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USURY LAWS: UNDERDEVELOPED PROTECTION IN AN OVERDEVELOPED MARKET

The charge card, the revolving account, numerous time payment plans, and the "finance industry" have created a market place without cash. From the consumer's viewpoint, the ease with which goods may be obtained often outweighs the confusion resulting from the computation of time charges and the question of where to finance.[1] With his judgment thus marred, the consumer, unless he is adequately protected by the law, is vulnerable to the unscrupulous money lender or seller of goods.

The usury statutes, generally, protect the borrower from the payment of more than a specified rate of interest. These statutes, however, do not affect the entire consumer market because, in a credit sale, "a purchaser is not like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller."[2]

In the nineteenth century, the sale on credit was instituted and almost immediately, the courts were asked to determine the extent to which the additional charges were to be considered interest.

> As a result, the time-price doctrine emerged; the courts held that one can offer his goods for sale at two prices—a credit, or time, price and a cash price. The difference between the two—the time-price differential—can exceed the amount allowable under the usury laws because it is not interest.[3]

Laws have been designed to allow protection for the consumer as he attempts to seek out the most advantageous financing arrangement.[4] These laws have been based on the premise that the consumer should know what financing will cost. Closely related to these efforts has been a more fundamental and more

1. Consumer in this context refers to both the buyer and the debtor—two terms which many writers and courts would prefer to distinguish.
2. Michigan Nat'l Bank v. Hanner, 268 N.C. 668, 672, 151 S.E.2d 579, 582 (1966). *See also* Carolina Indus. Bank v. Merrimon, 260 N.C. 335, 132 S.E.2d 692 (1963).
3. Jordon & Warren, *Disclosure of Finance Charges: A Rationale*, 64 Mich. L. Rev. 1285 (1966) [hereinafter cited as Jordon].
4. Jordon, *supra* note 3.

controversial issue: Legislative involvement in the regulation of maximum credit charges in all credit transactions.

With the advent of legislation in the area of credit sales, installment and consumer loans, however, the future of the usury laws is conjectural.[5] To evaluate South Carolina legislation, several questions must be posed and answers sought: Are South Carolina's usury laws typical? How are our usury laws applied to consumer or debtor protection? What is the future of consumer protection in South Carolina?

I. ARE SOUTH CAROLINA'S USURY LAWS TYPICAL?

A. Criteria for Usury.

To constitute usury, many statutes and courts require that the interest charged must be attached to a "loan or forbearance" of money.[6] South Carolina's basic usury statute,[7] however, does not define usury in the classic terms of "a loan or forbearance," charged with an excessive rate of interest. The language of the South Carolina statute is explicit in what it proscribes:

> [N]o greater interest than six per cent per annum shall be charged, taken, agreed upon or allowed upon any contract . . . for the hiring, lending or use of money or other commodity . . . .[8]

The statute further provides that the upper limits shall be seven per cent on written contracts.

This failure to include what is considered to be the standard elements of usury—a loan or forbearance—does not, however, appear to affect our judicial interpretation of usury. In *Carolina Savings Bank v. Parrott*,[9] the words of the usury laws were viewed as mandatory. It was stated that, "[t]he usury law . . . is very positive and peremptory"[10], allowing no greater interest than that which the law recognizes. Intent is now an issue.

> After the facts are ascertained, whether a contract is usurious is a question of law, and proof that the agreement is corrupt is not necessary, for a contract may be

5. For the historical background and the general scope of decisions concerning the applicability of usury laws to credit sales, *see* Note, *Applicability of Usury Laws to Credit Installment Sales,* 4 S.C.L.Q. 290 (1951).
6. Annot., 14 A.L.R.3d 1065 (1967). This annotation represents a comparative study of credit sales and cash sales and the effect of the usury laws.
7. S.C. CODE ANN. § 8-3 (1962).
8. *Id.*
9. 30 S.C. 61, 8 S.E. 199 (1888).
10. *Id.* at 67, 8 S.E. at 201.

> usurious though the parties did not know that it was contrary to law.[11]

The basic Georgia usury statute[12] and its courts use the elements of a "loan or forbearance" to determine usury. In *Bank of Lumpkin v. Farmers' State Bank*,[13] the court stated that the four requirements for every usurious transaction are:

> (1) A loan or forbearance of money, either expressed or implied; (2) upon an understanding that the principal shall or may be returned; (3) and that for such loan or forbearance a greater profit than is authorized by law should be paid or is agreed to be paid; (4) that the contract was made with intent to violate the law.[14]

The court, however, expanded the last element by stating that a corrupt intent will be implied if the other requirements are expressed on the face of the contract.[15] In essence, the Georgia court agreed with the South Carolina court that one does not necessarily need to know that he is violating the statute to be charged with usury.

In *Plyler v. McGee*,[16] a South Carolina case, the lender honestly believed that he could collect compound interest under the terms of the note. The court, however, said that since he had the intent and meant to collect the compound interest, which was above the legal rate, the transaction was usurious. Despite this holding, the court, in qualifying its stand against usury, recognized that there are mistakes which may be made that will rebut the implication of usury. In explaining its position, the court pointed out that if the lender had collected the amount unintentionally by way of miscalculation of interest, the transaction would not have been usurious.[17]

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11. *Id.* at 68, 8 S.E. at 202. *See also* Merchant's & Planters' Bank v. Sarratt, 77 S.C. 141, 57 S.E. 621 (1907); Thompson v. Nesbit, 2 Rich. 73 (S.C. 1845).
12. GA. CODE ANN. § 57-101 (1937). The statute provides that "in no event shall any person, company, or corporation reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per centum per annum, either directly or indirectly . . . ."
13. 161 Ga. 801, 132 S.E. 221 (1926).
14. *Id.* at 811, 132 S.E. at 225; *accord,* Harrison v. Arrendale, 113 Ga. App. 118, 147 S.E.2d 356 (1966).
15. 161 Ga. at 811, 132 S.E. at 225. For application, *see* Plastic Dev. Corp. v. Flexible Prod. Co., 112 Ga. App. 460, 145 S.E.2d 655 (1965).
16. 76 S.C. 450, 57 S.E. 180 (1907).
17. *Accord,* Graydon v. Standard Bldg. & Loan Ass'n, 145 S.C. 551, 143 S.E. 259 (1928), in which the court stated that to find usury "would be tending to make of the usury statute a sword instead of a shield . . . ." *Id.* at 557, 143 S.E. at 261.

North Carolina has also designed its statute so that the court may use the standard criteria—a loan or forbearance—for finding usury. The statute provides that the legal rate shall be six per cent per annum and "no more."[18] In applying the statute, the court in *Michigan National Bank v. Hanner*[19] accepted the four elements which the Georgia court used to determine usury —(1) a loan or forbearance, expressed or implied; (2) an agreement to repay; (3) a charge of a greater rate of interest than allowed by law; and (4) a corrupt intent or scheme to take more than the legal rate. It is doubtful, however, that the North Carolina courts will declare a transaction usurious where it cannot be shown that a corrupt intent or scheme existed, even if the other elements are present. Section 24-2[20] of the General Statutes of North Carolina specifically provides that before the penalty for usury will attach, the lender must "knowingly" take, receive, reserve or charge a greater rate of interest than is allowed by law. This principle was applied in *Preyer v. Parker*[21] in which the court pointed out that "unless these four things concur in any transaction it is safe to say that no case of usury can be declared."[22]

Usury is predicated on the fact that "interest" in excess of the maximum allowed by law is charged on a transaction which involves a loan or forbearance or use of money. When it is clear that the charge was actually interest, then the court as a matter of law will determine whether the charge was in excess of the legal limit.[23] The problem arises, however, when the court cannot, as a matter of law, find the existence of a transaction which normally can be identified as a loan, or forbearance, or use of money. In this situation, it becomes a question for the jury as to whether the additional charge was interest.

The jury may be affected by the fact that the debtor entered the transaction understanding what he was to pay. If the jury determines that the transaction is non-usurious, though some of the elements of usury are present, the court will be reluctant to overrule the jury and imply a usurious transaction.

18. GEN. STAT. OF N.C. § 24-1 (Replacement 1965).
19. 268 N.C. 668, 151 S.E.2d 579 (1966). *See also* Carolina Indus. Bank v. Merrimon, 260 N.C. 335, 132 S.E.2d 692 (1963); Preyer v. Parker, 257 N.C. 440, 125 S.E.2d 916 (1962); Savings Loan & Trust Co. v. Yokley, 174 N.C. 573, 94 S.E. 102 (1917).
20. GEN. STAT. OF N.C. § 24-2 (Replacement 1965).
21. 257 N.C. 440, 125 S.E.2d 916 (1962).
22. *Id.* at 444, 125 S.E.2d at 919.
23. *See* Preyer v. Parker, 257 N.C. 440, 125 S.E.2d 916 (1962).

B. Civil Remedies

The remedial section of our usury statute[24] provides two forms of relief: (1) the statute grants the debtor relief by voiding any remaining interest and costs, but does not void the debt as to principal, and, (2) the statute provides a penalty where the debtor has paid part or all of the interest charges; the debtor may recover double the amount of interest actually paid.[25]

During the nineteenth century North Carolina's usury laws provided a severe penalty for extending usurious credit, voiding the contract both as to principal and interest. A conflict developed, however, concerning the application of the usury law to the national banks and the North Carolina legislature revamped its laws, in effect, bringing them in line with those of South Carolina.[26] At present, the North Carolina statute[27] provides for voiding a usurious contract of interest only and allows double recovery of interest actually paid.[28]

It has been suggested that these forfeiture provisions will "tend to decrease the likelihood of strict application of the statute by the courts, due to the judicial abhorrence of forfeiture."[29] Furthermore, it is argued that the severity of these provisions should be kept to a minimum, by confining the penalty to interest alone, and not "multiple" interest. Similar remedies in Georgia[30] and Tennessee[31] are limited to single recovery of interest actually paid; but, it does not appear that there is any significant difference between the application of the usury laws of Georgia and Tennessee and those of North Carolina and South Carolina.

24. S.C. CODE ANN. § 8-5 (1962).
25. For application of § 8-5 to permit double recovery, *see* Atlantic Discount Corp. v. Driskell, 239 S.C. 500, 123 S.E.2d 832 (1962), in which it was held that discounting the interest in advance did not constitute an actual receipt of payment by the creditor. The creditor actually received only a proportional amount of interest on each payment.
26. For a history of North Carolina usury laws, *see* Commercial Credit Corp. v. Robeson Motors, 243 N.C. 326, 90 S.E.2d 886 (1956).
27. GEN. STAT. OF N.C. § 24-2 (Replacement 1965).
28. For application of § 24-2, *see* Wilkins v. Commercial Fin. Co., 237 N.C. 396, 75 S.E.2d 118 (1953).
29. Note, *supra* note 6, at 308.
30. GA. CODE ANN. § 57-112 (1935), provides that there shall be a forfeiture of "the entire interest so charged or taken . . . ." *Construed in* Service Loan & Fin. Corp. v. McDaniel, 115 Ga. App. 548, 154 S.E.2d 823 (1967).
31. TENN. CODE ANN. § 47-14-117 (Replacement 1964), provides that if usury is paid, the borrower may recover the amount by a court action. TENN. CODE ANN. § 47-14-112 (Replacement 1964), further provides that the defendant "may avoid the excess over legal interest . . . ."

II. USURY LAWS AND CONSUMER PROTECTION

A. Limitation of Usury Statute to Loan Transactions

Although the consumer is protected when procuring a loan, the basic South Carolina usury statute which was designed to provide this protection has been, to some extent, superseded. Special legislation has been enacted specifically covering consumer loans made by banks, building and loan associations and other licensed lending institutions. In some circumstances these special acts do not materially change the amount which the lender may receive. In section 8-233,[32] dealing with installment loans, the South Carolina legislature set the maximum rate for interest or add-on charges at seven per cent per annum for the making of "loans and advances of credit to persons . . . payable in installments, for the financing of purchases and for other desirable purposes . . . ."[33]

In drafting the *Consumer Finance Law*,[34] however, the legislature increased the maximum amount that may be charged by licensees who lend sums of money not exceeding seven thousand five hundred dollars ($7500). For cash advances not exceeding one hundred fifty dollars ($150.00) the licensee may charge a maximum of two dollars and fifty cents ($2.50) per month. As to loans exceeding one hundred fifty dollars ($150.00), the lender may charge twenty dollars ($20.00) for the first one hundred dollars ($100.00), eighteen dollars ($18.00) per hundred for the next two hundred dollars ($200.00), and nine dollars ($9.00) per hundred for those amounts exceeding three hundred dollars ($300.00) but not exceeding one thousand dollars ($1000.00).[35] Georgia,[36] North Carolina[37] and Tennessee[38] have passed similar laws which have the same general effect.

32. S.C. CODE ANN. § 8-233 (Supp. 1968).
33. *Id.*
34. S.C. CODE ANN. § 8-800.10 (Supp. 1967).
35. *Id.*
36. *See generally* GA. CODE ANN. § 25-315 (Supp. 1967). It provides for loans by licensees not exceeding two thousand five hundred dollars ($2,500.00) for a period of two years or less. The licensee may "charge, contract for, receive and collect interest at a rate not to exceed eight per cent (8%) per annum." He may also charge a fee in addition which may not exceed eight per cent (8%) of the first six hundred dollars ($600.00), and four per cent (4%) for the excess.
37. *See generally* GEN. STAT. OF N.C. § 53-166 (Replacement 1965). It provides for loans not exceeding six hundred dollars ($600.00).
38. *See generally* TENN. CODE ANN. § 45-437 (Replacement Supp. 1968) (installment loans by banks and trust companies). *See also* TENN. CODE ANN. § 45-2007 (Replacement 1964) (industrial loans and thrift corporations).

Lack of effectiveness of the old usury laws in certain applications is not an indication that these new statutes are destructive. The customer has not lost what protection he had. Usury laws still protect against the unlicensed lenders, but the protection has shifted. It is hoped that the new legislation will enable the consumer to understand the discrepancy in charges of various institutions, thus allowing the "selling industry" and the "finance industry" to compete somewhat more effectively for the consumer's patronage. Under the old law, the lender was limited to a charge of seven per cent, but the seller could add practically any charge for a credit sale, because the courts, for all practical purposes, refused to apply the usury laws to credit sales.

B. Usury and the Credit Sale

Courts have felt that the definition of usury and its elements do not include the elements of a credit sale. The courts have referred to a credit sale or "sale on time" as a sale with two distinct prices—a cash price and a credit or time price. A credit sale transaction is generally composed of the original cash price, plus finance charges, service charges or "time-price differential," which the buyer will pay in installments.[39] This total is what the courts have referred to as the "credit-price." Suppose, for example, *A* is offering a television for sale at a cash price of two hundred dollars ($200.00). *B* wants to buy the set but does not have cash readily available. *A*, therefore, offers to allow *B* to pay for the television at ten dollars ($10.00) a week for twenty-two weeks, or a total of two hundred and twenty dollars ($220.00) for the "credit-price." The twenty dollars difference between the two prices is the "time-price differential."

The South Carolina Supreme Court has stated that

> [i]t is manifest that any person owning property may sell it at such price and on such terms as to time and mode of payment as he may see fit, and such sale, if bona fide, cannot be usurious however unconscienable it may be.[40]

In *Osborne v. Fuller*[41] the court stated a principle from which it appears that the court was prepared to pierce the veil

39. This is known as the "add-on" method of computing finance charges. See *supra* note 5.
40. Brown v. Crandall, 218 S.C. 124, 127, 61 S.E.2d 761, 762 (1950). *See also* Wheeler v. Marchbank, 32 S.C. 594, 10 S.E. 1011 (1889).
41. 92 S.C. 338, 75 S.E. 557 (1912).

of a true credit sale and declare such transactions usurious. It said that "[t]he law will not permit evasions of the usury law by excessive charge for the use of money under the disguise of an increase price for credit in the sale of property."[42] In this case, however, there was no sale at all. Defendant Fuller had purchased some goods for the plaintiff, Osborne, and Osborne agreed to repay Fuller the amount paid for the goods plus twenty per cent. In a suit to recover double the interest paid, Fuller contended that the transaction was a sale on time, for which he would legally charge a higher rate than allowed under the usury laws. It is agreed that the court did pierce the veil which Fuller set up, by pointing out that Fuller never owned the goods; and, therefore, Osborne had received nothing but the "use" of Fuller's money. The court, however, did not pierce the veil of a true or actual sales transaction which it has contended it will do when the credit price is, in fact, a cloak for usury.[43]

In *Brown v. Crandall*,[44] the South Carolina court was faced with a true credit sales transaction which consisted of a cash price and a higher credit price—a time-price differential. In *Brown* only one price was stated on the bill of sale. The court determined, however, that the parties had agreed to additional charges. These findings were sufficient to indicate an actual credit price.

The South Carolina courts have frequently pointed out that it is the substance of the transaction, not the form, to which the courts will look to determine whether a transaction is in reality a cloak for usury. In *Brown*, however, the court pointed to the form which the seller used in *Milford v. Milford*,[45] and stated that if the seller had merely used different words, the transaction would not have been usurious. In effect, this dictum opened the door to the "usurious" credit sale; and at the same time, locked out any glimmer of hope that the usury laws would be applied to credit sales transactions, by telling sellers that the language used is most important.[46]

North Carolina and Georgia are similar to the majority of states in the application of their usury laws to the credit sales

42. *Id.* at 341, 75 S.E. at 558.
43. *See* Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761 (1950); Martin v. Pacific Mills, 160 S.C. 458, 158 S.E. 831 (1931).
44. 218 S.C. 124, 61 S.E.2d 761 (1950).
45. 67 S.C. 553, 46 S.E. 479 (1903).
46. For application of Brown, *see* Note, *supra* note 6.

transactions. The North Carolina court, in *Michigan National Bank v. Hanner*,[47] after pointing out that it would pierce the veil of a transaction when it is a subterfuge for usury, stated that, in general, the price of a sale "is a matter of concern to the parties and not to the courts . . . ."[48] In *Carolina Industrial Bank v. Merrimon*,[49] it was further pointed out that "[a] bona fide credit sale upon an installment payment basis does not involve a loan of money or a forbearance of a debt within the meaning and application of the usury laws,"[50] nor is such transaction converted into a loan because a finance company furnishes rate schedules to the dealer, from which the dealer computes the finance charges.

While accepting the general propositions as stated by most courts as to the two price sale, the Georgia courts have set up a further standard by which the court may find a usurious transaction. In *Plastics Development Corp. v. Flexible Products Co.*,[51] the sales contract allowed the buyer a one per cent discount if he paid within ten days from the date of shipment. The contract, however, went on to provide that if the amount were not paid in thirty days, a time-price differential would be charged at the rate of one and one-half per cent per month on the unpaid balance. The Georgia court held that the contract was usurious when the property was to be sold at a cash valuation and certain payments were to be deferred in consideration of payment of interest at a rate above the legal limit.

The Tennessee legislature has removed most doubts as to whether a "retail" credit sale can be affected by its usury laws. In its *Retail Installment Sales Act*[52] the legislature stated that no "retail installment transaction as defined . . . or any other conditional sales contract . . . shall be . . . deemed to be loans or forbearances of money or things of value . . . ."[53] Although the purpose of the act may be to protect the consumer and regulate the time price of a sale, the buyer is still left in a precarious position because of the notice provision of the statute. Section 47-11-107[54] provides that the buyer must notify the seller of any

47. 268 N.C. 668, 151 S.E.2d 579 (1966).
48. *Id.* at 672, 151 S.E.2d at 581.
49. 260 N.C. 335, 132 S.E.2d 692 (1963).
50. *Id.* at 339, 132 S.E.2d at 694.
51. 112 Ga. App. 460, 145 S.E.2d 655 (1965).
52. TENN. CODE ANN. § 47-11-101 (Replacement 1964).
53. *Id. See also* Falcone v. Palmer Ford Inc., 242 Md. 487, 219 A.2d 808 (1966).
54. TENN. CODE ANN. § 47-11-107 (Replacement 1964).

overcharge under the statute, and gives the seller thirty days to correct his wrong.[55] In *Southland Tractor, Inc. v. H & N Construction Co.*[56] the Tennessee court pointed out that "[u]nder this provision, the seller will be able to continue any oppressive business practice against the installment buyer with the assurance of no criminal or civil sanctions . . ."[57] because once the seller rectifies the overcharge, he will be protected against any liability for even an intentional violation of the act.

C. Arkansas—A New Twist

Arkansas has taken a hard line approach toward eradication of usurious transactions. The Arkansas constitution provides that all contracts for a greater rate of interest than ten per cent per annum shall be void as to principal and interest.[58] The constitution also directs the state legislature to prohibit such contracts by statute. Based on this constitutional mandate, the legislature passed significant legislation which the courts, many years later, were able to use to strike down the guise of the "credit sale." Arkansas statute § 68-602[59] permits agreement for interest on any contract which is "due" or is "to become due" and which does not exceed the legal rate. Arkansas statutes §§ 68-608, and 609[60] reaffirm the constitutional provision that a usurious contract and its security will be void, and further provides that the law will be the same even where the interest is "indirect."

For many years the Arkansas courts recognized the artificial distinction of two sales prices. However, in 1952 the court in *Hare v. General Contract Purchase Corp.*[61] realized that "[b]uying at a credit price, as distinguished from a cash price, has largely disappeared in fact . . . ."[62] The court went on to say that the credit price "is being used as a cloak for usury in many cases by such words as time price differential, or some other such language."[63] In *Hare*, the plaintiff purchased a used truck from

55. TENN. CODE ANN. § 47-110-103 (Replacement 1964), contains provisions for disclosure requirements and sets a maximum charge on a given retail sales transaction.
56. 52 Tenn. App. 664, 377 S.W.2d 789 (1963).
57. *Id.*, 377 S.W.2d at 798, *quoting* Bankester, *Personal Property Sales—1959 Tenn. Survey*, 12 VAND. L. REV. 1270, 1280 (1959).
58. ARK. CONST. art. 19, § 13.
59. ARK. STAT. ANN. § 68-602 (1957).
60. ARK. STAT. ANN. §§ 68-603, 608-09 (1957).
61. 220 Ark. 601, 249 S.W.2d 973 (1952).
62. *Id.*, 249 S.W.2d at 978.
63. *Id.*

one Meeks for one thousand seven hundred fifty dollars ($1750.00) reducing this figure by one hundred dollars ($100.00) cash payment and a five hundred dollar ($500.00) trade-in, thus leaving a balance of one thousand one hundred fifty dollars ($1150.00). To cover the balance the plaintiff signed a note, on forms supplied Meeks by defendant, for one thousand four hundred thirty-nine dollars and thirteen cents ($1,439.13), an increase of two hundred eighty-nine dollars and thirteen cents ($289.13) to cover insurance, interest and service charges on delayed payments. Shortly thereafter, Meeks transferred the title retaining contract and note to the defendant, without recourse, and received one thousand one hundred fifty dollars ($1,150.00) in cash.

After making six payments, the plaintiff filed suit to void the contract on grounds of usury. To the charge of usury the defendant set up three defenses: (1) that they were bona fide purchasers for value, without notice and therefore had the defenses of a holder in due course; (2) that the sale was a credit sale for two thousand thirty-nine dollars and thirteen cents ($2,039.13), or one thousand seven hundred fifty dollars ($1750.00) in cash; (3) and that the service charges were only one hundred forty dollars and eighty-nine cents ($140.89), the rest being insurance costs.

The court rejected the first defense by referring to the constitution and stating that if the transaction were usurious, the contract and note thereto were void. As to the contention that the charge was a legal addition to a credit sale, the court pointed out that there was no credit price stated—that the only price stated was one thousand seven hundred fifty dollars ($1750.00) and the service charges were added to a balance after the initial payment, and not to the original cash price. In addition, the majority found that the interest and service charges were two hundred eighty-nine dollars and thirteen cents ($289.13) and not one hundred forty dollars and eighty-nine cents ($140.89), since, at the time of the contract, the insurance amount had not been determined.

Although the court did find usury, it held for the defendant, saying that it could not retroactively overrule its past holdings. Instead the court laid down a caveat that in future cases, it would scrutinize the *bona fides* of an increased credit price as a factual issue and void the contract if the higher price did not

represent protection for the increased risk involved in a credit sale. The court said further, that a valid credit sales contract would still be recognized when the seller actually intended to sell on credit; but when it is made on a cash estimate, it may be, in effect, an agreement for forbearance, and thus usurious.[64] Although the term "cash estimate" is often used by the courts, it remains unsatisfactorily defined.

It was also pointed out that when the seller transfers the paper to an individual or company at a price that permits the transferee to receive a return of more than "ten per cent (10%)" on its investment, a question of fact arises as to whether the seller increased his cash price with a reasonable assurance that he could discount the paper. Likewise, when the finance company supplies the dealer with a set of forms in a schedule for credit price increases, it will be an indication that the dealer had this reasonable assurance of being able to discount the paper. Once this reasonable assurance is established, the transaction will be, in substance, a loan which may be attacked on the grounds of usury.

From 1952 to 1957, the criteria for usury under the *Hare* decision was a source of confusion. In 1957, the Arkansas court clarified itself by striking down a credit charge in *Sloan v. Sears Roebuck & Co.*[65] Sloan had purchased from the defendant a garden tractor and tires. The carrying charge in this credit sale contract, when added to the total case price of the purchase amounted to more than ten per cent per annum. The trial court held that there was no usury, saying that the usury laws did not apply to credit sales, but applied only to loans of money and to amounts charged by a creditor for allowing additional time to pay a debt after it has become due.

The Supreme Court of Arkansas reversed, saying that the statute[66] clearly stated that the usury laws referred to debts "due or to become due," and not solely to loans of money or to debts after they become due. The majority felt that the statute lent itself to the interpretation that forbearance, as it was used in the Acts, "simply means that the person to whom the money is owed waits for all or part of the money after the consumma-

64. *Id.*, 249 S.W.2d at 977. The Georgia Court in *Plastics Dev. Corp. v. Flexible Prod. Co.*, 122 Ga. App. 460, 145 S.E.2d 655 (1965), used the same definition for finding usury, but it is doubtful that the Georgia court will go as far as Arkansas as to what is a cash estimate.
65. 228 Ark. 464, 308 S.W.2d 802 (1957).
66. ARK. STAT. ANN. § 68-602 (1957).

tion of the contract in which the money is involved. The seller forgoes payment in cash and waits for all or part of his money."[67]

The court then pointed out that the sale was made on a cash estimate based on the following facts: "Tickets were made out showing the cash price; the cash price was named in the contract; and sales tax was paid only on the cash price."[68] In effect the seller was merely adding an extra charge for waiting for the money.

While it is true that the Arkansas constitution and statute allow a very strong stand against usurious transactions, some of these same propositions could have easily been used by the South Carolina courts. The language of the South Carolina statute "use of money or other commodity" could have been employed by our court. Since the words "loan or forbearance" are not used anywhere within this section, it may be argued that the phrase "use of money or other commodities" implies a waiting period before payment is received. The South Carolina court did apply the phrase "use of money" in *Osborne*.[69] *Osborne*, however, did not involve a true sales transaction.

It might be suggested that a discussion of what the courts might have done or what they will do is academic following the *Brown*[70] decision. Sellers and suppliers of services now use the language suggested in *Brown* when formulating a credit contract. It is unlikely, moreover, that *Brown* will be overruled, even under the attack of the usury laws. The previous discussion, however, has been aimed at pointing out the weaknesses in our usury law. The usury law, a rule of thumb for the protection of the debtor in its inception, has outlived its original utility. The distinctions between the borrower and the buyer are obsolete. The "selling world" and the "lending world" have become so interrelated that any future protection laws must encompass both fields to be effective.

III. WHERE ARE WE GOING?

The consumer today meets a staggering problem when he attempts to enter into a financing agreement for a contract of

67. 228 Ark. 464, 467, 308 S.W.2d 802, 804 (1957).
68. *Id.* at 471, 308 S.W.2d at 806.
69. Osborne v. Fuller, 92 S.C. 338, 75 S.E. 557 (1912); *see* text accompanying note 41 *supra*.
70. Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761 (1950); *see* text accompanying note 44 *supra*.

sale for consumer products. He must decide whether it would be cheaper to finance the purchase through the seller, or to borrow the money from a loan company or a bank and pay the seller in cash. The average consumer cannot begin to comprehend the meaning or value of the rates quoted him by the individual sellers and/or lending institutions. For example, the seller may be offering the consumer the "privilege" of financing the sale through him at a fixed dollar rate per hundred, per year on a thirty-month contract. On the other hand the bank is quoting the consumer a discount percentage rate per year with a maturity period of twenty-four months. Simultaneously, the small loan company is offering him a "deal" of a fixed dollar rate for the first hundred dollars and a different rate for each succeeding hundred dollars. It is doubtful that the consumer knows "that on an installment contract, six dollars ($6.00) per hundred ($100.00) per year is not the same as six per cent (6%) interest on the declining balance of the debt, but is nearly twelve per cent (12%) interest on a twelve-month contract."[71]

Today, the financial world is interrelated. Sellers and lending institutions compete in the same market. The idea of debtor protection, which was bestowed by the usury laws is no longer sufficient. Any new legislation must be designed to protect the buyer as well as the borrower. To regulate one without the other would be not only unfair to the financial institutions and retail credit industries involved, but would also be unfair to the consuming public.

The concept of protection must, therefore, not be limited to the setting of rates, but should also be designed so that the consumer may use it as "self-protection." The regulation of rates alone would not be sufficient because the consumer would still be unable to evaluate the various methods of computation. The answer is education of the public. The general public, however, is unable to comprehend the complexities of the present rate structure. Therefore, it is necessary to require that the consumer be presented with rates and costs which he can easily comprehend.

Congress, by passing the *Consumer Credit Protection Act*,[72] or, as popularly called, the *Truth in Lending Act*,[73] has taken a

71. Jordan, *supra* note 3, at 1293.
72. 15 U.S.C. § 1601 (1968) (hereinafter referred to as the Act).
73. *Id.*

positive stand with reference to consumer education.[74] The Act is not designed to regulate the terms or conditions for credit, but rather it provides for the full disclosure of credit charges.[75] Congress did not necessarily stop with disclosure in general, but instead, proceeded to regulate the method of disclosure by establishing simplicity and uniformity as criteria in reporting sales and finance costs.[76]

The ultimate effect of sections 1638 and 1639 of the Act is to require the seller and lender, in transactions not under open end credit plans, to inform the consumer of the total cost and rates "before the credit is extended."[77] To maintain uniformity, Congress has required that the rates must be disclosed as an annual percentage rate,[78] as opposed to a ratio of dollars per hundred dollars or any other noncomparable system. Section 1606[79] also creates a uniform method for determining rates and allows the Board[80] to authorize the use of rate tables and charts.[81]

Section 1605[82] further provides for a concise method for the computation of finance charges. The section provides:

> [T]he amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension credit, including any of the following types of charges which are applicable:
>
> (1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.

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74. *Id.* This section proclaims that the purpose of the Act is: (1) to strengthen competition among various financial institutions in the field of consumer credit; (2) to "enhance" economic stability; (3) to promote informed use of credit resulting from awareness of the cost to the consumer; (4) to assure meaningful disclosure of credit terms so the consumer can compare costs readily.

75. H.R. REP. No. 1040, 90th Cong., 1st Sess. (1967).

76. Consumer Protection Act, 15 U.S.C. § 1637-39 (1968).

77. *Id.* § 1638(b) and § 1639(b). For example, § 1638 requires that a creditor, in a sales transaction, must disclose the cash price, the value of any trade-in allowance or other credit, all other charges, individually itemized which are not included in the finance charge, the total to be financed, the finance charge and the finance charge expressed as an annual percentage.

78. *Id.* §§ 1638(a)(7), 1639(a)(5).

79. *Id.* § 1606.

80. *Id.* § 1602(b) defines the "Board" as the Board of Governors of the Federal Reserve System.

81. *Id.* § 1606(d).

82. *Id.* § 1605.

(2) Service or carrying charge.

(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation or credit report.

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.[83]

It must be remembered that while the Act does require disclosure and thus, hopefully, consumer education, it does not provide for the basic protection of the consumer by rate regulation; nor does it change any protection rate laws which now exist in the states, except where it is determined that a disclosure provision is in conflict with provisions of the Act.[84] The Act specially provides that it does not

> annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to laws, relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this title extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.[85]

To maintain its neutral position with respect to state law, the Act also provides that the annual percentage rate disclosure requirement may not be "received as evidence that the sale was a loan or any type of transaction other than a credit sale."[86]

One could argue that with the advent of the federal *Truth in Lending Act* and the effective application of South Carolina statutes to control loan rates, a seller will have to adjust his rates so as to compete effectively with the lending institutions. The consumer, being able to understand the charges and costs, will do more shopping around for the best possible credit situations. While this argument in the long run may hold true for the average seller and consumer, the need for "total" legislation in the consumer financing field is necessary and cannot be overlooked. As previously stated, the usury laws today can serve only a limited purpose and many consumers will not be so educated

83. *Id.* § 1605(a). This section further provides that certain items need not be included in the finance charges, as long as they are itemized and disclosed in accordance with the regulations of the Board. *Id.* § 1605(d).
84. *Id.* § 1610(a).
85. *Id.* § 1610(b).
86. *Id.* § 1610(c).

as to take advantage of these laws. Without comparable legislation in the sales field, the consumer is at the mercy of any unethical seller.

It is desirable that the state act independently with respect to its own consumer and finance situations. It appears, moreover, that Congress itself might issue rate regulations if the states do not act responsibly in this area. To avoid federal preemption, the states must react to the need for credit sale legislation.

Recently, the National Conference of Commissioners on Uniform State Laws promulgated the *Uniform Consumer Credit Code*.[87] Two of the purposes of this proposed legislation are "to simplify, clarify and modernize the law governing retail installment sales, consumer credit, small loans and usury;"[88] and "to conform the regulation of consumer credit transactions to the policies of the Federal Consumer Credit Protection Act . . . ."[89]

The rate section of the Code provides for rather high maximum charges. As to credit sales, the Code states:

> The credit service charge . . . may not exceed the equivalent of the greater of either of the following:
> (a) the total of
> (i) 36 per cent per year on that part of the unpaid balances of the amount financed which is $300 or less;
> (ii) 21 per cent per year on that part of the unpaid balances of the amount financed which is more than $300 but does not exceed $1000; and
> (iii) 15 per cent per year on that part of the unpaid balances of the amount financed which is more than $1000; or
> (b) 18 per cent per year on the unpaid balances of the amount financed.[90]

At the same time the Code sets a maximum for consumer loans of 18 per cent per year on the unpaid balances of the principal.[91]

These high ceilings serve two very practical purposes under discussion. They provide "rate ceilings to assure the consumer

87. UNIFORM CONSUMER CREDIT CODE § 1.101 (1968).
88. *Id.* § 1.102(2)(a). Unlike the courts application of the usury laws, § 1.102(1) requires this Code to be "liberally applied" so as to promote its purposes and policies.
89. *Id.* § 1.102(2)(f).
90. *Id.* § 2.201(2). This section sets rates or services charges for consumer sales other than revolving charge accounts. As to the limits on revolving charge accounts *see* § 2.207.
91. *Id.* § 3.201(1).

of an adequate supply of credit"[92] while supporting "competition among suppliers of consumer credit so that consumers may obtain credit at reasonable cost . . . ."[93] By allowing a high ceiling, the creditor can extend credit more freely. His percentage of loss, which may result from nonpayment by consumers and cost of litigation, may be spread more evenly over the remaining consumers. Also, under the credit sales provisions, the operating cost levels of the seller may be increased because of the various consumer protection provisions of the Code,[94] and the seller would find it practically impossible to compete if he were restricted by low rate ceilings.

IV. CONCLUSION

The need for consumer protection as to rates and charges has become apparent. Any new legislation in this field must take into account the consumer's needs, but it must not be so restrictive as to stifle competition among the honest lenders and sellers. A reasonable law will promote competition and create a market place that is more fair and just. It is suggested, however, that the law should provide for strong penalties against the unscrupulous seller or loan shark. The low income consumer has neither the knowledge nor, in many cases, the ability to bring court actions to satisfy wrongs against him. The statute should be so designed that an unscrupulous seller or lender will think twice before committing an unlawful act. The present usury laws cannot serve this purpose, for many lenders and sellers who act illegally or unethically do not worry about the one-time law suit with which they may be faced. The unscrupulous lender or vendor realizes he can make up any such loss by applying the same type of charges to other unknowing buyers or borrowers.

Usury laws, previously enacted, have outlived their utility in the field of consumer protection. It is now the responsibility of the legislature to expand the concept of consumer protection to include the credit sales situation by providing a workable statute for judicial enforcement.

STANLEY W. APPLEBAUM

92. *Id.* § 1.102(b).
93. *Id.* § 1.102(c).
94. Section 2.404, alternative A, provides for holding the assignee subject to defenses of the buyer; § 2.502 provides for cancellation of home solicitation sales; §§ 2.410 and 3.403 provide that there should be no assignment of the buyer or lessee's earnings; and § 5.103 places restrictions on deficiency judgments in consumer credit sales.