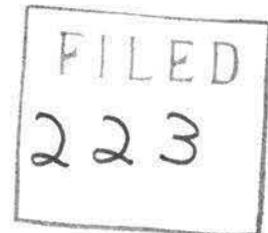


CORPORATIONS NOT-FOR-PROFIT: Corporations organized under Chapters  
USURY: 352, RSMo (pro-forma decree) and 355,  
RSMo (general not-for-profit) can not  
interpose defense of usury, nor can  
they sue for and recover allegedly  
usurious interest under Section 408.050,  
RSMo 1959.

OPINION NO. 223

March 26, 1970

Honorable Vance R. Frick  
Prosecuting Attorney  
Adair County  
213 West Washington  
Kirksville, Missouri 63501



Dear Mr. Frick:

This official opinion is issued in response to your request in which you ask about the applicability of Missouri's usury statutes (see generally Chapter 408, RSMo) to corporations organized under Chapter 352, RSMo (Religious and Charitable Corporations organized pursuant to pro-forma decree) or Chapter 355, RSMo (General Not-For-Profit Corporations).

Section 408.060, RSMo 1959, treats of usury as a defense and provides as follows:

"Usury may be pleaded as a defense in civil actions in the courts of this state, and upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage, or as payment upon the principal, or as interest on said indebtedness; provided, however, that no corporation shall, after this section takes effect, interpose the defense of

usury in any such action, nor shall any bond, note, debt, contract or obligation of any corporation or any security therefor, be set aside, impaired or adjudged invalid by reason of the rate of interest which the corporation may have paid or agreed to pay hereon." (Emphasis supplied)

The provision relating to corporations was added by Laws 1935, p. 267. At this time the statutory provision defining the powers of business corporations (Section 5030, RSMo 1939), had no provision with regard to the rate of interest on corporation obligations, similar to what is now contained in Section 351.385, RSMo Supp. 1967. The first special mention of authorized interest rates in the business corporation statutes was added in 1943 (Laws 1943, p. 410, section 4).

Nothing in the language of Section 408.060 would exclude any type of corporation, organized under any provision of the Missouri statutes. Nor would there be any basis for excluding corporations of other states which enter into loan transactions governed by Missouri law. The statute makes no distinction among types of corporations, nor does it concern itself with the profit-making or non-profit aspect.

There remains the possibility that a corporation organized under Chapter 352 or 355 might be denied the defense of usury, but still might be able to sue for and recover usurious interest pursuant to Section 408.050, RSMo 1959. It is true that this latter section has no specific language which says that a corporation may not bring an action in accordance with its terms. In *Brierley v. Commercial Credit Co.*, 43 F.2d 724, 728 (E.D. Pa. 1929), however, it was held that a similar statute denying a corporation the defense of usury also operated to preclude a suit to recover the usurious interest. The court said that there would be an absurdity in holding that a corporation could not use a claim of usury in total or partial defense when sued, but that it could immediately bring suit to recover the usurious interest which the court's judgment had forced it to pay. The court found, therefore, that the intent of the legislature was to authorize the payment of interest by corporations in excess of the rates which the law allowed individuals to pay. The opinion cites several other cases in support of its conclusion, and seems logical and well-reasoned. We believe that the Missouri courts would reach the same result.

We consider, therefore, that the effect of the 1935 statute was to deny corporations of all types the defense of usury, and to preclude actions by corporations for the recovery of usurious interest. The 1943 modifications of the business corporation statutes would serve to clarify the situation as to those corporations, but surely would not have the effect of giving other kinds of corporations right of action which did not exist under the prior law.

We deal only with bona fide corporate transactions. It is possible that there might be a loan in which the corporation is the ostensible borrower, but in which the transaction might be a cloak for a usurious loan to an individual. We do not interpret your request as presenting any inquiry along these lines and therefore do not discuss the problem.

CONCLUSION

Non-profit corporations organized under Chapters 352 and 355, RSMo can not interpose usury as a defense, nor can such corporations sue for and recover allegedly usurious interest under Section 408.050, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my special assistant, Charles B. Blackmar.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH  
Attorney General