OPINION
68-110

May 29, 1968 (OPINION)

Honorable Evan E. Lips

State Senator

Bismarck, North Dakota

RE: Interest - Corporations Borrowing Out of State - Rate

This is in response to which you ask for an opinion on the following situation:

> May a North Dakota corporation which has applied for and obtained a Certificate of Authority to do business in another state borrow money in such other state in which the legal rates of interest are higher than North Dakota and in doing so, in good faith contract with the lender of the money in the other state, agreeing to pay a higher rate of interest than seven percent? The North Dakota corporation would go to the lender in the other state and all negotiations for the loan would be in the other state, the loan documents would be drawn and executed in the other state and include a specific contractual agreement, that the law of the state of the lender's residence be considered as the law governing all aspects of the transaction as well as any proceedings for foreclosure of mortgage security even though the security consisted of real estate in the state of North Dakota.
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> A subsidiary question, being a very important one, is whether or not if the loan were not repaid and the lender instituted an action in North Dakota to forecloser a mortgage on North Dakota land given as security for the loan, could the North Dakota corporation raise in the North Dakota court in the foreclosure proceeding the defense of usury under the North Dakota statutes, or would the corporation be precluded from asserting such a defense under the contractual conditions above set forth?
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> In other words, it is impossible for a North Dakota corporation to borrow money any other place in the world and the lender be precluded from charging more than seven percent interest because of the fear that if the loan is not repaid and the security foreclosed on in a North Dakota court, the defense of usury could be interposed?"

The questions presented can be resolved upon the determination of which state law will prevail. Will the law of the State in which the land is situated control or does the law of the State in which the transaction took place (situs of contract) control? The answer to this question will be material in answering the questions you presented.

Section 47-14-09 of the North Dakota Century Code defines what is

"usury" and also sets out the maximum rate of interest permitted. This section does not specifically state that anything contrary to its provisions shall be deemed against public policy of this State.

Section 47-14-11 of the North Dakota Century Code sets forth the penalty for violating the provisions of Section 47-14-09. Whether this would indicate that it is against public policy in this state is not without doubt, but we do believe that it is necessary to resolve that point because section 9-07-11 of the North Dakota Century Code states that a contract is to be interpreted according to the law and usage of the place where it is to be performed, or if it does not indicate a place of performance, according to the law and usage of the place where it is made. This obviously recognizes the theory of conflicts of law. Numerous jurisdictions have reached conclusions substantially the same as set forth in the above section. In addition to this, section 9-07-08 of the North Dakota Century Code provides that a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect if it can be done without violating the intentions of the parties.

As to corporations, section 10-19-04(8) of the North Dakota Century Code provides that each corporation shall have power, as follows:

> 8. To make contracts and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises, and income;
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> * * *"

The above quoted subsection apparently recognizes that corporations may do business in states other than the state in which it is domiciled and under which it is incorporated. A corporation may obtain a certificate of authority in a state other than the one in which it was incorporated. We believe that subsection 8 permits a corporation to borrow money at rates of interest in accordance with the laws of the state in which the transaction takes place.

The Supreme Court of Arkansas in Smith v. Brokaw, 297 S.W. 1031, had under consideration a question which resolves substantially the same facts that you presented. In that case, Smith and his wife resided in Arkansas and owned land located in Arkansas. An investment company which had its principal place of business in Oklahoma was also authorized to do business in Arkansas and was, in fact, engaged in lending money on farms in Arkansas and elsewhere. The investment company had agents in Arkansas. Smith and wife made application for a loan through the agent. The investment company sent out an appraiser and approved the loan. The mortgage and notes were prepared by the home office in Oklahoma and were sent to the agent in Arkansas where same were executed by Smith and wife, upon which same were returned to the investment company in Oklahoma. The money was sent by check on a bank in Oklahoma. Subsequently, the investment company assigned the note and mortgage. Under the terms of the loan the interest rate, together with brokerage fees charged, were usurious under the laws of Arkansas but not under the laws of

Oklahoma. Smith and his wife defaulted in payments. Court action followed. The court held that: * * * "The contract having been made in Oklahoma where it is not void for usury will be enforced and adjudicated by the courts of this state (Arkansas) precisely as it would be adjudicated in the courts of that state (Oklahoma). (Citations omitted - material in parenthesis ours.) The court remanded the case with instructions to foreclose and sell the land for payments, etc.

In this case the court simply applied the theory of conflicts of law and said that the situs of the contract was controlling. It is significant to note that the action was brought in Arkansas and the court was, in fact, construing a contract entered into in the state of Oklahoma.

The Supreme Court of Arkansas later in Cooper v. Cherokee Village Development, 364 S.W.2d. 158 reaffirmed its position and on page no. 161 quoted approvingly from Terry v. Porter, 33 S.W. 211, as follows:

> The law of the place which determines the validity of a contract secured by mortgage determines the mortgage to be valid or usurious, irrespective of the place where the land which is the subject of the mortgage is situated."

The Federal Court in Whitman v. Green, 289 Fed. 2d. 566, held that the Washington law controlled where an Idaho borrower sought out a lender in Washington in which state the note and mortgage were prepared even though same were executed in Idaho and delivered to Washington. In this instance the land was located in Idaho. The note was payable in Washington. Here again the court recognized the conflicts of law theory that a contract must be construed in accordance with the law of the state in which the contract was entered into.

In Patterson v. Wyman, 170 N.W. 928, the Minnesota court said:

> Where a note is made payable in North Dakota its validity is governed by laws of North Dakota, notwithstanding that it is secured by mortgage on Minnesota land."

The North Dakota Supreme Court had under consideration a question which was similar to the one that you pose. In Gold-Stabech Loan & Credit Co. v. Kinney, et al, 157 N.W. 482, 33 N.D. 495, the land upon which the mortgage was given was located in North Dakota. The owner of the land resided in Wisconsin. The lender was a Minnesota resident. The loan and mortgage were entered into and performed in Minnesota, and the conditions of repayment were also to be performed in Minnesota. The note said that the laws of the state of Minnesota controlled. The court, in effect, held that a mortgage made by a resident of Wisconsin to a resident of Minnesota to secure a debt which is payable in Minnesota, is, as far as the defense of usury is concerned, governed by the laws of Minnesota even though the land is situated in North Dakota.

Our research disclosed only one result which might be considered contrary and that the case of DeKorwin v. First National Bank, 318 Fed. 2d. 176, but in this case the transaction involved a trust

estate and the assignment of same. The corpus of the trust was located in the state of Illinois but the assignment took place in California. The court in this instance said that the transaction was governed by the laws of Illinois in the absence of any showing that the assignment and other elements arising thereunder were to be governed by any other law. In reality, this case is not contrary to the aforementioned cases.

Our research did not disclose any case law which reached a result contrary to the ones mentioned above.

It is significant to note that in the Gold-Stabech case the North Dakota Supreme Court recognized the laws of Minnesota in determining whether or not the initial contract was valid or usurious. However, it appears that the courts of one state will not enforce the laws of another state as same may apply to forfeitures and penalties. (See Patterson v. Wyman, supra.)

Some states have provided by law that a corporation may not raise the defense of usury. We have not made a special effort to determine whether the law of the state in which the transactions occur or the state in which the corporation is organized controls as to raising the defense of usury, where, in fact, the rate is usurious under the laws of the state in which the transaction took place. Neither have we attempted to determine what the law is on this subject where a corporation is authorized to do business and transacts its business in the state with reference to raising the defense of usury, if the loan is actually usurious under that state because some facts might vary the result. We, however, do not believe this will come into operation if the loan is within the legal rate authorized by the state in which the transaction occurs. We further believe that if a corporation is, in fact, authorized to do business in the state, which state has a law providing that a corporation may not plead usury as a defense, said provision would most likely prevail if the transaction took place in that state and under its laws.

Case law has established that courts will look to the laws of the state in which the transaction occurred. If the transaction is legal it will be deemed valid without regard to the laws of the state wherein the land is situated upon which the mortgage is given. There is no indication that the North Dakota courts will not follow the decision in Gold-Stabech Loan & Credit Co. v. Kinney, 157 N.W. 482, discussed earlier herein.

It is therefore our opinion that a corporation under the facts outlined in paragraph no. 1, except as to the foreclosure proceedings, may obtain the loan in accordance with the legal rate of interest allowed in the state in which the transaction takes place and that such loan or contract, if valid in that state, would be valid in this state (North Dakota). It is our further opinion that a corporation could not plead the North Dakota usury laws for a defense in the interest rate is legal under the laws of the state in which the transaction took place.

Foreclosure proceedings would have to be under the laws of this state.

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