January 22, 1974

OPINION LETTER NO. 40
Answer by letter-Klaffenbach

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Honorable Ike Skelton
State Senator, District 28
Room 421, Capitol Building
Jefferson City, Missouri 65101

Dear Senator Skelton:

This letter is in response to your question asking:

> "May a Missouri corporation [or a non-Missouri corporation], whose primary purpose is originating and making loans, make and close a loan in another state, requiring all payments on this loan to be made in the other state, and validly hold and enforce a loan represented by a deed of trust on real estate located in Missouri upon default by the borrowers for the principal balance due on the loan plus all interest accrued on such loan at a rate of interest in excess of the Missouri 8% statutory limit, which would be stated in the note."

In answering either of your questions, there are a multitude of facts which would have to be determined which are not presented.

The generally accepted rules governing such conflict situations are found in Usury-Effectiveness of the General Usury Statutes of Missouri, 26 Mo.L.Rev. 217, 235 (1961), footnoted material in brackets:

> "G. Conflict of Laws Problem
>
> Where there is a possibility of conflict between Missouri laws and the laws of another state which allow a higher interest rate, Missouri courts generally apply the rule that, in

the absence of any subterfuge to evade the stricter Missouri laws, the intention of the parties governs as to which laws should apply [Davis v. Tandy, 107 Mo. App. 437, 81 S.W. 457 (K.C. Ct. App. 1904).], and parol evidence is admissible to show such intention [Hansen v. Duvall, 333 Mo. 59, 62 S.W.2d 732 (1933).]. In the absence of evidence of the intention, the laws of the place of performance of the loan contract prevail [Central Nat'l Bank v. Cooper, 85 Mo. App. 383 (K.C. Ct. App. 1900). But the court indicated that if performance is placed in a state which has no connection with the contract merely as a device to evade Missouri's usury laws, such a device would fail. But see Cowgill v. Jones, 99 Mo. App. 390, 73 S.W. 995 (K.C. Ct. App. 1903), which indicated that the law of the place of execution would govern.]. Performance is said to be the repayment of the loan [Central Nat'l Bank v. Cooper, supra note 138.]. But Missouri's avowed public policy against usurious contracts is not so strong that Missouri courts will refuse to enforce a contract which would be unenforceable under Missouri law because of usury if such contract is legal under the laws of the other state [Davis v. Tandy, supra]. Therefore, the above rules are sometimes disregarded or modified in order to prevent a loan from being usurious. In Davis v. Tandy, there was no stipulation as to the intention of the parties and the loan was to be repaid in Missouri. The court indicated that since the interest was usurious under Missouri law, it would be presumed the parties intended the governing law to be that of the state of execution of the contract, in which the interest rate charged was legal [But see J. I. Case Threshing Mach. Co. v. Tomlin, supra note 116, which indicates a statement of place of performance is evidence that the parties intended the law of that place to govern.]. In Hansen v. Duvall, the plaintiff in purchasing property assumed his predecessor-in-title's notes, but later gave defendant-holder his own notes. The court disregarded the facts that the later notes were both executed and payable in Missouri and that both plaintiff and defendant were residents of Missouri, and based its

> decision on the fact that since plaintiff's predecessor's notes were payable in Kansas plaintiff's notes assumed the same governing law--that of Kansas."

The question of whether usury affects the validity of a deed of trust of realty has been answered by the Missouri Supreme Court in Gehlert v. Smiley, 114 S.W.2d 1029, 1034 (Mo. 1937):

> ". . . When we look to our own statutes, we find that, except as to mortgages and pledges of personal property, usury invalidates only the part of an agreement which provides for illegal interest. Ferguson v. Soden, 111 Mo. 208, 19 S.W. 727, 33 Am.St.Rep. 512; Bowman v. Strother, 144 Mo.App. 100, 128 S.W. 848. Section 2844, R.S.1929, Mo.St.Ann. § 2844, p. 4633, provides that receiving or exacting usurious interest on any indebtedness 'shall render any mortgage or pledge of personal property, or any lien whatsoever thereon given to secure such indebtedness, invalid and illegal.' Other statutes allow usury to be pleaded as a defense to prevent recovery of more than the actual debt with legal interest, section 2843, R.S.1929, Mo.St.Ann. § 2843, p. 4632; and permit recovery back by a borrower of usurious interest actually paid, with attorneys' fees and costs, section 2842, R.S. 1929, Mo.St.Ann. § 2842, p. 4630. We have no statute making real estate mortgages invalid because they exact usurious interest and the mortgage involved here was a real estate mortgage. Cavally v. Crutcher, Mo.App., 9 S.W.2d 848. Mortgagors of real estate therefore, have only the rights given by the other two statutes, namely, to claim credit on the principal debt for any usurious interest payments, to prevent foreclosure for failure to make payment of usury, to stop the sale by tender of the actual amount due, and to recover back anything paid in excess of the actual debt with legal interest. Section 4421, R.S. 1929, Mo. St.Ann. § 4421, p. 3042, in addition provides punishment as a criminal offense in certain cases."

Honorable Ike Skelton

The question of how the Missouri courts would apply the foregoing precedents in any given situation is a question upon which we cannot speculate in view of the myriad fact situations that may exist.

Yours very truly,

JOHN C. DANFORTH
Attorney General