

BUILDING AND LOAN: Associations with sufficient funds must pay members withdrawing; persons who buy stock with note which is non-participating are not members; persons who collect rents and sell land for Associations are employees and must give bond.

7/20
July 6, 1937.



Honorable J. W. McCammon
Supervisor, Bureau of
Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

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

"Inclosed is a letter dated June 12th from J. L. Moore, examiner, setting forth four questions pertinent to building and loan operation. These questions must be answered if this department is to properly supervise the operation of state chartered associations. Therefore, we respectfully submit, for your opinion, the following:

1. Is an association entitled to operate under Section 5604, of the Missouri building and loan association laws, when it has funds available to pay in full all withdrawal notices on file?
2. Does the mere issuance to a borrower of a certificate of stock upon which no dues are paid and which does not participate in the earnings of the association, comply with Section

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5597 of the Missouri building and loan association laws in the case of a direct reduction or straight loan?

3. Does Section 5591, of the Missouri building and loan association laws, include agencies or parties other than the regular officers and employees of the association when such other agencies or parties handle funds belonging to the association?"

I.

Section 5604, Laws of Missouri 1931, page 155, provides as follows:

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

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time as the by-laws may provide. If given before a stated meeting, the time of such notice shall not be deemed to have commenced to run until the first stated meeting thereafter. The member so withdrawing, or, if deceased, his legal representative, shall, if his stock be withdrawable according to the terms of the certificate and by-laws of the association, be entitled to receive the amount actually withdrawable at the time of making application for withdrawal according to the by-laws of the corporation and the provisions of the certificate of stock. At no time, however, shall more than one-half of the receipts of the corporation for any fiscal month, and, when the corporation is indebted on matured shares of an earlier series, not more than one-third of said receipts, be applicable to the demands of the withdrawing shareholders, or of shareholders, whose stock has been forfeited in the manner hereinafter provided, without the consent of the directors; and when the demands of withdrawing shareholders exceed the moneys applicable to their payment, the funds applicable to the payment of the withdrawing shareholders shall be pro-rated among the members who have filed notice of

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withdrawal upon the following basis: All shares on which notice of withdrawal have been filed for a period of 30 days, shall receive their pro-rata share of the funds available for withdrawal at the end of the preceding fiscal month, based upon the withdrawal value of the shares at the time distribution is made. Such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder."

The right of the above statute allowing the shareholder to withdraw is a fundamental right. "The right is an absolute one and cannot be arbitrarily withheld." 9 C.J. 938.

In State v. Redwood Falls Bldg. & L. Ass'n. 45 Minn, 154, 47 N.W. 540, the rule is stated thus:

"So long as funds remain on deposit in the hands of the association, members who are not borrowers may avail themselves of the right to withdraw their proper share of the same, upon complying with the conditions laid down in the by-laws."

It is therefore our opinion that a shareholder may withdraw when funds are available and all the requirements of the statute are complied with. It must be noted that we do not deal in this opinion with the situation when no funds are available.

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II.

The facts that apply to your second question are given in the letter attached to the request, and are as follows:

"This association is now operating considerable loans on the Direct Reduction basis. When a loan is made say in the amount of \$1000, ten shares of stock, par value \$100 per share, is proportioned to such loan. The borrower signs a note wherein is incorporated the fact that stock pledged does not participate in the earnings, also the assignment on stock certificates clearly states that stock is non-participating, and all payments received on loan are credited to principal after interest payment due is deducted, at no time does the element of stock dues enter into the transaction. In other words the stock has nonstatus inasmuch as no dues is ever paid on same neither is any earnings credited to same."

Section 5597, Laws of Missouri 1935, page 204, provides in part as follows:

"And provided further, than any association shall be permitted to make real estate loans to its members on a plan or plans requiring periodical direct re-

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duction of the principal of the loan; and that any loan so made with which any number of shares of stock of the association is pledged shall be for all purposes a loan to a member, and that the proportion that the number or total amount in dollars of all such loans may bear to the number or total amount in dollars of all loans shall not impair or affect mutuality."

Kimball v. Dave, 32 Mo. App. 194, states

"The word (stockholders' as employed in the statute in its application to corporations must be construed to mean a member who has a direct financial interest in the business of the corporation with power to participate in the conduct of its affairs."

In Bertche v. Equitable Loan & Investment Association of Missouri, 147 Mo. 343, 48 S. W. 954, the Supreme Court of Missouri, en banc, said:

"All members must participate equally in the profits and bear the losses, if any, in the same proportion."

Also as is stated in 9 C. J. 949,

"Dues are generally payable only in cash and officers of the

corporation have no authority to accept anything else such as checks."

It was held in *Grohmann v. Brown*, 68 Mo. App. 630, that the issuance of a certificate of stock does not of itself make the person a shareholder.

The scheme described above seems to partake of a straight loan and the so-called selling of stock is only a subterfuge to allow the borrower to come in as a member and take advantage of the benefits and privileges accorded to members of building and loan associations.

For the reasons stated above, the borrower is not shareholder and therefore comes within the provisions of Section 5594, Laws of Missouri, 1931, amended Laws of Missouri, 1933 Extra Session, which provides that surplus money may be loaned to non-member on the posting of certain collateral.

III.

Your third question deals with whether the bond required of officers and employees of building and loan association who handled money, must be given by those who are not regular officers or employees but collect and handle money of the association only in a collateral way. The specific example given in the accompanying letter is that the A Co. of Tulsa, Okla., looks after the property of the association in that city, renting and selling said property, collecting rents, attending to repairs and other matters.

Section 5591, Laws of Missouri 1931, page 147, provides in part as follows:

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"All officers and employes of any building, loan and savings association doing business in this state, whether created under this article, or any previous laws of this state, who may have the custody or handling of any of the funds or securities of such association, or who sign or endorse checks of said association, shall give such security for the faithful performance of their duties as the by-laws may require, and no such officer shall be deemed qualified to enter upon the duties of his office until such security is approved by the board of directors and the supervisor of building and loan associations. All such bonds shall be filed with the supervisor of building and loan associations, or some depository designated by the supervisor of building and loan associations."

The question is therefore whether the term 'employee' as used in the above section is broad enough to include persons who collect rents, sell the property and carry on the business of the associations.

In 59 C. J. 1106, it is said

"Laws for the prevention of fraud should be liberally construed with a view to promote the object in the mind of the Legislature."

The word "employee" therefore should be liberally construed so as to effectuate the purpose of the Legislature.

The purpose of a building and loan association 'is to enable persons of limited means and income to build homesteads and pay for them by small installments in keeping with their incomes'. *Hammerslough v. Kansas City Bldg. L. & S. Assn.*, 79 Mo. 80.

The object of Section 5591, supra, which requires employees handling money to give a bond, manifestly was to protect that class of investors upon whom any defalcation or misdirection of funds would fall heavily.

An "employee" is defined in *Employers' Indemnity Co. vs. Kelly Coal Co.*, 149 Ky. 712, 149 S. W. 992, as "one who works for and under the control of his employer; and the mode of payment, while a circumstance to be considered in determining the question, is not decisive."

In *Ocean Accident & Guarantee Corp. v. Industrial Accident Comm.*, 262 P. 38, 87 Cal. App. 290, the Court held a person collecting monthly dues for which he received a commission was an employee.

It is therefore our opinion that a person who rents and sells property for a building and loan association, and collects the money on such transactions, even though he is not regularly or full-time employed, is an employee within the meaning of Section 5591, supra, and must give a bond.

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CONCLUSION.

It is therefore the opinion of this Department that building and loan associations which have sufficient funds on hand shall pay members who wish to withdraw, said members complying with the statutes and by-laws relating to withdrawal. It is further the opinion of this Department that a person who pays for his stock with a note and receives stock under an agreement that said stock is to be non-participating is not a member and cannot borrow as such. Thirdly, under Section 5591, persons who collect rents and sell land for a building and loan association are 'employees and must give a bond'.

Respectfully submitted,

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APPROVED:

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AO'K/R