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ATTORNEY GENERAL OPINION NO. 79- 252

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The Honorable Arnold Berman
State Senator, District 2
827 Vermont Street
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Re: Contracts and Promises--Interest and Charges--
Usury

Synopsis: Loans secured by a first real estate mortgage may be made pursuant to the provisions of the Uniform Consumer Credit Code (K.S.A. 16a-1-101 through 16a-9-102), either as a "consumer loan," as defined by K.S.A. 16a-1-301(14), or as a loan made subject to the UCCC by agreement of the parties thereto, as authorized by K.S.A. 16a-1-109. Unless it is a supervised loan made under a license issued by the Consumer Credit Commissioner, such real estate loans may be made at a maximum interest rate of not to exceed 14.45% on that portion of the unpaid balance thereof in excess of \$1,000 (K.S.A. 1978 Supp. 16a-2-401).

The 11% interest rate authorized by K.S.A. 1978 Supp. 16-207 is applicable only to loans secured by a first real estate mortgage. Unless made pursuant to the UCCC as a consumer loan or by agreement of the parties under K.S.A. 16a-1-109, a loan secured by a second real estate mortgage is subject to the general usury rate of 10% specified in K.S.A. 1978 Supp. 16-207. Unless made subject to the UCCC by agreement of the parties under K.S.A. 16a-1-109, a contract for deed wherein a rate of interest is specified also is subject to said general usury rate of 10%.

Gentlemen:

Each of you has requested the opinion of this office on the appropriate interest rate to be charged on loans made to enable third parties to purchase real estate. There are two statutory provisions relevant to the area of real estate mortgages. The Kansas usury statute--K.S.A. 1978 Supp. 16-207--prescribes an 11% interest rate ceiling on first real estate mortgages and a 10% ceiling on other contracts; the Kansas Uniform Consumer Credit Code (K.S.A. 16a-1-101 through 16a-9-102, hereafter U3C) sets a 14.45% maximum interest rate on consumer loans secured by an interest in land. To fully understand the effect of each statute on real estate loan transactions, it is necessary to examine the history and development of both usury and consumer loan protection in this state.

The Kansas usury statute dates to an enactment of the 1863 territorial legislature that imposed an interest rate ceiling of 10% on all consumer and non-consumer debts. One of the first Kansas cases dealing with the usury statute was Marshall v. Beeler, 104 Kan. 32 (1919). The suit was for the recovery of usurious interest that had been voluntarily paid by a borrower as a condition precedent to refinancing by the lender of an existing mortgage on several tracts of the borrower's land. The Court held that statutory provisions

"regulating the legal rate of interest and providing penalties and forfeitures for taking or contracting for the payment of interest in excess of the statutory rate . . . have abrogated the borrower's common-law right to recover back usurious interest." Id. at 32.

In reaching its conclusion, the Court analyzed the history and development of the Kansas usury statute and pointed out that "from the earliest times the term 'usury,' was synonymous with the term 'interest,' and meant the taking of any compensation whatever for the use of money." Id. at 34. The Court recognized that the increasing requirements of trade and business expanded the distinction between usury and interest. "The doctrine announced by Calvin, that the true meaning of usury was illegal or oppressive interest, began to be accepted in England and in most Protestant countries during the reign of Elizabeth." Id. at 36.

Interest has recently been defined by the Kansas Supreme Court in Shapiro v. Kansas Public Employees Retirement System, 216 Kan. 353 (1975), a case in which the Court needed to determine if

KPERS could avoid the payment of interest when it wrongfully withholds benefits from a member or his beneficiaries. The Court explained:

"Interest has been defined as the compensation allowed by law or fixed by the parties for the use, detention, or forbearance of money. In our society today money is a commodity with a legitimate price on the market and loss of its use, whether occasioned by the delay or default of an ordinary corporation, citizen, state or municipality should be compensable." Id. at 537.

After the distinction became apparent, the courts enacted usury statutes to protect borrowers from unscrupulous lenders. In Marshall the Court pointed out:

"It is worthy of note that from the time when no distinction was recognized between usury and interest, the ecclesiastical law, and later, the statutes and the common law of England, paid no attention whatever to the attitude of the borrower It was against the greed and oppression of the lender alone that the church leveled its decrees." 104 Kan. at 37.

In Jones v. Nossaman, 114 Kan. 886 (1923), the Court held that a contract which provided that overdue and unpaid interest on a promissory note would become part of the principal and subject to an interest charge was not usurious. Tracing the development of the usury statutes, the Court said:

"In modern times the exaction of reasonable interest for the use of money is recognized as free from any taint of impropriety, and the term usury is now confined to interest in excess of the maximum rate allowed by statute. The whole matter is regulated by statute, and in this state, at least, debtors are generously protected from extortionate creditors by our humane exemption statutes, our long periods of redemption after foreclosure sales and the like. But since the legality or illegality of the exaction of interest is simply a matter of statute, precedents from other jurisdictions are not of controlling significance and a student of the general subject can find authorities for almost any views he cares to adopt." Id. at 891.

It seems apparent that usury statutes have a settled purpose in this state: the protection of debtors from the practices of unscrupulous lenders. In the last thirty years, increasing amounts of legislation have sought to protect specific groups from the clutches of the unethical lender and seller. The Consumer Loan Act of 1955 (G.S. 1955 Supp. 16-202, 16-203, 16-205, 16-401 to 16-426) prescribed maximum non-usurious interest rates as well as specific penalties for non-compliance with the Act. The Kansas Supreme Court in Young v. Barker, 185 Kan. 246 (1959), construed the purposes of the Consumer Loan Act of 1955. In a situation much like that of Marshall, plaintiff borrowers sought to recover alleged usurious charges paid to defendant lender. The Court considered several provisions of the Consumer Loan Act and said:

"The Consumer Loan Act was a new enactment to legalize and regulate the business of making comparatively small 'consumer type' installment loans and to fix the maximum amount of interest or charges in all cases for the loan or forbearance of money."
Id. at 252.

The Court also explained:

"The Consumer Loan Act . . . should be construed as intending to prohibit any interest or charges for the loan or forbearance of money beyond that specifically provided as the maximum amount authorized by law. Its primary purpose is preventive rather than punitive and should be construed so as to accomplish its remedial purpose; its provisions should be liberally construed in favor of the borrower and should not be more strictly construed as to the lender than its language and objective demand."
Id. at 246, Syl. 1.

In 1973, the legislature enacted the U3C (L. 1973, ch. 85) and repealed most of the provisions of the Consumer Loan Act. Following each of the sections of the U3C--as codified in Kansas Statutes Annotated--are comments prepared by Professor Barkley Clark of the University of Kansas School of Law. Professor Clark served as consultant to the legislative committees considering the proposed legislation. One such comment provides insight as to what effect the U3C was intended to have on the then existing consumer loan laws:

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"One of the primary purposes of the U3C is to place under a single statutory umbrella all aspects of consumer credit, thereby treating the subject as a functional unity. To this end, the U3C replaces widely scattered pieces of legislation which were enacted by different Kansas legislatures, at different times, for different reasons: the 1955 consumer loan act, those portions of the 1958 sales finance act dealing with motor vehicles and those dealing with non-motor vehicles, the 1969 truth in lending act, part of the 1929 credit union law, various installment loan provisions, and part of the 1968 buyer protection act. In addition, the U3C alters several provisions in the uniform commercial code." Kansas Comment, 1973 (following K.S.A. 16a-1-102).

By its terms, the purpose of the U3C is to protect the consumer. K.S.A. 16a-1-102, in pertinent part, provides:

"(2) The underlying purposes and policies of such sections of this act are:

"(a) To simplify, clarify and modernize the law governing retail installment sales, consumer credit, consumer loans and usury;

"(b) to provide rate ceilings to assure an adequate supply of credit to consumers;

"(c) to further consumer understanding of the terms of credit transactions and to foster competition among suppliers of consumer credit so that consumers may obtain credit at reasonable cost;

"(d) to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interest of legitimate and scrupulous creditors;

"(e) to permit and encourage the development of fair and economically sound consumer credit practices;

"(f) to conform the regulation of consumer credit transactions to the policies of the federal truth in lending act; and

"(g) to make uniform the law, including administrative rules, among the various jurisdictions."

It seems apparent that the legislature intended the U3C to provide an all inclusive protection device for several defined consumer transactions. It is significant to note that the legislature did not repeal the existing usury statute in 1973 when the U3C was enacted; in fact, the usury statute (K.S.A. 16-207) was amended in the same enactment which promulgated the U3C (L. 1973, ch. 85, §132).

K.S.A. 1978 Supp. 16-207 is the statutory consolidation of several usury-related statutes. Although K.S.A. 16-207 was amended in 1973 in the same bill which authorized the passage of the U3C, it was not incorporated as part of the new Code itself. As it existed in 1973, the parties to any bond, bill, promissory note or other instrument of writing for the payment or forbearance of money could not contract to receive interest greater than 10%, unless another law specifically authorized that a higher rate could be charged. The U3C was, therefore, made available as an alternate provision for those lenders wishing to comply with its strict consumer protection requirements.

Faced with the problems of an inflationary economy and resulting credit squeeze, the legislature considered several measures designed to provide relief from what many lenders considered a harsh and impractical usury limitation. In 1977, interim legislative Proposal Number 11 "directed the Special Committee on Commercial and Financial institutions to study the desirability of allowing exceptions to the limitations on the contract interest rate for certain real estate and commercial loans." (Report on Kansas Legislative Interim Studies to the 1978 Legislature, Special Committee on Commercial and Financial Institutions, Re: Proposal No. 11--Usury Rate for Savings and Loan Associations, at 19). The committee considered two bills: House Bill No. 2530 which would have eliminated the usury ceiling completely, and Senate Bill No. 517 which proposed an exemption from the usury rate for loans secured by a first real estate mortgage. As a result of its deliberations, the Committee made the following observations:

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"Late in the years 1970, 1973, and 1974, Kansas lenders, particularly the savings and loan associations, were confronted with shortages of lendable funds. While several factors caused the 'tight money' situations, the net results were higher than ever interest rates on home loans. On occasion, those rates nearly touched the 10 percent usury ceiling.

"As the interest rates increased, the number of first mortgage loans declined; Veterans Administration and Federal Housing Authority loans were not made; only excellent credit worthy persons with substantial down payments were granted loans; lending on multi-family dwellings was restricted primarily to corporate borrowers; loans were not sold in the secondary markets since the usury ceiling made Kansas loans non-competitive with loans made in states with either a high usury ceiling or with no interest restrictions; and finally, Kansas associations purchased loans from the lesser restricted states which were meant to improve the liquidity and yield of the associations, but which had the effect of reducing the amount of mortgage money available to Kansans." Id. at 20.

It was within this economic climate that the interim committee considered the bills assigned to it. The committee rejected the proposed removal of the usury ceiling "since no evidence was adduced to indicate a rapid increase in interest rates in such a short period of time so as to preclude the Legislature from changing the rate." Id. at 21. Instead, it recommended raising the usury rate applicable to loans secured by first real estate mortgages. The 1978 Legislature responded to such recommendation by amending K.S.A. 16-207, which now provides in pertinent part:

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"(a) Subject to the following provision, the parties to any bond, bill, promissory note or other instrument of writing for the payment or forbearance of money may stipulate therein for interest receivable upon the amount of such bond, bill, note or other instrument of writing, at a rate not to exceed ten percent (10%) per annum unless otherwise specifically authorized by law. The parties to any loan evidenced by a note secured by a first real estate mortgage may stipulate therein for interest receivable upon the amount of such note at a rate not to exceed eleven percent (11%) per annum. No penalty shall be assessed against any party for prepayment of any home loan"

The question now arises as to the effect of these amendments on the provisions of the U3C.

One of the principal provisions of the U3C applicable to our consideration is K.S.A. 1978 Supp. 16a-2-401, which establishes maximum finance charges for consumer loans. While subsection (2) prescribes rates which may be charged "with respect to a supervised loan made under a license issued by the administrator [consumer credit commissioner]" (see K.S.A. 16a-6-103), the general provisions of subsection (1) are more pertinent to our consideration, reading as follows:

"(1) With respect to a consumer loan, including a loan pursuant to open end credit, a lender may contract for and receive a finance charge, calculated according to the actuarial method, not exceeding eighteen percent (18%) per year on the unpaid balances of the amount financed not exceeding one thousand dollars (\$1,000) and fourteen and forty-five hundredths percent (14.45%) per year on that portion of the unpaid balance in excess of one thousand dollars (\$1,000)."

It is apparent that comprehension of the foregoing provisions requires an understanding of the term "consumer loan," which is set forth in K.S.A. 16a-1-301(14), as follows:

"(14) 'Consumer loan':

"(a) Except as provided in paragraph (b), a 'consumer loan' is a loan made by a person regularly engaged in the business of making loans in which

"(i) the debtor is a person other than an organization;

"(ii) the debt is incurred primarily for a personal, family, household, or agricultural purpose;

"(iii) either the debt is payable in installments or a finance charge is made; and

"(iv) either the amount financed does not exceed twenty-five thousand dollars (\$25,000) or the debt, other than one incurred primarily for an agricultural purpose, is secured by an interest in land.

"(b) Unless the loan is made subject to sections 1 through 131 [16a-1-101 through 16a-9-102] of this act by agreement (section 16a-1-109), a 'consumer loan' does not include a loan secured by an interest in land if at the time the loan is made the value of this collateral is substantial in relation to the amount of the loan and the finance charge, including any closing costs (subsection (8)) included in the finance charge (subsection (19)), does not exceed twelve percent (12%) per year calculated according to the actuarial method on the unpaid balances of the amount financed on the assumption that the debt will be paid according to the agreed terms and will not be paid before the end of the agreed term."

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A consumer loan therefore has several elements. It must be: (1) made by a person regularly engaged in the business of making loans; (2) a debt incurred primarily for a personal, family, household or agricultural purpose; (3) a loan made to a person and not an organization; (4) an amount financed less than \$25,000 or greater than that if secured by an interest in land; and (5) if the debt is secured by an interest in land, the value of the land must be substantial in relation to the amount of the loan and the finance charge must exceed 12%.

Considering the foregoing in light of your inquiry, it is apparent that the U3C contemplates consumer loans secured by a first real estate mortgage, if the necessary criteria are satisfied. It also is apparent that not all loans secured by a first real estate mortgage are "consumer loans" under the U3C. However, it is to this consideration that the following provisions of K.S.A. 16a-1-109 are relevant:

"The parties to a sale, lease, or loan or modification thereof, which is not a consumer credit transaction may agree in a writing signed by the parties that the transaction is subject to the provisions of sections 1 through 131 [16a-1-101 through 16a-9-102] of this act applying to consumer credit transactions. If the parties so agree the transaction is a consumer credit transaction for the purposes of sections 1 through 131 [16a-1-101 through 16a-9-102] of this act." (Emphasis added.)

Thus, even though a loan is not a "consumer credit transaction," which is defined by 16a-1-301(12) to include a consumer loan, the parties to such loan may agree to make the entirety of the U3C applicable thereto. Within this context, then, the provision of 16a-2-401(1) permits interest at the rate of 14.45% per year to be charged on a consumer loan secured by a first real estate mortgage, regardless of whether such loan is one meeting the statutory criteria for a consumer loan or is one which has been brought within the purview of the U3C by written agreement of the parties thereto.

The foregoing conclusions regarding the applicability of the U3C to loans secured by first real estate mortgages have been reached without reference to K.S.A. 16-207, as amended by the 1978 Legislature. When these separate statutory enactments are considered with reference one to the other, resolution of your inquiry becomes one of statutory interpretation. However, because several well-recognized principles of statutory construction support either one of two opposing arguments of relatively equal strength, we have had considerable difficulty in reaching our conclusion. A sound argument can be made for the proposition that K.S.A. 1978 Supp. 16-207 was intended by the legislature to be the single provision controlling interest rates on any first mortgage on real estate. Such argument is supported by the rule of statutory construction that

"old statutes must be read in the light of later legislative enactments. The older statute must be harmonized with the newer; if a conflict exists, the older must be subordinated to the newer. (In re Moseley's Estate, 100 Kan. 495, 164 Pac. 1073 [1917].)"
Thomas v. Trustees of Salem Township, 224 Kan. 539, 544, 545 (1978).

Obviously, the 1978 amendments to K.S.A. 16-207 represent the latest expression of legislative will, insofar as maximum interest rates are concerned. Furthermore, since K.S.A. 16-207 now deals specifically with a subject treated generally under the U3C, i.e., loans secured by first real estate mortgages, such fact is to be accorded weight. As stated in Thomas, supra:

"Where there appears to be a conflict between a statute dealing generally with a subject and another statute dealing specifically with a certain phase of the subject, the specific statute will be favored over the general statute and controls. (State v. Kliewer, 210 Kan. 820, 504 P.2d 580 [1972].)" 224 Kan. at 545.

While the foregoing principles of statutory construction can be cited in support of the proposition that K.S.A. 1978 Supp. 16-207 establishes the maximum interest rate applicable to all loans secured by a first real estate mortgage, it is to be noted that the applicability of such principles requires the existence of a conflict between the statutes under consideration. Furthermore, the existence of such conflict requires determination of legislative intent. Id. at 545.

As to this latter consideration, the statement of the Court in Southeast Kansas Landowner's Ass'n v. Kansas Turnpike Authority, 224 Kan. 357 (1978), is pertinent:

"The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statutes. Eason v. Farmers Insurance Co., 221 Kan. 415, Syl. 2, 560 P.2d 117 (1977); Thomas County Taxpayers Ass'n v. Finney, 223 Kan. 434, 573 P.2d 1073 (1978); Brinkmeyer v. City of Wichita, 223 Kan. 393, 573 P.2d 1044 (1978).

"In determining legislative intent, courts are not limited to a mere consideration of the language employed, but may properly look to the historical background of the enactment, the circumstances attending its passage, the purposes to be accomplished, and the effect the statute may have under the various constructions suggested. State, ex rel., v. City of Overland Park, 215 Kan. 700, Syl. 10, 527 P.2d 1340 (1974); State v. Luginbill, 223 Kan. 15, 574 P.2d 140 (1977)." 224 Kan. at 367.

Premised on the dictates of these fundamental principles applicable to judicial construction of statutory enactments, together with supporting corollaries thereof, we have rejected the argument that K.S.A. 1978 Supp. 16-207 precludes utilization of the U3C provision regarding permissible interest rates on loans secured by first real estate mortgages. To the contrary, we have found significant support for the opposite point of view.

The guidelines for ascertaining legislative intent in situations involving independent statutory enactments relating to the same subject matter are exactly stated in Callaway v. City of Overland Park, 211 Kan. 646, 650 (1973): "In determining legislative intent, it is the duty of a court to construe all provisions of statutes in pari materia with a view of reconciling and bringing them into workable harmony, if reasonably possible to do so."

Furthermore, "to be in pari materia statutes need not have been enacted at the same time. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together." Claflin v. Walsh, 212 Kan. 1, 8 (1973). See, also, Flowers, Administratrix v. Marshall, Administrator, 208 Kan. 900, 904, 905 (1972).

In keeping with these principles, we have determined that when the provisions of K.S.A. 1978 Supp. 16-207 and the U3C are construed together, each may be given force and effect in harmony with the other. As noted previously, not all loans secured by a first real estate mortgage are "consumer loans" within the meaning of the U3C. For this reason, it is certainly reasonable to attribute to the legislature an intent that the usury statute and the interest rate provisions of the U3C can exist independent of the other with equal force and effect. To state such findings in the negative, we have found no evidence of any legislative intent that the 1978 amendments to K.S.A. 16-207 were designed to preclude making first real estate mortgage loans under the U3C. A finding of legislative intent to this effect would result in an irreconcilable conflict between K.S.A. 1978 Supp. 16-207 and those provisions of the U3C permitting loans secured by a first real estate mortgage to be made thereunder. Notably, such conflict would exist not only with respect to 16a-1-301(14), defining "consumer loan" so as to encompass certain loans secured by an interest in land, including first mortgages on real estate, but also would exist with respect to 16a-1-109 which, as stated previously, permits loans outside of the U3C's provisions to be brought within these provisions by agreement of the parties. The latter, of course, would include loans secured by a first real estate mortgage.

In The State, ex rel., v. Posey, 109 Kan. 552 (1921), the Court considered the consequences of finding a conflict between statutes, stating thus:

"It is always the case that all sections of prior statutes and all acts and parts of acts in conflict with the latest expression of the legislative will are repealed whether that latest expression of legislative will takes pains to say so or not. Sometimes the later legislation does not altogether repeal the earlier, but it always does so far as any conflict exists; and it often becomes an interesting judicial question whether earlier legislation which is partially superseded by a later independent

enactment in which the provisions of the earlier act are completely ignored is so far emasculated that it serves no further apparent legislative purpose or whether there is still a field in which it can and should operate notwithstanding the later legislation. (Elliott v. Lochrane and others, 1 Kan. 126; Bank v. Reilly, 97 Kan. 817, 828, 156 Pac. 747.)" 109 Kan. at 555, 556.

Thus, a finding of conflict between the latest expression of legislative will and prior statutes results in a repeal by implication of such prior acts, or at least so much thereof as to the extent of such conflict. In considering this possible construction of the amendments to K.S.A. 16-207, as counseled by Southeast Kansas Landowner's Ass'n v. Kansas Turnpike Authority, supra at 367, we find that such interpretation is never favored. State v. Makin, 223 Kan. 743, 745 (1978). The Courts look upon repeals by implication with such disfavor that "a former act will not be held to have been repealed by implication unless a later enactment is so repugnant to the provisions of the first act that both cannot be given force and effect." Jenkins v. Newman Memorial County Hospital, 212 Kan. 92, 96 (1973). We are constrained from finding any such repugnancy in light of an alternative interpretation which gives force and effect to both K.S.A. 1978 Supp. 16-207 and the various related sections of the U3C.

Finally, in looking beyond the amendatory language inserted in K.S.A. 16-207 in 1978, we find no evidence of legislative intent to preempt or repeal by implication the referenced sections of the U3C. There is nothing in the report of the 1977 interim legislative committee which warrants such a conclusion, nor is there any such indication of such intent from the records and proceedings of the 1978 Legislature which effected such change. To the contrary, it is quite evident that these legislative bodies intended to raise the maximum interest rates permitted on loans secured by a first real estate mortgage. However, an interpretation of these amendments to the effect that U3C provisions are repealed thereby by implication would totally subvert such purpose. That is, there seems to be no suggestion being made that prior to the amendment of K.S.A. 16-207 in 1978, there existed any conflict between K.S.A. 16-207 and the U3C. Thus, at that time, loans secured by a first real estate mortgage could be made under the U3C at a rate as high as 14.45%,

pursuant to K.S.A. 16a-2-401(1). If these 1978 amendments are construed as repealing pertinent U3C provisions by implication, thereby eliminating first real estate mortgage loans being made thereunder, the net effect of such construction would be to place an interest rate ceiling on these types of loans that is lower than the maximum interest rates available for such loans prior to the amendment. Even though the U3C has been used sparingly in the past for making loans secured by first real estate mortgages, apparently due to reluctance of lenders to subject such loans to various "consumer protection" features of the U3C, such as the prohibitions against balloon payments (16a-3-308) and prepayment penalties (16a-2-509 and 16a-2-510), nonetheless there is little question that the U3C could be utilized for such loans prior to the 1978 amendment of the usury statute. Thus, we are constrained from attributing to the legislature an intent to preclude subsequent use of these provisions.

Therefore, it is our opinion that loans secured by a first real estate mortgage may be made pursuant to the provisions of the U3C, either as a "consumer loan," as defined by K.S.A. 16a-1-301(14), or as a loan made subject to the U3C by agreement of the parties thereto, as authorized by K.S.A. 16a-1-109. Unless it is a supervised loan made under a license issued by the Consumer Credit Commissioner, such real estate loans may be made at a maximum interest rate of not to exceed 14.45% on that portion of the unpaid balance thereof in excess of \$1,000 (K.S.A. 1978 Supp. 16a-2-401).

In addition to the question regarding maximum interest rates on first mortgage loans, you have inquired as to the allowable interest rates on loans secured by second real estate mortgages and sales of real estate pursuant to contracts for deed. It seems clear that second mortgages, as well as home improvement loans, commonly fall within the U3C's definition of consumer loan and therefore will be subject automatically to the protections and provisions of the U3C. Should the transaction not fall within the definition of consumer loan, the K.S.A. 16a-1-109 option to make it a consumer credit transaction is available. Such transactions other than those defined or agreed upon to be consumer credit transactions are subject to the 10% interest rate limitation of K.S.A. 1978 Supp. 16-207.

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A common real estate transaction that may fall outside the scope of the U3C is the "contract for deed" sale of property. When two private parties are involved in a contract for the sale of real estate, their transaction is automatically outside the definition of "consumer loan" (i.e., one made by a person regularly engaged in the business of making loans). In Kansas such an arrangement has been interpreted by the Court as early as 1893:

"A written bond or contract for a deed of land, putting the purchaser thereof in immediate possession, and containing no provision for the forfeiture of the bond or contract if the purchaser fails to pay the installments of purchase money due thereon, passes the entire equitable estate to the purchaser. The legal title is merely held by the vendor as security for the payment of the balance of the purchase money."
Jones v. Hollister, 51 Kan. 310 (1893) Syl. 1.

As explained in 77 Am.Jur.2d, Vendors and Purchasers §316 (1975):

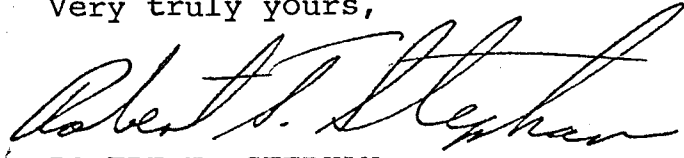
"Where the vendor contracts to sell real estate for payments to be made in installments, he holds the legal title subject to an equitable obligation to convey on payment of the purchase money. As against his vendor the purchaser cannot convey legal title, but only his equity.

"Under an executory contract for the sale of land the legal title in fee is retained by the vendor as security for the payment of the purchase price. In equity, the vendor, under a contract for the purchase of land, is deemed to hold the legal title to the land as security for the payment of the purchase price"

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By its terms, K.S.A. 1978 Supp. 16-207 applies to "any instrument of writing for the payment or forbearance of money." A contract for deed, whether considered a device creating a security interest for the purchase price, or an installment contract for the sale of property, is certainly a contract for the payment of money, and where a rate of interest is stipulated therein, it is subject to the 10% interest ceiling of K.S.A. 1978 Supp. 16-207.

Very truly yours,



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