

**OPINION
67-14**

October 18, 1967 (OPINION)

Mr. G. W. Ellwein, Chief Deputy

Office of State Examiner

RE: Banks - Installment Loans - Rate of Interest

This is in response to your letter in which you ask for an opinion whether or not under the provisions of Section 13-04-01 of the North Dakota Century Code, as found in the Supplement, banks may basically quote in newspapers, radio, TV, etc., a rate of six percent interest. You ask whether or not a trust company chartered under the provisions of Chapter 6-05 may make loans under the provisions of Section 13-04-01. Section 13-04-01 provides as follows:

"INSTALLMENT BANK LOAN CHARGES. - Any bank organized under the laws of this state and under the jurisdiction and supervision of the state banking board, or any national banking association doing business in the state, making any loan of money not exceeding thirty-six hundred dollars repayment in installments, may make a charge for such loan computed at a rate not exceeding six dollars per one hundred dollars per annum upon the total amount of the loan from the date thereof until the stated maturity date of the final installment thereof, which shall not exceed three years and thirty-two days from the date of the loan, notwithstanding that such loan is required to be repaid in installments or that the loan is secured by mortgage, pledge, or other collateral, except that this chapter shall not apply to loans secured by realty. Any charge authorized by this chapter may be deducted in advance from the proceeds of such loan or may be included in the principal amount of the note or other instrument evidencing said loan and the aggregate amount thereof be payable in installments." (Underscoring ours.)

The foregoing section was created and enacted by Chapter 125 of the 1963 Session Laws. The same chapter also created and enacted Sections 13-04-02 and 13-04-03, which respectively provide as follows:

"13-04-02. CHARGE ON DEFAULT. - An installment bank loan may provide for the payment by the borrower of a delinquency and collection charge in an amount not in excess of five percent of the delinquent installment or five dollars whichever is less on each installment in default when such default continues for a period of more than ten days provided that only one such delinquency and collection charge may be collected on any such installment regardless of the period during which it remains in default."

"13-04-03. PREPAYMENT - REFUND. - The borrower may at any time prepay the entire balance of a bank installment loan made under

the provisions of this chapter at any time, and upon such prepayment the borrower shall be entitled to a refund, the amount of which shall represent at least as great a proportion of the original loan charge as the sum of the periodic time balances after the month in which prepayment is made bears to the sum of all the periodic time balances under the schedule of installments in the original contract."

Neither the Act itself nor the title of the Act attempts in any manner to define the term "bank", nor does the Act in any manner indicate that the term "bank" is used in a specific manner. It is therefore not a work of art.

Webster's New 20th Century Unabridged Dictionary, 2nd Edition, defines the word "bank" as follows:

1. An establishment for the deposit, custody, and issue of money, for making loans and discounts, and for making easier the exchange of funds by checks, notes, etc.: banks make profit by lending money at interest.
2. a company or association carrying on such a business.
3. the building or office in which the transactions of a banker or banking company are conducted * * * ."

We must assume that the Legislature had reference to a bank as such term is ordinarily understood in its common usage. We must also take into consideration that the bank referred to here is one "which is organized under the laws of this state."

"Banks" in the normal concept are organized under the provisions of Chapter 6-02 of the North Dakota Century Code. We also are aware of the definitions found in Section 6-01-02, which defines such terms as "state banking association", "banking" and "bank." While these definitions are not binding on the terms used in Section 13-04-01, nevertheless they are helpful in determining the legislative intent with reference to organizations and institutions created under the provisions of Chapter 6-02 and Chapter 6-05. Section 6-02-01 prior to the amendment initially provided as follows:

"COMPLIANCE WITH TITLE REQUIRED - PENALTY FOR NONCOMPLIANCE. - No person, firm, company, copartnership, or corporation, either domestic or foreign, not organized under this title, excepting only national banking corporations and the Bank of North Dakota, shall make use of or display in connection with its business, in signs, letterheads, advertising, or in any other way, such words as "bank," "banker," "banking," "savings bank," or any other word or words of like import, nor shall any person or concern do or perform anything in the nature of the business of a bank or savings bank until and unless such business is regularly organized and authorized under this title. * * * ."

The 1963 version of Section 6-02-01, as amended by Chapter 93, contained the following language:

"COMPLIANCE WITH CHAPTERS REQUIRED - PENALTY FOR NONCOMPLIANCE.

- No person, firm, company, copartnership, or corporation, either domestic or foreign, not organized under this chapter, or chapters 6-04 or 6-05, excepting only national banking corporations and the Bank of North Dakota, shall make use of or display in connection with its business, in signs, letterheads, advertising, or in any other way, such words as 'bank', 'banker', 'banking', 'savings bank', or any other word or words of like import, nor shall any person or concern do or perform anything in the nature of the business of a bank or savings bank until and unless such business is regularly organized or authorized under this chapter or chapters 6-04 or 6-05. * * *

."

The 1963 amendment also contained the following language:

" * * * Any trust company, hereafter organized which has not secured a hearing and determination by the state bank board under the provisions of sections 6-02-05 and 6-02-06, shall not engage in banking business except for the power provided under chapter 6-05."

In 1965, Section 6-02-01 was amended by Chapter 84, the last provision of said section as a result of the amendment, stating as follows:

" * * * The provisions of sections 6-02-02, 6-02-03, 6-02-04, 6-02-05, 6-02-07, 6-02-08 and 6-02-09 shall not be applicable to trust companies granted authority to engage in the business of banking by the state banking board."

In 1967, the same section was further amended and limited the use of the terms "bank" or "banking" and savings bank" to those organized under Chapter 6-02 or Chapter 6-04. A review of these various amendments indicate that the Legislature in providing, under Section 13-04-01, that "any bank organized under the laws of this state" actually referred to a bank doing business as a bank pursuant to authority of the laws of this state. Even though by inference certain trust companies created and organized prior to certain amendments could continue to use the term "bank", particularly because of the initial provisions of Section 6-02-01, it is not the use of the term "bank" but the actual operation or authority to operate which is controlling.

It thus appears eminently clear that a trust company organized under Chapter 6-05 would not constitute a bank as such term is found in Section 13-04-01. Conceivably a trust company organized prior to the 1963 amendments might qualify for such term, depending upon what authority had been granted to such trust company prior to the amendments.

It is therefore our opinion that a trust company organized under Chapter 6-05 does not qualify as a "bank" as such term is used under Section 13-04-01, unless such trust company is also legally authorized and qualified to engage in the business of banking. See also the discussion of such term by the North Dakota Supreme Court in *Nelson v. Dakota Bankers Trust Co.*, 132 N.W.2d. 903.

As to the rate of interest charged, we would specifically note that Section 13-04-01, amongst other things, states as follows:

" * * * may make a charge for such loan computed at a rate not exceeding six dollars per one hundred dollars per annum upon the total amount of the loan from the date thereof until the stated maturity date of the final installment thereof, * * * ."

This section also authorizes the deduction of a charge in advance from the proceeds of such loan. If the loan would be for a one year period and the entire amount repayable at the end of the year, the charge allowed would amount to a rate of six percent per annum. However, if the loan is to be repaid in monthly installments, the charge of six dollars per hundred would produce an interest rate considerably greater than six percent. Thus quoting an interest rate of six percent would be misleading if, in fact, the charge is six dollars per hundred dollars per annum and where the loan is repayable in monthly installments or in other periodic installments within the time specified.

Sections 13-04-02 and 13-04-03 further indicate that the charge of six dollars per hundred per annum is not the interest rate but is a charge for advancing the money and can be made and deducted in advance, even though the repayment is by installments occurring prior to the final due date.

It is therefore our opinion that where an institution loans money and charges six dollars per hundred per annum and requires payments within the specified time of said loan on a monthly or periodic basis, it would be a false and misleading statement for such institution to advertise that it is loaning money at the rate of six percent per annum. In arriving at this conclusion we are construing the term "six percent interest, or at the rate of six percent" to mean six percent interest per annum. We are not saying that an institution may not advertise such rate of interest if, in fact, that is the rate of interest being charged. Neither are we saying that a bank may not charge the amount authorized under Section 13-04-01, but we are concluding that a bank may not advertise that it is charging a rate of six percent per annum when, in fact, it is charging a higher rate. A bank may advertise the rate authorized under Section 13-04-01 but in doing so it should not use language which is false or misleading. It should state the actual charges or rates involved.

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