. In September 2008, Robert Recio expressed interest in leasing one of Chretien's properties with an option to purchase. The parties agreed on a purchase price of $475,000. After further discussions, Recio and William Secor signed a long-term lease with Chretien. At the time of the lease execution, the parties also executed an option to purchase the property, which, if exercised, obligated Chretien to provide a first mortgage loan for $425,000 at 6.25% interest, which was "fully due and payable on the third anniversary date of the real estate closing and the transfer of title."

In December 2008, Recio and Secor decided to exercise the option to purchase the property. Recio rejected Chretien's suggestions to look for long-term financing, and instead opted to refinance after closing. In addition, Recio represented to Chretien that he was expecting a large insurance settlement, which would help pay down or satisfy the mortgage.

On March 13, 2009, Recio and Secor executed a promissory note secured by a mortgage to Chretien. Under the terms of the note, Recio and Secor promised to pay $425,000 at 6.25% interest, in monthly payments of $300, plus interest, until March 2012, when the remaining balance was fully due and payable. This transaction is the only mortgage loan Chretien has ever made.

In late 2009, Frost, as manager of Chretien, initiated foreclosure proceedings on the property Chretien sold to Recio and Secor. In response, Recio filed for bankruptcy. In the bankruptcy court, Chretien sought and was granted relief from the automatic stay based on fraudulent misrepresentations by Recio that he had not previously filed for bankruptcy protection. Shortly thereafter, Recio filed a complaint with the Consumer Protection Bureau of the Attorney General's Office alleging, among other things, that Frost and Chretien fraudulently induced him to enter into the sale for an inflated price. Subsequently, Frost was charged with four class A misdemeanors alleging criminal violations of RSA chapter 397-A (prohibiting, among other things, unlicensed mortgage banking). The complaint was also forwarded to the Department. Upon receipt of Recio's complaint, the Department initiated an investigation, which disclosed the two seller-financed transactions by the LLCs.

In March 2009, after both instances of seller-financing, Frost submitted a loan originator license application to the Department. On April 1, 2009, Frost became a licensed mortgage loan originator, see RSA 397-A:1, XVII (Supp. 2009) (amended 2011) (defining "Originator"), sponsored by Academy Mortgage, a licensed mortgage banker, see RSA 397-A:1, XII (2006) (defining "Mortgage banker").

In 2010, the Department initiated administrative proceedings against Frost through an "Order to Show Cause with Immediate Emergency Suspension and Cease and Desist Order," as well as a "Staff Petition." In these initiating documents, the Department alleged that although Frost disclosed on his mortgage loan originator's license application that "he was and still is self-employed through" Frost Family, he failed to disclose that Frost Family was a "financial services-related employment." It alleged that "[i]n fact Frost Family served as either the mortgage broker or mortgage banker for [the Cayer] mortgage loan," and that Frost Family was "servicing [the Cayer] mortgage loan without a New Hampshire mortgage servicer registration." See RSA 397-B:4, I (Supp. 2009) (describing registration requirements for mortgage servicing companies). The Department alleged further that "Frost failed to include [on his application] . . . that he is also part owner of [Chretien]," which conducted a mortgage loan transaction with Recio and Secor, and that Chretien "continues to actively service this . . . residential mortgage loan" without a valid mortgage servicer registration or a valid mortgage banker license. See id. Finally, the Department alleged that "Frost, by continuing his employment with both [LLCs]

while employed by mortgage banker licensee, Academy Mortgage, as a licensed Mortgage Loan Originator, work[ed] for more than one mortgage banker or mortgage broker and mortgage servicer and [was] therefore in violation of RSA 397-A:1, XVII(a), RSA 397-A:3, III, and/or RSA 397-B:1, IV-c."

At the time the administrative proceedings were initiated, the Department notified Frost that he could request a hearing with the Department under RSA chapter 541-A (2007). Frost did not file such a request. Instead, the petitioners initiated a declaratory judgment proceeding in superior court, which included a request for a temporary restraining order. The petitioners contended that the respondents lacked subject matter jurisdiction to proceed against Frost and violated the State Constitution's prohibition against retrospective laws by seeking to impose a $25,000 fine for each alleged violation.

After a hearing, the trial court granted the preliminary injunction, concluding that "[w]hile the [Department] may have jurisdiction over Frost because he is now a loan originator, it [could] take no action against him based on the September 2008 or the March 2009 transactions." Further, the trial court concluded that since the Department "may not impose any penalties on Frost," it did not need to consider the issue of the retrospective nature of the sanctions.

Subsequently, the parties agreed to treat the preliminary injunction order as a final order. See Super. Ct. R. 161(b)(2). Prior to entry of the final order, however, the trial court allowed the petitioners to file a motion for attorney's fees. The petitioners filed such a motion, which the trial court denied.

I. The Department's Appeal

The Department first argues that the petitioners "should not have been permitted to bypass the statutory administrative procedures by seeking a preliminary and permanent injunction in the superior court." The Department maintains that under the doctrine of primary jurisdiction, the trial court should have abstained from intervening and required the petitioners to exhaust their administrative remedies.

Conversely, the petitioners maintain that the trial court properly exercised its authority to grant both a preliminary and permanent injunction because the Department lacks subject matter jurisdiction under RSA chapter 397-A to regulate the LLCs. Specifically, they argue that because resolution of this issue requires statutory interpretation, and the superior court has authority to issue declaratory findings on issues of law, the trial court did not err.

The doctrine of primary jurisdiction "provides that a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by the specialized administrative agency that also has jurisdiction to decide it." Wisniewski v. Gemmill, 123 N.H. 701, 706 (1983).

> [The doctrine] is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. It applies to claims that contain some issue within the special competence of an administrative agency. Thus, under the primary jurisdiction doctrine, courts, even though they could decide, will in fact not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision.

2 Am. Jur. 2d Administrative Law § 480, at 407 (2004). "Where[, however,] the issue or issues . . . involve purely questions of law, the matter will not be referred to an agency." 73 C.J.S. Public Administrative Law and Procedure § 77, at 270 (2004). Because the decision to refrain from exercising its jurisdiction "rests in the sound discretion of the trial judge," Dolan v. Utica Mut. Ins. Co., 630 F. Supp. 305, 308 (D. Mass 1986), we review the court's decision under an unsustainable exercise of discretion standard. See Baykeeper v. NL Industries, Inc., 660 F.3d 686, 690 (3d Cir. 2011) ("We review a district court's decision to abstain on primary jurisdiction grounds . . . for abuse of discretion."); GCB Communications v. U.S. South Communications, 650 F.3d 1257, 1262 (9th Cir. 2011) ("We review a district court's denial of a request to refer a case to an agency under the primary jurisdiction doctrine for abuse of discretion."); TON Services, Inc. v. Qwest Corp., 493 F.3d 1225, 1239 (10th Cir. 2007) ("This court applies an abuse of discretion standard to the district court's decisions to invoke the primary jurisdiction doctrine and to either stay or dismiss the action without prejudice."); see also State v. Lambert, 147 N.H. 295, 296 (2001).

In Wisniewski, the defendants diverted the flow of a river abutting the plaintiffs' property and theirs without prior authorization by the New Hampshire Water Resources Board. Wisniewski, 123 N.H. at 704. Upon learning of the defendants' actions, the board ordered them to return the river to its original flow and restore the affected area. Id. Later, however, the board voted to reconsider its order and deferred further action on the issue until the defendants submitted a permit application and detailed plans for the diversion of the river. Id. No plan was ever submitted, but the board took no further action. Id.

The plaintiffs brought an action in superior court for damages caused by the river's diversion. Id. The defendants moved to dismiss the plaintiffs' claim, arguing the trial court lacked jurisdiction over the action because the board had exclusive jurisdiction over matters involving state waters. Id. at 705. The superior court granted the defendants' motion, and the plaintiffs appealed. Id.

On appeal, we reversed, concluding that the legislature, in enacting RSA chapter 483-A, did not intend "to vest exclusive jurisdiction over state waters in the board and to eliminate the common law right of a property owner to bring an action for a violation of its riparian rights when the board has not authorized the filling or dredging in state waters." Id. Moreover, we rejected the defendants' alternative argument that the trial court's order should have been affirmed under the doctrine of primary jurisdiction. Id. at 706. We concluded that the doctrine was "inapplicable . . . because RSA chapter 483-A granted the water resources board no jurisdiction over disputes between private parties involving an infringement of riparian rights when the filling and dredging was not given prior authorization by the board." Id.

Similarly, if RSA chapter 397-A does not grant the Department jurisdiction over the two transactions at issue here, there is no need for the court to await the outcome of the Department's administrative proceedings centered on these transactions. See 5 G. J. MacDonald, Wiebusch on New Hampshire Civil Practice and Procedure, § 62.04, at 62-4, 62-5 (noting agencies' powers "come solely and directly from the statutes that create them or give them authority and from the necessary implications of those statutes"). Because a determination of the Department's jurisdiction requires statutory analysis, the trial court could properly resolve this legal issue. See 73 C.J.S., supra § 77, at 270 (noting no referral to agency where agency lacks jurisdiction over the matter). While the dissent apparently acknowledges that the doctrine of primary jurisdiction is discretionary, it nevertheless maintains that in circumstances such as those here, where agency action is pending, the trial court's discretion is limited. We do not agree that such limitation is warranted here. We conclude, therefore, that the trial court's decision not to refrain from exercising its jurisdiction did not constitute an unsustainable exercise of that discretion.

We note that our decision here does not alter our law regarding exhaustion of administrative remedies. Whenever a statute provides a procedure for appeal or review of an administrative agency's decision, that procedure is exclusive and must be followed. See Nashua v. Public Utilities Commission, 101 N.H. 503, 506-07 (1959); 2 Am. Jur. 2d. Administrative Law § 475, at 403 (2004) ("[W]here a statute requires exhaustion of administrative remedies a court has no jurisdiction to review an interlocutory order and the exhaustion requirement is not a matter for the court's discretion."). Thus, before an agency decision may be reviewed, administrative remedies typically must be exhausted. See Konefal v. Hollis/Brookline Coop. School Dist., 143 N.H. 256, 258 (1998) (requiring plaintiff to exhaust her administrative remedies before the PELRB where her claims required resolution of disputed fact, and were therefore exclusively within administrative discretion).

For example, RSA 397-A:7 provides that an applicant who is denied a mortgage lending license by the banking commissioner may appeal the decision in accordance with RSA chapter 541, the Administrative Procedure Act. See RSA 541:22 (2007) ("No proceeding other than the appeal herein provided for shall be maintained in any court of this state to set aside, enjoin the enforcement of, or otherwise review or impeach any order of the [agency], except as otherwise specifically provided."). Thus, under this section, a petitioner must exhaust administrative remedies before seeking judicial review. 5 G.J. MacDonald, supra § 62.28, at 62-28 ("When review under RSA chapter 541 is authorized, it is the exclusive means of challenging an agency's decision.").

By contrast, RSA 397-A:17 (mortgage license revocation and suspension) does not set forth a similar review procedure. Rather, this section simply outlines the procedural steps in the revocation or suspension process. Accordingly, there is no exclusive review process that Frost was required to exhaust.

Assuming, however, that RSA 397-A:17 implies exclusive administrative review remedies, here, exhaustion is not required. "We have recognized that the exhaustion of administrative remedies doctrine is flexible, and that exhaustion is not required under certain circumstances." Konefal, 143 N.H. at 258; see Metzger v. Brentwood, 115 N.H. 287, 290 (1975). For example, in Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140 (1998), we explained that "[a] party is not required to exhaust administrative remedies where the issue on appeal is a question of law rather than a question of the exercise of administrative discretion." Pheasant Lane Realty Trust, 143 N.H. at 141-42 (quotation omitted); see also Bedford Residents Group v. Town of Bedford, 130 N.H. 632, 639 (1988) (where the issue is a question of law, such as the interpretation of a statute, exhaustion is not necessarily required). Thus, here, where an issue of law is dispositive, the trial court sustainably exercised its discretion to maintain jurisdiction.

Next, the Department contends that the trial court erred in enjoining its administrative proceedings against Frost. Specifically, the Department challenges the trial court's interpretation of RSA chapter 397-A. In reaching its decision to exercise its equitable powers to grant temporary relief, the trial court concluded that the petitioners demonstrated a likelihood of success on the merits. The trial court reasoned that since none of the petitioners could "be said to be in the business of making or brokering mortgage loans, by virtue of a single isolated transaction," RSA chapter 397-A was inapplicable. In addition, the trial court found that without an injunction, the petitioners had no adequate remedy at law and would suffer irreparable harm. We will uphold the issuance of an injunction absent an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact. N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007).

The Department argues that the trial court misinterpreted RSA chapter 397-A. The Department maintains that the chapter applies to all residential mortgage transactions that are not specifically exempt under RSA 397-A:4 (exempting certain classes of persons from licensing requirements). It argues that mortgage loans executed by the LLCs were not exempt "because those companies were not . . . 'natural person[s],'" so licensure was required. See RSA 397-A:4, II (exempting "[a]ny natural person making not more than 4 first mortgage loans within any calendar year with the person's own funds and for the person's own investment without an intent to resell such mortgage loans").

We review the trial court's statutory interpretation de novo. Fog Motorsports #3 v. Arctic Cat Sales, 159 N.H. 266, 267 (2009). We are the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole. Kenison v. Dubois, 152 N.H. 448, 451 (2005). When examining the language of the statute, we ascribe the plain and ordinary meaning to the words used. Fog Motorsports #3, 159 N.H. at 268. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. We also interpret a statute in the context of the overall statutory scheme and not in isolation. Id.

RSA 397-A:2 provides in pertinent part that:

> This chapter shall provide for the department's regulation of persons that engage in the business of making or brokering mortgage loans secured by real property located in the state of New Hampshire, which is or shall be occupied in whole or in part as a place of residence by the borrower and which consists of not more than 4 living units.

RSA 397-A:2, I (emphasis added). Thus, by its plain and unambiguous language, the statute grants the Department jurisdiction only over "persons that engage in the business of making or brokering mortgage loans." The qualification that a person be a natural person relates not to this jurisdictional predicate, but rather to the exemption set forth in RSA 397-A:4, II. Because our analysis focuses on the scope of the Department's subject matter jurisdiction under RSA chapter 397-A, we need not consider, as the dissent suggests, the exemptions delineated in RSA 397-A:4. The question, then, is whether either of the LLCs was a person "engage[d] in the business of making or brokering mortgage loans" by virtue of a single isolated transaction, thereby subjecting Frost, as its agent, to the Department's administrative proceedings. We agree with the trial court's conclusion that the LLCs were not engaged in the business of making mortgage loans.

The statute does not define the phrase "engage in the business." Generally, however, "business" is defined as "transactions, dealings, or intercourse of any nature." Webster's Third New International Dictionary 302 (unabridged ed. 2002) (defining "business"); see also Black's Law Dictionary 226 (9th ed. 2009) (defining "business" as "[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain" (emphasis added)). Thus, to "engage in the business" implies multiple transactions or dealings, rather than a single incident.

Our case law supports the contention that a single mortgage lending transaction does not constitute being "in the business" of making mortgage loans. In Green Meadows Mobile Homes v. City of Concord, 156 N.H. 394, 397 (2007), we held that the petitioners were not "dealer[s]" because "while the petitioners on occasion [sold] manufactured housing units, they [were] not in the business of selling such units, but rather [were] in the business of owning and managing manufactured housing parks." Id. (quotations and brackets omitted). Similarly, in Hughes v. DiSalvo, 143 N.H. 576, 578 (1999), we concluded that the plaintiff, who rented and attempted to sell her real property through a lease and sales agreement, did not violate the Consumer Protection Act because remedies under the Act are not available when the subject transaction is strictly private in nature, and not undertaken in the ordinary course of a trade or business. Thus the plaintiff's involvement in a single transaction was insufficient to constitute engagement in trade or commerce. Id. at 578-79 ("The plaintiff was not a real estate professional engaged in the business of renting or selling properties."); cf. Currier v. Tuck, 112 N.H. 10, 12 (1972) ("It has been held that an occasional isolated act of loaning money as an accommodation to a customer or friend is not engaging in the business of making loans under similar statutes.").

Finally, the subsequent legislative history, while not controlling, supports our construction. See Franklin v. Town of Newport, 151 N.H. 508, 512 (2004). In response to the federal SAFE Act, the New Hampshire legislature initially narrowed the exemptions for seller-financing to exclude from the licensing requirements only "[a]ny individual who offers or negotiates terms of a residential mortgage loan with or on behalf of an immediate family member of the individual," or "[a]n individual who offers or negotiates terms of a residential mortgage loan secured by a dwelling that served as the individual's residence." RSA 397-A:4, III-IV (Supp. 2009).

Subsequently, however, section four was again amended. Effective July 1, 2011, RSA 397-A:4 (Supp. 2011) was amended to provide as follows:

> The provisions of this chapter shall not apply to . . . [a]n owner of real property who in any 12 consecutive month period makes no more than 3 mortgage loans to purchasers of the property for all or part of the purchase price of the real estate against which the mortgage is secured . . . .

RSA 397-A:4, VI; Laws 2011, 212:1. The purpose of the amendment was to combat the "excessive enforcement of the SAFE Act," see RSA 397-A (2009), and to "restore common sense to New Hampshire law" after the July 2009 amendments "harshly eliminated any legal commerce in most private residential lending." N.H.H.R. Jour. 1579 (2011). With this amendment, the legislature has made clear that the statute applies only to persons who make numerous loan transactions per year.

We conclude, therefore, that in context, "engag[ing] in the business" of mortgage lending requires more than a single isolated transaction. Because each of the LLCs conducted only one mortgage lending transaction, neither "engage[d] in the business of making or brokering mortgage loans," RSA 397-A:2, I, and, thus, Frost had no obligation to disclose the two transactions on his license application. Moreover, neither of the LLCs was a mortgage banker or mortgage broker, see RSA 397-A:1, XII-XIII, so Frost did not "work[ ] for more than one mortgage banker or mortgage broker and mortgage servicer . . . ." Therefore, although Frost became subject to the Department's regulation when he became a licensed mortgage loan originator, after the two seller-financed transactions by the LLCs occurred, he is not subject to disciplinary action by the Department based upon those transactions.

Given our holding herein, and the fact that penalties were not, in fact, imposed on Frost, we need not address the Department's argument that its application of the suspension and penalty provisions set forth in RSA 397-A:14 and RSA 397-A:17 would not have violated Part I, Article 23 of the New Hampshire Constitution. See N.H. CONST. pt. I, art. 23 ("Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.").

We conclude, therefore, that the trial court sustainably exercised its discretion by enjoining the Department from taking disciplinary action against Frost with respect to the LLCs' single mortgage lending transactions. Our decision, however, does not otherwise limit the Department's regulatory authority over Frost as a mortgage loan originator.

II. The Petitioners' Cross-Appeal

Finally, the petitioners challenge the trial court's denial of attorney's fees. Specifically, they maintain that they are entitled to attorney's fees because: (1) the Department acted in bad faith; (2) the Department "intru[ded] upon the protection against retrospective laws"; and (3) "they conferred a substantial benefit on the public through this action." We disagree.

We will not overturn the trial court's decision concerning attorney's fees absent an unsustainable exercise of discretion. Grenier v. Barclay Square Commercial Condo. Owners' Assoc., 150 N.H. 111, 115 (2003). To warrant reversal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party. Arcidi v. Town of Rye, 150 N.H. 694, 704 (2004). In evaluating the trial court's ruling on this issue, we acknowledge the "tremendous deference" given a trial court's decision regarding attorney's fees. Grenier, 150 N.H. at 116. If there is some support in the record for the trial court's determination, we will uphold it. Arcidi, 150 N.H. at 704.

"A prevailing party may be awarded attorney's fees when that recovery is authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees." Tulley v. Sheldon, 159 N.H. 269, 272 (2009) (quotation omitted). "As to judicially-created exceptions, attorney's fees have been awarded in this State based upon two separate theories: bad faith litigation and substantial benefit." Bedard v. Town of Alexandria, 159 N.H. 740, 744 (2010) (quotations and ellipsis omitted). "Under the bad faith litigation theory, an award of attorney's fees is appropriate where one party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, where the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and where it should have been unnecessary for the successful party to have brought the action." Id. (quotations omitted). "Under the substantial benefit theory[,] . . . attorney's fees may be awarded when a litigant's actions confer a substantial benefit upon the general public." Id. (quotations omitted).

Here, the trial court found that the petitioners met none of the standards warranting departure from the general rule. After review of the record, we agree and conclude that the trial court sustainably exercised its discretion. First, the record supports the trial court's finding that the Department did not act in bad faith. The Department neither employed obstinate or unreasonable litigation tactics, nor did it seek "burdensome discovery."

Nevertheless, the petitioners contend that the trial court erred when it failed to consider, in its bad faith analysis, the Department's allegedly "obstinate and unlawful" pre-lawsuit conduct. In particular, the petitioners argue that litigation was "unnecessary" and was prompted only by their need to protect themselves against the Department's "unconstitutional investigatory tactics" and the disputed staff petition. We disagree.

Despite the petitioners' representations to the contrary, the trial court did address their argument regarding the Department's investigatory tactics. The court ruled that "the theory that the State's conduct in related criminal

proceedings and issuing search warrants and administrative actions would authorize an award of attorney's fees . . . [cannot] be sustained." Further, it rejected the petitioners' argument that an award of fees was supported by alleged flaws in the staff petition (i.e., naming Frost individually, creating "illusory" charges by "duplicating" alleged misconduct, and threatening unconstitutional retroactive penalties). The trial court noted that "[the Department] took a legal position which involved complex statutes and their application to a highly regulated industry." Thus, we find no merit in the petitioners' claim that the trial court failed to address the Department's pre-lawsuit conduct.

Moreover, as the trial court noted, the complexity of the underlying suit suggests that the petitioners were not forced to litigate a clearly defined right. We agree that the rights at issue were not clearly defined, as is evidenced by the fact that the petitioners filed an expert report to aid the trial court in understanding the statutes involved in this case.

Finally, the trial court did not err in finding the substantial benefit exception inapplicable. As the trial court noted, the exception is based on promotion of the public benefit, not the petitioners' own benefit. See Bedard, 159 N.H. at 746.

Affirmed.

DALIANIS, C.J., and HICKS, J., concurred; LYNN, J., with whom DUGGAN, J., retired, specially assigned under RSA 490:3, joined, dissented.

LYNN, J., dissenting. Because I conclude that, under the doctrine of primary jurisdiction, the superior court erred in enjoining the ongoing enforcement proceedings before the banking department, I would reverse.

Perhaps the best elucidation of the doctrine of primary jurisdiction is that found in a prominent administrative law treatise:

> The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court. The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will initially

> decide a particular issue, not the question of whether court or agency will finally decide the issue.

3 K. Davis, Administrative Law Treatise § 19.01, at 3 (1958), quoted in Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 199 n. 29 (1978); see also Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S. 644, 673 (2003) (Breyer, J., concurring in part and concurring in the judgment) ("[Primary jurisdiction] seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime."); Konefal v. Hollis/Brookline Coop. School Dist., 143 N.H. 256, 258 (1998) ("Primary jurisdiction in an agency requires judicial abstention until the final administrative disposition of an issue, at which point the agency action may be subject to judicial review." (quotations omitted)). Because primary jurisdiction is a prudential doctrine, rather than one based on the absence of judicial power,[1] there is no "fixed formula" for determining when the doctrine applies. United States v. Western Pac. R. Co., 352 U.S. 59, 64 (1956). However, the following factors are often cited as relevant considerations in making this determination: (1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue in dispute; (2) the need for uniform resolution of the issue; and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities. See II K. Davis & R. Pierce, Jr., Administrative Law Treatise § 14, at 272 (3d ed. 1994); see also Walsh, 538 U.S. at 673 (Breyer, J., concurring in part and concurring in the judgment) ("[The question], in a word, [is] whether preliminary reference of issues to the agency will promote that proper working relationship between court and agency that the primary jurisdiction doctrine seeks to facilitate."); cf. Konefal, 143 N.H. at 258 ("The rule requiring administrative remedies to be exhausted prior to appealing to the courts is based on the reasonable policies of encouraging the exercise of administrative expertise, preserving agency autonomy and promoting judicial efficiency." (quotations omitted)).

While acknowledging the doctrine of primary jurisdiction, the majority holds that the trial court did not unsustainably exercise its discretion in declining to apply the doctrine because the issue addressed by the trial court concerned the banking department's subject matter jurisdiction and was

[1] Although not grounded in an absence of judicial power, the primary jurisdiction doctrine does implicate separation of powers concerns because it relates to the relationship between the branches of government. See, e.g., Travelers Ins. Co. v. Detroit Edison Co., 631 N.W.2d 733, 741 (Mich. 2001) (noting that one of the justifications for the primary jurisdiction doctrine "relates to respect for the separation of powers and the statutory purpose underlying the creation of the administrative agency, the powers granted to it by the legislature, and the powers withheld[; t]his justification includes the principle that courts are not to make adverse decisions that threaten the regulatory authority and integrity of the agency").

purely a question of law rather than of administrative discretion. I believe the majority takes too narrow a view of the circumstances under which deference is owed to an administrative agency, and that the cases it relies on to support its position are distinguishable in important respects from this case. Accordingly, I would find that the trial court's decision to enjoin the ongoing banking department proceedings did constitute an unsustainable exercise of discretion.

None of the cases relied on by the majority involved an effort to enjoin an ongoing administrative enforcement proceeding, i.e., a proceeding examining whether a licensee had violated a regulatory regime, a circumstance that presents a particularly compelling reason for a court to stay its hand. See Interfaith Community Organization v. PPG, 702 F. Supp. 2d 295, 310 (D.N.J. 2010); accord Dept. of Public Works v. L.G. Indus., 758 A.2d 950, 957 (D.C. 2000) (reversing grant of injunction against agency enforcement proceeding, and admonishing that "the trial court must be especially careful before resorting to that remedy where . . . the requested relief would enjoin agency action pending the outcome of administrative review. In part the reason for this restraint is the very one that underlies the primary jurisdiction doctrine, which is that the court is acting – and risks disruption – in a field that is normally confided to the agency's expertise" (quotations, brackets, and citation omitted)); Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d 74, 78 (Me. 1980) (lifting temporary restraining order that prevented Bureau of Consumer Protection from holding hearing to determine whether bank had violated statute regulating permissible finance charges, explaining that "[w]here the administration of a particular statutory scheme has been entrusted to an agency, the Court will postpone consideration of an action until the agency has made a designated determination if such postponement will protect the integrity of the statutory scheme" (quotation omitted)); Luskins Inc. v. Consumer Protection, 657 A.2d 788, 793 (Md. 1995) (holding that primary jurisdiction doctrine required dismissal of declaratory judgment action filed by merchant subject to agency proceedings for misleading consumer advertising); Zar v. S.D. Bd. of Examiners of Psychologists, 376 N.W.2d 54, 55 (S.D. 1985) (reversing writ of prohibition preventing disciplinary proceedings against licensee; trial court had reasoned that it should make initial decision as to whether Board lacked jurisdiction to discipline licensee because of alleged invalidity of administrative rules; supreme court disagreed, citing Myers v. Bethlehem Corp., 303 U.S. 41, 58 (1938), for proposition that "[u]nder the doctrine of separation of powers, an administrative agency, a branch of the executive department, is empowered to determine its own jurisdiction" in the first instance); cf. Smith v. N.H. Bd. of Psychologists, 138 N.H. 548, 554 (1994) (reversing trial court's entry of injunction that prevented Board of Examiners of Psychologists from conducting disciplinary proceedings involving licensees).

Unlike the instant case, Wisniewski v. Gemmill, 123 N.H. 701 (1983), on which the majority primarily relies, did not involve an action in which the

plaintiff sought an injunction against the regulatory agency itself; indeed, the agency (the former water resources board) was not even a party to that case. Instead, the lawsuit was a common law action for damages between private parties in which the defendant sought dismissal based on the argument that, because the suit concerned the alteration of the course of a public water body, the board had exclusive jurisdiction. Id. at 705. Moreover, unlike this case, where the banking department was actively pursuing administrative proceedings against petitioner Frost and had extended him the opportunity for a hearing at the time he sought judicial relief, in Wisniewski, the agency proceedings had lain dormant for nine months before suit was filed. See id. at 704; cf. Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 586-87 (1989) (expressing concern that requiring exhaustion of administrative remedies would relegate parties to a dispute resolution process the Court described as a "black hole"). Furthermore, none of the parties before the court in Wisniewski was a licensee of the water resources board, nor did the board have the authority to award the type of relief, i.e., monetary damages, that the plaintiff was seeking. See Wisniewski, 123 N.H. at 707. Here, by contrast, Frost was a licensee of the banking department, and, as the majority recognizes, the department therefore unquestionably had "regulatory authority" over him. Thus, even accepting the majority's construction of "engage in the business" as used in RSA 397-A:2 (2006 & Supp. 2011), the department, at worst, had a mistaken view of the scope of its regulatory authority. But no one disputes that this was an issue Frost could have challenged, and the department could have decided, at an administrative hearing, which would have to have been conducted pursuant to the provisions of the Administrative Procedures Act governing adjudicative proceedings. See RSA 397-A:17, III (2006); RSA 541-A:30, III (2007). Collectively, the foregoing considerations demonstrate that this case presents a far more compelling argument for invoking primary jurisdiction than did Wisniewski.

The other cases cited by the majority, Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140 (1998), Bedford Residents Group v. Town of Bedford, 130 N.H. 632 (1988), and Metzger v. Brentwood, 115 N.H. 287 (1975), also are distinguishable. Not only did none of those cases involve agency enforcement proceedings, but the land use and/or property tax statutes at issue in those cases were also not nearly as complex – or the legal position of the governmental body as arguable – as that presented here. It is a well-recognized principle of administrative law that where the legislature has described an agency's powers in broad and ambiguous language, the agency generally is given the first opportunity to rule upon the extent of its jurisdiction. Although we have not gone so far as to adopt the federal rule, which requires courts to defer to an agency's reasonable construction of an agency-administered statute, see Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-45, 866 (1984), we have long taken the view that substantial deference is due to the interpretation placed on a statute of doubtful meaning by the agency charged with its

implementation. See Grand China v. United Nat'l Ins. Co., 156 N.H. 429, 434 (2007); cf. Win-Tasch Corp. v. Town of Merrimack, 120 N.H. 6, 9-10 (1980). The doctrine of primary jurisdiction complements our substantial deference policy by ensuring that an agency is given the first opportunity to construe an ambiguous statute. See Verizon New England v. Maine Public Utilities, 509 F.3d 1, 11-12 (1st Cir. 2007). As Professor Pierce explains:

> The primary jurisdiction doctrine often compels a court to refer an issue to an agency . . . when the issue ultimately is determined not to be within the agency's statutory jurisdiction. The resulting situation – an agency's primary jurisdiction is often broader than its statutory jurisdiction – seems strange at first glance. It makes eminently good sense, however, upon examination of the nature and frequent difficulty of determining the scope of the agency's statutory jurisdiction.

II R. Pierce, Jr., Administrative Law Treatise § 14.2, at 1185 (5th ed. 2010). Put another way, the primary jurisdiction doctrine comes into play when conduct that is the subject of court litigation "is . . . at least arguably protected or prohibited by a . . . regulatory statute" and when agency resolution of an issue is likely to be of "material aid" to judicial resolution of the dispute. Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 299-300, 302 (1973); see Clark v. Time Warner Cable, 523 F.3d 1110, 1115-16 (9th Cir. 2008) (referring matter to agency where issue was novel, agency regarded resolution of issue as important to policies it was required to implement, and agency had issue under active consideration); cf. Leedom v. Kyne, 358 U.S. 184, 188-89 (1958) (declining to require exhaustion of administrative remedies when agency action is plainly ultra vires).

At the times pertinent to this case, RSA chapter 397-A established a comprehensive regulatory scheme for "persons that engage in the business of making or brokering" certain mortgage loans. RSA 397-A:2, I (2006). If the "engage in the business" language found in RSA 397-A:2, I, were the only pertinent section regarding the scope of the statute, I would agree with the majority that the statute does not reach the two isolated mortgage loan transactions conducted by Frost Family and Chretien. However, this is not the case. Instead, RSA 397-A:3, I (2006 & Supp. 2011) provides: "Any person not exempt under RSA 397-A:4 that, in its own name or on behalf of other persons, engages in the business of making or brokering mortgage loans secured by real property located in this state shall be required to obtain a license from the department." (Emphasis added.) And, when these transactions occurred, RSA 397-A:4 (2006) provided, in relevant part, that RSA chapter 397-A was inapplicable to:

II. Any natural person making not more than 4 first mortgage loans within any calendar year with the person's own funds and for the person's own investment without an intent to resell such mortgage loans.

III. Any natural person who, as seller, receives one or more first or second mortgages or deeds of trust on real estate as security for a purchase money obligation.

(Emphases added.)

Because neither Frost Family nor Chretien is a "natural person," neither was covered by these exemptions.[2] More importantly, the existence of these statutory exemptions results in an ambiguity as to the intended meaning of the "engage in the business" term found in RSA 397-A:2, I, and :3. The effect of the first exemption is to create a safe harbor for natural persons who make fewer than five first mortgage loans within a calendar year. The effect of the second is to exclude any natural person who provides a first or second mortgage as part of seller-financing in connection with even one property he or she sells to another. Contrary to the majority's suggestion, it is not proper to simply ignore these exemptions in construing the scope of the banking department's authority under RSA chapter 397-A. Indeed, failing to consider the exemptions in determining what is meant by the term "engage in the business" of making or brokering loans is inconsistent with a first principle of statutory interpretation – that statutory provisions are not to be considered in isolation but in the context of the entire statutory scheme. State v. Jennings, 159 N.H. 1, 3 (2009). By failing to consider the overall statutory scheme, the majority offers no answer to what is the seminal question that must be addressed in order to properly construe the statute: If the legislature intended "engage in the business" to cover only non-natural persons who regularly or habitually make or broker mortgage loans, why would it have found it necessary to specifically exclude them in the above exemptions?[3] See State v.

[2] Nor do petitioners argue that any other provisions of RSA 397-A:4 in effect at the relevant times exempt Frost Family or Chretien from the reach of RSA chapter 397-A.

[3] Insofar as the RSA 397-A:4, II exemption is designed to establish a safe harbor for a course of conduct that might otherwise constitute "engaging in the business," it might be contended that the exclusion of non-natural persons from this exemption was merely intended to disqualify entities (non-natural persons) from the safe harbor, not to signify that entities did not have to make or broker mortgages with some level of regularity in order to be engaged in the business. The same argument cannot be made as to the RSA 397-A:4, III exemption. The fact that, with respect to natural persons, the legislature found it necessary to include a specific exemption for a person who makes even one seller-financing mortgage suggests that without the exemption such person could be considered engaged in the business of making mortgages; and, of course, the

Pierce, 152 N.H. 790, 791 (2005) ("All words of a statute are to be given effect, and the legislature is presumed not to use words that are superfluous or redundant."). Reading the statute as a whole, one plausible construction is that the legislature intended non-natural persons, such as Frost Family and Chretien, to be deemed "engaged in the business" of making or brokering mortgages even if they engage in only a single transaction. And, of course, if the statute is construed so as to require Frost Family and Chretien to have been licensed, then there is a basis for the banking department's investigation into whether Frost (1) made misrepresentations in his application for licensure as a loan originator, (2) serviced loans for non-licensed mortgage bankers, and (3) simultaneously represented more than one mortgage banker. See RSA 397-A:1, XVII, :3, III, :17 (2006 & Supp. 2011).[4]

To be clear, it is not my purpose to attempt a definitive construction of RSA chapter 397-A. Given the statute's ambiguity, it may be that ultimately I too would come to the conclusion that the most sensible construction of RSA 397-A:2 and :3 would exclude Frost Family and Chretien from being "engaged in the business" of making or brokering mortgage loans.[5] To me, the critical

exemption does not apply to non-natural persons even if they make only one seller-financing mortgage.

[4] Both the petitioners and the trial court seemed to recognize that the meaning of the statute was less than completely clear. This is demonstrated by the fact that the petitioners found it necessary to provide the trial court with an expert report from a banking law attorney opining on his interpretation of the scope of activity falling within the reach of the statute. The trial court considered this report and found it "valuable and helpful." It also is demonstrated by the trial court's denial of the petitioners' request for attorney's fees. Rejecting the petitioners' claim that the defendants acted in bad faith, the court found, "[the banking department] took a legal position which involved complex statutes and their application to a highly regulated industry."

[5] I cannot agree with the majority that the legislative history of the 2011 amendment to RSA 397-A:4 supports its construction of the 2005 version of the statute – the version that is controlling with respect to the conduct at issue. On this point, I note initially that the very fact that the majority deems it necessary to reference legislative history confirms my view that, prior to the 2011 amendment, the statute was ambiguous with respect to whether Frost Family and Chretien were engaged in the business of making or brokering mortgages. See Appeal of Cote, 144 N.H. 126, 129 (1999) ("While legislative history may be helpful in the interpretation of an ambiguous statute, it will not be consulted when the statutory language is plain." (quotation omitted)). More importantly, while the actions of Frost Family and Chretien would appear to have been exempt if they had occurred after the 2011 amendment to RSA 397-A:4 had taken effect, that amendment clearly did more than clarify pre-existing law. On the contrary, as its legislative history makes clear, the amendment was intended to change existing law to expand the circumstances in which seller-financing of real estate transactions would be allowed without the need for the seller to be licensed. See Hearing on SB 28 before Senate Commerce Comm. (Jan. 25, 2011) (testimony of Sen. Boutin) ("This de minimis exemption would allow a number of the transactions which cannot be completed now while ensuring that the exemption will not undermine the current law." (emphasis added)); N.H.H.R. Jour. ___ (May 25, 2011) (remarks of Rep. Manuse) ("Current law requires any person to get a mortgage loan originators license from the New Hampshire banking department, even in harmless circumstances when licensing private citizens who intend to make up to three loans is not practical." (emphasis added)). The 2011 amendment is the first time the legislature clearly created a safe harbor exemption that covers non-natural persons such as Frost Family and Chretien.

point is that any such construction of the statute by either the trial court or this court is premature at this time. Rather, in my view, where, as here, the banking department had not obviously overstepped the bounds of its authority, respect for the proper functioning of an agency of a coordinate branch of government that has been given primary jurisdiction to regulate in the field required the trial court to refrain from interfering with the ongoing administrative proceedings.

In closing, I also must note my concern that today's decision may pave the way for future licensees to attempt to circumvent agency enforcement proceedings any time imaginative counsel is able to fashion a plausible argument that the agency has misinterpreted its regulatory authority. Needless to say, such a development would not be consonant with sound public policy.

For the reasons stated above, I respectfully dissent.

DUGGAN, J., retired, specially assigned under RSA 490:3, joins in the dissent.

State of New Hampshire Banking Department

In re the Matter of:	Case No.: 10-013
State of New Hampshire Banking Department,	Order to Show Cause with Immediate Emergency Suspension and Cease and Desist Order
Petitioner,	
and	
Jeffrey Shawn Frost,	
Respondent	

NOTICE OF ORDER

This Order to Show Cause with Immediate Emergency Suspension and Cease and Desist Order commences an adjudicative proceeding under the provisions of RSA Chapter 397-A and RSA Chapter 541-A (including but not limited to RSA 541-A:30).

LEGAL AUTHORITY AND JURISDICTION

Pursuant to RSA 397-A:17,I the Commissioner of the New Hampshire Banking Department (hereinafter "Department") has the authority to issue an order to show cause why license revocation or suspension and penalties for violations of RSA Chapter 397-A should not be imposed. The Commissioner may by order summarily postpone or suspend any license or application pending final determination of any order to show cause, or other order, or of any other proceeding under RSA 397-A:17, provided that the Commissioner finds that the public interest would be irreparably harmed by delaying in issuing such order.

RSA 397-A:17,I further provides in part that the Commissioner may by order, upon due notice and opportunity for hearing, assess penalties or

deny, suspend, or revoke a license or application if it is in the public interest and the applicant, respondent, or licensee, any partner, officer, member, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the applicant, respondent, or licensee has, inter alia,: (a) violated any provision of RSA Chapter 397-A or rules thereunder, (b) not met the standards established in RSA Chapter 397-A…,(d) has filed an application for licensing which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect, or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact…, (e) has made a false or misleading statement to the Commissioner or in any reports to the Commissioner…, or (k) engaged in dishonest or unethical practices in the conduct of the business of making or collecting mortgage loans.

Pursuant to RSA 397-A:17,II(a), the Commissioner has the authority to order or direct persons subject to RSA Chapter 397-A to cease and desist from conducting business, including immediate temporary orders to cease and desist.

Pursuant to RSA 397-A:17,II(b), the Commissioner has the authority to order or direct persons subject to RSA Chapter 397-A to cease any harmful activities or violations of RSA Chapter 397-A, including immediate temporary orders to cease and desist.

Pursuant to RSA 397-A:17,II(c), the Commissioner has the authority to enter immediate temporary orders to cease business under a license if the

Commissioner has determined that such license was erroneously granted or the licensee is currently in violation of RSA Chapter 397-A, or rules or order thereunder.

Pursuant to RSA 397-A:17,II(e)(1) the Commissioner has the authority to remove or ban from office or employment, including license revocation, any person conducting business under RSA Chapter 397-A who violates RSA Chapter 397-A.

Pursuant to RSA 397-A:17,II(e)(4) the Commissioner has the authority to remove or ban from office or employment, including license revocation, any person conducting business under RSA Chapter 397-A if by a preponderance of evidence the Commissioner determines that the person no longer demonstrates the financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the person subject to RSA Chapter 397-A will operate honestly, fairly, and efficiently within the purposes of RSA Chapter 397-A.

Pursuant to RSA 397-A:17,II(f) the Commissioner has the authority to deny, suspend, revoke, condition, or decline to renew a license if an applicant or licensee fails at any time to meet the requirements of RSA 397-A:5,IV-c or RSA 397-A:5,IV-d, or withholds information or makes a material misstatement in an application for a license or renewal of a license. RSA 397-A:5,IV-c,(a)(5) states the Commissioner shall not issue a mortgage loan originator license unless the Commissioner makes at a minimum, inter alia, a finding that the applicant has demonstrated financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the

mortgage loan originator will operate honestly, fairly, and efficiently within the purposes of RSA Chapter 397-A. RSA 397-A:5,IV-d(a)(1) states that, in addition to other provisions of New Hampshire law and rules, in order to be eligible to renew a license, a mortgage originator shall, inter alia, meet and continue to meet the minimum standards for license issuance under RSA 397-A:5,IV-c.

Pursuant to RSA 397-A:17,III, if the Commissioner finds that protection of consumers, lenders, or investors requires emergency action and incorporates a finding to that effect in his or her order, immediate suspension of a license may be ordered pending an adjudicative proceeding. The adjudicative proceeding shall be commenced not later than 10 business days after the date of the order suspending the license. Unless expressly waived by the license, the Commissioner's failure to commence an adjudicative proceeding within 10 business days shall mean that the suspension order is automatically vacated.

Pursuant to RSA 397-A:17,V, the Department may take action for immediate suspension of a license, pursuant to RSA 541-A:30,III.

Pursuant to RSA 397-A:17,VIII, in addition to any other penalty provided for under RSA Chapter 397-A or RSA 383:10-d, after notice and opportunity for hearing, the Commissioner may enter an order of rescission, restitution, or disgorgement of profits directed to a person who has violated RSA Chapter 397-A, or a rule or order thereunder.

Pursuant to RSA 397-A:17,IX, in addition to any other penalty provided for under RSA Chapter 397-A, after notice and opportunity for hearing, the Commissioner may assess fines and penalties against a mortgage

loan originator in an amount not to exceed $25,000.00 (for each violation) if the Commissioner finds the mortgage loan originator has violated or failed to comply with the S.A.F.E. Mortgage Licensing Act of 2008, Public Law 110-289, Title V or any regulation or order issued thereunder. Each of the acts specified shall constitute a separate violation.

Pursuant to RSA 397-A:17,X, an action to enforce any provision of RSA Chapter 397-A shall be commenced within 6 years after the date on which the violation occurred.

Pursuant to RSA 397-A:18, the Department has the authority to issue a complaint setting forth charges whenever the Department is of the opinion that the licensee or person over whom the Department has jurisdiction is violating or has violated any provision of RSA Chapter 397-A, or any rule or order thereunder.

Pursuant to RSA 397-A:18,II, the Department has the authority to issue and cause to be served an order requiring any person engaged in any act or practice constituting a violation of RSA Chapter 397-A or any rule or order thereunder, to cease and desist from violations of RSA Chapter 397-A.

Pursuant to RSA 397-A:20,IV the Commissioner may issue, amend, or rescind such orders as are reasonably necessary to comply with the provisions of RSA Chapter 397-A.

Pursuant to RSA 397-A:21, the Commissioner has the authority to suspend, revoke or deny any license and to impose administrative penalties of up to $2,500.00 for each violation of New Hampshire banking law and rules.

Pursuant to RSA 397-A:21,I-a, any person who willfully violates any

provisions of RSA 397-A:2,VI or VII or a cease and desist order or injunction issued pursuant to RSA 397-A:18,II shall be guilty of a class B felony. Each of the acts specified shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction of any other offense.

Pursuant to RSA 383:10-d, the Commissioner shall investigate conduct that is or may be an unfair or deceptive act or practice under RSA Chapter 358-A and exempt under RSA 358-A:3,I or that may violate any of the provisions of Titles XXXV and XXXVI and administrative rules adopted thereunder. The Commissioner may hold hearings relative to such conduct and may order restitution for a person or persons adversely affected by such conduct.

Pursuant to RSA 541-A:30,III, if the agency finds that public health, safety or welfare requires emergency action and incorporates a finding to that effect in its order, immediate suspension of a license may be ordered pending an adjudicative proceeding. The agency shall commence this adjudicative proceeding not later than 10 working days after the date of the agency order suspending the license. A record of the proceeding shall be made by a certified shorthand court reporter provided by the agency. Unless expressly waived by the licensee, agency failure to commence an adjudicative proceeding within 10 working days shall mean that the suspension order is automatically vacated.

NOTICE OF RIGHT TO REQUEST A HEARING

Pursuant to RSA 541-A:30, the Department shall hold a hearing within ten (10) working days after the date of this Order to Show Cause with Immediate Emergency Suspension and Cease and Desist Order suspending the Respondent's mortgage loan originator license. Such hearing is noticed under separate cover. A record of this proceeding shall be made by a certified shorthand court reporter provided by this Department. If the Respondent fails to appear at the hearing after being duly notified, such person shall be deemed in default, and the proceeding may be determined against the defaulting Respondent upon consideration of this Order to Show Cause with Immediate Emergency Suspension and Cease and Desist Order, the allegations of which may be deemed to be true.

After said hearing and within 20 days of the date of the hearing the Commissioner shall issue a further order vacating this Order to Show Cause with Immediate Emergency Suspension and Cease and Desist Order or making it permanent as the facts require and making such findings as are necessary. All hearings shall comply with 541-A.

The above named Respondent has the right to be represented by counsel at the Respondent's own expense. Any such request shall be in writing, and signed by the Respondent or by the duly authorized agent of the above named Respondent, and shall be delivered either by hand or certified mail, return receipt requested, to the New Hampshire Banking Department, 53 Regional Drive, Suite 200, Concord, NH 03301.

STATEMENT OF ALLEGATIONS, APPLICABLE LAWS AND REQUEST FOR RELIEF

The Staff Petition dated March 23, 2010 (a copy of which is attached hereto) is incorporated by reference hereto.

ORDER

WHEREAS, finding it necessary and appropriate and in the public interest, and consistent with the intent and purposes of the New Hampshire banking laws;

WHEREAS, finding that the allegations contained in the Staff Petition, if proved true and correct, form the legal basis of the relief requested; and

WHEREAS, finding that the allegations contained in the Staff Petition, if proved by a preponderance of the evidence that the above named person no longer demonstrates the financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the person subject to RSA Chapter 397-A will operate honestly, fairly, and efficiently within the purposes of RSA Chapter 397-A, forms the legal basis of the relief requested;

WHEREAS, finding that the public interest would be irreparably harmed by delay in issuing this immediate suspension;

WHEREAS, finding a substantial likelihood that delay will cause irreparable harm to the public, health, safety or welfare, requiring emergency action;

WHEREAS, finding that the protection of consumers, lenders, or investors requires emergency action;

It is hereby ORDERED, that:

1. Respondent Jeffrey Shawn Frost's ("Respondent Frost") New Hampshire license as a mortgage loan originator is immediately suspended; and
2. Pursuant to RSA 541-A:30,III, and adjudicative hearing shall be held within ten (10) working days of the date of this Order to Show Cause with Immediate Emergency Suspension and Cease and Desist Order.

It is hereby FURTHER ORDERED, that:

3. Respondent Frost is hereby ordered to cease and desist from conducting business regulated by RSA Chapter 397-A in New Hampshire;
4. Respondent Frost is hereby ordered to cease and desist from violating New Hampshire state law and federal law and any rules or orders thereunder;
5. Respondent Frost shall show cause why penalties in the amount of $57,500.00 should not be imposed against him plus any additional penalty not to exceed $25,000.00 for each violation ($575,000.00) pursuant to RSA 397-A:17,IX;
6. Nothing in this Order to Show Cause with Immediate Emergency Suspension and Cease and Desist Order shall prevent the Department from taking any further administrative action under New Hampshire law;
7. Nothing in this Order to Show Cause and Cease and Desist Order shall prevent the Attorney General from bringing an

action against Respondent Frost in any New Hampshire superior court, with or without prior administrative action by the Commissioner;

8. Respondent Frost shall show cause why, in addition to the penalties listed in Paragraphs 1 through 7 above, Respondent Frost's mortgage loan originator license should not be revoked;
9. Respondent Frost shall show cause why, in addition to the penalties listed in Paragraphs 1 through 8 above, Respondent Frost should not be removed or banned from office or employment;

It is hereby further ORDERED that:

10. Along with the administrative penalties listed for Respondent Frost, any applicable rescission, restitution or disgorgement of profits shall be immediately paid; and
11. Failure to attend the hearing to be held within 10 working days of this Order to Show Cause with Immediate Emergency Suspension and Cease and Desist Order shall result in a default judgment being rendered and administrative penalties imposed upon Respondent Frost.

SIGNED,

Dated: *03/23/10*

/s/
PETER C. HILDRETH
BANK COMMISSIONER

State of New Hampshire Banking Department

In re the Matter of:	Case No.: 10-013
State of New Hampshire Banking Department,	Staff Petition
Petitioner,	March 23, 2010
and	
Jeffrey Shawn Frost,	
Respondent	

I. STATEMENT OF ALLEGATIONS

The Staff of the Banking Department, State of New Hampshire (hereinafter "Department") alleges the following facts:

Facts Common on All Counts:

1. Respondent Jeffrey Shawn Frost (hereinafter "Respondent Frost") has been licensed as a Mortgage Loan Originator in New Hampshire since April 1, 2009. Respondent Frost has been sponsored by Academy Mortgage (a Department licensee) since March 24, 2009 (prior to the required Mortgage Loan Originator licensure).
2. Respondent Frost submitted and attested to his New Hampshire Mortgage Loan Originator MU4 application on or about March 21, 2009 or March 23, 2009.

Violation of RSA 397-A:1,XVII(a) Simultaneously Representing More Than One Mortgage Banker or Mortgage Broker (2 Counts):

Violation of RSA 397-A:3,III Simultaneously Representing More Than One Mortgage Banker or Mortgage Broker (2 Counts):

Violation of RSA 397-A:14,IV(d) Conduct Business Covered By RSA Chapter 397-A Without a Valid License Required by RSA Chapter 397-A (2 Counts):

Violation of RSA 397-A:14,IV(e) Failure to Make Disclosures Required by RSA 397-A (2 Counts):

Violation of RSA 397-A:14,IV(f) Failure to Comply with RSA Chapter 397-A or Other New Hampshire State Law (2 Counts):

Violation of RSA 397-A:14,IV(h) Negligently Making Any False Statement or Knowingly Make A False Statement or Knowingly and Willfully Make Any Omission of a Material Fact in Connection with Information or Reports Filed with the Department and the Nationwide Mortgage Licensing System and Registry (2 Counts):

Violation of RSA 397-A:17,I(a) Violation of RSA Chapter 397-A Generally (2 Counts):

Violation of RSA 397-A:17,I(b) Failing to Meet Standards Established by RSA Chapter 397-A (1 Count):

Violation of RSA 397-A:17,I(d) Filed a Mortgage Loan Originator Application that is Materially Incomplete and Contains False and Misleading Statements (2 Counts):

Violation of RSA 397-A:17,I(e) Made a False or Misleading Statement to the Commissioner (2 Counts):

Violation of RSA 397-A:17,I(k) Engaged in Dishonest or Unethical Practices (2 Counts):

If Respondent Frost Considers the 2 Unlicensed Entities Mortgage Brokers, then a Mortgage Servicer Registration Would be Needed To Service the Two Closed Residential Mortgage Loans: Violation of RSA 397-B:1,IV-c

Simultaneously Representing More Than One Mortgage Servicer (2 Counts):

3. Paragraphs 1 through 2 are hereby realleged as fully set forth herein.

4. At the time of Respondent Frost's New Hampshire Mortgage Loan Originator MU4 application or attestation, he was and still is self-employed through the Frost Family LLC. Respondent Frost stated in both his original MU4 application and in his amended application attested to on or about April 8, 2009 that Frost Family LLC is not a financial services-related employment. In Respondent Frost's MU4 application to which he attested on or about March 21, 2009, Respondent Frost's duties with Frost Family LLC are to manage some of his properties with long term leases.

5. In fact, Frost Family LLC served as either the mortgage broker or mortgage banker for one residential mortgage loan, which closed on September 3, 2008, well before Respondent Frost submitted or attested to his MU4 New Hampshire Mortgage Loan Originator application.

6. Frost Family LLC continues to actively service this residential mortgage loan, which means if Frost Family LLC brokered the loan as an unlicensed entity, it is servicing this residential mortgage loan without a New Hampshire mortgage servicer registration.

7. If Frost Family LLC served as the unlicensed mortgage banker on this residential mortgage loan, it is currently servicing this

loan without a valid mortgage banker license.

8. Respondent Frost failed to include in any version of his New Hampshire MU4 Mortgage Loan Originator application that he is also part owner in Chretien/Tillinghast, LLC, which closed one residential mortgage loan prior to his MU4 application.

9. On March 13, 2009 (the closing date of one residential mortgage loan), Chretien/Tillinghast, LLC served as either the mortgage broker or mortgage banker.

10. The March 13, 2009 closed residential mortgage loan closed prior to Respondent Frost's March 21, 2009 submittal or attestation to his MU4 New Hampshire Mortgage Loan Originator application.

11. Chretien/Tillinghast, LLC continues to actively service this March 13, 2009 closed residential mortgage loan, which means if Chretien/Tillinghast, LLC brokered the loan as an unlicensed entity, it is servicing this residential mortgage loan without a New Hampshire mortgage servicer registration.

12. If Chretien/Tillinghast, LLC served as the unlicensed mortgage banker on this March 13, 2009 closed residential mortgage loan, it is currently servicing this loan without a valid mortgage banker license.

13. Respondent Frost, by continuing his employment with both Frost Family, LLC and Chretien/Tillinghast, LLC while employed by mortgage banker licensee Academy Mortgage as a licensed Mortgage Loan Originator, works for more than one mortgage

banker or mortgage broker and mortgage servicer and is therefore in violation of RSA 397-A:1,XVII(a), RSA 397-A:3,III, and/or RSA 397-B:1,IV-c.

II. ISSUES OF LAW

The staff of the Department alleges the following issues of law:

1. The Department realleges the above stated facts in Paragraphs 1 through 13 as fully set forth herein.
2. The Department has jurisdiction over the licensing and regulation of persons engaged in mortgage banker or broker activities pursuant to RSA 397-A:2 and RSA 397-A:3.
3. The Department has jurisdiction over the registration and regulation of persons engaged in mortgage servicing activities pursuant to RSA 397-B:2.
4. RSA 397-A:1,X provides that "licensee" means a person, whether mortgage banker, mortgage broker, or mortgage originator, duly licensed by the Commissioner pursuant to the provisions of RSA Chapter 397-A.
5. RSA 397-A:1,XVII(a) provides that an originator or mortgage loan originator or mortgage originator or loan originator means an individual who for direct or indirect compensation or gain or in the expectation of direct or indirect compensation or gain, takes a mortgage application or offers, negotiates, solicits, arranges, or finds a mortgage loan or who assists a consumer in obtaining or applying to obtain a mortgage loan by, among other things, advising on loan terms (including rates,

fees, and other costs), preparing loan packages, or collecting information on behalf of the consumer with regard to a mortgage loan or who offers or negotiates terms of a residential mortgage loan. No individual may act as an originator for more than one mortgage broker, mortgage servicer, or mortgage banker. A sole proprietor licensed as a mortgage broker, mortgage servicer, or mortgage banker shall also obtain a license as a mortgage originator prior to engaging in the activities of a mortgage originators. Respondent Frost violated this provision on at least two occasions as alleged above.

6. RSA 397-A:3,III provides that it is unlawful for any mortgage banker or mortgage broker to employ, retain, or otherwise engage an originator unless the originator is licensed. No originator shall at any time represent more than one mortgage banker or mortgage broker. Respondent Frost violated this provision on at least two occasions as alleged above.
7. RSA 397-A:14,IV(d) provides that no person subject to RSA Chapter 397-A shall conduct any business covered by RSA Chapter 397-A without holding a valid license as required under RSA Chapter 397-A, or assist or aid and abet any person in the conduct of business under RSA Chapter 397-A without a valid license as required under RSA Chapter 397-A. Respondent Frost violated this provision on at least two occasions as alleged above.

8. RSA 397-A:14,IV(e) provides that no person subject to RSA Chapter 397-A shall fail to make disclosures as required by RSA Chapter 397-A and any other applicable state or federal law including rules and regulations thereunder. Respondent Frost violated this provision on at least two occasions as alleged above

9. RSA 397-A:14,IV(f) provides that no person subject to RSA Chapter 397-A shall fail to comply with RSA Chapter 397-A or rules or orders promulgated thereunder, or fail to comply with any other state or federal law, including the rules and regulations thereunder, applicable to any business authorized or conducted under RSA Chapter 397-A. Respondent Frost violated this provision on at least two occasions as alleged above.

10. RSA 397-A:14,IV(h) provides that no person subject to RSA Chapter 397-A shall negligently make any false statement or knowingly and willfully make any omission of material fact in connection with any information or reports filed with a governmental agency or the Nationwide Mortgage Licensing System and Registry or in connection with any investigation conducted by the Commissioner or another governmental agency. Respondent Frost violated this provision on at least two occasions as alleged above.

11. Pursuant to RSA 397-A:17,I the Commissioner of the New Hampshire Banking Department (hereinafter "Department") has the

authority to issue an order to show cause why license revocation or suspension and penalties for violations of RSA Chapter 397-A should not be imposed. The Commissioner may by order summarily postpone or suspend any license or application pending final determine of any order to show cause, or other order, or of any other proceeding under RSA 397-A:17, provided that the Commissioner finds that the public interest would be irreparably harmed by delaying in issuing such order.

12. RSA 397-A:17,I further provides in part that the Commissioner may by order, upon due notice and opportunity for hearing, assess penalties or deny, suspend, or revoke a license or application if it is in the public interest and the applicant, respondent, or licensee, any partner, officer, member, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the applicant, respondent, or licensee has, inter alia,: (a) violated any provision of RSA Chapter 397-A or rules thereunder, (b) not met the standards established in RSA Chapter 397-A…,(d) has filed an application for licensing which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect, or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact…, (e) has made a false or misleading statement to the Commissioner or in any

reports to the Commissioner..., or (k) engaged in dishonest or unethical practices in the conduct of the business of making or collecting mortgage loans. Respondent Frost has violated each subparagraphs (a), (d), (e) and (k) on at least two occasions and subparagraph (b) on at least one occasion as alleged above.

13. Pursuant to RSA 397-A:17,II(a), the Commissioner has the authority to order or direct persons subject to RSA Chapter 397-A to cease and desist from conducting business, including immediate temporary orders to cease and desist.

14. Pursuant to RSA 397-A:17,II(b), the Commissioner has the authority to order or direct persons subject to RSA Chapter 397-A to cease any harmful activities or violations of RSA Chapter 397-A, including immediate temporary orders to cease and desist.

15. Pursuant to RSA 397-A:17,II(c), the Commissioner has the authority to enter immediate temporary orders to cease business under a license if the Commissioner has determined that such license was erroneously granted or the licensee is currently in violation of RSA Chapter 397-A, or rules or order thereunder.

16. Pursuant to RSA 397-A:17,II(e)(1) the Commissioner has the authority to remove or ban from office or employment, including license revocation, any person conducting business under RSA Chapter 397-A who violates RSA Chapter 397-A.

17. Pursuant to RSA 397-A:17,II(e)(4) the Commissioner has the authority to remove or ban from office or employment, including

license revocation, any person conducting business under RSA Chapter 397-A if by a preponderance of evidence the Commissioner determines that the person no longer demonstrates the financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the person subject to RSA Chapter 397-A will operate honestly, fairly, and efficiently within the purposes of RSA Chapter 397-A.

18. Pursuant to RSA 397-A:17,II(f) the Commissioner has the authority to deny, suspend, revoke, condition, or decline to renew a license if an applicant or licensee fails at any time to meet the requirements of RSA 397-A:5,IV-c or RSA 397-A:5,IV-d, or withholds information or makes a material misstatement in an application for a license or renewal of a license. RSA 397-A:5,IV-c,(a)(5) states the Commissioner shall not issue a mortgage loan originator license unless the Commissioner makes at a minimum, inter alia, a finding that the applicant has demonstrated financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently within the purposes of RSA Chapter 397-A. RSA 397-A:5,IV-d(a)(1) states that, in addition to other provisions of New Hampshire law and rules, in order to be eligible to renew a license, a mortgage originator shall, inter alia, meet and continue to meet the

minimum standards for license issuance under RSA 397-A:5,IV-c.

19. Pursuant to RSA 397-A:17,III, if the Commissioner finds that protection of consumers, lenders, or investors requires emergency action and incorporates a finding to that effect in his or her order, immediate suspension of a license may be ordered pending an adjudicative proceeding. The adjudicative proceeding shall be commenced not later than 10 business days after the date of the order suspending the license. Unless expressly waived by the license, the Commissioner's failure to commence an adjudicative proceeding within 10 business days shall mean that the suspension order is automatically vacated.

20. Pursuant to RSA 397-A:17,V, the Department may take action for immediate suspension of a license, pursuant to RSA 541-A:30,III.

21. Pursuant to RSA 397-A:17,VIII, in addition to any other penalty provided for under RSA Chapter 397-A or RSA 383:10-d, after notice and opportunity for hearing, the Commissioner may enter an order of rescission, restitution, or disgorgement of profits directed to a person who has violated RSA Chapter 397-A, or a rule or order thereunder.

22. Pursuant to RSA 397-A:17,IX, in addition to any other penalty provided for under RSA Chapter 397-A, after notice and opportunity for hearing, the Commissioner may assess fines and penalties against a mortgage loan originator in an amount not to exceed $25,000.00 (for each violation) if the Commissioner

finds the mortgage loan originator has violated or failed to comply with the S.A.F.E. Mortgage Licensing Act of 2008, Public Law 110-289, Title V or any regulation or order issued thereunder. Each of the acts specified shall constitute a separate violation. Respondent Frost violated twelve New Hampshire statutory provisions on at least twenty-three occasions total as alleged above.

23. Pursuant to RSA 397-A:17,X, an action to enforce any provision of RSA Chapter 397-A shall be commenced within 6 years after the date on which the violation occurred.

24. Pursuant to RSA 397-A:18,I the Department has the authority to issue a complaint setting forth charges whenever the Department is of the opinion that the licensee or person over whom the Department has jurisdiction is violating or has violated any provision of RSA Chapter 397-A, or any rule or order thereunder.

25. Pursuant to RSA 397-A:18,II, the Department has the authority to issue and cause to be served an order requiring any person engaged in any act or practice constituting a violation of RSA Chapter 397-A or any rule or order thereunder, to cease and desist from violations of RSA Chapter 397-A.

26. Pursuant to RSA 397-A:20,IV the Commissioner may issue, amend, or rescind such orders as are reasonably necessary to comply with the provisions of RSA Chapter 397-A.

27. RSA 397-A:21,IV provides that any person who, either knowingly

or negligently, violates any provision of RSA Chapter 397-A, may upon hearing, and in addition to any other penalty provided for by law, be subject to an administrative fine not to exceed $2,500.00, or both. Each of the acts specified shall constitute a separate violation, and such administrative action or fine may be imposed in addition to any criminal penalties or civil liabilities imposed by New Hampshire Banking laws.

28. RSA 397-A:21,V provides that every person who directly or indirectly controls a person liable under this section, every partner, principal executive officer or director of such person, every person occupying a similar status or performing a similar function, every employee of such person who materially aids in the act constituting the violation, and every licensee or person acting as a common law agent who materially aids in the acts constituting the violation, either knowingly or negligently, may, upon notice and opportunity for hearing, and in addition to any other penalty provided for by law, be subject to suspension, revocation, or denial of any registration or license, including the forfeiture of any application fee, or the imposition of an administrative fine not to exceed $2,500, or both. Each of the acts specified shall constitute a separate violation, and such administrative action or fine may be imposed in addition to any criminal or civil penalties imposed.

29. RSA 397-A:21,VI provides that the attorney general on the Commissioner's behalf, may, with or without prior

administrative action by the Commissioner, bring an action against any person in any superior court in New Hampshire to enjoin the acts or practices and to enforce compliance with RSA Chapter 397-A or any rules or orders thereunder. Upon a proper showing, a permanent or temporary injunction, bar, restraining order, or writ of mandamus shall be granted and a receiver may be appointed for the defendant or the defendant's assets. The court shall not require the Commissioner or attorney general to post a bond. The court shall have the power to enforce obedience to such injunction, in addition to all of the court's customary powers, by a fine not exceeding $10,000.00 or by imprisonment, or both. In a proceeding in superior court under RSA Chapter 397-A:21,VI where the state prevails, the Commissioner and the attorney general shall be entitled to recover all costs and expenses of investigation, and the court shall include the costs in its final judgment.

30. Pursuant to RSA 397-A:21,I-a, any person who willfully violates any provisions of RSA 397-A:2,VI or VII or a cease and desist order or injunction issued pursuant to RSA 397-A:18,II shall be guilty of a class B felony. Each of the acts specified shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction of any other offense.

31. RSA 397-B:1,IV-c provides that originator and mortgage loan originator shall have the same meaning as provided in RSA 397-

A:1,XVII. Respondent violated this provision on at least two occasions as alleged above.

32. Pursuant to RSA 383:10-d, the Commissioner shall investigate conduct that is or may be an unfair or deceptive act or practice under RSA Chapter 358-A and exempt under RSA 358-A:3,I or that may violate any of the provisions of Titles XXXV and XXXVI and administrative rules adopted thereunder. The Commissioner may hold hearings relative to such conduct and may order restitution for a person or persons adversely affected by such conduct.

33. Pursuant to RSA 541-A:30,III, if the agency finds that public health, safety or welfare requires emergency action and incorporates a finding to that effect in its order, immediate suspension of a license may be ordered pending an adjudicative proceeding. The agency shall commence this adjudicative proceeding not later than 10 working days after the date of the agency order suspending the license. A record of the proceeding shall be made by a certified shorthand court reporter provided by the agency. Unless expressly waived by the licensee, agency failure to commence an adjudicative proceeding within 10 working days shall mean that the suspension order is automatically vacated.

III. RELIEF REQUESTED

The staff of the Department requests the Commissioner take the following action:

1. Pursuant to RSA 397-A:17,I and RSA 397-A:20,IV, find this action and all resulting findings and orders herein necessary and appropriate and in the public interest, and consistent with the intent and purposes of the New Hampshire banking laws;
2. Find that the allegations contained in the Staff Petition, are true and correct and form the legal basis of the relief requested;
3. Pursuant to RSA 397-A:17,II(e)(4), find that the allegations contained in this Staff Petition, if proved by a preponderance of the evidence that the above named person no longer demonstrates the financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the person subject to RSA Chapter 397-A will operate honestly, fairly, and efficiently within the purposes of RSA Chapter 397-A, forms the legal basis of the relief requested;
4. Pursuant to RSA 397-A:17,I find that the public interest would be irreparably harmed by delay in issuing this immediate suspension;
5. Pursuant to RSA 541-A:30,III, find that delay will cause harm to the public, health, safety or welfare, requiring emergency action;

6. Pursuant to RSA 397-A:17,III, find that the protection of consumers, lenders, or investors requires emergency action;

7. Find as fact the allegations contained in section I of this Staff Petition;

8. Make conclusions of law relative to the allegations contained in section II of this Staff Petition;Pursuant to RSA 397-A:17, order Respondent Frost's New Hampshire mortgage loan originator license be immediately suspended;

9. Pursuant to RSA 397-A:17,II (a),(b) and (c) and RSA 397-A:18,II, order Respondent Frost to cease and desist from conducting business in New Hampshire;

10. Pursuant to RSA 397-A:17,II (a),(b) and (c) and RSA 397-A:18,II, order Respondent Frost to cease and desist from violating New Hampshire state law and federal law and any rules or orders thereunder;

11. Pursuant to RSA 397-A:17, order Respondent Frost to show cause why his mortgage loan originator license should not be revoked;

12. Pursuant to RSA 397-A:17,II(e)(1), order Respondent Frost to show cause why he should not be banned or removed from office;

13. Pursuant to RSA 397-A:17,VIII, order Respondent Frost to rescind, give restitution, or disgorge profits;

14. Pursuant to RSA 397-A:17,IX, order Respondent Frost to show cause why, in additional to administrative penalties, he should not be assessed an additional penalty not to exceed $25,000.00 for each violation alleged above.

15. Assess fines and administrative penalties in accordance with RSA 397-A:21, for violations of RSA Chapter 397-A, in the number and amount equal to the violations set forth in section II of this Staff Petition; and

16. Take such other administrative and legal actions as necessary for enforcement of the New Hampshire Banking Laws, the protection of New Hampshire citizens, and to provide other equitable relief.

IV. RIGHT TO AMEND

The Department reserves the right to amend this Staff Petition and to request that the Commissioner take additional administrative action. Nothing herein shall preclude the Department from bringing additional enforcement action under RSA Chapter 397-A or the regulations thereunder.

Respectfully submitted by:

/s/
Maryam Torben Desfosses
Hearings Examiner

03/23/10
Date

Voting Sheets

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on HJR 2

BILL TITLE: making restitution to Jeffery Frost for inappropriate prosecution.

DATE: February 19, 2013

LOB ROOM: 208

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep. Sullivan

Seconded by Rep. Woodbury

Vote: 19-0 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: NO

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Sylvia E. Gale, Clerk

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on HJR 2

BILL TITLE: making restitution to Jeffery Frost for inappropriate prosecution.

DATE: ~~{Type DATE}~~ 2-19-13

LOB ROOM: 208

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep. Sullivan

Seconded by Rep. Woodbury

Vote: 19-0 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: {Type VOTE} YES - 10

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Sylvia E. Gale, Clerk

STATE OF NEW HAMPSHIRE
OFFICE OF THE HOUSE CLERK

1/10/2013 11:55:21 AM
Roll Call Committee Registers Report

2013 SESSION

JUDICIARY

Bill #: HR 21 Title: making restitution for Jeffrey Frost

PH Date: 2/14/13 Exec Session Date: 2/19/13

Motion: ITL Amendment #:

MEMBER	YEAS	NAYS
Smith, Marjorie K, Chairman	19	
Wall, Janet G, V Chairman	1	
~~Hackel, Paul L.~~ Carey, Lorrie	2	
Watrous, Rick H	3	
Sullivan, Peter M	4	
Horrigan, Timothy O	5	
Berch, Paul S	6	
Gale, Sylvia E, Clerk	7	
Heffron, Frank H	8	
Phillips, Larry R	9	
Woodbury, David	10	
Rowe, Robert H,	11	
Hagan, Joseph M	12	
Peterson, Lenette M,	13	
Hopper, Gary S	14	
Kappler, Lawrence M	15	
Luther, Robert A	16	
Sylvia, Michael J	17	
Takesian, Charlene F	18	
Thompson, David H		
TOTAL VOTE:	19	0

Committee Report

REGULAR CALENDAR

February 20, 2013

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Committee on JUDICIARY to which was referred HJR 2-FN-A,

AN ACT making restitution to Jeffery Frost for inappropriate prosecution. Having considered the same, report the same with the following Resolution:

RESOLVED, That it is INEXPEDIENT TO LEGISLATE.

Rep. Peter M Sullivan

FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

COMMITTEE REPORT

Committee:	**JUDICIARY**
Bill Number:	**HJR2-FN-A**
Title:	**making restitution to Jeffery Frost for inappropriate prosecution.**
Date:	**February 20, 2013**
Consent Calendar:	**NO**
Recommendation:	**INEXPEDIENT TO LEGISLATE**

STATEMENT OF INTENT

The Judiciary Committee takes no stance on the merits of Jeffrey Frost's claim. Our objection to HJR 2 is based on our learning that Mr. Frost chose to initiate litigation in Superior Court. This is the appropriate forum. The House is not equipped to offer findings of fact or rulings of law in a civil tort case. Further, passing HJR 2 would set a dangerous precedent. A flood of aggrieved litigants seeking financial compensation through the legislative process would overwhelm the House staff and undermine the authority of the courts.

Vote 19-0.

Rep. Peter M Sullivan
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

JUDICIARY

HJR 2-FN-A, making restitution to Jeffery Frost for inappropriate prosecution. **INEXPEDIENT TO LEGISLATE.**

Rep. Peter M Sullivan for JUDICIARY. The Judiciary Committee takes no stance on the merits of Jeffrey Frost's claim. Our objection to HJR 2 is based on our learning that Mr. Frost chose to initiate litigation in Superior Court. This is the appropriate forum. The House is not equipped to offer findings of fact or rulings of law in a civil tort case. Further, passing HJR 2 would set a dangerous precedent. A flood of aggrieved litigants seeking financial compensation through the legislative process would overwhelm the House staff and undermine the authority of the courts. **Vote 19-0.**

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

JUDICIARY

MAJORITY REPORT

HJR 2, making restitution to Jeffery Frost for inappropriate prosecution.

RECOMMENDATION: INEXPEDIENT TO LEGISLATE

VOTE: 19-0

The Judiciary Committee takes no stance on the merits of Jeffrey Frost's claim. Our objection to HJR 2 is based on our learning that Mr. Frost chose to initiate litigation in Superior Court. This is the appropriate forum. The House is not equipped to offer findings of fact or rulings of law in a civil tort case. Further, passing HJR 2 would set a dangerous precedent. A flood of aggrieved litigants seeking financial compensation through the legislative process would overwhelm the House staff and undermine the authority of the courts.

Rep. Peter M. Sullivan

Sullivan

COMMITTEE REPORT

COMMITTEE: Judiciary

BILL NUMBER: HJR2

TITLE: making restitution for Jeffrey Frost

DATE: 2/19/13 CONSENT CALENDAR: YES ☐ NO ☒

☐ OUGHT TO PASS

☐ OUGHT TO PASS W/ AMENDMENT

☒ INEXPEDIENT TO LEGISLATE

☐ INTERIM STUDY (Available only 2nd year of biennium)

Amendment No. _____

STATEMENT OF INTENT:

The Judiciary Committee takes no stance on the merits of Jeffrey Frost's claim. Our objection to HJR2 is based on our learning that ~~arises from concerns about the separation of powers between the legislative and judicial branches.~~ Mr. Frost chose to initiate litigation claim ~~[redacted] is the subject of litigation currently pending~~ in Superior Court. This is the appropriate forum. The House is not equipped to offer findings of fact or rulings of law in a civil tort case. Further, passing HJR2 would set a dangerous precedent. A flood of aggrieved litigants seeking financial compensation through the legislative process would overwhelm the House staff and undermine the authority of the courts.

ok MKS

COMMITTEE VOTE: 19-0

RESPECTFULLY SUBMITTED,

Rep. Peter M. Sullivan
For the Committee

- Copy to Committee Bill File
- Use Another Report for Minority Report

Rev. 02/01/07 - Yellow