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North Dakota Law Review

Volume 45 | Number 1 Article 2

1968

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Kinsey, Robert W. (1968) "Alternatives to Increasing the Maximum Rate of Interest in North Dakota," *North Dakota Law Review*: Vol. 45 : No. 1 , Article 2.
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ALTERNATIVES TO INCREASING THE MAXIMUM RATE OF INTEREST IN NORTH DAKOTA

ROBERT W. KINSEY*

INTRODUCTION

The North Dakota Century Code presently provides:

> Except as otherwise provided by the laws of this state, no person, copartnership, association, or corporation, either directly or indirectly, shall take or receive, or agree to take or receive, in money, goods, or things in action, or in any other way, any greater sum or greater value for the loan or forebearance of money, goods, or things in action than seven per cent per annum, and in the computation of interest the same shall not be compounded. No contract shall provide for the payment of interest on interest overdue, but this section shall not apply to a contract to pay interest at a lawful rate on interest that is overdue at the time such contract is made. Any violation of this section shall be deemed usury.[1]

On Monday, January 23, 1967, Senators Hernett and Trenbeath introduced Senate Bill No. 386 before the Fortieth Session of the

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1. N.D. CENT. CODE § 47-14-09. The phrase "except as otherwise provided by the laws of this state" has taken on an increasingly more definite meaning. First, § 47-14-05 of the N.D. CENT. CODE provides: "Interest for any indebtedness shall be at the rate of four per cent per annum unless a different rate not to exceed the rate specified in section 47-14-09 is contracted for in writing . . . ." On three relatively recent occasions the North Dakota Attorney General has delivered opinions in an effort to further define the scope of the above mentioned phrase. On March 11, 1968, Mr. H. L. Thorndal Jr., North Dakota State Examiner, asked the Attorney General if a North Dakota state bank might participate in a loan originating in Minnesota if the loan carried a rate of interest of 7.5 per cent. The Attorney General reached the rather equivocal conclusion that " . . . while we believe that in most instances a bank may not participate in a loan that calls for an interest rate higher than the legal North Dakota contractual rate, we are not prepared to say, as a matter of law, that in no instance may a bank participate in such a loan, since it is conceivable, under certain circumstances that the interest rate of another State would apply and such interest rate might be higher than that of this State." Mr. Thorndal's next inquiry received a more definitive answer. In May of 1968, Mr. Thorndal inquired whether the transactions mentioned in §§ 6-03-47, 6-03-47.1, 6-03-48 and 6-03-49 were exempted from the provisions of section 47-14-09 of the N.D. CENT. CODE. In order to answer the question, it was necessary to refer to section 6-03-50 of the Code which section provides, in part, as follows: "No law of this state . . . prescribing or limiting interest rates upon loans or investments . . . shall be deemed to apply to loans or investments made pursuant to sections 6-03-47, 6-03-48, and 6-03-49." The Attorney General reached the logical conclusion in Opinion No. 267 that transactions mentioned in sections 6-03-47, 6-03-48 and 6-03-49 were "exempted from the provisions of section 47-14-09" and that the transactions mentioned in section 6-03-47.1 were not. The transactions which were not governed by section 47-14-09 are loans and advances of credit, purchases of obligations representing loans and advances of credit and loans secured by liens on real property or leasehold interests therein which are insured or guaranteed in any manner in part or in full by the United States, the State of North Dakota or the instrumentalities of either entity. Notes or bonds secured by mortgage or deed of trust insured by the federal housing administrator, debentures issued by the federal housing administrator and securi-

North Dakota Legislative Assembly.[2] Senate Bill No. 386 was drafted to amend section 47-14-09 of the North Dakota Century Code in order to raise the maximum rate of interest from seven per cent per annum to eight per cent per annum.[3] After its introduction, the bill was referred to the Senate Committee on Industry, Business and Labor.[4] On Thursday, February 2, 1967, the Senate Committee on Industry, Business and Labor recommended that Senate Bill No. 386 be passed.[5] On Saturday, February 4, 1967, the bill was read for the second time and then passed by the Senate on a roll call vote with thirty members in favor of passage, thirteen opposed to passage and six not voting.[6] The bill was read to the House for the first time on Tuesday, February 7, 1967, and then referred to the House Committee on Industry and Business.[7] On Friday, February 24, 1967, the House Committee on Industry and Business reported the bill back with a recommendation of passage; the Committee report carried a minority recommendation of indefinite postponement.[8] Representative Dahl moved that the minority report be substituted for that of the majority; the motion was defeated. The report of the majority of the Committee was adopted on the original motion.[9] On Saturday, February 25, 1968, Senate Bill No. 386 was read for a second time. Representative Sandness moved that consideration be laid over one legislative day and the motion prevailed.[10] On Monday, February 27, 1967, Representative Kingsbury requested that he be excused from voting on Senate Bill No. 386 due to personal interest. Representative Streibel moved that Representative Kingsbury and all other members with a personal interest

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ities issued by national mortgage associations are not, as well, governed by section 47-14-09 of the N.D. CENT. CODE. In May of 1968, Senator Evan E. Lips inquired of the Attorney General:

> 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 7 per cent? 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 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.

The Attorney General concluded in Opinion No. 274 that a corporation, under the above described facts, except as to the foreclosure proceedings, could obtain a loan in accordance with the legal rate of interest allowed in the state in which the transaction occurred. The proceedings of foreclosure would, however, have to conform to the requirements of the laws of North Dakota.

2. N.D. S. JOUR., 40th Sess. 179 (1967).
3. S. B. No. 386, 40th Sess. (1967).
4. N.D. S. JOUR., 40th Sess. 179 (1967).
5. *Id.* at 295.
6. *Id.* at 333.
7. N.D.H. JOUR. 40th Sess. 484 (bound), 491 (unbound) (1967).
8. *Id.* at 912 (bound), 929 (unbound).
9. *Id.* at 918 (bound), 930 (unbound).
10. *Id.* at 937 (bound), 955 (unbound).

in Senate Bill No. 386 be permitted to vote and the motion prevailed.[11] On that same day the bill passed by a vote of fifty-seven in favor to forty-one opposed.[12] After the bill was enrolled and signed by the President of the Senate and the Speaker of the House, the bill was sent to the Governor on March 3, 1967. The bill was subsequently vetoed by the Governor.

The efforts to raise the maximum rate of interest during the Fortieth Session of the Legislative Assembly were not the first[13] and apparently will not be the last. During the month of February, 1968, a Bismarck businessman stated that North Dakota was being pushed out of the money market by the seven per cent maximum interest rate. The businessman was an associate in a firm which planned to construct a retail parking facility in Bismarck and had been unable to obtain the necessary financing at any rate other than seven and one-fourth per cent per annum. The businessman stated that in a recent trip to Minneapolis he had been shown a number of North Dakota loan applications which had been rubber-stamped "Rejected under usury conditions."[14] Governor Guy promptly replied that these remarks were merely the opening of the campaign to raise the maximum rate of interest. The Governor also denied the charge that there was a shortage of funds available for investment purposes in North Dakota.[15]

In light of the legislative history of the effort to raise the maximum rate of interest and in light of the current debate regarding the relative merits of such a proposal, this article will attempt to establish and assess some alternatives to raising the maximum rate of interest as a means of providing capital for investment in North Dakota. The following discussion will assume that there is a shortage of capital without deciding the question.

It would be well to place North Dakota in perspective relative to the maximum and legal rates of interest which are charged in other states of the United States. In doing this, the reader should keep in mind the distinction between the "legal" rate of interest and the "maximum" rate of interest. The "legal" rate of interest is the rate of interest which is presumed to be agreed upon by the parties, absent a contrary expression in writing. The "maximum" rate of interest is the top rate of interest allowed by law. Any interest beyond the maximum rate will subject the lender to civil

11. *Id.* at 992 (bound), 1010 (unbound).
12. *Id.* at 993 (bound), 1011 (unbound).
13. An attempt had been made to increase the maximum rate from seven to eight per cent per annum during the Thirty-ninth Session of the North Dakota Legislative Assembly. The legislation introduced during that session was passed by the North Dakota Senate [N.D. S. JOUR. 39th Sess. 402 (1965), but indefinitely postponed in the North Dakota House (N.D. H. JOUR. 39th Sess. 921 bound 1965)].
14. Fargo Forum, February 16, 1968, at 9, col. 1.
15. Sunday Forum, February 18, 1968, at C-6, col. 1.

and/or criminal penalties for usury. The subject of "small loan laws" is excluded from consideration in this article because the primary concern shall be with the financing of investments which require capital beyond the limitations of all small loan laws.

No state in the nation has a lower legal rate of interest than the four per cent per annum currently provided for in the North Dakota statutes.[16] Five states currently provide for a legal rate of interest of five per cent per annum.[17] Forty states presently provide for a legal rate of interest of six per cent per annum.[18] The statutes of four states presently provide for a legal rate of interest of seven per cent per annum.[19] The legal rate of interest established by statute will have very little bearing upon the availability of capital for investment purposes because it can generally be assumed that all contracts for the loans of money of the proportions which are being considered will be in writing.

Presently there are eight states which provide for a lower maximum rate of interest than does North Dakota.[20] Five states, other than North Dakota, provide for a maximum rate of interest of seven per cent per annum.[21] Twelve states presently provide for a maximum rate of interest of eight per cent per annum.[22] One

16. N.D. CENT. CODE § 47-14-05 (1960).

17. ILL. ANN. STAT. ch. 74, § 1 (Smith-Hurd 1966); IOWA CODE ANN. § 535.2(1) (Supp. 1968); LA. CIV. CODE ANN. art. 2924 (West 1952); MICH. COMP. LAWS § 438.31 (1967) and WIS. STAT. ANN. § 138.04 (Supp. 1968).

18. ALA. CODE, tit. 9, § 60 (1959); ALASKA STAT. § 45.45.010(a) (1962); ARIZ. REV. STAT. ANN. § 44-1201(A) (1956); ARK. CONST. art. 19, § 13; COLO. REV. STAT. ANN. § 73-1-1 (1964); CONN. GEN. STAT. ANN. § 37-1 (1960); DEL. CODE ANN. tit. 6, § 2301 (Supp. 1967); FLA. STAT. ANN. § 687.01 (1966); HAWAII REV. LAWS § 191-1 (1955); IDAHO CODE ANN. § 28-22-104 (1967); IND. STAT. ANN. § 19-12-101(a) (1964); KAN. GEN. STAT. ANN. § 16-201 (1964); KY. REV. STAT. § 360.010 (Supp. 1966); ME. REV. STAT. ANN. tit. 9, § 228 (1964); MD. CODE ANN. *art.* 49, § 1 (1968); MASS. GEN. LAWS ANN. ch. 107, § 3 (1958); MINN. STAT. ANN. § 334.01 (1966); MISS. CODE ANN. § 36 (Supp. 1967); MO. ANN. STAT. § 408.020 (1952); MONT. REV. CODES ANN. § 47-124 (Supp. 1967); NEB. REV. STAT. § 45-102 (Supp. 1966); N.H. REV. STAT. ANN. § 336.1 (1966); N.J. STAT. ANN. § 31:1-1 (1963); N.M. STAT. ANN. § 50-6-3 (1962); N.Y. GEN. OBL. LAW § 5-501 (McKinney 1964); N.C. GEN. STAT. § 24-1 (1965); OHIO REV. CODE ANN. § 1343.03 (1964); OKLA. STAT. ANN. tit. 15, § 266 (1966); ORE. REV. STAT. § 82.010(1) (1967); PA. STAT. ANN. tit. 41, § 3 (1954); R.I. GEN. LAWS ANN. § 6-26-1 (1957); S.C. CODE ANN. § 8-2 (1962); S.D. CODE § 38.0108 (1939); TENN. CODE ANN. § 47-14-104 (1964); TEX. REV. CIV. STAT. ANN. art. 5070 (Vernon 1962); UTAH CODE ANN. § 15-1-1 (1962); VT. STAT. ANN. tit 9, § 31 (Supp. 1967); VA. CODE ANN. § 6.1-318 (Supp. 1968); WASH. REV. CODE ANN. § 19.52.010 (1961) and W. VA. CODE ANN. § 4627 (1961).

19. CALIF. CIV. CODE ANN. § 1916-1 (West 1954) and CALIF. CONST. art. 20, § 22 (1954); GA. CODE ANN. § 57-101 (1960); NEV. REV. STAT. § 99.040 (1963) and WYO. STAT. ANN. § 13-477 (1965).

20. MD. CODE ANN. art. 49, § 3 (1968); N.J. STAT. ANN. § 31:1-1 (1963); N.Y. GEN. OBL. LAW § 5-501 (McKinney Supp. 1968); N.C. GEN. STAT. § 24-1 (1965); TENN. CODE ANN. § 47-14-104 (1964); VT. STAT. ANN. tit. 9, § 41 (Supp. 1968); VA. CODE ANN. § 6.1-318 (1968) and W. VA. CODE ANN. § 4627 (1961). In each case the maximum rate of interest is six per cent per annum, except Vermont with six and one-half per cent per annum.

21. ILL. ANN. STAT. ch. 74, § 4 (Smith-Hurd 1966), ch. 74, § 4(b) provides for an unlimited rate of interest on loans of at least five thousand dollars which are in writing, repayable on demand and secured by negotiable instruments; IOWA CODE ANN. § 535.2(1) (Supp. 1968); KY. REV. STAT. § 360.010 (Supp. 1966); MICH. COMP. LAWS ANN. § 438.31 (1967) and S.C. CODE ANN. § 8-3 (1962).

22. ALA. CODE, tit. 9, § 60 (1958); ALASKA STAT. § 45.45.010(b) (1962); ARIZ. REV. STAT. ANN. §§ 44-1201(B), 44-1202 (1956); GA. CODE ANN. § 57-101 (1960); IDAHO CODE ANN. § 28-22-105 (1967); IND. ANN. STAT. § 19-12-101(b) (1964); LA. CIV. CODE ANN.

state provides for a maximum rate of interest of nine per cent per annum.[23] Ten states provide for a maximum rate of interest of ten per cent per annum.[24] Five states provide for a maximum rate of interest of twelve per cent per annum.[25] New Mexico distinguishes between loans made with collateral and those without; in the latter instance, the maximum rate of interest allowable is twelve per cent per annum while in the former instance, the maximum rate allowable is ten per cent per annum.[26] One state, Maine, provides for a maximum rate of interest of sixteen per cent per annum on loans in excess of two thousand dollars.[27] Rhode Island provides for a maximum rate of interest of twenty-one per cent per annum.[28] Five states provide for no limitation on the maximum rate of interest which may be charged.[29] Many of the foregoing statutes provide for exceptions to the stated maximum. These exceptions are either irrelevant to the issue at hand or will be discussed at a subsequent point in this article.

The reader should be aware of an underlying bias of the author, i.e., that the best interests of the state of North Dakota will not be served by raising the maximum rate of interest from seven to eight per cent per annum. This bias is not without foundation. First, the banks in North Dakota, frequent lenders for projects requiring large amounts of capital, are presently receiving a more than adequate return on their invested dollar. Further, many of the banks within the state are owned by Minneapolis based corporations.[30] Second, there would appear to be no logical reason for subjecting the general borrowing public to the burden of a fourteen per cent increase in the maximum rate of interest. It is primarily the borrowers of larger sums of money who perceive the necessity for an increase in interest rates; it is these people,

art. 2924 (West 1952); MINN. STAT. ANN. § 334.01 (1966); MISS. CODE ANN. § 36 (Supp. 1966); MO. ANN. STAT. § 408.030 (1952); OHIO REV. CODE ANN. § 1343.01 (1964) and S.D. CODE § 38.109 (1939).

23. NEB. REV. STAT. § 45-101 (Supp. 1965).

24. ARK. STAT. ANN. § 68-602 (1957); CALIF. CONST. art. 20, § 22 (1954); FLA. STAT. ANN. § 687.02 (1966); KAN. GEN. STAT. ANN. § 16-202 (Supp. 1967); MONT. REV. CODES ANN. § 47-125 (1961); OKLA. STAT. ANN. tit. 15 § 266 (1966); ORE. REV. STAT. § 82.010(2) (1967); TEX. REV. CIV. STAT. ANN. art. 5071 (Vernon 1962); UTAH CODE ANN. § 15-1-2 (Supp. 1967) and WYO. STAT. ANN. § 13-476 (1965).

25. CONN. GEN. STAT. ANN. § 37-4 (1958), § 37-9 exempts loans by banks or trust companies which are in excess of five thousand dollars and are upon mortgages on real property; HAWAII REV. LAWS § 191-1 (1955); NEV. REV. STAT. § 99.050 (1963); WASH. REV. CODE ANN. § 19.52.020 (Supp. 1967) and WIS. STAT. ANN. § 138.05(a) (Supp. 1968).

26. N.M. STAT. ANN. § 50-6-16 (1962).

27. ME. REV. STAT. ANN. tit. 9, § 229 (Supp. 1967).

28. R.I. GEN. LAWS ANN. § 6-26-2 (Supp. 1967).

29. COLO. REV. STAT. ANN. § 73-1-3 (1963); DEL. CODE ANN. § 6-2302 (1953); MASS. GEN. LAWS ANN. ch. 107, § 3 (1958); N.H. REV. STAT. ANN. § 336.1 (1966); and PA. STAT. ANN. tit. 41, § 1 (1954). The Pennsylvania and Deleware statutes are applicable only if the loans are for not less than five thousand dollars, secured by negotiable instruments and payable upon demand.

30. For a discussion of the extent of foreign ownership of North Dakota banks and of the extent of profits garnered from North Dakota banks by these foreign corporations see, Note, *The Ownership of Banks In North Dakota*, 44 N.D. L. REV. 65 (1967).

not the general borrowing public, who should bear the direct expense of higher interest rates.

If one accepts the premise that the reason for raising the maximum rate of interest is to provide additional capital for investment purposes, then there are at least four alternatives which will accomplish the same goal without the burdens attendant to an increase in interest rates. The balance of this article will be devoted to the presentation and discussion of these alternatives.

ALTERNATIVE ONE

Every state except one imposes some form of taxation upon insurance companies doing business within the state. The tax is generally upon the gross premiums received for policies written within the state.[31] Of the states which impose a gross premiums tax, eleven, or approximately twenty-five percent, provide for a reduction of the rate of taxation to those insurance companies which maintain a specified percentage of their admitted assets within the taxing state.[32] These assets, to qualify for the reduction, must be invested in various defined forms of property within the state.

It is arguable that these statutory provisions are designed to increase the capital available for investment purposes within the state. The tax reduction which is afforded must be substantial enough to encourage an insurer to invest its funds within that state despite a relatively low maximum rate of interest. In other words, the tax reduction must compensate the insurer for its lesser return on its investments within the state. This contention is tenable only if the percentage of assets required to be invested is realistic. In most cases this is not the case. The percentage necessary to qualify is generally so high that the only insurers capable of qualifying would be those organized and having their principal place of business within the taxing state. In order to qualify for *any* tax reduction, the insurer must have the following minimum percentage of its admitted assets invested in property within the following states: Colorado, thirty per cent;[33] Georgia, twenty-five per cent;[34] Idaho, twenty-five per cent;[35] Louisiana, sixteen and

31. *E.g.*, ALASKA STAT. § 21.09.210 (1962); ILL. ANN. STAT. ch. 73 § 1021 (Smith-Hurd 1965); N.D. CENT. CODE § 26-01-11 (1960); R.I. GEN. LAWS ANN. tit. 44, ch. 17 (1956) and WYO. STAT. ANN. § 39-206 (1959).

32. ALA. CODE tit. 51, § 816 (1958); COLO. REV. STAT. ANN. § 72-1-14 (1963); GA. CODE ANN. § 56-1305 (1960); IDAHO CODE ANN. § 41-403 (1961); LA. REV. STAT. ANN. § 22-1068 (1959); N.M. STAT. ANN. § 58-5-1(c) (Supp. 1967); OKLA. STAT. ANN. tit. 36, § 625 (1958); S.C. CODE ANN. § 37-123 (Supp. 1967); TENN. CODE ANN. § 56-414 (1955); TEX. REV. CIV. STAT. ANN. art. 7064 (Vernon 1960) and W. VA. CODE ANN. § 3321(2) (Supp. 1965).

33. COLO. REV. STAT. ANN. § 72-1-14(1)(b) (1963).

34. GA. CODE ANN. § 56-1305 (1960).

35. IDAHO CODE ANN. § 41-403 (1961). The opportunity for the reduction in taxes applies only to domestic insurance companies.

sixty-hundredths per cent;[36] New Mexico, fifty per cent;[37] South Carolina twenty-five per cent;[38] Tennessee, seventy per cent;[39] Texas, seventy-five per cent;[40] and West Virginia, twenty-five per cent.[41] Two states provide a more realistic minimum percentage necessary to qualify for a tax reduction.

Alabama taxes *foreign* fire and/or marine insurers at a basic rate of two and fifty-hundredths per cent and all other foreign insurers at a basic rate of three per cent of gross premiums written in Alabama.[42] The tax is an excise or license tax imposed for the privilege of doing business in Alabama.[43] The Alabama statutes establish a scale for the proportionate reduction of taxes as the percentage of admitted assets invested within Alabama increases. In order to qualify for the first level of reduction, an insurer need have only one per cent of its admitted assets invested in Alabama. In this instance, the rate of taxation on gross premiums is reduced by one tenth of one per cent. The statute provides an additional one tenth of one per cent reduction in tax for each additional per cent of admitted assets the insurer has invested in Alabama. The scale continues the reduction for insurers until they have more than ten per cent of their admitted assets invested in Alabama. When this occurs, the rate of taxation for fire and marine insurers has been ultimately reduced from two and fifty hundredths per cent to one and fifty hundredths per cent of gross premiums and the rate for other foreign insurers has been reduced from three per cent to two per cent of gross premiums. Beyond this point there is no further reduction.[44]

Oklahoma imposes a four per cent tax on all direct premiums

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36. LA. REV. STAT. ANN. § 22-1068 (1959).
37. N.M. STAT. ANN. § 58-5-1(c) (Supp. 1967).
38. S.C. CODE ANN. § 37-123 (Supp. 1967).
39. TENN. CODE ANN. § 56-414 (1955).
40. TEX. REV. CIV. STAT. ANN. art. 7064 (Vernon 1960).
41. W. VA. CODE ANN. § 3321(2) (Supp. 1965).
42. ALA. CODE, tit. 51, § 816(a) (1958).
43. Rinehart v. Reliance Ins. Co., 273 Ala. 535, 142 So.2d 254 (1962).
44. ALA. CODE, tit. 51, § 816(b) (1958). The intermediate steps in the tax reduction are along the following lines:

Percentage of Company's Admitted Assets Invested In Alabama Investments	Applicable Rate of Premium Tax for Fire and/or Marine Insurance Companies	Applicable Rate of Premium Tax for All Other Insurance Companies Including Life Insurance Companies
Less Than 1%	2.5%	3.0%
1% and Above But Less Than 2%	2.4%	2.9%
2% and Above But Less Than 3%	2.3%	2.8%
3% and Above But Less Than 4%	2.2%	2.7%
4% and Above But Less Than 5%	2.1%	2.6%
5% and Above But Less Than 6%	2.0%	2.5%
6% and Above But Less Than 7%	1.9%	2.4%
7% and Above But Less Than 8%	1.8%	2.3%
8% and Above But Less Than 9%	1.7%	2.2%
9% and Above But Less Than 10%	1.6%	2.1%
10% and Above	1.5%	2.0%

and on all membership, application, policy and/or registration fees collected by *foreign* or *alien* insurers. The tax is upon insurance written in Oklahoma and is collected from the insurer for the privilege of doing business in Oklahoma.[45] The Oklahoma statutes establish a scale for the proportionate reduction of taxes as the percentage of admitted assets invested within Oklahoma increases. In order to qualify for the first level of reduction, a foreign or alien insurer need have only two per cent of its admitted assets invested in Oklahoma. If this is the extant situation, then the insurer will have its tax reduced to three and seventy-five-hundredths per cent. The statute provides an additional twenty-five-hundredths per cent reduction in taxes for each additional two per cent of admitted assets in Oklahoma. The reduction continues to an eventual elimination of the tax for insurers with as much as thirty per cent of their admitted assets in Oklahoma.[46]

Since the prime concern of those who would raise the maximum rate of interest is the attracting of capital for investment purposes in North Dakota, it is of interest to note the classes of investments which qualify for inclusion in determining the granting of the tax reduction. Alabama has fourteen classes of qualifying property: (1) real estate in Alabama; (2) bonds or interest-bearing warrants or other evidences of indebtedness of Alabama or its political subdivisions; (3) stocks, bonds or other evidences of indebtedness of any housing or redevelopment authority organized under the Housing Authorities Law or Redevelopment Law of the State; (4) notes or bonds secured by mortgages or other liens on real estate or leasehold interests in real estate in Alabama; (5) stocks, bonds, debentures, notes or other evidences of indebtedness of any corporation orgranized under the laws of Alabama; (6) notes, debentures, or other evidences of indebtedness of any business oper-

45. OKLA. STAT. ANN. tit. 36, § 624(2) (Supp. 1967).

46. OKLA. STAT. ANN. tit. 36, § 625 (1958). The intermediate steps in the tax reduction are along the following lines:

Percentage of Company's Admitted Assets Invested in Oklahoma Investments	Applicable Rate of Premium Tax
2% and Above But Less Than 4%	3.75%
4% and Above But Less Than 6%	3.50%
6% and Above But Less Than 8%	3.25%
8% and Above But Less Than 10%	3.00%
10% and Above But Less Than 12%	2.75%
12% and Above But Less Than 14%	2.50%
14% and Above But Less Than 16%	2.25%
16% and Above But Less Than 18%	2.00%
18% and Above But Less Than 20%	1.75%
20% and Above But Less Than 22%	1.50%
22% and Above But Less Than 24%	1.25%
24% and Above But Less Than 26%	1.00%
26% and Above But Less Than 28%	.75%
28% and Above But Less Than 30%	.50%
30% and Above	.00%

ated as a sole proprietorship, partnership, or other legal entity, having its principal office and place of business in Alabama; (7) notes, bonds, or other evidences of indebtedness secured by mortgage or other lien upon real estate situated in the State and insured or guaranteed in whole or in part by the United States or any agency or instrumentality thereof, together with any bonds, debentures or other evidences of indebtedness of the United States or any agency or instrumentality thereof received and retained in whole or partial settlement of any insurance or guaranty; (8) collateral loans to Alabama residents or to others where at least one-half of the value of the collateral so pledged constitutes an Alabama investment as defined by the statute; (9) cash deposits in national or state banks in the state; (10) loans secured by policies on the lives of residents of the state of Alabama; (11) share or share accounts in federal savings and loan associations having their principal office in Alabama; (12) stocks, bonds, notes, debentures or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of that corporation located in Alabama bear to the the total assets of the corporation; (13) stocks, bonds, notes or other evidences of indebtedness issued by railroad companies, public carriers or other transportation companies, to the extent that either the trackage or mileage in Alabama bears to the total trackage or mileage of the company; (14) that percentage of the insurer's investments in stocks, bonds, notes or other evidences of indebtedness of any telegraph, telephone, electric power company, or other public utility to the extent that the revenue of any such company from Alabama bears to the total revenue of such telegraph, telephone, electric power company, or other public utility.[47]

Oklahoma has six classes of qualifying property and one catch-all classification: (1) real estate in Oklahoma; (2) bonds of the State; (3) bonds or interest bearing warrants of any political subdivision of Oklahoma; (4) notes or bonds secured by mortgages or other liens on real estate located in Oklahoma; (5) cash deposits in national or state banks located within Oklahoma; (6) policy loans secured by the legal reserve on policies insuring residents of Oklahoma; (7) "and" any other Oklahoma property or securities in which by the laws of the State of Oklahoma such insurance companies may invest their funds.[48]

There can be little question of the validity of these statutes.[49]

47. ALA. CODE, tit. 51, § 816(c) (1958).
48. OKLA. STAT. ANN. tit. 36, § 625 (1958).
49. In 1946 the United States Supreme Court in Prudential Ins. Co. v. Benjamin, 328 U.S. 408, held a South Carolina tax of three per cent on gross premium from South Caro-

If North Dakota should adopt a statute providing for a tax reduction for foreign insurers based upon North Dakota investments, a definition of "North Dakota Investment" must be established. This definition must be formulated in reference to those segments of the State's economy which have the greatest demands for investment capital. In defining a North Dakota investment, primary emphasis should be placed upon the establishing of direct debtor-creditor relationships of limited duration. This definition should not be designed to encourage ownership of North Dakota property by insurance companies. Consequently, there are certain areas of investment which, though included in other statutes, should not be included within the North Dakota statute. First, the inclusion of North Dakota real estate as a qualifying investment would do very little to increase the flow of capital for investment purposes into North Dakota. Further, obligations of the State of North Dakota and its political subdivisions should likewise be excluded. The tax benefits concomitant with ownership of these obligations generally make them sufficiently attractive to investors;[50] the additional incentive would not appear necessary. Stocks of domestic corporations should not be included. This view is based upon the belief that ownership should be limited, as much as feasible, to North Dakotans. The State's long and continuing history of dominance of industry and finance by Minneapolis and other out of state based corporations suggests that the interests of these corporations and those of North Dakota have not been, and are not now, necessarily identical.[51] Further, there would appear to be no compelling reason to include stocks, bonds, notes or other evidences of indebtedness of foreign corporations unless their principal place of business were in North Dakota or unless the evidences of indebtedness were for investments in North Dakota. Even in this latter instance, the policy may result in further control of industry and finance in North Dakota by foreign corporations. In order to be qualifying property, there must be a balancing of the need for the services to be provided with the possible undesirable and consequences which might flow from non-North Dakotan ownership.

Cash deposits in banks and share accounts in savings and loan associations should be given some consideration as possible qualifying investments. The main thrust of qualifying property should

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lina business upon foreign corporations to be valid. The South Carolina tax had a feature for the reduction in the amount scaled to specified investments in South Carolina securities or property. The validity was based upon the McCarran Act, 59 Stat. 33 (1945), 15 U. S. C. § 1011 (1964) which authorizes state regulation and taxation of the insurance business. The tax was held to be not in violation of the Commerce Clause of the United States Constitution.

50. INT. REV. CODE of 1954, § 103(a)(1).

51. E. ROBINSON, HISTORY OF NORTH DAKOTA, *passim* (1966).

be aimed directly at putting capital at the disposal of the North Dakota investor; using banks and savings and loan associations as intermediaries would not necessarily be justifiable. Increasing deposits in banks and savings and loan associations does not insure that these deposits will be made available to the North Dakota borrowing public. These lending institutions have not indicated that their failure to make loans has been due to the lack of sufficient capital, rather it has been that there are other investments which will provide a higher rate of return. Consequently, an increase in deposits in lending institutions will not necessarily achieve the desired end.

Those items which should be included as qualifying property are the following: (1) bonds, debentures, notes and other evidences of indebtedness of domestic corporations; (2) notes, debentures or other evidences of indebtedness of businesses operated as sole proprietorships, partnerships, or other legal entities having their principal office and place of business in North Dakota; (3) notes or bonds secured by mortgages or other liens on real estate or on leasehold interests in real estate in North Dakota; (4) collateral loans to North Dakota residents or to non-residents where at least one half of the value of the collateral so pledged constitutes a North Dakota investment as defined by the statute; (5) and loans secured by policies on the lives of North Dakota residents.

It has been a rather difficult task to gather together sufficient empirical information upon which to base a recommendation of such a legislative program. As previously mentioned, this writer believes that only the Alabama and Oklahoma programs are drafted realistically to achieve the goal of attracting capital for investment purposes. My inquiries to the State of Oklahoma relative to the success of their program were not answered. The Superintendent of Insurance of the State of Alabama responded that the Alabama Department of Insurance maintained no records of companies that avail themselves of premium tax credits for Alabama investments. The Superintendent did, however, check a number of statements and was able to conclude that "while it [the tax credit statute] has not been the major factor in securing investments for the state, it has probably been an overall success because the investments that this statute has been the incentive for has more than offset, by other revenue, the loss of premium taxes."[52]

Mr. Con Dietz, Director of the University of North Dakota Computer Center, has given quite generously of his time in assisting in formulating the basis for a tax credits statute for the State of

52. Letter of June 11, 1968, from Walter S. Houseal, Superintendent of Insurance for the State of Alabama, Montgomery, Alabama to Robert W. Kinsey.

North Dakota. The following is a prose elaboration prepared by Mr. Dietz, of a series of mathematical formulae which can be utilized by the State in drafting a tax credits statute for North Dakota.

STATEMENT OF THE PROBLEM:

Make it equally profitable for insurance companies to invest in North Dakota as it would be for them to invest outside of the State. Since the maximum rate of interest which may be charged in North Dakota is less than that which may be charged in other jurisdictions, a means must be found whereby the insurance companies may be compensated for the loss of interest on monies invested in North Dakota.

SOLUTION:

By reducing the tax paid on insurance premiums collected in North Dakota by an amount proportional to the number of dollars invested in North Dakota it is possible to compensate these insurance companies for possible losses due to different rates of interest.

The reduction in the premium tax necessary to compensate for a loss of interest can be calculated. To do this we must find a mathematical relationship between the reduction in tax and the amount invested in North Dakota. The following definitions will help express this relationship mathematically:

Let A = the insurance companies total assets.

Let a = the amount that the insurance company has invested in North Dakota.

Let P = the total premiums collected in North Dakota by the insurance company.

Let R = the North Dakota tax rate on premiums collected in North Dakota.

Let r = the rate at which the tax is to be reduced (Note: r must be limited to values between 0 and 1).

Let i = the previously proposed maximum rate of interest in North Dakota.

Let j = the maximum interest presently allowed by North Dakota law.

Using these relationships we can now observe the following:

The potential loss to an insurance company on money invested in North Dakota can be expressed as:

$$(i - j)\, a$$

That is, the potential loss is the difference in the interest rate times the amount invested in North Dakota.

The current tax paid by insurance companies on premiums collected in North Dakota is:

$$RP$$

That is, the tax paid is equal to the tax rate times the premiums collected in North Dakota.

The reduction in the tax paid is the rate of reduction times the total tax or:

$$r(RP)$$

The solution to the problem proposed is that the reduction in tax should be greater than or equal to the potential loss due to different interest rates. Using the expressions developed above, the formula can be expressed as:

rRP is greater than or equal to $(i - j)a$ or,

$$r\ R\ P \geq (i - j)\ a.$$

Thus, the necessary rate, r, at which the tax is to be reduced can be isolated as follows: (1)

$$r \geq (i - j) \quad \frac{a}{R\ P}$$

EXAMPLE I. Given that the proposed maximum rate of interest for North Dakota is .08, the maximum rate of interest presently allowed by North Dakota law is .07 and the tax rate on premiums collected in North Dakota is .03; find the reduction rate necessary to compensate an insurance company which has invested $150,000.00 in North Dakota and collects $90,000.00 premiums in North Dakota annually.

We note that the potential loss is:

$$(i - j)\ a = (.08 - .07)\ 150{,}000$$

$$= .01 \times 150{,}000 = 1{,}500.00$$

Using the relationship, (1), derived above we have:

$$r \geq (.08 - .07)\ \frac{\text{x } 150{,}000}{.03 \text{ x } 90{,}000}$$

$$r \geq .01 \text{ x } \frac{150{,}000}{2{,}700}$$

$$r \geq \frac{1{,}500}{2{,}700}$$

$$r \geq .5555$$

Thus, if the insurance company's premium taxes are reduced at a rate greater than or equal to .5555 it will be compensated for the lower rate of interest prevailing in North Dakota. The effective tax rate for this insurance company would be the original tax rate less the tax rate reduction or: $.03 - .5555 \times .03 = .0133$. This tax rate will fully compensate this insurance company for potential loss due to its investment in North Dakota.

It appears reasonable that one would want to limit granting a reduction in tax to those insurance companies having significant investments in North Dakota. There are many ways an investment can be considered significant. Two such ways are outlined below:

SOLUTION A: This solution would limit receiving a reduction in the tax rate on premiums to those companies which invested a given fraction of their assets in North Dakota. (Obviously, this idea could be extended to a graduated reduction depending on the fraction of their assets that are invested in North Dakota.) This leaves the problem of determining an appropriate fraction. If f is the fraction of a company's total assets invested in North Dakota, the following is true: $a = f\,A$ (a and A defined above)

By substituting $f\,A$ for a in the relation given in (1) we have:

$$r \geq (i - j)\ \frac{f\,A}{R\,P}$$

Using this relationship we can thus determine for any insurance company, with given assets and given fraction of those assets invested in North Dakota, what reduction is necessary to compensate for possible losses due to differences in interest rates. Likewise, a table can be derived which would give a graduated reduction in tax based upon the fraction of assets invested in North Dakota.

SOLUTION B: It is also possible to derive a relationship between a reduction in the premium tax based upon the multiple of those premiums which are invested in North Dakota. If we let m be the multiple of premiums (collected in North Dakota) that the insurance company has invested in North Dakota, we have the following equality: $a = m\,P$

Thus, we can write the relationship given in (1) as:

$$r \geq (i - j)\ \frac{m\,P}{R\,P}$$

or

$$r \geq (i - j)\ \frac{m}{R}$$

Using this relationship one can determine an appropriate tax rate reduction (r) for companies having a given multiple of the premiums collected in North Dakota invested in North Dakota.

It would seem desirable to limit reducing the tax rate to those companies for which the value of m is significant. Again a table of values of m versus values of r or tax reduction rates can be derived using this relationship.

If the North Dakota Legislative Assembly will set itself to the tasks of determining the requisite information as outlined in the foregoing material by Mr. Dietz and applying that information to the formulae constructed by Mr. Dietz a tax credits statute could be drafted which would be tailored specifically to the North Dakota situation. Such a statute would provide a viable alternative to increasing the maximum rate of interest in North Dakota.

ALTERNATIVES TWO AND THREE

Numerous states recognize the duality of their function in the market for capital. First, the state must provide adequate protection for the general borrowing public, the masses, if you will. Second, this protection of the public must not be allowed to subvert the development of industry and commerce in the state. Mr. Justice Parke of the Court of Appeals of Maryland stated it more eloquently:

> The usury laws therefore proceed upon the theory that a usurious loan is attributable to such an inequality in the relation of the lender and borower that the borrower's necessities deprive him of freedom in contracting and placed him at the mercy of the lender. The law regards the borrower as in vinculis, and so the injury inflicted and the relief afforded as personal to the individual wronged. A corporation, on the contrary, is not a natural person, but an artificial legal entity, which intervenes between the lender and the persons who own its stock or form its membership. It is organized for commercial or other purposes which are best subserved by the advantages given through the corporate powers conferred by the state of which it is a creature. It has no sensations, and cannot be coerced by its necessities into any legal obligation beyond its defined and corporate powers. It is primarily a creature of the law under which capital concentrates for business and other gainful ends in an amount judged sufficient for the particular undertaking, and with the knowledge that what has been contributed in the form of capital and resources is the usual measure and limit of the loss of the corporate membership.
>
> The individual borrows from a need springing from his

> own personal necessities, but the corporation becomes a borrower from a corporate exigency. Although popular prejudice against usury laws subsists, the progress of society has brought about the general use of corporate enterprises in all forms of commercial activity and a general recognition of the economic truth that the volume of borrowing for commercial purposes through corporations has gradually [as of 1925] become of surpassing importance in comparison with the borrowing for purposes of necessity by the individual, and that usury laws, particullarly with respect to business affairs, increase the value of money, and are restraints on the natural flow and supply of capital to the prejudice of industry and commerce. . . .
>
> . . . .
>
> . . . [T]he legitimate object of a usury statute is the protection of the public rather than the mediate protection of the shareholders of a corporation. . . .[53]

In recognition of the need for balancing these conflicting interests, many states have established usury laws which have provisions on loans to corporate borrowers which vary from the provisions for loans to individual borrowers.

Presently eight states provide a definition of usury for loans to corporate borrowers that is different than that for loans to individuals. Corporations are allowed to pay a higher rate of interest before a plea of usury is available.[54] Five states presently provide within their statutes pertaining to interest and usury that corporations may pay "any" rate of interest without the lender being in violation of the state usury laws.[55] Two states provide explicitly within their corporate codes that corporations may contract for

53. Carozza v. Federal Fin. & Credit Co. 149 Md. 223, 131 A. 332, 342 (1925).

54. ARIZ. REV. STAT. ANN. § 10-177 (Supp. 1966) (Twelve per cent for corporations rather than the usual maximum of eight per cent per annum); FLA. STAT. ANN. § 687.02 (1966) (fifteen per cent for corporations instead of the usual ten per cent per annum maximum); IDAHO CODE ANN. § 28-22-105 (1967) (twelve per cent per annum on loans of at least ten thousand dollars rather than the usual maximum of eight pert cent per annum); N.C. GEN. STAT. § 24-8 (Supp. 1965) (eight per cent on loans of at least thirty thousand dollars of at least five years duration for repayment, of which no more than one-fifth may be repayable in any of the first five years instead of the usual maximum rate of six per cent per annum); ORE. REV. STAT. § 82.010 (3,4) (1967) (twelve per cent for corporations for loans agreed to in writing instead of the usual maximum of ten per cent); TENN. CODE ANN. § 47-14-106 (1964) (seven and one-half per cent for corporations on notes or bonds of a minimum face value of fifty thousand dollars instead of the usual six per cent maximum); TEX. REV. CIV. STAT. ANN. art. 1302-2.09 (Vernon Supp. 1967) (one and one-half per cent per month on principals of at least five thousand dollars instead of the usual maximum of ten per cent per annum; the higher rate of interest does not apply to charitable or religious corporations); UTAH CODE ANN. § 15-1-2(h) (Supp. 1967) (fourteen per cent for corporations instead of the usual ten per cent maximum).

55. GA. CODE ANN. § 57-118 (Supp. 1967) (on loans in excess of twenty-five hundred dollars; the provision does not apply to charitable, religious, public or nonprofit corporations): ILL. ANN. STAT., ch. 74, § 4(a) (Smith-Hurd 1966); IND. ANN. STAT. § 19-12-101(c) (1964); IOWA CODE ANN. § 535.2(2) (Supp. 1968) and N.C. GEN. STAT. § 24-9 (1965) (applies to corporations engaged in commercial, manufacturing or industrial pursuits for profit if the loan is in writing and secured by liens upon or security interests in accounts receivable, materials, goods in process, inventory, machinery, equipment and other similar personal property).

"any" rate of interest.[56] Seventeen states presently provide that the plea of usury is not available to corporations.[57]

North Dakota could well distinguish between the corporate and the individual borrower by any of the devices utilized by the foregoing thirty-two states. It is arguable, although the argument has, in the opinion of this writer, little credibility, that the provisions of the Model Business Corporation Act stating the powers of the corporation provide for this distinction. The statute grants the corporations the power to "borrow money at such rates of interest as the corporation may determine."[58] On this section of the Act, the official comment states: "[r]ates of interest on corporate borrowing might or might not be subject to usury laws, which are often outside the corporate statutes."[59] Such an equivocal statement would hardly provide a convincing counterbalance to the continuing provisions of the usury laws of North Dakota. The fact that thirty-two states have enacted specific provisions on the issue of the power of corporations to borrow would suggest that a relatively obscure provision of a uniform statute was not designed to alter or repeal a state's usury laws.

Consequently, North Dakota should adopt a provision within Chapter 47-14 of the North Dakota Century Code that would redefine usury for corporations or deny the plea of usury to that legal entity. By adopting one of these alternatives—as opposed to increasing the maximum rate of interest—the general borrowing

56. LA. REV. STAT. ANN. § 12-603 (Supp. 1967) (the statute provides as follows: *"Notwithstanding any other provision of the laws of this state to the contrary,* any domestic or foreign corporation organized for profit may agree to pay any rate of interest in excess of the maximum rate of conventional interest authorized by law, and as to any such agreement, the claim or defense of usury, or of the taking of interest in excess of the maximum rate of conventional interest, by such corporation, is prohibited." (emphasis added), and MICH. COMP. LAWS § 450.78 (1967) (the statute provides as follows: "Corporations domestic or foreign may by agreement in writing, and not otherwise, agree to pay any rate of interest in excess of the legal rate and in such instances where the rate is above the legal rate the defense of usury is prohibited: Provided, That nothing contained in this section shall prevent any charitable, religious, or other nonprofit corporation from interposing or pleading the defense of usury in any action.")

57. KAN. GEN. STAT. ANN. § 17-4103 (1964); KY. REV. STAT. § 360.025 (1962); (the plea is denied to all corporations except those whose principal asset is a one or two family dwelling); MD. CODE ANN., art. 23, § 125 (1966); MINN. STAT. ANN. § 334.021 (1966); MO. STAT. ANN. § 408.060 (Vernon 1952); NEB. REV. STAT. § 45-102 (Supp. 1965) (the agreement must be in writing); N.J. STAT. ANN. § 31:1-6 (1963); N.M. STAT. ANN. § 51-12-13 (Supp. 1967); N.Y. GEN. OBL. LAW § 5-521 (McKinney 1964); OHIO REV. CODE ANN. § 1701.68 (1964); OKLA. STAT. ANN., tit. 18, § 1.26 (1953); PA. STAT. ANN. tit. 41, § 2 (Supp. 1968); S.C. CODE ANN. § 8-8 (1962) (applies only to corporations organized for profit and capitalized at forty thousand dollars or more); VA. CODE ANN. § 6.1-327 (1966); WASH. REV. CODE ANN. § 19.52.030 (Supp. 1967) (the statute provides in part as follows: *"Provided,* That the debtor may not commence an action on the contract to apply the provisions of this section if a loan or forebearance is made to a corporation engaged in a trade or business for the purposes of carrying on said trade or business unless there is also, in connection with such loan or forebearance, the creation of liability on the part of a natural person or his property for an amount in excess of the principal plus interest allowed pursuant to RCW 19.52.020 [providing for the highest rate of permissible interest]. W. VA. CODE ANN. § 4632 (1961) and WIS. STAT. ANN. § 138.05(5) (Supp. 1968).

58. N.D. CENT. CODE § 10-19-04(8) (1960).

59. MODEL BUSINESS CORPORATION ACT § 4(h), Comment.

public will continue to be protected and the corporate entity will be at liberty to promote industry and commerce. If North Dakota should adopt such a provision, it would be well to exclude co-operative corporations from the provision. Also, if agricultural corporations become a reality in North Dakota, they too should be excluded. Likewise, nonprofit, public, religious and charitable corporations should be excluded.

The State of Washington has a statute which provides that a defense of usury is not available to a corporation unless there is also in connection with the loan "the creation of liability on the part of a natural person or his property for an amount in excess of the principal plus interest allowed"[60] under the provisions of the usual maximum rate of interest law. This distinction is a recognition that frequently a close corporation is merely the alter ego of an individual. The distinction aids in preventing contrivances which would subvert the intent of the usury laws—protection of those who are in an unequal bargaining position with the lender. If a lender were allowed to extract a higher or unlimited rate of interest from a corporation and also have the organizers of the corporation serve as guarantors of the loan, this would be tantamount to the proverbial "having its cake and eating it too." This should not be the result. If North Dakota should choose to adopt a statute barring the plea of usury to corporations, it should adopt a provision similar to that of the State of Washington.

ALTERNATIVE FOUR

The final alternative to be presented can best be classified as a *lex loci contractus* statute. Georgia has such a statute and it provides as follows:

> Every contract shall bear interest according to the law of the place of the contract at the time of the contract, unless upon its face it shall be apparent that the intention of the parties referred the execution of the contract to another forum; in this case, the law of the forum shall govern.[61]

If North Dakota has a shortage of capital for investment purposes flowing into the state, enactment of a similar statutory provision within Chapter 47-14 of the North Dakota Century Code would enable the borrower to go outside of the state and literally bring his necessary capital back with him. The Introduction mentioned the instance of a Bismarck businessman who was having difficulty finding capital

60. WASH. REV. CODE ANN. § 19.52.030 (Supp. 1967).
61. GA. CODE ANN. § 57-106 (1960).

in Minneapolis at any rate other than seven and one-quarter per cent per annum. If North Dakota had had a *lex loci contractus* statute, that businessman would have been free to enter into a contract, in conformity with Minnesota law, providing for interest of up to eight per cent per annum if he had not assumed the corporate entity and for any rate of interest per annum if he had assumed the corporate entity.

The adoption of a *lex loci contractus* provision would allow or provide for the continuing protection of the general North Dakota borrowing public while concurrently allowing a person or corporation seeking capital to shop the national market for that capital.

It is arguable that section 1-105 of the Uniform Commercial Code[62] is such a *lex loci contractus* statute. That section of the Code allows the parties to a transaction to agree that the law of a particular jurisdiction will govern their rights and duties under that transaction. There are, however, certain qualifications upon that right. First, the transaction must bear a reasonable relation to the jurisdiction named as having the controlling law. Second, section 1-105 of the Uniform Commerical Code applies only to transactions governed by the Code. The official comment to section 1-105 suggests that the purpose of that section is to allow the parties to a transaction to make the choice between having their relationship governed by the laws of a Code or a non-Code state. Since usury laws are considered to be "entirely" outside of the scope of the Code,[63] the applicability of the Code is, therefore, doubtful.

Section 9-07-11 of the North Dakota Century Code provides 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 of the place where it is made." To date, the North Dakota Supreme Court has not been faced with the issue as to whether the statute would uphold a contract entered into by a North Dakota resident, such contract being usurious under North Dakota law, but valid in the jurisdiction where it was made or to be performed. Essentially, the issue ultimately rests in the determination of whether evasion of the state's usury statute by operation of section 9-07-11 would result in contravention of public policy. There can be little doubt that, notwithstanding section 9-07-11, the Court should apply the North Dakota usury statute in order to preserve a vital public interest.

There is, however, a somewhat persuasive case for the contention that the North Dakota Supreme Court would enforce a contract made outside of the state which provided for a rate of

62. N.D. CENT. CODE § 41-01-05 (Supp. 1967).
63. UNIFORM COMMERCIAL CODE § 9-201, Comment.

interest that would, otherwise, be usurious under North Dakota law. In 1916 the North Dakota Supreme Court held that a contract made in Minnesota between a resident of Minnesota and a resident of Wisconsin was governed by Minnesota law in determining whether the contract was usurious. The contract was a mortgage and a note on North Dakota land.[64] However, the parties had stipulated that Minnesota law governed. The decision would represent a somewhat more substantial authority if one of the parties—particularly the borrower—had been a North Dakota resident. In *Kinney* the Supreme Court was not faced with the necessity for determining whether the protective umbrella of the North Dakota usury laws extended to a North Dakota resident mortgaging North Dakota land at a usurious rate of interest under North Dakota law but at a permissible rate of interest under the law of the contracting state. Until the Court decides that issue, it must be concluded that the law is unsettled relative to the enforceability of contracts for rates of interest which are usurious in North Dakota.

The North Dakota Legislative Assembly should provide explicitly within Chapter 47-14 of the North Dakota Century Code for a *lex loci contractus* provision.

While it is apparent that the foregoing alternatives are not necessarily a panacea for North Dakota's economic ills, it is believed that a combination of these alternatives, if enacted by the North Dakota Legislative Assembly, would provide a solution to the problem of the perceived shortage of capital for investment purposes. Further, these alternatives are considerably less onerous upon the general borrowing public than would be an increase in the maximum rate of interest. This latter factor, alone, commends these alternatives to the legislature for serious consideration.

64. Gold-Stabeck Loan & Credit Co. v. Kinney, 33 N.D. 495, 157 N.W. 482, 483 (1916).