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HARRY J. HAYNSWORTH, IV*

INTRODUCTION

The South Carolina Consumer Protection Code (SCCPC),[1]

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1. S.C. CODE ANN. §§ 37-1-101 to 37-9-102 (1976 & Cum. Supp. 1977). For the benefit of persons doing research on the SCCPC, the following is a brief summary of the protracted history of this legislation as distilled from the South Carolina Senate and House Journals, 1971-76.

(1) The original legislation, which was a modified version of the UNIFORM CONSUMER CREDIT CODE (1968) [hereinafter cited as 1968 UCCC], was introduced in 1971 as S. 120, 1971 S.C. SEN. J. 265-66 and H. 1359, 1971 S.C. HOUSE J. 740-41. These bills were the recommended work product of the Joint Legislative Uniform Consumer Credit Code Study Committee created by concurrent resolution, H. 1291, 1969 S.C. HOUSE J. 1904-05; 1969 S.C. SEN. J. 1665-66. The differences between the recommended legislation and the UCCC are summarized in the Study Committee's Report under the section titled Proposed South Carolina Consumer Credit Code, 1971 S.C. SEN. J. 311, 442-48; 1971 S.C. HOUSE J. 369, 509-15. No action was taken on these bills.

(2) A modified version of the 1971 proposals was introduced in 1973 as S. 340, 1973 S.C. SEN. J. 693. After considerable debate, it was passed by the Senate on March 7, 1974, and sent to the House where it was referred to the Judiciary Committee. In the meantime, the House had passed and sent to the Senate H. 2356, a controversial bill that authorized the practice by merchants of making service charges of 18% per annum on items purchased with credit cards. The provisions of S. 340, except for the most controversial aspects of this legislation dealing with rates and charges for loans and the licensing provisions for high rate lenders, were attached as amendments to H. 2356, and this amended version of H. 2356 was approved by the Senate on June 27, 1974. 1974 *id.* 1877-1965, 1981. When the House refused to concur in the Senate action, a Conference Committee was appointed and the Conference Committee Report, which contained several important compromise amendments, *see* Conference Committee Report, 1974 S.C. HOUSE J. 3098-99, resulted in a final bill, No. 1241, 1974 S.C. Acts 2879-966, that was ratified on August 8, 1974, H. 2356, S.C. HOUSE J. 3156-57, and signed by the Governor on August 13, 1974. Act 1241 [hereinafter referred to as the 1974 SCCPC] became effective on January 1, 1975.

(3) In 1975 the loan and licensing provisions of S. 340 of 1973, which had been deleted from the 1974 SCCPC, were introduced as H. 2435, 1973 *id.* 427, and referred to the Judiciary Committee. In addition, another bill, designated S. 119, 1975 S.C. SEN. J. 187, was introduced in the Senate and referred to the Committee on Banking and Insurance. S. 119 was essentially a clean-up bill that included several provisions designed to clear up problems caused by the last minute revisions made in S. 340 of 1973. The Senate passed S. 119, 1975 *id.* 281, but no action was taken on it in the 1975 session by the House. In February 1976, however, the Joint Study Committee on the Uniform Consumer Credit Code, the successor to the original Study Committee created in 1969, recommended a comprehensive bill that added the loan and licensing provisions included in H. 2435 and a number of additional and revised consumer protection provisions based primarily on the 1974 official text of the UCCC. *See* note 5 *infra.* The Study Committee bill was reported

which was originally enacted in 1974[2] and substantially revised in 1976,[3] comprehensively regulates a major portion of what are commonly referred to as consumer credit transactions. In addition, certain provisions substantially affect South Carolina laws regulating real estate mortgages and business credit.[4]

Essentially, the SCCPC is a modified combination of the 1968 and 1974 official texts of the Uniform Consumer Credit Code (UCCC)[5] promulgated by the prestigious National Conference of Commissioners on Uniform State Laws and currently enacted in ten other states.[6] It also incorporates by reference Regulation Z[7] and the Truth In Lending provisions (TIL)[8] of the Federal Con-

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out of the House Judiciary Committee as part of S. 119 and after extensive debate, but very few amendments, was passed by the House on June 25, 1976, 1976 S.C. HOUSE J. 3577, and sent to the Senate, which on June 25 concurred with the House amendments. 1976 S.C. SEN. J. 2303-04. This bill, designated as Act 686 of 1976, No. 686, 1976 S.C. Acts 1792-1853, was ratified on June 25 and signed on June 30, 1976. Act 686 [hereinafter referred to as the 1976 SCCPC Amendments] became effective on September 29, 1976. Ad. Interpretation No. 9.101-7606, S.C. Dep't of Cons. Aff. (1976).

2. No. 1241, 1974 S.C. Acts 2879-966.

3. No. 686, 1976 S.C. Acts 1792-1853. An integrated version of the SCCPC [hereinafter referred to as the INTEGRATED CODE] with comments prepared by the author of this article will be published in 1979. It is uncertain at this point whether it will be distributed by the Department of Consumer Affairs or by the printer.

4. *See, e.g.*, S.C. CODE ANN. §§ 37-3-601, -605 (Cum. Supp. 1977).

5. The 1968 UCCC was approved by the National Conference of Commissioners on Uniform State Laws, the body that promulgated the Uniform Commercial Code (UCC) and the American Bar Association in 1968. It provides the basic framework for the 1974 SCCPC. As a result of several significant developments, including the implementation of the Truth in Lending Act (TIL), 15 U.S.C. §§ 1601-1667e (1976), Truth in Lending Regulations, 12 C.F.R. § 226 (1977) [hereinafter referred to as Regulation Z], and the publication of the comprehensive report of the National Commission on Consumer Finance entitled CONSUMER CREDIT IN THE UNITED STATES (1972) [hereinafter cited as CONSUMER FINANCE REPORT], the National Conference undertook to revise the UCCC. The revised version [hereinafter cited as the 1974 UCCC] was approved by both the National Conference and the American Bar Association in 1974. For background material on the UCCC, see Curran & Fand, *An Analysis of the Uniform Consumer Credit Code*, 49 NEB. L. REV. 727 (1970); Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387 (1968); Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445 (1968); and *Symposium — Consumer Credit Reform*, 33 LAW & CONTEMP. PROB. 639 (1968). For an explanation of the changes made in the 1963 UCCC by the 1974 UCCC, see 1974 UCCC PREFATORY NOTE and Miller & Warren, *1974 Uniform Consumer Credit Code*, 23 KAN. L. REV. 619 (1975). The full texts of both the 1968 and 1974 UCCC, together with the official comments are located in 7 UNIFORM LAWS ANNOT. at 63-323 (1970), 174-305 (Supp. 1971-77) and [1976] 1 CONS. CRED. GUIDE (CCH) ¶¶ 5000-6603.

6. The other states are: Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, Utah, Wisconsin, and Wyoming. 7 UNIFORM LAWS ANNOT. 102, 158 (Supp. 1971-77).

7. Regulation Z, 12 C.F.R. § 226 (1977).

8. 15 U.S.C. §§ 1601-1667e (1976).

sumer Credit Protection Act (CCPA).[9]

Like the UCCC, the SCCPC is divided into nine articles. Article 1[10] contains basic definitions of terms used throughout the Code and provisions defining the scope and application of the SCCPC.

Article 2,[11] which is broken down into six parts, governs all aspects of consumer credit sales and consumer leases covered by the SCCPC, including the maximum charges that can be made in consumer credit sales (Part 2);[12] disclosure and advertising rules (Part 3);[13] and limitations on the use of referral

9. *Id.* §§ 1601-1692o (1976 & Supp. 1977) [hereinafter referred to as CCPA]. Title I of CCPA is known as the Truth in Lending Act (TIL), *id.* §§ 1601-1667e, and contains general disclosure provisions for consumer credit transactions, consumer leases, and consumer credit advertising, and provisions regulating credit billing and credit cards. The regulations implementing these provisions are known as Regulation Z. 12 C.F.R. § 226 (1977). Other titles in CCPA deal with garnishment restrictions, 15 U.S.C. §§ 1671-1677 (1976), fair credit reporting requirements, *id.* §§ 1681-1681t, extortionate credit transactions, 18 *id.* §§ 891-896, equal credit opportunity, 15 *id.* §§ 1691-1691f, and regulation of debt collection practices, 15 U.S.C.A. §§ 1692-1692o (Cum. Supp. 1978).

The 1968 UCCC included disclosure provisions parallel to those of TIL on the theory that a UCCC state could qualify for an exemption from TIL and Regulation Z. *See, e.g.*, 12 C.F.R. § 226.12 (1977). Because of the number of changes in the TIL provisions and Regulation Z and other legal problems, however, the 1974 UCCC adopted the concept of incorporating by reference TIL and Regulation Z. *See* 1974 UCCC § 3.201. This approach was adopted in both the 1974 SCCPC and the 1976 SCCPC Amendments, which utilize the wording of one of the early working drafts of the 1974 UCCC. *See* S.C. CODE ANN. §§ 37-1-302, 37-2-301, 37-3-301 (1976). In spite of this legislative history, a recent opinion by the South Carolina Attorney General held that the SCCPC incorporated only those provisions in TIL that were in existence on the effective date of the SCCPC, 1976 OP. S.C. ATT'Y GEN. No. 4208. This opinion seems to be incorrect. TIL has been amended in several respects since January 1, 1975, and major revisions are now pending in Congress. The attorney general's opinion would require SCCPC disclosures that are inconsistent with current and any future TIL requirements. In the event of this inconsistency, TIL and Regulation Z would control. 15 U.S.C. § 1610(a) (1976). A more correct interpretation would be that the SCCPC incorporates by reference all existing and future provisions of TIL and Regulation Z. A given transaction, however, would be subject to the TIL and Regulation Z provisions in effect at the time the transaction was entered into. This interpretation is consistent with the intent of the UCCC drafting committee in promulgating what is now § 3.201 of the 1974 UCCC to have dual administrative enforcement of TIL. *See* 1974 UCCC § 3.201, Comment. *See also* 7 UNIFORM LAWS ANNOT. 172 (Supp. 1971-77) (citation of authorities for the incorporation principle).

10. S.C. CODE ANN. §§ 37-1-101 to -303 (1976 & Cum. Supp. 1977).

11. *Id.* §§ 37-2-101 to -605.

12. *Id.* §§ 37-2-201 to -211.

13. *Id.* §§ 37-2-301 to -304. In addition to incorporating by reference the TIL disclosure and advertising regulations, *see* note 9 *supra*, the SCCPC disclosure provisions require the issuance of written receipts for cash payments, statements of account upon demand, written acknowledgment of payment, and special notices and copies of relevant documents to cosigners, guarantors, and similar parties. S.C. CODE ANN. §§ 37-2-302,

schemes,[14] balloon payments,[15] wage assignments,[16] cognovit clauses authorizing confession of judgment,[17] waiver of defense clauses,[18] attorneys' fees,[19] default charges,[20] and restrictions on

-303 (Cum. Supp. 1977). Identical provisions are applicable to loan transactions governed by the SCCPC. *Id.* §§ 37-3-302, -303.

14. *Id.* § 37-2-411.

15. *Id.* §§ 37-2-405 to -406 (1976 & Cum. Supp. 1977). Balloon payments in connection with consumer loans are also regulated in a similar fashion. *Id.* § 37-3-402 (1976).

16. *Id.* § 37-2-410. A parallel provision limits wage assignments arising out of a consumer loan. *Id.* § 37-3-403. *See also id.* § 41-11-30.

17. *Id.* § 37-2-415. An identical provision prohibits cognovit clauses in consumer loans. *Id.* § 37-3-407. Post-default confession of judgment is, however, permissible. *Id.* §§ 15-35-350 to -380.

18. *Id.* § 37-2-404(5) (Cum. Supp. 1977). *See also id.* §§ 37-2-403 (negotiable instruments other than a check prohibited in a consumer credit sale), 37-3-410(4) (interlocking relationship between lender and seller or lessor can result in making the lender subject to the debtor's claims and defenses against the seller or lessor), 37-3-411 (credit card issuer subject to claims and defenses of the cardholder against a seller or lessor). The Federal Trade Commission (FTC) Rule on Consumer Claims and Defenses, 16 C.F.R. § 433.1-.2 (1977), and TIL, 15 U.S.C. § 1666h (1976), and Regulation Z credit card regulations, 12 C.F.R. § 226.13(i) (1977), are designed to produce the same basic legal results as the above sections in the SCCPC.

There are, however, several significant differences in the SCCPC and the federal rules. *See* INTEGRATED CODE, *supra* note 3, §§ 37-2-404, 37-3-410 to -411, Comments. For example, under the SCCPC the debtor is not allowed to recover from the assignee more than the amount owing at the time the assignee receives written notice of the claim or defense. S.C. CODE ANN. § 37-2-404(2) (Cum. Supp. 1977). Under the FTC rule, however, the debtor can also recover all amounts previously paid on the obligation. *See* 16 C.F.R. § 433.2 (1977); Guidelines on the Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20,022, 20,023-24 (1976); [1976] 5 CONS. CRED. GUIDE (CCH) ¶¶ 11,394-95. Under the federal preemption doctrine, the federal statute or regulation will control over an inconsistent state provision. This assumes that the federal rule is constitutional. U.S. CONST. art. VI, § 2; Free v. Bland, 369 U.S. 663 (1962). *See generally* Verkuil, *Preemption of State Law by the Federal Trade Commission,* 1976 DUKE L.J. 225. On the other hand, to the extent there is no specific federal provision, under the same doctrine the state law would control, and if there are dual but not inconsistent provisions, then both apply. *Cf.* 15 U.S.C. §§ 1610, 1666j, 1667e (1976)(these principles codified into TIL).

This latter principle can be very beneficial to consumers. For example, as a general rule, there is no private right of action to enforce a violation of a Federal Trade Commission rule. Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973). *See also* Sebert, *Obtaining Monetary Redress for Consumers Through Action by the Federal Trade Commission,* 57 MINN. L. REV. 225, 225-29 (1972). This principle, however, has no effect on private remedies to enforce consistent state statutes; for example, a South Carolina consumer can bring a private action in South Carolina to enforce a violation of the SCCPC limitations on the defenses of assignees, and presumably would be able to recover the amounts authorized by the FTC rule even though no private action is available for violation of the FTC rule.

19. S.C. CODE ANN. § 37-2-413 (1976). Similar provisions limiting attorneys' fees in connection with consumer loan transactions are contained in §§ 37-3-404, -514 (Cum. Supp. 1977).

20. *Id.* § 37-2-414 (1976). Consumer loans are also subject to the same restrictions on default charges. *Id.* § 37-3-405 (Cum. Supp. 1977).

the amount and type of collateral that can be taken by a secured party[21] (Part 4).[22] Article 2 also provides for a three-day right of rescission for home solicitation sales (Part 5).[23] Part 6 deals with charges that can be made for credit sales that are not consumer credit sales.[24]

Article 3[25] governs all aspects of consumer loans and basically follows the same pattern as Article 2. Parts 2[26] and 5[27] contain provisions regulating the charges that can be made for consumer loans governed by the SCCPC rate structure, and Part 6[28] contains complex rules regulating the contract provisions for charges made for loan transactions that are not covered by the SCCPC. Part 5 also contains licensing and examination provisions for supervised lenders.[29] Part 3[30] contains disclosure and advertising rules, and Part 4[31] contains limitations on certain creditor practices. These limitations are similar to those in Part 4 of Article 2.[32]

Article 4[33] regulates the sale of insurance sold in consumer credit transactions, including the amount, price, and term of credit life, disability, property, and liability insurance.

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21. *Id.* §§ 37-2-407 to -409 (1976 & Cum. Supp. 1977). With the exception of a prohibition against a lender taking a security interest in land in a supervised loan (a loan in which the loan finance charge exceeds 12% per annum) unless the principal exceeds $1,000, there are no similar provisions regulating security interests taken in connection with SCCPC consumer loans. *See id.* § 37-3-510 (Cum. Supp. 1977).

22. *Id.* §§ 37-2-401 to -416 (1976 & Cum. Supp. 1977).

23. *Id.* §§ 37-2-501 to -506. Home solicitation sales are also subject to the provisions of the FTC regulation, Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. § 429 (1977). S.C. CODE ANN. § 37-2-506 (1976) specifies that compliance with the FTC rule constitutes compliance with the SCCPC provisions, thereby minimizing the conflict between the two regulations. See note 18 *supra. See also* S.C. CODE ANN. § 37-2-503(2) (Cum. Supp. 1977). In this connection, the FTC rule only covers sales of goods or services where the purchase price is $25 or more. 16 C.F.R. § 429.1 (1977). The SCCPC, however, has no dollar minimum and, therefore, is the exclusive regulation governing door-to-door sales of less than $25. On the other hand, the FTC rule covers consumer leases as well as sales, but the SCCPC provisions only regulate sales.

24. S.C. CODE ANN. §§ 37-2-601 to -605 (1976).

25. *Id.* §§ 37-3-101 to -605 (1976 & Cum. Supp. 1977).

26. *Id.* §§ 37-3-201 to -210 (Cum. Supp. 1977).

27. *Id.* §§ 37-3-500 to -515.

28. *Id.* §§ 37-3-601, -605.

29. *Id.* §§ 37-3-502 to -507. Except for consumer finance companies operating with licenses issued under Act 988 of 1966, *see* Part I, section C(9) *infra,* all lenders making loans with rates in excess of 12% must either be a supervised financial institution such as a bank or have an SCCPC supervised loan license. S.C. CODE ANN. §§ 37-1-301(17), 37-3-501(1), -502 (Cum. Supp. 1977).

30. *Id.* §§ 37-3-301 to -304 (1976 & Cum. Supp. 1977). *See* note 13 *supra.*

31. *Id.* §§ 37-3-401 to -411 (1976 & Cum. Supp. 1977).

32. See notes 15-21 *supra.*

33. S.C. CODE ANN. §§ 37-4-101 to -304 (1976 & Cum. Supp. 1977).

Article 5[34] contains the basic remedies and civil penalties in the SCCPC and is divided into three parts. Part 1[35] places limitations on many traditional creditor remedies. The limitations include the elimination of the right of a creditor to obtain a deficiency judgment in consumer credit sales in which the initial cash price is $1,500 or less[36] and the abolishment of the right of wage garnishment for collection of the balance due in a consumer credit transaction.[37] Part 1 also defines the restrictions on the circumstances under which default can be declared[38] and requires a one-time notice to the debtor and an opportunity for cure before repossession or foreclosure proceedings can be undertaken.[39] Part 2[40] of Article 5 sets out the broad scope of private civil remedies available to consumers for SCCPC violations. In addition to damages and penalties, Part 2 also mandates the award of attorneys' fees for a debtor who successfully proves that a creditor has violated the SCCPC.[41] The SCCPC also gives the debtor a three-day right of rescission in certain real estate transactions,[42] which parallels similar provisions in TIL and Regulation Z.[43] A separate section in Part 2 provides disclosure violation penalties.[44] Part 3[45]

34. *Id.* §§ 37-5-101 to -303.

35. *Id.* §§ 37-5-101 to -112.

36. *Id.* § 37-5-103 (Cum. Supp. 1977). The threshold figure for deficiency judgments in the 1974 SCCPC was $1,000. *Id.* § 37-5-103 (1976). A credit-seller is entitled to a deficiency judgment if he foregoes the right to repossess the collateral. Neither the SCCPC nor the UCCC official texts contain any limitations on the right to deficiency judgments in connection with consumer loans.

37. *Id.* § 37-5-104. *See also id.* § 15-39-410. The South Carolina prohibition against any wage garnishment is more stringent than the CCPA garnishment provision and controls. *See* 15 U.S.C. §§ 1675, 1677 (1976). See also note 18 *supra.*

38. S.C. CODE ANN. § 37-5-109 (Cum. Supp. 1977). The burden of proving a default other than failure of the debtor to make a required payment is on the creditor. *Id.* § 37-5-109(2).

39. *Id.* §§ 37-5-110, -111. The notice must be given at least 20 days before any acceleration, repossession, or foreclosure is undertaken. *Id.* § 37-5-111(1).

40. *Id.* §§ 37-5-201 to -205 (1976 & Cum. Supp. 1977).

41. *Id.* § 37-5-202(8) (Cum. Supp. 1977).

42. *Id.* § 37-5-204 (1976).

43. 15 U.S.C. § 1635 (1976); 12 C.F.R. § 226.9 (1977). The federal rules are incorporated into the SCCPC. *See* S.C. CODE ANN. §§ 37-2-301, 37-3-301 (1976). See also note 9 *supra.*

44. S.C. CODE ANN. § 37-5-203 (1976). The incorporation of TIL and Regulation Z into the SCCPC results in dual enforcement of the disclosure provisions of TIL by federal and state statutes. If a creditor fails to comply with TIL, he has violated both TIL and the SCCPC and is subject to the remedies provided in both statutes. *See* INTEGRATED CODE, *supra* note 3, §§ 37-1-102, 37-5-203, -204, -302, 37-6-104(2), Comments. Under § 37-5-203(7) (1976), however, only a single action claiming either an SCCPC or TIL disclosure violation can be brought. This protects a creditor against multiple suits and possible double liability arising from the same alleged disclosure violation.

45. *Id.* §§ 37-5-301 to -303 (1976 & Cum. Supp. 1977).

contains criminal penalties for violation of the SCCPC.

Article 6[46] deals with the administrative machinery in the SCCPC. This article provides for a Code Administrator,[47] who is the Administrator of the South Carolina Department of Consumer Affairs,[48] a state agency charged with responsibility for enforcing the SCCPC. The Code Administrator is employed by a policy-making board known as the Commission on Consumer Affairs (Part 5)[49] and advised by a Council of Advisors on Consumer Credit (Part 3).[50] Other provisions in this article specify a wide range of administrative and judicial enforcement powers available to the Administrator, including the right to seek cease and desist orders[51] and injunctions,[52] to bring civil actions, including class actions, for damages or civil penalties,[53] to file suit to collect unpaid notification fees due from creditors,[54] and to issue substantive rules, declaratory rulings, and administrative interpretations.[55] In addition, the SCCPC Administrator has broad authority to conduct investigations to determine if suspected violations are in fact occurring.[56] Part 4[57] of Article 6 sets out the procedures for hearings and other matters brought before the Commission by the Administrator. Part 2[58] stipulates the fees that are to be paid

46. *Id.* §§ 37-6-101 to -510.

47. *Id.* § 37-6-501(c) (1976). *See also id.* §§ 37-6-103, -507.

48. *Id.* § 37-6-501(a).

49. *Id.* §§ 37-6-501 to -506 (1976 & Cum. Supp. 1977).

50. *Id.* §§ 37-6-301 to -303 (1976).

51. *Id.* § 37-6-108(1).

52. *Id.* §§ 37-6-110 to -112 (1976 & Cum. Supp. 1977).

53. *Id.* § 37-6-113 (Cum. Supp. 1977). The Administrator can bring a civil action for damages or penalties, but not both. *Id.* § 37-6-113(1).

54. *Id.* § 37-6-113(3) (Cum. Supp. 1977).

55. *Id.* §§ 37-6-104, -506(2) (Cum. Supp. 1977), -409 (1976). *See also* Rules and Regs. of the S.C. Dep't of Cons. Aff. 28-24 to -26, S.C. CODE OF STATE REGS. (1976). A creditor who relies on these rules and interpretations is protected against any liability for penalties or attorneys' fees. S.C. CODE ANN. §§ 37-6-104(4), -506(3) (Cum. Supp. 1977). See also Part II, section E(2) *infra.*

56. S.C. CODE ANN. §§ 37-6-105 to -106 (1976 & Cum. Supp. 1977). *See also id.* § 37-3-506 (Cum. Supp. 1977). Some of these investigatory powers are delegated to the State Board of Financial Institutions. *Id. See* INTEGRATED CODE, *supra* note 3, §§ 37-3-506, 37-6-105 to -106, Comments.

57. S.C. CODE ANN. §§ 37-6-401 to -416 (1976 & Cum. Supp. 1977). Some conflict exists between these SCCPC provisions and the general South Carolina Administrative Procedure Act (APA), *id.* §§ 1-23-10 to -400 (Cum. Supp. 1977). To the extent of any conflict, the APA would prevail. *See, e.g.,* Garey v. City of Myrtle Beach, 263 S.C. 247, 209 S.E.2d 893 (1974). See INTEGRATED CODE, *supra* note 3, §§ 37-6-401 to -415, Comments for discussion of other areas of conflict.

58. S.C. CODE ANN. §§ 37-6-201 to -203 (1976 & Cum. Supp. 1977).

to the Code Administrator by creditors extending credit that is governed by the SCCPC.[59]

Article 7, dealing with consumer credit counseling, and Article 8, providing for wage earner receiverships, are reserved for future use.

Article 9[60] specifies the effective dates for the SCCPC[61] and rules for transactions, part or all of which take place prior to these effective dates.[62] Article 9 also contains a special licensing provision that allows small loan consumer finance companies operating with licenses granted under the authority of Act 988 of 1966 to obtain licenses for high interest supervised loans, as authorized by Part 5 of Article 3.[63]

Although the format of the SCCPC and the UCCC are similar, they differ in several important respects. Most of these differences primarily affect the rates and charges that can be made by creditors. The most significant variations from the UCCC are (1) the enactment of several additional exclusions that leave a large number of consumer credit transactions regulated in whole or in part by South Carolina statutes other than the SCCPC,[64] and (2) the failure to enact the UCCC provisions that effectively repeal all prior statutes dealing with rates and charges.[65] The SCCPC actually does not repeal any significant South Carolina statute regulating interest or other credit charges.[66] Yet it has radically

59. *Id.* § 37-6-203 (Cum. Supp. 1977).

60. *Id.* §§ 37-9-101 to -102 (1976 & Cum. Supp. 1977).

61. The effective date of the 1974 SCCPC was January 1, 1975. *Id.* § 37-9-101(1) (1976). The effective date of the 1976 SCCPC Amendments was September 29, 1976. No. 686, 1976 S.C. Acts 1853; Ad. Interpretation No. 9.101-7606, S.C. Dep't of Cons. Aff. (1976).

62. S.C. CODE ANN. §§ 37-9-101(2) to -101(4) (1976).

63. S.C. CODE ANN. § 37-9-102 (Cum. Supp. 1977). See Part I, section C(9) *infra* for further explanation of the significance of this provision.

64. See Part I, sections B(5) and C *infra.*

65. The UCCC achieved this result by the simple device of repealing all usury and other statutes regulating credit charges other than those in the UCCC. 1968 UCCC §§ 2.605, 3.605. The original Joint Legislative Study Committee, *see* note 1 *supra,* recommended the UCCC approach. *See* 1971 S.C. SEN. J. 311, 490-91; 1971 S.C. HOUSE J. 526, 559, 596. While the South Carolina Legislature eventually agreed to this approach for credit sales, it rejected the approach for loan transactions. Therefore, the pre-SCCPC loan usury laws remain effective. See Part III *infra* for further explanation of the problems that result from the failure to enact 1968 UCCC § 3.605.

66. The rate provisions of the Motor Vehicle Sales Finance Act, S.C. CODE ANN. §§ 56-17-10 to -100 (1976) were incorporated into the SCCPC. *Id.* § 37-2-211. Unfortunately, an abortive attempt to delete § 37-2-211 during consideration of the 1976 SCCPC Amendments resulted in the repeal of subsection 2(c) of § 2.201 of the 1974 SCCPC, *id.* § 37-2-201(2)(c), which specified that § 37-2-211 was the exclusive section for maximum rates for motor vehicles, thereby creating the possibility that the general rates specified in §

altered the other South Carolina usury laws.[67] The net result is that another layer of statutory law has been added to the already patchwork, overly complex, and arcane law of usury in South Carolina.

There are now at least five different categories of credit sales and nine different categories of loans.[68] The determination of the maximum credit charges that are permissible for a given transaction, as well as the penalties for violation if the applicable maximum charges are exceeded, depends not only on the type of transaction but also on the status of the creditor as a seller or lender and the purpose and amount of the credit. The interrelationship of all these factors produces an immensely complex rate structure. For example, there are five distinct types of real estate mortgage loans governed by eleven possible rate maximums ranging from a low of eight percent per annum to no limitation at all.[69] Even a seemingly simple transaction like the financing of an automobile could fall into one of seven possible categories, many of which have more than one rate structure; the maximum permissible rate could vary from twelve percent per annum (if the automobile is financed through a credit union) to no limitation (if it is purchased primarily for business as opposed to personal, family, or household use and is financed by the seller).[70]

The main purpose of this article is to analyze this maze of rate statutes with special emphasis on the changes imposed by the SCCPC. A second purpose is to provide some guidelines to

37-2-201 (Cum. Supp. 1977) also apply to credit sales of motor vehicles purchased for personal, family, or household use. *See* INTEGRATED CODE, *supra* note 3, § 37-2-211, Comment. See also Part II, section B(1)(b) *infra.*

67. In addition to altering the usury laws, the SCCPC also alters a number of traditional creditor rights with the indirect effect of modifying other statutes. For example, the SCCPC limits the right of creditors to enforce deficiency judgments in credit sales, regulates the amount of collateral and cross-collateral, and provides a limited right of cure before acceleration and foreclosure. See notes 36-39 *supra.* These, and other provisions, modify the traditional rights of secured parties under Article 9 of the Uniform Commercial Code. The drafters of the UCC had the foresight to anticipate the impact of this type of consumer legislation and as a consequence no section of the UCC is repealed by the SCCPC. *See* S.C. CODE ANN. §§ 36-9-201 to -203(2), -206 (1976). *See generally* Hogan, *Integrating the UCCC and the UCC—Limitations on Creditors' Agreements and Practices,* 33 LAW & CONTEMP. PROB. 686 (1968); Note, *The Uniform Consumer Credit Code and Article 9 of the Uniform Commercial Code,* 65 NW. U.L. REV. 838 (1970).

68. See Part V *infra.*

69. See Part V, chart B(9) *infra.*

70. See Part V, chart A(1), A(2), A(5), B(1), B(3), B(4), B(8) *infra.* This transaction could also be handled as a lease, in which case there would be no rate limitation, assuming the transaction was a true lease. See Part I, section B(3) *infra.*

assist lawyers, creditors, and other persons working with the South Carolina usury laws to determine the applicable statutes regulating the credit charges and penalties for a particular transaction. The article is divided into five parts. Part I analyzes the coverage and exclusion sections of the SCCPC. Part II explains the SCCPC rate, charge, and penalty provisions. Part III discusses South Carolina law for credit transactions not governed by the SCCPC rate and charge provisions. Part IV contains some concluding observations and recommendations for amending the SCCPC to reduce the existing complexity. Finally, Part V contains a chart summarizing the existing South Carolina rules governing each different major category of credit.

PART I. SCCPC COVERAGE AND EXCLUSIONS

A. Overview

On the surface, determining which of the substantial number of statutes regulating rates and other charges that are to be applied to credit transactions appears confusing. In practice, however, once the basic legal rules governing each major type of creditor are understood, these rules, with certain notable exceptions,[71] are relatively easy to apply to a properly categorized transaction. The key to properly categorizing the transaction lies in determining whether and to what degree the transaction is governed by the SCCPC. Because the question of coverage by the SCCPC is the initial determination, the basic types of transactions included and excluded by the SCCPC are analyzed in this Part. Permissible rates and charges for SCCPC and non-SCCPC credit transactions are discussed in Parts II and III.

B. Coverage

The SCCPC, like the UCCC, is designed to cover most typical consumer credit transactions involving individual debtors and professional creditors. The rationale behind the extensive regulation of consumer credit is the premise that the consumer credit market traditionally has been characterized by the widespread

71. For example, the rules applicable to real estate credit are particularly complex. See Part I, section B(4)(d) *infra* for a discussion of real estate transactions.

use of standardized adhesion contracts, and in reality no effective bargaining over credit charges or other contract terms takes place. There is substantial evidence that some unscrupulous creditors have used overreaching, abusive tactics against consumers, particularly in transactions involving less knowledgeable and less sophisticated individual debtors.[72] Credit for business purposes, however, is essentially excluded from regulation by the SCCPC and the UCCC because the market for business credit is generally highly competitive and provides a reasonable opportunity for effective creditor-debtor bargaining.

This division between typical consumer credit transactions and business credit is implemented through the definitions of the terms "consumer credit sale,"[73] "consumer lease,"[74] and "consumer loan."[75] Transactions falling within the parameters of these definitions, which are derived from the 1968 UCCC,[76] are

72. For background material on the UCCC, which provided the basic framework for the SCCPC, see the authorities cited in note 5 *supra*. For further information on the problems of adhesion contracts, see Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). Hearings on creditor abuse in South Carolina were held by the original UCCC Study Committee in 1969 and 1970. A report on the testimony and findings was published as part of the Committee's 1971 report to the Legislature. See 1971 S.C. SEN. J. 311, 331-46, 374-92; 1971 S.C. HOUSE J. 369, 389-405, 435-58.

73. S.C. CODE ANN. § 37-2-104 (Cum. Supp. 1977).

74. *Id.* § 37-2-106 (1976).

75. *Id.* § 37-3-104 (Cum. Supp. 1977).

76. See 1968 UCCC §§ 2.104, .106, 3.104. The UCCC, in turn, essentially utilized the coverage language of TIL and other provisions of the CCPA. *See* note 9 *supra*. *See generally* Landers, *The Scope of Coverage of the Truth in Lending Act*, 1976 AM. B. FOUNDATION RESEARCH J. 565; Warren & Larmore, *Truth in Lending: Problems of Coverage*, 24 STAN. L. REV. 793 (1972).

Coverage provided by the SCCPC and TIL differs in some respects, but TIL disclosures are required for transactions covered by TIL even if the SCCPC does not apply. The most prominent example of the difference in coverage is agricultural credit, which is totally excluded from the SCCPC, S.C. CODE ANN. § 37-1-202(8) (Cum. Supp. 1977); however, only agricultural credit above $25,000 is currently excluded from TIL, 15 U.S.C. § 1603(5) (Supp. 1977). Other examples involving the application of this principle are loans by credit unions and government supported education loans, which are covered by TIL but are excluded from the SCCPC. S.C. CODE ANN. § 37-1-202(9)-(10) (Cum. Supp. 1977). Loans and installment sales for personal, family, household, or agricultural purposes secured by real estate mortgages but not within the coverage of the SCCPC, *see id.* §§ 37-2-104(2)(b), 37-3-104(2), would also be subject to TIL disclosure requirements. See Part I, section B(4)(d) *infra* for further elaboration of the complicated treatment of real estate mortgages under the SCCPC. TIL disclosures would apparently not be necessary, however, for transactions excluded from the coverage of TIL but covered by the SCCPC. *See* Ad. Interpretation No. 3.301-7803, S.C. Dep't of Cons. Aff. (1978) (no TIL disclosure necessary for loans made subject to the SCCPC by agreement under S.C. CODE ANN. § 37-3-601 (Cum. Supp. 1977) unless such disclosure is mandated by TIL). The additional

covered fully by the SCCPC, unless excluded by other provisions. Except by mutual agreement of the parties,[77] however, transactions that do not meet the definitional tests for coverage are not regulated by the SCCPC because they are not deemed to be SCCPC consumer credit sales, leases, or loans.

These definitional tests are summarized below. All specified criteria must be met for a particular transaction to be covered by the SCCPC.

1. Consumer Credit Sales.—A consumer credit sale is a sale or contract for the sale of goods, services, or a covered interest in land that meets the following criteria: (a) The extension of credit is by a person who is regularly engaged in the business of making credit sales transactions of the same kind as the one in question; (b) the purchase is primarily for personal, family, or household purposes; (c) the sale is to an individual; (d) the debt is payable in four or more installments or a credit service charge is made by the creditor; and (e) except in the case of the sale of a covered interest in land, the amount financed does not exceed $25,000.[78] In effect this definition covers all normal retail installment sales, whether they are under an installment sales contract or pursuant to a revolving charge plan.

Excluded from this definition are transactions without service charges such as the normal thirty-sixty-ninety day charge accounts utilized by many retailers, the normal thirty-day account utilized by many servicemen, like plumbers and electricians, and the bills of professional people, like doctors and lawyers. If by agreement, however, the bill in one of these transactions can be repaid in four or more installments or if the buyer has the option of either paying within a four-month period or incurring a finance charge or the bill can be repaid in two or more installments and a finance charge is imposed, or finally if a finance charge is imposed with or without the privilege of repayment in installments, the transaction is covered under the

disclosures specifically required by the SCCPC would apply to such transactions, however. *See, e.g.*, S.C. CODE ANN. §§ 37-2-302, -303, 37-3-302, -303, -305, 37-5-110 (Cum. Supp. 1977).

77. S.C. CODE ANN. §§ 37-2-601 (1976), 37-3-601 (Cum. Supp. 1977). See Part II, section B(3) *infra*.

78. S.C. CODE ANN. § 37-2-104(1) (Cum. Supp. 1977). The "payable in installment" requirement is defined in § 37-1-301(12) (Cum. Supp. 1977). "Credit service charge" is defined in § 37-2-109 (1976) and "amount financed" in § 37-2-111 (1976). These statutorily defined terms play an important role in the SCCPC rate structure discussed in Part II *infra*.

SCCPC as a consumer credit sale.[79]

The SCCPC specifically excludes a credit sale of an interest in land, "if the debt is primarily secured by a first lien which is a purchase money security interest in land."[80] Credit sales of interests in land that do not meet this test, however, are consumer credit sales, if the other criteria for SCCPC coverage are met.[81]

2. *Consumer Loans.*—A consumer loan is a loan that has basically the same characteristics as a consumer credit sale: (a) The loan is made by a person regularly engaged in the business of making loans; (b) it is made to an individual; (c) it is used primarily for a personal, family, or household purpose; (d) it is either payable in two or more installments, or a loan finance charge is made; and (e) except, in the case of a secured interest in real estate that is governed by the SCCPC rate structure, the principal amount of the loan does not exceed $25,000.[82]

Like the definition of a consumer sale, the definition of a consumer loan excludes a mortgage loan that is "primarily secured by a first lien which is a purchase money security interest in land."[83] This type of mortgage is not a consumer loan even if it meets all the other criteria specified above. As a consequence, most typical first lien real estate home mortgage loans made by banks, mortgage companies, and savings and loan associations are exempt from the SCCPC. They are governed instead by other state and federal statutes and by case law.[84]

Nevertheless, the definition of a consumer loan covers practically every other type of individual loan made for family, household, or personal purposes. Thus, the SCCPC applies to a loan to be used by the borrower to purchase a family automobile, to buy a stove, or to finance a vacation. A loan to a corporation or a partnership for any purpose and in any amount, however, is exempt from the SCCPC, because it is a loan to an organization and not to an individual.

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79. S.C. CODE ANN. § 37-1-301(12) (Cum. Supp. 1977).

80. *Id.* § 37-2-104(2)(b).

81. The legal significance of this distinction is explored in Part I, section B(4)(d) *infra.*

82. S.C. CODE ANN. § 37-3-104 (Cum. Supp. 1977). The term "loan finance charge," defined in § 37-3-109 (Cum. Supp. 1977), is the equivalent of "credit service charge" for credit sales, defined in § 37-2-109 (1976), and is discussed in more detail in Part II, section C *infra.*

83. S.C. CODE ANN. § 37-3-104(2) (Cum. Supp. 1977).

84. See Part I, section B(4)(d); Part V, chart B(9) *infra.*

3. Consumer Leases.—The SCCPC defines a consumer lease as a lease of goods made by a lessor who is regularly engaged in the business of leasing to an individual who uses the leased goods primarily for personal, family, or household purposes, the amount payable under the lease does not exceed $25,000, and the lease term exceeds four months.[85] Under this definition, long-term leases of items such as pianos are covered, while short-term rentals such as daily or weekly Rent-A-Car contracts and tool equipment rentals are excluded. This definition only applies to leases of goods and, therefore, real estate leases are not consumer leases regulated by the SCCPC.[86]

If the lessee agrees under the terms of the lease to pay an amount that substantially equals or exceeds the true value of the goods, and the lessee, at the termination of the agreement, will become, or has the option to become, the owner of the goods for a nominal consideration or for no additional consideration, then the transaction is treated as a consumer credit sale rather than as a lease.[87] This distinction is important since a consumer credit

85. S.C. CODE ANN. § 37-2-106 (1976).

86. The term "goods" is only partially defined in the SCCPC. *See id.* § 37-2-105(1). Despite this lack of a complete definition, the term "goods" in the SCCPC has the same meaning as it has under the UCC, *see id.* §§ 36-2-105(1), -107. See also note 101 *infra.*

A consumer lease pursuant to a lender credit card or similar arrangement is a consumer loan subject to the SCCPC loan rates and is not a consumer lease. *See* S.C. CODE ANN. § 37-2-106(2) (1976).

87. S.C. CODE ANN. § 37-2-105(4) (1976). *See* Mid-Continent Refrigeration Co. v. Way, 263 S.C. 101, 208 S.E.2d 31 (1974) (lease with option to purchase held to be an installment sale). The test employed in many cases to determine whether the lessee can become the owner for a nominal consideration is the economic reality test, which upholds the transaction as a lease only if the option price bears some reasonable relation to the anticipated market value of the leased property at the time the option is exercisable. *See, e.g.,* Hawkland, *The Impact of the UCC on Equipment Leasing,* 1972 U. ILL. L.F. 446; Peden, *The Treatment of Equipment Leases as Security Agreements Under the Uniform Commercial Code,* 13 WM. & MARY L. REV. 110 (1971).

Most of the cases involving the construction of leases have been UCC Article 9 priority cases and have turned on the issue of whether the lease in question was a disguised credit transaction creating a security interest in the lessor. If a credit transaction is found and no financing statement has been filed, then the security interest of the lessor is unperfected and subordinate to the perfected security interests of the lessee's creditors. S.C. CODE ANN. § 36-9-301 (1976); UCC § 9-301.

A lessor in South Carolina, as well as a secured party, must file a UCC financing statement to be protected against rights of subsequent creditors of the lessee. *Id.* § 27-23-80 (1976); First South Leasing Co. v. Abrams (*In re* Bazen), 425 F. Supp. 1184 (D.S.C. 1977). Hence, the characterization of a lease as a credit transaction does not have the same critical importance as it has in other states that do not require any public filing for true leases. Nevertheless, the SCCPC authorizes higher permissible rates for consumer credit sales (basic rate of 18%) than for consumer loans (12%, except for supervised or restricted loans, and most lessors are not eligible to make such loans). Therefore, it is important

sale is subject to many more provisions of the SCCPC than a consumer lease. For instance, the SCCPC rate regulations do not apply to consumer leases but do apply to consumer credit sales. In addition, the disclosure requirements for a consumer credit sale are quite different from those for a consumer lease.[88]

4. Some Problem Areas.—The four aspects of these coverage definitions that are likely to cause the most serious difficulties include the concept of a person "regularly engaged in the business," the determination of whether a transaction involving both personal and business attributes is for "personal, family or household purposes," the application of the $25,000 limitation, and the parameters of the provisions dealing with interests in real estate.[89]

(a) The "Regularly Engaged in the Business" Test.—The purpose of the "regularly engaged in the business" test for sellers,

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under the SCCPC to determine whether a particular lease is a sale or a loan. This assumes the transaction is a credit transaction and not a true lease. See Part II, section B for a detailed discussion of the SCCPC rate structure. Unfortunately, S.C. CODE ANN. § 37-2-105(4) (1976), which provides that a consumer lease with a nominal option to purchase is a sale of goods under the SCCPC, has no counterpart in Article 3 of the SCCPC dealing with loans. One possible interpretation of this statutory scheme is that all consumer leases that are in fact credit transactions are to be construed as consumer credit sales and, therefore, eligible for the higher credit sales rate in the SCCPC. The contrary argument is that even though the SCCPC loan provisions do not specifically refer to leases, the definition of a loan in § 37-3-106 (1976) is broad enough to encompass a consumer lease that is in reality a loan and not a sale. Under this argument the rates for consumer loans apply rather than those for consumer credit sales.

Courts in other states have construed lease agreements as loans for the purpose of determining whether usury ceilings have been violated. *See, e.g.*, National Equip. Rental, Ltd. v. Stanley, 177 F. Supp. 583 (E.D.N.Y. 1959) (equipment lease agreement between a South Carolina resident and a New York lessor held to be a usurious loan); McGaillard v. Liberty Leasing Co. of Alaska, 534 P.2d 528 (Alas. 1975); DiLeo v. Parliament Funding & Leasing Corp., [1976] 5 CONS. CRED. GUIDE (CCH) ¶ 98,376 (N.Y. Sup. Ct., 1976). This issue is much less likely to occur under the UCCC than under the SCCPC because the UCCC rate structure for both consumer credit sales and loans is more uniform than it is in the SCCPC.

88. *Compare* Regulation Z, 12 C.F.R. §§ 226.6-.8 *with* 12 C.F.R. §§ 226.15, .1501-.1503 (1977).

89. This is by no means an exhaustive list of problem areas. One situation that is not discussed in the text and that has been the subject of considerable litigation involves cases in which there is a hidden finance charge in connection with a sale of goods or services but no installment payments. Usually a discount for early payment or other indicia of the finance charge are present in these transactions. The courts have been fairly successful in unmasking these schemes. *See, e.g.*, Miller, *Some Conundrums in an Enigma: Three Latent Consumer Credit Transactions Under the Oklahoma Version of the Uniform Consumer Credit Code*, 23 OKLA. L. REV. 241 (1970); Miller, *The Basic Exclusions from the UCCC: A Roadmap for Traversing a New World with Oblique Guides*, 43 U. COL. L. REV. 269, 280-83 (1972); *cf.* Landers, *Determining the Finance Charge Under the Truth in Lending Act*, 1977 AM. B. FOUNDATION RESEARCH J. 45, 84-93, 135-51.

lenders, and lessors, also referred to as the professional creditor test, is to exclude from the coverage of the SCCPC isolated, irregular transactions, such as an individual's sale of his residence or car. The exclusion is based upon the idea that the burden of full compliance would be excessive and unjustified in those cases.[90] Unfortunately, neither the SCCPC, the UCCC, nor TIL, all of which utilize this requirement, contains any language specifying the number of transactions required before someone is characterized as being in the credit or leasing business. Existing non-SCCPC law also is not helpful.[91] Most cases involving this question can be resolved by applying the overall purpose of the requirement. By focusing on the purpose, the courts will be able to differentiate more easily between persons who engage with some regularity in credit transactions and those who are only occasionally involved in them. In doubtful cases in which the other criteria for a consumer sale, loan, or lease are met, a creditor or lessor would be well advised to consider the transaction as covered by the SCCPC.

(b) The Personal, Family, or Household Use Criteria.—A second troublesome area in the SCCPC coverage definitions is determining whether a transaction is primarily for "personal,

90. This is the rationale behind the same exclusion in TIL. Landers, *The Scope of Coverage of the Truth in Lending Act*, 1976 AM. B. FOUNDATION RESEARCH J. 565, 570. While the cost of compliance, particularly with respect to TIL disclosures, is an important consideration, the SCCPC provides an umbrella of consumer protection for all aspects of covered consumer credit transactions. This protectionist philosophy should weigh heavily in determining whether a borderline transaction ought to be brought within the ambit of the SCCPC.

91. *See* 15 U.S.C. § 1602(f) (1976); S.C. CODE ANN. §§ 37-2-104(1)(a), 37-3-104 (Cum. Supp. 1977), 37-2-106 (1976); 12 C.F.R. § 226.2(5) (1977); 1968 UCCC §§ 2.104(1)(a), .106(1)(a), 3.104(1)(a). *Compare* S.C. CODE ANN. § 34-29-230 (1976) (licenses to make high interest restricted loans of up to $7,500 under Act 988 of 1966). This statute states that all persons "engaged in the business of lending which includes any person making more than ten loans per year, whether with or without security," must have a license to make these loans. In Smith v. Bulman, 197 S.C. 357, 15 S.E.2d 635 (1941), the South Carolina Supreme Court interpreted the term "banks, banking institutions and other lending agencies" used in several non-SCCPC usury statutes, *e.g.*, S.C. CODE ANN. § 34-13-120 (1976), to include all corporations, firms, and individuals involved in the lending of money in this state, 197 S.C. at 361-62, 15 S.E.2d at 637, but the decision did not specify any minimum number of transactions necessary to qualify under this holding. The standard of ten credit transactions per year specified in Act 988 of 1966 seems somewhat high. *See* Eby v. Reb Realty, Inc., 495 F.2d 646, 649-51 (9th Cir. 1974) (realtor with three credit transactions in one year held to meet the creditor test for TIL disclosure purposes). For TIL purposes one author has suggested a threshold test of five or more credit extensions per year involving a total extension of credit in excess of $10,000. *See* Landers, *supra* note 90, at 571. *See also* Ad. Interpretation No. 3.104-7511, S.C. Dep't of Cons. Aff. (1975) ("regularly engaged" means "as a regular course of business" as opposed to isolated transactions).

family or household" purposes. The transactions that cause the most difficulty are those involving a mixture of personal and business purposes, such as a loan to an individual to buy a mobile home which is subsequently leased to a third party. Courts and regulatory bodies applying the identical language in TIL[92] have focused on the primary purpose of the transaction as far as the debtor is concerned.[93] They have required no TIL disclosures if the primary purpose of the transaction was determined to be commercial or business, even though the debt may have been secured by property used for personal purposes (for example, the debtor's residence).

This test, however, does not really deal with the more difficult issue of determining what is a personal, as opposed to a commercial or business, purpose. For example, is a loan to an individual to purchase stock for investment a loan for personal or business purposes?[94] Logically, because the overall purpose of the "personal, family or household" requirement is to provide maximum protection to individual consumers, the correct answer would be that any such transaction would be primarily for a personal purpose unless the transaction for which the credit in question is to be used is a principal business activity of the debtor.[95] Under this rationale, a loan to a teacher to purchase

92. 15 U.S.C. § 1602(h) (1976). As was previously pointed out, the UCCC and TIL, but not the SCCPC, also include within their coverage credit of up to $25,000 for agricultural purposes. See note 76 *supra.*

93. *See, e.g.,* Sapenter v. Dreyco, Inc., 326 F. Supp. 871 (E.D. La.), *aff'd per curiam,* 450 F.2d 941 (5th Cir. 1971), *cert. denied,* 406 U.S. 920 (1972) (mortgage on residence in connection with a refinancing of a past due business property obligation held to be a business transaction). The status of a credit transaction in which part of the proceeds are needed for personal purposes and part for business purposes presents some special allocation problems. An example of this occurs when a debtor obtains a loan to pay for both a dishwasher to be used in his home and a calculator for his business. One expert has suggested that the characterization would have to be made on the basis of the primary or principal use of the proceeds and that "no better guideline is possible." Miller, *Basic Exclusions, supra* note 89, at 276.

94. A credit sale of securities, as opposed to a loan to purchase the same securities, is definitionally excluded from the SCCPC since the definition of goods excludes "instruments," S.C. CODE ANN. § 37-2-105(1) (1976), which under the UCC includes investment securities, *id.* § 36-8-102. In addition, TIL, but not the SCCPC, excludes all transactions, sales, or loans involving the purchases of securities from registered broker-dealers. All loans to purchase securities, however, are covered by the SCCPC, regardless of whether the loan is from a registered broker-dealer in a margin account, a bank, or other lenders, if the other criteria of a consumer loan are present.

95. This seems to be the thrust of the Federal Reserve Board's (FRB) TIL pronouncements in this area. *See, e.g.,* 12 C.F.R. § 226.302 (1977) (1970 interpretation that any credit extended for a dwelling containing more than four family-dwelling units conclusively would be for business purposes). Since issuance of this interpretation, the Board

securities held for investment would be for personal purposes, unless the teacher had a substantial stock investment business on the side, while the same loan to a stockbroker to purchase stock would be a loan for business purposes. The courts, however, have not consistently followed this rationale,[96] and many borderline situations are bound to arise. One common example is credit extended to a sole proprietor to purchase items like typewriters or small calculators that can be used in both the home or business. Another troublesome transaction involves the extension of credit to an individual for investment when the debtor has investments such as rental real estate that produce substantial income

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has consistently refused to make any definitive rulings in other types of situations. In FRB Letter No. 918, [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,252 (Aug. 19, 1975), the Board stated that a loan on an owner-occupied, three-unit dwelling was not necessarily for business purposes and pointed out that its 1970 interpretation was based on the assumption that anyone with enough assets to own a large multi-unit apartment building did not really need the protection of the TIL disclosures. It also stated, however, that in other cases the result would depend on the relation of the income from the investment to the owner's total income, the ownership of other investment property, and the degree of personal management involved. This and other FRB letters further suggest that, given TIL's purpose of protecting consumers, creditors would be well advised to make disclosures unless the credit is clearly for business purposes. *See, e.g.*, FRB Letter No. 808, *id.* ¶ 31,130 (May 30, 1974). For further discussion of the appropriate test to distinguish between a personal and business purpose, see Landers, *supra* note 76, at 671-74 and Warren & Larmore, *supra* note 76, at 812-15.

96. A few cases interpreting TIL have adopted a position that allows exclusion for business purposes if the credit is used for any substantial investment purpose without requiring proof that the projected income from the investment is substantial in relation to income from the debtor's regular employment. *See, e.g.*, Puckett v. Georgia Homes, Inc., 369 F. Supp. 614 (D.S.C. 1974) (a loan on a rental mobile home purchased by a barber to supplement his income held to be for a business purpose as far as TIL disclosures were concerned). *See also* Sapenter v. Dreyco, Inc., 326 F. Supp. 871 (E.D. La.), *aff'd per curiam*, 450 F.2d 941 (5th Cir. 1971), *cert. denied*, 406 U.S. 941 (1972) (a refinancing transaction involving rental property was held to be for business purposes even though the debtors owned one piece of residential property and one multifamily rental property). The court in *Sapenter* stated: "While they may have had other, full-time occupations, plaintiffs were nevertheless engaged in the 'business' of owning and renting real estate for profit." 326 F. Supp. at 873-74.

The difficulty with applying the analysis in these cases to the SCCPC is that this analysis would exclude from SCCPC coverage basically all credit transactions for investment purposes, including the loan to the teacher to purchase securities, an example mentioned in the text. While such a broad exclusionary rationale might be justified in cases in which the debtor is trying to recover against the creditor for a technical violation of TIL, which was the case in both *Puckett* and *Sapenter*, it seems inappropriate when the issue is whether the creditor or the debtor is bound by the comprehensive coverage of the SCCPC. Something more substantial than a casual or small business endeavor ought to be required to trigger the business purpose exclusion. *Compare Sapenter and Puckett with* Gerasta v. Hibernia Nat'l Bank, 411 F. Supp. 176, (E.D. La. 1975) (loan used to remodel a duplex, one side of which was occupied after the remodeling as debtor's residence, held to be for personal and not business purposes under TIL).

compared to the individual's income from his or her occupation. A creditor faced with one of these borderline cases would be well advised to determine and document all the facts and to get the debtor to indicate in writing whether the transaction is for personal or business purposes. While such a statement is not conclusive, it might be successfully presented as an affirmative defense or as grounds for estoppel against a later contrary claim by the debtor.[97]

(c) The $25,000 Limitation.—The third area of the coverage definitions that merits further discussion is the $25,000 limitation on all SCCPC transactions except real estate transactions. The basic premise of the dollar limitation is that an individual rarely will be involved in a non-real estate consumer credit transaction or consumer lease involving more than $25,000, and even when such cases do arise, the individual involved probably will be sophisticated enough to protect himself adequately.[98] With real estate, however, the $25,000 figure would be an unrealistic cutoff point for providing protection to the average consumer because of the rapidly increasing cost of housing. For this reason, the dollar limitation is excluded from real estate transactions.[99]

The $25,000 limitation applies to the amount of credit extended or the total amount of rental payments called for in a lease and not to the cash sales price of the property. Any down payment made by the debtor would be excluded in determining the amount of credit.[100] Thus, a $28,000 Rolls Royce Silver Shadow

97. *See, e.g.*, Lakeview Meadows Ranch, Ltd. v. Bintliff, 36 Cal. App. 3d 418, 111 Cal. Rptr. 414 (1973) (debtor estopped to plead usury); Heubusch v. Boone, 213 Va. 414, 192 S.E.2d 783 (1972); Annot., 16 A.L.R. 3d 510 (1967). This whole problem is complicated in South Carolina because of the complex interest rate structure. A creditor acting in good faith after a reasonable investigation and relying upon a debtor's written statement that the credit was for business purposes should be entitled to rely on this statement. Otherwise, the creditor might be liable for TIL violations as well as possible penalties and damages under the SCCPC because he guessed incorrectly. On the other hand, since the permissible rates and charges under the SCCPC are higher in many credit transactions than are those for non-SCCPC transactions, a creditor should again be able to rely on the debtor's statement that the primary purpose of the credit was for personal use. One exception, of course, is when proof exists that the creditor and debtor collusively stated that the credit was for personal purposes to utilize the SCCPC rates when they were not applicable under the true state of facts.

98. 1968 UCCC § 2.605, Comment.

99. *See* Miller, *Basic Exclusions, supra* note 89, at 296. *See also* Meyers, *Real Estate Transactions, Rates and the Uniform Consumer Credit Code*, 23 OKLA. L. REV. 263 (1970). Even though no dollar maximum is applicable, a real estate credit transaction is not covered by the SCCPC unless it meets certain special definitional tests discussed in the next subsection, Part I, section B(4)(d).

100. *See* S.C. CODE ANN. §§ 37-2-111 (1976) (definition of "amount financed" in a

purchased by an individual for his family's use and financed with a down payment of $6,000 and an installment sale or loan of $22,000, or leased under a true consumer lease calling for total lease payments of less than $25,000, is covered by the SCCPC.

(d) Real Estate Transactions.—The most difficult aspect of the coverage sections is the treatment of real estate transactions. A credit transaction "primarily secured by a first lien which is a purchase money security interest in land" is by definition not a consumer credit sale or consumer loan.[101] Consequently, only real estate mortgage transactions that are *not* "primarily secured by a first lien which is a purchase money security interest in land" and that meet all other criteria of consumer credit and consumer loans are covered by the SCCPC.

The apparent intent of the quoted language is to exclude from the coverage of the SCCPC most types of typical first mortgage transactions on improved and unimproved residential real estate.[102] This same purpose is sought by the UCCC, which, however, utilizes a completely different approach. The UCCC excludes from the definition of a consumer credit sale and consumer loan all real estate mortgages with interest rates below 12% per annum.[103] The theory behind the UCCC approach is that the 12%

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consumer credit sale), 37-3-107(3) (Cum. Supp. 1977) (definition of "principal" of a loan).

101. *Id.* §§ 37-2-104(2)(b) (credit sales), 37-3-104(2) (Cum. Supp. 1977) (loans). Although most real estate leases are excluded by definition from the operation of the SCCPC (a consumer lease only includes leases of goods pursuant to § 37-2-106 (1976)), a lease of real estate with an option to purchase, from which all or a substantial portion of the rental is to be applied to the purchase price, is a sale of an interest in land. *Id.* § 37-2-105(6) (1976). While this provision makes many typical lease-purchase contracts on houses sales of interest in land, the transaction is still not covered by the SCCPC unless it involves a credit transaction that is *not* primarily secured by a first lien purchase money security interest. See notes 119-28 and accompanying text *infra.*

102. No record of the public debate exists from which the actual, as opposed to apparent, intent of the South Carolina Legislature can be determined. Although the South Carolina House and Senate Journals detail chronologically all debate and proposed amendments to this legislation, see note 1 *supra,* unfortunately, the journals do not contain the comments made by the proponents and opponents of the various proposals. With the exception of the study committees, there are no typed minutes of the proceedings before the various legislative committees that considered this legislation over the years. Consequently, it is sometimes difficult to determine the intention of particular provisions, especially those that are not part of the UCCC, which served as the model for the SCCPC. The comments to the SCCPC try to fill this gap to the extent concrete evidence is available to substantiate the actual debate. The author was a member of the Joint Study Committee that drafted the recommended legislation that ultimately became Act 686 of 1976 and, therefore, is reasonably familiar, on a firsthand basis, with the rationale behind most of the provisions of this legislation.

103. 1974 UCCC § 1.301(12)(b)(ii), .301(15)(b)(ii).

figure (10% in the 1968 UCCC text)[104] would exclude most first mortgages, which are highly regulated by non-Code law, and include most second mortgages, in which the need for consumer protection against potential overreaching by unscrupulous creditors is greater.[105] Although the 1974 SCCPC incorporated the UCCC approach,[106] this concept, apparently at the insistence of real estate interest groups, was rejected in the course of enacting the 1976 SCCPC Amendments.[107]

A third attempt to deal with real estate transactions is made in TIL, which exempts from certain disclosure provisions loans that are "secured by a first lien on a dwelling made to finance the purchase of that dwelling." If the dwelling is the principle dwelling of the debtor and the credit is used to acquire or construct that dwelling, the loan is exempt from the three-day right of rescission as well.[108] Regardless of whether the particular transaction qualifies as a consumer credit transaction under the SCCPC, TIL disclosures are required in all TIL real estate credit transactions for personal, family, household, or agricultural purposes. The quoted language above affects only the type and extent of the required disclosure.[109]

Of these three tests, the SCCPC language may well be the most difficult and uncertain to apply because of the dependence in the SCCPC on the term "purchase money security interest," a concept lifted from section 9-107 of the Uniform Commercial

104. 1968 UCCC §§ 2.104(2)(b), 3.105.

105. *See* 1974 UCCC § 1.301(15), Comment. *See also* Miller, *Basic Exclusions, supra* note 89, at 300.

106. *See* S.C. CODE ANN. §§ 37-2-104(2)(b), 37-3-104(2) (Cum. Supp. 1977) (enacted as part of § 1 of the 1974 SCCPC).

107. This language first appears in § 13 and § 14 of S. 119, note 1 *supra*, introduced in 1975 as technical amendments legislation. S. 119 was ultimately passed with major amendments introduced in the 1976 legislative session as Act 686. The new real estate test in § 13 and § 14 of S. 119, as well as the trailing amendments, §§ 16-19 of S. 119, were incorporated into the combined final bill that passed the Legislature in 1976 without any changes from the initial wording. *See* No. 686, 1976 S.C. Acts 1792, 1851-52, §§ 62-67.

108. *See* 15 U.S.C. §§ 1635(c), 1638(a)(6), 1639(a)(4) (1976); Regulation Z, 12 C.F.R. §§ 226.8(b)(3), .8(k), .9(g)(1)-(2) (1977). For obscure reasons Congress did not attempt to draw the line of demarcation between first and second residential mortgages as far as disclosure is concerned. *See* Landers, *supra* note 76, at 679.

109. See note 76 *supra*. TIL disclosure is required for all real estate credit for personal, family, or household purposes regardless of the amount of credit; however, less disclosure is required in some types of real estate credit than in others and a three-day right of rescission applies to some, but not all, real estate credit transactions. The transactions exempted from rescission, however, do not precisely parallel the transactions requiring less disclosure. *See generally* R. CLONTZ, TRUTH IN LENDING MANUAL ¶¶ 5.01-.05 (4th ed. 1976).

Code.[110] Another problem of the SCCPC is its failure to define more precisely the remaining terms in the real estate exclusion. Although the term "purchase money security interest" has a well understood meaning when applied to the financing of personal property, its application to real estate mortgages produces serious legal problems, which are avoided by the simplistic test used by the UCCC and the more traditional approach in TIL and Regulation Z. Under section 9-107 of the UCC a security interest taken as security for or in satisfaction of a preexisting claim or antecedent debt cannot qualify as a purchase money mortgage.[111] A purchase money mortgage covering real estate given by a purchaser to the seller at the time of the sale and a real estate mortgage in favor of a lender in which all proceeds of the loan are used to acquire the real estate in question clearly qualify as purchase money security interests. It is equally clear that any refinancing of an existing permanent mortgage, even one that qualified initially as a purchase money security interest,[112] or a post-acquisition mortgage on real estate that had no existing mortgage would not qualify for purchase money status and would be governed by the SCCPC.[113] In addition, the UCC purchase money concept also seems to preclude any permanent mortgage that pays off a construction mortgage from qualifying as a purchase money mortgage,[114] even if it is assumed that the construction

110. *Compare* S.C. CODE ANN. § 36-9-107 (1976) *with id.* § 37-1-301(21) (Cum. Supp. 1977).

111. *See id.* § 36-9-107, Comment 2 (1976). A purchase money security interest is given a special priority status under Article 9. *See* Kimbrell's Furniture Co. v. Friedman, 261 S.C. 172, 198 S.E.2d 803 (1973); S.C. CODE ANN. §§ 36-9-301(2), -302(c) to (d), -312(3) to (5) (1976). If new value were not required as a prerequisite for purchase money status, the super-priority status granted such security interests could not be justified.

112. *See, e.g.*, Roberts Furniture Co. v. Pierce (*In re* Manuel), 507 F.2d 990 (5th Cir. 1975); Babcock Corp. v. Banks, (*In re* Norrell), 426 F. Supp. 435 (M.D. Ga. 1977); *In re* Brouse, 6 UCC Rep. 471 (W.D. Mich. 1969). But see the discussion in notes 125-28 and accompanying text *infra* for a contrary position taken by the South Carolina Department of Consumer Affairs.

113. *See* Declaratory Ruling No. 3.601-7712, S.C. Dep't of Cons. Aff. (1977) (loan proceeds to be used in a business secured by a mortgage on an existing lot and building held not to be a purchase money loan); *cf.* FRB Letter No. 1179, [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,588 (Apr. 28, 1977) (a mortgage to pay off a prior bond for title arrangement does not qualify as a mortgage to finance the acquisition of a dwelling for TIL purposes). *See also* North Platte State Bank v. Production Credit Ass'n, 189 Neb. 44, 200 N.W.2d 1 (1972); *In re* Simpson, 4 UCC Rep. 250 (W.D. Mich. 1966). See, however, notes 125-28 and accompanying text *infra*.

114. This is because the proceeds of the loan are not being used to acquire the real estate but to pay off a prior loan that may or may not have qualified as a purchase money mortgage.

money mortgage could qualify as a purchase money mortgage. This assumption, however, is questionable in many situations. For instance, it is unclear whether a construction loan used in part to pay off a prior purchase money mortgage in favor of the seller[115] or a construction mortgage covering property that is sub-

115. The failure of the SCCPC to define the words "land" or "primarily" complicates this situation as well as many other typical cases. Literally the term "land" can be construed to mean only the raw, undeveloped real estate without any improvements. Under this interpretation a construction money mortgage can never be a purchase money security interest in land, since most of the loan proceeds will be utilized to acquire rights in the improvements. If, on the other hand, the term "land" includes all improvements, the construction loan can technically qualify as a purchase money mortgage to the extent that the proceeds are utilized to pay for the improvements. The portion of the loan used to pay off any prior mortgage on the land, however, cannot technically qualify for purchase money status. *See* authorities cited notes 112-13 *supra*. Nevertheless, the wording of the SCCPC real estate exclusion requires only that the debt be "*primarily* secured by a first lien which is a purchase money security interest in land" (emphasis supplied). If the term "primarily" refers to a purchase money security interest rather than to "first lien" or "land," the entire mortgage qualifies for the exclusion, if, in addition, the portion of a real estate mortgage loan that qualifies for purchase money status is significantly greater than that portion of the loan that does not qualify. The result is that the full amount of a typical construction mortgage will qualify under the SCCPC real estate exclusion only if: (1) the term "land" includes improvements built on the land and (2) the purchase money portion of the mortgage loan predominates over the non-purchase money portion. For a real estate mortgage that is not a construction mortgage to qualify for the exclusion, these same conditions will also have to exist. This is essentially the position adopted by the South Carolina Department of Consumer Affairs in Regulation No. 28-31-3.104 (as revised Apr. 7, 1978). See notes 125-28 and accompanying text *infra*.

Although it would have been preferable either to have a definition of "land" or to have used the term "real property," which clearly includes any improvements on the land, BLACK'S LAW DICTIONARY 1383 (Rev. 4th ed. 1968), the omission of a definition may not, as a practical matter, cause much difficulty, except perhaps in the case of mortgages covering condominiums, discussed in note 123 *infra*. This is for several reasons. First, the terms "land" and "real property" have been used interchangeably in cases. *See, e.g.*, Reynard v. City of Caldwell, 55 Idaho 342, 354-55, 42 P.2d 292, 296-97 (1935). Second, TIL and Regulation Z consistently use the term "real property," *see, e.g.*, 15 U.S.C. §§ 1603, 1605(e), 1635 (1976); Regulation Z, 12 C.F.R. § 226.2(dd), (ee) (1977), but both the 1968 and 1974 UCCC use the term "land" in the same sense that TIL uses "real property," *see, e.g.*, 1968 UCCC §§ 1.301(5), 2.104, .105(6), .202(1)(d), 3.105, .202(1)(d); 1974 UCCC 1.301(36). The National Conference of Commissioners on Uniform State Laws certainly thought that the two terms were interchangeable, and even though the treatment of "land" transactions covered by the SCCPC is different from that of the UCCC, it was perfectly natural for the drafters of the SCCPC to utilize the term "land" since the basic framework of the SCCPC is drawn from the UCCC. Third, existing South Carolina statutes have used the terms "land," "real property," and "real estate" as though they were coextensive in meaning. *See, e.g.*, S.C. CODE ANN. §§ 27-7-10 (form of conveyances for land or real estate), 27-29-10 to -210 (Uniform Land Sales Practice Act), 29-1-10 (mortgage is a lien on real estate), 29-3-20 (satisfaction by second mortgage of first mortgage in same lands and tenements), 30-7-10 (recording of deeds conveying interests in lands), 30-7-20 (manner and form of recording liens on real property) (1976). But see the discussion of condominiums in note 124, *infra*.

ject to a prior or contemporaneous purchase money mortgage in favor of a seller of the property would qualify as purchase money security interests.[116]

Moreover, an interpretation of the SCCPC real estate exclusion that results in the term "primarily" referring to either "first lien" or "land" rather than to "purchase money security interest" appears to be unreasonable. For "primarily" to modify "first lien" requires the illogical premise that a mortgage be both a first and a second lien at the same time. On the other hand, if "primarily" modifies "land," the definition of land becomes critical, and if "land" by definition includes improvements, it has no meaning. If "land" does not include improvements, the only types of real estate mortgages that qualify for the exclusion are those that are made to secure the purchase price of unimproved real estate obtained by a consumer for personal, family, or household purposes. Finally, both by the process of elimination and by logic it makes good sense to conclude that "primarily" refers to the term "purchase money security interest," especially since a number of typical real estate mortgages, including most real estate construction mortgages, technically contain both purchase money and non-purchase money elements.

116. The seller's mortgage in this last example in the text is now a second mortgage, although it was originally a first lien. Does this change in status mean that the SCCPC now applies to the mortgage if the purpose of the credit was for personal, family, or household purposes? Fortunately, the interest rate structure under the SCCPC for credit sales is high enough that no usury question is likely to occur, but other important issues have to be resolved. For instance, if the SCCPC applies, the mortgagee has to give a special notice and opportunity to cure before beginning foreclosure proceedings. S.C. CODE ANN. §§ 37-5-109 to -111 (Cum. Supp. 1977).

A related problem involves the status of a transaction in which a bank, mortgage broker, savings and loan institution, or other lender purchases an installment sales contract executed in connection with the sale of real estate by a developer to a consumer. The installment sales contract is presumably exempt from any rate limitation as a credit sale. *See id.* §§ 37-2-104(2)(b) (Cum. Supp. 1977), -605 (1976). See notes 457-61, 474 and accompanying text *infra.* The status of this transaction when the lender purchases the installment sales contract, however, raises a serious legal problem. If the transaction is characterized as a sale and is, therefore, exempt from any usury limitations, a lender can indirectly avoid the interest maximums applicable to real estate mortgage loans by use of the sales device. See notes 119-28 and accompanying text *infra.* As initially published on April 7, 1978, paragraph 4 of revised Proposed Regulation No. 28-31-3.104 of the Rules and Regulations to Implement the Consumer Protection Code, see notes 125-28 and accompanying text *infra,* characterized these installment sale—purchase transactions as loans "primarily secured by a first lien which is a purchase money security interest in land" rather than as sales. The result is that they are subject to the rate limitations for non-SCCPC mortgage loans. Paragraph 4, however, was not approved by the Commission on Consumer Affairs. The failure of the Commission to approve paragraph 4 does not mean that there is no risk that these transactions will be characterized as loans rather than sales. Banks and other mortgage lenders are in the business of lending money and the general rule has always been that lenders are subject to usury laws. Two lines of authority are pertinent. The first is cases holding that certain kinds of installment sales are actually loans because of the close connection between the seller and the lender, who takes assignments of chattel paper on a regular basis from a seller of goods. See notes 273, 458-59 *infra.* The second is the arguments involved in determining whether a bank or other lender that bids in property at a foreclosure sale can sell the property to a third party on a purchase money mortgage basis and charge a rate higher than that allowed for a mortgage loan in the same amount. See note 474 *infra.* On the basis of these authorities, there is a strong possibility that a court would hold a purchase by a lender of the installment

Another problem that arises because of the grafting of the UCC concept onto real estate transactions concerns refinancing transactions where new money is advanced to acquire additional collateral. Several cases involving security interests in personal property under the UCC have held that to the extent a refinancing transaction involves new money and new collateral, the security interest might be a purchase money security interest on the new property, but not on the original property even though the entire original security interest qualified as a purchase money security interest.[117] Based on these cases, a real estate mortgage given to a lender partially to refinance a prior purchase money mortgage and partially to finance a home improvement project would be a non-purchase money mortgage to the extent of the balance prior to the refinancing and a purchase money mortgage to the extent of the new money advanced for the home improvement project. If this rationale is applied to these hybrid real estate mortgage transactions, the next legal problem that would have to be resolved would be to determine whether the appropriate interest rate is the interest rate applicable to first lien purchase money mortgages (non-SCCPC coverage), the rates applicable to other types of mortgages (SCCPC coverage), or a combination of the two. If combined rates are used, the purchase money rate would be applied to the amount of the loan that qualified for purchase money status and the non-purchase money rate would be applied to the remaining portion.[118]

The determination of the applicable interest rates is the real issue involved in this situation. First lien loans that qualify as purchase money security interests in land generally will be subject to much lower interest rates than those that do not have this status. For example, the maximum permissible rate in South Carolina for nongovernmentally guaranteed or insured first lien mortgage loans on real estate is 9% per annum on mortgage loans

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sales contract to be, in effect, a disguised loan from the lender, particularly in situations in which the lender has purchased a number of these contracts from a developer of a subdivision.

117. *See, e.g.*, cases cited note 112 *supra*. *But see In re* Simpson, 4 UCC Rep. 243 (W.D. Mich. 1966); *In re* Simpson, 4 UCC Rep. 250 (W.D. Mich. 1966). *Compare* Goodyear Tire & Rubber Co. v. Staley (*In re* Staley), 426 F. Supp. 437 (M.D. Ga. 1977) (a security interest arrangement involving subsequent purchases in which all the payments received were applied to the first item purchased until it was paid for in full and released as collateral qualified the security interest in the first item for purchase money status).

118. The problems involved in interpreting the terms "land" and "primarily" are also important to the resolution of this issue. See the discussion in note 115 *supra*.

up to $60,000, 10% per annum on mortgages over $60,000, but not more than $100,000, 12% for mortgages above $100,000 but not exceeding $500,000 and no maximum for mortgages above $500,000.[119] This rate structure applies to all nongovernmentally guaranteed or insured mortgages that qualify as "primarily secured by a first lien which is a purchase money security interest in land"—the magic words used in the SCCPC.[120] If the real estate mortgage is not one "primarily secured by a first lien which is a purchase money security interest in land," and the credit is for a personal, family, or household purpose, then the transaction is governed by the SCCPC regardless of the amount of the mortgage. In such a case the applicable rate varies with the type of transaction and the status of the creditor involved, but the basic maximum rate possible in every case is at least 12% per annum, which is significantly higher than the above non-SCCPC rate structure for all first mortgage loans below $100,000.[121]

Given this interest rate differential and the present high market interest rates, real estate mortgage lenders can be expected to try to structure a mortgage so that it does not qualify for exclusion under the purchase money first lien test, but instead qualifies for the higher rates permissible under the SCCPC.[122] Yet the intent of the drafters of the 1976 SCCPC Amendments was to ensure that almost all first mortgage real estate residential loans would not be affected by the SCCPC but continue to be governed by section 34-31-30, which sets the 9%, 10%, and 12% limits discussed in the preceding paragraph.[123] Unfortunately,

119. S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977). See the Addendum at the end of this article for an explanation of the 1978 amendment to § 34-31-30 (Cum. Supp. 1977) that attempted to raise the ceiling on first mortgage loans of $60,000 or less from 9% to 10%.

120. S.C. CODE ANN. §§ 37-2-104(2)(b), 37-3-104(2) (Cum. Supp. 1977). Government guaranteed and insured mortgages are exempt from any state interest regulation. *See id.* §§ 31-19-10 to -30, 34-25-150 (1976). See note 478 and accompanying text *infra.*

121. See Part II *infra* for further explanation of the SCCPC rate structure.

122. Pre-SCCPC statutes did not regulate the rates on credit sales of real estate, and non-SCCPC real estate credit sales are still not subject to any rate limitations. *See* S.C. CODE ANN. § 37-2-605 (1976). Even if a credit sale involving real estate falls within the coverage of the SCCPC, however, the SCCPC rates for credit sales are high enough (18% per annum, *id.* § 37-2-201(2)(b) (Cum. Supp. 1977)) that the actual rate on a credit sale involving an interest in land will rarely be affected by SCCPC coverage. The main impact of this issue falls on real estate lenders, whose rates are highly regulated.

123. *Id.* § 34-31-30 (Cum. Supp. 1977). The statement in the text is based on the author's recollection of the discussions concerning the 1976 SCCPC Amendments in the Committee to Study the Uniform Consumer Credit Code. The author was appointed by the Governor as a member of this committee. No statement concerning this issue appears

the language chosen to implement this objective falls far short of accomplishing the intended result. Many types of typical first mortgage real estate loans apparently cannot meet the technical requirements of a purchase money security interest. The problems with the purchase money security interest test discussed above are but some of the important legal issues raised by the language used in the SCCPC to differentiate between covered and noncovered real estate transactions. Some of the additional problems are discussed in the footnote below.[124]

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in the minutes of the Study Committee or in the House or Senate journals. See also note 102 *supra.*

124. Problems created by lack of a definition of the terms "land" and "primarily" in S.C. CODE ANN. §§ 37-2-104(2)(b) and 37-3-104(2) (Cum. Supp. 1977) are discussed in note 115 *supra.* Three types of fairly common transactions need additional comment.

The first involves the status of mortgages on condominiums. The South Carolina Horizontal Property Act, *id.* §§ 27-31-10 to -300 (1976), differentiates between land and property. "Property" is the broader term and includes any leasehold or fee interest in the land, as well as any improvements, *id.* § 27-31-20(k). While the status of a construction mortgage for a typical condominium project will not arise because the loan in all likelihood will be for business purposes as far as the developer is concerned, the status of a mortgage given by the purchaser of an individual condominium is important for SCCPC purposes. Such a mortgage only covers the interior apartment itself and the purchaser's percentage of undivided interests in the elements of common ownership. S.C. CODE ANN. § 27-31-230 (1976). The elements of common ownership include the "land," foundations, flat roof, elevators, hallways, and any basement. *Id.* § 27-31-20(f) (1976). Given the distinction between property and land in the Horizontal Property Act, there is a serious question whether a nonconstruction mortgage covering an individual condominium unit could even qualify as one "primarily secured by a first lien which is a purchase money security interest in *land.*" (emphasis supplied) *See* note 115 *supra.*

The second involves security interests in mobile homes. If the security interest covers only the mobile home and if the mobile home is for personal, family, or household purposes, it is subject to the SCCPC rate structure as a security interest in goods. *See id.* § 36-2-105(1). This should be the result even if the mobile home is attached in some fashion to land owned or leased by the debtor. In either case no security interest in land is involved in the transaction so that the SCCPC definitional exclusion for certain types of real estate mortgages does not apply. *Cf.* Rosen v. Hummel, 47 A.D.2d 782, 365 N.Y.S.2d 79 (1975); S.C. CODE ANN. § 36-2-107(2) (1976) ("sale of things attached to realty and capable of severance without material harm thereto . . . is a contract for the sale of goods . . . ."). Security interests in mobile homes in South Carolina must be perfected by notation on a certificate of title, which is further evidence of their status as personalty. *See* S.C. CODE ANN. §§ 56-19-210, -220(9), -630 to -650 (1976). *See also id.* § 36-9-302, S.C. Rptr. Comment; *In re* Vinarsky, 287 F. Supp. 446 (N.D.N.Y. 1968) (security interest in a mobile home perfected in same manner as motor vehicles); Albany Discount Corp. v. Mohawk Nat'l Bank of Schenectady, 28 N.Y.2d 222, 269 N.E.2d 809, 321 N.Y.S.2d 94 (1971).

On the other hand, if the security interest covers both the mobile home and the land on which the mobile home is situated, the situation has many of the same conceptual problems as a condominium mortgage. If the real estate mortgage does not qualify as a "first lien which is a purchase money security interest in land," the real estate mortgage is eligible for the SCCPC rate structure, and the status of the mobile home as personalty or realty is not significant for determining the applicable interest rate structure. If the real

The Department of Consumer Affairs, which administers the SCCPC, has attempted to remedy some of the confusion and uncertainty by a proposed regulation.[125] The key provisions are

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estate mortgage, however, does qualify as "a first lien which is a purchase money security interest in land," the mortgage is not eligible for the SCCPC rates, and, unless the mobile home is financed independently of the mortgage on the real estate, the maximum rate is governed by the non-SCCPC rate structure. As was pointed out in the text, the maximum rate in these circumstances is considerably lower than if the SCCPC applied to the transaction.

A lender can avoid this problem and obtain the benefit of the SCCPC rate structure by (1) financing only the mobile home, (2) financing the mobile home and the land in independent loan transactions, or (3) financing the mobile home and the real estate in a unitary transaction only if the real estate mortgage will not clearly qualify as a "first lien which is a purchase money security interest in land."

An additional problem with mobile home financing is determining whether the mobile home is a fixture. This issue affects the manner of perfecting a security interest in a mobile home and the priority of the mobile home financer over persons claiming interests in the real estate to which the mobile home is attached. It does not, however, affect the maximum interest rate for which a mobile home can be financed. *See* S.C. CODE ANN. §§ 36-9-302(1)(d), -313 (1976); Note, *Housing—Mobile Homes—Some Legal Questions*, 75 W. VA. L. REV. 382, 406-17 (1972-73). *Compare* George v. Commercial Credit Corp., 440 F.2d 551 (7th Cir. 1971) (mobile home set on cement blocks and connected to a well, septic tank, and electric power lines on real property owned by purchaser of mobile home held to be a fixture subject to the lien of a mortgage on the real property) *with* Clifford v. Epstein, 106 Cal. App. 2d 221, 234 P.2d 687 (1951) (mobile home attached to water and electrical outlets and used as a combination home and office by the manager of the mobile home park held not to be a fixture so that title to the mobile home did not pass under a contract to sell the real estate).

A third troublesome transaction involves mortgages covering property held by the mortgagor under a long-term ground lease. In addition to problems of whether the mortgage covers the "land" and the impact of the term "primarily," S.C. CODE ANN. § 37-2-105(b) (1976) states that a "sale of an interest in land" includes a lease of real estate with an option to purchase when a substantial amount of the lease payments are applied to the purchase price; however, all other leases of real estate are excluded definitionally from the concept of a sale of goods covered by the SCCPC. *See* S.C. CODE ANN. §§ 36-2-105(1), -107 (UCC), 37-2-105(1) (SCCPC) (1976). Does this mean that no type of security interest in a real estate lease except one which contains an option to purchase could ever be covered by the SCCPC? Since most mortgages in South Carolina covering improvements constructed by a mortgagor on leased real estate are for commercial or business purposes, and are, therefore, exempt from the SCCPC, this question may not be very important from a practical standpoint.

125. Proposed Reg. No. 28-31-3.104, S.C. Dep't of Cons. Aff. (as revised Apr. 7, 1978). This proposed regulation has been approved by the Commission on Consumer Affairs, but as of August 1, 1978, had not been submitted to the Legislature as required by the South Carolina Administrative Procedure Act. The South Carolina General Assembly has ninety days to review any regulations proposed by a state agency. S.C. CODE ANN. § 1-23-120 (Cum. Supp. 1977). Since this proposed regulation was not submitted to the General Assembly until after the close of the 1978 legislative session, the earliest this regulation can become effective is April 1979. It could be approved or disapproved earlier than ninety days after the beginning of the 1979 legislative session by a resolution adopted by the General Assembly or amended or withdrawn by the Commission on Consumer Affairs.

Prior to the initial publication of this proposed regulation in July 1977, the Depart-

paragraphs 1 and 2. Paragraph 1 defines the concept "primarily secured by a first lien which is a purchase money security interest in land" as a loan that "is made and used to enable the borrower to acquire rights in or the use of land, is secured by an interest in land, and the lien is not subordinate to a lien of another per-

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ment of Consumer Affairs issued three Administrative Interpretations dealing with the exclusionary language. The first, issued late in 1976, held that a construction loan to build a dwelling on land already owned by the mortgagor was not a consumer loan governed by the SCCPC because it fell within the language of the real estate exclusion in S.C. CODE ANN. § 37-3-104(2) (Cum. Supp. 1977) as a purchase money security interest in land. Ad. Interpretation No. 3.104-7706, S.C. Dep't of Cons. Aff. (1976). This interpretation states that the Legislature intended to exclude from the coverage of the SCCPC the same kinds of transactions qualifying for special disclosure treatment under TIL and Regulation Z. See note 108 and accompanying text *supra*. The problem with this rationale is that the South Carolina Legislature did not use the same language as is utilized in TIL and Regulation Z, which speak in terms of "a loan secured by a first lien or equivalent security interest on a dwelling and made to finance the purchase of that dwelling." 12 C.F.R. § 226.8(3) (1977). Second, the purposes of the two types of provisions are quite different. TIL is a disclosure act and the real estate transactions qualifying under the above language are exempted from some but not all required disclosures. The purpose of the SCCPC real estate provisions, however, is primarily to determine the applicable interest rate for a given transaction. If the SCCPC applies, much higher interest rates are permissible than if it does not. *Compare* FRB Letter No. 1179, [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,588 (Apr. 28, 1977) (mortgage to pay off a prior bond for title arrangement does not qualify as a mortgage to finance the acquisition of a dwelling for TIL purposes) *with* Ad. Interpretation No. 1.301-7701, S.C. Dep't of Cons. Aff. (1977) (discussed *infra*). *See also* FRB Letter No. 1235 [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,674 (Sept. 2, 1977) (purchase money mortgage at 12% held not "equivalent to a first lien" since the property was sold subject to a prior development mortgage at 8% interest).

The second ruling on this topic came in early 1977 when the Department of Consumer Affairs issued an Administrative Interpretation holding that a purchase money mortgage in land includes a conventional mortgage given to pay off a prior purchase money mortgage. Ad. Interpretation No. 1.301-7701, S.C. Dep't of Cons. Aff. (1977). Whether or not the prior mortgage was a construction mortgage is not specified. In this interpretation, the Department abandoned the analogy of TIL language and stated instead that the South Carolina Legislature intended the scope of the SCCPC real estate provisions to be the same as those in the UCCC, which exempts the ordinary first lien home mortgage. *Id.* As is pointed out in the text, however, the language of the real estate exclusion in the UCCC and in the SCCPC is obviously quite different.

The third Administrative Interpretation held that a second mortgage to purchase an interest in the borrower's residence was not covered by the real estate exclusion and, therefore, was a consumer loan subject to SCCPC rates. *Id.* No. 3.104-7705. No reference to either the TIL or the UCCC real estate provisions was made in this ruling. Since the initial publication of the proposed regulation, the Department of Consumer Affairs has issued one additional relevant interpretation. It said that a loan that is used in the mortgagor's business and that is secured by a real estate mortgage on an existing lot and building owned by the mortgagor is not made to purchase land and, therefore, is not covered by the SCCPC exclusion. Declaratory Ruling No. 3.601-7712, S.C. Dep't of Cons. Aff. (1977). Neither TIL nor the UCCC are referred to in this ruling. All the results in these rulings would still be valid under the proposed regulation. See notes 126-28 and accompanying text *infra*.

son." Paragraph 2 exempts from the above definition a loan "made and used to pay off a loan 'primarily secured by a first lien that is a purchase money security interest in land' . . . if (a) The original principal amount of the loan being paid off has been reduced by at least 25% at the time of the refinancing, or (b) the new money advanced is at least 50% of the refinanced loan amount."[126] The purpose of paragraph 1 is to expand the SCCPC real estate exclusion to its broadest limits so that as many mortgages as possible will be excluded from the higher rates of the SCCPC. Under the proposed regulation almost all first lien purchase money mortgages on improved and unimproved real estate, construction mortgages, and permanent mortgages used to pay off prior construction mortgages[127] would be definitionally excluded from the SCCPC. Most refinancings, deferrals, or extensions of all such mortgages, which do not qualify for the "safe harbor" provisions of paragraph 2, would also be excluded. The only types of real estate mortgage loans that clearly will not fall within the exclusion as interpreted by the regulation are second mortgages and first mortgages on property already owned by the mortgagor where the property had no outstanding prior mortgage or if a prior mortgage is refinanced at a time when the payoff balance is less than 75% of the original principal amount or in a transaction in which new money equal to at least 50% of the total refinanced loan amount is advanced. Undoubtedly a considerable number of refinancing transactions will not meet the "safe harbor" tests in paragraph 2 of the proposed regulation. When this is the case, the prudent course of action would be to treat the transaction as if it falls within the definition of a loan "primarily secured by a first lien that is a purchase money security interest."[128] The proposed regulation is a good faith effort to overcome

126. Proposed Reg. No. 28-31-3.104, S.C. Dep't of Cons. Aff. (as revised Apr. 7, 1978).

127. If a prior construction mortgage does not qualify as a first lien purchase money mortgage, the later permanent mortgage could not be a first lien purchase money mortgage under the definition in paragraph 1 of the proposed regulation. See note 114 and accompanying text *supra*.

128. If the mortgage in question is determined to be one that is not subject to SCCPC rates, the regular South Carolina usury penalty statute applies and the mortgagor can collect twice the amount of any interest paid and need repay only the remaining principal of the mortgage. S.C. CODE ANN. § 34-31-50 (1976). A mortgage lender is really between a rock and a hard place in this situation even if the lender believes in good faith that the regulation is invalid because he knows from prior interpretations and the above discussed regulation that the Department of Consumer Affairs will interpret the real estate exclusion broadly, and, therefore, that there is little likelihood of getting a ruling favorable to the lender's position in a borderline case. The advantages of such a ruling are discussed in

some of the shortcomings of the SCCPC language and will be effective unless the 1979 Legislature disapproves it. Given the

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notes 430-31 and accompanying text *infra*. In addition, making a mortgage at SCCPC rates in a situation in which the Department of Consumer Affairs has specifically ruled that the transaction is not subject to SCCPC rates opens up the possibility of criminal sanctions for willful violation of the usury statutes. *See id.* § 34-31-100.

The initial version of this proposed regulation, published in 1977, attempted to define more generally the types of refinancing transactions that would not be "primarily secured by a first lien which is a purchase money security interest in land." Paragraph 2 of the initial proposed regulation stated that "[a] loan made and used to pay off a loan 'primarily secured by a first lien which is a purchase money security interest in land' is also such a loan if the prior loan balance when paid off was *substantially* as great as the amount of the new loan." Proposed Reg. No. 28-31-3.104, S.C. Dep't of Cons. Aff. (1977) (emphasis supplied). Apparently the idea behind this language was to treat all real estate mortgages that are essentially equivalent to purchase money mortgages, in the sense that the loan proceeds are used in part to acquire some rights in the land *or* the improvements, as purchase money mortgages even though they do not technically qualify as purchase money mortgages. This results in all these mortgages being subject to the non-SCCPC rate structure for first mortgages on real estate, which, as was pointed out in the text, is the presumed intent of the real estate provisions in the SCCPC. The initial proposed regulation would have made refinancing of a prior first lien purchase money mortgage a purchase money mortgage if the old loan was substantially as great as the new loan. Unfortunately, the term "substantially" was not defined, but presumably meant that unless the new loan is a great deal larger than the old loan, the new mortgage would be considered a purchase money mortgage. A typical refinancing of a prior mortgage for the purpose of providing some additional capital needed by the debtor for some purpose (for example, home improvements) would be a common type of mortgage covered by this paragraph in the regulation. Under the initial version of the regulation, this type of mortgage would qualify as a mortgage "primarily secured by a first lien which is a purchase money security interest in land" and, therefore, would be subject to the non-SCCPC real estate mortgage rates, unless the amount of the new mortgage was "substantially" greater than the old mortgage. The "substantially as great" test was criticized in the comments and hearings on the regulation as being too indefinite. In response to this criticism, the latest version of the proposed regulation, dated April 7, 1978, adopted the safe harbor provisions described in the text. It does not provide, however, any guidance for mortgages that do not qualify under the safe harbor provisions but, nevertheless, are not clearly "primarily secured by a first lien which is a purchase money security interest in land."

Another problem with the proposed regulation is the lack of a definition of "land" or "primarily." Although the language in the proposed regulation strongly suggests that the word "primarily" is used to qualify "purchase money mortgage" rather than the other two possibilities discussed in note 115 *supra*, problems relating to the lack of a definition of these concepts continue to exist. An additional problem not dealt with in the final revision of the proposed regulation is the status of a purchase money mortgage taken by a developer or other seller of real estate that is subsequently sold to a bank or other lender. See note 116 *supra*.

Nothing in either the initial or current version of the proposed regulation prevents a lender from taking a second mortgage instead of refinancing the initial mortgage, if the lender has the authority to take second mortgages. Handling the transaction in this fashion qualifies the loan for the higher rates permissible for second mortgages under both the SCCPC and non-SCCPC rate structures. See Parts II and III *infra*. This possibility has always existed. Paragraph 3 of the proposed regulation prohibits the splitting of a single loan into multiple agreements to obtain higher rates, but would not affect the type of second mortgage transaction discussed above.

problems with the statutory language, a judicial or legislative challenge to the regulation on the grounds that it unlawfully broadens the types of real estate mortgages that qualify as "primarily secured by a first lien which is a purchase money security interest in land" is likely.

In retrospect, the drafters of the 1976 SCCPC Amendments would have been well advised to insist on continuing the UCCC language, which would make all real estate mortgages above 12% per annum fully subject to the SCCPC and those below 12% subject to non-SCCPC law. The UCCC test is easy to apply and does not involve all the legal complications inherent in the jsccpc language. But hindsight is always better than foresight, and the SCCPC purchase money test is the law. Until this situation can be cleared up by court decision or further legislation, mortgagees would be well advised to use caution in making high-rate real estate loans based on a narrow, literal interpretation of the purchase money security interest concept, especially in light of the apparent legislative intent in enacting the 1976 SCCPC Amendments, not to change radically the prior interest rate structure governing real estate mortgages.

5. Summary List of Transactions Not Within the Definitions of Consumer Credit Sale, Consumer Loan, and Consumer Lease.—Any transaction not fitting the definitions of a consumer credit sale, consumer lease, or consumer loan is not a consumer credit transaction under the SCCPC. While the categories of these transactions can be easily deduced from the preceding discussion, the following summary may be helpful.

The definitions in the coverage sections implicitly place the following credit transactions outside the scope of the SCCPC:

1. Credit sales, leases, and loans made by persons not regularly engaged in these transactions;

2. credit sales, leases, and loans made to organizations, a term broadly defined to include all types of business and governmental entities except proprietorships;[129]

3. credit sales, leases, and loans made primarily for business or commercial purposes;

4. credit sales and loans in which there is no requirement for payment of a finance charge or for payment of the requisite number of installments;

5. credit sales and loans, other than those involving covered

129. S.C. CODE ANN. § 37-1-301(11) (1976).

real estate transactions, in which the amount financed exceeds $25,000;

6. leases in which the amount of the payments exceeds $25,000;

7. leases in which the term is four months or less; and

8. a credit sale of an interest in land in which the debt is primarily secured by a first lien that is a purchase money security interest in land or a loan primarily secured by a first lien that is a purchase money security interest in land.

Unless these transactions are made subject to the SCCPC by mutual agreement of the parties,[130] the permissible rates, charges, and other aspects of these transactions would be governed by non-SCCPC statutes and case law.[131]

These are not the only transactions excluded from the SCCPC. In the next section other types of exclusions are discussed.

C. Total and Partial Exclusions

Three broad categories of transactions are not within the coverage of some or all of the SCCPC. The first category consists of transactions that do not fit the SCCPC definitions of a consumer credit sale, lease, or loan and are therefore nonconsumer credit transactions. Credit for business purposes is the clearest example.[132] This type of exclusion was discussed in the preceding section. The second category consists of transactions that are totally excluded from the SCCPC by express provision. Loans, sales, or leases made for agricultural purposes are examples.[133] The third category consists of transactions that are excluded from some but not all of the provisions of the SCCPC. An example is loans made by insurance premium service companies to finance insurance purchases. These loans are exempt from the rate and charge provisions of the SCCPC, but are otherwise subject to all other sections.[134] The second and third categories of exclusion are discussed in this section.

The rationale behind the three different categories is hazy. The theory appears to be that transactions that do not involve an

130. *See id.* §§ 37-2-601 (1976), 37-3-601 (Cum. Supp. 1977). These provisions are discussed in Part II, section B(3) *infra.*

131. See Part III *infra.*

132. See Part I, section B(5) *supra.*

133. S.C. CODE ANN. § 37-1-202(8) (Cum. Supp. 1977).

134. *Id.* § 37-1-202(6).

extension of credit or a lease of personal property to an individual for personal, family, or household purposes ought not to be covered by a code that deals primarily with consumer credit.[135] Not all consumer credit transactions, however, are fully included in the SCCPC and not all nonconsumer credit transactions are excluded. Most transactions in the first and third categories and many totally excluded transactions of the second category would meet the definitional requirements for coverage by the SCCPC except that they are specifically excluded from all or some of its provisions.

A more realistic explanation for the different categories is that these coverage and exclusion provisions are the result of political compromises necessary to obtain approval of this legislation. Although evident in the drafting of the UCCC,[136] which provided the basic format for the SCCPC, this process was carried to an extreme by the South Carolina Legislature[137] so that the differences between the SCCPC and UCCC are greater in this area than in any other. The direct and collateral legal consequences of these differences are critical to a clear understanding of the SCCPC.

Section 1.202 of the 1968 text of the UCCC contains four partial or total exclusions.[138] The equivalent section of the SCCPC[139] contains these four plus an additional five for a total of nine exclusions.

1. Debts of Governmental Bodies.—All extensions of credit to governmental bodies, agencies, or instrumentalities are totally excluded from all provisions of the SCCPC on the theory that these transactions are not true consumer credit transactions.[140]

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135. *See* 1968 UCCC §§ 2.605, 3.605, Comments.

136. *See generally* authorities cited in note 5 *supra*. *Compare* these authorities *with* Landers, *The Scope of Coverage of the Truth in Lending Act*, 1976 AM. B. FOUNDATION RESEARCH J. 565 (contains an excellent discussion of the background and congressional debate on the TIL coverage provisions, which in many important respects are similar to those in the UCCC and the SCCPC).

137. *But see* note 102 *supra*.

138. 1968 UCCC § 1.202. The 1974 text of § 1.202, which substantially revised the four exclusions in the 1968 text, contains six exclusions. One new exclusion is for securities or commodities transactions with SEC registered broker-dealers and is identical to the TIL exclusion from § 104(2) of that Act, 15 U.S.C. § 1603(2) (1976). This particular exclusion was not included in the SCCPC. The second new exclusion in the 1974 UCCC is an optional exclusion of the rate and loan maturity provisions for credit union loans. The SCCPC totally excludes credit union loans. S.C. CODE ANN. § 37-1-202(10) (Cum. Supp. 1977). See Part I, section C(8) *infra*.

139. S.C. CODE ANN. § 37-1-202 (Cum. Supp. 1977).

140. *Id.* § 37-1-202(1). This exclusion is partially derived from TIL. *See* 15 U.S.C. §

2. Sale of Insurance by an Insurer.[141]—This exclusion is much narrower than it appears at first glance. It applies only to direct sales of insurance by insurers or their agents.[142] The financing of these sales is excluded from all provisions of the SCCPC, except the provisions on cancellation of property and liability policies.[143] Loans by a third party to pay for an insurance premium for personal, family, or household related insurance do not fall within this exclusion because these transactions are not sales by an insurer. Such third-party loan transactions are covered fully by the SCCPC, with the exception of loans by a licensed insurance premium service company. These loans are excluded from the SCCPC rate and charge provisions as explained in the next subsection. In addition, any insurance written for a consumer credit sale, lease, or loan, which is covered by the SCCPC and financed as part of the consumer credit transaction, is fully subject to the SCCPC. Thus, for example, premiums for credit life, disability, and property insurance financed by a bank as part of a loan to a consumer to purchase an automobile for his wife's personal use are fully subject to the SCCPC.[144]

1603(1) (1976).

141. S.C. CODE ANN. § 37-1-202(2) (Cum. Supp. 1977). The SCCPC insurance exclusion is identical to that in the 1968 UCCC. *See* 1968 UCCC § 1.202(2).

142. Some transactions within the scope of this exclusion are technically not financing transactions because they do not involve the extension of credit, as defined in S.C. CODE ANN. § 37-1-201(7) (Cum. Supp. 1977). For example, a three-year fire insurance policy with a privilege of yearly payment of premiums, but with a right of cancellation at any time by the insured, is not really a credit transaction. Since credit is involved in many consumer insurance sales by insurers these transactions would be subject to the SCCPC were it not for this exclusion. *Cf.* S.C. CODE ANN. § 37-2-105(3)(c) (1976) (defines "services" for purposes of a consumer credit sale under the SCCPC as "insurance provided by a person other than the insurer"). For an excellent short analysis of the insurance exclusion, see Miller, *Basic Exclusions, supra* note 89, at 290-94.

143. *See* S.C. CODE ANN. § 37-4-102(2) (Cum. Supp. 1977).

144. Borderline cases that will be hard to determine will obviously arise. For example, suppose a consumer buys a life insurance policy and gives a note to the insurance agent for the first year's premium. The transaction may technically still fit the definition of a sale by an insurer, in which case the transaction would be excluded from the SCCPC; in reality, however, it is no different from a loan by a third party to finance the premium, a covered transaction. Whether it is or is not within the SCCPC could make a difference in permissible charges and remedies. In addition, Article 4 of the SCCPC, S.C. CODE ANN. §§ 37-4-401 to -411 (1976 & Cum. Supp. 1977), extensively regulates the premiums and other aspects of consumer credit life, disability, and property insurance. Since the primary purpose of the SCCPC is to protect consumers, a court would likely construe this exclusion narrowly, and creditors would be well advised to do likewise. *See* Miller, *Basic Exclusions, supra* note 89, at 292-93. The 1974 UCCC revises the insurance exclusion considerably, narrowing further the scope of the exclusion and eliminating much of the confusion that results from the 1968 UCCC version incorporated into the SCCPC. The 1974 UCCC also

3. Rates and Charges for Certain Insurance Premium Loans.[145]—This exclusion covers the permissible rates and charges that can be made by insurance premium service companies, which are companies formed for the purpose of financing insurance premiums on various types of insurance purchased by individuals and businesses.[146] The remaining aspects of any insurance premium service company loan that qualified as a consumer loan are governed by the SCCPC. Insurance companies designated by this section are permitted to charge a $10 nonrefundable fee.[147] This fee produces a high actuarial annual percentage rate for typical small insurance premium loans on automobile and homeowner's policies when it is added to the permissible 9% per annum interest rate.[148] Apparently, this high rate is the main reason the insurance premium service companies requested exemption from the SCCPC rate structure.[149] A proposed provision for special high rates for this type of premium loan was considered but rejected, as unnecessary, by the 1974 UCCC drafting committee.[150]

This exclusion is also applicable to loans made by insurance agents or producers of record to finance the premiums on automobile, personal, family, or household insurance policies they sell.[151]

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contains special provisions for insurance premium loan agreements, which are not included in the SCCPC. *See* Miller & Warren, *supra* note 5, 629-30 (1975). Note that the inclusion or exclusion from the SCCPC does not affect any disclosure requirements under TIL. *See* note 76 *supra.*

145. S.C. CODE ANN. § 37-1-202(6) (Cum. Supp. 1977).

146. Insurance premium service companies are authorized and governed by §§ 38-27-10 to -140 (1976).

147. *Id.* § 38-27-90(d).

148. *Id.* § 38-27-90(e). A review of the annual reports of all licensed insurance premium service companies on file in the South Carolina Insurance Commission reveals that the average premium loan in 1976 was $300.20. If the seven companies whose premium loans average in excess of $1,000 are excluded, the average premium loan for the remaining twenty-two licensees was $256.75. The statistics show figures for all states where these companies are licensed, and the total amount of loans written in South Carolina is not separately stated.

149. Insurance premium service companies are licensed by the South Carolina Insurance Commission. *Id.* § 38-27-30 (1976). If the insurance premium service company rates were governed by the SCCPC, they would automatically be eligible to make loans at the 18% rate structure authorized for supervised lenders since they would qualify as supervised financial organizations. *See id.* § 37-1-301(17) (Cum. Supp. 1977). Without a license to make supervised loans the maximum rate that could be charged, including the $10 nonrefundable fee, would be 12% per annum. *See id.* § 37-3-201 (explained in Part II, section B *infra.*).

150. *See* Miller & Warren, *supra* note 5, at 630.

151. S.C. CODE ANN. § 37-1-202(6) (Cum. Supp. 1977). *See id.* §§ 38-51-410 to -480 (1976).

Originally doubt arose over the authority of agents to make loans because the legislation permitting the loan could be construed to limit the loans to automobile policies written under the South Carolina Assigned Risk Plan.[152] This plan has been inferentially repealed,[153] but a 1978 statute clears up this problem and raises the maximum interest rate on such loans from 12% to 18% per annum, or $1.50 per month, whichever is greater.[154] These loans are exempt from the SCCPC rate and charge provisions, but like loans by insurance premium service companies, are subject to all other provisions in the SCCPC.

4. Certain Transactions With Public Utilities.—This exclusion applies if "the charges for the services involved, the charges for delayed payment, and any discount allowed for early payment" are specifically regulated by a state or federal agency.[155] On the other hand, if the charges in question are not specifically regulated, then all provisions of the SCCPC apply, even though the utility in question is generally supervised by a regulatory agency. The concept behind this exclusion is the desirability of avoiding dual and possibly inconsistent regulation. If no specific

152. *Id.* § 38-51-410 (1976) (authorizes these advances "[w]hen, pursuant to the written or oral request of an insured or applicant for insurance, any insurance agent, insurance agency or producer of record under the *Assigned Risk Plan of the Motor Vehicle Safety Responsibility Act* shall advance all or any part of premium . . . ." *Id.* (emphasis added)). *See also id.* § 38-51-450 (Insured's failure to repay the agent advancing the premium will constitute grounds for cancellation of a policy insuring a private passenger automobile pursuant to § 38-37-1310 (1976)).

153. *See id.* §§ 38-37-710 to -790, -910 to -950 (1976 & Cum. Supp. 1977) (establishing a reinsurance pool to replace the assigned risk plan previously authorized by S.C. CODE ANN. § 46-719 (1962 & Cum. Supp. 1975) (repealed 1974)); Note, *The Automobile Reform Act (Part II): Compulsory Insurance—A Synopsis and Appraisal*, 27 S.C.L. REV. 919, 931-37, 944-45 (1975).

154. S.C. CODE ANN. § 38-51-410 (1976), *as amended by* No. 596, 1978 S.C. Acts 1746. No other charges can be made in connection with these loans. S.C. CODE ANN. § 38-51-420 (1976). Ironically, for rates and other aspects of the transaction, insurance agents might be better off with no special SCCPC rate exclusion. If the advancement of premiums by agents is construed as a sale of insurance rather than as a loan, see note 144 *supra*, the transaction is totally exempt from the SCCPC. *See* S.C. CODE ANN. § 37-1-202(6) (Cum. Supp. 1977). It is also exempt from any non-SCCPC rate limitations. *See id.* § 37-2-605 (1976). Even if the transaction qualifies as a consumer credit sale, it is eligible for the SCCPC rate structure, which authorizes a basic 18% per annum. *See id.* § 37-2-201 (Cum. Supp. 1977). On the other hand, even if these advancements were loans governed by the SCCPC, the maximum rate that could be charged would be 12% per annum, *id.* § 37-3-201, but the agent or producer of record could also make the additional permissible charges authorized by the SCCPC, *id.* § 37-3-202. If the agent or producer obtained a supervised lender license, the charge could be 18% per annum plus the authorized additional charges. *See id.* § 37-3-508.

155. *Id.* § 37-1-202(3).

public utility regulations covering the charges within this exclusion exist, however, the reason for the exclusion does not exist, and it does not apply.[156] Late payment fees charged by public utilities operating in South Carolina appear to be the main type of existing regulation that falls within this exclusion.[157]

5. Loans by Pawnbrokers.[158]—This exclusion applies only to rates, charges, and disclosures of the rates and charges to the extent that these items are regulated by other statutes, or ordinances. In South Carolina the exclusion is limited to loans of $50 or less.[159] The entire SCCPC, therefore, applies to all pawnbroker loans about $50, and all of the SCCPC, except the rate, charge, and most disclosure provisions, apply to pawnbroker loans below $50. Because in all likelihood pawnbroker loans are subject to the disclosure requirements of TIL, the purpose served by the disclosure exclusion is dubious.[160]

6. Government Supported Educational Loans Made to or on Behalf of Students.[161]—These educational loans are totally

156. *Cf.* Iowa v. Town of LeGrand, [1976] 5 CONS. CRED. GUIDE (CCH) ¶ 98, 034 (D. Iowa Jan. 3, 1978) (10% late payment charge for nonpayment of a water bill was interest subject to the Iowa usury law).

157. The South Carolina Public Service Commission has specifically authorized late payment charges of 1½% per month on unpaid balances for electric, gas, telephone, sewer, and water utility bills that are in arrears. In all cases, except telephone bills, this late payment charge cannot be made unless the bill remains unpaid for twenty-five days after the billing date. The late charge for unpaid telephone charges is apparently added to the bill at the time of the next succeeding billing date. *See* Rules and Regs. of the S.C. Pub. Service Comm'n Nos. 103-339(3), -439(3), -532(2), -622(2), -732(2), S.C. CODE OF STATE REGS. (1976). These regulations apply only to public utilities whose rates are regulated by the South Carolina Public Service Commission and do not apply to utilities whose rates are regulated by the Federal Power Commission. *Compare* S.C. CODE ANN. §§ 58-3-140, -210 (1976) *with* 16 U.S.C. § 824(d)-(e) (1976).

158. S.C. CODE ANN. § 37-1-202(4) (Cum. Supp. 1977). This exclusion is identical to that contained in § 1.202(4) of the 1968 UCCC.

159. S.C. CODE ANN. § 40-39-100 (1976). This statute authorizes a maximum charge of $1 per thirty-day period for each $10 loaned (up to $50). This amounts to a rate of 120% per annum calculated actuarially, as required by the SCCPC and TIL. For loans under $10 a flat fee of fifty cents in lieu of interest is authorized. *Id.*

160. The effect of the disclosure exemption appears to be that failure to comply with TIL disclosure rules would create a cause of action only under TIL, but not an additional state remedy, as would be the case with transactions covered by the SCCPC disclosure rules. See note 44 *supra.* The pawnbroker exclusion, however, technically exempts only "disclosure of rates and charges," but TIL and SCCPC require disclosure of items other than mere rates and charges, for example, security interests. If this exclusion is given a narrow interpretation, a state cause of action for violation of these other disclosure items arises. *See generally* Miller, *The Perplexing Status of Pawnbrokers Under the UCCC,* 24 OKLA. L. REV. 121 (1971).

161. S.C. CODE ANN. § 37-1-202(9) (Cum. Supp. 1977). *See, e.g.,* 20 U.S.C. §§ 421-441 (1976) (pertains to student loans under the National Defense Education Act); S.C.

excluded from all provisions of the SCCPC. These loans differ somewhat from ordinary consumer installment loans because they normally authorize longer than usual repayment periods, payments of interest only for a period of time, or both.[162] It is difficult, however, to justify a complete exclusion that has the effect of preventing the many consumer protective devices and remedies of the SCCPC from applying to any aspect of these loans. Educational loans covered by this exclusion are governed entirely by the non-SCCPC South Carolina usury statutes and common law.[163] Loans for educational purposes that are not made pursuant to "a government supported educational loan program," however, are fully covered by the SCCPC. It seems anomalous to have less protection for a government supported loan than a similar nongovernment loan, particularly when the SCCPC's overall purpose is protection of the consumer interest. No other state that has adopted the UCCC has a similar exemption.

7. Loans, Sales, or Leases Made Primarily for Agricultural Purposes.[164]—This exclusion in the SCCPC, which is a total ex-

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CODE ANN. § 34-13-40 (1976) (discussed in note 162 *infra*). *See generally* Jenkins, *Regulation of Colleges and Universities Under the Guaranteed Student Loan Program*, 4 J.C. & U.L. 13 (1976).

162. Under S.C. CODE ANN. § 34-13-40 (1976), which will continue to apply to these loans because of the educational loan exclusion in the SCCPC, the normal restrictions on repayment terms on installment loans do not apply to loans "for the purpose of obtaining higher education, however, the first payment on any such loan shall be made not later than four years from the date of completion of the course of higher education for which the loan was made." A similar provision in the SCCPC as an amendment to S.C. CODE ANN. § 37-3-511 (Cum. Supp. 1977), which requires substantially equal installment payments over a limited period of time for supervised loans (those with interest rates in excess of 12%) of $1,000 or less, appears sufficient to handle the special problems presented by these loans. Representatives of the banking industry who appeared before the Uniform Consumer Credit Code Study Committee insisted, however, that a complete exclusion be granted, and this recommendation was included in the proposed statute submitted by the Study Committee to the Legislature in 1976. *See* Committee on the Uniform Consumer Credit Code, *Report to the General Assembly*, 1976 S.C. HOUSE J. 914; 1976 S.C. SEN. J. 718. *See also* note 1 *supra*.

163. The permissible maximum rate will depend on the status of the lender. See Part V, Chart B(8) *infra*. Many educational loans are made by banks and can be made at a 7% add-on rate (12.68% per annum for a twelve-month loan calculated actuarially as required by the SCCPC and TIL). S.C. CODE ANN. § 34-13-120 (1976). Ironically, if not excluded, banks could make such loans at the much higher rates authorized by the SCCPC for supervised loans—base rate of 18%, and higher rates for loans of less than $1,000, *see id.* § 37-3-508 (Cum. Supp. 1977).

164. *Id.* § 37-1-202(8). "Agricultural purpose" is very broadly defined; however, a person dealing with agricultural products is engaged in an agricultural purpose only if the person in question "cultivates, plants, propagates or nurtures" the products in question. *Id.* § 37-1-301(4) (1976).

clusion, is different from the exclusion provided by the 1968 and 1974 texts of the UCCC and TIL. Both the UCCC and TIL cover agricultural credit of $25,000 or less to individuals involved in agricultural endeavors[165] on the theory that credit of this amount is mostly to individual small farmers and is more akin to consumer credit than ordinary business credit.[166] This rationale was apparently not persuasive to the South Carolina Legislature. The result is that all credit for agricultural purposes is governed by non-SCCPC statutes and case law,[167] and the permissible maximum rates and other charges depend on the status of the creditor and the type of credit transaction involved.[168]

8. Loans by Credit Unions.—All loans by credit unions are completely excluded from the SCCPC.[169] This exclusion was inserted at the insistence of the credit unions during the debate over the 1976 SCCPC Amendments.[170] The rationale given for the ex-

165. *See* 15 U.S.C. § 1603(5) (1976); Regulation Z, 12 C.F.R. § 226.3(e) (1977); 1968 UCCC §§ 2.104 (consumer credit sale), .106 (consumer lease), 3.104 (consumer loan); 1974 UCCC § 1.301(12), (14)-(15). Leases, however, (but not sales or loans below $25,000) for agricultural purposes are excluded from TIL disclosure requirements. Regulation Z, 12 C.F.R. § 226.2(mm) (1977).

166. *See, e.g.*, Landers, *The Scope of Coverage of the Truth in Lending Act*, 1976 AM. B. FOUNDATION RESEARCH J. 565, 661-65; Warren & Larmore, *Truth in Lending: Problems of Coverage*, 24 STAN. L. REV. 793, 811, 815 (1972).

167. One possible exception, which is debatable under the present wording of the SCCPC, see Part II, section B *infra*, is an agreement between a creditor and an agricultural debtor to be bound by the SCCPC, in which case the SCCPC rate structure applies and a 12% per annum actuarial rate is possible. S.C. CODE ANN. §§ 37-2-601 (1976), 37-3-601, -605 (Cum. Supp. 1977).

168. Depending on the type of creditor and the kind of transaction, the authorized rates under the SCCPC might be higher or lower than non-SCCPC rates for the same amount of credit. For example, the maximum permissible rate for a single payment agricultural loan of $50,000 or less is 8% per annum; however, the same transaction can be made for up to 12% per annum if it is subject to the SCCPC. On the other hand, if the same loan is payable in three or more installments, the lender can charge up to 12.68% per annum on a 12 month contract if the transaction is *not* governed by the SCCPC versus 12% if the transaction is governed by the SCCPC rate structure. See Part V, Chart B(8) *infra*. The real issue, however, ought to be whether the exclusion adversely affects small farmers by cutting down undesirably on the amount of credit available to them. If the permissible rates do not justify the investment, a creditor will simply not enter into the transaction or will increase the credit requirements so that he lowers the risk factors. *See* authorities cited notes 217 and 752-53 *infra*. To place small farmers on an equal basis with large farmers, which is the result of the SCCPC exclusion, begs this issue. A great deal of credit to large farmers, particularly in larger amounts, is subject to higher rate maximums than are permitted for small credit transactions with small individual farmers because of the many exceptions to the basic South Carolina usury statutory contract rate of 8%. See Part III, section B(2) *infra*.

169. S.C. CODE ANN. § 37-1-202(10) (Cum. Supp. 1977).

170. *See* 1976 S.C. HOUSE J. 2675. The 1976 UCCC Committee Report, *supra* note 162, did not contain any kind of exclusion for credit unions. Representatives from the

clusion was the desire of credit unions to continue to make loans at a maximum of 12% per annum as authorized by federal and state statutes[171] rather than at the higher rates authorized for supervised lenders under the SCCPC. Many observers have speculated, however, that the real reason for the requested exclusion, originally made by the credit unions at the time the 1968 UCCC was drafted, was to prevent a wholesale conversion of federal credit unions, whose rates are set at a 12% maximum by federal statute, into state credit unions, if state credit unions could qualify for the higher SCCPC rate structure.[172] Federal credit unions outnumber state credit unions by better than four to one in South Carolina.[173]

South Carolina Credit Union League requested exclusion at a House Judiciary Committee hearing on S. 119, which ultimately became the 1976 SCCPC Amendments, *see* note 1 *supra,* but the Judiciary Committee reported out S. 119 without such an exclusion. The amendment creating this exclusion was one of the few amendments approved during the protracted debate over S. 119 in the 1976 legislative session.

171. 12 U.S.C. § 1757(5)(A)(vi) (Supp. 1977) (federal credit unions); S.C. CODE ANN. § 34-27-70 (1976) (state credit unions). One major difference between the two is that the 12% limit authorized for federal credit union loans is by statute *inclusive* of all other charges, whereas the 12% authorized for state credit loans is presumably *exclusive* of any additional charges authorized by common law or applicable regulations.

172. *See, e.g.,* Braucher, *Consumer Credit Reform: Rates, Profits and Competition,* 43 TEMP. L.Q. 313, 322-23 (1970); Miller & Warren, *supra* note 144, at 626 n.72. The conversion problem could be avoided by amending the Federal Credit Union Act to authorize federal credit unions to charge the same rates as state credit unions. A similar statute allowing national banks to charge the highest rates authorized by state laws has been in effect for many years. 12 U.S.C. § 85 (1976). The concern of credit unions over their inclusion in the SCCPC rate structure is illogical. Being legally authorized to charge higher rates does not mean that a lender has to, or actually would, charge the highest rates permitted. Because of the cost advantages they have over banks and consumer finance companies, credit unions would still be able to make profitable loans at rates below those of their competitors even if they were fully covered by the SCCPC. See note 178 *infra.* The only disadvantage in being authorized to lend under SCCPC rates is loss of the ability to advertise that loans with interest rates in excess of 12% are not legally authorized. Rationally, a consumer should be more interested in knowing that a loan from his credit union carries an interest rate lower than the equivalent credit from someone else than he is in knowing the difference between the interest rate he is being charged and the maximum legal rate.

173. *See* 1977 S.C. CREDIT UNION LEAGUE Y.B. 18-24. For multistate companies with multiple credit unions, dealing with one federal supervisory agency, the Federal Credit Union Administration, is far simpler than dealing with a multitude of state regulatory agencies. In addition, a variety of other administrative and operational advantages are available for operating as a federal credit union. Traditionally, the loan authority of federal credit unions has been greater than that of state credit unions with the exception of authority to make long-term real estate loans. In 1975 the South Carolina Legislature enacted S.C. CODE ANN. § 34-1-110 (1976), which authorizes state-chartered credit unions to have the same loan powers as federal credit unions pursuant to regulations issued by the State Board of Financial Institutions. If the Board of Financial Institutions issues the

No other state that has adopted the UCCC has a similar total exclusion. The 1974 UCCC authorizes an optional exclusion for "the ceilings on rates or limits on loan maturities" for credit union loans, but all remaining provisions of the UCCC apply to those transactions.[174] While a limited exclusion, such as the optional exclusion in the 1974 UCCC, could be rationalized because credit unions do not need or want the higher rates available under the SCCPC, the complete exclusion is very difficult to justify. Nationwide, credit unions are the fastest growing segment in the consumer credit industry. Credit union loans increased nationally from $9.8 billion in 1967 to $34.1 billion at the end of 1976.[175] In South Carolina credit unions had outstanding loans of $350.2 million at the end of 1976. This figure represents an increase of over $125 million in outstanding loans since the end of 1974.[176] The total exclusion in the SCCPC carves out an enormous segment of consumer credit from many of the important SCCPC consumer protective devices and remedies[177] and increases the already substantial cost advantages credit unions have over their

appropriate regulations, state and federal credit unions would then have loan authority on an equal basis. In 1977 the United States Congress passed major liberalizing amendments to the Federal Credit Union Act. *See* 12 U.S.C. §§ 1751-1790 (1976 & Supp. 1977). Included in these amendments are authorization for twelve-year maturities on all loans except for first liens on mobile homes, which can have a fifteen-year maturity, and residential real estate acquisition loans for one to four family dwellings, which can have a maturity of up to 30 years. For the first time federal credit unions will also be authorized to extend lines of credit to members, lend to other credit unions, and enter into loan participation agreements with other credit unions. Act of Apr. 19, 1977, Pub. L. No. 95-22, 91 Stat. 49 (amending 12 U.S.C. § 1757(5) (1976)).

174. 1974 UCCC § 1.202(6).

175. 1977 CREDIT UNION NAT'L A.Y.B. 25-27.

176. *Id.* at 26; 1977 S.C. CREDIT UNION LEAGUE Y.B. 17.

177. Although the permissible interest rates under the SCCPC are higher than those now authorized for credit unions, the other aspect of such loans are largely unregulated—with the result that debtors with consumer loans from credit unions do not have the same amount of protection as other consumer debtors. For example, in a credit union loan no guaranteed right of cure before enforcement of a past due obligation exists as it does under the SCCPC, S.C. CODE ANN. §§ 37-5-110 to -111 (Cum. Supp. 1977). Nor would a debtor be entitled by statute to all the notices and other consumer protective devices guaranteed a debtor by the SCCPC. See INTEGRATED CODE, supra note 3, Introduction. In addition, charges that are permitted state credit unions, other than interest, are subject only to nebulous common-law limitations, and, at the present time, no statute imposes a civil penalty or other remedy against a state credit union that levies excess charges and interest. The only remedy is recovery of the excess charge. See Part II, section E *infra* for further explanation of this issue. The statute regulating federal credit unions, however, specifically provides for forfeiture of all interest and a right to recover any interest paid in the event of excess charges. 12 U.S.C. § 1757(5)(A)(vii) (Supp. 1977).

chief competitors, commercial banks and consumer finance companies.[178]

9. Loans by Consumer Finance Companies Holding Licenses Under Act 988 of 1966.[179]—This is the most complicated of all exclusions in the SCCPC; no other state that has adopted the UCCC has similar provisions. Nevertheless, this exclusion produces a workable system that gives consumers with loans from consumer finance companies qualifying for the exclusion more rights and remedies than if the loans were governed by the SCCPC.

The scope of this exclusion is the product of a carefully worked out compromise between the small independent consumer finance companies whose average loans are under $500 and the remaining consumer finance companies and other lenders authorized to do business in the state. Under this compromise, consumer finance companies have a choice: they can maintain a license under Act 988 of 1966 (Act 988),[180] in which case all loans will be subject to the rates and charges established by Act 988, or they can obtain a license to make loans as a supervised lender under the SCCPC, in which case all loans would be subject to the SCCPC rate structure.[181]

178. Credit unions have considerably lower operating costs than banks and consumer finance companies. Their offices are often provided by the sponsoring employer rent free or at minimal rental fee; they need few employees because of the relative simplicity of their operation; their advertising costs are much less; their employees on the average are paid less than competitors' employees; and the cost of their capital (interest rate on depositor's savings accounts) is considerably less than the normal borrowing rate paid for equity capital by their competitors, particularly consumer finance companies. Credit unions also do not have to pay dividends to shareholders (other than dividends on savings accounts) as do banks and consumer finance companies, which are profitmaking ventures. In addition, credit unions, as cooperatives, are essentially nontaxable entities, unlike their competitors. *See, e.g.*, P. SMITH, COST OF PROVIDING CONSUMER CREDIT 10, 16-19 (1962). Furthermore, the *in terrorem* effect of being an employee of the sponsoring employer naturally causes collections to be more prompt and less expensive than for banks and consumer finance companies making the same loan to the same individual. In combination, these and other cost and risk advantages of credit unions account for their combined ability to make consumer installment loans at rates substantially below those of banks and consumer finance companies and in spite of existing interest rate market conditions, to make a reasonable return on a 12% per annum maximum rate structure.

179. S.C. CODE ANN. § 37-1-202(7) (Cum. Supp. 1977).

180. No. 988, 1966 S.C. Acts 2391.

181. *See* S.C. CODE ANN. §§ 37-3-500, -501(3) to (4), 37-9-102 (Cum. Supp. 1977). In SCCPC terminology consumer finance companies with Act 988 licenses are designated restricted lenders who make restricted loans, but consumer finance companies operating under SCCPC licenses are supervised lenders who are entitled to make supervised loans. *See id.* §§ 37-3-501 to -503.

The Act 988 maximum rates[182] are higher for small loans than the SCCPC maximum rates for supervised loans.[183] For example, on a one-year loan for $400, the maximum rate that can be charged under the SCCPC is 34.67% per annum,[184] but the maximum rate under Act 988 is 36.33% per annum. If this twelve-month loan was for $500, however, the maximum rate permitted under the SCCPC is 33.03% per annum as opposed to a 32.38% per annum maximum under Act 988; if the loan was for $1,000, the maximum SCCPC rate is 28.05% per annum, as opposed to a 24.39% per annum maximum under Act 988.[185]

This rate differential is the main reason the drafters expected the consumer finance companies whose loan portfolios consisted primarily of small loans under $500 to retain their Act 988 licenses. The consumer finance companies whose loan portfolios consisted in the main of larger loans, however, were expected to give up their Act 988 licenses in favor of an SCCPC supervised lender license. Since the effective dates of the 1976 SCCPC Amendments, this bifurcation has occurred as expected. Presently approximately 55% of all licensed consumer finance companies have SCCPC supervised lender licenses, and approximately 45% have Act 988 licenses.[186]

This unique South Carolina "compromise" has important collateral legal consequences. The exclusion for Act 988 licensees is unlike any of the other eight discussed in this section:

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182. *Id.* § 34-29-140.

183. *Id.* § 37-3-508.

184. These figures are all computed on an equivalent actuarial basis, as required by the SCCPC and TIL. The cited Act 988 rates include in their computation the authorized initial fee that can be made in addition to the permitted finance charge. *See id.* § 34-29-140. Inclusion of the initial fee for comparison purposes is appropriate since most charges covered by the initial fee have to be included as part of the loan finance charge in a loan subject to the SCCPC rate structure. See Part II, section D(1) *infra.*

185. The breaking point, at which the SCCPC rates become higher than those in Act 988 of 1966, varies with the maturity of the loan. For a loan with a twelve-month maturity, the breaking point occurs at $475. For a loan with an eighteen-month maturity, however, the breaking point is $375, and for a loan with a twenty-four month maturity, the breaking point is $325.

186. *See* letter of Everett H. Whittler, Director, Consumer Finance Division Report of the Board of Financial Institutions, 1976 *Annual Report* [hereinafter cited as *1976 Consumer Finance Division Annual Report*]. As of December 31, 1976, 342 consumer finance companies were licensed to make SCCPC supervised loans and 293 were Act 988 restricted lenders. *Id.* The average loan made by all consumer finance companies in 1976 was $684.37. Forty-four percent (252,734) of the loans made by all licensed consumer finance companies in 1976 (573,479) were for $300 or less; but these loans accounted for only 10.5% of the total loans made. *Id.* Consumer finance companies specializing in these smaller loans are the ones that have Act 988 licenses.

not only does it specifically exclude the SCCPC rate and charge provisions[187] and some, but not all, of the other provisions of the SCCPC,[188] but the SCCPC also contains a provision that states that "any inconsistency or conflict between any provision of this Act and Act 988 shall be resolved in favor of Act 988."[189] This provision ensures that Act 988 licensees will continue to be subject to all of Act 988 except when the SCCPC specifically states that the SCCPC is to apply to loans made by Act 988 licensees or when Act 988 contains no applicable provision contained in the SCCPC and the SCCPC does not prohibit the SCCPC provision from applying to loans by Act 988 licensees.

The practical applications of this rather unusual and convoluted blending of two major pieces of regulatory legislation are significant and far reaching. Consumer finance companies operating as Act 988 licensees are limited to loans of less than $7500,[190] as opposed to a no dollar limitation for consumer finance companies operating as SCCPC supervised lender-licensees; they are able to charge Act 988 rates and charges, though, including the late charges, deferral fees, and prepayment penalties specified by Act 988.[191] Loans by consumer finance companies having Act 988 licenses, however, are subject to the provisions of Act 988 voiding loans if excess charges are made, instead of to the less strict penalties in the SCCPC.[192] In addition, the maximum maturity rate provisions of Act 988 rather than the less restrictive provisions of the SCCPC[193] apply, and the credit insurance provisions

187. S.C. CODE ANN. § 37-1-202(7) (Cum. Supp. 1977).

188. *See id.* §§ 37-3-200 (prevents Part 2 of Article 3 of the SCCPC, dealing with permissible rates and other charges, from applying to restricted loans), 37-3-500 (with the exception of one section, see note 204 *infra*, prevents Part 5 of Article 3 of the SCCPC, dealing with supervised loans, from applying to restricted loans), 37-4-102(2) (with the exception of the provisions on cancellation of consumer credit insurance, prevents Article 4 of the SCCPC from applying to restricted loans) (Cum. Supp. 1977).

189. *Id.* § 37-1-106. This section was § 60 of the 1976 SCCPC Amendments, which modified an earlier version that was contained in § 5 of the 1974 SCCPC. If it were not for this provision, which was deemed essential by the smaller independent consumer finance companies, the higher rates they sought to protect could have been achieved either by exempting very small loans from the SCCPC rate structure or by including a special high rate section for very small loans in the SCCPC. The former was done, for example, in the case of insurance premium service companies discussed *supra*. The latter alternative was the approach utilized in Oklahoma when it adopted the UCCC. *See* OKLA. STAT. ANN. tit. 14A, § 3-508B (West 1972).

190. S.C. CODE ANN. §§ 34-29-20 (1976), -140 (Cum. Supp. 1977).

191. *Compare id.* § 34-29-140 (Cum. Supp. 1977) *with id.* §§ 37-3-201 to -210, -508.

192. *Compare id.* § 34-29-140(e) *with id.* § 37-5-202.

193. *Compare id.* § 34-29-140(b) *with id.* § 37-3-511. The main difference is that Act

of Act 988, rather than Article 4 of the SCCPC,[194] govern. Act 988 requires that both a husband and wife sign a security interest covering household furniture,[195] but the SCCPC has no similar provision. Finally Act 988 prohibits purchase money real estate loans.[196] In all these instances, Act 988 governs the transaction because it specifically covers the particular matter or the SCCPC expressly defers to Act 988. On the other hand, the SCCPC provisions apply to those aspects of a transaction that are not expressly covered by Act 988 or excluded by the SCCPC. This includes limitations on balloon payments[197] and wage assignments,[198] and authorization for debtors to assert defenses against lenders in interlocking loans.[199] On the same basis the Article 5 rights of debtors and limitations of creditors, including the debtor's right of cure[200] and restrictions on events of default,[201] also apply to loans made by Act 988 licensees. The SCCPC penalty for excess charges, however, will not apply since, as was pointed out above, Act 988 contains its own penalty provision.[202] While this is not an exhaustive list of the interaction between Act 988 and the SCCPC,[203] it should serve the purpose of illustrating the appropri-

988 has maximum maturity dates for all permissible loans. See note 543 and accompanying text *infra*.

194. *Compare* S.C. CODE ANN. § 34-29-160 (1976) *with id.* §§ 37-4-107 to -304 (1976 & Cum. Supp. 1977). Pursuant to § 37-4-102(2) (Cum. Supp. 1977), Article 4 of the SCCPC, except the provision relating to cancellation of property and liability insurance, *see id.* § 37-4-304 (1976), does not apply to loans made by Act 988 licensees. Determining from the statutory language whether there will be any substantial difference in the cost and other regulations of life, disability, liability, and property damage insurance between Act 988 restricted loans and SCCPC supervised loans is difficult. *Cf.* Ad. Interpretation No. 4.107-7612, S.C. Dep't of Cons. Aff. (1976) (the SCCPC, unlike Act 988, does not specify what retroactivity feature is permissible for consumer credit insurance).

195. S.C. CODE ANN. § 34-29-150(e) (1976).

196. *Id.* § 34-29-140(h) (Cum. Supp. 1977). The SCCPC prohibits a security interest in land for a supervised loan of $1,000 or less. *Id.* § 37-3-510. This limitation does not, however, apply to Act 988 licensees making restricted loans. *See id.* § 37-3-500.

197. *Id.* § 37-3-402 (1976).

198. *Id.* § 37-3-403.

199. *Id.* § 37-3-410.

200. *Id.* §§ 37-5-110 to -111 (Cum. Supp. 1977). These sections require that a debtor be given a notice of default and a twenty-day right to cure before any consumer credit obligation can be accelerated or foreclosed. Only one notice and right to cure is required. If the debtor is subsequently in default, the creditor can proceed to enforce its rights without any further cure notices.

201. *Id.* § 37-5-109. Under this provision, failure to make a required payment is the only absolute event of default. Any other default must involve "significant impairment" of the prospect of payment, performance, or realization of the collateral, and the burden of proving "significant impairment" is on the creditor.

202. See note 192 and accompanying text *supra*.

203. Most sections that could apply for the SCCPC are in Parts 3 and 4 of Article 3

ate result for many of the questions that are likely to arise.[204]

The exclusion for consumer finance companies operating under Act 988 licenses is far more rational than the exclusion for credit unions and some of the other exclusions discussed above. This exclusion does not result in lack of regulation of many important aspects of consumer loans as does the credit union exclusion. A consumer with a loan from an Act 988 licensee actually has more rights than he would if the same loan were governed totally by the SCCPC because the Act 988 exclusion serves to blend the protective devices of both acts. The difference in the treatment of consumer finance companies and credit unions is brought into sharper focus when one considers they are competitors in essentially the same market segment in South Carolina

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and in Articles 5 and 6. In several instances, because of parallel provisions in both acts, no specific exclusion applies. For example, both acts prohibit cognovit confession of judgment clauses. *Compare* S.C. CODE ANN. § 34-29-170 (1976) *with id.* § 37-3-407. To the extent there is any difference in wording in these parallel statutes it seems that the section that provides the greatest protection to the consumer would apply since no "inconsistency or conflict", in the sense of a direct conflict in statutory coverage appears and since such an interpretation is consistent with the policy followed by courts in interpreting federal and state statutes regulating the same subject matter. *See* note 18 *supra.* One possible application of this rationale is in the prohibition contained in both acts against loan splitting. *Compare* S.C. CODE ANN. § 34-28-110(d) (1976) *with id.* § 37-3-409. Violation of the provision in Act 988 results in a void loan as opposed to much less stringent penalties in the SCCPC. See note 192 and accompanying text *supra.* Therefore, the Act 988 provision should apply. There is some danger, however, that the Act 988 provision violates the Equal Credit Opportunity Act, 15 U.S.C. § 1691(c) (1976), and Regulation Z, 12 C.F.R. § 202.8 (1977). *See* 1975 OP. S.C. ATT'Y GEN. No. 4209. If this proves to be the case, the SCCPC prohibition against multiple agreements would apply since at that point no "inconsistency" would exist because the Act 988 provision would not be effective.

204. Two additional aspects of the relationship between Act 988 restricted lenders and SCCPC supervised lenders justify additional comments. First, S.C. CODE ANN. § 37-3-512 (Cum. Supp. 1977), which restricts the types of business, other than the making of loans, that can be conducted by a supervised lender, applies to Act 988 licensees rather than the more vague Act 988 provision at § 34-29-130(a) (1976). *See id.* §§ 37-1-106, 37-3-500 (Cum. Supp. 1977). Second, administratively, licensing and examination functions of all consumer finance companies, whether they operate under SCCPC supervised lender licenses or under Act 988 restricted lender licenses, are controlled by the State Board of Financial Institutions. All consumer finance companies are, however, under the jurisdiction of the Department of Consumer Affairs for administrative enforcement of violations of the SCCPC and other applicable statutes dealing with consumer credit. *See id.* §§ 37-3-503 to -507 (Cum. Supp. 1977), 37-6-101 to -117 (1976 & Cum. Supp. 1977). While there are some differences, the standards for granting and revoking licenses for both types of consumer finance companies are essentially identical. *Compare id.* §§ 37-3-503 to -504 (Cum. Supp. 1977) *with id.* §§ 34-29-40 to -80 (1976). *See also* INTEGRATED CODE, *supra* note 3, §§ 37-3-503, -504, Comments. Both statutes require a showing of "convenience and advantage," contrary to the 1968 and 1974 UCCC, which eliminated the convenience and advantage test because it had the effect of stifling competition among lenders. *See* 1968 UCCC § 3.503, Comments; 1974 UCCC § 2.302, Comments.

and have an almost identical amount of consumer credit loans outstanding.[205]

D. Conflict of Laws

A final area related to the coverage of the SCCPC that merits discussion is the conflict of laws rules that determine when and to what extent the SCCPC will apply to a multistate consumer credit transaction.[206] Many consumer credit transactions involve more than one state so that it is necessary to determine which state's laws will apply to these transactions. For example, consumer credit transactions are often handled by mail with receipt of a catalog being the only part of the transaction taking place in South Carolina. Many credit purchases of goods and personal loans are also made through personal solicitations in South Carolina by nonresident salesmen of companies that have no offices or resident agents in this state. In both types of transactions, the contract and other documents are typically mailed to the seller's or lender's home office in another state where they are accepted and the transaction is consummated. In addition, many credit transactions in communities along the boundaries of South Carolina will frequently be with creditors located in adjoining states. South Carolina residents also will frequently enter into consumer credit transactions while travelling through or temporarily staying in other states. Another typical situation presenting conflict of laws problems involves individuals who were residents of another state when the consumer credit transactions were entered into, but who subsequently move to South Carolina. If a transaction meets the SCCPC criteria of a consumer credit sale, consumer loan, or consumer lease, the effect of having the laws of the other state apply rather than the laws of South Carolina is the same as if the transactions had been excluded by definition or by a specific exclusion from the SCCPC.

In general, courts have been quite liberal in upholding multistate contracts against claims of usury. The rule followed by the South Carolina Supreme Court[207] and most other

205. At the end of 1976 all consumer finance companies had $348.2 million in outstanding loans in South Carolina. *1976 Consumer Finance Division Annual Report, supra* note 186, at 5. Credit unions had $350.2 million in outstanding loans. 1977 S.C. CREDIT UNION LEAGUE Y.B. 17.

206. S.C. CODE ANN. § 37-1-201 (Cum. Supp. 1977).

207. *See, e.g.*, Columbian Bldg. & Loan Ass'n v. Rice, 68 S.C. 236, 47 S.E. 63 (1904); British Am. Mtg. Co. v. Bates, 58 S.C. 551, 36 S.E. 917 (1900); Equitable Bldg. & Loan

courts[208] is that in the absence of a contrary statute a credit transaction that is usurious under the laws of one state but nonusurious under the laws of another state having a significant contact with the transaction will be held to be nonusurious.

South Carolina has two contrary statutes modifying this rule.[209] The first, which was enacted in 1898, states that "the rate of interest allowed and in all other respects," on any mortgage on real estate located in South Carolina will be governed by South Carolina law.[210] This statute is limited to real estate mortgages

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Ass'n v. Vance, 49 S.C. 402, 27 S.E. 274 (1896); Thornton v. Dean, 19 S.C. 583 (1883). *See also* Savannah Bank & Tr. Co. v. Shuman, 250 S.C. 344, 157 S.E.2d 864 (1967), discussed note 210 *infra*. A close reading of these and similar cases clearly indicates that while the court rationalized its decisions on grounds that the contracts were to be made or performed in the state whose laws were held to apply, the cases actually are basically indistinguishable in their essential facts, and the state chosen was the state in which the transaction was not usurious. In other types of contract cases the South Carolina Supreme Court has fairly consistently applied the laws of the state where the contract was made, regardless of the state designated as the place of performance. *See, e.g.*, Columbia Weighing Mach. Co. v. Rhem, 164 S.C. 376, 162 S.E. 427 (1931).

208. *See, e.g.*, Fahs v. Martin, 224 F.2d 387 (5th Cir. 1955); Annot., 125 A.L.R. 482 (1940); Weintraub, *Beyond Dépeçage: A "New Rule" Approach to Choice of Law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Consumer Credit Code*, 25 CASE W.L. REV. 16 (1974); Comment, *Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris*, 55 CAL. L. REV. 123 (1967). Many credit contracts stipulate that the law of a particular state will apply. If the state specified has some reasonable relation to the contract and no controlling statute specifies otherwise, the stipulation will be upheld. This rule, codified in UCC § 1.105, S.C. CODE ANN. § 36-1-105 (1976), is really nothing more than an application of the broader rule applied by courts even in the absence of such a stipulation. *See* authorities cited this footnote *supra*.

209. Theoretically, there is a third such statute, *S.C. Code Ann.* § 34-29-220 (1976), that mandates that small loans of under $7,500 made by consumer finance companies holding licenses under Act 988 of 1966 be governed by Act 988, but provides that Act 988 will not apply to loans valid under the laws of another state "with a regulatory consumer finance law similar in principles to this chapter." Because of the unusual relationship between Act 988 and the SCCPC, see Part I, section C(9) *supra*, this statute may still be effective, but whatever its meaning may be, it applies only to a situation in which the rates and other charges authorized by another state are greater than those authorized by Act 988, a situation that is quite unlikely to occur.

210. S.C. CODE ANN. § 29-3-60 (1976). This statute was most recently construed to apply South Carolina law to a loan made to South Carolina residents secured in part by a mortgage on South Carolina real estate. Savannah Bank & Tr. Co. v. Shuman, 250 S.C. 344, 157 S.E.2d 864 (1967). The loan was payable and all documents were accepted in Georgia. One interesting aspect of the case is that the loan was usurious under Georgia law as well as under South Carolina law, but under Georgia law a usurious loan of this type is apparently totally void whereas under South Carolina law the creditor could still recover the principal despite the usury. The South Carolina Supreme Court applied South Carolina law to the entire transaction even though part of the collateral for the loan was business equipment. In a case in which a transaction is usurious under the law of all the states involved, a majority of courts will apply the usury laws of the state that imposes the least penalty. *See, e.g.*, Pellerin Laundry Mach. Sales Co. v. Hogue, 219 F. Supp. 629, 640 (W.D. Ark. 1963).

and does not apply to security interests in personal property or to unsecured credit. The second statute is the SCCPC conflict of laws provision.[211] Although application of these statutes to all the various facets of consumer credit transactions covered by the SCCPC is complex,[212] rules regarding credit charges are quite simple: (1) if the transaction is covered by the SCCPC and is made to an individual who is a resident of this state at the time the credit is extended, then the creditor cannot collect credit charges in excess of those authorized by the SCCPC;[213] however, (2) if the debtor was a nonresident at the time the credit was extended, then, unless the transaction is secured by real estate located in South Carolina, the rates and charges of the state whose laws are deemed to be applicable to the transaction would control, whether those rates are lower or higher than the SCCPC rate structure.[214] Under the first of these rules, a creditor cannot recover any rates or charges in excess of those permitted by the SCCPC in an action brought in South Carolina to enforce the obligation, even though the entire transaction was handled by mail with an out-of-state creditor or the South Carolina resident

211. S.C. CODE ANN. § 37-1-201 (Cum. Supp. 1977).

212. *See* INTEGRATED CODE, *supra* note 3, § 37-1-202, Comments. Different parts of the SCCPC apply depending on whether the credit is made in South Carolina and whether the debtor was a South Carolina resident at the time the credit was granted.

213. S.C. CODE ANN. § 37-1-201(1) to (5) (Cum. Supp. 1977). The impact of these two rules is nicely illustrated by a recent Georgia case in which a consumer loan that was made by a South Carolina consumer finance company to Georgia residents, who lived in or near Augusta, and was secured by real and personal property located in Georgia, was held to be governed entirely by South Carolina law even though for the purposes of the ruling the loan was admitted to be usurious under Georgia law. Clark v. Transouth Fin. Corp., 142 Ga. App. 389, 236 S.E.2d 135 (1977). This is the traditionally acceptable court resolution to this type of problem. See notes 207-10 and accompanying text *supra*. If this transaction had been made to South Carolina residents by a Georgia lender after the effective date of the 1976 SCCPC Amendments, the SCCPC would automatically apply regardless of whether the note or mortgage specified that Georgia law would apply and even if the transaction were in excess of the maximum SCCPC rates but less than the maximum rates authorized by Georgia law. S.C. CODE ANN. § 37-1-201 (Cum. Supp. 1977). Thus, for debtors who are residents of South Carolina at the time the credit is extended, the rule in § 37-1-201 (Cum. Supp. 1977) effects a significant change in prior law.

214. *Id.* § 37-1-201(3) to (5). Presumably, in cases falling within the second rule, the courts will uphold a stipulation that the laws of one of the original states having a significant contact with the transaction will apply. *See* note 208 *supra*. Such a stipulation would not, however, be upheld in a transaction falling within the first rule. *See* note 213 *supra*. The UCCC has specific provisions invalidating such stipulations for debtors who are residents of the UCCC state at the time credit is extended. *See* 1968 UCCC § 1.201(9)(a); 1974 UCCC § 1.201(8). Unfortunately, these provisions were omitted from the SCCPC, but the same result can be reached by application of the statutory language that was adopted.

entered into the consumer credit transaction while travelling or visiting in another state.[215]

E. Summary

Despite the many types of transactions that are excluded either wholly or partially from the SCCPC, most types of credit transactions that traditionally have been classified as consumer credit transactions usually are covered by some provisions of the SCCPC or equivalent legislation. The major exceptions consist of certain types of real estate mortgage transactions, loans by credit unions, and governmentally supported educational loans. To the extent that a transaction is not covered by the SCCPC, it will be governed by other South Carolina statutes, federal laws, or both. The maximum rates and other charges that can be made in such transactions are discussed in Part III. The rates and other charges that can be made in transactions whose rates are governed by the SCCPC are analyzed in Part II of this article.

PART II. SCCPC RATE STRUCTURE

A. Comparison With UCCC Rate Structure

The rationale behind the composition of the SCCPC rate structure is the same as that behind the UCCC. Open, effective competition among creditors, rather than inflexible interest maximums, is felt to better assure an adequate amount of credit for all segments of society at a reasonable price.[216] The draftsmen of

215. Although legitimate arguments can be made that the full application of the first rule to the two situations mentioned in the text constitutes an unlawful restraint on interstate commerce or a denial of due process, the courts so far have upheld similar provisions regulating consumer credit. *See, e.g.,* Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir.), *cert. denied,* 434 U.S. 880 (1977) (constitutionality of Wisconsin Consumer Act provision applying Wisconsin rates to revolving credit transactions between Wisconsin residents and out-of-state mail-order creditor upheld); Aldens, Inc. v. Ryan, 571 F.2d 1159 (10th Cir. 1978) (Oklahoma Consumer Credit Code held applicable to a mail-order transaction between a resident of Oklahoma and an out-of-state catalog company). *See also* Buerger, *Revolving Credit and Credit Cards,* 33 LAW & CONTEMP. PROB. 707, 709 (1968); Weintraub, *supra* note 208, at 30-43. *But see* Ad. Interpretation No. 1.201-7506, S.C. Dep't of Cons. Aff. (1975) which holds that the SCCPC only applies to a creditor who mails information soliciting open-end credit from a place in South Carolina.

216. For detailed discussion of the UCCC rate structure and the theory behind it, see, *e.g.,* Braucher, *Consumer Credit Reform: Rates, Profits and Competition,* 43 TEMP. L.Q. 313 (1970); Johnson, *Regulation of Finance Charges on Consumer Installment Credit,* 66 MICH. L. REV. 81 (1967); Shay, *The Uniform Consumer Credit Code: An Economist's*

the UCCC imposed rate maximums on consumer credit transactions on the theory that maximums are politically necessary because state legislatures are reluctant to give up their ultimate control over rates; however, the rates are set high enough to make a reasonable amount of credit from legitimate creditors available to all segments of society.[217] As a trade-off for these rates, however, UCCC creditors engaged in consumer credit transactions are required to accept increased competition resulting from less restrictive licensing requirements[218] and a number of limitations

View, 54 CORNELL L. REV. 491 (1969); Smith, *Some Reflections on Free Entry and the Rate Ceilings Under the Uniform Consumer Credit Code*, 7 U. RICH. L. REV. 235 (1972); Warren, *Consumer Credit Law: Rates, Costs, and Benefits*, 27 STAN. L. REV. 951 (1975).

217. A number of studies have indicated that artificially low rate ceilings that do not allow creditors a reasonable rate of return in exchange for possible risks have the effect of driving creditors out of the market. Low ceilings also foster creditor subterfuge to collect a reasonable rate, for example, by alteration of the type of credit being extended and alteration of the eligibility requirements. This is done to reduce the risks to a level in which the creditor will be able to make a profit under the given rate ceilings. *See, e.g.*, E. KOHN, C. CARLO, & B. KAYE, THE IMPACT OF NEW YORK'S USURY CEILING ON LOCAL MORTGAGE LENDING ACTIVITY (1976) (reaching the conclusion that low interest rate maximums caused mortgage lenders in New York to raise their eligibility and down payment requirements, which consequently resulted in significantly fewer residential mortgage loans than other states with higher rates); CONSUMER FINANCE REPORT, *supra* note 5, at 91-147; Note, *An Empirical Study of the Arkansas Usury Law: "With Friends Like That . . . ,"* 1968 U. ILL. L.F. 544 (commentary on an Arkansas study demonstrating that a 10% limit on credit sales had resulted in higher cash prices, greater credit insurance, and higher service charges than adjoining states with higher authorized rates).

The available evidence indicates that the pretax profit of consumer credit lenders is surprisingly uniform, which is further proof that creditors usually operate at a level in which they make a reasonable profit regardless of the rate structure. *See, e.g.*, R. SHAY & J. CHAPMAN, THE CONSUMER FINANCE INDUSTRY: ITS COSTS AND REGULATION (1967); Benfield, *Interest Ceilings and the Uniform Consumer Credit Code*, 56 A.B.A.J. 946 (1970); Felsenfeld, *Consumer Interest Rates: A Public Learning Process*, 23 BUS. LAW 931 (1968).

The UCCC rates for smaller transactions were based on the prevailing market rates and on recently enacted modern small loan statutes. *See* Shay, *The Impact of the Uniform Consumer Credit Code Upon the Market for Consumer Installment Credit*, 33 LAW & CONTEMP. PROB. 752, 754 (1968). Despite the general rise in interest rates since the late 1960's when the UCCC was drafted, credit rates in states that have adopted the UCCC have been below the established rate ceilings for most types of credit transactions, indicating that the Code's rate theory, and subsequent increased competition, are working well in practice. *See* 1974 UCCC, PREFATORY NOTE, at xx-xxi. For very small loans and revolving credit, however, the prevailing rates have traditionally been near the established ceilings. The PREFATORY NOTE to the 1974 UCCC suggests this is because the UCCC rates in these areas were set too low given the risks and costs involved. *Id.* The UCCC rate ceilings were not, however, raised in the 1974 UCCC. See note 323 and accompanying text *infra*.

218. Increased competition under the UCCC is fostered by eliminating the convenience and advantage test as the basis for a license to make high-rate supervised loans by consumer loan companies. The absence of any licensing requirements for lenders making loans at rates not in excess of 18% or for sellers engaged in making credit sales,

on traditional rights and practices.[219]

To implement this policy of open competition, the UCCC has a unitary rate structure that places all consumer creditors on an

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regardless of the rate charged, also encourages competition. The convenience and advantage test, which requires a positive showing by an applicant that existing credit needs are not being met in a given area, is replaced by a more liberal test of "financial responsibility, character and fitness." 1968 UCCC § 3.503; *id.* at Comment 1. The SCCPC requires both a showing of convenience and advantage and proof of financial responsibility ($25,000 worth of assets per location) before a license to make supervised loans by a consumer finance company will issue. Licenses for all loans in excess of 12% (versus 18% for the UCCC) are required. S.C. CODE ANN. § 37-3-503 (Cum. Supp. 1977). Compare the similar requirements for consumer finance companies proposing to operate under a license granted pursuant to Act 988 of 1966, in § 34-29-40 (1976). The SCCPC, however, does incorporate the nonlicensing requirements of the UCCC for consumer credit sales and consumer loans of 12% or less. *Compare* 1968 UCCC § 3.501-.502 *with* S.C. CODE ANN. § 37-3-501 to -503 (Cum. Supp. 1977). The existing requirements for banks and other "supervised financial organizations," § 37-1-301(17) (Cum. Supp. 1977), are not affected by either the UCCC or SCCPC licensing requirements. *See, e.g.,* S.C. CODE ANN. § 34-1-70 (1976) (charters issued to state banks and building and loan associations only upon proof that the operation "would serve the public interest . . ."). *Compare* 1968 UCCC § 3.502 *with* S.C. CODE ANN. § 37-3-502 (Cum Supp. 1977). Further explanation of the SCCPC licensing requirements can be found in notes 231-32 and accompanying text *infra.*

219. For example, a creditor in a consumer credit sale with a cash price of $1,500 or less ($1,750 in § 5.103 of the 1974 UCCC) must forego the right to a deficiency judgment if the collateral is repossessed. S.C. CODE ANN. § 37-5-103(4) (Cum. Supp. 1977). A creditor in a consumer credit sale or loan must give the debtor a one-time notice and opportunity to cure after default before proceeding to accelerate or foreclose on the collateral. *Id.* §§ 37-5-110, -111 (Cum. Supp. 1977). See also notes 35-39 and accompanying text *supra;* INTEGRATED CODE, *supra* note 3, at INTRODUCTION gives a complete list of these provisions. The SCCPC includes most but not all of the UCCC consumer protection provisions with variations. For example, the SCCPC unconscionability section is not as broad as the equivalent provision in the 1974 UCCC. *Compare* S.C. CODE ANN. § 37-5-108 (Cum. Supp. 1977) *with* 1974 UCCC § 5.108. The SCCPC does not include some of the restrictions in the UCCC, such as the provisions relating to venue and stay of enforcement of default judgments, and the provisions prohibiting the right to repossess household goods covered as collateral in a nonpurchase money credit transaction unless certain protective measures are fulfilled. *See* 1974 UCCC §§ 5.113-.116.

While all these limitations are undoubtedly necessary and beneficial to consumers, they do increase the cost of consumer credit, particularly in high-risk categories. *See, e.g.,* White, *The Abolition of Self-Help Repossession: The Poor Pay Even More,* 1973 WIS. L. REV. 503; Whitford & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act,* 1975 WIS. L. REV. 607; Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period,* 78 YALE L.J. 618 (1969). *Compare* Johnson, *Denial of Self-Help Repossession: An Economic Analysis,* 47 S. CALIF. L. REV. 82 (1973) *with* Dauer & Gilhool, *The Economics of Constitutionalized Repossession: A Critique of Professor Johnson, and a Partial Reply,* 47 S. CALIF. L. REV. 116 (1973). The final article in this sequence is Johnson, *A Response to Dauer and Gilhool: A Response of Self-Help Repossession,* 47 S. CALIF. L. REV. 151 (1973). *See also* Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process,* 61 VA. L. REV. 807 (1975). These cost increases were taken into account by the drafters of the UCCC in establishing the UCCC rate structure. *See generally* authorities cited note 216 *supra.*

equal footing, whether they are sellers or lenders, by authorizing them to charge the same rates. In addition, all the rates are calculated on a uniform actuarial basis that conforms to the spirit and substance of TIL, which makes it easier for consumer creditors and debtors to determine and to compare rates. Competition is also encouraged by eliminating many of the traditional barriers to free entry into the credit market, such as the restrictive convenience and advantage test.[220]

Although the SCCPC rates and licensing requirements are based on the UCCC, they are significantly different in many important respects. The major differences between the two are listed below:

(1) The SCCPC has more exclusions from coverage than does the UCCC, so that a significant portion of consumer credit is not governed by the SCCPC rate structure. A comparison of the UCCC and SCCPC exclusions is presented in Part I.[221]

(2) Unlike the UCCC, sellers and lenders under the SCCPC are not on an equal footing in certain transactions. For closed-end credit transactions (for example, installment sales and loans note made on a revolving credit account), the SCCPC has a rate maximum of 18% per annum for credit sellers and 12% per annum for lenders, as opposed to 18% for both in the UCCC.[222] Also significant are differences between the two in the rate maximums applicable to open-end or revolving credit.[223]

(3) The SCCPC has special rate provisions for credit sales of automobiles[224] and for small loans by consumer finance companies licensed under Act 988 of 1966.[225] The official texts of the UCCC do not contain either type of special rate structure.

(4) The SCCPC does not affect the rate structure of non-SCCPC transactions to the same extent as the UCCC. The latter effectively repeals all rate limitations on noncovered transac-

220. See note 218 *supra* for an explanation of the convenience and advantage test.

221. See Part I, sections B and C *supra.*

222. *Compare* S.C. CODE ANN. §§ 37-2-201, 37-3-301 (Cum. Supp. 1977) *with* 1968 UCCC §§ 2.201, 3.301. See Part II, section B(1) *infra* for further discussion of the SCCPC closed-end rate structure.

223. *Compare* S.C. CODE ANN. §§ 37-2-207 (1976), 37-3-201, -515 (Cum. Supp. 1977) *with* 1968 UCCC §§ 2.07, 3.201, .508. See Part II, section B(2) *infra* for further discussion of the SCCPC open-end rates.

224. S.C. CODE ANN. § 37-2-211 (1976). See Part II, section B(1)(b) *infra.*

225. S.C. CODE ANN. § 34-29-140 (Cum. Supp. 1977). See Part I, section C(9) *supra* for further discussion of the interrelation between Act 988 of 1966 and the SCCPC; Part III, section B(2)(b)(ii) *infra* for further discussion of the Act 988 rate structure.

tions.[226] The SCCPC does eliminate rate maximums on noncovered credit sales;[227] the existing non-SCCPC rate structure, however, continues to apply to most noncovered loan transactions below $50,000 and to most real estate mortgage transactions, including those mortgages made to build or to purchase a residence for personal, family, or household purposes and those secured by business property.[228]

(5) The SCCPC does not contain the UCCC provision that adjusts the dollar amounts to which the various rates apply to compensate for inflation.[229] The UCCC provides for the dollar amounts to automatically adjust in 10% increments on July 1 of every even-numbered year if the Consumer Price Index has increased at least 10% from the preceeding period. If the Index increased 12% during a particular two-year period, the dollar amounts on which the rates are applied are adjusted by 10%. For example, a 36% per annum charge is authorized by the UCCC on the unpaid portion of a closed-end credit sale or supervised loan that is $300 or less. Based on 12% increase of the Index this 36% rate could, after the effective date of the adjustment, be applied to $330 of the unpaid balance. Besides offsetting the effects of inflation, this provision substantially reduces the likelihood that creditors will have to seek legislative approval for rate increases in times of rising interest rates. Legislators have traditionally resisted requests for rate increases for political reasons, no matter how justified the increases were.

(6) As a prerequisite for the issuance of a license to consumer finance companies to make supervised or restricted loans at a rate above 12% per annum,[231] the SCCPC continues the convenience and advantage test, which requires proof by the applicant that

226. 1968 UCCC §§ 2.605, 3.605; 1974 UCCC § 2.601(1). The 1968 UCCC contains special rate provisions for transactions designated as "consumer related" credit sales and loans. The principal application of these provisions was to certain noncovered transactions, for instance, a transaction made by a nonprofessional creditor or to an organization and secured by a security interest in a one- or two-family dwelling occupied by an individual who was a principal in the organization. 1968 UCCC §§ 2.602-.604, 3.602-.604. These provisions were dropped from the 1974 UCCC. *See* Miller & Warren, *supra* note 5, at 626-27. They were not included in either the 1974 or 1976 versions of the SCCPC.

227. S.C. CODE ANN. § 37-2-605 (1976).

228. *Id.* §§ 37-3-601, -605 (Cum. Supp. 1977). See Part III; Part V, Chart B(8) and (9) *infra*. But see Part II, section B(3) *infra* for a discussion of the provisions in the SCCPC authorizing the parties to a transaction other than a consumer credit sale or loan to agree to be bound by the SCCPC.

229. *See* 1968 UCCC §§ 1.106, 2.201(7), .207(5), 3.508(6).

230. *See id.* § 1.106, Comment (case 2).

231. *See* note 218 *supra*.

existing credit needs are not being met in a given area. The UCCC eliminates the convenience and advantage criteria because it has been used to artificially keep down the number of licensees making high-interest consumer loans.[232]

(7) A lender who is licensed to make supervised loans is not allowed by the SCCPC to transact sales of goods in the same building where the loans are being made.[233] This so-called "brick wall" provision was rejected by the drafters of the UCCC, but has been adopted by several UCCC states as a nonuniform provision.[234] The motivation behind this provision is the fear that a combined selling-lending operation gives retailers, particularly large operations like Sears or J.C. Penney's, an unfair competitive advantage over lenders who traditionally have been restricted to operating a lending business in a licensed location.[235] Sellers of goods can still obtain a license to make loans, but a consumer who wants to obtain a loan under these conditions must go to premises other than the licensee's retail operation to obtain the loan.

The net effect of these differences is that a much less comprehensive unitary rate structure covers consumer credit transactions in the SCCPC than in the UCCC. Additionally, SCCPC competition, although based on the free-entry concept of the UCCC, is not as fully operative as it is under the pure UCCC. Despite differences between the two, however, the SCCPC does implement the rationale of the UCCC of free competition and reasonable rates, albeit in a most convoluted fashion, and competition among consumer creditors will increase as a result of its enactment.[236]

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232. *See* note 218 and accompanying text *supra*. Even the pure UCCC does not authorize sellers of goods and services to make loans at supervised lender rates unless they have a supervised lender license or are otherwise qualified to make supervised loans. Thus, the UCCC competition provisions do not really establish true "free entry," although they do promote more competition than is possible under traditional licensing restrictions. *See* Shay, *The Impact of the Uniform Consumer Credit Code Upon the Market for Consumer Installment Credit*, 33 LAW & CONTEMP. PROB. 752, 763-64 (1968).

233. S.C. CODE ANN. § 37-3-512 (Cum. Supp. 1977). This section applies to both SCCPC supervised lenders and Act 988 consumer finance company licensees making restricted loans under the SCCPC. *See id.* §§ 37-1-106, 37-3-500, -515(1) (Cum. Supp. 1977).

234. *See, e.g.*, COLO. REV. STAT. § 5-3-512 (1973 & Cum. Supp. 1976); OKLA. STAT. ANN. tit. 14A, § 3-512 (1972); UTAH CODE ANN. § 70B-3-512 (Supp. 1977).

235. *See* Miller & Warren, *supra* note 5, at 641.

236. The SCCPC authorizes banks and other supervised financial lenders to make personal and installment loans at rates above the 7% add-on rate (APR of 12.68% per year on a 12-month contract) authorized by S.C. CODE ANN. § 34-13-120 (1976). These organiza-

B. SCCPC Rate Ceilings

The SCCPC rate ceilings vary according to whether the credit is extended by a seller or a lender and whether the transaction is classified as closed-end or open-end.[237] The distinguishing feature between open and closed transactions is that open-end credit is a continuing transaction, that is, a line of credit or revolving credit, whereas closed-end credit consists of a single credit transaction. Regardless of whether the credit is an open or closed sale or loan, all of the varying SCCPC rates, like those in the UCCC, are calculated on the same actuarial basis. The rates include all charges for the credit except those charges specifically authorized to be excluded from the calculations.[238] The SCCPC also regulates delinquency and deferral charges, prepayment rebates, refinancing and consolidation transaction charges, and charges made by a creditor on behalf of a debtor for advances on items like insurance.[239]

The SCCPC rate ceilings will be discussed in this section. The mechanics of calculating these rates will be discussed in the next section, and the remaining rate regulations will be dealt with in section D. Finally, the SCCPC remedy and penalty provisions will be discussed in section E.

1. Closed-End Transactions.—

(a) Consumer Credit Sales of Goods or Services Other Than Motor Vehicles.—In a closed-end consumer credit sale of goods or services covered by the SCCPC rate structure, other than one involving motor vehicles, the seller can impose a credit service charge that must not exceed the greater of either of the following:

> (a) The total of (i) Thirty-six percent per year on that part of the unpaid balances of the amount financed that is three hundred dollars or less; (ii) Twenty-one percent per year on that

tions are automatically eligible to make high-rate SCCPC supervised loans, see Part II, section B *infra,* at rates previously authorized only for consumer finance companies. Banks especially can be expected to compete with consumer finance companies in this high-rate market. *See* Shay, *supra* note 232, at 763-64.

237. The only regulation of rates and charges for consumer leases is contained in S.C. CODE ANN. § 37-2-406 (Cum. Supp. 1977), which prevents the final payment for a consumer lease from exceeding three times the average monthly payment. This provision prevents large "balloon payments" at the end of the lease. The 1974 SCCPC limited the final payment to no more than two times the monthly payment. *Id.* § 37-2-406 (1976). If the "lease" is in reality a disguised consumer credit sale or consumer loan, then the SCCPC rate ceilings apply. See note 87 and accompanying text *supra.*

238. See Part II, section C *infra.*

239. *Id.*

part of the unpaid balances of the amount financed that is more than three hundred dollars but does not exceed one thousand dollars; and (iii) Fifteen percent per year on that part of the unpaid balances of the amount financed that is more than one thousand dollars; or

(b) Eighteen percent per year on the unpaid balances of the amount financed.[240]

In lieu of making a credit service charge, the seller can contract to receive a minimum fee of $5 when the amount financed does not exceed $75, and $7.50 when the amount financed exceeds $75.[241] The flat fee is used most often in very small transactions with a short repayment period when the applicable flat fee yields a return in excess of the 36% per year authorized for amounts financed of $300 or less.[242]

(b) Consumer Credit Sales of Motor Vehicles.—The SCCPC contains a special rate section covering certain motor vehicle sales[243] that is not included in the UCCC. The section was lifted verbatim from the South Carolina Vehicle Sales Finance Act.[244] It governs only installment sales of motor vehicles used primarily on public highways and sold to individuals for personal, household, or family use; for example, automobiles, motorcycles, and trucks.[245] Mobile homes purchased for personal, family, or household purposes are governed by the rate ceilings for other closed-end credit sales[246] unless they are self-propelled. Credit sales of mobile homes and motor vehicles for business use are free from any rate limitation.[247] The rates specified in this section are as follows:

240. S.C. CODE ANN. § 37-2-201(2) (Cum. Supp. 1977). The SCCPC prohibits the splitting of a single transaction into two or more contracts in order to increase the yield. For example, a creditor could not require a debtor to split a credit sale with an amount financed of $600 for a color television set into two $300 contracts in order to charge 36% on the full $600. The resulting excess amount of credit service charge is considered "excess charges" under the SCCPC remedial provisions. *Id.* § 37-2-402 (1976).

241. *Id.* § 37-2-201(6) (Cum. Supp. 1977).

242. In addition, *id.* § 37-2-210(2) allows the creditor to retain all of this flat fee charge in the event of prepayment. Rebates of unearned credit charges are due for precomputed transactions in which these flat fees are not made. See Part II, section D(3) *infra.*

243. S.C. CODE ANN. § 37-2-211 (1976).

244. *See id.* § 56-17-20.

245. *Id.* § 37-2-211(1). While this section makes consumer credit sales of motor vehicles subject to special rates, all other aspects of these sales, including the charges that can be made in addition to the credit service charge, are covered by the remainder of the SCCPC.

246. *See id.* § 37-2-201(2) (Cum. Supp. 1977).

247. *Id.* § 37-2-605 (1976). See notes 457-61, 474 and accompanying text *infra.*

(1) New motor vehicles—$7 per $100 per year (12.68% per annum for a 12-month contract);
(2) One-year old new or used motor vehicles—$8 per $100 per year (14.45% per annum for a 12-month contract);
(3) Two-year old motor vehicles and new motor vehicles with three or fewer wheels (for example, motorcycles)—$10 per $100 per year (17.97% per annum for a 12-month contract);
(4) Three-year old used motor vehicles—$15 per $100 per year (26.63% per annum for a 12-month contract);
(5) All other used motor vehicles—$16 per $100 per year (28.32% per annum for a 12-month contract).[248]

Although the 1974 SCCPC specifically provided that this rate structure was the only available one for motor vehicle sales that fell within its coverage,[249] this exclusivity provision was repealed by the 1976 SCCPC.[250] While this action was probably the result of legislative oversight,[251] the existing legislative history does not help to determine whether this is true.[252] Consequently, the South Carolina Department of Consumer Affairs, which administers the SCCPC, has issued an administrative interpretation[253] holding that a seller has the option of either using this special rate statute or the rate statute that governs other closed-end credit sales. Whether the maximum rates authorized by this section are higher or lower than those authorized for other closed-end credit sales depends upon the age of the vehicle and the amount financed. Based on the average price of motor vehicles, the rate ceilings for new and one- or two-year old "previously used" motor vehicles should be lower under this section than for other closed-end credit sales. The rate ceilings authorized by this

248. S.C. CODE ANN. § 37-2-211(2) (1976). All rates are based on 12-month contracts and are calculated on the actuarial method required by the SCCPC and TIL.

249. *See id.* § 37-2-201(2)(c) (1976) (repealed 1976).

250. No. 686, 1976 S.C. Acts 1850.

251. The 1976 UCCC Study Committee Report contained provisions that would have repealed S.C. CODE ANN. §§ 37-2-211, -201(2)(c) (1976) on the basis that motor vehicle sales should be covered by the regular SCCPC rate structure. COMMITTEE REPORT §§ 57-58, *supra* note 162, at 69.

During the debate on S. 119, which became Act 686 of 1976, § 2.211 was successfully restored to the Bill, primarily at the insistence of used car dealers. No. 686, 1976 S.C. Acts 1792. *See* INTEGRATED CODE, *supra* note 3, § 37-2-211, at Comment 1. Section 2.201(2)(c) was not reinstated, however, leaving open the argument that § 2.211 is not the exclusive rate section for motor vehicles.

252. The absence of any record of the legislative debate on this point makes it impossible to prove that the Legislature did not intend to give automobile dealers a choice between the two rate sections. See note 102 *supra*.

253. Ad. Interpretation No. 2.211-7801, S.C. Dep't of Cons. Aff. (1978).

section for older used cars, however, might be higher on the average than for other SCCPC closed-end sales transactions. A seller of motor vehicles who grants credit in a consumer credit sale governed by the SCCPC at rates in excess of this special rate statute for motor vehicles runs the risk of having to repay the excess in the event this administrative interpretation is successfully challenged in a court action.[254]

Litigation on this issue will not occur, however, if the rates imposed for new cars do not exceed 12.68% per annum for a 12-month loan and if used car rates do not exceed 14.45% per annum for a 12-month loan since rates to these levels are clearly authorized under either statute.[255]

(c) Consumer Loans.—Two sets of rate ceilings are established for closed-end consumer loans. One is applicable to supervised loans,[256] which are defined as loans above 12% per year made by supervised lenders.[257] The other is for nonsupervised loans.[258] Supervised lenders are financial institutions such as banks and savings and loan associations that are authorized to receive deposits and to make loans and other persons who are specially licensed to make supervised loans under the SCCPC.[259] These other licensees are mainly consumer finance companies.[260]

The rate ceilings for closed-end supervised loans are the same as for closed-end credit sales other than motor vehicles, that is: the greater of (1) 18% per year on the unpaid balance of the principal, or (2) the total of (a) 36% per year on the unpaid balance of the principal that is $300 or less, (b) 21% per year on the unpaid balance of the principal that is over $300 but is less than $1,000, and (c) 15% per year on the unpaid balance of the principal that is more than $1,000.[261] The rate ceiling for nonsupervised closed-end loans is 12% per annum.[262]

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254. *See* S.C. CODE ANN. §§ 37-6-104(4), -506(3) (Cum. Supp. 1977). See notes 429-30 and accompanying text *infra* for further explanation of these provisions.

255. S.C. CODE ANN. § 37-2-211 (1976).

256. *Id.* § 37-3-508 (Cum. Supp. 1977).

257. *Id.* § 37-3-501(1)-(2).

258. *Id.* § 37-3-201.

259. *Id.* §§ 37-1-301(17), 37-3-501 to -502.

260. See Part I, section C(9) *supra;* Part II, section B(2) *infra.* Insurance premium service companies also qualify as supervised lenders. S.C. CODE ANN. § 37-1-301(17).

261. *Id.* § 37-3-508(2) (Cum. Supp. 1977). See note 240 and accompanying text *supra.* As is the case with consumer credit sales the SCCPC prohibits the use of split loans in a single credit transaction as a device to increase the overall yield on the loan. S.C. CODE ANN. §§ 37-3-409 (1976), -509 (Cum. Supp. 1977).

262. *Id.* § 37-3-201(1) (Cum. Supp. 1977). The UCCC has an 18% per year limit for nonsupervised loans. 1968 UCCC § 3.201. One reason the SCCPC contains a lower rate

The SCCPC special rate structure for motor vehicles, discussed above, only covers credit sales; therefore, a loan to purchase a motor vehicle for personal, family, or household purposes is governed exclusively by the standard closed-end loan rate ceilings.[263] Additionally, unlike the practice in closed-end credit sales, no minimum fee in lieu of the authorized credit charges is permitted in any closed-end consumer transaction.[264]

2. *Open-End Transactions.*—The SCCPC, like the UCCC, has different rate maximums for open-end credit sales and loans.[265] Open-end credit sales are primarily[266] made pursuant to a credit card issued by the seller for the purpose of purchasing or leasing goods and services from the issuer or a subsidiary or franchisee of the issuer. Open-end consumer loans are most often

than the UCCC is that S.C. CODE ANN. §§ 37-3-601, -605 (Cum. Supp. 1977) allow the parties to a transaction other than a consumer loan to agree to be bound by the SCCPC, in which case the SCCPC rate ceiling for nonsupervised loans applies. See Part II, section B(3) *infra*. The UCCC 18% rate was thought to be too high a rate in comparison to the normal maximum contract rate of 8% in South Carolina, S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977), to be salable to the Legislature. The 12% figure represented an acceptable compromise.

263. See notes 241-42 and accompanying text *supra*. Pursuant to S.C. CODE ANN. § 37-3-210(2) (Cum. Supp. 1977), however, a lender can contract for a minimum fee not exceeding $5.00, if the loan is $75.00 or less, or not more than $7.50, if the loan exceeds $75.00. In the event of early prepayment, the lender can retain the excess of the fee over the amount of loan finance charge actually earned on the transaction. Therefore, the actual difference between consumer credit sales and consumer loans on this point is less than it may appear to be.

264. See Part II, section B(1) *supra*.

265. *Compare* S.C. CODE ANN. §§ 37-2-207 (1976) (credit sales), 37-3-201,-515 (Cum. Supp. 1977) (revolving loans) *with* 1968 UCCC §§ 2.207, 3.201, .508; 1974 UCCC §§ 2.202, .401. The UCCC rates for open-end credit are higher than the SCCPC rates. For credit sales, the UCCC authorizes 2% per month on the first $500 and 1½% per month on all amounts above $500, versus the SCCPC authorized rates of 1½% on amounts up to $1,000 and 1% per month above $1,000. For revolving loans the UCCC authorizes the same rate structure as applied to closed-end transactions, 18% for nonsupervised loans and 36%:21%:15% or 18% for supervised loans, versus the SCCPC rates of 12% for nonsupervised revolving loans and a maximum of 18% for supervised revolving loans under the SCCPC. The SCCPC rates are basically in line with similar rates in other states. The drafters of the UCCC concluded that their higher rates were justified to allow the creditor to make a reasonable profit on revolving credit. *See* 1974 UCCC, PREFATORY NOTE, at xix-xxi. See also note 273 *infra*.

266. The rates for open-end consumer credit sales are applicable to any consumer credit sale made "pursuant to a revolving charge account . . . ." S.C. CODE ANN. § 37-2-207(1) (1976). It is possible to have a revolving charge account without the use of a credit card. The definition of "seller credit card" in the SCCPC is not restricted to credit cards, but includes any "arrangement pursuant to which a person gives to a buyer or lessee the privilege of using a credit card, *letter of credit, or other credit confirmation or identification* primarily for the purpose of purchasing or leasing goods or services from that person. . . ." *Id.* § 37-1-301(16) (Cum. Supp. 1977) (emphasis added).

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made with a lender-issued credit card, but other arrangements are possible.[267] The SCCPC differentiates between sales and loans by means of the mutually exclusive terms "seller credit card"[268] and "lender credit card or similar arrangement."[269] Typical examples of seller credit cards are department store and gasoline credit cards. A card can be used for credit purchases at other establishments and still be a seller credit card so long as the purpose of the card is to purchase or lease goods or services from the issuer or one of its affiliates. Bank credit cards, such as Master Charge and Visa (Bank Americard), and travel and entertainment cards,[270] such as American Express or Diner's Club, are typical examples of lender credit cards. A bank overdraft loan plan is the most common type of a "similar arrangement." A letter of credit agreement for a bank customer with third parties and the purchase by a bank of the accounts receivable from, for example, a doctor, would also be an arrangement similar to a lender credit card, assuming that the underlying transaction is a consumer credit transaction covered by the SCCPC.[271]

(a) Consumer Credit Sales Pursuant to a Seller Credit Card

267. Like the rates on open-end consumer credit sales, the SCCPC rates for open-end consumer loans, other than supervised loans, are applicable to any consumer loan "made pursuant to a revolving loan account." *Id.* § 37-3-201(4). *See also id.* § 37-3-515(1) (establishes an 18% per annum maximum for supervised loans, those at rates over 12% per annum, made "pursuant to a lender credit card or similar arrangement.") It is possible to have a revolving loan account without the use of a lender credit card. An example is a note authorizing an open-end line of credit with a bank. In addition, the definition of lender credit card clearly contemplates non-credit card transactions. The term " 'lender credit card *or similar arrangement'* means an arrangement *or loan agreement,* other than a seller credit card, pursuant to which a lender gives a debtor the privilege of using a credit card, *letter of credit, or other credit confirmation or identification* in transactions out of which debt arises . . . ." *Id.* § 37-1-301(9) (emphasis added). This definition harmonizes the difference in language used in the two SCCPC sections that establish rates for open-end loans.

268. *Id.* § 37-1-301(16) (1976).

269. *Id.* § 37-1-301(9) (Cum. Supp. 1977). The definition of a "lender credit card or similar arrangement" specifically excludes a transaction pursuant to a "seller credit card."

270. In the 1974 UCCC, travel and entertainment cards are treated as seller credit cards. 1974 UCCC § 1.301(39)(b). The SCCPC utilizes the approach taken in the 1968 UCCC, however, classifying these cards as lender credit cards.

271. *See* S.C. CODE ANN. § 37-1-301(9) (Cum. Supp. 1977). The growth in the number of bank credit cards during the past decade has been phenomenal. At the end of the first quarter of 1977, an estimated 75 million cards were issued with more than $11 billion of outstanding credit. In South Carolina approximately 595,000 Visa (Bank Americard) and Master Charge cards were outstanding with $76 million in credit extended as of the end of 1976. F. Ingram & O. Pugh, Financial Services: Household Attitudes and Practices — A Consumer, Panel Approach 47-50 (1977).

or Revolving Charge Account.—The maximum permissible rate for consumer credit sales executed pursuant to a revolving charge account is 18% per year on unpaid balances that are $1,000 or less and 12% per year on the unpaid balances that are over $1,000.[272] These maximums apply to all consumer credit sales made with the use of a seller credit card governed by the SCCPC rate structure, and to all other credit sales made pursuant to a revolving charge account with a credit seller of goods and services.[273]

(b) Loans Pursuant to a Lender Credit Card or Similar Arrangement.— As is true with closed-end transactions, the rate ceilings for lender credit card loans differ depending on whether the lender is qualified to make supervised loans. If the lender is so qualified,[274] then the permissible rate is 18% per year on the unpaid balance.[275] In all other cases, the maximum rate is 12% per

272. S.C. CODE ANN. § 37-2-207 (1976).

273. *Id.* § 37-1-301(16). See note 266 *supra.* This rate provision, which was adopted as part of the 1974 SCCPC, was the subject of considerable controversy. In 1968 the South Carolina Legislature passed legislation that authorized banks and other lending institutions to charge up to 1½% per month or 18% per year on revolving credit plans. S.C. CODE ANN. § 34-13-120 (1976). Retail merchants were not included in this authorization, although they had for many years charged approximately 1½% per month for revolving credit. The assumption was that credit charges by sellers of goods and services were exempt from any rate maximums under the time-price doctrine. *See, e.g.,* Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761 (1950). In the late 1960's and early 1970's a few state supreme courts, however, held that these merchant revolving charge accounts were in reality "loans" subject to the state's usury statutes and, that, therefore, the time-price doctrine did not apply. *See, e.g.,* State v. J.C. Penney Co., 48 Wisc.2d 125, 179 N.W.2d 641 (1970); Annot., 41 A.L.R.3d 682 (1972). An attempt to clarify this issue in South Carolina by special legislation, similar to that enacted for banks, was attacked by many legislators as an attempt to circumvent the usury laws. The amount of the rate was also controversial. Several proposed amendments were made to lower it. 1974 S.C. HOUSE J. 1377-79, 1539-44, 1568-70, 1881-90. The 1974 SCCPC was attached as an amendment to this special item of proposed legislation during the final debate in the Senate. See note 1 *supra;* 1974 S.C. SEN. J. 1877.

Studies have shown that retailers actually lose money when charging 1½% per month or 18% per year authorized by the SCCPC and by the statutes of most states. *See, e.g.,* CONSUMER FINANCE REPORT, *supra* note 5, at 107. The most recent survey confirming these losses (3.71% of sales) was made in 1972 involving 17 retail stores of all kinds in New York State. One reason for the losses is the high percentage of persons who either did not make any charges or used revolving credit, but paid off the balance before any finance charge was imposed. The retailers, however, also lost money when a finance charge was made and collected. *See* R. SHAY & W. DUNKELBERG, RETAIL STORE CREDIT CARD USE IN NEW YORK 9, 11, 72-73 (1975). The 1968 and 1974 UCCC authorize 2% per month or 24% per year on the first $500, and 1½% per month or 18% per year on all amounts over $500. See note 263 *supra.* See also Part II, section C *infra* for a discussion of the various methods of calculating the rate in open-end loan accounts.

274. See notes 257, 259-60 and accompanying text *supra.*

275. S.C. CODE ANN. § 37-3-515 (Cum. Supp. 1977). Because banks are automatically eligible to make SCCPC supervised loans and were already authorized to make open-end

year on the unpaid balance of the principal.[276]

3. Nonconsumer Credit Transactions Made Subject to the SCCPC by Mutual Agreement.—Parties involved in a sale or loan other than a consumer credit sale or loan may agree in writing that the transaction in question will be subject to the SCCPC.[277] If the parties enter into such an agreement, then the rate ceilings and other provisions of the SCCPC apply to the transaction, with the exception that any such loans are subject to the 12% per annum ceiling for nonsupervised loans and are not eligible for the higher rates available for supervised loans. A loan (but not a sale) primarily secured by a first lien that is a purchase money security interest in land is specifically excluded from being subject to these agreements.[278]

The idea behind these provisions is that as a result of the agreement the debtor receives greater protection of his rights under the SCCPC than he can under the non-SCCPC law ordinarily applicable to the transaction. This benefit is considered to be a sufficient setoff for the higher credit charges authorized by the SCCPC. The requirement that the agreement be in writing and signed by both parties also provides reasonable protection against any overreaching by a creditor or misunderstanding by the debtor.[279]

While the rationale behind these provisions is clear, the actual scope of their application is not easily delineated. The provisions apply to sales and loans "other than" consumer credit sales or loans. This language could mean that the agreement may be

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credit at an 18% rate by § 34-13-120 (1976), this provision actually only authorizes them to charge what they had authority to charge for credit prior to the 1976 SCCPC Amendments. Section 34-13-120 is still available to banks and other lending institutions for non-SCCPC transactions. See notes 516-21 and accompanying text *infra*.

276. S.C. CODE ANN. § 37-3-201 (Cum. Supp. 1977).

277. *Id.* §§ 37-2-601 (1976), 37-3-601 (Cum. Supp. 1977).

278. *Id.* See Part I, section B(4)(d) *supra* for a detailed discussion of the exclusion of this type of real estate transactions from the SCCPC. Credit sales, as opposed to loans, primarily secured by a first lien that is a purchase money security interest in land, are not excluded from the category of transactions eligible for agreement. Real estate credit sales have always been exempt from any rate limitation under the time-price doctrine and, therefore, any agreement to make a particular transaction subject to the SCCPC rates is imposing a legal restraint on a creditor that did not previously exist. *See, e.g.*, Wheeler v. Marchbanks, 32 S.C. 594, 10 S.E. 1011 (1890). Loans secured by real estate mortgages, however, have traditionally been subject to strict rate limits. See Part III, section B(2)(a) *infra*.

279. *See* 1968 UCCC § 2.601, Comment. The precise kind of writing required is not specified, but a creditor should have the debtor sign a separate form in which he agrees that the SCCPC will apply to the transaction.

made in any transaction that is not a consumer credit sale or consumer loan because the transaction does not fit the definition of a consumer credit sale or consumer loan, or is specifically excluded from the SCCPC, or both. Alternatively, it could mean that only transactions outside the definition of a consumer credit sale or loan could be made subject to the SCCPC, but transactions specifically excluded from the SCCPC could not be the subject of such agreements.[280]

The difference between these two interpretations may have important practical implications. If the second, narrower interpretation is correct, then the only types of transactions that could be subject to an agreement to be bound by the SCCPC are credit sale or loan transactions made by a nonprofessional creditor, or made for a business purpose, or made to an organization, or credit sales secured by real estate mortgages, regardless of the amount, or non-real estate credit sales or loans in excess of $25,000.[281]

280. The first alternative is based on the assumption that these provisions were meant to apply to any transaction whose rates and charges were not otherwise governed by the SCCPC. It in effect reads the "other than" language to mean "other than" a transaction whose rates and charges are covered by the SCCPC. The language in S.C. CODE ANN. § 37-3-601 (Cum. Supp. 1977) excluding loans primarily secured by a first lien that is a purchase money security interest in land from eligibility for an agreement supports this position. Since these transactions are already definitionally excluded from the coverage sections, the inclusion of this language in § 37-3-601 is unnecessary unless the drafters felt that the first alternative was the correct one. In addition, the differences between the types of transactions excluded from the SCCPC coverage definitions and those specifically excluded by statute are based on convenience more than necessity. The real estate exemption, see Part I, section B(4)(d) *supra*, is an example of one item that technically belongs in the exclusion section, if exclusions are defined as transactions that would be consumer credit transactions under the coverage definitions except for the statutory exception.

The second alternative is based on the assumption that the Legislature could have easily extended the benefit of these transactions to definitionally excluded transactions as well as specific statutory exclusions, if they had wished to. The absence of this authorization justifies a narrow interpretation of the terms consumer credit sale and consumer loan.

Unfortunately no written legislative history exists that can shed light on which interpretation was intended. The language used in these provisions comes from the equivalent sections of the 1968 UCCC. The official comments to §§ 2.601 and 3.601 of the 1968 UCCC do not touch on this problem. 1968 UCCC § 2.601, Comment; *id.* § 3.601, Comment. The 1974 UCCC utilizes almost the same language in its "agreement by the parties" section, which covers sales and loans. 1974 UCCC § 2.601. The examples used in the official comment are illustrations of transactions that are excluded definitionally from the UCCC. *Id.*, Comment. Nothing in this comment, however, indicates that the list of illustrations is intended to be exclusive or exhaustive. In addition, fewer definitional and specific exclusions appear in the 1968 and 1974 UCCC than in the SCCPC, so the practical importance of a narrow interpretation of the "other than a consumer credit sale or loan" language is much less critical in a pure UCCC state than in South Carolina.

281. *See* Part I, section B(5) *supra*. See also note 278 *supra*.

Under this interpretation, credit transactions whose rates and charges are specifically excluded from the SCCPC[282] would not be eligible for these agreements. If the alternative interpretation is adopted, however, then those credit transactions specifically excluded from the SCCPC could also be eligible to be fully subject to the SCCPC by agreement. The four types of transactions most likely affected by this difference in interpretation are insurance premium service company loans, agricultural credit, government supported educational loans to students, and credit union loans. In many of these transactions, the non-SCCPC rates will be as high or higher than the permissible SCCPC rate ceilings; but there undoubtedly will be cases in which the SCCPC rate will be higher or for some other reason the parties will want the SCCPC to apply.[283] Nevertheless, until this matter can be cleared up by regulation, legislation, or litigation, creditors would be well advised to take the second, narrower position in cases affected by the dichotomy between the two interpretations of the language in question.

C. Calculating the Credit Service Charge and the Loan Finance Charge

The SCCPC rate ceilings described in the preceding section

282. *See* Part I, section C *supra.*

283. Under S.C. CODE ANN. § 34-13-120 (1976), banks and other lending institutions are authorized to make installment loans at a 7% add-on rate which translates into an actuarial rate of up to 12.68% per year on a 12-month contract. This is higher than the 12% per year authorized under § 3.601 of the SCCPC. *Id.* § 37-3-601 (Cum. Supp. 1977). Credit unions were already authorized to make loans at 12% per year. *Id.* § 34-27-70 (1976) (state-chartered credit unions); 12 U.S.C. § 1757(b) (1977) (federal credit unions). Non-SCCPC credit sales are exempt from any rate regulation under the SCCPC. S.C. CODE ANN. § 37-2-605 (1976). Therefore, as a practical matter, the only types of credit that might be affected by this difference in interpretation are loans by insurance premium service companies and single payment agricultural and educational loans. But see *id.* § 38-27-90(b) (1976), which states: "[a] premium service company shall not charge, contract for, receive, or collect a service charge other than as permitted by this chapter." The rate ceiling established by this section is three-fourths of 1% per month-or 9% per year plus a $10 nonrefundable fee. *Id.* § 38-27-90(d) to (e) (1976). An argument for authorizing insurance premium service companies to take advantage of the agreement process under § 37-3-601 (Cum. Supp. 1977) is that the SCCPC was enacted after the Insurance Premium Service Company Act, and the normal rule in South Carolina is that the last legislative expression on a particular subject controls and impliedly repeals any prior inconsistent statute even though no specific repeal or reference is made of the prior statute. *See, e.g.*, Garey v. City of Myrtle Beach, 263 S.C. 247, 209 S.E.2d 893 (1974); Independence Ins. Co. v. Independent Life & Acc. Ins. Co., 218 S.C. 22, 61 S.E.2d 399 (1950); South Carolina Elec. & Gas Co. v. South Carolina Pub. Serv. Auth., 215 S.C. 193, 54 S.E.2d 777 (1949).

may appear to be quite high. Closer study, however, reveals that these ceilings are similar to existing South Carolina rates in many consumer credit installment transactions, and, in some cases, the maximum rates allowed by the SCCPC will be lower than those legally permitted in transactions whose rates are not governed by the SCCPC.[284] The effective rates are lower because charges that can be tacked onto the maximum permitted rates are few in number and highly regulated. In addition, the SCCPC's maximum rates are defined by concepts much more inclusive than the ones they replaced, the concepts of time-price differential[285] and interest.[286]

Three steps are involved in calculating SCCPC rates. The first is the determination of the amount of credit to be extended. The second is the determination of the applicable rate. The third is the application of the rate to the amount of credit on an actuarial basis.

1. Determination of the Amount of Credit.—The starting point in calculating the actual rate for an SCCPC transaction is the determination of the "amount financed"[287] for a consumer credit sale and the "principal"[288] for a consumer loan. The amount financed and the loan principal are the base amounts upon which the rate to be charged is applied. Essentially, both terms define what in laymen's language is referred to as the actual amount of credit extended, however, the terminology is slightly different because of the peculiarities of the definitions of credit sale and loan.[289] In a consumer credit sale, the amount

284. See Parts III and V *infra*. The most prominent example of permissible rates under the SCCPC being lower than non-SCCPC rates governing the same type of consumer credit transaction is the rate structure for consumer finance companies licensed under Act 988 of 1966. See Part I, section C(9); Part III, section B(2)(b)(ii) *infra*.

285. The difference between the cash price and credit price of goods and services sold on credit has traditionally been characterized as the "time-price differential." This is to distinguish it from the "interest" charged for a loan. Interest is subject to usury statutes, but the time-price differential has traditionally been considered as exempt from such statutes. This is the foundation for the doctrine that credit sales are not subject to usury limitations. *See, e.g.*, Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761 (1950). See Part III, section A *infra*.

286. The term "interest" is not defined by any South Carolina statute. See Part III, section C(1) *infra*.

287. S.C. CODE ANN. § 37-2-111 (1976).

288. *Id.* § 37-3-107(3) (Cum. Supp. 1977).

289. The SCCPC definitions of "amount financed" and "loan principal" are harmonious with the term "amount financed," the equivalent TIL term. *See* Regulation Z, 12 C.F.R. §§ 226.2(d), .4(d), .8(c)(7), (d)(1). The 1974 UCCC combines these concepts into a single definition designated "amount financed." 1974 UCCC § 1.301(5). This amalgamation is part of the merging of Article 2 (sales) and Article 3 (loans) in the 1974 UCCC,

financed is the cash price *less* any down payment plus any amount required to discharge a prior lien on any traded-in property. Added onto the cash price are amounts the seller is to pay, which are not included in the cash price but are being financed as part of the transaction,[290] for example, registration, certificate of title or license fees, and additional charges specifically authorized by the SCCPC.[291] The principal of a consumer loan whose rates are governed by the SCCPC is the net amount paid to or on behalf of the debtor *plus* amounts paid by the lender on behalf of the debtor for registration, certificate of title or license fees, and any additional charges specifically authorized by the SCCPC, to the extent that these charges and fees are being financed by the lender as part of the transaction.[292] Advance pay-

justified by the similarities between the two types of credit, and because merger makes the entire code easier to work with and more harmonious with TIL. While the SCCPC incorporates many of the concepts in the working and final drafts of the 1974 UCCC, the dichotomy between Articles 2 and 3 in the 1968 UCCC was utilized by the South Carolina Legislature in 1974 and 1976.

290. S.C. CODE ANN. § 37-2-111 (1976). See Part II, section D(1) *infra*.

291. If the debtor pays these costs directly or gives a check or cash to the seller to pay them, then they are not included in the amount financed. S.C. CODE ANN. § 37-2-111(3)(c) (1976) specifically authorizes sales, use, excise or documentary stamp taxes to be included in the amount financed if paid by the seller. Since these taxes are authorized additional charges under § 37-2-202(1)(a), however, this particular subsection is unnecessary. See Part II, section D(1) *infra* for further discussion of these charges.

292. As in the case of cash sales, if the debtor pays for additional items with cash or a check, the amounts paid for are not part of the loan principal. S.C. CODE ANN. § 37-3-107(3)(b) (1976) states that the principal includes "any discount excluded from the loan finance charge" by § 37-3-109(2) (1976). These two sections mean that the principal of a consumer credit loan made pursuant to a lender credit card arrangement includes the full dollar amount of the charge even though the lender actually pays the seller on a discounted basis. For example, in a transaction involving a $100 charge for purchase of goods from a retailer on a bank credit card, the bank will pay the retailer $95, assuming that under the terms of the contract between the bank and the retailer the bank agrees to purchase the retailer's accounts receivable for 95% of their face value. The amount financed is $100 and not $95. The basis for this result is that (1) the card holder presumably would have paid $100 for the item if he had paid cash, and (2) the contractual arrangement between the bank and the retailer is independent of the sale between the cardholder and the retailer. The merchant discount is also excluded from the credit service charge and loan finance charge. One authority estimates that as much as 23% of all profit from bank credit cards and similar arrangements comes from these merchant discounts, which range from 2% to 8% depending on the credit standing of the merchant. Upshaw, *Banking in the Consumer Protection Age*, 5 U.C.C.L.J. 232, 274 (1973). This problem does not arise in a two-party transaction made with a seller credit card.

The discount charged by lenders to merchants for what is actually the purchase of their accounts receivable needs to be distinguished from two other types of discounts. One is a cash discount given by merchants to customers who paid cash instead of using a credit card. Pursuant to the TIL amendments adopted in 1976, any discount of this type that does not exceed 5% of the price will not be considered part of the finance charge for TIL

ment of any finance charge, prepaid interest, or the amount of any required compensating balance the debtor must maintain are examples of items that are deducted from the gross amount of the loan to determine the net amount of principal because these monies are not actually available for use by the debtor.[293]

2. *Determination of the Applicable Rate.*—The next step is the calculation of the "credit service charge"[294] for a consumer credit sale and the "loan finance charge"[295] for a consumer loan whose rates are covered by the SCCPC. As is explained more fully below, the amount of the credit service charge is applied to the amount financed to determine the actual SCCPC rate for a consumer credit sale and the loan finance charge is applied to the principal for the actual rate for an SCCPC consumer loan.[296]

A clear comprehension of the terms credit service charge and loan finance charge is critical. The following example illustrates this point. Assume that a debtor borrows $100 for 12 months, and, under the applicable rate statute, the lender is allowed to charge

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disclosure purposes *or* state law usury statutes. The discount must also be offered to all prospective buyers; and this fact must be conspicuously disclosed. TIL §§ 167(b), 171(c), 15 U.S.C. § 1666(f), (j) (Supp. 1977); Regulation Z, 12 C.F.R. § 226.4(i) (1977). This discount is, under these provisions, excluded from the credit service or loan finance charge under the SCCPC. A cash discount in excess of 5% or a premium charged for use of a credit card, however, is part of the finance charge under TIL and the SCCPC. Premiums or extra charges for use of credit cards are specifically prohibited by TIL § 167(2), 15 U.S.C. § 1666(f) (Supp. 1977). *See* Landers, *supra* note 89, at 69-70; *cf.* FRB Official Staff Interpretation No. FC-0139, 43 C.F.R. 3898 (1978) (the TIL preemption of state usury laws for the purpose of this cash discount extends to consumer and business credit obtained with credit cards). The 5% cash discount is apparently not being utilized as widely as its proponents expected. *See* Wall St. J., Aug. 17, 1977, at 1, col. 6. A third type of discount is one given by a merchant for early payment, for example, a 2% discount for payment in 10 days. This type of discount is clearly a credit service charge. It is also part of the finance charge for TIL disclosure purposes. Regulation Z, 12 C.F.R. § 226.8(o) (1977).

293. This is a codification of a well-established common-law rule that, for usury purposes, calculates the effective interest rate by applying the total amount of interest collected to the amount of money actually subject to the control and use of the borrower. *See, e.g.*, Tri-County Fed. Sav. & Loan Ass'n v. Lyle, 280 Md. 69, 371 A.2d 424 (1977); Capparert v. Bierman, 339 So. 2d 1355 (Miss. 1976). *Cf.* Grundel v. Bank of Craig, 515 S.W.2d 177 (Mo. Ct. App. 1974) (interest on loan used to purchase a $5,000 interest free certificate of deposit added to interest on revolving loan on grounds that the certificate of deposit was a prerequisite to an additional line of credit under the revolving loan agreement). See also note 617 and accompanying text *infra*. These problems do not arise in credit sales.

294. S.C. CODE ANN. § 37-2-109 (1976).

295. *Id.* § 37-3-109 (Cum. Supp. 1977).

296. See notes 317-22 and accompanying text *infra*. The calculations involved are essentially the same as those involved in calculating the annual percentage rate under TIL.

at the rate of $8 per annum per $100 of principal.[297] In addition to this $8, an additional $4 charge is made by the lender for some legitimate purpose. If the additional charge must be included in the loan finance charge, then the total loan finance charge is $12 and the rate of the loan finance charge is 21.46% per year, as calculated on the actuarial method. If the $4 charge can be excluded from the loan finance charge and consequently included in the principal as a permissible additional charge, however, then the amount financed is $104, the finance charge is $8, and the rate of the loan finance charge is 13.91% per year. Of course, as the amount of credit rises, the difference between including or excluding a small charge in the loan finance charge is less drastic than in the above illustration. For example, if the loan had been for $1,000 rather than $100, and the lender charged $8 per $100 plus the $4 charge, the inclusion of the $4 in the loan finance charge results in a rate of 15.16% per year. Although less dramatic, the difference is still significant. In a borderline case, a creditor should include a charge in the credit service charge or loan finance charge. The SCCPC remedies for excess charges can be triggered when a creditor mistakenly excludes an item from the credit service charge or the loan finance charge with the result that the correct calculation required by the SCCPC shows that the rate charged exceeds the applicable SCCPC rate ceiling.[298] Courts have always strictly enforced statutes regulating credit rates and unless a mistake is solely attributable to a clerical computational error, courts have held creditors to be in violation of a rate statute even though the charge in question amounted to a dollar or less and the creditor was acting in good faith.[299]

The credit service and loan finance charges include all

297. This is the typical way add-on rates are expressed. Under the SCCPC, this is the applicable maximum rate that could be charged for a one-year old motor vehicle bought for personal, family, or household purposes. S.C. CODE ANN. § 37-2-211(2)(b) (1976).

298. *See* Part II, section E *infra.*

299. See note 429 *infra.* The SCCPC, like the UCCC and TIL, relieves a creditor from any liability for violations of the rate and charge provisions "if the creditor shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedure reasonably adapted to avoid the error." S.C. CODE ANN. §§ 37-5-202(7) (Cum. Supp. 1977) (general penalty section), 37-5-203(1) (1976) (disclosure violations). The cases interpreting similar language have all involved TIL. These decisions have consistently construed the similar TIL provisions to exculpate a creditor from liability only in those rare cases in which a simple clerical mathematical error has occurred. *See, e.g.,* Foundation Plan, Inc. v. Breaux, 345 So. 2d 955 (La. Ct. App. 1977); Ives v. W. T. Grant Co., 522 F.2d 749 (2d Cir. 1975).

charges imposed by the creditor with the exception of charges specifically excluded or authorized by statute. The loan finance charge for consumer loans is defined as

> the sum of (a) all charges payable directly or indirectly by the debtor and imposed directly or indirectly by the lender as an incident to the extension of credit, including any of the following types of charges which are applicable: interest or any amount payable under a point, discount, or other system of charges, however denominated, premium or other charge for any guarantee or insurance protecting the lender against the debtor's default or other credit loss; and (b) charges incurred for investigating the collateral or credit-worthiness of the debtor or for commissions or brokerage for obtaining the credit, irrespective of the person to whom the charges are paid or payable, unless the lender had no notice of the charges when the loan was made. The term does not include charges as a result of default, additional charges [§ 37-3-202], delinquency charges [§ 37-3-203], or deferral charges [§ 37-3-204].[300]

The definition for credit service charge is substantially the same as that for loan finance charge.[301]

The SCCPC concepts of credit service and loan finance charge are identical to those same terms as used in the 1968 UCCC, and, with minor exceptions, are the same as the term "finance charge" used in TIL.[302] Under all three statutes the essential test for determining whether a particular charge is included or excluded is the "but for" test.[303] Unless a specific statute exists to the contrary and if the particular charge is not imposed on a cash customer, then the charge in question is part of the credit service or loan finance charge because the charge would not have been imposed "but for" the extension of credit. The credit service and loan finance charge concepts are much more inclusive than the traditional concepts of interest and time-price differential. As a result, the SCCPC definitions of credit service and loan finance charges include many types of charges and fees, generally covering any charge or fee imposed on the debtor by the creditor, whether the charge is retained by the creditor or is paid by the creditor to third parties performing services for the trans-

300. S.C. CODE ANN. § 37-3-109 (Cum. Supp. 1977).

301. *Id.* § 37-2-109 (1976).

302. 15 U.S.C. § 1605(a) (1976). *See also* Regulation Z, 12 C.F.R. § 226.4 (1977); note 306 *infra.*

303. *See* Landers, *Determining the Finance Charge Under the Truth in Lending Act,* 1977 AM. B. FOUNDATION RESEARCH J. 45, 57-58.

action.[304] Some specific examples are origination, commitment, and stand-by fees,[305] appraisals, credit investigation charges,[306] brokerage fees (unless the creditor has no knowledge of the brokerage fee), discount points taken with real estate mortgages,[307] and charges for insurance (unless specifically authorized as "additional charges"). The initial fees traditionally charged with small loans and some types of retail installment purchases are also considered in the calculation of the charge.

Pre-SCCPC South Carolina cases had treated some "extra charges" in loans as interest, except when disallowed by statute.[308] In credit sales these charges, if properly disguised as part of the time-price differential, had been thought to be permissible without limitation under the well-established time-price doctrine, which exempts all charges made in a credit sale from the usury laws.[309] From a technical standpoint, therefore, the

304. Charges kept by the creditor have a greater risk of being found to be part of the credit service or loan finance charge than do reasonable charges that are paid to third parties for services rendered. See Part III, section C(2) *infra*. Retained charges are often a means by which a creditor is trying to indirectly cover overhead expenses, thereby increasing the actual yield on the transaction.

If a particular charge is included in the credit service or loan finance charge, it can be amortized over the life of the obligation for rate determination and disclosure purposes under the SCCPC and TIL. To the extent that obligations are prepaid, however, the actual yield to the creditor is higher than the disclosed rate because the creditor has already collected many of these front-end charges in full and has no obligation to return them. This increase in actual yield has its greatest impact in real estate mortgages in which, although the average maturity is 20 to 30 years, the average life in only 8 to 12 years. *See* Landers, *supra* note 303, at 66.

305. *See* Ad. Interpretation No. 1.202(7)-7602, S.C. Dep't of Cons. Aff. (1976) (holding that an origination fee is part of the credit service or loan finance charge and constitutes an excess charge if made in addition to the maximum authorized rate for a transaction).

306. TIL excludes from the finance charge appraisal fees and credit report fees incurred in real estate transactions. These exclusions, which clearly violate the "but for" test, were purposely not included in the UCCC or the SCCPC. *See* S.C. CODE ANN. §§ 37-2-109 (1976), 37-3-109 (Cum. Supp. 1977). *Compare id.* §§ 37-2-202(1)(d), 37-3-202(1)(d) (Cum. Supp. 1977), 15 U.S.C. § 1605(e)(5)-(6) (1976) *with* TIL § 106(e), Regulation Z, 12 C.F.R. § 226.4(e) (1977).

307. The language in the definitions of credit service and loan finance charges is broad enough to cover points paid by either the buyer or the seller. Since any points imposed on the seller as a condition of a loan to the purchaser are going to be recovered by the seller from the purchaser through a higher purchase price, they are indirectly payable by the debtor and indirectly imposed by the creditor "as an incident to the extension of credit." The SCCPC requirements for inclusion in the credit service and loan finance charges are, therefore, met. S.C. CODE ANN. §§ 37-2-109 (1976), 37-3-109 (Cum. Supp. 1977). The inclusion of seller points under TIL is not as clear cut. *See* Regulation Z, 12 C.F.R. § 226.406 (1977); Landers, *supra* note 303, at 66-68.

308. See Part III, section C(2) *infra*.

309. *See, e.g.*, Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761 (1950). *See also* note

SCCPC's rate structure will have its greatest impact in South Carolina on calculation of rates on consumer credit sales that previously had not been subject to rate limits, with the exception of installment sales under the Motor Vehicle Sales Finance Act.[310] It is well known, however, that many lenders in South Carolina, particularly in the past few years, have been imposing a variety of front-end fees and service charges in addition to the maximum interest rates allowed. This is a calculated risk on their part; because of the tight credit situation, a debtor is unlikely to challenge extra charges. Thus, from a practical point of view, the impact of the SCCPC's rate structure on South Carolina consumer credit lenders may be just as great as on retail creditors.

Two important conditions limit the all-inclusiveness of the credit service and loan finance charges:

(a) The "directly or indirectly" language in the definitional sections[311] require that the charge must have been imposed by the creditor on the debtor for the credit in question. If the charge is imposed on someone unconnected with the debtor or is made by a third party not acting as the agent of the creditor, then the normal rule is that the charge in question can be excluded from the credit service and loan finance charge.[312] Brokerage fees, however, are treated in a special manner and can be excluded only if the creditor had no knowledge of any such fees when the credit was granted.[313] If the creditor knew brokerage fees were being paid, the amount must be included in the credit service and loan finance charge even though the broker is retained and paid by the debtor.

(b) Certain charges are specifically authorized to be excluded from the credit service and loan finance charge. The exclusions

286; Part III, section A *infra.*

310. S.C. CODE ANN. § 56-17-40 (1976) (incorporated into *id.* § 37-2-211 (1976)). See notes 243-55 and accompanying text *supra.*

311. *Id.* §§ 37-2-109(1) (1976), 37-3-109(1) (Cum. Supp. 1977).

312. In addition, see note 292 *supra,* which discusses the exclusion of some types of discount charges.

313. *Id.* §§ 37-3-109(2) (1976); 37-3-109(2) (Cum. Supp. 1977). Charges for credit reports and investigation of any collateral must also be included in the credit service or loan finance charge unless the creditor had no knowledge of the charges. *Id.* Such charges are invariably made at the request of the creditor. Debtors do on occasion, however, retain their own mortgage brokers and the requirement that brokerage fees be included in the credit service or loan finance charge if the creditor learns that a broker is involved even though the broker is not acting as the agent of the creditor is contrary to the common-law rule that still applies to transactions not governed by the rate and charge provisions of the SCCPC. See Part II, Section C(2) *infra.*

mentioned in the definitions of credit service and loan finance charges fall into two categories: (1) "additional charges"[314] and (2) default, delinquency, and deferral charges. The difference between a prepayment rebate calculated on the actuarial basis and one calculated on the Rule of 78's also falls into the latter category.[315] Certain other charges also are excludible charges. These authorized charges will be discussed in Part II, section D.

In summary, in the absence of a specific statutory exclusion, any charge made by the creditor for the credit in a transaction governed by the SCCPC rate structure that meets the "but for" test[316] must be included in the credit service and loan finance charge. A strong presumption exists that all charges are included and the burden is on the creditor to prove exclusion was proper.

3. Calculation of Rate on Actuarial Method.—The third major computation is the calculation of the rate of the credit service charge and loan finance charge by the actuarial method. This method requires the credit service charge to be applied to the amount financed and the loan finance charge to be applied to the principal in a manner so that each payment is allocated first to the accumulated credit service charge or loan finance charge at the monthly rate, and second to the remaining unpaid balance of the amount financed or principal, which is reduced accordingly.[317] The net result under the actuarial method is that the same dollar amount of credit service charge or loan finance charge for a given amount of credit will yield the same rate of credit service charge or loan finance charge per year regardless of whether the transaction is characterized as being handled on a precomputed basis, that is a transaction in which the debt is expressed as a single amount that includes all credit charges,[318] and regardless of whether the permissible rate is expressed in terms of so many dollars per $100 of credit, add-on, discount,

314. S.C. CODE ANN. §§ 37-2-202 (1976), 37-3-302 (Cum. Supp. 1977). See Part II, section D(1) *infra.*

315. See Part II, section D(3) *infra* for further discussion of prepayment rebates. The difference in the amount of the rebate between the actuarial method and Rule of 78's or "sum-of-the-digits" method has been argued to be a "penalty" that is subject to special disclosure under TIL. The Federal Reserve Board has issued an official interpretation specifically holding that a rebate calculated under the Rule of 78's is not a penalty. Regulation Z, 12 C.F.R. § 226.818(6) (1977).

316. See note 303 and accompanying text *supra.*

317. S.C. CODE ANN. § 37-1-301(1) (Cum. Supp. 1977).

318. *See id.* §§ 37-2-105(7) (1976), 37-3-107(2) (Cum. Supp. 1977). This is the usual method of handling consumer installment loans and credit sales. See also note 357 and accompanying text *infra.*

simple or compound interest, or in any other manner.[319]

By regulation,[320] the method of calculating the actuarial method under the SCCPC is the same as that for computing the annual percentage rate under TIL's Regulation Z.[321] This method provides parity between the rate of credit service and loan finance charges and the TIL annual percentage rate in accordance with the intent of the UCCC, from which it was adopted, and eases the problems of calculation for creditors. The rate calculations under the SCCPC, like those under TIL, are based on a 365-day year (366 during a leap year) and not the 360-day year that has been traditionally utilized by creditors.[322] Although the difference is slight, in a situation in which a creditor charges per diem interest calculated on a 360-day table an excess charge claim might result under the SCCPC remedial provisions.

Special considerations are involved in the calculation of the appropriate charges for open-end credit transactions, such as revolving charge accounts. Different considerations arise because of the varying way creditor practices treat purchases and payments within a billing cycle. Many creditors will not impose any credit service or loan finance charge if the prior month's bill is paid before the next month's bill is prepared. Some creditors traditionally allow this "free ride" only if the prior month's bill is paid in full. Others, however, will give credit for partial payments. Still others do not allow any free ride and impose a credit service or loan finance charges on the amount owing as of the ending day of the billing cycle.

Two principal methods are used to calculate the amount of credit to which the appropriate credit service or loan finance

319. The many different methods of calculating credit charges authorized by state statutes and the inability of consumers to compare on a rational basis the actual rates of the charges made under the various methods were important factors in the development of both TIL and the UCCC. *See generally* Landers, *supra* note 76, and authorities cited note 5 *supra*.

320. Rules and Regs. of the S.C. Dep't of Cons. Aff. 28-28-1.301, S.C. CODE OF STATE REGS. (1976).

321. The various formulas and other technical data for computing the annual percentage rate are contained in Regulation Z, 12 C.F.R. § 226.5(6) (1977).

322. Ad. Interpretation No. 3.508-7702, S.C. Dep't of Cons. Aff. (1977). This modifies prior South Carolina law. *See* Merchants & Planters' Bank v. Sarratt, 77 S.C. 141, 57 S.E. 621 (1907) (which approved the use of a 360-day year for interest calculations). *See also* Annot., 35 A.L.R.2d 842 (1954). The continued use of a 360-day table is apparently authorized in transactions whose rates are governed by the SCCPC. See note 473 and accompanying text *infra*. *But see* American Timber & Trading Co. v. First Nat'l Bank of Ore., 511 F.2d 980 (9th Cir. 1973), *cert. denied*, 421 U.S. 921 (1975).

charge will be applied in open-end credit transactions. Each has several variations.

One mode of calculation is based on the average daily balance in the account during the billing cycle. Under this method the finance charge is computed on the sum of the balances outstanding each day during the billing cycle, divided by the number of days in the cycle. Purchases during the cycle may or may not be included in the daily balances from the day they are made, and an optional feature may or may not permit the customer to avoid a credit charge for payment before a given date.

The second method is to calculate the credit charge on the unpaid balance of the account as of the last day of the cycle. Three principal variations of this second method are used. The oldest and easiest to understand is the ending balance method, in which the credit service or loan finance charge is calculated on the balance of the account on the last day of the billing cycle, taking into account all purchases and payments through the last day of the cycle. This method does not give the debtor any free period during which payment can be made without any credit charge being due. A second variation is the previous balance method, under which the credit service or loan finance charge is computed on the ending balance, but the charge is not payable if the full amount of the balance is paid before a particular date. If the prior ending balance, or "previous balance," is not paid in full by the particular date specified, then the credit service or loan finance charge is applied to the full amount of the ending balance. Under this method, which is still apparently the one most widely utilized, purchases, partial payments, and credits during the current billing cycle do not affect the amount of the credit charge because the charge is based on the previous balance or ending balance at the end of the prior billing cycle. These purchases and partial payments are taken into account in determining the ending balance for the next billing cycle. A third variation, the adjusted balance method, is similar to the previous balance method except that partial credits and payments during the current cycle are deducted from the prior ending balance before applying the credit charge.[323]

323. For a more detailed explanation of these and other calculation methods used in open-end accounts, see 1974 UCCC, PREFATORY NOTE, at xxx-xxxiii; R. SHAY & W. DUNKELBERG, *supra* note 273, at 72-75, 113-14; Higgs, *Rate Limitations, Interest and Usury*, 33 BUS. LAW. 1043, 1051-54 (1978); Miller & Warren, *A Report on the Revision of the Uniform Consumer Credit Code*, 27 OKLA. L. REV. 1, 17-20 (1974).

Both the previous balance and adjusted balance methods give the debtor a free period during which payment can affect the amount of the credit charge that has been initially deferred. The chief difference between them is that, under the previous balance method, only a full payment or credit during the free period will affect the amount of the credit charge, whereas a partial payment or credit computed under the adjusted balance method will reduce the balance to which the credit charge is applied. Several lawsuits have been brought charging that the failure of the previous balance method to take into account partial credits or payments during the current billing cycle is illegal. Creditors have prevailed in all but one[324] of these suits, primarily on the grounds that free periods are not legally required, and, therefore, as long as the actual return to the creditor does not exceed the yield derived from the ending balance method, the creditor is not making any unlawful charge.[325] Because the amount of the credit ser-

324. Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083 (3d Cir. 1975). This case can be distinguished from the other cases, see note 325 *infra*, on the basis of the peculiar wording of the controlling state statute.

325. Seibert v. Sears, Roebuck & Co., 120 Cal. Rptr. 233, 45 Cal. App. 3d 1 (1975); Federated Dep't Stores, Inc. v. Pasco, 275 So. 2d 46 (Fla. Dist. Ct. App. 1973); Johnson v. Sears, Roebuck & Co., 14 Ill. App. 3d 838, 303 N.E. 2d 627 (1973); Zachary v. R.H. Macy & Co., 31 N.Y.2d 443, 293 N.E.2d 80, 340 N.Y.S.2d 908 (1972). A recent study showed that although the actual yield to the creditor on the typical previous balance and average daily balance methods is greater than the adjusted balance and similar methods, the ending balance method produces a greater average yield than any of the other standard methods. The actuarial method, computed on the actual amount of credit outstanding, eliminates any "free periods" and provides the highest yield of all methods.

Assessment Percent Rate Per Year	Assessment Method	Percent of Previous Balance
18	Previous balance	100
18	Adjusted balance	86
18	Ending balance	109
18	Average daily balance (ADB)	100
18	ADB, excluding purchases	94
18	True actuarial	114

R. SHAY & W. DUNKELBERG, *supra* note 273, at 74. Since the actuarial method is the approved method of computing all rates under the SCCPC and a debtor has no right to any free period, a strong argument can be made that any calcuation method that yielded the same or less return than the true actuarial method, with all free periods eliminated, should be allowed. *See In re* Romine, 556 F.2d 895 (8th Cir. 1977) (the court amortized the interest rate charged a dealer by a manufacturer over the entire period of the credit, including a substantial free period in which the dealer could repay the obligation without any interest obligation. If the free period had been excluded, then the obligation would have been usurious under Arkansas law). *See also* Higgs, *supra* note 323, at 1054 (stating

vice or loan finance charge is applied to the prior month's ending balance under the previous balance method, the maximum yield to the creditor can never exceed the yield under the ending balance method. The SCCPC and UCCC specifically authorize the use of the unpaid balance and average daily balance methods, regardless of whether the method in question involves a free period.[326] The choice of method is left to the creditor. The average daily balance methods, as a general rule, require more sophisticated computer methodology than the unpaid balance methods, and the extra costs involved make the average daily balance methods impracticable for many creditors.[327] No matter what balance method is utilized, however, the rate applied to the resulting balance cannot exceed the rate authorized in the SCCPC for the type of open-end credit in question.[328] For example, assume a debtor with a revolving charge account has a previous balance of $1,100 and makes payments of $110 during the month, but makes no new purchases. Under the previous balance method the seller would be in violation of the SCCPC if the debtor was charged 1 ½% per month or 18% per annum on the full $1,100, which would be the amount of the indebtedness to which the credit service charge is applied under this method since the balance was not paid in full. The maximum charge that could properly be imposed in this situation would be 18% on $1,000 and 12% on the

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that most New York banks have recently decided to eliminate the interest free period in all cases). This position may have particular relevance in South Carolina because of S.C. CODE ANN. § 37-2-207(6) (1976), which specifies that in a revolving charge account governed by the SCCPC "no rate charged pursuant to this section shall exceed eighteen percent per annum." No explanation of the intent of this section, which is not in the UCCC texts, exists in the legislative history of the SCCPC. *See* notes 1, 102 *supra*. This section was approved as an amendment to H. 2356 of 1974, a bill that originally was limited to authorizing a 1½% per month rate for retail merchants and that eventually became the 1974 SCCPC in a spirit of compromise. 1974 S.C. HOUSE J. 1884-85. *See also* notes 1, 273 *supra*. This particular provision was introduced by Rep. Moss of Beaufort who had previously introduced an amendment that would have prohibited the use of the "previous balance" method. 1974 S.C. HOUSE J. at 1881-82. Ad. Interpretation No. 2.207-7707, S.C. Dep't of Cons. Aff. (1977) states that this language was simply meant to make certain that the monthly rate of 1½% authorized by S.C. CODE ANN. § 37-2-207(3) (1976) for accounts of $1,000 or less, meant the same thing as 18% per annum. Another plausible explanation is that this language could refer to 18% per annum calculated on the actuarial method. Such an interpretation would give merchants maximum flexibility to structure a balance method that suited their particular needs.

326. S.C. CODE ANN. §§ 37-2-207 (1976), 37-3-201, 37-3-515 (Cum. Supp. 1977). *See also* 1968 UCCC §§ 2.207, 3.201, .508; 1974 UCCC §§ 2.202, .401. These SCCPC and UCCC sections also authorize the use of a single rate applied to a limited range (8% variance from the median) of outstanding credit under either type of method.

327. See authorities cited in note 323 *supra*.

328. See Part II, section B(2) *supra*.

remaining $100.[329] If the creditor had used the adjusted balance method, however, the payment during the month would have been taken into account in computing the amount onto which the rate is applied and an 18% credit service charge on the full amount would have been proper, since the ending balance would have been $990.

Finally, with revolving charge accounts, the SCCPC requires that the credit service charge made in any billing cycle not exceed 42% of the scheduled minimum payment for the billing cycle.[330] The purpose of this provision is to ensure that a reasonable amount of the principal balance is paid each month. This is to prevent the situation in which essentially all of a debtor's payment is used to pay the credit service charge, and, consequently, the account is never paid off. No parallel restriction is in the provisions dealing with open-end loans.[331]

D. Additional and Other Charges, Rebates, Refinancings, and Consolidations

1. Additional Charges.—The SCCPC specifically authorizes certain charges to be excluded from the credit service and loan finance charges. The first category of excluded charges is designated "additional charges." The provisions for these additional charges are the same for the original SCCPC consumer credit sale[332] and consumer loan[333] and for deferral and refinancing transactions.[334] Unless specifically authorized by the SCCPC,[335] any other charge or any charge in violation of or in excess of those permitted[336] must be included in the credit service or loan finance charge.[337]

329. *See* S.C. CODE ANN. § 37-2-207(3) (1976). Partial payments and credits are not taken into account in the previous balance method.

330. *Id.* § 37-2-207(5) (1976).

331. The SCCPC open-end rate sections authorize the creditor to charge a 50¢ minimum charge if any balance is due in the account. This charge helps to defray some of the overhead costs in maintaining these accounts. No minimum charge can be made in a revolving loan account, however, if the lender has charged an annual fee for use of the account. *Compare id.* § 37-2-207(4) *with id.* §§ 37-3-201(4)(c), -515(1)(c) (Cum. Supp. 1977).

332. *Id.* § 37-2-202.

333. *Id.* § 37-3-202.

334. *Id.* §§ 37-2-204(5), 37-3-204(5) (Cum. Supp. 1977) (deferrals), 37-2-205(2) (1976), 37-3-205(1) (Cum. Supp. 1977), (refinancing transactions).

335. *See id.* §§ 37-2-109, 37-3-109 (1976).

336. This is the result of the definitions of credit service charge and loan finance charge. *Id.* §§ 37-2-109 (1976), 37-3-109 (Cum. Supp. 1977).

337. Consumer finance companies licensed under Act 988 of 1966 can make a sub-

The permissible additional charges are as follows:

(a) Official Fees and Taxes.—Included within this category are filing fees for perfecting security interests, license fees, certificate of title and registration fees, insurance fees paid in lieu of perfecting a security interest, documentary stamps, and tax payments (for example, sales, excise, and use taxes).[338]

(b) Insurance Premiums.—

(1) Property damage and liability insurance can be excluded from the credit service or loan finance charges, when the insurance was obtained from or through the creditor, if the creditor has clearly disclosed the cost of this insurance to the debtor and has given the debtor the option of choosing the person from whom the insurance is to be obtained.[339] When vendor's single interest insurance is utilized, two additional requirements must be met for exclusion: (a) The insurer can have no right of subrogation against the consumer, and (b) the insurance cannot duplicate other insurance under which any loss is payable to the creditor when a separate charge to the consumer is made for the other insurance.

(2) Credit life and disability insurance premiums can be excluded from the credit charges if the insurance is not required as a prerequisite for obtaining the credit and the debtor voluntarily gives his written consent to the insurance after written disclosure

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stantial initial charge covering all the expenses incurred by the lender, including many types of expenses that are not permissible additional charges under the SCCPC and, therefore, are part of the loan finance charge if the loan was governed by the SCCPC rate structure. *Id.* § 34-29-140(a) (Cum. Supp. 1977). This initial charge cannot be made by consumer finance companies licensed as supervised lenders under the SCCPC. The ability to exclude this initial charge from the finance charge is one of the reasons why the actual yield on very small loans is higher under Act 988 than under the SCCPC. See Part I, section C(9) *supra.* These intial charges are a substantial source of income for Act 988 licensees. In 1976 initial charges accounted for 20.34% of the total income of all such companies. *1976 Consumer Finance Division Annual Report, supra* note 186, at 2.

338. S.C. CODE ANN. §§ 37-2-202(1)(a) (credit sales), 37-3-202(1)(a) (Cum. Supp. 1977) (loans). These charges are excluded from the determination of interest under pre-SCCPC South Carolina cases. See Part III, section C(2)(a) *infra.* If the creditor purchases nonfiling insurance, instead of perfecting a security interest or a real estate mortgage by filing the required documents, the maximum exclusion is the amount of the official filing fee that would be due if a financing statement or mortgage had been filed. Any premiums above that amount would be part of the credit service or loan finance charge. Ad. Interpretation No. 1.301-7618, S.C. Dep't of Cons. Aff. (1976).

339. S.C. CODE ANN. §§ 37-2-202(1)(b), (2) (credit sales), 37-3-202(1) (b), (2) (Cum. Supp. 1977) (loans). Consumer finance companies licensed under Act 988 can exclude property and liability, as well as life and disability, insurance from the loan finance charge even if it is required. *Id.* § 34-29-160 (1976). The premiums many require for life and disability insurance, however, would have to be disclosed as part of the finance charge and Annual Percentage Rate under the TIL. TIL § 106, 15 U.S.C. § 1605(b) (1976).

of the cost. If these conditions are not met, however, then the cost of the insurance must be included in the credit service or loan finance charge, which results in the creditor getting a lower effective return than usual because the premiums (less commissions and rebates) are paid to third parties. These provisions are essentially the same as the insurance provisions in TIL and Regulation Z.[340]

If the statutory requisites are met, the exclusion applies to the full amount of the premiums even though the creditor receives a commission or rebate on any insurance purchased through the creditor, assuming the commission or rebate is reasonable and standard for the type of insurance in question.[341] In addition, although the SCCPC and TIL also require that, for the premiums to be excluded from the credit service and loan finance charge, the purchase of credit life and disability insurance and choice of insurance agent be voluntary, approximately 95% or more of all debtors are estimated to "voluntarily" purchase insurance through the creditor.[342] The commissions and rebates from this insurance provide a significant amount of additional income to creditors. For example, in 1976, 8.4% of all income earned by consumer finance companies licensed in South Carolina came from this source.[343]

(c) Annual Fees for Use of Credit Cards.—An annual charge

340. *See id.* § 1605(b)-(c); 12 C.F.R. § 226.4(a)(5)-(6) (1977).

341. *See, e.g.*, Landers, *supra* note 303, at 113-35. This continues the common-law rule, which has been followed in South Carolina. See Part III, section C(2)(j) *infra*. *Cf.* S.C. CODE ANN. § 37-4-108(2)(c) (1976) (creditor not required "to account to the debtor for any portion of a separate charge for insurance because . . . [t]he creditor pays or accounts for premiums to the insurer. . ."). The type, amount, charges, and rebates for insurance are regulated by Chapter 4 of the SCCPC. *Id.* § 37-4-101 to -304. (1976 & Cum. Supp. 1977). A charge exceeding these regulations is considered an excess charge for purposes of the SCCPC remedies provisions. *Id.* § 37-4-104(2) (Cum. Supp. 1977). Credit life and disability insurance premiums must be calculated to produce a loss to a premium ratio of "approximately fifty percent." *Id.* § 37-4-203(4) (1976). Act 988 of 1966, which governs consumer finance companies licensed to make small loans under that Act, states that the premium to loss ratio must not be "less than fifty per cent, and rates producing a lesser loss ratio shall be deemed excessive." *Id.* § 34-29-160. Whether any difference in the effective rates for the two acts was intended is not revealed in the legislative history of the SCCPC. See also note 539 and accompanying text *infra*. Section 4.203 of the 1968 and 1974 UCCC texts only require that the rates not be "unreasonable in relation to the benefits provided."

342. *See* Landers, *supra* note 303, at 121.

343. *1976 Consumer Finance Division Annual Report, supra* note 186, at 2. In some states, the amount of this income is even greater. For example, in Kansas insurance commissions and rebates accounted for 40% of consumer loan profits in 1973. Landers, *supra* note 303, at 115 n.151.

for the privilege of using a seller credit card, lender credit card, or other similar arrangement can be excluded from the credit service and loan finance charge if the arrangement entitles the consumer to purchase goods and services from a minimum of 100 persons unrelated to the issuer.[344] This exclusion applies to bank, travel, and entertainment credit cards, and bank over draft plans. In most cases, however, an annual fee imposed by a retail store on its own credit cards would have to be included in the credit service charge because these cards usually can be used only to purchase or lease items from the issuer, or its affiliates and franchises and, therefore, could not meet the "100 persons not related to the issuer" requirement.[345] The exclusion of the annual fee from the credit service charge can make a significant difference in the applicable rate. For example, if the average monthly balance of an open-end account qualifying for the exclusion is $200 and the creditor charges 1½% per month or 18% per annum, then a $15 annual fee results in an effective yield of 25.5%, even though the rate for the purposes of the SCCPC and TIL is 18%. This is because the annual fee is excluded from the calculation of the credit service or loan finance charge.[346]

(d) Real Estate Closing Costs.—If real estate closing costs "are bonafide, reasonable in amount, and not for the purpose of circumvention or evasion" of the SCCPC, they can be excluded from the credit service and loan finance charges.[347] If all the prerequisites are fulfilled, the following costs can be excluded from the credit service and loan finance charges:

344. S.C. CODE ANN. §§ 37-2-202(1)(c) (seller credit cards), 37-3-202(1)(c) (Cum. Supp. 1977) (lender credit cards and similar arrangements). In the absence of specific statutory authorization, the status of this fee is doubtful. *But see* Key v. Wortham Bank & Tr. Co., 543 S.W.2d 496 (Ark. 1976) (annual membership fee of $12 held to be a permissible additional charge).

345. If an annual fee is required, the issuer of a seller credit card can make a 50¢ minimum charge on any account in which a balance is due. An issuer of a lender credit card cannot make this minimum charge. *Compare* S.C. CODE ANN. § 37-2-207(4) *with id.* §§ 37-3-201(4)(c), -515(1)(c) (Cum. Supp. 1977).

346. Landers, *supra* note 303, at 72 nn.50-51. A recent survey of urban middle class households in South Carolina showed that the average balance on different types of credit cards varied considerably. For example, the average balance was $76.24 on an Exxon card, $106.88 on a J.C. Penney card, $158 on an American Express, $251 on a Master Charge, and $281 on a Visa credit card (Bank Americard). F. Ingram & O. Pugh, *supra* note 271, 44-63 (1977). The median level for these cards was considerably lower than the average. For example, the median account for Bank Americard accounts was $159.50. *Id.* at 51 table 20.

347. S.C. CODE ANN. §§ 37-2-202(1)(d) (credit sales), 37-3-202(1)(d) (Cum. Supp. 1977) (loans).

(i) Fees or premiums for title examination, abstract of title, title insurance, surveys, or similar purposes,

(ii) Fees for preparation of a deed, settlement statement, or other documents, if not paid to the creditor or a person related to the creditor,

(iii) Escrows for future payment of taxes, including assessments for improvements, insurance, and water, sewer and land rents, and

(iv) Fees for notarizing deeds and other documents if not paid to the creditor or a person related to the creditor.[348]

Some normal real estate closing costs do not fall within this exclusion. For example, appraisal fees and credit report charges are specifically included in the credit service and loan finance charge definitions.[349] Inspection fees charged for construction loans also must be included in the credit service and loan finance charge.[350]

This exclusion only applies when the transaction involves a credit purchase in land that is governed by the SCCPC.[351] Most real estate mortgages are not covered by the SCCPC and the treatment of these closing costs in excluded mortgage transactions is controlled by non-SCCPC statutes and cases.[352]

(e) Other Charges Approved for Exclusion by the SCCPC Administrator.—The SCCPC gives the Administrator of the De-

348. A considerable amount of recent litigation by consumer advocates has been brought over escrow accounts. They claim that the "lost" interest, or interest earned by the creditor on these escrow balances, ought to be included in any finance charge calculation, disclosed as such under TIL, or both. The decisions to date have been in favor of the creditor's position. *See, e.g.,* Moore v. Great W. Sav. & Loan Ass'n, 513 F.2d 688 (9th Cir. 1975); Stravrides v. Mellon Nat'l Bank & Tr. Co., 353 F. Supp. 1072 (W.D. Pa.), *aff'd,* 487 F.2d 953 (3d Cir. 1973); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7 (D.D.C. 1973).

349. S.C. CODE ANN. §§ 37-2-109 (1976), 37-3-109 (Cum. Supp. 1977). *See also* Ad. Interpretation No. 3.202-7613, S.C. Dep't of Cons. Aff. (1976). TIL includes appraisal fees and credit reports in the list of permissible additional charges in real estate transactions. TIL § 106(e)(5)-(6), 15 U.S.C. § 1605(e)(5)-(6) (1976); Regulation Z, 12 C.F.R. § 226.4(e)(5)-(6). Depending on the amount involved and the term of the loan, this difference in treatment may be enough to cause the actual rate of the credit service or loan finance charge to be mathematically higher than the Annual Percentage Rate (APR) for disclosure purposes. See note 306 *supra.* TIL, consistent with the UCCC and the SCCPC, does exclude the cost of appraisal and credit reports from permissible additional charges in non-real estate mortgage transactions. 15 U.S.C. § 1605(a)(4) (1976); 12 C.F.R. § 226.4(a)(4) (1977).

350. See FRB Letter No. 1212, [1974-1977 Transfer Binder] 5 CONS. CRED. GUIDE (CCH) ¶ 31,651 (July 11, 1977) (holding that inspection fees are not within the definition of appraisal fees and, therefore, are to be included in the finance charge for TIL disclosure purposes).

351. See Part I, section B(4)(d) *supra.*

352. See Part III, section C(2) *infra.*

partment of Consumer Affairs authority to designate by rule other additional charges that can be excluded from the credit service and loan finance charges.[353] The statutory guidelines require that the benefits be of value to the consumer debtor, and that the charges be reasonable in amount and of "a type that is not for credit."[354] At the time this article was written, the Administrator had issued no rules under this authority, but does possess the flexibility to deal with specific issues as they arise.

2. *Other Charges and Fees Excluded From the Credit Service and Loan Finance Charges.*—In addition to permissible "additional charges" the SCCPC and the UCCC authorize other charges and fees to be excluded from the credit service and loan finance charges. These are (1) delinquency charges, (2) deferral fees, (3) certain post-default attorneys' fees, (4) default charges, and (5) advances by a creditor to perform a debtor's obligation to insure or preserve the collateral.

If the prerequisites for exclusion are not met, the charge must be included in the credit service and loan finance charge and will trigger the SCCPC remedies for refunds, civil penalties, costs, and attorneys' fees if the charge in question when added to the other credit or loan finance charges made exceeds the permissible rate ceiling authorized for the particular type of transaction.[355] The SCCPC rules governing excluded charges differ from prior South Carolina law in many respects. A clear understanding of the parameters of the applicable sections is important.

(a) Delinquency Charges.[356]—In a transaction whose rates and charges are governed by the SCCPC, a delinquency charge

353. S.C. CODE ANN. §§ 37-2-202(1)(e) (credit sales), 37-3-202(1)(e) (Cum. Supp. 1977) (loans).

354. *Id.* The apparent purpose of this language is to require that the charge be for a service to the debtor, rather than part of the credit charge or normal overhead of the creditor.

355. *See id.* § 37-5-202; *cf.* Ad. Interpretation No. 1202(7)-7602, S.C. Dep't of Cons. Aff. (1976) (origination fee would be an excess charge if made in addition to the maximum rate authorized). Amounts in excess of those authorized may trigger the penalty provisions of § 37-5-20(1) even though the excess would not, when added to the other credit service and loan finance charges imposed in the transaction, exceed the maximum authorized amount. This would be the case with, for example, excess attorneys' fees and default charges. *Id.* See Part II, section E *infra* for further explanation of the SCCPC remedies provisions.

356. *See* S.C. CODE ANN. §§ 37-2-203 (1976), 37-3-203 (Cum. Supp. 1977). The general common-law rule is that a delinquency charge, assuming it is reasonable, is not part of the finance charge because it is not imposed on the debtor as part of the credit, but rather is a charge the debtor voluntarily incurs for failure to make a timely payment. *See* Annot., 63 A.L.R.3d 50 (1975); Part III, section C(2)(h) *infra.*

can be made only in a precomputed transaction, that is, one in which the debt is expressed in a credit sale as a sum of the amount financed plus the credit service charge, or in a loan as the principal plus the loan finance charge.[357] The usual precomputed transactions are calculated on an add-on or discount basis in which the credit charge is added to the amount of credit extended to create the total debt. Most typical closed-end installment credit transactions are handled this way. The reason behind the authorization of a delinquency charge in precomputed transactions is to prevent the unfairness to the creditor that would result from the absence of income for the period of delay in the absence of a late payment charge. In effect, a prohibition of a delinquency charge in a precomputed transaction would amount to an interest free loan to the debtor.[358] In a nonprecomputed transaction, however, the delinquent payment is added back to, and continues to be, a part of the total debt to which the credit service or loan finance charge is applied. Unlike the precomputed transaction, the creditor is, therefore in effect, being compensated for the late payment. Typical examples of nonprecomputed transactions include open-end credit, including revolving charge accounts and bank credit card accounts, most real estate mortgages, direct reduction loans when the credit service or loan finance charge is calculated monthly on the unpaid balance of the indebtedness, and simple interest installment loans made by banks.

If the transaction is precomputed, the creditor can collect a single delinquency charge on any payment including any deferred payment that is not paid in full within 10 days of its due date. The amount, which must be authorized in the contract between the creditor and the debtor, cannot exceed the greater of (a) 5% of the installment or $5, whichever is the lesser, or (b) the permissible deferral charge[359] that is due for the period the installment is delinquent.[360]

To prohibit a creditor from forcing multiple delinquencies by allocating a portion of any subsequent payment to a prior delinquency, the SCCPC requires the creditor to first apply any subse-

357. *See* S.C. CODE ANN. §§ 37-2-105(7) (1976), 37-3-107(2) (Cum. Supp. 1977); Ad. Interpretation No. 3.107-7710, S.C. Dep't of Cons. Aff. (1977).

358. This is because the total credit charge is included in the payment and no additional amount of credit charge for the period of the delinquency would be collectible. *See* INTEGRATED CODE, *supra* note 3, § 2.203, at Comment 2.

359. *See* S.C. CODE ANN. §§ 37-2-204, 37-3-304 (Cum. Supp. 1977). See also Part II, section D(2)(b) *infra*.

360. S.C. CODE ANN. §§ 37-2-203(1) (1976), 37-3-203(1) (Cum. Supp. 1977).

quent payment received to the current month's payment. This prevents any of the amount currently paid from being applied against the delinquent payment, unless the total amount paid exceeds the current month's payment.[361]

In a precomputed loan a lender has the option of converting the transaction to one in which the loan finance charge is based on unpaid balances after two or more installments are in default for ten or more days.[362] This conversion right is advantageous to the lender because it avoids some of the administrative headaches involved in assessing delinquency fees. As a prerequisite for converting the account, however, the lender must rebate the portion of the unearned loan finance charge required by the SCCPC for prepayments.[363] This conversion option is not available in the case of a consumer credit sale.

(b) Deferral Charges.—As with delinquency charges, deferral charges are only authorized in precomputed transactions.[364] The primary distinction between a deferral and delinquency fee is that the former is the credit charge made on a payment that, by agreement, can be made at a time other than the scheduled payment date, whereas a delinquency fee is a penalty charge made for a late payment. Deferral and delinquency charges are mutually exclusive. A creditor can, however, make a deferral charge on an installment in which a delinquency charge was originally made, if the delinquency charge is deducted from the total deferral charge.[365] The agreement by the debtor to pay a deferral fee

361. *Id.* §§ 37-2-203(3) (1976), 37-3-203(3) (Cum. Supp. 1977).

362. *Id.* § 37-3-203(4) (Cum. Supp. 1977). *See* Ad. Interpretation No.3.203-7611, S.C. Dep't of Cons. Aff. (1976).

363. See Part II, section D(3) *infra.*

364. *Id.;* S.C. CODE ANN. §§ 37-2-204, 37-3-204 (Cum. Supp. 1977). *See* note 357 and accompanying text *supra.* Delinquency and deferral charges are a significant source of income for creditors. In 1976, 6.26% of the total income of consumer finance companies licensed in South Carolina came from these charges. *1976 Consumer Finance Division Annual Report, supra* note 186, at 2. Considerable differences exist between the size of delinquency and deferral fees that can be charged by consumer finance companies licensed as supervised lenders under the SCCPC and those licensed under Act 988. In many instances, the charges permitted under Act 988 will be higher. For example, under Act 988 a delinquence charge of 5% of the total payment due (versus $5 maximum under the SCCPC) can be collected on any installment delinquent for 5 or more days (versus 10 days under the SCCPC). Act 988 also authorizes a deferral charge of 2% per month on loans less than $500 and 1% per month on loans exceeding $500. Whether the Act 988 deferral charge is higher or lower than the corresponding charge under the SCCPC depends on the method of calculation and the rate of the credit sevice or loan finance charge in a particular contract. *Compare* S.C. CODE ANN. §§ 37-2-203 (1976), -204, 37-3-203, -204 (Cum. Supp. 1977) *with id.* § 34-29-140(e)-(f) (Cum. Supp. 1977).

365. S.C. CODE ANN. §§ 37-2-204(3) (credit sales), 37-3-204(3) (Cum. Supp. 1977) (loans). *See also id.* §§ 37-2-203(2) (1976), 37-3-203(2) (Cum. Supp. 1977).

can be made either before or after default of a scheduled payment.[366] The contract between the creditor and debtor can specify that a deferral fee will automatically be made on any payment not made within 10 days of its due date.[367] A deferral fee, however, cannot be made once the maturity of the transaction has been accelerated by the creditor.[368]

The SCCPC authorizes two methods for calculating the deferral fee. The first method, designated the "standard deferral," is calculated by determining the portion of the total finance charge attributable to the payment being deferred and multiplying that figure by the number of months the payout period is extended.[369] The second method is the more traditional; the total deferral fee cannot exceed the fee calculated by applying the annual percentage rate charge disclosed in the original agreement (the annualized credit service or loan finance charge)[370] to each amount deferred for the period of the deferral. Under either method,[371] the authorized additional charges applicable to the amount deferred may be collected from the debtor or added to the amount being deferred.[372]

Two additional facts about the SCCPC deferral provisions are worth noting: (1) Generally, a standard deferral fee will be slightly lower than the maximum nonstandard deferral fee for the same transaction; and, (2) if a nonstandard deferral is utilized in a particular contract, a creditor must compute the rebate of unearned credit service or loan finance charge in a full prepayment situation on the actuarial basis rather than under the Rule of 78's, which is the standard method for calculating prepayment rebates.[373] Because the actuarial method will result in a higher re-

366. *Id.* §§ 37-2-204(2), 37-3-204(2) (Cum. Supp. 1977).

367. *Id.* §§ 37-2-204(6), 37-3-204(6).

368. Acceleration negates any possibility of deferring one or more payments. To allow a creditor to add a deferral fee to an accelerated credit transaction amounts to authorizing the collection of unearned credit charges in violation of the prepayment rebate provisions of the SCCPC. *See id.* §§ 37-2-210, 37-3-210 (discussed in Part II, section D(3) *infra*).

369. *Id.* §§ 37-2-204(3), 37-3-204(3).

370. *Id.* §§ 37-2-204(4), 37-3-204(4).

371. A comprehensive example illustrating the mechanics of calculating deferral fees under both methods is contained in the SCCPC Comments. INTEGRATED CODE, *supra* note 3, §§ 37-2-202, 37-3-304, at Comment 2.

372. S.C. CODE ANN. §§ 37-2-204(5), 37-3-204(5) (Cum. Supp. 1977).

373. *See id.* §§ 37-2-210(5)(a), 37-3-210(5)(a); Ad. Interpretation No. 2.204-7704, S.C. Dep't of Cons. Aff. (1977). See notes 395-401 and accompanying text *infra* for further discussion of the difference between these two methods of calculating prepayment rebates.

bate to the debtor than is payable under the Rule of 78's,[374] the net effect is to encourage creditor use of standard deferrals.

(c) Creditors' Post-Default Attorneys' Fees.—The agreement between the creditor and debtor may provide for the payment by the debtor of reasonable attorneys' fees not to exceed 15% of the unpaid amount after default. The attorneys' fees must be payable to an attorney who is not a salaried employee of the creditor. No such attorneys' fees are collectible in the absence of a stipulation for payment in the note or other contract evidencing the obligation. This position is consistent with existing South Carolina law disallowing attorneys' fees in the absence of a statute or contractual agreement.[377] In addition, no attorneys' fees can be collected for a supervised loan (one in which the loan finance charge exceeds 12% per year) in which the original principal is $1,000 or less.[375] Any agreement in violation of these provisions is unenforceable and constitutes a specific violation of the SCCPC.[376]

Except insofar as attorneys' fees qualify under the special exemption for certain real estate closing costs,[378] attorneys' fees charged or collected at the inception of a transaction are included in the credit service or loan finance charges because they are not authorized by statute.

(d) Other Default Charges.—In addition to delinquency, deferral, and attorneys' fees in default situations, the SCCPC also authorizes the collection of "reasonable expenses incurred in real-

374. See notes 395-97 and accompanying text *infra.*

375. S.C. CODE ANN. §§ 37-2-413 (1976) (credit sales). 37-3-404, -514 (Cum. Supp. 1977) (loans). One alternative of Item 8 in the proposed FTC Rule on Unfair Credit Practices prohibits a creditor from collecting any attorneys' fees in a consumer credit transaction by making all agreements of this type an unfair trade practice. 40 Fed. Reg. 16,347 (1975). The other alternative is consistent with the SCCPC provisions, which in turn were derived from the UCCC. *Id. See* 1968 UCCC §§ 2.413, 3.404, .514 (alternative B); 1974 UCCC § 2.507 (alternative B). If the first alternative in the Proposed FTC Rule is adopted, it supercedes the SCCPC attorneys' fees provisions under the federal preemption doctrine. See note 18 *supra.* Attorneys' fees for debtors are mandatory, however, when the creditor is found to have violated the SCCPC in any particular. S.C. CODE ANN. § 37-5-202(8) (Cum. Supp. 1977). The amount of recovery is not controlling in determining the amount of the fee awarded. *Id.*

376. S.C. CODE ANN. §§ 37-2-413 (1976), 37-3-404, -514 (Cum. Supp. 1977). Allowable creditors' attorneys' fees are based on the amount that the creditor can legally collect from the debtor, taking into account any rebates due the debtor, and not on the total amount due on the contract at the time of the default. *Id.* §§ 37-2-210(7), 37-3-210(7) (Cum. Supp. 1977); Ad. Interpretation No. 3.404-7510, S.C. Dep't of Cons. Aff. (1975).

377. *See, e.g.,* Hertzog v. Spartanburg Bonded Warehouses, Inc., 184 S.C. 378, 192 S.E. 397 (1937).

378. S.C. CODE ANN. §§ 37-2-202(1)(d)(ii), 37-3-202(1)(d)(ii) (Cum. Supp. 1977) (discussed in Part II, section D(1)(d) *supra*).

izing on a security interest."[379] The expenses incurred under these provisions, which includes all reasonable expenses for repossessing, storing, and selling the collateral, are specifically excluded from the calculation of the amount of credit service or loan finance charge.[380] An agreement to collect any type of default charge other than those specifically authorized is unenforceable and would trigger the SCCPC remedy provisions.[381]

(e) Creditor Advances on Behalf of a Debtor.—The agreement between the creditor and debtor may require the debtor to perform certain duties pertaining to insuring or preserving collateral (for example, payment of taxes, public assessments, and other similar charges). If the debtor fails to fulfill his part of the contract and the creditor pays the charge pursuant to authorization in the agreement, the creditor may make a separate credit service or loan finance charge for the amounts involved, provided he has complied with certain disclosure requirements.[382] The charge cannot exceed the original annual percentage rate disclosed to the debtor in the agreement. In the case of revolving accounts, the amount advanced is simply added to the unpaid balance and is subject to a credit service or loan finance charge at the same rate as the remaining unpaid amount.[383]

3. Prepayment Rebates.—The general rule, which is followed in South Carolina,[384] entitles the creditor to the full amount of interest or credit charge. Therefore, no rebate is legally due upon prepayment by a debtor. This rule has been modified by statute in many situations, particularly in consumer credit transactions, to require a rebate of some or all of the unearned credit charges.[385] One reason for these statutory rules is to prevent a creditor from "flipping," that is, increasing the yield significantly

379. *Id.* §§ 37-2-414 (1976) (credit sales), 37-3-405 (Cum. Supp. 1977) (loans).

380. *Id.* §§ 37-2-109 (1976), 37-3-109 (Cum. Supp. 1977). Realization on collateral is governed by Article 9 of the UCC. *See id.* §§ 36-9-207, -501 to -507 (1976).

381. *See id.* §§ 37-2-414 (1976), 37-3-405, 37-5-202(1) (Cum. Supp. 1977).

382. *Id.* §§ 37-2-208 (1976) (credit sales), 37-3-208 (Cum. Supp. 1977) (loans). South Carolina has similar statutes covering advances for real estate mortgages. *Id.* §§ 29-3-30 to -40 (1976) (advancement of taxes, insurance premiums, and public assessments and repairs). These statutes are discussed in note 699 and accompanying text *infra.*

383. *See* INTEGRATED CODE, *supra* note 3, § 37-2-208, at Comment.

384. *See, e.g.,* Barringer v. Jefferson Standard Life Ins. Co., 9 F. Supp. 493 (E.D.S.C. 1935); Cooke v. Young, 89 S.C. 173, 175, 71 S.E. 837 (1909). See also Part III, section C(2)(j) *infra.*

385. *See, e.g.,* S.C. CODE ANN. § 34-29-140(c) (Cum. Supp. 1977) (prepayment rebates under Act 988 are limited to the Rule of 78's, with the exception that pro rata rebates are required when the loan is refinanced within 90 days of inception).

by frequently refinancing prior credit transactions and including in the amount refinanced the unearned charges from the original transaction and any prior refinancing.[386]

The SCCPC, utilizing provisions from the UCCC, extensively regulates prepayment rebates when a covered consumer credit transaction is prepaid in full, whether the prepayment is voluntary, by means of a refinancing or consolidation transaction, or involuntary, by means of consumer credit insurance or a judgment entered against the debtor on the debt.[387] The following material briefly summarizes the SCCPC prepayment rebate provisions:

(a) No rebate is due in the case of any partial prepayment, which can be made only with the express consent of the creditor and under terms agreed to by the creditor.[388] This is consistent with prior South Carolina cases and practice.[389] The normal practice in South Carolina is to apply any partial prepayment to the last maturing installments in inverse order.

(b) With one exception, described in (c) below, the SCCPC provisions specifically deal with prepayment rebates only in precomputed transactions. The possible inference that no rebate of any kind is due in a nonprecomputed transaction, however, is rebutted by the provisions stating that the debtor may repay in full a transaction governed by the SCCPC rate and charge provisions "at any time without penalty."[390] The most reasonable inference from this language is that a rebate of unearned credit service or loan finance charges as of the date of prepayment

386. The evil involved in flipping is the ability to charge interest on interest or compounding of interest when full rebate of unearned credit charges is not required. *See also* notes 418-19 and accompanying text *infra.*

387. S.C. CODE ANN. §§ 37-2-209 (1976), -210 (Cum. Supp. 1977) (credit sales), 37-3-209, -210 (Cum. Supp. 1977) (loans). The 1974 SCCPC utilized the 1968 UCCC provisions. The 1976 SCCPC Amendments replaced these with the 1974 UCCC provisions.

388. *See* INTEGRATED CODE, *supra* note 3, §§ 37-2-209, 37-3-209, at Comments.

389. *See* authorities cited note 274 *supra. But see* Note, *The Effect of Partial Prepayment on Precomputed Consumer Loans,* 29 OKLA. L. REV. 731 (1976) (in which the author argues that a credit or rebate of the credit charge in a partial prepayment situation should be required because a creditor ends up receiving more total finance charge than originally authorized).

390. S.C. CODE ANN. §§ 37-2-209 (1976), 37-3-209 (Cum. Supp. 1977). See Part II, section D(4) *infra* for the SCCPC provisions regulating refinancing transactions. These provisions require the credit service or loan finance charge in non-precomputed transactions be applied to the unpaid amount in the account plus "accrued charges on the date of refinancing." S.C. CODE ANN. §§ 37-2-205(1) (1976) (credit sales), 37-3-205(1) (Cum. Supp. 1977) (loans). The term "accrued" is an accounting term meaning money earned but unpaid.

should be returned to the debtor. Any other interpretation negates the meaning of the term "without penalty." Since the credit service or loan finance charge in most nonprecomputed transactions is calculated on the unpaid balance at the end of the month or other payment period in question, no unearned charges will have been collected by the creditor.[391] To the extent that a portion of the full prepayment is attributable to unaccrued and, therefore, unearned credit service or loan finance charges, however, it must be refunded or credited to the debtor.[392]

(c) In both precomputed and nonprecomputed transactions, except those pursuant to revolving accounts or consumer leases, a creditor can contract to retain a minimum charge not to exceed $5 in a transaction in which the original indebtedness is $75 or less, or up to $7.50 in a transaction in which the original indebtedness exceeds $75.[393] If such a right is included in the contract, the creditor can retain the minimum amount without any obligation to rebate even though the actual amount of the credit service or loan finance charge earned at time of the prepayment may be less than these specified amounts.[394]

(d) Two methods of calculating prepayment rebates for precomputed transactions are specified by the SCCPC: The "actuarial method" and the "sum-of-the-digits" method, more commonly known as the Rule of 78's.[395] The actuarial method

391. This is in contrast to the situation in a precomputed transaction in which the credit service or loan finance charge is added to the amount of credit. If the full amount of the obligation is collected and kept by the creditor in advance of the due date of the final installment, then necessarily the charge includes some unearned items. The earlier the prepayment is made, the greater the percentage of unearned charges collected.

392. Regardless of the legal rights involved, in real estate transactions mortgage lenders have generally rebated unearned interest on a pro rata or actuarial basis in a full prepayment situation, except when the mortgage or an applicable statute specifically provides for some kind of prepayment penalty. Hunt, *The Rule of 78: Hidden Penalty For Prepayment In Consumer Credit Transactions,* 55 B.U.L. REV. 331 (1975).

393. S.C. CODE ANN. §§ 37-2-210(2), 37-3-210(2) (Cum. Supp. 1977). *See also id.* § 37-2-201(6) (Cum. Supp. 1977). See notes 241-42 and accompanying text *supra.* A creditor must forego the right to this minimum charge, however, in a refinancing transaction. S.C. CODE ANN. §§ 37-2-205 (1976), 37-3-205 (Cum. Supp. 1977). If the rule were otherwise, a creditor might be tempted economically to encourage refinancings in the early stage of an obligation, especially when the amount of credit is small.

394. *Id.* §§ 37-2-210(2), 37-3-210(2) (Cum. Supp. 1977).

395. *Id.* §§ 37-2-210(4), 37-3-210(4) ("sum-of-the-digits" method), 37-2-210(5), 37-3-210(5) ("actuarial" method). The comments at §§ 37-2-210 and 37-3-310 of the INTEGRATED CODE contain extensive examples showing the calculations of both methods to the same set of facts. Another excellent summary of the sum-of-the-digits method, as well as a fairly complete refund table, is found in 1 CONS. CRED. GUIDE (CCH) ¶530. The Department of Consumer Affairs has proposed a rule authorizing the use of various tables based on a 365-

results in a rebate of essentially all of the unearned credit service or loan finance charge because the calculations require that all payments received be allocated first to the unpaid credit charge, computed on an actuarial basis, and then to the unpaid balance of the principal. The sum-of-the-digits method allocates a greater portion of the total credit service or loan finance charge to the earlier portions of the transaction than does the actuarial method. As a consequence, the sum-of-the-digits method always results in a lower rebate being due the debtor than the actuarial method.[396] The amount of the difference increases with the term and rate of the obligation and is greater during the initial months of a typical precomputed installment transaction. Whichever method is used or required, no rebate need be made if the amount of the rebate due is less than one dollar.[397]

(e) The actuarial method for computing the rebate can be used in all cases, but is mandatory when more than 61 installments are due or a nonstandard deferral charge has been made in the transaction.[398]

(f) In situations in which the sum-of-the-digits method is authorized, the difference between a rebate calculated pursuant to the sum-of-the-digits method[399] and the one calculated on the

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day year actuarial rebate method, utilizing the annual percentage rate disclosed to the consumer in the transaction, rounded to the nearest one half of one per cent. The creditor is protected from liability for any error in such charts, provided the charts are not used after discovery of an error. This proposed rule is being issued pursuant to S.C. CODE ANN. §§ 37-2-210(5)(b), 37-3-210(5)(b) (Cum. Supp. 1977). Note, however, the rule had not been formally adopted as of 8/8/78 and will not be final until sometime in 1979.

396. *See* Hunt, *supra* note 392, at 338-39. "First, the higher APR (Annual Percentage Rate) for a given term of indebtedness, the greater is the error in the Rule of 78. Second, the longer the term for a given APR, the greater is the error in the Rule of 78. Third, if both the rate and term increase, the resulting error increases dramatically." *Id.* at 349. A dramatic example of these principles is when a $5,000 obligation on a mobile home is to be repaid in 12 years at a 9% add-on rate (14.12% APR) and refinancing or consolidation takes place in the 52d month. The actuarial refund method will result in a rebate that is $1,157 higher than would be due under the sum-of-the-digits method. *Id.* at 346. The dollar amount of the "error" or difference between the two methods peaks at approximately one-third of the transaction. *Id.* at 339. *See also* Comment, Rule of 78's And The Required Disclosures Under Regulation Z, 23 U. KAN. L. REV. 709, 710-13 (1975).

397. S.C. CODE ANN. §§ 37-2-210(1), 37-3-210(1) (Cum. Supp. 1977).

398. *Id.* §§ 37-2-210(4) to (5), 37-3-210(4) to (5) (Cum. Supp. 1977). The 1974 UCCC recommends 48 months as the cut-off point for the Rule of 78's. 1974 UCCC § 2.510. The legislative history of the SCCPC does not reveal any reason for the change to 61 months. *See* note 1 *supra.* The rationale for a cut-off point is to eliminate the incentive to creditors to refinance long-term installment contracts to increase the actual yield. See notes 373-74 and accompanying text *supra* for discussion of the relation between deferrals and prepayment rebates.

399. See S.C. CODE ANN. §§ 37-2-210(4) to (5), 37-3-210 (4) to (5) (Cum. Supp. 1977) for transactions in which the sum-of-the-digits method is authorized.

actuarial method is not a penalty and does not constitute a part of the credit service or loan finance charge.[400] Any sum deducted from the authorized rebate, however, such as an acquisition or refinancing fee, must be included in the calculation of the credit service or loan finance charge.[401]

(g) When prepayment is made other than by voluntary, full prepayment by the debtor, the following rules apply:

(1) If a judgment is entered against the debtor following acceleration after default, the debtor is entitled to any required prepayment rebate on the obligation calculated as of the date the judgment is entered.[402]

(2) If the prepayment is made by the proceeds of consumer credit insurance, the required prepayment is calculated as of the date the creditor receives the insurance proceeds or twenty days after proof of loss has been furnished to the creditor, whichever is the earlier.[403]

(3) If prepayment is made in a refinancing or consolidation transaction,[404] the required prepayment rebate that is credited to the total amount due is calculated as of the effective date of the refinancing. If the transaction is not precomputed, then the amount of credit against which the permissible credit service or loan finance charge is applied is the unpaid balance plus any accrued, but unpaid, credit charge on the obligation in question.

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400. See note 315 and accompanying text *supra*. In one respect, Act 988, which governs the rates, charges and most other aspects of loans made by consumer finance companies holding licenses under that Act, see Part I, section C(9) *supra*, gives the consumer more protection in rebate situations that the SCCPC. Act 988 generally authorizes the sum-of-the-digits rebate method, but requires that the rebate be calculated on a pro rata basis if the loan is refinanced during the first 90 days of the contract. S.C. CODE ANN. § 34-29-140 (Cum. Supp. 1977). This restriction, which has the effect of eliminating any incentive for the creditor to encourage a refinancing during the first 3 months of a contract, has no comparable counterpart within the SCCPC. Because a creditor will increase the effective yield on a particular contract anytime the sum-of-the-digits rebate method is used (versus the use of the actuarial method) and because a very high percentage of small loans involve one or more refinancings, an amendment to the SCCPC similar to the provision in Act 988 is worthy of serious consideration. According to one authority, up to 80% of all small loans are refinanced or consolidated before being fully paid out. *See* Hunt, *supra* note 392, at 333.

401. S.C. CODE ANN. § 56-17-50 (1976), which is part of the Motor Vehicle Sales Finance Act, authorized a $15.00 acquisition fee in prepayment situations. This charge is not an authorized excludible cost under the SCCPC.

402. *Id.* §§ 37-2-210(7), 37-3-210(7) (Cum. Supp. 1977).

403. *Id.* §§ 37-2-210(8), 37-3-210(8). In other prepayment situations, credit insurance written for the transaction will be cancelled. In these cases the creditor must refund or credit to the debtor any premium rebate received from the insurer under rebate methods approved by the South Carolina Insurance Commissioner. *Id.* § 37-4-108(3) to (4) (1976).

404. See Part II, section D(4) *infra*.

The minimum fees specified in (b) above, however, cannot be retained by the creditor in any such transaction.[405]

4. Refinancing, Consolidation, and Conversion Transactions.—The SCCPC has provisions governing several different types of refinancing, consolidation, and conversion transactions.

(a) Refinancing Rates for Closed-End Consumer Credit Transactions.—A closed-end consumer credit sale or loan whose rates and charges are governed by the SCCPC can be refinanced in the traditional rewriting transaction. The permissible credit service or loan finance charge is governed by the SCCPC rates applicable to closed-end credit transactions.[406] Appropriate additional charges,[407] payment of which is deferred, can also be added to the amount of the debt and excluded from the credit service and loan finance charge.[408]

(b) Consolidation of Multiple Consumer Credit Transactions.—When a debtor has more than one consumer credit transaction with the same seller or lender, the creditor can agree to consolidate the transactions in the same manner as refinancing a single debt. The appropriate credit service and loan finance charge rate ceilings are the same as for single debt refinancing transactions.[409]

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405. S.C. CODE ANN. §§ 37-2-205 (1976), 37-3-205 (Cum. Supp. 1977).

406. *Id.* See the Chart in Part V *infra* for a summary of the appropriate rate ceilings for the various transactions referred to in this subsection.

407. See Part II, section D(1) *supra.*

408. S.C. CODE ANN. §§ 37-2-205(2) (1976), 37-3-205(2) (Cum. Supp. 1977). The minimum fee that can be retained by a creditor in a prepayment transaction, however, cannot be retained in a refinancing of this type. See note 393 *supra.*

409. *Id.* §§ 37-2-206 (1976), 37-3-206(1) (Cum. Supp. 1977). If the transaction is a closed-end consumer credit sale and is secured by cross-collateral, § 37-2-408 (1976), or two or more secured transactions are consolidated with the result that only a single periodic payment is due, all payments are deemed to be applied to the various security interests on a pro rata basis in proportion to the original amounts of the respective debts for the goods or services in question. *Id.* § 37-2-409(1). For example, if the original amount financed in the first transaction is $1,000 and $500 in the second and the two debts are consolidated or secured by cross-collateral, two-thirds of each payment will be allocated to the first transaction and one-third to the second until the first transaction is deemed to be paid in full. At that point the seller's security interest in the collateral in the first transaction terminates. All subsequent payments are then allocated to the second transaction. The 1968 and 1974 UCCC texts require the entire payment be applied to the original goods or services purchased in a closed-end collateral transaction. 1968 UCCC § 2.409; 1974 UCCC § 3.303. While the UCCC allocation results in the initial collateral being released more quickly than it is under the SCCPC, the UCCC allocation method has been criticized as being unfair to the creditor because the amount of the debt on the new collateral, which is constantly depreciating, is not reduced until after all prior transactions

(c) An Alternative to Refinancing Multiple Consumer Credit Sale Transactions.—When the debtor has more than one consumer credit sale with a seller, an alternative to treating the transaction as a refinancing is for the parties to agree to add the unpaid balances together and have a single payment made.[410] This consolidation method will not result in any substantive change in the credit service charge of any of the credit sales involved, although it may involve an extension of the maturity of the original obligation.[411]

(d) Consolidation and Refinancing Transactions Between Different Creditors.—When the debtor has one consumer credit obligation with a credit seller and another with a lender, the parties can agree to refinance and consolidate with one of the two creditors.[412] If this is done, however, the maximum permissible rates are those applicable to closed-end consumer loans. Therefore, if a seller ends up as the creditor, the maximum permissible rate is 12% per annum[413] unless the seller can qualify as a supervised lender. As a practical matter, this provision is only feasible for use by lenders who qualify to make loans at supervised loan

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have been paid in full. In addition, a creditor can easily avoid the allocation problem by not consolidating and continuing to apply the full amount of each payment to each transaction involved, or by not securing the transaction with cross-collateral. The SCCPC allocation method, which was the one adopted in one of the early drafts of the 1968 UCCC, is a compromise between the first in - first out approach finally adopted by the UCCC and a straight pro rata system based on the amount of the respective debts at the time of the consolidation. The latter method was held unconscionable in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), because the original collateral could never be released until the entire debt had been paid. *See* Kripke, *supra* note 5, at 474-75 (1968). No parallel provision regulates consumer credit loans secured by cross-collateral. The rationale of the *Williams* case would seemingly apply to loans as well as to sales. The proposed FTC Rule on Unfair Credit Practices, 16 C.F.R. § 444 (1975), first published in April 1975, requires an allocation on a first in - first out basis in all cross-collateral obligations involving goods purchased from retailers. Failure to use this method would be an unfair trade practice. This provision covers consumer credit sales and loans secured by cross-collateral. If this rule becomes effective, it would supercede the pro rata provisions in the SCCPC. See note 18 *supra*. Both the SCCPC and the UCCC require that payments in revolving charge accounts secured by cross-collateral payments be allocated first to the credit service charges and then to the unpaid balances of the amounts financed in the order of purchase. S.C. CODE ANN. § 37-2-409(2) (1976); 1968 UCCC § 2.409; 1974 UCCC § 3.303 (2).

410. S.C. CODE ANN. § 37-2-206(2)(1976).

411. No refinancing is really involved in this transaction and, therefore, no prepayment rebate is due. If one or more of the consolidated transactions are secured credit sales, then the payments are to be applied as required by § 37-2-409. See note 408 and accompanying text *supra*.

412. *Id.* § 37-3-206(2) (Cum. Supp. 1977).

413. *Id.* § 37-3-201.

rates, which have a base ceiling of 18% per annum.[414]

(e) Conversion to Revolving Loan Account.—When the debtor has an open-end revolving charge account and either a closed-end credit transaction with the same lender or a consumer credit sale with a seller, the parties may agree to add the unpaid balance of the other transaction to the open-end revolving loan account.[415] This transaction is treated as a refinancing and the appropriate loan finance charge ceiling is that applicable to open-end loans. This alternative is not available to authorize consolidation into a revolving charge account.

(f) Conversion in Event of Default in a Precomputed Loan Transaction.—When the debtor is in default for 10 or more days on two or more installments on a precomputed loan transaction, the lender can elect to convert the loan to one in which the loan finance charge is based on the unpaid balance.[416] The appropriate rate ceiling is then that for closed-end loans. This type of conversion is an alternative to imposing delinquency or deferral charges. This option is not available in consumer credit sales.[417]

Refinancing and consolidation transactions require special regulations to ensure that a creditor cannot abuse them to evade the rate ceilings on regular transactions. One method utilized by the SCCPC to accomplish this goal is to require that all refinancing and consolidation of transactions, with one exception discussed below, be treated in effect as full prepayments. This means that the debtor will be credited with an unearned credit service or loan finance charge calculated as required by the SCCPC rebate provisions.[418] This prevents "flipping," which arises when a creditor is not required to make rebates of unearned finance charges in refinancing transactions and, therefore, can add the unearned finance charge to the unpaid balance and collect a new finance charge on the full amount. This process results in collecting interest on interest.[419] The net result of the

414. *Id.* § 37-3-508; Part II, section B(1)(c) *supra.* It is highly unlikely, because of the required convenience and advantage test, that a credit seller could qualify for a supervised lender license.

415. S.C. CODE ANN. § 37-3-207 (Cum. Supp. 1977).

416. *Id.* § 37-3-203(4).

417. The UCCC also prevents this option from being exercised in consumer credit sales. 1968 UCCC § 2.203; 1974 UCCC § 2.502.

418. *See* S.C. CODE ANN. §§ 37-2-210, 37-3-210 (Cum. Supp. 1977). See Part II, section D(3) *supra.*

419. The rate ceiling structure imposed on refinancing transactions is another attempt to regulate flipping. See notes 406-18 and accompanying text *supra.* A creditor could also seek to evade the normal rate structure by use of a large balloon payment at

SCCPC provisions is that the credit service or loan finance charge on the refinanced or consolidated transaction is based on the total amount of credit extended after giving effect to all rebates due. The one exception is a true consolidation involving consumer credit sales in which the balances on two separate accounts with the same seller are simply added together and made payable in one rather than two payments (transaction (c) above). Although such transactions frequently extend the maturity of the obligations, technically no refinancing, and, therefore, no rebate is involved.

E. SCCPC Remedies

The individual and administrative remedies set forth in Articles 5 and 6 of the SCCPC are an integral part of the regulation of consumer credit transactions that are governed by the SCCPC. No regulatory system will be effective without a comprehensive system of remedies to enforce its provisions. On the whole the SCCPC remedies meet this criteria. The individual remedies are more comprehensive and consistent than those available in non-SCCPC transactions.[420] More importantly, the administrative powers of the Administrator of the Department of Consumer Affairs provide the real assurance that the SCCPC will be fully enforced. Individual consumers will often not know that a violation has occurred or will choose not to pursue a claim even if they should discover a violation. The Administrator is armed with broad investigative powers and can bring a variety of administra-

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the end of the obligation. The creditor might agree to refinance the amount of the balloon payment at a much higher rate than the original transaction. Another possible method of evasion is to split one obligation into two or more obligations to collect the higher credit charges authorized for obligations under $1,000 under the SCCPC rate structure. Refinancing at a higher rate in the balloon payment situation is effectively controlled by requiring the creditor to refinance the balloon payment (defined as one more than two times the average prior payments) at the same rate as the original transaction. S.C. CODE ANN. §§ 37-2-405 (credit sales), 37-3-402 (1976) (consumer loans). The multiple agreement abuse is regulated by the SCCPC provisions that make the extra credit service or loan finance charge collected by a creditor excess charges subject to the various individual and administrative remedies established in the SCCPC. *Id.* §§ 37-2-402 (Cum. Supp. 1977) (consumer credit sales), 37-3-409 (1976), 37-3-509 (Cum. Supp. 1977) (consumer loans). The SCCPC remedial provisions are discussed in Part II, section E *infra.*

420. See Part III, section D *infra.* The SCCPC civil and administrative remedies are derived from an amalgamation of the 1968 and 1974 Texts of the UCCC. *See generally,* Curran, *Administration And Enforcement Under The Uniform Consumer Credit Code,* 33 LAW & CONTEMP. PROB. 737 (1968); Miller, *Enforcement Of The Uniform Consumer Credit Code: Observations From The Oklahoma And Federal Experience,* 51 N.C.L. REV. 1229 (1973).

tive and court actions,[421] to enforce any violation of the SCCPC. Prior to the adoption of the SCCPC, the administrative enforcement in consumer credit transactions was parceled out to a number of federal and state agencies that licensed or in some cases insured the particular creditor, and the primary regulation of credit practices of retail merchants and service companies granting consumer credit was through TIL and the various unfair trade practice regulations administered by the Federal Trade Commission. Although the SCCPC Administrator still shares investigative and enforcement powers with other regulatory agencies, the centralization of the enforcement powers in the Administrator substantially increases the chances that effective, consistent enforcement will take place.[422]

The following is a summary of the main features of the remedies for violation of the SCCPC rate and charge provisions.

1. Individual Remedies.—

(a) Debtor Remedies.—The SCCPC provides three different individual consumer remedies. The first requires a refund of any excess charge that is collected by the creditor.[423] A creditor must actually make the refund to the debtor and is not allowed to credit the account by the amount of the refund, unless the debtor waives this right. This prevents the creditor from applying the refund to the last maturing installments.[429]

Second, if the court finds that a violation has occurred, it is required to award attorneys' fees and costs to the consumer. In determining the attorneys' fees due, "the amount of the recovery on behalf of the consumer is not controlling."[425] This language is

421. See notes 433-43 and accompanying text *infra.*

422. Rather than seeking the appropriate state or federal agency to file a complaint with, a consumer can file with the SCCPC Administrator, who has the responsibility to see that the complaint is funneled to other agencies that legally must be involved and to see that appropriate action is taken to resolve meritorious complaints. S.C. CODE ANN. §§ 37-6-104 to -105. (Cum. Supp. 1977). Complaint centralization should have a significant positive impact on the number of complaints and the action taken on them.

423. *Id.* § 37-5-202(3). Other SCCPC violations can also trigger the SCCPC civil penalty and attorneys' fees provisions as well as other remedies. In some cases, the provision or practice that constitutes the violation is declared void or unenforceable. *See, e.g., id.* §§ 37-2-413 (1976), 37-3-404, -514 (excess attorneys' fees provision is unenforceable), 37-2-414 (1976), 37-3-405 (Cum. Supp. 1977) (excess default charge provision is unenforceable). If the debtor paid a charge that violated these provisions, the amount can be recovered as an excess charge. See note 355 and accompanying text *supra.*

424. *Id.* § 37-5-202(2) (Cum. Supp. 1977). The consumer can lose the right to a refund by affirmatively waiving the right or by failing to request the refund after being given a 30-day notice of the right by the creditor.

425. *Id.* § 37-5-202(8).

obviously intended to encourage individual actions to enforce SCCPC violations when the amount of recovery is too small to justify representation by a private attorney on a contingent fee basis. In this connection, the SCCPC, like the UCCC, does not affect any existing state restrictions on private class actions. Under South Carolina case law, however, it is extremely doubtful that a private class action could be brought against a creditor because of excess charges.[426]

Third, the court may award the debtor in a private nonclass action suit a civil penalty of not less than $100 nor more than $1,000.[427]

(b) Creditor Defenses.—A creditor has a defense to liability for one or more of these remedies under three different statutory provisions. First, no liability other than for a refund of any excess charge paid by the debtor is due if the "creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error."[428] Similar language in TIL has been strictly construed, and creditors in most cases have been relieved of liability only when the error is purely clerical, such as the misreading of a rate table.[429]

426. South Carolina has a state class action statute, § 15-5-50 (1976), but it is extremely doubtful that a class action based on a claim of excess charges is authorized by this statute. This statute has been narrowly construed in the past and held inapplicable to cases in which the issue in question can be fully determined without joining other parties. *See, e.g.*, Benjamin v. South Carolina Nat'l Bank, 269 S.C. 250, 237 S.E.2d 72 (1977); Wilder v. South Carolina St. Highway Dep't, 228 S.C. 448, 90 S.E.2d 635 (1955). *See also* Note, *State Class Actions*, 27 S.C.L. REV. 87, 91-116 (1975). The rationale in these decisions should apply to a case involving usury when the only issue necessary for decision is whether the particular contract before the court violated the SCCPC or other applicable usury statutes. Other parties having contracts with the same creditor might have different or independent claims. The preclusion of a class action in a state court has no effect on the right to maintain a class action in federal court, assuming the jurisdiction and other requisites can be met. *See* TIL § 130, 15 U.S.C. § 1640 (1976) (class actions authorized in TIL disclosure violation cases).

427. S.C. CODE ANN. § 37-5-202(1), (3) (Cum. Supp. 1977).

428. *Id.* § 37-5-202(7).

429. *See, e.g.*, Ives v. W.T. Grant Co., 522 F.2d 749 (2d Cir. 1975); Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974); Ratner v. Chemical Bank N.Y. Tr. Co., 329 F. Supp. 270, 281-82 (S.D.N.Y. 1971); Foundation Plan, Inc. v. Breaux, 345 So.2d 955 (La. App. 1977). Many cases construing usury statutes have been more liberal in excusing creditors for errors of fact in the absence of evidence of an intent to collect usurious charges. Most courts, however, distinguish between errors of fact and errors of law, allowing the creditor to escape with a mere refund when relatively minor errors of fact are involved, but imposing a penalty when misinterpretations of law are involved, even if the amount involved is minor. *See, e.g.*, Georgia Inv. Co. v. Norman, 231 Ga. 821, 204 S.E.2d 740 (1974) (payment of $1 notary fee to employee of a lender held to be

Second, the creditor can argue that the excess charge was made in conformity with a rule, regulation, administrative interpretation, or opinion issued by the SCCPC Administrator or the Commission on Consumer Affairs.[430] The only remedy authorized for the debtor in this situation is a refund of any excess charge paid, but neither the civil penalty, nor presumably attorneys' fees or costs, is awarded to the debtor.[431]

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additional interest that caused loan to be usurious); Fisher v. Bethesda Discount Corp., 221 Md. 271, 157 A.2d 265 (1960) (loan held void for usury when a $2.68 late charge was collected for a payment that was four rather than the required five days overdue; the lender forgot to exclude Sunday from the time period as required by statute); Annot., 11 A.L.R.3d 1498 (1967) (contains a collection of cases in this area). The South Carolina usury cases are consistent with those from other jurisdictions. *See* Graydon v. Standard Bldg. & Loan Ass'n, 145 S.C. 551, 143 S.E. 259 (1928); Westrope v. Abbott, 134 S.C. 502, 133 S.E. 465 (1926); Tate v. Lenhardt, 110 S.C. 569, 96 S.E. 720 (1918); Rushton v. Woodham, 68 S.C. 110, 46 S.E. 943 (1903); Mortimer v. Pritchard, 8 S.C. Eq. (Bail. Eq.) 505 (1831). *But see* Plyler v. McGee, 76 S.C. 450, 57 S.E. 180 (1906) (lender liable for "unintentioned" mistake in charging compound interest). The South Carolina Supreme Court has been more liberal than some other courts in excusing creditors when the error has been made by an attorney advising one of the parties. *Compare* Haynes v. Logan Furniture Mart, Inc. *with* Westrope v. Abbott; Mortimer v. Pritchard.

430. S.C. CODE ANN. §§ 37-6-104(4), -506(3) (Cum. Supp. 1977). This defense is available even though the rule, regulation, administrative interpretation, or opinion is subsequently declared invalid. In addition, any creditor and not merely the creditor who made the request or is the subject of the interpretation can utilize the defense. *See also* note 254 and accompanying text *supra.*

431. The two applicable SCCPC sections are ambiguous concerning attorneys' fees and costs, however. One statute states that "[e]xcept for refund of an excess charge, no liability is imposed under this title for an act done or omitted in conformity with a *rule* of the Administrator . . . ." *Id.* § 37-6-104(4) (1976) (emphasis added). The other section involved, § 37-6-506(3), states that

> [n]o provision of this title or of any statute to which this title refers which imposes any *penalty* on any creditor shall apply to any act done, or omitted to be done, in conformity with any rule *or regulation* so adopted, amended or repealed or in conformity with *any written order, opinion, interpretation or statement* of the Commission or of the Administrator. . .(emphasis added).

The term "rule," used in both provisions, is defined in § 37-6-402(5) (Cum. Supp. 1977) and appears to be broad enough to cover most of the actions mentioned in § 37-6-506(3), except possibly "statements." This definition, however, specifically excludes declaratory rulings, which under § 37-6-409 (1976) are treated as having "the same status as decisions or orders in contested cases," another defined term. *See id.* § 37-6-402(1) (Cum. Supp. 1977). Declaratory rulings will at best be covered only by § 37-6-506(3), which excuses the creditor from any "penalty," a term that is distinguished from attorneys' fees and costs in the liability sections. *See id.* §§ 37-5-202 (civil liability in individual actions), 37-6-113 (civil actions by the Administrator). The entire issue is further complicated by the legislative adoption of a revised administrative procedure act in 1977, codified at §§ 1-23-10 to -400. To the extent of any conflict, the APA will prevail. *See, e.g.,* Garey v. City of Myrtle Beach, 263 S.C. 247, 209 S.E.2d 893 (1974). The 1977 Act restricts the term "rule" to decisions in "contested cases" and uses a new term, "regulations," to cover what is defined as "rules" in § 37-6-402(5) of the SCCPC. S.C. CODE ANN. §§ 1-23-10(4), -310(2), (6) (Cum. Supp. 1977). As a result, more matters may fall under § 37-6-506(3) and be exempt

Third, the creditor is not liable if he has notified the debtor of the violation before the creditor receives written notice of the violation from the debtor. The creditor must also correct the violation by refunding any excess charge paid by the debtor within 45 days after giving the debtor the required notification.[432]

2. *Administrative Remedies.*—The SCCPC Administrator has several different enforcement powers.

First, the Administrator has broad investigatory powers, including the power to examine all books and records and to subpoena records of any creditor entering into or collecting any indebtedness due on consumer credit transactions in South Carolina.[433] Second, the Administrator can seek cease and desist orders for violations.[434] All complaints concerning alleged violations by supervised financial organizations (for example, banks, savings and loan institutions) must be referred to the administrative agency having supervisory authority over these institutions. The agency is then required to consult with the SCCPC Administrator and to keep the Administrator informed of all developments. Any cease and desist action can only be filed by the licensing agency.[435] Nevertheless, the SCCPC Administrator can bring

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from civil liability but still may be subject to an award of attorneys' fees and costs.

S.C. CODE ANN. § 37-6-104(3) (1976) is identical to § 6.104(3) of the 1968 UCCC which contains the identical definition of "rule" in § 6.402(5) as is contained in S.C. CODE ANN. § 37-6-402(5) (1976). Section 6.104(4) of the 1974 UCCC contains the same exculpatory language as S.C. CODE ANN. § 37-6-104(4), but adds the terms "interpretation" and "declaratory ruling" after "rule." The comments do not indicate that a major substantive change was intended by the 1974 text change. Neither the 1968 nor 1974 UCCC contains a section similar to § 37-6-506(3).

In summary, while the Legislature clearly intended to allow a creditor to escape all liability that arises as a result of reliance on a public ruling of the Administrator, except for refund of excess charges, the chosen language unfortunately falls short of accomplishing this purpose. The entire issue is further complicated by the 1977 South Carolina Administrative Procedure Act. Amendments to §§ 37-6-104(5), -506(3), clarifying the actual legislative intent, are highly desirable. *Cf.* TIL § 130(f), 15 U.S.C. § 1640(f) (1976) (TIL provisions exempting a creditor from liability when an act is done or omitted to be done in good faith "in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal System duly authorized by the Board to issue such interpretations or approvals. . .").

432. S.C. CODE ANN. § 37-5-202(6) (Cum. Supp. 1977). In this situation the creditor has the choice of adjusting the account or refunding the excess to the debtor. Compare note 424 and accompanying text *supra.* For disclosure violations, TIL and the SCCPC require that a creditor make the correction within 15 days of notifying the consumer in order to escape liability. TIL § 130(b), 15 U.S.C. § 1640(b) (1976); S.C. CODE ANN. § 37-5-203(2) (1976).

433. S.C. CODE ANN. § 37-6-106 (1976).

434. *Id.*

435. *Id.* § 37-6-105 (Cum. Supp. 1977). A variety of different agencies have this

other types of authorized actions, described below.

A third type of enforcement power is the right of the SCCPC Administrator to bring a civil action seeking injunctions against alleged violators of the SCCPC.[436] The SCCPC Administrator also can bring a civil action, including a class action, to recover actual damages and excess charges imposed upon consumers.[437] The individual consumer's right to recover a civil penalty of up to $1,000 is not available in such an action; the Administrator, however, can sue to recover a single civil penalty of up to $5,000, "for repeatedly and intentionally violating" the SCCPC.[438]

Approval must be obtained from the Commission on Consumer Affairs for the commencement of litigation, except in a nonclass action civil suit for damages and a cease and desist action against a creditor who is not a supervised financial institution.[439] This is an unusual and probably unique provision and is not contained in the UCCC texts. The apparent purpose of this section is to prevent the SCCPC Administrator from recklessly bringing groundless lawsuits against creditors.[440] No evidence exists so far that this approval requirement has caused any difficulty for the Administrator.

3. Criminal Penalties.—Criminal sanctions, consisting of a fine of up to $5,000, and imprisonment not exceeding one year,

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power. For example, the South Carolina Board of Financial Institutions has licensing authority over state banks, state savings and loan institutions, state credit unions, and all consumer finance companies whether licensed under the SCCPC or Act 988 of 1966. The Comptroller of the Currency has general supervisory control over national banks; the Federal Home Loan Bank has general supervisory authority over federal savings and loan associations. The Federal Credit Union Administration has licensing and supervisory authority over federal credit unions. Many institutions are subject to both state and federal supervision. For example, the Federal Deposit Insurance Corporation and the South Carolina Board of Financial Institutions approve licenses and supervise the operations of state banks that are not members of the federal reserve system.

436. *Id.* §§ 37-6-110 to -12 (1976 & Cum. Supp. 1977). Included is the power to obtain temporary restraining orders as well as permanent injunctions for substantive violations of the SCCPC and unconscionable credit practices. Injunctive relief can also be combined with a claim for civil damages brought by the Administrator.

437. *Id.* § 37-6-113 (Cum. Supp. 1977).

438. *Id.* § 37-6-113(2). No civil penalty, however, can be recovered for "making unconscionable agreements or engaging in course of fraudulent or unconscionable conduct." *Id.* An injunction under § 37-6-111 is the only remedy for unconscionable conduct.

439. *Id.* § 37-6-104(6).

440. The official legislative history contains no information on the rationale of this section. *See* notes 1, 102 *supra*. The statement in the text is based on the author's personal recollection of the debate on this issue in various meetings of the Uniform Consumer Credit Code Study Committee, which submitted this provision to the Legislature as part of the 1976 SCCPC Amendments. *See* 1976 UCCC STUDY COMMITTEE REPORT, *supra* note 1, at § 43.

or both, can be imposed on "a lender who willfully makes charges in excess of those permitted by applicable law."[441] A violation is a misdemeanor. A similar criminal statute for violation of the South Carolina usury statutes[442] has apparently not been widely utilized. The SCCPC Administrator can be expected, however, to push for prosecution under the SCCPC criminal provision in appropriate cases.

4. Miscellaneous.—The statute of limitations for suits brought to enforce damage rights for excess charges under the SCCPC is "one year after the scheduled or accelerated authority of the debt" for closed-end transactions,[443] and two years "after the violation or passage of a reasonable time for refund occurs" for open-end transactions.[444] These statutes of limitations, however, only affect the right of affirmative recovery by the debtor, who also has the right to assert the claim of excess charges and penalties by way of defense or set off in any suit brought by the creditor to collect on the obligation.[445] A creditor has six years from the date of default to file a suit based on a note or security agreement,[446] and twenty years for a real estate mortgage.[447]

The SCCPC also directs that "[a]ny judgment obtained for violations of any provision of this act shall draw interest on the judgment at the same rate as initially charged by the lender to the borrower."[448] This provision is quite unusual because the rate ceilings under the SCCPC reach a maximum of 36% per year for obligations of $300 or less. The statutory rate on all other judgments is 6% per year.[449] Some aspects of this provision are troublesome. By its wording, this section only applies to loans and may be interpreted as not applying to credit sales, an interpretation that would produce an anomalous and awkward situation. In

441. S.C. CODE ANN. § 37-5-301(1) (Cum. Supp. 1977). Criminal sanctions for excess charges under the UCCC are limited to supervised lenders, not all lenders as under the SCCPC. 1968 UCCC § 5.301; 1974 UCCC § 5.301. Credit sellers are not subject to criminal liability under either the UCCC or the SCCPC.

442. S.C. CODE ANN. § 34-31-100 (1976).

443. *Id.* § 37-5-202(3) (Cum. Supp. 1977). The statute of limitations for administrative action seeking a special civil penalty under § 37-6-113(2) is two years from the act or violation in question.

444. *Id.* § 37-5-202(3).

445. *Id.* § 37-5-205 (1976). This is a codification of the common-law right of set-off utilized in prior South Carolina usury cases. *See, e.g.*, Allen v. Petty, 58 S.C. 240, 36 S.E. 586 (1900); Land Mtg. Inv. & Agency Co. of Am. v. Gillam, 49 S.C. 345, 26 S.E. 990 (1896).

446. S.C. CODE ANN. § 15-3-520 (1976).

447. *Id.*

448. *Id.* § 37-6-416.

449. *Id.* § 34-31-20.

addition, the section is placed in Article 6 of the SCCPC, which contains the administrative remedies and other SCCPC administrative provisions, and a question exists on whether the section applies only to judgments obtained by the SCCPC Administrator. Furthermore, if the transaction out of which the judgment arose has been refinanced at a higher or lower rate than at the original obligation, it is unclear whether the rate on the judgment should be the rate charged on the initial transaction or the rate charged on the refinancing.[450] Because of these problems, the Legislature should seriously consider revising this section.

One final problem that deserves brief discussion concerns the applications of the SCCPC penalty provisions to national banks. Because of the federal preemption doctrine,[451] national banks violating the SCCPC rate and charge provisions are liable for the penalties specified in the National Banking Act[452] and not those

450. This section is not in either the 1968 or 1974 UCCC texts. The section was originally an amendment to S.340 of 1973, adopted by the Senate in 1974. 1974 S.C. SEN. J. 625.

451. See note 18 *supra.*

452. *See* 12 U.S.C. § 86 (1976) (calls for forfeiture of the entire interest due on the obligation plus an affirmative recovery by the debtor of twice the interest paid by means of a separate action or counter-claim). *See, e.g.,* Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29 (1875); American Timber & Trading Co. v. First Nat'l Bank, 511 F.2d 980 (9th Cir.), *cert. denied,* 421 U.S. 921 (1975) (federal remedy exclusive even though state law determines whether the transaction is usurious); First Nat'l Bank v. Howard, 59 Okla. 134, 158 P. 438 (1916) (debtor's attorneys' fee authorized by state law not recoverable against national bank). This is the same statutory usury penalty provided by S.C. CODE ANN. § 34-31-50 (1976), which, as is pointed out in Part III, section D, continues to govern many transactions whose rates and charges are not governed by the SCCPC. The National Banking Act provision contains a two-year statute of limitations on the right to recover the penalty that begins to run from the date of payment of the illegal interest. *See, e.g.,* Panos v. Smith, 116 F.2d 445 (6th Cir. 1940). Presumably S.C. CODE ANN. § 37-6-416 (1976), which states that any judgment for violation of the SCCPC will bear interest at the same rate as the initial loan obligations, rather than the normal judgment rate of 6%, § 34-31-20, will apply to a judgment against a national bank arising out of an SCCPC violation. *See* notes 448-50 and accompanying text *supra.* The National Banking Act does not prescribe any judgment interest rate.

The criminal penalties specified in the SCCPC can be enforced against a national bank. State v. First Nat'l Bank, 2 S.D. 568, 51 N.W. 587 (1892), *cert. denied,* 163 U.S. 686 (1896). An individual or official administrator having jurisdiction over national banks can bring an action to enforce the rights granted under 12 U.S.C. § 86 (1976) in either state or federal court. *See* Daniel v. First Nat'l Bank, 227 F.2d 353 (5th Cir. 1955); Planters' Nat'l Bank v. Wysong & Miles Co., 177 N.C. 380, 99 S.E. 199, *cert. denied,* 250 U.S. 665 (1919). A national bank can escape liability under 12 U.S.C. § 86 (1976) under the SCCPC bona fide error theory codified in S.C. CODE ANN. § 37-5-202(7) (Cum. Supp. 1977). This statute states that a creditor can escape liability if the violation was unintentional and "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error." A national bank can also utilize whatever other defenses are available against a claim of usury under state law.

in the SCCPC. In many situations, however, the National Banking Act penalties are more stringent than those under the SCCPC.[453]

PART III. CREDIT TRANSACTIONS WHOSE RATES AND CHARGES ARE NOT GOVERNED BY THE SCCPC RATES CEILINGS

A. Introduction

Not only is all business and commercial credit exempt from direct regulation by the SCCPC rate structure, but a significant amount of what is normally thought of as consumer credit is also excluded from the SCCPC rate and charge provisions.[454] The permissible rates and charges that can be made in these excluded and exempted transactions are based on a complex combination of statutory and case law typical of the usury system that exists in most states. The rate structure for a particular transaction depends on four interrelated factors: (1) The status of the creditor as a seller or lender (there are several different types of lenders, each with special rate structures), (2) the status of the debtor (whether, for example, the debtor is an individual or a corporation with at least $40,000 of issued stock), (3) the type of credit (the primary but not exclusive distinction being whether the credit is a sale or a loan and whether it is secured by a real estate

One final issue involving national bank consumer credit loans made in South Carolina deserves a brief comment. A national bank is allowed to charge "interest at the rate allowed by the laws of the State . . . where the bank is located . . ." 12 U.S.C. 485 (1976). This language has been interpreted to mean that a national bank can charge the highest rate authorized by state law for any lender even though a state bank was not eligible to make loans at these rates. *See,e.g.,* Fisher v. First Nat'l Bank of Omaha, 548 F.2d 255 (8th Cir. 1977); Fisher v. First Nat'l Bank of Chicago, 538 F.2d 1284 (7th Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977); Northern Lanes v. Hackley Union Nat'l Bank & Tr. Co., 464 F.2d 855 (6th Cir. 1972); United Mo. Bank v. Danforth, 394 F. Supp. 774 (W.D. Mo. 1975). For criticism of this line of cases, see Comment, *National and State Interest Rates Under the National Bank Act: Preference or Parity?,* 58 IOWA L. REV. 1250 (1973). See also note 721 and accompanying text *infra.* This "most favored lender" doctrine provides additional protection, which is unavailable to state banks, to a national bank sued on an excess charge claim.

453. *Compare* S.C. CODE ANN. § 37-5-202 (Cum. Supp. 1977) *with* 12 U.S.C. § 86 (1976). See Part II, section E(1)-(2) *supra.*

454. See Part I, sections B and C *supra.*

mortgage of some kind), and (4) the amount of credit.

Although the SCCPC deals with consumer credit, it contains two significant provisions that affect all credit that is not governed by its rate ceiling structure. The first, which is identical to the equivalent UCCC section[455] provides: "With respect to a sale other than a consumer credit sale, the parties may contract for the payment by the buyer of any credit service charge."[456] As a result, there are no limitations of any kind on the rates and charges that can be made on any credit sale that is not a consumer credit sale under the definitions and exclusions of the SCCPC.[457] This statute codifies the time-price doctrine[458] under which the credit charges imposed in a credit sale are held not to be interest and, therefore, to be exempt from the usury statutes. This doctrine has been recognized in South Carolina for well over a century.[459]

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455. *See* 1968 UCCC § 2.605.

456. S.C. CODE ANN. § 37-2-605 (1976).

457. There is no rate limit for real estate mortgages or other credit sales not covered by the SCCPC rate structure. This includes any sale of real estate that is for personal, family, or household purposes in which the seller takes a mortgage and the mortgage is one that is "primarily secured by a first lien which is a purchase money security interest in land." The transaction is by definition not a consumer credit sale. *Id.* § 37-2-104(2)(b) (Cum. Supp. 1977). See Part I, section B(4)(d) *supra.* A purchase money real estate mortgage taken by a seller in connection with a credit sale that is not for personal, family, or household purposes (*e.g.*, a purchase money mortgage taken by a seller of real estate used for business or farming purposes) is also exempt from any rate limitation under this provision. A mortgage that is taken by a seller and that does not meet the test of being "primarily secured by a first lien which is a purchase money security interest in land," but that is taken on land used for personal, family, or household purposes, is, however, subject to the SCCPC rate structure. This is true regardless of the amount of the mortgage since, if the other requisites of a consumer credit sale exist the mortgage is a consumer credit sale. *See id.* § 37-2-104(1). See Part I, section B(1) *supra.* The SCCPC rate structure also governs a mortgage taken by a seller that meets the statutory first lien purchase money test when the parties agree that the SCCPC will apply to the transaction. *Id.* § 37-2-601 (1976). Section 37-3-601 (Cum. Supp. 1977), however, specifically prohibits the parties from agreeing to make the transaction subject to the SCCPC in a loan transaction "primarily secured by a first lien which is a purchase money security interest in land." Since there is no rate maximum applicable to non-SCCPC real estate mortgages arising from credit sales, a seller would probably not agree in many circumstances to have the transaction governed by the SCCPC. A proposed bill (S. 899) designed to make all credit sales involving real estate mortgages subject to the same rates as real estate mortgage loans passed the South Carolina Senate in the 1978 legislative session, but was not voted on by the House of Representatives.

458. For discussions of the doctrine, see, *e.g.*, Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761 (1950); Warren, *Regulation of Finance Charges in Retail Installment Sales,* 68 YALE L.J. 839 (1959); Note, *Applicability of Usury Laws to Credit Installment Sales,* 4 S.C.L.Q. 290 (1951); Annot., 14 A.L.R.3d 1065 (1967).

459. *See* Coleman v. Garington, 28 S.C.L. (2 Speers) 238 (1843). The time-price doctrine was most recently applied in Davenport v. Unicapital Corp., 267 S.C. 691, 230

The second SCCPC provision[460] that affects the rate structure of non-SCCPC transactions concerns maximum rates for loans and, in contrast to the section on nonconsumer credit sales, makes major changes in South Carolina law. This section, which varies considerably from the equivalent section of the UCCC,[461] states:

> With respect to a loan other than a consumer loan, the parties may contract for the payment by the debtor of any finance charge or other charge except such loans that are less than $50,000 or are primarily secured by a first lien which is a purchase money security interest in land.[462]

For purposes of analysis this section can be viewed as creating two categories of nonconsumer credit loans: (1) loans not secured by real estate and (2) loans secured by real estate.

Non-SCCPC loans that are for $50,000 or above and are not secured in whole or in part by a real estate mortgage are not subject to any rate or charge limitations. This has significantly changed the law governing these loans because the South Carolina general usury statute,[463] which before the enactment of the SCCPC regulated these transactions, contains a maximum rate structure of 10% for nonmortgage loans in excess of $50,000, but not more than $100,000, 12% for loans in excess of $100,000, but not in excess of $500,000 and no limitation on loans above $500,000.

On the other hand, loans of less than $50,000 that are not secured in whole or in part by a real estate mortgage are subject to the pre-SCCPC usury statutes.[464] The result is that, except for those loans governed by the general SCCPC rate ceiling structure,

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S.E.2d 905 (1976), in which the South Carolina Supreme Court held that the creditor's failure to use the magic words "credit price" or "time price differential" indicated that the transaction in question was a loan and not a credit sale and, as a loan, was usurious. This case, based on a factual situation that arose before the effective date of the SCCPC, concerned aluminum siding installed on a residence and typifies the strict construction placed on the time-price doctrine in consumer credit transactions. Several courts have held recently that various types of consumer credit sales were really loans and, therefore, subject to the usury interest limitations. See note 273 *supra*. In effect, the SCCPC, like the UCCC, adopts the rationale of these cases and subjects consumer credit sales to rate maximums that are basically the same as the consumer loan rate ceilings.

460. S.C. CODE ANN. § 37-2-605 (Cum. Supp. 1977).

461. *See* 1968 UCCC § 3.605, which provides that there is no rate limitation for any loans not governed by the UCCC rate structure.

462. S.C. CODE ANN. § 37-3-605 (Cum. Supp. 1977).

463. *Id.* § 34-31-30.

464. See Part III, section B *infra*.

there has been no change in the rate structure for these loans.

If a non-SCCPC loan is secured in whole or in part by a real estate mortgage, an entirely different rate structure applies and depends on whether the loan is one "primarily secured by a first lien which is a purchase money security interest in land."[465] If the mortgage meets this test, the applicable rate structure is that established in the general usury statute for loans secured by first mortgages on real estate.[466] The rate structure for these loans is thus the same as before the enactment of the 1976 SCCPC Amendments. If the loan, however, is not "primarily secured by a first lien which is a purchase money security interest in land," the applicable rate structure depends on whether the loan is less than $50,000 and whether it qualifies as a first lien. If it is $50,000 or more, then there is no rate maximum regardless of whether it is a first or second lien.[467] This represents a significant change from prior South Carolina law, which regulated the rates of these mortgages in amounts of $500,000 or less.[468] If it is less than

465. See Part I, section B(4)(d) *supra*. If the mortgage does not meet this test but involves a loan transaction that is primarily for personal, family, or household purposes and otherwise meets the tests of a consumer loan, the mortgage is subject to the SCCPC loan rate structure as well as to all other provisions of the SCCPC regardless of the amount of the mortgage. *See* S.C. CODE ANN. § 37-3-104 (Cum. Supp. 1977). Unlike the practice with credit sales involving mortgages, the parties cannot agree that a mortgage loan that is "primarily secured by a first lien which is a purchase money security interest in land" will be subject to the SCCPC. *Id.* §§ 37-3-601, -605. See also note 457 *supra*.

466. S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977).

467. This is because § 37-3-605 (Cum. Supp. 1977) specifically states that the parties may contract for a finance or other charge for any loan that is not a consumer loan subject to the SCCPC or other special rate statute, except in two situations: (a) loans that are less than $50,000 and (b) loans of whatever amount that are "primarily secured by a first lien which is a purchase money security interest in land." Most wrap-around real estate mortgages, which have been widely used in recent years, would probably be exempt from any interest maximum if the amount of the mortgage is $50,000 or more since such mortgages are generally considered second mortgages. *See* Note, *Wrap-Around Financing: A Technique for Skirting the Usury Laws?*, 1972 DUKE L.J. 785. As this note indicates, however, qualification of wrap-around mortgages as second mortgages, which are generally eligible for higher interest rates than first mortgages, is far from certain. In addition, these mortgages present other legal problems. *See* Ferguson v. Tanner Development Corp., 541 S.W.2d 483 (Tex. Civ. App. 1976) (collection of prepaid interest made note usurious even though the total interest over the life of mortgage was less than statutory maximum). *But see* Monning, *Usury Implications of Front-End Interest and Interest in Advance*, 29 SW. U.L. REV. 748 (1975). In addition, these mortgages usually involve significant amounts of prepaid interest, which under I.R.C. § 461(g), enacted as part of the Tax Reform Act of 1976, must be amortized over the period to which the interest applies. Prior law authorized the deduction of this interest in the year it was paid. This change will undoubtedly reduce the incentive to use wrap-around mortgages in the future. *See also* I.R.C. § 189 (amortization of construction period interest).

468. S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977).

$50,000, then, the applicable rate maximum ranges between 8% and 12.68%, depending on the status of the lender and the lien of the mortgage.[469] The rate ceiling structure for these loans is essentially the same as existed prior to the adoption of the 1976 SCCPC Amendments.[470]

An additional complicating factor involved in all transactions subject to the non-SCCPC rate statutes is the determination of the charges that must be included in the calculation of the interest on loan finance charge in order to determine whether the maximum rate has been exceeded. Except in a few cases, notably Act 988 of 1966,[471] the applicable statutes do not specify what charges can be excluded from the interest calculations, as does the SCCPC.[472] Therefore, case law is the primary source of authority for this determination. Unfortunately, the case law is not consistent or comprehensive, particularly in cases involving real estate mortgages. The interrelationship between the non-SCCPC usury statutes and cases determining which charges must be included and which can properly be excluded from the interest or loan finance calculation are explored in sections B and C of this Part.

B. Statutory Provisions

1. Basic Usury Statute.—The basic South Carolina usury statute, which applies in the absence of any statutory exception, provides:

> No greater interest than six percent per annum shall be charged, taken, agreed upon or allowed upon any contract arising in this State for the hiring, lending or use of money or other commodity, either by way of straight interest, discount or otherwise, except upon written contracts wherein, by express agree-

469. See Part III, section B(2)(a) *infra*. All rates cited in this Part are based on 12-month contracts. Rates for longer term contracts will be higher in many cases. See also B(a) of the Chart in Part V *infra* for a summary of the possible rates that would apply to such a transaction.

470. The rates discussed in this paragraph are based on the assumption that the mortgage loan in question is not covered by the SCCPC. If it is, then the SCCPC rate structure would apply. See Part V, Chart B(9)(e) *infra*.

471. *See* S.C. CODE ANN. § 34-29-140 (Cum. Supp. 1977). Act 988 of 1966 (codified at S.C. CODE ANN. §§ 34-29-10 to -260 (1976 & Cum. Supp. 1977)) governs consumer finance companies that want to qualify to make high rate restricted loans, in contrast to supervised loans that require a supervised lender license. See Part I, section C(9) *supra* and Part III, section B(2)(b)(ii) *infra*, for further discussion of Act 988.

472. See Part II, section D *supra*.

ment, a rate of interest not exceeding eight percent may be charged . . . .[473]

The maximum allowable rate under this statute is 6% unless the debtor agrees in writing to a rate not exceeding 8% per annum. As a practical matter, however, the 6% limitation comes into play only in a loan or contract in which no interest rate is specified or in a verbally made loan. But these situations are quite rare. The maximum contract rate, then, is effectively 8%, and this figure is referred to as the maximum contract rate throughout the remainder of this article.

2. *Exceptions to the 8% Contract Interest Rate.*—A number of South Carolina statutes create exceptions to this basic 8% contract rate. Some of these exceptions have broad application, and others apply to one specific type of institution. A great variety in the rate of interest is allowed by the statutes. Some of these statutory exceptions express the rate as so many dollars per $100 per annum, and others speak in terms of a certain percentage per month or per year. Some specifically allow or prescribe certain additional charges; others do not. The result is that it is extremely difficult for a lawyer, much less a layman, to understand, compare, and analyze all these exceptions intelligently.

(a) General Exceptions.—The following exceptions to the 8% contract rate are available to all creditors who meet the criteria listed, unless their rates are governed by special statutory rate ceilings.

(i) No Rate Ceiling.—The following transactions are not subject to any rate ceilings established by South Carolina statutes:

(a) A credit sale that is not covered by the general SCCPC rate ceiling structure.[474] This includes a credit sale secured by a real estate mortgage.

473. S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977). In contrast to SCCPC rates, which must be calculated on the basis of a 365-day year, *see* note 322 and accompanying text *supra*, non-SCCPC rates can be calculated on the basis of a 360-day year. *See* Merchants' & Planters' Bank v. Sarratt, 77 S.C. 141, 57 S.E. 621 (1907).

474. S.C. CODE ANN. § 37-2-605 (1976). See notes 457-61 and accompanying text *supra*. One additional type of transaction involving credit sales of real estate that merits some discussion is a "sale" of property by a lender who as the mortgagee purchases the real estate at a foreclosure sale or takes title to the property in lieu of a foreclosure. If the lender subsequently conveys the property to a third party and in return takes a mortgage for all or a portion of the sales price, is this subsequent transaction a "credit sale" or a "loan"? If it is a loan, the transaction is subject to much more stringent rate regulation than if it is a sale. See notes 484-500 and accompanying text and Part V *infra*. The answer to this question is critical in a situation in which the rate in the new mortgage exceeds

the maximum rate authorized for a mortgage loan for the principal involved. The argument in favor of the transaction's being a sale and, therefore, subject to the credit sale rate maximums is as follows: The lender properly obtained legal title to the property and the original mortgage has been extinguished. Its prior existence, therefore, should be legally irrelevant to subsequent sales. In addition, there is no reason why the lender should not be treated like any other party who sells property. If a nonlender had purchased the property at the foreclosure sale and subsequently conveyed it and took back a purchase money mortgage, no one would seriously question that the transaction was a sale. *See, e.g.,* Stark v. Bauer Cooperage Co., 3 F.2d 214 (6th Cir. 1925); Wheeler v. Marchbanks, 32 S.C. 594, 10 S.E.2d 1011 (1890); Annot., 14 A.L.R.3d 1065, 1121-24 (1967).

The argument that the transaction should be treated as a loan for usury purposes rather than as a sale is as follows: Courts have always taken the position that the substance and not the form of the transaction controls its characterization and have in past cases involving real estate mortgages held that transactions that are cast in the form of sales and, therefore, exempt from usury claims under the time-price doctrine, are actually loans. *See, e.g.,* Raben v. Overseas Barters, Inc., 55 Misc. 2d 613, 286 N.Y.S.2d 404 (Sup. Ct. 1967); *cf.* Chewning v. Huebner, 142 Ga. App. 112, 235 S.E.2d 573 (1977) (subsequent refinancing of original purchase money mortgage assumed by a subsequent purchase held to be a usurious loan); London v. Toney, 263 N.Y. 439, 189 N.E. 485 (1934) (same basic fact situation as *Chewning*); 1970 OP. S.C. ATT'Y GEN. No. 2652; 1967 OP. S.C. ATT'Y GEN. No. 2363. The argument that these transactions are in substance loans is strengthened by the fact that lenders are in the business to make loans and not to sell property, in credit sales transactions. Some lenders are actually prohibited from holding on an indefinite basis property taken in satisfaction of mortgages. *See* 12 U.S.C. § 29 (1976) (national banks may hold this type property for no more than five years); *cf.* Rules and Regs. of the S.C. Bd. of Fin. Insts. 15-26 S.C. CODE OF STATE REGS. (1976) (state savings and loan associations must write down the value of such property on a yearly basis). In addition, the imposition of rates higher than can legally be made for loans under the guise of a sale is an indication of an intent to evade the usury laws. *See, e.g.,* Raben v. Overseas Barters, Inc., 55 Misc. 2d 613, 286 N.Y.S.2d 404 (Sup. Ct. 1967); Mayfield v. British & Am. Mtg. Co., 104 S.C. 152, 157-58, 88 S.E. 370, 372 (1916) (looks to substance of transaction and intent of lender). While the mortgagee technically has title to the property, this should not, under the circumstances, authorize the mortgagee to charge a rate higher than it could have charged had it made a mortgage loan when it did not own the property being mortgaged.

The pertinent South Carolina cases are inconsistent. Cohen v. Williams, 164 S.C. 499, 162 S.E. 758 (1932), held that a subsequent sale involving a purchase money mortgage by the original mortgagee who purchased the property at a foreclosure sale was a credit sale that qualified for application of the time-price doctrine even though the mortgagee had charged the new purchaser the maximum interest plus $300 profit over and above the foreclosure sales price. In an earlier case, Milford v. Milford, 67 S.C. 553, 46 S.E. 479 (1903), however, the South Carolina Supreme Court held that a sale of real state in which the seller took a purchase money mortgage was a loan transaction. *Cohen,* which did not discuss *Milford,* nevertheless appears to have overruled it. In Brown v. Crandall, 218 S.C. 124, 161 S.E.2d 761 (1950), however, the supreme court stated that *Milford* failed to meet the time-price test of a credit sale because the deed had stated the total consideration for the sale to be $1632.00, whereas the notes executed in connection with the mortgage added up to $2251.20. Apparently the interest was included in the notes. According to the court, a valid credit price for the purposes of the time-price doctrine could have existed only if the deed had stated that the consideration was $2251.20. *Id.* at 129, 61 S.E.2d at 763. If this rationale is followed, and the supreme court has in the past strictly construed the time-price doctrine, no credit sale of real property involving a mortgage would qualify as a "sale" under the time-price doctrine unless the consideration in the deed and the amount of the mortgage included the full amount of the "interest" to be collected in the transaction. *Cf.* Davenport v. Unicapital Corp., 267 S.C. 691, 230 S.E.2d 905 (1976) (credi-

(b) A loan in excess of $50,000 not secured by a real estate mortgage.[475]

(c) A real estate mortgage loan in excess of $50,000 in which the mortgage is not "primarily secured by a first lien which is a purchase money security interest in land" and the loan is not for personal, family, or household purposes.[476]

(d) A real estate mortgage loan in excess of $500,000 that is "primarily secured by a first lien which is a purchase money security interest in land."[477]

(e) A real estate mortgage loan purchased or insured by a government agency.[478]

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tor's failure to use the magic words "credit price" or "time-price differential" result in a loan and not a sale). The cost of documentary stamps alone makes this approach impractical in a transaction of any sizeable amount or term. *Cohen* is distinguishable from *Milford* since *Cohen* is not a time-price case because the court determined that the $300 profit made by the original mortgagee when he sold the property was not interest. Hence, the interest rate in the mortgage was legal even if the transaction had been considered a loan.

Sufficient doubt about the ultimate outcome in this type of situation exists to indicate that lenders are well advised not to make real estate mortgages on reacquired mortgaged property that is subsequently sold at rates higher than the authorized loan rates until the legal issues involved can be clarified by legislative or judicial action.

475. S.C. CODE ANN. § 37-3-605 (Cum. Supp. 1977).

476. *Id.*

477. Demas v. Convention Motor Inns, 268 S.C. 186, 232 S.E.2d 724 (1977); S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977).

478. *See* S.C. CODE ANN. §§ 31-19-10 to -30, 34-25-150 (1976), 34-31-30 (Cum. Supp. 1977). All mortgages purchased in whole or in part or insured by the Federal Housing Administration, Veterans Administration, Farmers Home Administration, Federal National Mortgage Association, Government National Mortgage Association, Federal Home Loan Mortgage Corporation, "or by any State or Federal governmental or quasi-governmental organizations" are exempt from any South Carolina rate limitation. The rates on some of these types of mortgages are established essentially by free market bids, for example, those purchased by the Federal National Mortgage Association; however, the maximum rates on other, such as many types of FHA and VA loans, are established by federal statute or regulation. The various federal programs accounted for 13.29% of all outstanding real estate mortgages in the United States at the end of 1976. SAVINGS AND LOAN FACT BOOK 30 (24th ed. 1977). At the end of 1976 only two percent of the total real estate mortgages held by savings and loan associations operating in South Carolina were VA or FHA-HUD loans. Fed. Home Loan Bd. of Atlanta, *Statistics* (1977) (unpublished). The remainder of the federally sponsored programs were handled by other lenders, principally private mortgage companies and insurance companies. For a detailed description of the various federal programs, see SAVINGS AND LOAN FACTBOOK *supra*, at 110-17. *See generally* H. BIVENS, BACKGROUND AND HISTORY OF THE FEDERAL NATIONAL MORTGAGE ASSOCIATION (1969). Although the legislation creating this exemption covers mortgages purchased by state agencies, no valid program of this kind presently exists in South Carolina. See also note 488 *infra*. As of June 29, 1978, the maximum rate set by HUD for FHA single-family residential loan programs and by the Veterans Administration for VA loans was 9.50% per annum. 43 Fed. Reg. 29000, 29113 (1978). In addition to these interest rates, the mortgagor may pay directly or indirectly "points," which raise the mortgagee's effective yield, and, in the case of FHA insured loans, an annual insurance premium of ½ of 1% of the average principal outstanding.

(f) A loan to a corporation with $40,000 of issued capital stock. A corporation organized to do business for profit with issued capital stock of a par value of $40,000 or more, or stated capital of $40,000 when the stock is no par, is prohibited from pleading or claiming usury in either a civil or criminal action.[479] Thus, there is no rate ceiling for loans to these corporate borrowers. The amount of issued capital stock reported to the South Carolina Tax Commission in the annual report of corporations, or in a similar report by a foreign corporation, is conclusive evidence of the $40,000 minimum required by this statute.[480] Guarantors, accommodation parties, and other persons secondarily liable on the obligation are prohibited from making a usury claim.[481] This prohibition also applies to assignees, transferees, and other successors in interest of corporate obligors meeting the $40,000 issued capital requirement. This provision overrides any statutory interest rate limitation. Its main effect, then, is to include within the category of transactions having no rate maximum loans made to corporations with issued capital of $40,000 or more in which the amount loaned is either less than $50,000 and not secured by real estate, or $500,000 or less and "primarily secured by a first lien which is a purchase money security interest in land."[482] Partnerships, joint ventures, proprietorships, and other types of noncorporate entities do not fall within the ambit of this statute.[483]

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479. S.C. CODE ANN. § 34-31-80 (1976).

480. *Id.*

481. Robert L. Huffines, Jr., Foundation, Inc. v. Rockie Realty, Inc., 347 F. Supp. 1256 (D.S.C. 1972). This accords with the rule generally followed in the United States. *See, e.g.*, Universal Metals & Mach., Inc. v. Bohart, 539 S.W.2d 874 (Tex. 1976); Sundseth v. Roadmaster Body Corp., 74 Wis. 2d 61, 245 N.W.2d 919 (1976). An individual comaker, however, can plead usury because he is primarily and not secondarily liable. *See, e.g.*, Universal Metals & Mach., Inc. v. Bohart, 539 S.W.2d 874 (Tex. 1976). The claim of usury is considered personal to the borrower. This is the rationale for the rule that an assignee or vendee cannot recover for usury if the assignor or vendor had no valid usury claim. *See, e.g.*, Zeigler v. Maner, 53 S.C. 115, 30 S.E. 829 (1897); S.C. CODE ANN. § 34-31-70 (1976) (only the "borrower and his heirs, devisees, legatees or personal representative or any creditor or any person having a legal or equitable interest in the estate or assets of such borrower may plead" usury).

482. See Part I, section B(4)(d) and notes 462-70 and accompanying text *supra*. A mortgage loan of less than $50,000 that does not meet the purchase money security interest test is also exempt from any rate limitation if it is made to a qualifying corporation; but these loans are less likely to occur than loans falling within the two categories described in the test.

483. An issue that has not been decided by the South Carolina Supreme Court is the status of a loan to a corporation that is in effect a "dummy" corporation meeting the requirements of S.C. CODE ANN. § 34-31-80 (1976) but having no purpose other than to serve as a vehicle for a loan at a higher rate. The courts are split on this issue. Most follow the New York rule that upholds the transaction against the claim of usury if the corporate

(ii) Real Estate Mortgages Other Than Those Not Subject to Any Rate Limitation.—The rate structure for real estate mortgages that are regulated by South Carolina statutes is complicated immensely by the amorphous concept of a mortgage loan "primarily secured by a first lien which is a purchase money security interest in land," a concept that is used in the SCCPC to exclude certain real estate mortgages from the definition of a consumer credit sale and a consumer loan.[484] This same concept, however, is also used as a linchpin to distinguish between mortgage loans that are subject to non-SCCPC South Carolina rate statutes and those that are not.[485] None of the rate statutes for real estate mortgages were designed to harmonize with the magic words "primarily secured by a first lien which is a purchase money security interest in land." The result is a very complex mortgage rate structure, which for the purpose of analysis can be broken down into three broad categories.

The first category consists of a considerable number of real

formalities are complied with. *See, e.g.*, Jenkins v. Moyse, 254 N.Y. 319, 172 N.E. 521 (1930). The other courts follow the stricter New Jersey rule that looks at the substance of the transaction to determine if the loan is actually made to an individual or noncorporate entity at a usurious rate. *See, e.g.*, Lesser v. Strubbe, 56 N.J. Super. 274, 152 A.2d 409 (1959). *See generally* Gortnan, *Using a "Dummy" Corporate Borrower Creates Usury and Tax Difficulties*, 28 SW. L.J. 437 (1974); Note, *Incorporation to Avoid the Usury Laws*, 68 COLUM. L. REV. 1390 (1968). Under the existing interest rate structure in South Carolina, this question will actually present problems only in situations involving real estate mortgages for apartments and for other commercial and business purposes when the amount of the mortgage is $500,000 or less. Even in these situations, there is less likelihood now than in the past that a developer or owner would be willing to form a corporation in order to obtain a mortgage. Many real estate ventures are based on the ability of the investors to offset against their other income various tax losses generated by the business. This can be accomplished if an individual or a partnership (although in the case of partnerships to a lesser degree than before the enactment of the Tax Reform Act of 1976) owns the property but not if a corporation is the owner of the property, unless the corporation qualifies for subchapter S status. This is difficult to achieve in most types of real estate ventures. Attempts by taxpayers to utilize a corporate form for loan purposes and subsequently to claim that it should be disregarded for tax purposes have been largely unsuccessful. *See* Stogel & Jones, *Straw and Nominee Corporations in Real Estate Tax Shelter Transactions*, 1976 WASH. U.L.Q. 403. If the loan is made to a corporation that subsequently conveys the property to individuals or to a partnership, the vendee cannot claim the mortgage was usurious. See note 481 *supra*. *See also* Rosen v. Columbia Sav. & Loan Ass'n, 29 Misc.2d 329, 213 N.Y.S.2d 765 (Sup. Ct. 1961); Annot., 82 A.L.R. 1153 (1933).

484. See Part I, section B(4)(d) *supra*.

485. *See* S.C. CODE ANN. § 37-3-605 (Cum. Supp. 1977). Non-SCCPC credit sales are not subject to any rate limitation. *See id.* § 37-2-605 (1976). See also notes 455-59 and accompanying text *supra*. This was the state of the law in South Carolina before the SCCPC. Rates on mortgage loans have traditionally been highly regulated, and the interaction of the purchase money security interest test with these traditional mortgage loan rate statutes is the major source of the complexity discussed in the text.

estate mortgages that are not subject to any South Carolina statutory rate limitations. These mortgages are listed in the preceding subsection.[486]

A second category includes the mortgages subject to the rate structures of the SCCPC[487] or, if the lender is a qualified restricted lender,[488] to Act 988 of 1966.[489] These rate structures apply to any real estate mortgage transaction, regardless of the amount, in which the credit is used primarily for personal, family, or household purposes and in which the transaction is not one that is "primarily secured by a first lien which is a purchase money security interest in land." All these mortgages are by definition consumer credit transactions.[490] A second mortgage on a home owned by the mortgagor who uses the loan proceeds primarily for personal, family, or household purposes, is one example of a mortgage qualifying under this category. Another example is a first mortgage on the borrower's residence when the residence was not at the time subject to any other mortgage and the loan proceeds are used primarily for personal, family, or household purposes.

All other real estate mortgages comprise the third category and are subject to non-SCCPC South Carolina rate statutes. The applicable rate statute for a particular transaction in this category depends on a number of factors, the most important of which are the amount of the loan and the qualification of the mortgage as one "primarily secured by a first lien which is a purchase money security interest in land."[491] The following is a summary

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486. See notes 474-78 and accompanying text *supra*. Mortgage loans to corporations with $40,000 or more of issued capital stock are also not subject to a usury defense. See notes 479-83 and accompanying text *supra*.

487. See Part II, section B(1) *supra*. The basic rate maximum for these mortgages is 18% per annum.

488. *See* S.C. CODE ANN. §§ 37-3-501(3) to (4) (Cum. Supp. 1977). See Part I, section C(9) *supra*.

489. See Part III, section B(2)(b)(ii) *infra*.

490. *See* S.C. CODE ANN. §§ 37-2-104(2)(b), 37-3-104(2) (Cum. Supp. 1977). See Part I, section B(4)(d) *supra*. Real estate mortgages taken in connection with consumer credit sales, as well as real estate mortgage loans, qualify for this category. Non-SCCPC credit sale mortgages, however, are exempt from any rate limitations. *See id.* § 37-2-605 (1976). See notes 455-59 and accompanying text *supra*.

491. All the problems with this purchase money security interest concept discussed in Part I, section B(4)(d) *supra* apply to the following remarks. The interpretations of this concept by the South Carolina Commission on Consumer Affairs are also relevant. See note 125 *supra*. Mortgage lenders will naturally seek ways to keep a mortgage for personal, family, or household purposes from qualifying as one "primarily secured by a first lien which is a purchase money security interest in land" because most nonqualifying mortgages are eligible for higher rates than mortgages meeting this test. Litigation over the proper scope of a purchase money security interest mortgage is likely because of the many

of the maximum rate structure applicable to mortgages falling within this residual category:

(1) A real estate mortgage that is "primarily secured by a first lien which is a purchase money security interest in land." The rate structure for these loans is: 9% for loans not in excess of $60,000, 10% for loans in excess of $60,000 but not more than $100,000, 12% for loans in excess of $100,000 but not more than $500,000, and no limitation for such mortgages exceeding $500,000.[492] This rate structure governs basically all first mortgage loans in which the loan is used by an individual to purchase land for future development as a homesite or to build or to purchase a personal residence. It also governs any qualifying first mortgage when the loan proceeds are used for business or for any other nonconsumer purpose as, for example, to finance a factory, shopping center, or a real estate development project. It is not, however, applicable to any first mortgage that does not qualify as one "primarily secured by a first lien which is a purchase money security interest in land" or to any second mortgage. All these mortgages are governed by the SCCPC or Act 988 of 1966 if the loan is used primarily for personal, family, or household purposes.[493] If the loan is not for these purposes, the rate structure

problems with this concept. Any scheme or artifice that gives the appearance of trying to avoid the interest limitations that govern purchase money mortgages will substantially increase the chances that a court will find a particular transaction usurious. See notes 617-21, 706 and accompanying text *infra*.

492. S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977). In the 1978 legislative session, the South Carolina Legislature attempted to amend this section to provide that all first lien real estate mortgages of $100,000 or less could have a maximum interest rate of 10%. The constitutionality of this amendment is discussed in the Addendum at the end of this article. In 1977 the General Assembly enacted legislation establishing the rate structure set forth in the text. No. 222, 1977 S.C. Acts 223-24. This legislation, whose constitutionality is not in doubt, will expire on July 1, 1979. The 1978 legislation will also expire on the same date. Unless the legislature enacts special legislation after June 30, 1979, the rate structure on mortgage loans of amounts up to $100,000 will be 8% for mortgages not in excess of $50,000 and 10% on mortgages in excess of $50,000, but not more than $100,000. *Id.* Legislation authorizing a basic rate of 9% for standard first mortgages on a two-year basis was first passed in 1973. No. 839, 1973 S.C. Acts 1879. The 9% rate applied to mortgages of $50,000 or less until June 30, 1977, the effective date of the legislation extending the rate an additional two years. No. 122, 1977 S.C. Acts 223-24.

Some real estate mortgages might be made pursuant to § 34-13-120 (1976), which authorizes a 7% add-on rate (12.68% per annum for a 12-month note) for installment loans. See notes 506-12 and accompanying text *infra*. Mortgages made under the authority of this statute are, like other closed-end installment loans, precomputed transactions in contrast to standard mortgages, which are usually fully amortized. Section 34-13-120 is most often used for mortgage loans on unimproved real estate and for some second mortgages.

493. See notes 487-90 and accompanying text *supra*.

outlined in the next paragraph is applicable.

(2) A real estate mortgage that is not "primarily secured by a first lien which is a purchase money security interest in land" and the loan proceeds are not used primarily for personal, family, or household purposes. There is no rate limitation on these mortgages unless the amount of the mortgage is less than $50,000.[494] Mortgages of less than $50,000 can utilize the highest of the following four rate maximums for which the loan in question can qualify: 12.68% per annum, if the mortgage can qualify as an installment loan;[495] 12% per annum if the parties agree that the transaction will be governed by the SCCPC;[496] 9% if the mortgage qualifies as a first mortgage;[497] or 8% if the mortgage does not qualify for the higher rates authorized in any of the above.[498]

This rate structure applies to all second mortgages in which the loan proceeds are not used primarily for personal, family, or household purposes; for example, a second mortgage on a home taken as security for a business loan to the borrower. It also applies to any first mortgage that does not qualify under the purchase money security interest rubric when the loan proceeds are not used primarily for personal, family, or household purposes; for example, a business loan involving a first mortgage placed on business property that was previously not subject to any mortgage.

South Carolina statutes also contain stringent restrictions on the use of variable interest rates. Although 1977 legislation authorizes a variable interest rate for mortgage loans in excess of

494. *See* S.C. CODE ANN. § 37-3-605 (Cum. Supp. 1977). An argument can be made that any mortgage falling within this category, regardless of the amount, is free from any interest limitations under the wording of § 37-3-605 (Cum. Supp. 1977). This interpretation requires that the $50,000 threshold in the section be construed as applying only to non-real estate transactions. For at least two reasons, it is unlikely that the South Carolina Legislature intended this construction. First, contrary to prior South Carolina law, it frees many second mortgages and some first mortgage loans made to businesses from any rate limitations. The available legislative history indicates that in enacting the 1976 SCCPC Amendments the Legislature intended to leave mortgage interest rates unchanged. See notes 1 and 102 and Part I, section B(4)(d) *supra*. Second, since there is no comma between the $50,000 language and the phrase "or are primarily secured by a first lien which is a purchase money security interest in land," this interpretation of § 37-3-605 (Cum. Supp. 1977) violates the normal rules of statutory construction.

495. *Id.* § 34-13-120 (1976). See Part III, sections B(2)(b)(i) and B(2)(b)(ii) *infra*.

496. *Id.* § 37-3-601 (Cum. Supp. 1977). Loans that are "primarily secured by a first lien which is a purchase money security interest in land," are, however, not eligible for this agreement. See Part II, section B(3); note 457 and accompanying text *supra*.

497. *Id.* § 34-31-30 (Cum. Supp. 1977).

498. *Id.* The 8% maximum automatically applies if no exception is available. See note 473 and accompanying text *supra*.

$100,000,[499] its use in mortgages of $100,000 or less is severely limited by two factors: the variation cannot exceed 1% over and above the interest rate initially agreed upon, and if the rate is raised, the mortgagor has the option of paying off the mortgage without penalty; and if the mortgage is $50,000 or less, the maximum rate, including the maximum variable rate, cannot exceed 8%, which is less than the rate authorized for such mortgages in the absence of a variable rate.[500] The result is that on mortgage

499. No. 122, 1977 S.C. Acts 223-24 (amending S.C. CODE ANN. §§ 34-31-30, -90(2) (1976)). Prior to this legislation, the wording of these two statutes on variable interest rates was confusing at best. They were also subject to being interpreted as prohibiting the use of variable interest rates on any mortgage, except those of $50,000 or less in which the highest interest rate was less than 8%.

500. *See* S.C. CODE ANN. § 34-31-90(2) (1976), *as amended by* No. 122, 1977 S.C. Acts 223-24. The use of variable interest rates in residential mortgages has not met with a great deal of success in the United States, although this device has been used in Europe and England for several decades. *See* Landers, *The Truth in Lending Act and Variable-Rate Mortgages and Balloon Notes*, 1976 AM. B. FOUNDATION RESEARCH J. 35; Werner, *Usury and the Variable-Rate Mortgage*, 5 REAL EST. L.J. 155 (1976); Note, *Adjustable Interest Rates in Home Mortgages: A Reconsideration*, 1975 WIS. L. REV. 742.

A clause authorizing a rise in the stipulated rate in the event of a statutory increase in the state's authorized rate has been held illegal on the ground that changes in the usury statutes operate only prospectively. Campbell v. Gawart, 46 Mich. App. 529, 208 N.W.2d 607 (1973). *Compare Campbell with* Union Mtg. Banking & Tr. Co. v. Hagood, 97 F. 360 (C.C.D.S.C. 1899); Lewis v. Dunlap, 112 S.C. 544, 100 S.E. 170 (1919); Exchange Bank v. McMillan, 76 S.C. 561, 57 S.E. 630 (1907) (statutes in effect at time loan entered into control determination of usury). An attempt to avoid the legal problems of variable interest rates by means of a clause adjusting the principal for inflation was struck down in Aztec Properties, Inc. v. Union Planters Nat'l Bank, 530 S.W.2d 756 (Tenn. 1975), *cert. denied*, 425 U.S. 975 (1976). *See also* Olwine v. Torrens, 344 A.2d 665 (Pa. 1975); Note, *Indexing the Principal: The Usury Laws Hang Tough*, 37 U. PITT. L. REV. 755 (1976). A more promising solution is a new HUD program that has a fixed interest rate, but authorizes lower payments in the early years of the mortgage than in later years. The amounts that would have been payable on a constant payment basis in excess of the amounts actually paid in the reduced payment years are added back to the principal. This variable payment program, also known as an "FHA 245 loan," avoids the legal problems inherent in a variable interest rate mortgage. It does, however, raise other usury questions because, in effect, these plans involve interest on interest, or compounding of interest. In October 1977 Congress passed legislation authorizing the use of graduated mortgage payment plans on a permanent basis and exempting all these mortgages that are insured under a National Housing Act program from any state interest restrictions. Housing and Community Development Act of 1977, Pub. L. No. 95-128, § 310, 91 Stat. 1136 (1977) (amending 12 U.S.C. § 1715z-10 (1976)). Existing South Carolina statutes exempt mortgages insured or purchased by any federal program from any state usury limitations; so the use of graduated mortgage payments for any of these mortgages produces no usury problems. *See* S.C. CODE ANN. §§ 31-19-10 to -30, 34-25-150 (1976), 34-31-10 (Cum. Supp. 1977). The use of graduated payments in other types of mortgages, however, is possibly subject to attack because of usurious compounding of interest. See note 631 and accompanying text *infra*. The Federal Home Loan Bank Board has recently published proposed regulations that authorize savings and loan institutions wide latitude to make all kinds of flexible mortgages.

loans of $100,000 or less, a variable rate of 1% is only available for mortgage loans in excess of $50,000, but not more than $100,000, and the maximum rate with the variation cannot exceed 10% per annum. Because of the prevailing real estate mortgage rates, variable interest rates are of doubtful practical use in any South Carolina real estate mortgages of $100,000 or less.

(b) Special and Limited Exceptions.—The South Carolina Code also exempts certain types of creditors from the 8% loan contract rate. One broad category of these exemptions applies to loans by banks, banking institutions, and other lending agencies.[501] The term "other lending agencies" has been broadly construed to include all corporations, firms, and individuals involved in the business of lending money in South Carolina.[502] An individual or business entity making an occasional loan, however, is apparently not able to take advantage of these provisions and is limited to the 8% contract rate maximum unless the loan can by agreement be made subject to the SCCPC.[503] If SCCPC coverage is agreed upon, the maximum rate is 12% per annum.[504] In addition, not all lending agencies can utilize these sections because some statutes regulating the particular creditor specifically make the regulating statute exclusive. Credit unions, insurance premium service companies, and pawnbrokers (for loans not in excess of $50) fall into this category.[505] The lending institutions that can utilize these provisions are banks, savings and loan institutions,[506] insurance companies, mortgage brokers, and consumer finance companies operating as Act 988 licensees.[507] A second category of these special exemptions consists of the statutes that apply to a specific lender, such as consumer finance companies

Presumably, however, these mortgages are subject to state usury limitations. *See* 43 Fed. Reg. 33,254-57 (1978).

Due-on-sale and similar clauses are also used by mortgagees as methods of attempting to raise mortgage rates. These clauses have enjoyed more judicial success than variable interest rates. See Part III, section C(2)(m) *infra.*

501. See Part III, section B(2)(b)(i) *infra.*

502. Smith v. Bulman, 197 S.C. 357, 15 S.E.2d 635 (1941).

503. S.C. CODE ANN. § 37-3-601 (Cum. Supp. 1977). See Part II, section B(3) *supra.*

504. S.C. CODE ANN. § 37-3-601 (Cum. Supp. 1977).

505. See Part III, section B(2)(b)(ii) *infra.*

506. There is some question, however, concerning the authority of savings and loan institutions to utilize the installment loan section, S.C. CODE ANN. § 34-13-120 (1976), for real estate mortgages other than home improvement loans that are not covered by the SCCPC rate structure. See notes 511 and 596-607 and accompanying text *infra.*

507. The rate structure available to Act 988 companies is high enough that it is doubtful that they would want to utilize the rate authorized in these sections. See Part III, section B(2)(b)(ii) *infra.*

operating as Act 988 licensees.[508]

(i) Loans by Banks, Banking Institutions, and Other Lending Agencies.—Three statutes are involved in this category.

(1) Banks, banking institutions, and other lending agencies are authorized to collect fees in lieu of interest or add-on charges.[509] The fees are statutorily set according to the following scale:

Type	Period	Amount	Rate	Renewal
Single Payment	30 days or more	Under $50	Flat $3	Flat $2
Single Payment	30 days or more	$50 or more	Flat $5	Flat $2
Installment Loan	Not less than 3 monthly installments	$50 or more	Flat $7.50 or $1.50 installment whichever is greater	$1.50 installment

Prior to adoption of the 1976 SCCPC Amendments, this statute was used primarily in connection with small, short-term personal loans. This statute, however, was not repealed by the SCCPC and, therefore, could theoretically be used for very small loans whose rates are not governed by the SCCPC. The yield under this statute could be higher in certain loans than the yield permitted by any other applicable statute.

The actuarial rates authorized by this provision are extremely high. For example, if a single payment loan for $50 is made for thirty days and is renewed for eleven subsequent thirty-day periods before final payment is collected, the total paid will be $77 ($5 plus $22 renewal, plus $50 principal) for an annual actuarial interest rate of 54%. Since the statute contains nothing more than a rate statement, it would also be possible to refinance—rather than renew the loan—and enter into a new loan contract each month. Each monthly period would then yield a $5 charge. Installment loans could be handled in the same manner since this statute does not contain a definition of "monthly installment" or "renewal." It also does not require the lender to

508. See Part III, section B(2)(b)(ii) *infra.*
509. S.C. CODE ANN. § 34-31-40 (1976).

rebate any of the fee upon prepayment of the loan or in connection with a refinancing transaction.[510] Apparently it is also possible under this section to make separate "loans of interest" on the unpaid fees due and "loans of principal" on the unpaid amount of cash advanced at the end of a loan period. If this is done,the actual yields calculated on an annual percentage rate basis as required by the SCCPC and TIL could be increased astronomically. Because of the statute's limited applicability and the possibility of inordinately high effective yields when it is used, serious thought should be given to repealing this statute.

(2) Another statute allows banks, banking institutions, and other lending agencies to make installment loans of not less than $10.00, repayable in installments over a period of not less than three months at an add-on rate of 7% per annum "for the financing of purchases and for other desirable purposes."[511] This statute

510. Prepayment rebates for SCCPC loan transactions are regulated under S.C. CODE ANN. § 37-3-210 (Cum. Supp. 1977). See Part II, section D(4) *supra*.

511. S.C. CODE ANN. § 34-13-120 (1976). In 1962 this statute, originally passed in 1935, was amended to make it inapplicable to real estate loans. No. 762, 1962 S.C. Acts 1882. This section, however, was reenacted in 1966, and the language relating to real estate loans was omitted. No. 1042, 1966 S.C. Acts 2662. A further revision and reenactment in 1968 eliminated any dollar maximum and again did not refer to real estate loans. No. 1265, 1968 S.C. Acts 3018. Most lenders have assumed that it is permissible to make some kinds of real estate mortgage loans under this statute. Two questions have arisen, however. The first relates to the authority of savings and loan institutions to utilize this section at all for real estate mortgage loans other than for home improvement loans not covered by the SCCPC. See notes 596-607 and accompanying text *infra*. The second concerns the use of this section for first mortgages of any kind by lenders in view of No. 839, 1973 S.C. Acts 1880 (amending S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977)) which provides special rate maximums for "loans secured by first mortgages on real estate . . . ." The inference is that § 34-31-30 (Cum. Supp. 1977) is the exclusive section governing first mortgage rates and that it limits the applicability of § 34-13-120 (1976) to second mortgages. This does not seem, however, to be a justifiable position since further language in § 34-31-30 states: "*[P]rovided further*, that nothing contained herein shall limit or prohibit the . . . rate of interest, charges, [or] fees . . . made pursuant to any other statutes of this State." The installment loan statute, § 34-13-120 (1976), does not distinguish between first and second mortgages since it does not refer at all to real estate mortgages. Perhaps a more important impediment on the use of § 34-13-120 (1976) for first lien real estate mortgages of any kind is as follows: The statute authorizes the use of "interest or add-on charges at the rate of not exceeding seven percent per annum just as if the entire amount of the debt matured on the date the last installment becomes due . . . ." This language implies that the transactions authorized are precomputed transactions in which all the interest is added to the principal at the inception of the transaction rather than being computed monthly on the declining principal balance, which is the standard method of computing interest in real estate mortgage loans. Not only is the method of computation authorized in this statutory section awkward for real estate mortgages, but it also results, particularly in long-term transactions, in increasing substantially the cost of documentary stamps, which are based on the amount of the debt. In a precomputed transaction, the amount of the debt shown on the note includes the interest; however, in an amortized loan, only the

allows an effective yield of 12.68% per year on a twelve-month loan and a slightly higher rate on a longer loan calculated on the actuarial basis as required by the SCCPC. It is the main statute used by banks and other qualified lenders to obtain rates for closed-end credit transactions[512] that are higher than the basic 8% contract rate. There is no requirement in this statute that the loan be secured. Prior to the adoption of the 1976 SCCPC Amendments, it was utilized in connection with all types of installment loans from small personal unsecured loans to fairly large secured loans involving purchases of consumer goods such as automobiles and color televisions. Although the SCCPC closed-end rate ceiling structure,[513] which authorizes a base rate of 18% per annum, will apply in most consumer installment credit transactions, this statute is still in effect and can be utilized for any closed-end credit transactions that are not governed by the SCCPC rate structure, including some loans secured by real estate.[514] Of course, the transactions must be made by banks and other institutions qualifying under the statute. This statute contains no limitations on what charges other than interest can be made. Under the rules discussed in the next section, it would be permissible for qualified lenders to charge late payment fees and prepayment penalties, or to refuse to rebate all or a portion of the unearned interest in connection with a refinancing type transaction.[515]

(3) Banks, banking institutions, and other lending agencies doing business in South Carolina are authorized to charge "interest, service charges or add-on charges," at a maximum rate of 1½% per month on unpaid balances due under a revolving

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loan principal is shown on the note. Further, existing banking regulations seem to prohibit the use of a precomputed method for most types of real estate mortgages. Most second mortgage loans covering private residences are governed by the SCCPC rate structure. Therefore, § 34-13-120 (1976) would not be applicable to these loans either. See note 465 and Part I, section B(4)(d) *supra*. The existing confusion over the use of § 34-13-120 (1976) needs to be remedied by legislation. Part IV *infra* contains further recommendations for legislative reform of the existing regulation of real estate rates in South Carolina.

512. Closed-end credit transactions are generally single transactions, as opposed to open-end or revolving credit transactions in which the debtor can incur more than one loan up to the maximum authorized. Closed-end installment loans are typically precomputed, *i.e.*, the interest is added to the amount loaned and the total is repaid in equal monthly installments.

513. See Part II, section B(1)(c) *supra*.

514. See note 511 *supra*.

515. See Part III, section C(2) *infra*. This contrasts to prepayment rebates for SCCPC transactions, which are strictly regulated by statute. See Part II, section D(4) *supra*.

credit plan for the financing of purchases.[516] This provision, enacted in 1968,[517] legitimized the use of lender credit cards and authorizes an effective interest rate of 18% per annum calculated according to the actuarial method. Although most bank card consumer credit transactions are now governed by the SCCPC's 18% per year limit,[518] this statute applies to any open-end revolving credit transaction not covered by the SCCPC.[519] This provision does not, however, apply to revolving charge plans by sellers of goods and services. These transactions are governed by the SCCPC rate structure for revolving credit if they are consumer credit transactions subject to the SCCPC rates.[520] If the SCCPC does not cover the transactions, however, no statutory rate maximum would apply.[521]

(ii) Other Special Exceptions.—Seven types of institutions are subject to special legislation that either creates special exemptions to the 8% rate or prohibits the use of one or more of the exemptions. They include (a) consumer finance companies operating as Act 988 licensees, (b) credit unions, (c) insurance premium service companies, (d) pawn brokers, (e) banks, (f) savings and loan associations, and (g) insurance companies. The first four types of institutions are subject to much more extensive special rate regulation than the remaining three.[522]

(1) Consumer finance companies have a choice of being licensed under the SCCPC, in which case the loans are governed by the SCCPC, or of being licensed by the South Carolina Board of Financial Institutions[523] under the South Carolina Consumer

516. S.C. CODE ANN. § 34-13-120 (1976).

517. No. 1265, 1968 S.C. Acts 3018.

518. S.C. CODE ANN. § 31-13-515 (Cum. Supp. 1977). See Part II, section B(2)(b) *supra.*

519. *Cf.* FRB Official Staff Interpretation No. FC-0139 (1977) which holds that the 5% cash discount authorized by TIL for not using a credit card cannot be included as interest under state law. This ruling applies to business as well as consumer credit. [1977] 5 CONS. CRED. GUIDE (CCH) ¶ 31,749. See note 292 *supra.*

520. S.C. CODE ANN. § 37-2-207 (1976). See Part II, section B(2)(a) *supra.*

521. S.C. CODE ANN. § 37-2-605 (1976). See notes 455-57 and accompanying text *supra.*

522. See Part I, section C(9) *supra.*

523. The licensing and examination provisions of Act 988 licensees are contained in S.C. CODE ANN. §§ 34-29-30 to -100 (1976 & Cum. Supp. 1977). The requirements are essentially that the licensee have minimum liquid assets of $25,000 per office and meet the "convenience and advantage" to the community test. Although the wording is slightly different, these are essentially the same tests as for a supervised lender under the SCCPC. *Id.* § 37-3-503 (Cum. Supp. 1977). The Board of Financial Institutions (earlier called the Board of Bank Control) has the sole licensing and examination powers over both Act 988

Finance Act, more commonly known as Act 988 of 1966. If a consumer finance company elects to be an Act 988 licensee the rates and most other aspects of their loans are governed by that Act and not by the SCCPC.[524] Consumer finance companies licensed under Act 988 have authority to make loans in the amount of $7,500 or less to individuals and organizations other than corporations.[525] With the exception of the SCCPC, Act 988 is by far the most comprehensive South Carolina statute dealing with consumer credit transactions. The rates allowable under Act 988 are authorized as exceptions to the general contract rate maximums. Loans by banks, savings and loan associations, insurance companies, credit unions, and pawnbrokers, as well as loans to corporations, however, are specifically excluded from the purview of this rate structure.[526]

The basic fees that Act 988 licensees can legally charge are divided into two categories: "finance" charges and "initial" charges. The "finance charges" permitted by this Act vary with the size of the loan, which is the actual cash received by the borrower, as illustrated by the following table:[527]

Size of Loan	Maximum Finance Charge
1. $0 — — — — — $ 150	1. $2.50 per month
2. $150.01 — — — $1,000	2. (a) $20 per $100 per year on the 1st $100 of the loan (b) $18 per $100 per year on the next $200 of the loan (c) $9 per $100 per year on the next $700 of the loan.
3. $1,000.01 — — — $7,500	3. $7 per 100 per year

licensees and consumer finance companies that become SCCPC supervised lenders. *Id.* §§ 37-3-502 to -506 (Cum. Supp. 1977). Under both acts a separate license must be obtained for each business location. A parent company with several offices cannot, however, operate some of them under Act 988 licenses and others under SCCPC supervised lender licenses. Section 37-9-102 (Cum. Supp. 1977) requires that "all persons related to" an SCCPC supervised lender licensee must also become SCCPC licensees. The sharing of responsibility between the SCCPC administrator and the Board of Financial Institutions for administration, investigation, and prosecution of complaints of SCCPC violations by all consumer finance companies is discussed in Part II, section E(2) *supra.*

524. See Part I, section C(9) *supra.* When there is a conflict between Act 988 and the SCCPC, Act 988 controls. S.C. CODE ANN. § 37-1-106 (Cum. Supp. 1977). The implications of this bifurcation for Act 988 licensees are discussed in Part I, section C(9) *supra.*

525. S.C. CODE ANN. § 34-29-20(a) (1976). Loans to corporations by Act 988 licensees are governed by the general usury statutes.

526. *Id.* § 34-29-30(b).

527. *See id.* § 34-29-140 (Cum. Supp. 1977).

Each category is exclusive so that, for example, if making a $1,200 cash advance, an Act 988 lender cannot charge category 2(a), (b), and (c) rates on the first $1,000 and category 3 rates on the next $200.

To the unsophisticated person these rates may not appear terribly high because of the way they are expressed. When transposed, as required by TIL and SCCPC into the effective annual actuarial percentage rate,[528] however, they are quite high, particularly for very small loans. For example, on a $100 cash advance for 10 months, repayable in 10 equal monthly installments, an Act 988 licensee could collect a finance charge of $25.00, and the effective rate is 51.33% per annum. If the same loan was for $150, the effective rate, calculated as required under TIL and SCCPC, would be 35% per annum. For loans in amounts of less than $100 and for periods of less than one year the annualized rates are astronomical. For loans over $100 and up to $1,000, the effective rates (rounded off to the nearest ¼%) are 35% for the first $100, 31.75% for the next $200, and 16.25% for the remainder. On a $300 cash advance repayable in twelve monthly installments, the annual percentage rate is 42.80%. Finally, for loans over $1,000 and up to $7,500 the effective rate is 12.75% per annum.

In addition to these "finance charges," Act 988 also authorizes the collection of an initial nonrefundable charge.[529] This charge varies with the size of the loan as follows:

Size of Loan	Maximum Initial Charge
1. $0 — — — — — $ 300	1. 6% of cash advanced
2. $300.01 — — — $1,000	2. $18
3. $1,000.01 — — — $4,000	3. 5% of cash advanced
4. $4,000.01 — — — $7,500	4. $200

On loans under $1,000 this initial charge may never be collected on a renewal or a refinancing of the same amount within three months of the original loan. This initial charge, however, may be collected on the amount of the new money advanced if "within

528. See Part II, section C *supra.*

529. S.C. CODE ANN. § 34-29-140(a)(2) to (3) (Cum. Supp. 1977). Most or all of these initial charges would have to be included in the loan finance charge if the loan in question was governed by the SCCPC. See notes 184-85 *supra,* 533-34, 539 and accompanying text *infra.* See also Part I, section D(1) *supra.* It would also have to be included in the calculation of the Annual Percentage Rate for TIL purposes. See notes 9, 76 *supra.*

three months" a loan for more than the original amount is made in connection with a refinancing that takes place within three months of the initial loan. In addition, a new initial fee can be collected if the loan is renewed or refinanced more than ninety days after the transaction is initially consummated or ninety days after it has been renewed or refinanced. The same restrictions apply for loans over $1,000, except that the limitation period is twelve months rather than three months.

This fee is described by Act 988 as one that includes, but is not limited to, attorneys' and brokers' fees, costs of investigating the moral and financial standing of the borrower, closing costs, and any other services rendered in connection with the making of the loan.[530] This initial fee does not include the expenses for items such as documentary stamps and recording fees. They also constitute additional charges that can be excluded from the permissible finance charge.[531] The consumer finance company retains most, if not all, of this initial fee. The result is that the initial fee increases the effective yield received by an Act 988 licensee. In 1976 these initial fees accounted for 20.34% of all income received by South Carolina consumer finance companies.[532]

The ability to charge these initial fees in addition to the "finance charge" accounts in large measure for the real yield under Act 988 being higher on very small loans than the authorized by the SCCPC. Under the SCCPC a substantial portion of the initial charge has to be included in the credit service and loan finance charge, and results in a lower yield.[533] Consequently, approximately forty-five percent of all consumer finance companies operating in South Carolina have Act 988 licenses.[534] Most consumer finance companies whose average loan portfolio is above $500, however, have chosen to be licensed as supervised

530. *Id.*

531. Section 34-29-140(e) (Cum. Supp. 1977) excludes official fees from the finance charge.

532. *1976 Consumer Finance Division Annual Report, supra* note 186, at 2. The other sources of income for all consumer finance company licensees in 1976 were as follows: Delinquency and deferral fees—6.26%, insurance commissions and rebates—8.40%, net loan finance charges—60.13%, collections on loans previously charged off—.87%, and other income—4.00%. *Id.*

533. See Part I, section D *supra.* Such charges would also have to be included in the calculation of the Annual Percentage Rate for TIL disclosure purposes. See note 529 *supra.*

534. *See* cover letter of Everett H. Whitler, Director Consumer Finance Division, to the State Board of Financial Institutions, *1976 Consumer Finance Division Annual Report, supra* note 186.

lenders under the SCCPC since the SCCPC rate structure is higher for larger loans than the Act 988 rates.[535]

Besides the initial fee and filing and recording fees, Act 988 licensees can also make the following other charges in addition to the authorized finance charge:

> (1) A one-time late charge fee of five percent of any installment or portion of an installment which is delinquent for five or more days;[536]
> (2) a deferment charge of 1% per month on the amount deferred when the original amount of the loan exceeds $500 and of 2% per month if the original loan is less than $500. No initial charge can be collected on the deferral amount, however, and a deferral charge cannot be made on an installment for which a delinquency charge has been made. Further, if the deferral is for less than one month, it cannot exceed $10 regardless of the amount deferred;[537]
> (3) default charges, such as expenses of repossession, storing, and selling of the collateral, reasonable attorneys' fees determined by a court, and suit costs;[538] and
> (4) insurance, including authorization to require the borrower to purchase credit life and disability insurance for the term of the loan as well as reasonable property damage insurance covering any collateral.[539]

If a loan is repaid prior to maturity or in connection with a renewal, refinancing, or consolidation transaction, a refund of unearned finance charges (but not the initial fee) is required on the basis of the sum of the digits method also known as the Rule of 78's.[540] A pro rata refund is required, however, if the renewal or refinancing takes place within the first ninety days of the contract.[541] Moreover, if any insurance involved in the loan is

535. See notes 183-85 and accompanying text *supra.*

536. S.C. CODE ANN. § 34-29-140(e) (Cum. Supp. 1977).

537. *Id.* § 34-29-140(f).

538. *Id.* § 34-29-140(e).

539. *Id.* § 34-29-160 (1976). The terms, amounts, and rates for this insurance are subject to extensive regulation. For example, the loss to premium ratio on property and disability insurance must be "not less than fifty percent, and rates producing a lesser loss ratio shall be deemed excessive." *Id.* Under the SCCPC, which would govern consumer finance companies holding licenses as supervised lenders, the premiums that are required by a creditor for life and disability insurance have to be included in the calculation of the "credit service" or "loan finance" charge. *Compare* S.C. CODE ANN. §§ 37-2-202(2)(b) and 37-3-202(2)(b) (Cum. Supp. 1977) *with id.* § 34-29-160 (1976). See notes 339-43, 529, 533 and accompanying text *supra.*

540. See notes 395-96 and accompanying text *supra.*

541. S.C. CODE ANN. § 34-29-140(a)(3)(c) (Cum. Supp. 1977). *See also* 1970 OP. S.C.

cancelled and the Act 988 licensee receives any premium rebate, it must credit or refund the rebate to the borrower under the Rule of 78's.[542]

Act 988 also regulates maximum loan terms as follows:[543]

Cash Advance	Maximum Maturity
$1,000 or less	24½ months
$1,001 to $1,500	36½ months
$1,501 to $2,000	48½ months
$2,001 to $7,500	60½ months

In addition, Act 988 prohibits a consumer finance company from making a purchase money loan involving a security interest in real estate under the Act 988 rate structure.[544] Second mortgages, as well as first mortgages on real estate in connection with loans for purposes other than purchasing real estate, however, are permitted.[545] Act 988 does not regulate or prohibit any other type of loan. It does, however, require that both a husband and wife sign any security agreement involving household furniture[546] and prohibits splitting of loans between two or more borrowers, for example, a husband and wife, or between affiliated finance companies with the intended purpose of obtaining a higher rate than would be the case if the loans were not split.[547]

ATT'Y GEN. No. 2667 (pro rata basis means daily basis).

542. S.C. CODE ANN. § 34-29-160 (1976).

543. *Id.* § 34-29-140(b) (Cum. Supp. 1977). This statute also provides that "[t]he payments on any loan . . . shall be in substantially equal, consecutive monthly installments and shall be in an amount not less than ten dollars per month, exclusive of finance charges." *Id.* The SCCPC regulates only repayment maturities for supervised loans (those exceeding 12% per annum) of $1,000 or less in which the rate of loan finance charge exceeds 18% per annum. *Id.* § 37-3-511.

544. *Id.* § 34-29-140(h) (Cum. Supp. 1977). Technically Act 988 licensees could utilize the general usury statutes, including § 34-13-120 (1976), which authorizes a 7% add-on (12.68% on a 12-month loan on an actuarial basis) for permissible real estate mortgage loans. See notes 511-14 and accompanying text *supra.* Because many of the fees and charges excluded from the finance charge in Act 988 have to be included in the interest calculation under § 34-13-120, however, it is doubtful they would do so except in cases of loans of more than $7,500. *See* 1972 OP. S.C. ATT'Y GEN. No. 3131 (mortgage service fee authorized by S.C. CODE ANN. § 34-31-90 (Cum. Supp. 1977) not available for loans made under Act 988).

545. *See* S.C. CODE ANN. § 34-29-140(h) (Cum. Supp. 1977).

546. *Id.* § 34-29-150(e) (1976).

547. *Id.* § 34-29-140(d) (Cum. Supp. 1977). The SCCPC contains similar prohibitions against the use of multiple agreements. *Id.* §§ 37-2-402, 37-3-409, -509 (1976).

The penalty for contracting or receiving any charges in excess of those specifically permitted by Act 988 is that the entire loan is void and the debtor can recover from the lender any amounts paid for interest or principal.[548] In addition, any officer, director, or agent participating in the void transaction will be subject to criminal penalties for a misdemeanor, punishable by a fine of not less than $200 nor more than $500 or thirty days to six months in jail.[549] These civil and criminal penalties do not apply, however, if the excess charge was made as "the result of an accidental or bona fide error."[550] There have been no South Carolina cases construing this language, but it is similar to SCCPC language[551] exculpating creditors from liability. The cases interpreting these other statutes should apply by analogy.[552]

(2) South Carolina law authorizes the establishment of "cooperative credit unions" to promote thrift and to make moderate loans of money to its members. It regulates these entities under the authority of the act and the supervision of the State Board of Financial Institutions.[553] Federal credit unions are established under the Federal Credit Union Act and are supervised and insured by the National Credit Union Administration.[554] All aspects of loans by credit unions are excluded from the SCCPC even though virtually all of their transactions otherwise fall within the definition of consumer loans.[555]

The South Carolina act regulating state credit unions provides that a credit union may charge "reasonable rates of interest, not to exceed one percent per month on unpaid loan balances."[556] This is one of several statutes that allow what is classified as an add-on rate, and the effective rate calculated on the actuarial method is 12% per annum on a twelve-month loan. The Federal Credit Union Act, however, specifies that federal credit unions may lend "at rates of interest not exceeding one per centum per month on unpaid balances, *inclusive* of all charges incident to

548. *Id.* §§ 34-29-20(d) (1976), -140(e) (Cum. Supp. 1977).

549. *Id.* § 34-29-20(e) (1976).

550. *Id.* §§ 34-29-20(d) (1976), -140(e) (Cum. Supp. 1977).

551. *Id.* §§ 37-5-202(7), -203(3). See notes 430-32 and accompanying text *supra.* The SCCPC language was taken from TIL and the UCCC. *See* 15 U.S.C. § 1640(e) (1976); UCCC § 5.202(7), .203(3).

552. *See* cases cited in note 429 *supra.*

553. S.C. CODE ANN. §§ 34-27-10 to -270 (1976 & Cum. Supp. 1977).

554. 12 U.S.C. §§ 1751-1790 (1976), *as amended by* Act of Apr. 19, 1977, Pub. L. No. 95-22, §§ 101-310, 91 Stat. 49-53.

555. See Part I, section C(8) *supra.*

556. S.C. CODE ANN. § 34-27-70 (1976).

making the loan."[557] This comparison is revealing. Because the South Carolina act does not specifically include other charges in the interest rate computation and has no other provision regulating these charges, it is possible, subject to common-law limitations, for state credit unions to impose additional charges.[558] To the extent these additional charges are retained by the credit union, the actual effective yield on a particular loan may legally be in excess of the 12% per annum statutory limit. Federal credit unions, however, must include all costs in the interest computation. If these costs are significant, their inclusion in the calculation of the interest could reduce the actual effective yield below 12% per annum. Theoretically, state credit unions may also exact prepayment penalties in refinancing as well as voluntary prepayment situations because there is no specific regulation of prepayment under the state statute.[559] The Federal Credit Union Act, however, specifically provides that no prepayment penalty can be charged on either a partial or whole prepayment.[560]

Legislation passed by Congress in 1977 greatly expands the loan authority and flexibility of federal credit unions by authorizing: (1) home mortgage loans of up to thirty years for a principal residence (the previous statutory maximum was ten years), (2) mobile home and home improvement loans of up to fifteen years (the prior maximum was ten years), (3) unsecured loans in any amount for up to twelve years (the prior maximum amount was $2,500 for a maximum period of five years), (4) revolving lines of credit, which could lead to issuance of credit cards and participation in an Electronic Funds Transfer System (prior to these amendments each advance had to be separately approved), and (5) the ability to enter into loan participation agreements with other credit unions.[561]

State credit unions have had the power to make long-term real estate loans for many years without official regulation.[562] There are no specific statutes or regulations governing in detail

557. 12 U.S.C.A. § 1757(5)(A)(vi) (Cum. Supp. 1978).

558. See Part III, section C(2) *infra*. Permissible additional charges for loans whose rates are governed by the SCCPC are strictly regulated. See Part II, section D(1) *supra*.

559. See Part III, section C(2)(j) *infra*. Prepayment rebates in loans governed by the SCCPC rate structure are subject to extensive regulation. See Part II, section D(3) *supra*.

560. 12 U.S.C.A. § 1757(5)(A)(viii) (Cum. Supp. 1978).

561. *See id.* § 1757.

562. At the end of 1976, the 43 state credit unions in South Carolina had $16.7 million in real estate loans and $111.3 million of total loans outstanding. S.C. Bd. of Fin. Insts., *Comparative Abstract* (1977).

the amount and lengths of state credit union loans, but upon approval of the State Board of Financial Institutions they have the right to participate in any activity authorized for federal credit unions.[563] Because of the substantial cost advantages they have over other private creditors[564] and the aggressive attitude of their management personnel, credit unions can be expected to increase substantially their share of the consumer credit market in the future in spite of the twelve percent per annum interest limitation.

(3) Insurance premium service companies are specially licensed and regulated lenders.[565] The credit and other charges they make in connection with consumer credit unions are governed by the Insurance Premium Service Company Act rather than by the SCCPC; however, all provisions of the SCCPC except for the rate and charge provisions apply to their premium loans on insurance that is for personal, family, or household purposes.[566] On the other hand, premium loans by these companies for business and other nonconsumer purposes are not subject to any SCCPC provisions.[567]

Insurance premium service companies are authorized to advance to a broker, insurer, or agent premiums on an insurance contract and to contract with the insured for the repayment of amounts advanced plus a service charge. These companies are prohibited from writing any insurance or selling any service other than premium financing. The act does not apply to insurance companies, authorized lenders (banks, credit unions, consumer finance companies), or insurance sales in connection with installment sales or loans.

A premium service insurance contract requires a minimum down payment of 10%.[568] The service charge, the charge for the use of the cash advanced, must be computed on the balance of premiums due after subtracting the down payment. The maximum rate is ¾ of 1% per month on the unpaid balance, resulting in an effective rate of 9% per annum on a twelve-month contract.[569] These companies are also authorized to make an initial

563. S.C. CODE ANN. § 34-1-110 (1976).
564. See note 178 *supra.*
565. S.C. CODE ANN. §§ 38-27-10 to -100 (1976).
566. *See* S.C. CODE ANN. § 37-1-202(6) (Cum. Supp. 1977). See Part I, section C(3) *supra.*
567. See Part I, section B(5) *supra.*
568. S.C. CODE ANN. § 38-26-90(c) (1976).
569. *Id.* § 38-27-90(e).

nonrefundable $10 charge that is in addition to and not part of the service charge.[570] This $10 charge is excluded from the unpaid balance for the purpose of computing the service charge. This results in a much higher effective annual percentage rate than the allowable service charge indicates, because the amount of this initial charge is high in relation to the total loan and the average term of these loans is relatively short. If the insurance contract is cancelled by the borrower, the unearned service charge "shall be refunded on a short rate basis as determined by the Insurance Commission."[571] Premium service contracts may contain a power of attorney authorizing the lender, upon the borrower's default, to cancel, subject to certain notice limitations, the insurance contract listed in the agreement.[572] When such a contract is cancelled, the unearned premiums must be returned by the insurer to the insurance premium service company which, under penalty of license revocation or suspension, must return to the insured within thirty days of receipt any return premium over and above the "amount due from the insured."[573]

Although the Insurance Premium Service Company Act prohibits a service company from writing any insurance in connection with its loans,[574] it does not specifically prohibit charges such as delinquency or deferral charges or refinancing fees. A premium service company is prohibited, however, from splitting a loan on two or more policies financed with the same borrower or from intentionally cancelling an insurance policy with the intention in either case of obtaining an additional $10 initial fee.[575]

(4) Insurance agents and insurance agencies (other than those that are owned or controlled by insurance companies)[576] can advance premiums to an insured and charge the greater of 18% per annum or $1.50 per month from the effective date of the policy or binder.[577] If the insured defaults on the payments due

570. *Id.* § 38-27-90(d).

571. *Id.* § 38-27-90(e). For the short-rate tables, see Rules and Regs. of the S.C. Dep't of Ins. 69-10, S.C. CODE OF STATE REGS. (1976).

572. S.C. CODE ANN. § 38-27-100 (1976).

573. *Id.* § 38-27-100(b),(e).

574. *Id.* § 38-27-90(a).

575. *Id.* § 38-27-90(b).

576. *See id.* §§ 38-51-410, *as amended by* No. 596, 1978 S.C. Acts 1746, 38-51-470 (1976). Prior to the 1978 amendments to § 38-51-410, a possible argument was that this section applied only to assigned-risk automobile policies, which are no longer issued in South Carolina. See notes 151-54 *supra.*

577. S.C. CODE ANN. § 38-51-430 (1976). Prior to the 1978 legislation, *see* note 576 *supra,* the maximum authorized rate for advanced premiums was 12% per annum or $1.50 per month, whichever was greater. See *id.* § 38-51-470 (1976).

the agent, the agent has the right to cancel the policy,[578] in which event the insurer must rebate the unearned premium on a pro-rated basis. Any excess of unearned premium over the amount that the insured owes the agent on the loan must be refunded to the insured within thirty days of receipt by the agent.[579] The statutory provisions authorizing these premium loans prohibit the imposition of any charges other than the fee described above.[580] It is unclear, however, whether this prohibition covers delinquency or deferral fees. Nevertheless, it does seem clear that an agent making a premium loan cannot impose a prepayment penalty.[581]

There are no statutory restrictions on the types of policies that can qualify for this special rate treatment. If the insurance is for personal, family, or household purposes, a premium loan would then be subject to all provisions of the SCCPC except those covering rates and charges.[582] On the other hand, if the insurance is for business or other nonconsumer purposes, the loan is not subject to any part of the SCCPC.[583]

(5) Another South Carolina lender who has a special exemption from the 8% maximum contract rate is a licensed pawnbroker. For loans not in excess of $50 licensed pawnbrokers are authorized by statute to charge a maximum of $1 per 30-day period for each $10 loaned.[584] This rate amounts to 120% for a twelve-month contract. A minimum charge of fifty cents may be collected for loans of less than $10.[585] The SCCPC defers to this statute for the rates on loans not over $50; however, loans in excess of $50 are subject to the SCCPC rate and additional charge provisions if the loan is for personal, family, or household purposes.[586] The duration of pawnbroker loans is unregulated by the

578. *Id.* §§ 38-51-440 to -450.

579. *Id.* § 38-51-460.

580. *Id.* § 38-51-420.

581. This results from the requirement that the agent return to the insured "[a]ny excess of return premium paid by the insurer to an agent, agency or producer in discharge of the lien provided by this article over the amount of unpaid balance and accrued service charges" in the event the policy is cancelled. *Id.* § 38-51-460. If the agent cannot charge a prepayment penalty when the policy is cancelled for nonpayment of the premium, surely a prepayment penalty cannot be imposed if the insured voluntarily prepays the loan.

582. See Part I, section C(3) *supra.*

583. See Part I, section B(5) *supra.*

584. S.C. CODE ANN. § 40-29-100 (1976).

585. *Id.*

586. See Part I, section C(5) *supra.* If a loan by a pawnbroker qualified as a business loan, the maximum rate would be the charge authorized by S.C. CODE ANN. § 40-39-100 (1976), if the loan was $50 or less. Either § 34-31-40 (1976) or § 34-13-120 (1976) would

pawnbroker statute, and no provision requires any refund of the unearned portion of the service charge upon prepayment, renewal, or refinancing of an existing debt. If the loan is for personal, family, or household purposes, which is invariably the case, these matters, as well as all other aspects of pawnbroker loans, however, are subject to the SCCPC even with loans of $50 and less. This is because the pawnbroker exclusion in the SCCPC applies only to any rates and charges that are specifically regulated by another statute.[587]

(6) State and federal banks operating in South Carolina[588] can take advantage of all the exemptions to the 8% basic contract rate discussed above.[589] For example, they can have revolving

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control if the loan was in excess of $50. The rates under these statutes are discussed in Part III, section B(2)(b)(i) *supra.*

587. *See* S.C. CODE ANN. § 37-1-202(4) (1976). See Part I, section C(5) *supra.*

588. As of June 30, 1976, 71 state banks with a total of 380 banking locations and 19 national banks with 317 branches operated in South Carolina. Of the state banks, which are licensed by the State Board of Financial Institutions, only six had elected to become members of the Federal Reserve System. The primary reason most state banks have chosen to continue as nonmembers is the effect on earnings of the high reserves required by Federal Reserve Bank regulations. All national banks are automatically members of the Federal Reserve System. All South Carolina banks are insured by FDIC at the current $40,000 per account level. At the end of 1976 national banks held 52.4% of all deposits and 54.5% of all loans; state nonmember banks held 45.3% of all deposits and 43.9% of all loans; state member banks held 2.3% of all deposits and 1.6% of all loans. The loan mix at the end of 1976 was as follows: Real estate—30.04% (residential 38%, commercial 56%, farm 6%); non-real estate farm loans—6.37%; commercial and industrial loans—18.79%; individual loans—42.01%; other—2.79%. For some reason the proportion of individual loans by South Carolina banks is considerably higher (42.01% versus 28.39%) and the proportion of nonmortgage farm loans is much lower (6.37% versus 16.24%) than for the nation as a whole. *See Assets and Liabilities—Commercial and Mutual Savings Banks—December 31, 1976,* Tables 5, 12 and Attachment.

South Carolina has enabling legislation for what are called cash depositories, a type of institution that came into being during the Depression. *See* S.C. CODE ANN. §§ 34-17-10 to -170 (1976). These institutions accept and hold deposits, but do not make direct loans. While there were at one time in excess of twenty cash depositories operating in South Carolina, there are currently none, the last one having converted to a state bank approximately five years ago. Because of the capitalization requirements imposed by FDIC for charter approval, it is extremely doubtful that any new cash depository will ever be approved. Telephone interview with Mr. Carl Cleveland, Commissioner of the State Board of Financial Institutions (August 29, 1977).

589. See Part III, sections B(2)(a)(i)-(ii) and (b)(i) *supra.* The National Bank Act allows national banks to charge "interest at the rate allowed by the laws of the State . . . where the bank is located . . . ." 12 U.S.C. § 85 (1976). Several recent cases have interpreted this language to mean that national banks are not limited to the rates authorized for state banks, but can charge the highest rate that a lender in the state is authorized to make for the equivalent loan. *See* cases cited note 452 *supra.* On this basis, national banks operating in South Carolina could make loans of up to $7500 under the rate and charge system authorized under Act 988 of 1966. *See* S.C. CODE ANN. § 34-29-140 (Cum. Supp. 1977). See notes 527-42 and accompanying text *supra.*

credit or overdraft plans for which they can charge 1½% per month or 18% per annum on the unpaid balances,[590] and they can make installment loans of all kinds at 7% add-on rates (12.68% per annum for a twelve-month loan).[591] Of course, these South Carolina contract rate exemptions do not apply when banks make loans that are subject to the SCCPC rate structure.

All banks are subject to a great deal of state and federal regulation that in many cases restrict the use of these exceptions for certain types of loans. This is particularly true for real estate loans.[592] Although there are some differences, state member and nonmember banks, as well as federal banks, are generally eligible to make the same kinds of loans for the same rates and under almost the same restrictions even though they are subject to different regulatory bodies.[593]

The banking statutes do not limit the charges that, in addition to pure interest or add-on charges, can be made without danger of a usury claim. The appropriateness of such charges is governed by the rules discussed in the next section.[594]

(7) Approximately ninety-seven percent of all loans made by savings and loan associations operating in South Carolina are secured by real estate mortgages.[595] The remaining three percent

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In 1974 an amendment to the National Banking Act authorized national banks to charge at "a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located . . . ." Act of Oct. 29, 1974, Pub. L. No. 93-501, § 201, 88 Stat. 1558 (codified at 12 U.S.C. § 85 (1976)). This legislation, which applied only to business and agricultural loans in excess of $25,000, expired on July 1, 1977. *Id.* § 206, 88 Stat. 1560 (1974). Even if this provision had continued, it would have had very limited utility in South Carolina because of the existing interest rate structure (the discount rate at the end of October 1977 was 6%).

590. S.C. CODE ANN. § 34-13-120 (1976).

591. *Id.*

592. *See, e.g., id.* § 34-13-20. See *id.* §§ 34-13-30 to -90 for other types of limitations on amounts and types of loans made by state banks.

593. *See, e.g., id.* §§ 34-1-110 (allowing state banks, pursuant to regulations issued by the State Board of Financial Institutions, to engage in any "activities that are authorized for national banks"); 34-13-30 (permitting state banks to make secured and unsecured installment loans on "terms and conditions as may be prescribed for similar loans for national banks"). See notes 452 and 589 *supra.* Section 34-1-110 prohibits state banks from charging interest rates other than those specifically authorized by South Carolina statutes even if a federal statute authorizes a higher rate. *See also id.* § 34-3-20 (exempting national banks from most of the loan and other restrictions applicable to state banks).

594. See Part III, section C(2) *infra.*

595. Data from the Federal Home Loan Bank of Atlanta shows that the 48 federal and 25 state savings and loan institutions in South Carolina had $3.5 billion in mortgage loans and $96.7 million in nonmortgage loans outstanding at the end of 1976. Of the mortgage loans, 78% were single-family residential mortgages. The major types of non-

consist of passbook or share loans, unsecured home improvement loans, and loans to purchase mobile homes. The primary statute regulating real estate mortgages taken by savings and loan associations requires that they be amortized "by the periodic reduction of principal method" and that "interest shall be computed only on unpaid balances."[596] Each payment is required to be applied first to any advances made on behalf of the mortgagor for items such as taxes and insurance and "second to the payment of interest accrued prior to the date of such payment and the remainder to the reduction of principal."[597] This statutory language precludes the use of the typical precomputed installment loan method of calculation, in which the interest for the entire term of the loan is either added to or discounted from the amount of the credit extended and the yield is almost double the yield computed on an actuarial basis.[598]

Although the vast majority of real estate mortgages held by savings and loan associations are fully amortized mortgages, a question exists whether it is permissible for these associations to make mortgage loans under the South Carolina installment loan statute.[599] That section authorizes a 7% add-on rate that yields 12.68% per annum on the simple interest actuarial method for a twelve-month loan, a yield that is considerably higher than the

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real estate loans were passbook or share loans (35.57%), home improvement loans (22.63%) and mobile home loans (41.43%). Federal Home Loan Bank Data (1977) (unpublished). All savings and loan association accounts are insured by the Federal Savings and Loan Insurance Corporation.

Rates charged by federal savings and loan associations cannot exceed those established by state law. 12 U.S.C. § 1425 (1976). Unlike the National Bank Act, however, there is no separate federal penalty provision for making excess charges. See note 452 *supra.* Hence, the normal state usury statutes and other penalty provisions apply to federal associations. For a summary of the applicable penalty provisions, see the Chart in Part V *infra.*

Savings and loan institutions nationally hold 36.5% of all real estate mortgages and 41.5% of mortgages covering family dwellings occupied by four persons or fewer. Other major types of mortgagees are mutual banks (9.2%), commercial banks (16.7%), life insurance companies (10.3%), federally supported agencies (13.2%), and others—principally private mortgage companies and brokers (14.1%). SAVINGS AND LOAN FACT BOOK, *supra* note 478, at 29-30. For the total amount of mortgages on South Carolina property held by banks and life insurance companies, see notes 588 *supra,* and 616 *infra.* The only other readily available figure is that for mortgages held by the Federal Land Bank on South Carolina farms, which at the end of June 1977 totaled $423,553,880. *1977 Combined Financial Report—The Farm Credit Banks of Columbia, South Carolina.*

596. S.C. CODE ANN. § 34-25-110 (1976).

597. *Id.*

598. See Part III, section C(1) *infra.*

599. S.C. CODE ANN. § 34-13-120 (1976). See notes 511-15 and accompanying text *supra.*

rates authorized for standard first mortgages.[600] The argument in favor of the availability of the higher rate for installment loans is twofold: (1) the statute itself states that it applies to "banks, banking institutions and other lending agencies;"[601] and (2) the statute requiring "direct reduction" or fully amortized loans[602] is not intended to be exclusive. The argument against this interpretation is: (1) the statutory scheme regulating savings and loans is intended to make the "direct reduction" method the exclusive method for real estate mortgages; and (2) the South Carolina Legislature has specifically exempted home improvement loans and loans to purchase mobile homes from the direct reduction strictures,[603] a fact that further indicates that the direct reduction method is exclusive except when a specific statutory exemption exists. Many savings and loan associations are making loans on unimproved real estate under this 7% add-on installment loan provision. Although the amount of these loans is not significant in comparison to other loans held by savings and loans, the possibility of a usury claim exists, and it appears to be in the best interest of all parties that this issue be clarified by legislation or, perhaps, by appropriate regulations.[604]

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600. See Part III, section B(2)(a)(ii) *supra.*

601. S.C. CODE ANN. § 34-13-120 (1976).

602. *Id.* § 34-25-110.

603. *Id.* §§ 34-25-130 to -140. See § 34-25-120 (1976), which is subject to interpretation as prohibiting all loans under special rates allowed to banks and other lending agencies (see Part III, sections (1)(a)-(c) *supra)* without specific statutory authorization. This interpretation would also prohibit any loans other than real estate mortgage loans by state savings and loan associations without specific statutory approval. In addition, No. 659, 1976 S.C. Acts 1739 amended § 34-31-30 (1976) to provide that interest on passbook or savings account loans made by savings and loan institutions and banks is limited to the rates specified in § 34-31-30 (1976) (8% up to $50,000) unless federal statutes authorize higher rates. Section 34-25-140 (1976), which deals with mobile home loans by savings and loan institutions, specifically authorizes the use of the 7% add-on rate, allowed by § 34-13-120 (1976), in these loans. Home improvement loans insured by the FHA are exempt from state interest limitations by § 34-25-150(2)(b)(1976). Although § 34-25-130(1976), which deals with home improvement loans, does not specifically authorize the use of the 7% add-on rate authorized by § 34-13-120, non-FHA home improvement loans can, by inference, be made at the rate under this provision. If § 34-25-120 is subject to the restrictive interpretation suggested earlier in this paragraph, a question may be raised about the authority of savings and loan institutions to utilize SCCPC rates for any nonmortgage transaction since none of the statutes authorizing non-real estate mortgage loans specifically mention the SCCPC. Legislation clarifying all these points is desirable. See also note 511 *supra.*

604. Pending proposals that significantly expand the authority of savings and loan institutions to make additional types of non-real estate mortgage loans provide additional justification for resolving this issue. *See, e.g., The Hunt Commission Report: A Panel,* 29 BUS. LAW. 497, 516-22 (1974).

The above discussion is premised upon the assumption that the mortgage in question is not one whose rates and charges are governed by the SCCPC. If it is governed by the SCCPC, and this depends on the difficult determination of whether it is a mortgage "primarily secured by a first lien which is a purchase money security interest in land,"[605] the SCCPC loan rate ceilings, which authorize a base rate of 18% per annum on an actuarial basis, apply.[606] In addition, home improvement and mobile home loans that are for personal, family, or household purposes are governed by the SCCPC rate statutes.[607] The 7% add-on installment loan statute comes into play only for transactions in which the savings and loan association wants to make a loan at a rate above 8% and no other applicable statute authorizes a rate as high or higher than the 12.68% maximum authorized by this statute.

As far as charges that can be made in addition to the maximum authorized interest rate are concerned, the rules discussed in the next section[608] apply to any transaction not governed by the SCCPC rate structure and the rules discussed in Part II[609] apply to transactions governed by the SCCPC rate and charge provision.

In summary, the vast majority of loans by savings and loan associations are direct reduction, fully amortized real estate mortgages. The authority of savings and loan associations to make any kind of real estate mortgage loans on a precomputed installment basis is questionable, and this issue should be resolved by clarifying legislation. The rate structure for mortgage loans, as well as for all other types of credit made by savings and loan associations, is summarized in the appended chart.[610] Very few differences exist between the respective loan authorities and restrictions of state and federal savings and loan associations.[611]

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605. See Part I, section 4(d) and Part III, section B(2)(a)(ii) *supra.*

606. A savings and loan institution is a supervised lender entitled to make loans at the supervised loan rates authorized by S.C. CODE ANN. § 37-3-515 (Cum. Supp. 1977). *See id.* § 37-1-301(17) (Cum. Supp. 1977).

607. But see note 603 *supra.*

608. See Part III, section C(2) *infra.*

609. See Part II, section D(1) *supra.*

610. See Part V *infra.*

611. State savings and loan associations are licensed and supervised by the State Board of Financial Institutions, and federal associations are governed by the Federal Home Loan Bank Board. S.C. CODE ANN. § 34-1-110 (1976) authorizes state-chartered savings and loan associations, pursuant to regulations adopted by the State Board of Financial Institutions, "to engage in any activities that are authorized for . . . Federally-chartered savings and loan associations by Federal law or regulation . . . ."

(8) Since insurance companies are lending agencies, they can also make loans at interest rates in excess of the 8% contract rate under all of the exemptions set forth in subsections (a) and (b)(1) of this section.[612] In addition, an insurance company making a secured loan can require the borrower to purchase life, property, and title insurance with the lender insurance company as a prerequisite for the loan. The premiums charged for this insurance will not, by statute, be counted as additional interest and will not make the loan usurious as long as the charges for the premiums are the same as for other persons.[613] Since the insurance company presumably makes a profit on the premiums and can also charge the maximum interest rate for the type of loan in question, the result is a windfall.[614] This provision, however, covers only secured loans, and an insurance company cannot require this insurance for unsecured loans without the premiums being considered additional interest.

This statute does not regulate the other charges that can be imposed in a loan made by an insurance company. These charges are governed by the rules set forth in the next section.[615] Since real estate mortgages constitute the bulk of insurance company lending activities subject to any usury limitations, the charges that can be made in addition to interest in real estate transactions are of particular importance.[616]

C. Calculating the "Interest" on Loans

The most critical factor in determining whether a claim for usury exists in a particular loan is the calculation of the amount of interest that is being charged. If the actual per annum yield produced by applying the total interest to the amount of credit is less than the rate ceiling applicable to the particular loan, the usury statutes have not been violated. Most courts presented with this issue have held for usury purposes that the amount of credit

612. See notes 474-521 and accompanying text *supra.*

613. S.C. CODE ANN. § 38-9-240 (1976).

614. See Part III, section C(2)(b) *infra* for further discussion of the treatment of insurance premiums in non-SCCPC loans. Insurance companies do not ordinarily make loans that are governed by the SCCPC rate and charge structure; however, if these loans are made, the rate maximum for closed-end transactions is 12% unless the insurance company obtains a license as a supervised lender. *See* S.C. CODE ANN. §§ 37-1-301(17), 37-3-501 (Cum. Supp. 1977).

615. See Part III, section C(2) *infra.*

616. At the end of 1974, insurance companies held $815.6 million in real estate mortgages in South Carolina. LIFE INSURANCE FACT BOOK 78 (1976).

is limited to the amount of the loan actually controlled by the borrower. For this reason, the amount of any required compensating balance or similar device must be deducted from the loan principal and the amount of interest is applied to this net amount to determine if the applicable rate ceiling has been exceeded.[617] If the yield exceeds the authorized statutory rate, a claim for usury will lie.

This section discusses the charges that must be included in the determination of interest and those that may properly be excluded. They are examined in the same fashion as the SCCPC concepts of "credit service charge" and "loan finance charge" in Part II.[618] Particular emphasis will be given in this section to the interest and noninterest charges involved in real estate transactions since this is the area in which much of the recent litigation has taken place. The penalties and remedies are discussed in section D of this part.[619]

1. What is "Interest?"—The term "interest" is not defined by any South Carolina statute. The South Carolina Supreme Court, however, has stated that "interest is the compensation

617. *See, e.g.*, Cappaert v. Bierman, 339 So. 2d 1355 (Miss. 1976). Charging interest on the full amount of the principal on a mortgage when less than the full amount has been disbursed produces the same result. *See* Tri-County Fed. Sav. & Loan Ass'n v. Lyle, 280 Md. 69, 371 A.2d 424 (1977). But see note 673 *infra*. *See also* Grundel v. Bank of Craig, 515 S.W.2d 177 (Mo. Ct. App. 1974) (interest paid on a loan to purchase an interest-free certificate of deposit the borrower was required to purchase as a prerequisite for further loans under a line of credit held to be "interest" for the line of credit loans); Carson Meadows, Inc. v. Pease, 91 Nev. 187, 533 P.2d 458 (1975) (only 75% of face amount of note from a corporation to investors actually loaned to the corporation); Miller v. First State Bank, 551 S.W.2d 89 (Tex. Ct. App. 1977) ($14,000 of $70,000 of a three-year loan was frozen in special account to be used for payment of interest on the note). The normal rule is that the face amount of a note is controlling in determining the maximum permissible interest rate. Pursuant to this principle, the maximum interest rate that can be collected in a construction mortgage, or for a line of credit, or other open-end or revolving credit arrangement is the maximum rate based on the face amount of the note rather than the maximum rate that could be collected on the funds that have been disbursed and are outstanding. A lender cannot, however, as was pointed out above, charge interest on the face amount of the note if less than the face amount is outstanding. *See* Tri-County Fed. Sav. & Loan Ass'n v. Lyle, 280 Md. 69, 371 A.2d 424 (1977). Similarly, a creditor cannot utilize a note containing a face amount higher than the one he intends to make available to the borrower when the purpose of the face amount figure is to obtain a higher interest rate than would otherwise be permissible. For example, a court would probably find a note for more than $50,000 usurious if the lender intended to loan only $40,000 and the interest rate charged for the loan was greater than that allowed for a $40,000 loan for the same purpose. This transaction presents strong evidence of an intent to evade the interest statutes, one of the principle elements of usury. *See* cases cited notes 620 and 673 *infra*. See also notes 705-6 and accompanying text *infra*.

618. See Part III, section D *infra*.

619. See Part II, section D *supra*.

allowed by law, or fixed by the parties, for the use of money . . . ."[620] All attempts to charge fees in excess of the basic 8% contract rate authorized by statute must be evaluated against this definition.[621] If a fee is found to be simply a method of charging for the use of money, rather than a charge for other services rendered, the fee will be added to the stated interest charge when computing the actual per annum percentage. If the total amounts charged by a creditor for the use of money loaned to a debtor are found to exceed 8% per annum, the contract must fall within the ambit of a permitted exception to the basic 8% contract rate[622] or it will be subject to the penalties for usury.[623]

There are several methods of calculating interest. The normal rule, and the one that applies in the absence of a contrary statutory authorization, is the simple interest, or actuarial, method by which the interest is calculated periodically on the outstanding principal. This is the method utilized by the SCCPC.[624] There are two other common methods of calculation. The first is the discount method, under which the lender collects all the interest for the full term of the loan at the inception of the transaction. The second is the add-on or precomputed method, by which the interest for the entire term is added to the actual credit advanced and the total amount is repaid in installments. A typical add-on rate statute has provisions permitting $x per $100 per annum.[625] Both of these methods result in actual yields

620. Coward v. Jones, 167 S.C. 118, 126, 166 S.E. 96, 99 (1932). In contrast to SCCPC rates, which are required to be calculated on a 365-day year, see note 322 and accompanying text *supra*, non-SCCPC rates can be computed on the basis of a 360-day year, the basis used in most standard rate tables. Merchants' & Planters' Bank v. Sarratt, 77 S.C. 141, 57 S.E. 621 (1907). Whether the charge is called interest is irrelevant if a court determines that the charge is actually "for the use of money." One case was recently remanded by an appellate court to determine if the amount of the reduction in a discount on gasoline sold by a distributor to an operator of a gas station was in fact interest, in which case the loan would be usurious. Handi Inv. Co. v. Mobil Oil Corp., 550 F.2d 543 (9th Cir. 1977). The discount was negotiated at the same time as the signing of a renewal note between the distributor and the operator. The South Carolina Supreme Court has consistently held that the substance and not the form of the transaction controls. *See, e.g.*, Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761 (1950); Mayfield v. British & Am. Mtg. Co., 104 S.C. 152, 88 S.E. 370 (1916); Osborne v. Fuller, 92 S.C. 338, 75 S.E. 557 (1912) (disguised sale held to be a loan). The more devious the scheme to hide interest, the more likely a court is to find that usurious intent exists.

621. *See* S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977). See also note 473 and accompanying text *supra*.

622. See Part III, section B *supra*.

623. See Part III, section D *infra*.

624. See Part I, section C *supra*.

625. *See, e.g.*, S.C. CODE ANN. §§ 34-13-120 (1976) (nonconsumer installment loans), 37-2-211 (1976) (consumer credit sales of motor vehicles).

that are higher than the equivalent rate calculated on a simple interest basis.

The basic South Carolina usury statute[626] specifically allows interest to be computed on a discount basis, and since the lender under this statute collects his interest in advance and can earn interest on that amount by lending it out, the effective yield is higher than if the same loan were made on a simple interest basis. For example, a $1,000 twelve-month single payment loan, in which the interest is discounted and deducted from the proceeds at 8% per annum, actually yields 8.70% if it is calculated actuarially as required under the SCCPC and TIL. This type of loan, however, is legal under the general usury statute and case law, despite the fact that the yield exceeds the 8% per annum limitation imposed by that section.[627]

The general rule, however, is that the discount method cannot be used to collect interest in advance for periods in excess of one year.[628] One reason for this limitation is simply that the effective yield on a long-term discount basis would be enormous. For instance, a three-year discounted note at 8%, under which the borrower receives as proceeds the gross amount of the loan less all the interest for thirty-six months, would result in an effective yield in excess of 18% per annum, calculated on the actuarial basis as required under the SCCPC.[629] A second reason for this

626. *Id.* § 34-31-30 (Cum. Supp. 1977).

627. While it seems clear that the use of a discount method for a maximum period of one year is proper for a rate of up to 8% per annum, it is not at all clear that this method is permissible for the higher rates authorized by this same statute for loans in excess of $50,000. The first paragraph of § 34-31-30 (Cum. Supp. 1977) states that "no greater interest . . . shall be charged, taken, agreed upon or allowed . . . *either by way of straight interest, discount or otherwise,* except upon written contracts wherein, by express agreement, a rate of interest not exceeding eight percent may be charged." (emphasis added). None of the following paragraphs of this section, which authorize rates greater than 8%, however, make any specific mention of discount. They utilize instead only the term "rate of interest." The effective yield, if discounting were allowed for these larger loans, would be significantly higher than the stipulated interest rate. For example, on a one-year loan of $75,000 discounted at 10%, the effective yield is 11.11%. Except for loans made before September 29, 1976, the effective date of the SCCPC, this question is relevant only for real estate mortgages of one year or less in excess of $50,000 and not governed by the SCCPC. Caution dictates that the lender not use the discount method on any of these mortgages.

628. *See, e.g.,* First Nat'l Bank v. Nowlin, 509 F.2d 872 (8th Cir. 1975); Annot., 57 A.L.R.2d 630, 636-43 (1958). There are no South Carolina cases precisely on point. *But see* cases cited note 629 *infra.*

629. Apparently, it is not usurious if the three-year note is structured so that the lender collects a maximum of one-year's interest in advance each year. *See* Johnson v. Groce, 175 S.C. 312, 317, 179 S.E. 39, 40-41 (1935); Schlosburg v. Bluestein, 150 S.C. 311,

rule is that the general contract interest statute under consideration allows only for the collection of interest at the rate of 8% "per annum," and several cases from states with similar interest statutes have held that this "per annum" language prohibits a lender from computing discount interest on other than a per annum or yearly basis.[630] Therefore, on long-term loans a lender is limited to computing and collecting interest as earned or in advance by way of discount for a period not in excess of one year, unless a contrary statute, such as one specifically authorizing an add-on or similar rate, exists.

It is also usurious to discount and deduct interest from a note and then to charge interest on the principal amount of the note from the date of the loan. This amounts to collecting interest twice on the same loan, and a claim for usury would lie if the total interest exceeded the maximum allowed by the applicable statute.[631] On the other hand, the collection of interest on unpaid interest past due, which amounts to compounding of interest, is lawful if the loan contract allows such compounding.[632] Similarly,

148 S.E. 60 (1929); Newton v. Woodley, 55 S.C. 132, 33 S.E. 1 (1899) (no usury when five-year note provided that interest was to be discounted and collected annually in advance).

630. *See, e.g.*, Agostini v. Colonial Tr. Co., 28 Del. Ch. 30, 38-43, 36 A.2d 33, 37-39 (1944); Silver Sands of Pensacola Beach, Inc. v. Pensacola Loan & Sav. Bank, 174 So. 2d 61, 66-67 (Fla. Ct. App. 1965).

631. *See* Carolina Sav. Bank v. Parrott, 30 S.C. 61, 8 S.E. 199 (1888). The evil here is interest on interest or compound interest, which is universally condemned. *See, e.g.*, Partain v. First Nat'l Bank, 467 F.2d 167 (5th Cir. 1972); Annot., 10 A.L.R.3d 421 (1966). The collection of interest on overdue amounts after default is, however, generally not held to be illegal compounding of interest. See note 632 *infra*.

632. The collection of interest after maturity or default presents some difficult legal issues. A majority of cases concerning a claim of usury have upheld clauses that call for interest in excess of the statutory maximum after maturity. The decisions have held that the excess is in the nature of a delinquency charge that can be avoided by prompt payment and, therefore, is not a charge for the "use of money." The only South Carolina cases on this point, however, have held that these clauses constitute usurious interest. Union Mtg. Banking & Tr. Co. v. Hagood, 97 F. 360 (C.C.D.S.C. 1899); Carroll County Sav. Bank v. Strother, 28 S.C. 504, 6 S.E. 313 (1888). *See* Annot., 28 A.L.R.3d 449 (1969). Nevertheless, a clause calling for interest after maturity at a rate equal to or less than the maximum rate authorized by statute does not create a usury claim even though the result is that interest may be collected on interest. *See* Annot., 10 A.L.R.3d 421 (1966). If the loan contract, however, does not stipulate the rate of interest after maturity, the general rule is that the rate is automatically the legal rate, which is 6%, and not the rate specified in the note itself. *See* cases cited in Annot., 16 A.L.R.2d 902 (1951).

Acceleration of the note prior to maturity presents additional problems. The main issue is whether the creditor is entitled to collect the unearned interest on future installments. The majority rule is that the creditor must credit the borrower with any unearned interest that is included in the face amount of the notes. *See* Annot., 66 A.L.R.3d 650 (1975). *But see* Long Realty Co. v. Breedin, 175 S.C. 233, 242-49, 179 S.E. 47, 51-54 (1935) (unapproved dictum). In precomputed transactions, the normal rule is to rebate on the

it is also proper to provide in the loan contract that if the principal is not paid when due, additional interest at a permissible rate may be exacted on the unpaid principal until the balance due is paid in full. No illegal double collection of interest is involved in this instance.[633]

The type of discount discussed in the preceeding paragraphs, which deal with a particular method of interest calculation, needs to be distinguished from the discount involved in the purchase or assignment of an existing obligation at less than the face amount of the note. Unless the assignor in the latter type of transaction is a mere dummy conduit used as a scheme to evade the interest rate statutes, the discount charged the assignor by the assignee is not "interest" as far as the borrower is concerned because it is not imposed on the borrower by the assignee.[634] This rule applies even if there is a prior understanding or agreement between the original lender and the assignee to purchase or assign. Any other result would jeopardize the legality of the billions of dollars of chattel paper and real estate mortgage financing handled on a discount basis.[635]

Although discount and collection of interest in advance at the maximum authorized per annum rate for a period not in excess of one year are allowable under the basic South Carolina interest statute, computing or collecting this interest on an add-on basis, would almost certainly be held to be usurious.[636] Under

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sum of the digits or Rule of 78's method. See Part II, section D(3) *supra.* The lender, however, in the absence of a contrary statute, is not legally obligated to give the debtor any credit for unearned interest if the debtor voluntarily prepays. See Part III, section B(2)(j) *infra.* The inconsistency between requiring a rebate if the debtor defaults, but not requiring one if a voluntary prepayment is made, is hard to justify.

One additional question involves the collection of interest on the principal from the date of acceleration to the date of judgment or payment. Presumably this is treated like the issue of interest after maturity and should be covered by specific language in the note. After judgment is rendered, the amount of the judgment, which includes unpaid principal plus any accrued but unpaid interest, attorneys' fees, and costs bears interest at 6% per annum. S.C. CODE ANN. § 34-31-20 (1976). Several states have raised the interest rate on judgments in recent years to bring it more in line with prevailing rates. *See, e.g.,* ALASKA STAT. § 09.30.070 (1973) (8-10%); KAN. STAT. ANN. §§ 16-204 (1974), -205 (Cum. Supp. 1977) (up to rate specified in the obligation, otherwise 8%); OR. REV. STAT. § 82.010(1)(b) (1977) (same as rate specified in the obligation). *See also* S.C. CODE ANN. § 37-6-416 (1976). See notes 448-50 and accompanying text *supra.*

633. See note 632 *supra.*

634. *See, e.g.,* Hershman, *Usury and the Tight Mortgage Market,* 22 BUS. LAW. 333, 347-51 (1967); Annot., 165 A.L.R. 679 (1946). See also note 292 *supra. But see* Cumberland Capital Corp. v. Patty, 556 S.W.2d 516 (Tenn. 1977) (distinguishable on grounds of constitutional prohibition against discounting).

635. *See* authorities cited note 634 *supra.*

636. The few decisions on this issue agree that an add-on rate cannot be used in the

the add-on method, the total interest due for the entire period is added to the principal and the total sum is repaid in installments. The principle reason for this rule is that the yield calculated on an add-on basis is almost twice as much as the same rate calculated on a simple interest basis. For example, on a $1,000 twelve-month loan at 8%, the effective yield on a discounted basis is, as was pointed out above,[637] 15.68%; however, if the same loan were computed on an add-on basis and repayable in twelve monthly installments, the effective yield would be 14.45%, or almost double the basic 8% contract rate maximum authorized by the basic South Carolina usury statute.[638] Nevertheless, as was pointed out in the preceeding section,[639] there are several South Carolina statutes[640] that specifically allow interest to be computed on an add-on basis for certain types of installment loans. These statutes constitute exceptions to the general contract rate statute and its prohibition against the use of such rates.

In summary, interest includes any charge made for the use of money imposed by the lender on the debtor. Unless the statute indicates otherwise, interest must be calculated on a simple interest or actuarial basis. Several South Carolina statutes authorize the use of add-on rates and the general contract interest statute authorizes the use of the discount method of calculation for periods not in excess of one year.

2. *Additional Charges.*—The add-on and discount devices for increasing the loan yield involve methods of calculating the percentage ceiling based on the interest element stated in the loan contract. All lenders from time to time, however, make the borrower pay charges in addition to the stated interest. The charges range from the cost of documentary stamps for the note to a requirement that the borrower give the lender a certain percentage of the earnings or income from a business financed by the loan. It is important for all parties to determine whether certain charges are permissible additional charges or whether they are

absence of specific statutory authority. *See* Annot., 57 A.L.R.2d 630, 666-68 (1958). Although S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977) authorizes interest "either by way of straight interest, discount or otherwise," the "otherwise" does not constitute statutory authorization for the use of an add-on rate. Compare this with the cases cited in note 629 *supra.*

637. See note 627 and accompanying text *supra.*

638. S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977).

639. See Part III, section B(2)(a), (b)(i) *supra.*

640. *See, e.g.,* S.C. CODE ANN. §§ 34-13-120 (1976) (general installment loan statute), 34-29-140 (Cum. Supp. 1977) (consumer finance companies operating under Act 988 licenses).

merely disguised fees for use of the money. If a charge falls in the latter category it may be combined with the pure interest stated in the loan contract to result in a usurious yield. The problem has always been a perplexing one in South Carolina and elsewhere. This is primarily because the term "interest" is not defined in the usury statutes, and the determination of what is and what is not interest is left to the courts. This case-by-case approach has resulted in a large number of cases that are confusing and conflicting.[641] The SCCPC minimizes the definitional problem by extensive regulation of what charges and fees can be excluded from the credit service and loan finance charge.[642] South Carolina also has some additional statutes that stipulate what charges in addition to pure interest may be made.[643] Most notable is Act 988 of 1966 for consumer finance companies.[644] These statutes, however, cover only specific types of loans, and many do not have provisions regulating all types of additional charges. The common-law rules developed by the courts apply in these cases.

Any analysis of this area is difficult because of the confusing opinions. In the absence of contrary statutes, however, the existing rules in South Carolina may be summarized as follows:

(1) The basic rule is that any charge which is imposed on the debtor by the lender for the use of money is interest, regardless of what the charge is called in the agreement between the parties.[645] If the particular charge, however, is exacted by a third party unrelated to the lender and the lender receives no collateral benefit from the third party, it is a permissible charge that can be excluded from the determination of the interest for the transaction in question.[646]

641. *Compare* Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709 (1925) (2% commission paid to the bank president for a loan held to make the loan usurious even though the bank itself did not receive any portion of this commission) *with* Long Realty Co. v. Breedin, 175 S.C. 233, 179 S.E. 47 (1935) (loan involving a 5% commission, approximately one-half of which was received by the lender, held nonusurious).

642. See Part II, sections C and D *supra.*

643. *See* S.C. CODE ANN. § 34-29-140 (Cum. Supp. 1977).

644. *Id.* §§ 34-29-10 to -260 (1976 & Cum. Supp. 1977). See Part III, section B(2)(b)(ii) *supra.*

645. *See* cases cited note 620 *supra.*

646. If the charge, however, is exacted by the lender for use of the money in question, the charge is interest, even if it is paid by a third party. This is the situation, for example, with points charged a seller of real estate as part of a mortgage loan being made to the purchaser. See Part III, section C(2)(f) *infra.* This rule also applies to schemes in which a debtor pays less than the maximum permissible amount of interest, but a third person not directly receiving the loan proceeds agrees to pay an additional amount of interest and

(2) Charges retained by the lender are more likely to be construed as interest than are charges paid to third parties for actual services rendered. Nevertheless, as a general rule, reasonable charges retained by the lender, that can be traced directly to services rendered for a particular loan, and that are not general overhead expenses, such as rents or salaries, will not be included in the interest calculation. A charge is generally considered reasonable if it does not exceed what a third party unrelated to the lender would charge for the same service. The amount of this type of charge that is found to be unreasonable, or that is found to be part of general overhead will, however, be classified as interest.[647]

(3) Charges made after a default by the borrower and prepayment penalties are less suspect than charges made at the inception of the loan. Default charges and prepayment penalties have traditionally been viewed as charges that are voluntarily assumed by the debtor for failure to fulfill the terms of the loan agreement, rather than as charges for the loan of money.[648]

(4) Even if a particular charge is found to be interest it, along with all other charges found to be interest, can be amortized over the full term of the loan, even though it is collected at the inception of the loan.[649] This cuts down substantially on the legal impact of finding a particular charge to be interest, especially in cases involving long-term loans, such as real estate mortgages. If the loan is made on the mistaken basis that the charge in question is properly excluded but the interest rate charged is below the maximum rate authorized for that type of loan, the inclusion of the charge on an amortized basis might still result in the total interest being less than the maximum allowed. For example, if at the closing a charge of $500 is made and collected on a thirty-year

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the combination of the two payments exceeds the authorized maximum. *See* Andelson & Weiser, *Usury and Third Party Payments: Another View*, 51 LOS ANGELES B.J. 589 (1976).

647. *See* Cumberland Capital Corp. v. Patty, 556 S.W.2d 516 (Tenn. 1977).

648. *See, e.g.*, Abbot v. Stevens, 133 Cal. App. 2d 242, 284 P.2d 159 (1955). See Part III, section C(2)(j)-(k) *infra*.

649. *See, e.g.*, Long Realty Co. v. Breedin, 175 S.C. 233, 179 S.E. 47 (1935); Danielson v. Mixon, 109 S.C. 264, 95 S.E. 515 (1918); Danforth, *Usury: Applicability to Collateral Fees and Charges*, 16 S.D.L. REV. 52, 68 (1971). The rule allowing amortization over the full scheduled term of the loan is followed even in cases concerning real estate mortgages in which the actual average pay-out period is much less than the scheduled maturity date in the mortgage. The Federal Home Loan Bank Board estimates that the average life of the conventional home mortgage is only ten years. 9 FED. HOME LOAN BANK BOARD J. 39 n.4 (1976). If a mortgage loan is repaid before the maturity date, the mortgagee's actual yield is higher than the disclosed rate. *See* Landers, *Determining the Finance Charge Under the Truth in Lending Act*, 1977 AM. B. FOUNDATION RESEARCH J. 45, 66. This principle is illustrated in note 664 *infra*.

real estate first mortgage loan of $50,000 made to a consumer to purchase a new home at 8¾% interest, the loan is not in violation of the 9% maximum rate authorized for such mortgages,[650] even if the $500 is included in the interest calculation. This is because of the amortization rule. If this $500 had to be added to the other interest collected in the first year of the loan, which would be the case if amortization were not allowed, usurious interest in excess of the maximum 9% authorized would have been collected in the first year of the mortgage and would have triggered the usury penalty provisions.[651]

Applying these general rules to specific types of charges made by lenders produces results that are quite different in many cases from treatment of the same charge by the SCCPC.

(a) Charges Paid to Third Parties.—Any charge that is both reasonable in amount and paid to a third party for services either actually rendered, or required by law, is permissible and will not be held to be additional interest. Thus, it is proper for a lender to collect fees for items such as documentary stamps, recording costs, surveys, attorneys' fees for perfecting the title or for closing the transaction, title insurance, credit investigations and appraisals of collateral, and, in construction mortgages, payments for periodic inspections preceding disbursement.[652] On the

650. S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977). See Part III, section B(2)(a)(ii) *supra*. See also the Addendum *infra*.

651. See Part III, section D *infra*.

652. *See* Long Realty Co. v. Breedin, 175 S.C. 233, 179 S.E. 47 (1935); Yorkville Bldg. & Loan Ass'n v. Foster, 132 S.C. 276, 129 S.E. 44 (1925) (deduction of all reasonable expenses is authorized without making the loan usurious); American Mtg. Co. v. Woodward, 83 S.C. 521, 65 S.E. 739 (1909) (fee for recording costs and abstract of title); Brown v. Brown, 38 S.C. 173, 17 S.E. 452 (1893) ($3.50 recording fee and $25.00 fee paid to third party for an unspecified purpose). *See generally* Prather, *Mortgage Loans and the Usury Laws*, 16 BUS. LAW. 181, 188-91 (1960); Annot., 21 A.L.R. 797, 823 (1922), *supplemented by* Annot., 53 A.L.R. 743 (1928) & Annot., 63 A.L.R. 823 (1929).

Even if these charges are unreasonable, however, they will not be considered additional interest unless the third party is considered the agent of the lender. S.C. CODE ANN. § 34-31-60 (1976) specifically states that a lender shall not "be charged with usury . . . by reason of money paid or agreed to be paid to others by the borrower in order to obtain a loan when the lender neither took nor contracted to take more than lawful interest." It also gives the debtor a six-month period in which to bring suit against the third party for recovery of any unreasonable fees paid to the party. If the third party is the agent of the lender, however, the excessive part of the charge will be imputed to the lender as additional interest even though the entire fee is paid to the agent and the lender receives only a portion or none of the fee. *See* Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709 (1925); Mayfield v. British & Am. Mtg. Co., 104 S.C. 152, 88 S.E. 370 (1916) (lawyer who closed other loans of lender held to be agent of lender, even though his fee was paid by the borrower).

other hand, these charges are suspect if they are not paid to third parties, and there is some danger they would be considered additional interest. Most normal real estate closing costs, however, even those retained by the lender, are acceptable because they are payments for required services and not for the use of money.[653]

(b) Insurance.—Charges for insurance require special comment, since most lenders require property damage insurance on all secured loans involving personal property and real estate. Many lenders also routinely require life insurance or disability insurance.[654] If the borrower purchases this insurance from a third party who is unrelated to the lender, there is little danger that the charge will be held to be additional interest, even if the lender finances the premium as part of the loan.[655] In many cases, however, the lender voluntarily acts as the agent and procures the policy for the borrower. In this case the lender will generally receive a commission and a dividend or rebate from the insurer. Most cases considering this question have held that the commission or similar fee is not additional interest, even when the lender requires the insurance, as long as the amount of the insurance and the commission or rebate are reasonable and the premium collected by the lender is the same as the premium for like insurance purchased through independent agents.[656] No South Carolina cases have been decided recently in this area, however, and the question of commissions and rebates as interest is somewhat of an open one in this state.[657]

(c) Brokerage Fees.—Most cases have excluded any brokerage fee from the interest calculation if the broker was acting solely as the independent agent of the borrower.[658] The brokerage fee is

653. *But see* Danielson v. Mixon, 109 S.C. 264, 95 S.E. 515 (1918). See Part II, section D *supra* for a discussion of the different treatment of many of these expenses under the SCCPC.

654. S.C. CODE ANN. § 38-55-110 (1976) prohibits a lender from requiring the borrower to procure any of this insurance from a particular insurance company or to use the lender as the agent. These restrictions do not apply when the lender is an insurance company. S.C. CODE ANN. § 38-9-240 (1976). The premiums for life and disability insurance are not included as interest even if the insurance is required, a result contrary to that for transactions covered by the SCCPC rate structure. See Part II, section D(1)(b) *supra*.

655. *See* Annot., 91 A.L.R.2d 1344 (1963).

656. *Id.* at 1348.

657. The only South Carolina case dealing with this whole subject is the early case of Land Mtg. Co. v. Gillam, 49 S.C. 345, 26 S.E. 990 (1897), which held that a $25 fire insurance premium charged to a borrower was not additional interest and allowed the borrower to recover the charge for breach of contract because the lender failed to purchase the policy.

658. *See, e.g.*, Whaley v. American Freehold Land-Mtg. Co., 74 F. 73 (C.C.D.S.C.

interest, however, if it is paid to the lender or an agent of the lender.[659] There is a split in the decisions involving brokers who, in effect, are acting as the agent for both the borrower and the lender or have a close working relationship with the lender, even though technically they are employed and paid by the borrower in the particular transaction.[660]

(d) Commitment and Standby Fees.—These fees are generally not considered interest payments for the use of money but are viewed as payments for an option to borrow money in the future.[661] There are no South Carolina cases on this point, however.

(e) Service Charge or Origination Fees.—In the absence of a statute to the contrary, these fees are considered interest except to the extent the lender can show that the money is used to pay for actual services rendered in connection with the loan and is not for general overhead; in other words, that they qualify for exemption under the general rules stated above.[662] The South Carolina statute authorizing these fees in real estate mortgage loans is discussed later in this subsection.[663]

(f) Points.—The imposition of points in real estate transactions has become common during the past decade. Whether they

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1896); New England Mtg. Sav. Co. v. Baxley, 44 S.C. 81, 21 S.E. 444 (1895); Annot., 52 A.L.R.2d 703, 708-12 (1957).

659. *See, e.g.*, American Mtg. Co. v. Woodward, 83 S.C. 521, 65 S.E. 739 (1909). A majority of courts would not apply this rule if the lender did not know of the agent's involvement and did not participate in the payment of the commission or receive any portion of the commission. *See* Annot., 52 A.L.R.2d 703, 737-42 (1957). *But see* Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709 (1925) (2% commission paid to bank president in connection with a loan held to make the loan usurious even though the bank did not receive any portion of the commission).

660. *See* Annot., 52 A.L.R.2d 703, 713-19, 725-32 (1957). In Long Realty Co. v. Breedin, 175 S.C. 233, 179 S.E. 47 (1935), the South Carolina Supreme Court affirmed the result of a master's report that held the receipt of one-half of a commission by the mortgagee was not interest. The master's report, however, stated that at least part of the money paid to the mortgagee was used to pay expenses incurred by the mortgagee and that even if the portion of the commission paid to the mortgagee was considered interest, the total of the commission plus the stated interest would not exceed the statutory maximum. *Id.* at 240-42, 179 S.E. at 50-51.

661. *See, e.g.*, Athern v. Wilshire Mtg. Corp., 104 Ariz. 59, 448 P.2d 859 (1968); Pivot City Realty Co. v. State Sav. & Tr. Co., 88 Ind. App. 222, 112 N.E. 27 (1928); Danforth, *supra* note 649, at 61.

662. *See* Bankers Guar. Title & Tr. Co. v. Fisher, 31 Ohio Op. 2d 115, 117, 204 N.E.2d 103, 106 (1964); Bank of Aynor v. Adams, 132 S.C. 107, 128 S.E. 168 (1925); Danforth, *supra* note 649, at 61-63; Annot., 91 A.L.R.2d 1389 (1963). See also notes 645-48 and accompanying text *supra*. Essentially, origination fees paid to a lender are no different from a brokerage commission paid to a lender. *See* Hershman, *supra* note 634, at 344-46.

663. See Part III, section C(2)(n) *infra*.

are charged to the borrower directly by the lender or against the seller (who in turn raises the price of the property) points are clearly charged for the use of money, and, therefore, the dollar amount of the points is included in the calculation of interest.[664] There are no South Carolina cases on this issue.

(g) Participating Interests.—As an alternative to or in addition to lending money to a venture, an investor might demand a percentage of the income from the operations, a participating interest in the proceeds of any sale or refinancing, or a direct ownership interest in the business. Regardless of the form of the participating interest, the dollar amount of the equity interest will possibly be considered interest, and usury would exist if the total of all interest pushes the yield over the statutory maximum. That the transaction is cast in some form other than a loan is not determinative since the courts will readily look at the substance rather than the form of the transaction.[665] Although the cases in this area are not totally consistent,[666] the general rule is that the more speculative the possibility of a return on the participating interest, the better the chances that a court will determine that the participating interest is not interest for usury purposes. The likelihood of finding interest increases, however, as the certainty of a return on the participating interest increases.[667] When no

664. *See* Landers, *Determining the Finance Charge Under the Truth in Lending Act*, 1977 AM. B. FOUNDATION RESEARCH J. 45, 64-65. The effect of points (or any other non-service front-end charge) on the actual yield to the mortgagee varies inversely with the life of the mortgage. The following example illustrates this point: An $18,000 mortgage at 6% interest with the mortgagee getting 10 points or $1,800 from the seller yields 7.3% if the mortgage runs for twenty years, approximately 9% if it is paid off at the end of eight years and approximately 13.2% if it is paid off at the end of three years. Benfield, *Money, Mortgages and Migraine—The Usury Headache*, 19 CASE W. RES. L. REV. 819, 859-61 (1968). Points charged in connection with VA and FHA mortgages are governed by federal statutes and not state law since the rate and charges on these loans are specifically exempted from South Carolina interest statutes. See Part III, section B(2)(a)(i) *supra*. Although mortgage points are interest, for tax purposes the amount involved cannot be deducted in the year paid, but must be amortized over the life of the mortgage. I.R.C. § 675. If the inclusion of the ownership interest, the value of which can be amortized over the life of the obligation, see notes 659 and accompanying text *supra*, does not result in the maximum allowable rate being exceeded, there is no usury claim. *See* Brown v. Cardoza, 67 Cal. App. 127, 153 P.2d 767 (1974); Commerce Sav. Ass'n v. G.G.E. Managing Co., 539 S.W.2d 71 (Tex. Civ. App. 1976).

665. *See* cases cited note 620 *supra;* Annot., 16 A.L.R.3d 475 (1967).

666. *Compare* Kessling v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971) (total value of 25% interest as limited partner plus 8% on loan held usurious) *with* Thomassen v. Carr, 250 Cal. App. 2d 341, 58 Cal. Rptr. 297 (1967) (no usury when contract provided for interest plus 30% of gross rentals until sale).

667. *See* Hershman, *Usury and the "New Look" in Real Estate Financing*, 4 REAL PROP. PROB. & TR. J. 315 (1969); Loisseaux, *Some Usury Problems in Commercial*

debt is involved, a straight investment made for an ownership equity interest in a business will clearly not result in a finding of interest since any return is based on the profits of the business, and profits are highly speculative, particularly in a new venture.[668] On the other hand, the amount of an ownership interest taken in connection with a loan transaction in which the interest rate specified in the note is near the prevailing market rate presents a very substantial risk that a court will find the dollar value of the ownership to be additional interest for usury purposes.[669] The result in cases falling between these two extremes depends on a court's finding on the degree of contingency in the repayment. An ownership interest taken in lieu of interest on a loan is one example of this uncertain type of transaction.[670] The only South Carolina case dealing with this issue concerned construction of a contract that required the owner of a hotel to pay one-half the profits from the hotel in return for "loan" of $2,000.[671] The defendant claimed this contract created a joint venture in which he had invested $2,000 in return for one-half the profits. The South Carolina Supreme Court had little difficulty in finding the transaction to be a loan in which the profits were assigned as security for payment. Although the owner of the hotel had paid well over $2,000 under the contract, no claim of usury was made in the case; nevertheless the court stated:

> A court of equity will look through the form of a transaction to its substance. Notwithstanding the words used, if it appears that the form of the transaction is a disguise under which usurious interest may be exacted, the transaction will be held to be usurious and to the extent of the usury agreed to be paid will not be enforced.[672]

A prudent lender would be well advised to adopt a conservative stance in this area and not to take ownership interests except in loans that contain no applicable usury limitation or in which

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Financing, 49 TEX. L. REV. 419, 432-35 (1971).

668. *See* Atkinson v. Wilcken, 142 Cal. App. 2d 246, 298 P.2d 147 (1956).

669. *See* American Insurers Life Ins. Co. v. Regenold, 243 Ark. 906, 423 S.W.2d 551 (1968) (6% interest plus ½ net profit from ultimate sale of land); Whittemore Homes, Inc. v. Fleishman, 190 Cal. App. 2d 154, 12 Cal. Rptr. 235 (1961); Kessling v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971) (8% interest and 25% profits as limited partner).

670. *Compare* Thomassen v. Carr, 250 Cal. App. 2d 341, 58 Cal. Rptr. 297 (1967) (no usury) *with* Thompson v. Hague, 430 S.W.2d 293 (Tex. Civ. App. 1968) (usury).

671. Virginia Hotel Co. v. Dusenberry, 218 S.C. 524, 63 S.E.2d 483 (1951).

672. *Id.* at 536, 63 S.E.2d at 489.

the value of the ownership, when combined with any other interest charged, does not exceed the maximum amount authorized for the transaction.[673]

(h) Late Charges.—Delinquency charges are not held to be interest in the absence of proof that the amount assessed is unreasonable relative to the administrative and other costs inherent in processing late payments. The exclusion is based primarily on the premise that this charge is one voluntarily incurred by the debtor for nonperformance of the loan.[674] It is improper, however, to

673. *See* Hershman, *Usury and the Tight Mortgage Market—Revisited*, 24 BUS. LAW. 1121, 1140 (1969). An alternative course of action is for the lender to require the borrower to qualify for the corporate exemption in order to avoid any interest ceiling. There are serious complications with this approach, however, especially with real estate ventures. See note 483 and accompanying text *supra*. Loans of over $50,000 not secured by real estate and loans in excess of $500,000 secured by a real estate mortgage are exempt from any interest limitations; so the ownership interest problem does not exist for loans meeting these dollar limitations. See notes 475-77 and accompanying text *supra*. A court would probably not allow a lender to combine two independent loans to exceed the $50,000 or $500,000 thresholds and thereby obtain higher interest rates than could be obtained on either of the loans individually. *See* C&S S. DeKalb Bank v. Watkins, 236 Ga. 759, 225 S.E.2d 266 (1976). The result might be different, however, if the two loans were actually consolidated or were closely connected by means of cross-collateral. *See* Sparkman & McLean Income Fund v. Wald, 10 Wash. App. 765, 520 P.2d 173 (1974). See also note 617 *supra* for treatment of open-end or revolving credit transactions.

674. *See, e.g.*, Hayes v. First Nat'l Bank of Memphis, 256 Ark. 328, 507 S.W.2d 701 (1974); Annot., 63 A.L.R.3d 50 (1975). *But see* Garrett v. Coast & S. Fed. Sav. & Loan Ass'n, 9 Cal. 3d 731, 511 P.2d 1197, 108 Cal. Rptr. 845 (1973) (delinquency fee of 2% of the unpaid balance of the entire principal held unlawful as improper liquidated damages). Federal regulations apply to some types of real estate mortgages that are exempt from South Carolina usury limitations. *See* 24 C.F.R. § 241.105 (1977) (FHA mortgage late charges limited to maximum 2% of payments more than 15 days late); 38 C.F.R. § 36.4212 (1976) (VA mortgage late charges limited to maximum of 4% of payments more than 15 days late).

In 1970, the South Carolina Attorney General issued an opinion holding that banks could not impose delinquency or late charges on bank card revolving loans made pursuant to S.C. CODE ANN. § 34-13-120 (1976). 1970 OP. S.C. ATT'Y GEN. No. 2888. The opinion was based in part on the failure of the Legislature to provide for these fees at the time the statute was enacted. The authority for delinquency and other default charges, however, comes from case law and, if reasonable, these charges are not considered interest. Very few South Carolina statutes contain any provisions for late charges. The rationale of this opinion, however, would prohibit any late charges in the absence of specific statutory authorization. For example, neither the general usury statute, S.C. CODE ANN. § 34-31-30 (Cum. Supp. 1977), under which most business loans and real estate mortgages are made, nor the basic closed-end installment loan statute, S.C. CODE ANN. § 34-13-120 (1976), mentions late payments. No one has ever seriously questioned the right of a creditor to make delinquency charges in loans covered by these statutes. That bank credit card loans are open-end credit transactions should not change the common-law right of lenders in the absence of a contrary statute to make delinquency and other reasonable charges based on services rendered regardless of whether the transaction is open-end, closed-end, precomputed, or not precomputed. *See, e.g.*, Key v. Wortham Bank & Tr. Co.,

charge both a deferral fee and a delinquency fee on the same late payment, since this involves collecting interest on interest plus a penalty.[675] After imposing a late payment fee, a prudent creditor is also well advised to apply all subsequent payments to the current month's payment with any excess being applied to any prior late installment rather than applying the payment first to the late installment. The latter method of allocation results in current installments not being fully paid and in further late charges being triggered. The late charges would continue until the debtor pays the full amount of the late payment and the late charge assessed against it, plus the current month's payment.

(i) Deferral Charges.—An agreement to defer a past due payment is an alternative to imposing a late charge. Essentially, a new loan contract is made for the amount deferred. The cases have generally upheld deferral charges against claims of usury when the charge does not exceed the amount that can be collected under the applicable usury statute if the amount deferred were a new loan. Deferral charges have been upheld even if the interest rate for the deferral exceeds the stated interest rate in the original loan contract.[676] For example, it is proper to impose an 8% deferral charge even though the original note called for interest at 6%. The collection of both a deferral and a delinquency fee on the same payment, however, is not proper, for the same reasons stated in the preceding paragraph dealing with late charges.[677]

(j) Prepayments and Prepayment Penalties.—South Carolina cases have consistently held that a lender is not obligated to accept payment in advance of the due date. Therefore, no charge of usury can be based on a claim of a prepayment penalty even though a prepayment penalty technically involves the collection of unaccrued interest.[678] One South Carolina case implies that a

543 S.W.2d 496 (Ark. 1976) (holding $12.00 bank card membership fee not to be interest). A creditor cannot, however, charge both a delinquency fee and interest on a late payment in either open-end or closed-end transaction. *See* authorities cited note 675 *infra.*

675. *See, e.g.,* Partain v. First Nat'l Bank, 467 F.2d 167 (5th Cir. 1972); Gordon Fin. Co. v. Chambliss, 236 So. 2d 533 (La. Ct. App. 1970). The double charge would result in illegal compounding of interest. *See* Carolina Sav. Bank v. Parrott, 30 S.C. 61, 8 S.E. 199 (1888); Annot., 10 A.L.R.3d 421 (1966).

676. *See* Utley v. Cavender, 31 S.C. 282, 9 S.E. 957 (1889). The basis for this holding is that a deferral is essentially a new loan contract for the amount being deferred.

677. See note 675 and accompanying text *supra.*

678. Barringer v. Jefferson Standard Life Ins. Co., 9 F. Supp. 493 (E.D.S.C. 1935); Cooke v. Young, 89 S.C. 173, 71 S.E. 837 (1911); Alexander v. Herndon, 84 S.C. 181, 65 S.E. 1048 (1909); Pyross v. Fraser, 82 S.C. 498, 64 S.E. 407 (1909). The South Carolina cases are consistent with cases from other jurisdictions. *See, e.g.,* Eliasz v. Broadway Bank & Tr. Co., 62 N.J. Super. 1, 161 A.2d 737 (1960); Annot., 75 A.L.R.2d 1265 (1961).

100% prepayment penalty is proper.[679] Of course, in practice, no responsible institutional lender would exact such an exorbitant penalty, although many impose a small percentage penalty for partial or full prepayment or in refinancing transactions. This is particularly true when interest rates are high and money is tight.[680] In addition, the SCCPC[681] and other applicable statutes[682] regulate rebates in most consumer credit transactions. When no statute applies, however, the possibility exists for lenders to impose large prepayment penalties and to refuse to rebate some or all of the unearned interest in connection with refinancing, consolidation, or renewal transactions.

(k) Default Charges.—The Uniform Commercial Code, which has been adopted in South Carolina, requires that all charges incurred in repossessing, storing, and disposing of collateral be reasonable in amount and that any sale of the collateral be conducted in a commercially reasonable manner.[683] Default charges are not interest for the use of money but, like delinquency charges are imposed on the debtor for failure to fulfill the terms of the loan agreement.[684]

(l) Attorneys' Fees.—South Carolina follows the common-law rule that attorneys' fees payable after default are not allowed in the absence of an agreement to pay these fees, and, in any event, can only be enforced to the extent they are reasonable, a determination to be made by a court.[685] Like delinquency and default charges, they are imposed for breach of the loan contract and, therefore, are not considered interest on the loan. Attorneys' fees collected at the inception of a loan, however, are on a different footing and are construed as interest unless they fall within one of the non-interest categories discussed above.[686]

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679. Cooke v. Young, 89 S.C. 173, 71 S.E. 837 (1911).

680. Barringer v. Jefferson Standard Life Ins. Co., 9 F. Supp. 493 (E.D.S.C. 1935) (approved a 2% prepayment penalty).

681. *See* S.C. CODE ANN. §§ 37-2-210, 37-3-210 (Cum. Supp. 1977). See Part II, section D(3) *supra.*

682. *See* S.C. CODE ANN. § 34-29-140(c) (Cum. Supp. 1977) (Act 988 of 1966). See Part I, section C(9) *supra* for discussion of the relationship between the SCCPC and Act 988 of 1966.

683. *See* S.C. CODE ANN. §§ 36-9-207, -501 to -507 (1976).

684. *See* Hershman, *supra* note 634, at 347. For a discussion of the lender's right to interest after default and acceleration, see note 632 *supra.*

685. *See, e.g.*, Hertzog v. Spartanburg Bonded Warehouse, Inc., 184 S.C. 378, 192 S.E. 397 (1937).

686. See notes 645-51 and accompanying text *supra.* Reasonable attorneys' fees paid for drafting a deed and certifying title in a real estate transaction are examples of a non-interest charge. But see Part III, section C(2)(n) *infra.*

(m) Due-On-Sale Clauses.—Many real estate lenders in recent years have included clauses in mortgages that make the sale of the property by the mortgagor a default, triggering an acceleration of the mortgage, or conditioning consent to the sale on agreement by the purchaser to assume the mortgage at a higher rate. The purpose of these clauses is to enable the lender to renegotiate the interest rate on the mortgage with the purchaser. In lieu of changing the interest rate in a loan assumption transaction, the lender may charge a large loan transfer fee that has the effect of increasing the actual yield on the mortgage. These devices became popular primarily because of the rising interest rates on savings accounts and borrowed money that has taken place in the past decade. Lenders with long-term mortgages at low rates found themselves in a cost squeeze. The due-on-sale clause is one method of alleviating the problem by preventing assumptions at the old low rates. One other alternative, the use of variable interest rates, has not been generally upheld and is not as a practical matter available for most residential mortgages in South Carolina.[687] Another device is the imposition of prepayment penalties, which covers only prepayments and does not alleviate the assumption problem.

Although a few courts have held that a due-on-sale clause is unenforceable in the absence of a showing that the mortgagee's security or prospect of payment is significantly endangered by the sale on proposed assumption,[688] most cases have upheld these clauses primarily on the grounds that they are not illegal restraints against alienation.[689] They have also been upheld against claims of usury because the due-on-sale clause is merely incidental to the original loan and the renegotiated loan is simply consideration for the mortgagee's agreement not to be bound by an assumption agreement in the absence of its assent.[690] No South Carolina cases on this issue have yet been decided. The alterna-

687. *See* note 500 *supra.*

688. *See* Baltimore Life Ins. Co. v. Harn, 15 Ariz. App. 78, 486 P.2d 190 (1971); Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 481 S.W.2d 725 (1972); Clark v. Lachenmeier, 237 So. 2d 583 (Fla. Dist. Ct. App. 1970).

689. *See, e.g.,* Coast Bank v. Minderhout, 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964) (due-on-sale clause); Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1973) (increased interest rate). These and other cases are discussed in Annot., 69 A.L.R.3d 713 (1976).

690. *See, e.g.,* Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1973); Note, *Transfer Fees in Home Loan Assumptions: Illegal Interest or Legal Consideration?,* 9 GA. L. REV. 454, 468-77 (1975); Annot., 69 A.L.R.3d 713, 743-46 (1976).

tive of an assumption fee has not been presented in any South Carolina case either, but its characterization should be governed by the general rules discussed at the beginning of this section.[691] To the extent that the assumption fee represents payment for actual services rendered in connection with the assumption, the fee is unlikely to be held to be additional interest.

(n) Other Charges.—The general rules discussed at the beginning of this section should be helpful in determining whether a charge not specifically discussed in the preceding paragraphs will be held to be interest. The absence of a charge can also be interest if the transaction results in a benefit to the creditor that can be tied to the agreement to loan the money in question. For example, the difference between the fair market value and the actual price charged to the creditor in a bargain sale of property sold to the creditor as part of the loan agreement is interest.[692] The more a transaction looks like a scheme to obtain extra interest, the more likely a court is to examine the facts closely and to find a usurious intent.

Any existing statute covering the types of charges discussed above overrides cases holding contrary to the statutory rule. Other than the SCCPC, which extensively regulates all of these types of charges,[693] the most important additional statute is section 34-31-90(1) of the South Carolina Code.[694] It authorizes the imposition of a service fee or origination charge in connection with real estate mortgages. This statute, originally enacted in 1970, states:

> Any mortgage lender may make an initial service or origination charge; *provided,* such initial charge shall not exceed one percent of the first twenty-five thousand dollars and one and one-half percent on any amounts above twenty-five thousand dollars. *Provided, further,* that any lender shall provide the borrower with a statement showing all attorneys' fees, origination fees and processing charges which shall be charged the borrower upon closing the loan, and the lender shall obtain a signed receipt therefor from the borrower. Such initial charge shall not be considered interest within the meaning of the laws of this

691. See notes 645-51 and accompanying text *supra.*

692. *See, e.g.,* Oil City Motor Co. v. C.I.T. Corp., 76 F.2d 589 (10th Cir. 1935); First Nat'l Bank v. Danek, 89 N.M. 623, 556 P.2d 31 (1976) (difference between fair market value and sales price of stock transferred in connection with a loan held to be interest). See also note 617 *supra.*

693. See Part II, section D(1)-(2) *supra.*

694. S.C. CODE ANN. § 34-31-90(1) (Cum. Supp. 1977).

> State, which limit the rate of interest which may be charged on any transaction.[695]

In the absence of this statute, this charge would be held to be interest.[696] The statute does not, however, specify which charges can be made in addition to this service charge. Because attorneys' fees are mentioned in this statute, the Legislature may have contemplated a separate charge for this item, but this seems unlikely. Still, the inclusion of attorneys' fees without mentioning any other charges casts considerable doubt on the exclusion of any other charges from the interest calculations. It seems logical, however, that any expenses payable to unrelated third parties for services rendered in connection with the mortgage are not part of the service charge, and also are not interest under the general rules discussed at the beginning of this section.[697] On the other hand, since a service fee is normally intended to compensate a lender for the internal expenses of processing a loan, prudence dictates that a mortgagee who has collected the fee authorized by this statute not impose additional charges for any services in connection with the mortgage performed by its own personnel—for example, appraisals and property inspections— on any mortgage that is made at the maximum permissible interest rate.[698]

Other South Carolina statutes specifically allow mortgagees, when authorized to do so in a mortgage, to pay for taxes, assessments, insurance, and necessary repairs on the mortgaged property and to charge these expenses to the mortgagor. The mortgagee may charge the mortgagor for the full amount advanced plus interest "as provided in the mortgage, but not exceeding the legal rate."[699] These payments clearly do not constitute additional interest.

None of the problems associated with determining whether

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695. *Id.*

696. See Part III, section C(2)(e) *supra.*

697. See notes 652-53 and accompanying text *supra.*

698. This statute is not a model of clarity. If and when the Legislature revises the South Carolina usury statutes, this statute should be included among the candidates for revision. See Part IV *infra.*

699. S.C. CODE ANN. §§ 29-3-30 to -40 (1976). The legal rate of interest in South Carolina is 6%. *Id.* § 34-31-20. The maximum contract rate is 8%, with higher rates being authorized for larger loans. *Id.* § 34-31-30 (Cum. Supp. 1977). The wording of these statutes apparently restricts the permissible interest rates on these charges to 6%. Perhaps use of the term "legal rate of interest" was a legislative oversight. If this is the case, it should be corrected.

a particular charge is interest exists in transactions in which there is no applicable interest maximum.[700]

In transactions subject to a rate ceiling, a creditor will often seek to have the laws of another state having a higher ceiling apply to the transaction in order to obtain a higher rate on the loan. Courts have traditionally applied the law of the state whose usury limitations are most favorable to upholding the transaction against a claim of usury, even in the absence of a contractual clause stipulating which state's laws will apply.[701] The South Carolina Supreme Court has generally been as liberal on this issue as any state court in the nation.[702] Partially in response to the court's liberal attitude, the South Carolina Legislature in 1898 enacted a statute that requires that "the rate of interest allowed and in all other respects" all real estate mortgages covering land located in this state will be governed by South Carolina law.[703] This section effectively prevents the use of a clause stipulating that the law of another state will apply in a loan involving a real estate mortgage covering South Carolina realty. If the other state has some reasonable relation to the transaction, though, this type of contract clause is probably effective for non-real estate transactions that are not covered by the SCCPC.[704]

D. Penalties and Remedies

In order to succeed on a claim of usury in a non-SCCPC transaction[705] the debtor must prove four elements: (1) an agree-

700. See Part III, section B(2)(a)(i) *supra*. Some types of government purchased or insured mortgages, however, are subject to federal limitations on the types of charges that can legitimately be made. See notes 478 and 674 *supra*.

701. See Part I, section D *supra*.

702. *See* cases cited note 207 *supra*.

703. S.C. CODE ANN. § 29-3-60 (1976).

704. An unresolved issue is the status of a loan that is secured by both real estate and personal property. Section 29-3-60 (1976) says that not only the interest rate, but also "in all other respects" the loan will be governed by South Carolina law. In Savannah Bank & Tr. Co. v. Shuman, 250 S.C. 344, 157 S.E.2d 864 (1967), the South Carolina Supreme Court held in a case involving a single note secured by both real estate and personalty that the quoted language meant that South Carolina law applied to the entire transaction. Would this prohibit the splitting of the transactions into two loans: one involving the real estate mortgage to be governed by South Carolina law; the other, secured by the personalty, containing a clause that the second loan be governed by the laws of some other state that authorized a higher interest rate than South Carolina? It would, if a step-transaction approach were taken. Since loans in excess of $50,000 secured by personalty are free from any interest rate regulation as of September 29, 1976, the effective date of the 1976 SCCPC Amendment, this issue is less likely to occur now than prior to that date. See Part I, section D *supra*.

705. See Part II, section E *supra* for discussion of the SCCPC remedy provisions.

ment to lend money, or to forebear from requiring repayment for a period of time; (2) an absolute obligation by the debtor to repay the loan; (3) the lender's exaction from the debtor of interest greater than that allowed by the applicable state statutes; and (4) an intention to violate the usury statutes.[706] The third element, the excess interest requirement, is generally the most difficult one to prove. All four elements, however, must be present. If they exist, various civil and criminal remedies are available to deal with the situation.

1. Civil Penalties.—The general South Carolina statute on the subject defines usury as follows:

> Any person who shall receive or contract to receive as interest any greater amount than is provided for in § 34-31-30 shall forfeit all interest and the costs of the action and such portion of the original debt as shall be due shall be recovered without interest or costs. When any amount so charged or contracted for has been actually received by such person he shall also forfeit double the total amount received in respect of interest, to be collected by a separate action or allowed as a counterclaim in any action brought to recover the principal sum.[707]

Section 34-31-30 referred to in this usury statute is the 8% contract rate provision.[708] This specific statutory reference in the definition presents an interesting legal problem. If the lender contracts to receive interest under one of the statutory exceptions to the 8% rate, other than those exceptions specifically mentioned in Section 34-31-30, this penalty section does not apply to the transaction. Under these circumstances, the only remedy is the common-law remedy, which apparently is limited to a maximum recovery of the usurious interest or charges collected.[709]

The common-law remedy, thus, is apparently the only remedy available for the following types of non-SCCPC transac-

706. *See* Hershman, *supra* note 634, at 336-38. South Carolina cases have tended to stress the intent factor, but when the other three factors are present, the intent requirement is met unless the case falls within the minor error doctrine discussed at notes 733-36 and accompanying text *supra. See, e.g.*, Virginia Hotel Co. v. Dusenberry, 218 S.C. 524, 63 S.E.2d 483 (1951); Mayfield v. British & Am. Mtg. Co., 104 S.C. 152, 88 S.E. 370 (1916); Osborne v. Fuller, 92 S.C. 338, 75 S.E. 557 (1912).

707. S.C. CODE ANN. § 34-31-50 (1976).

708. *Id.* § 34-31-30 (Cum. Supp. 1977).

709. Harp v. Chandler, 32 S.C.L. (1 Strob.) 197 (1847); Caughman v. Drafts, 18 S.C. (1 Rich. Eq.) 193 (1845). *See* Flannery v. Bishop, 81 Wash. 2d 696, 504 P.2d 778 (1972) (common-law remedy supplements the statutory penalties); Annot., 59 A.L.R.2d 522 (1958).

tions:[710] (1) small loans made under the "fee authorized in lieu of interest" statute,[711] (2) installment loans made under the 7% add-on statute,[712] (3) revolving credit loans pursuant to bank credit cards and check overdraft plans,[713] (4) state credit union loans,[714] (5) insurance premium service company loans,[715] and (6) loans by pawnbrokers.[716]

The general civil usury statute, the provisions of which are set out above,[717] apply to all other types of loans not governed by the SCCPC rate structure. Loans made by consumer finance companies licensed under Act 988 of 1966[718] and loans by national banks[719] and federal credit unions,[720] which are subject to specific federal penalties, are governed, however, by independent state and federal laws. The National Banking Act penalty provision is essentially the same as the South Carolina general usury statute.[721] The Federal Credit Union Act provides that the loan is repayable on an interest-free basis, but does not impose any additional penalty.[722] Act 988 renders any loan void when excess charges have been made, "except as the result of bona fide error."[723]

The general usury statute contemplates two types of violations: (a) contracting and (b) actual receipt. Although the method of imposing the penalties is unclear in the statute itself, many case opinions make it clear that two distinct penalties are contemplated:

(a) forfeiture of the right to all interest and costs imposed

710. To the extent loans made under the statutes qualify as SCCPC consumer loans, they are governed by the SCCPC remedies. See Part II, section E *supra.* The one exception is credit union loans, which are totally excluded from the SCCPC. S.C. CODE ANN. § 37-1-202(10) (Cum. Supp. 1977). See Part I, section C(8) *supra.* A considerable number of nonconsumer loans, however, are still made under these statutes, and the absence of any statutory penalty in these transactions presents a serious legal problem that should be corrected by legislation.

711. S.C. CODE ANN. § 34-31-40 (1976).

712. *Id.* § 34-13-120.

713. *Id.*

714. *Id.* §§ 34-27-10 to -270.

715. *Id.* §§ 38-37-10 to -100.

716. *Id.* § 40-39-100.

717. See note 709 and accompanying text *supra.*

718. *See* S.C. CODE ANN. §§ 34-29-20 (1976), -140(e) (Cum. Supp. 1977).

719. *See* 12 U.S.C. § 86 (1976).

720. *See id.* § 1757(2).

721. *Compare id.* § 86 *with* S.C. CODE ANN. § 34-31-50 (1976). See also note 452 *supra.*

722. 12 U.S.C. § 1757(2) (1977).

723. S.C. CODE ANN. §§ 34-29-20 (1976), -140(e) (Cum. Supp. 1977). See Part III, section D(2) *infra.*

for the very making of a usurious contract and (b) liability for double the amount of any interest paid by the borrower.[724] The latter penalty, however, applies only when usurious interest is actually received; it can be collected by the debtor in a separate action or by counterclaim in a suit by the creditor.[725] Therefore, the creditor can only recover the principal when usurious interest has been contracted for, but not actually received. He relinquishes any right to interest, legal or excess, and may not recover any costs incurred in collecting the principal. When usurious interest is contracted for and the creditor receives the interest, the creditor must also forfeit double the amount of interest already received—legal and excess; however, the debtor again remains liable for the unpaid portion of the principal.

An additional general statutory provision protects the lender from a usury claim when fees and other charges paid to "others by the borrower in order to obtain a loan when the lender neither took nor contracted to take more than lawful interest."[726] This section was enacted in 1916 with the intent of overruling certain South Carolina decisions holding that excessive fees paid by a borrower to a third party for a loan would be counted as interest against the lender.[727] If these excessive fees are charged, the debtor has six months from the date of actual payment or contract for payment in which to bring suit against the person to whom the fees are paid.[728] The amount of recovery is limited to the excess above a reasonable fee.[729] Therefore, unlike the general usury statute,[730] there is no forfeiture of the entire amount of the charge or any penalty. This section applies only to those situations covered by the general usury statute.[731] It does not apply if the lender is the party that contracted for the charges or the charges in question were paid to the lender's agent.[732]

As pointed out above,[733] the common-law usury doctrine re-

724. *See* Atlantic Discount Corp. v. Driskell, 239 S.C. 500, 123 S.E.2d 832 (1962); Frick Co. v. Tuten, 204 S.C. 226, 29 S.E.2d 260 (1944).

725. *See* note 724 *supra.*

726. S.C. CODE ANN. § 34-31-60 (1976).

727. *See* Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709 (1925).

728. *See* S.C. CODE ANN. § 34-31-60 (1976).

729. *Id.*

730. *Id.* § 34-31-50.

731. See notes 708-16 and accompanying text *supra.*

732. *See* Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709 (1925). The treatment of various charges made by the lender rather than a third party is discussed in notes 645-64, 652-53 and accompanying text *supra.*

733. See note 706 and accompanying text *supra.*

quires as a prerequisite for imposing any penalty or forfeiture, the lender's intent to violate the usury laws. While the courts will carefully examine the facts of each transaction and will not hesitate to find usury where the facts indicate an intent to evade the usury limitations,[734] this intent has not generally been found where the amount of excess interest is relatively minor and has been collected under a genuine mistake of fact—for example, the misreading of a rate table, as opposed to a mistake of law.[735] The South Carolina Supreme Court has in the past followed these guidelines.[736]

An affirmative claim by the debtor to recover for usury must be brought within three years of making the contract or paying the usurious interest;[737] however, a debtor can utilize a claim of usury as a means of set-off or defense to a suit brought by the creditor to collect the balance due on the transaction.[738] The creditor's suit is governed by the contract statute of limitations sections which provide for a six-year limitation on all contracts except mortgages, which have a twenty-year statute of limitations.[739]

2. *Criminal Penalties.*—The South Carolina Code contains two main statutes providing criminal penalties for usury in transactions not governed by the SCCPC.[740]

(a) *The General Statute.*—There is a general criminal usury penalty making it a misdemeanor wilfully to "violate the laws of this State enacted for the purpose of prohibiting the charging, collecting or receiving of usurious interest."[741] The penalty, which can be a fine and/or imprisonment, is completely

734. *See* authorities cited notes 617, 620, 673, 706 *supra.*

735. See notes 428-29 and accompanying text *supra.* Another possible defense is estoppel, which many courts have used to prevent a borrower from asserting an otherwise valid usury claim. *See, e.g.,* Lakeview Meadows Ranch, Ltd. v. Bintliff, 36 Cal. App. 3d 418, 111 Cal. Rptr. 414 (1973); Cohn v. Receivables Fin. Co., 123 Ill. App. 2d 224, 260 N.E.2d 67 (1970); Heubusch v. Boone, 213 Va. 414, 192 S.E.2d 783 (1972); Annot., 16 A.L.R.3d 510 (1967). The South Carolina Supreme Court has apparently not applied estoppel in a usury case; however, it has never held that usury could not apply. *See, e.g.,* Davenport v. Unicapital Corp., 267 S.C. 691, 230 S.E.2d 905 (1976).

736. *See* authorities cited note 428 *supra.*

737. S.C. CODE ANN. § 15-3-540 (1976).

738. *See, e.g.,* Allen v. Petty, 58 S.C. 240, 36 S.E. 586 (1900); Land Mtg. Inv. & Agency Co. v. Gillam, 49 S.C. 345, 26 S.E. 990 (1897).

739. S.C. CODE ANN. §§ 15-3-520 (1976), -530 (Cum. Supp. 1977).

740. Violation of other statutes can also result in license revocation, which is, however, generally considered a civil penalty. *See, e.g., id.* §§ 34-29-80(a)(3) (1976) (Act 988 consumer finance companies), 38-27-50 (1976) (insurance premium service companies).

741. *Id.* § 34-31-100 (1976).

within the discretion of the judge, subject only to general misdemeanor penalty ceilings. The wording of this statute does not tie it to a specific type of transaction as the civil usury statute does.[742] Thus, this section presumably applies to all situations in which usurious interest is exacted.

(b) *Act 988 of 1966.*—There is a general misdemeanor penalty, with a fine of $100 to $1,000, for any wilful violation of this Act,[743] which governs consumer finance companies holding Act 988 licenses.[744] Any licensee or agent who participates in making charges in excess of the maximums allowed by any section of the Act, except as the result of bona fide error,[745] is guilty of a misdemeanor, and upon conviction, is punished by a fine of $200 to $500 *and* imprisonment of thirty days to six months. Contracting for, as well as receipt of, excess charges is regarded as a violation of this provision.[746] Civil or criminal violations of any provision of Act 988 are also grounds for revocation of the license of a consumer finance company.[747]

PART IV: CONCLUSIONS

The SCCPC rate structure[748] definitely improves the law governing those consumer credit transactions covered by its provision. The SCCPC reduces to relatively simple rules a myriad of disparate statutes and cases dealing with consumer credit and effectively regulates known creditor abuses. At the same time, the rate ceilings are high enough to allow creditors to extend a reasonable amount of consumer credit to all segments of the state's population, and enough competition exists to keep the effective rates at reasonable levels, when one considers the credit risks and other cost factors involved. In addition, the SCCPC frees a substantial amount of business credit and all credit sales other than those covered by its provisions from any credit charge limitations, thereby eliminating the many problems involved in coping with

742. *Id.*
743. *Id.* §§ 34-29-20(e), -140(e) (Cum. Supp. 1977).
744. *Id.*
745. See notes 428-29 and accompanying text *supra.*
746. *See* S.C. CODE ANN. § 34-31-100 (1976).
747. *Id.* § 34-29-80(a)(3).
748. See Part II, section B *supra.*

the intricacies of our usury statutes in these types of transactions.[749]

Nevertheless, the rate structures and other laws regulating credit in South Carolina are still too complex and unwieldy. The problems stem from the failure of the South Carolina Legislature to enact all of the provisions of the UCCC, particularly the failure to enact the provision that repeals all usury statutes that regulate transactions not governed by the SCCPC.[750]

Three areas need prompt legislative attention: (1) The regulation of real estate mortgages; (2) the elimination or modification of SCCPC exclusions not present in the UCCC; and (3) the treatment of business and other non-SCCPC credit not in excess of $50,000 and not secured by a real estate mortgage.

The regulation of real estate mortgages will be considered first. Probably no state has a system regulating real estate mortgage rates that is as complex and ambiguous as that in South Carolina.[751] The ideal solution would be to eliminate all rate ceilings on non-SCCPC loans, including those on real estate mortgages. Studies done on the subject have concluded that the real estate mortgage market is highly competitive and the rates in states having no rate maximums are not significantly higher than in states having rate ceilings.[752] Further, these studies show

749. See Part III, section B(2)(a) *supra.*

750. *Compare* S.C. CODE ANN. § 37-3-605 (Cum. Supp. 1977) *with* 1968 UCCC § 3.605 *and* 1974 UCCC § 2.601. The SCCPC did not repeal a single major rate statute. See note 66 and accompanying text *supra.*

751. See Part I, section B(4)(d); Part III, section B(2)(a).

752. *See* Benfield, *Money, Mortgages, and Migraine - The Usury Headache,* 19 CASE W. RES. L. REV. 819, 858-64 (1968). The author, after studying real estate mortgage rates throughout the United States and comparing the rates in states having no rate limitations with those having relatively low rate ceilings concluded as follows:

> [T]he usury laws in this area do more harm than good. The fear that without usury ceilings mortgage interest rates would go higher and higher is not justified by the facts. Interest rates on home mortgages are responsive to general money market levels and do not go to usury ceiling rates unless the general market interest rates approach the usury ceiling.

Id. at 858. Professor Benfield further concluded that as the general interest rates approach the statutory rate ceilings, the effect of the usury laws is to "(1) drive lenders to more or less deceptive ways of avoiding the usury limitations, and (2) drive money out of the home mortgage market." *Id.* at 864. At the time this study was begun in 1963, Boston, Massachusetts, had the lowest mortgage interest rate of any major metropolitan area in the country, 5.25%. *Id.* at 859. In June 1977, after more than a decade of steadily rising interest rates, Boston still had the lowest effective rate of any major metropolitan area in the country, 8.41%. (Unpublished data from the Federal Home Loan Bank Board, Washington, D.C.) Yet Massachusetts has not had any usury limitation for over 100 years. *See* BENFIELD, *supra,* at 859.

that when state rate ceilings are below the market rates, mortgagees (1) make fewer loans in the areas with the lower ceilings and more loans in those areas in which higher rates are available, (2) raise their eligibility and other requirements, (3) resort to devices, such as points, service fees, and due-on-sale clauses, that help compensate for the low ceilings.[753] Those hardest hit by these tactics are consumers, the very persons the rate regulations are designed to protect.[754]

Even if it is not politically feasible to eliminate rate ceilings on real estate mortgages,[755] much can be done to simplify the mortgage rate structure. One meritorious suggestion is to eliminate the concept in the SCCPC of a mortgage debt "primarily secured by a first lien which is a purchase money security interest in land."[756] This term is incapable of rational definition and inter-

753. *See* BENFIELD, *supra* note 752, at 858-64. *See also* E. KOHN, C. CARLO & B. KAYE, THE IMPACT OF NEW YORK'S USURY CEILING ON LOCAL MORTGAGE LENDING ACTIVITY at 3-6, 9-10, 50-54 (1976). The ultimate impact of interest rate ceilings at or below market rates is the negative effect on housing construction because fewer people can obtain financing. The authors of the New York study found that the number of building permits for residential construction in New York State, which has maintained relatively low rate ceilings on real estate mortgages, has consistently lagged behind the 14 states that have no usury ceilings or ceilings above the market rates. *Id.* at 9-10, 50-54. These findings confirmed conclusions of other studies done in Minnesota, Mississippi, and Missouri as well as nationwide statistical studies. *Id.* at 55-57. A recent study of the housing industry in South Carolina concluded that the low ceiling on most residential mortgages combined with higher rates of alternative investments would significantly reduce the amount of money available for home mortgages in times of rising interest rates. *See* F. INGRAM & A. WARNER, COMPETITION FOR HOUSEHOLD SAVINGS IN SOUTH CAROLINA: INFLUENCE AND IMPACT ON REAL ESTATE MARKETS, 3, 30-32 (1977).

754. See authorities cited in note 753 *supra.*

755. North Carolina has recently passed legislation that essentially frees real estate mortgages from usury rates. The North Carolina statute, effective in June 1977, imposes no limit on home loans except for mortgages of less than $10,000 that are made by an individual or any other lender that is not:

> (i) approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a national mortgage association or any federal agency; or (ii) a local or foreign bank, savings and loan association or service corporation wholly owned by one or more savings and loan associations and permitted by law to make home loans, credit union or insurance company; or (iii) a State or federal agency.

1977 N.C. SESS. LAWS ch. 542, § 24-1.1A(a)(2), *reprinted in* [1978] 3 CONS. CRED. GUIDE (CCH) ¶ 6411, at 40,655. In 1975 the Virginia Legislature repealed existing interest rate limitations on first mortgages. VA. CODE § 6.1-330.37 (Cum. Supp. 1978). Oregon authorizes a 12% limit on real estate mortgages of $50,000 or less and no limit on mortgages above $50,000. OR. REV. STAT. § 82.010 (1977). This statutory scheme is similar to one alternative suggested in the text under which real estate mortgages of $50,000 or less should be subject to the SCCPC nonsupervised lender rate of 12%. See text accompanying notes 774-75 *infra.*

756. *See* S.C. CODE ANN. §§ 37-2-104(2)(b), 37-3-601, -605 (Cum. Supp. 1977); Part

pretation and unnecessarily complicates an already complicated area.[757] Two approaches to the problem might be followed. First, all consumer residential mortgages could be brought within the coverage of the SCCPC.[758] If that is thought to be unwise because it would raise the existing rate ceiling on most mortgages, the 1974 UCCC provisions, which exclude all mortgages that have a rate of less than 12% from its regulation,[759] could be adopted and would be a second preferable approach to the present situation. If either of these suggestions is adopted, all real estate mortgages

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I, section B(4)(d); Part III, section B(2)(a)(ii) *supra*. For the definition of purchase money security interest in land, see S.C. CODE ANN. § 37-1-301(21) (Cum. Supp. 1977).

757. See Part I, section B(4)(d); Part III, section B(2)(a)(ii) *supra*.

758. The fear that the increase in rate ceilings would automatically result in the actual rates moving to the ceiling is not justified, based on available evidence. *See* notes 752-53 *supra*. Furthermore, the massive study of all phases of consumer credit by the National Commission on Consumer Finance, published in 1972 concluded as follows:

> Staff studies show that assertions that rates always rise to the ceiling are incorrect except when the price ceiling is set at or below the market rate for the particular form of credit placed under price control. Persuasive evidence that rates do not inevitably rise to the ceiling, available prior to establishment of the Commission, has been significantly reinforced by the Commission study of rates prevailing for various forms of consumer credit during the second quarter of 1971.

CONSUMER FINANCE REPORT, *supra* note 5, at 96.

Although the rate ceilings would be higher than the existing law allows if this proposal were enacted (*i.e.*, 18% for supervised lenders and 12% maximum for all others), the consumer would benefit from the increased protection against creditor abuse in the SCCPC. If these rates were considered too high, an alternative would be to subject all mortgage loans for personal, family, or household use to the SCCPC nonsupervised loan rates of 12% per annum. *See* S.C. CODE ANN. § 37-3-201 (Cum. Supp. 1977).

Mortgage lenders might object to the notice and right of cure provisions. *See* notes 39 *supra* and 764 *infra*. As a matter of sound business practice, however, most mortgagees already give the mortgagor advance notice of an impending foreclosure if overdue payments are not made, so the "cure" right in the SCCPC does not represent any significant change in current practice. A more legitimate objection would be the inability of mortgagees to collect late payment, deferral, and prepayment charges if mortgages were under the SCCPC because most real estate mortgages are not precomputed transactions. *See* S.C. CODE ANN. §§ 37-2-203, -204, -210 (sales), 37-3-203, -204, -210 (Cum. Supp. 1977) (loans). See Part II, sections D(2)(a), (b), D(3) *supra*. These and similar problems could be solved by amendments to the SCCPC designed to fit the particular needs of real estate loans.

Suggestions for revision of several other statutes relating to real estate loans have been made in various parts of this article. See notes 511, 603, 695-98, 699 and accompanying text *supra*.

Other reforms, not specifically discussed in this section, have also been suggested in other parts of the article. See notes 167, 448-50, 509-10, 708-16 and accompanying text *supra*.

759. 1974 UCCC § 1.301(12), .301(15). The 1968 UCCC used 10% as a dividing line. 1968 UCCC §§ 2.104(2)(b), 3.105. See Part I, section B(4)(d) *supra* for a discussion of the legislative history of the SCCPC provisions dealing with real estate mortgages.

involved in transactions in which the proceeds are used other than for personal, family, or household purposes should be treated the same as non-real estate loans for rate purposes.[760]

The elimination or modification of the SCCPC exclusions not present in the UCCC is a second area that needs legislative attention.[761] Exclusion of any consumer credit transactions detracts from the comprehensiveness and consistency of consumer credit regulation and perpetuates the complexity and, in many cases, the legal uncertainty that exists in the statutes and case law that govern non-SCCPC transactions. The SCCPC exclusion for credit union loans[762] is the most difficult exclusion to justify. Except for being subject to rate ceilings of 12%, credit union loans are virtually unregulated.[763] While there is as yet no evidence of creditor abuse in South Carolina, credit union debtors do not have the same rights and remedies as most other consumer debtors.[764] There is no reason why such a large segment of the consumer credit industry should be excluded from the SCCPC.[765] Concern about the necessity to maintain the 12% rate ceiling can be met by exempting credit union loans from the SCCPC rate sections, although even such a limited exclusion is hard to justify. In any case, all other aspects of credit union loans should be made subject to the SCCPC.

Another exclusion that should be eliminated or modified is the one that authorizes consumer finance companies to choose between being supervised lenders under the SCCPC or restricted

760. Under the current structure, the rate ceiling for these loans is 8% per annum unless the loan qualifies as an installment loan under S.C. CODE ANN. § 34-13-120 (1976), in which case the rate limit would be 12.68% for a 12-month contract. Alternatively the parties may agree that the loan is to be governed by the SCCPC pursuant to § 37-3-605 (Cum. Supp. 1977), in which case the rate limit would be 12% per annum. This proposal would be more realistic if nonconsumer loans under $50,000 were freed from rate limits or subjected to the SCCPC rates, and if the concept of the debt "primarily secured by a first lien which is a purchase money security interest in land" were eliminated.

761. See Part I, section C *supra.*

762. S.C. CODE ANN. § 37-1-202(10) (Cum. Supp. 1977). See Part I, section C(8) *supra.*

763. See Part III, section B(2)(b)(ii) *supra.*

764. One prominent example is the limited right of cure given to debtors in transactions covered by the SCCPC. S.C. CODE ANN. §§ 37-5-109 to -111 (Cum. Supp. 1977). Under these provisions a creditor cannot accelerate maturity of the unpaid balance or foreclose for 20 days following the giving of a required notice explaining what will happen if the debtor does not pay past-due installments. The required notice only has to be given one time, and the creditor would be able to accelerate without another cure notice if the debtor subsequently defaults.

765. At the end of 1976 credit unions operating in South Carolina had $350.2 million in outstanding loans. *See* 1977 S.C. CREDIT UNION LEAGUE Y.B. 17.

lenders under Act 988 of 1966.[766] The original rationale for this bifurcation was that rates higher than those specified in the SCCPC for very small loans were needed. The final legislative implementation of the dual system, however, has resulted in many other significant differences between equivalent loans made by SCCPC supervised lenders and Act 988 licensees.[767] The need for higher rates for small loans can be met by including a special high rate provision in the SCCPC.[768] If this were done, Act 988 of 1966 could then be repealed and all consumer finance company loans would be governed solely by the SCCPC.

The complete exclusion for educational loans is senseless and should be eliminated.[769] In addition, no compelling need exists for the exclusion of insurance premium loans from the SCCPC rate structure.[770] If the regular SCCPC rate ceiling is found to be too low, a special SCCPC rate section for insurance premium loans is a more logical approach than an exclusion.

The treatment of business and other non-SCCPC credit not in excess of $50,000 and not secured by a real estate mortgage is a third area that needs modification.[771] The UCCC approach is to eliminate rate ceilings on these transactions.[772] If this is not a feasible political alternative,[773] the simple expedient of making all this credit subject to the SCCPC rate structure for nonsupervised loans, or 12% per annum,[774] is a viable alternative that would have the effect of repealing a plethora of unnecessary interest rate statutes, but would not increase significantly the effective rates

766. *See* S.C. CODE ANN. § 37-9-102 (Cum. Supp. 1977). See Part I, section C(9) *supra.*

767. See Part I, section C(9) *supra.*

768. Oklahoma adopted a special, high-rate statute for loans of $100 or less when it adopted the UCCC. OKLA. STAT. tit. 14A, § 3-508B (1971). *See* note 189 *supra.*

769. *See* S.C. CODE ANN. § 37-1-202(9) (Cum. Supp. 1977); Part I, section C(6) *supra.*

770. *See* S.C. CODE ANN. § 37-1-202(6) (Cum. Supp. 1977). See Part I, section C(3) *supra.*

771. See Part III, sections A, B(2)(a)(i) *supra.*

772. *See* 1968 UCCC § 3.605, Comment; 1974 UCCC § 2.601, Comment. See Part III, section A *supra.*

773. Political opposition was the main argument used to defeat this proposal when it was brought before the UCCC Study Committee. *Cf.* notes 1, 102 *supra.* Other states, however, including North Carolina and Virginia, have in recent years eliminated usury limitations on most home mortgages. *See* note 755 *supra.*

774. This could be accomplished by amending S.C. CODE ANN. § 37-3-605 (Cum. Supp. 1977). Amendments would, as a minimum, require the elimination of the language "or are primarily secured by a first lien which is a purchase money security interest in land" and clarification of the phrase "other than a consumer loan." See Part II, section B(3) *supra.*

that now can be charged for most of these transactions.[775] The resulting statutory simplification is in itself sufficient justification for this action. More importantly, debtors in these transactions would automatically receive the full array of protective devices and remedies available in the SCCPC. Owners of small businesses, including most farmers, generally lack bargaining equality with lenders, and as a consequence, have as great a need for the protection of the SCCPC as most consumers.

In sum, we have come a long way, but we still need additional legislation to achieve a simple, rational, and workable system of usury statutes that govern all credit transactions.

ADDENDUM

After this article was completed, the South Carolina Legislature attempted to raise the maximum interest rate for real estate first mortgages of not more than $60,000 from 9% to 10% per annum effective until July 1, 1979, by including legislation amending section 34-31-30 of the South Carolina Code in the 1978 General Appropriations Act.[1] An attempt to enact the same amendment by separate legislation passed the Senate, but was never brought to a final vote in the House.

The attempted amendment of section 34-31-30 is patently unconstitutional, and for this reason it would not be appropriate to amend the text or the summary chart at the end of this article. Reference to this addendum has, however, been made throughout the article.

Article III, section 17 of the South Carolina Constitution states that "[e]very Act or resolution having force of law shall relate to but one subject, and that shall be expressed in the title." According to the cases, this section imposes two requirements, both of which are absent in the attempted amendment of section 34-31-30: (1) that an act relate to but one subject; and (2) that the subject be expressed in the title.

As for the first requirement, the cases hold that all of the provisions of an act must be germane to the subject matter of the bill.[2] The subject of the General Appropriations Act is state fi-

775. See Part III, section B(2)(b) *supra;* Part V, Chart B(8) *infra.*

1. 1978-79 General Appropriations Bill, § 38, at 574.

2. *E.g.,* Deloach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938).

nances, and all of the cases in which the South Carolina Supreme Court upheld inclusion of other matters in the Appropriations Act have been based on the grounds that the challenged legislation was reasonably and inherently related to the raising and expenditure of tax monies.[3] Raising the interest rates on first mortgages, however, has no inherent connection with state finances and, as a consequence, deals with other subject matter in violation of the Article III, section 17 requirement that an act relate to but one subject. The cases that come closest to this point would be those in which the original enactment of the long-arm provisions[4] (sections 36-2-801 through 36-2-809 of the 1976 South Carolina Code) were held unconstitutional under Article III, section 17 because they were not sufficiently related to the Uniform Commercial Code.[5]

The attempted amendment of section 34-31-30 also fails to meet the requirement in Article III, section 17 that the subject of a bill be expressed in the title. The reference to the amendment in the title portion of the 1978 General Appropriations Act is as follows: "And (23) To Amend Section 34-31-30, Relating To Maximum Interest Rates and Exceptions So As To Provide Variable Interest Rates On Certain Loans . . . ."[6] The actual amendment, section 37 of the 1978 General Appropriations Act,[7] only amends section 34-31-30 to delete any reference to a maximum interest rate of 9% on real estate first mortgages not in excess of $60,000. The amendment makes no change at all, however, in the existing variable interest rate limitations. As a result, the title is misleading and contradicts the wording of the actual amendment.[8] This

3. *See* Calwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953); State *ex rel.* Roddy v. Byrnes, 219 S.C. 485, 66 S.E.2d 33 (1951); Crouch v. Benet, 198 S.C. 185, 17 S.E.2d 320 (1941).

4. S.C. CODE ANN. §§ 36-2-801 to -809 (1976).

5. McGee v. Holan, 337 F. Supp. 721 (D.S.C. 1972); Tention v. Southern Pacific R.R., 336 F. Supp. 25 (D.S.C. 1972); *cf.* Thompson v. Hofmann, 263 S.C. 314, 210 S.E.2d 461 (1974) (a 3-2 decision in which the South Carolina Supreme Court upheld the constitutionality of separate legislation that reenacted the provisions previously declared constitutionally defective). *See also* Colonial Life & Accident Ins. Co. v. South Carolina Tax Comm'n, 233 S.C. 129, 103 S.E.2d 908 (1958) (in which the South Carolina Supreme Court held that the inclusion of a license tax on investment income of insurance companies as part of the 1950 State Appropriations Bill violated Article III, § 17).

6. The remainder of this clause deals with the addition of a new code section to establish a guaranty fund for certain state-chartered credit unions.

7. Note that one of the amendments to § 34-31-30 in Act 122 of 1977 did contain language relating to variable interest rates. *See* 1977 S.C. Acts 222.

8. The heading on the amendment in § 38 of the 1978 State Appropriations Act correctly describes the amendment to § 34-31-30, but this heading would not qualify as

defect is fatal to the constitutionality of the amendment, even if some way around the subject-matter defect could be found. The case most apposite is *Stewart v. Woodmen of World Life Ins. Soc'y.*[9] In this case the South Carolina Supreme Court held an act dealing with incontestible periods in insurance policies unconstitutional under Article III, section 17 because the title of the act stated that the act extended the application of the incontestibility of a life insurance policy to other related types of insurance but the act itself included a clause changing the time from which the incontestible period began to run. The later change had been added during the course of adoption, but inadvertently, the title had not been correspondingly amended. The court held as follows:

> If the most liberal construction is given to the title of the amendatory act of 1935, manifestly it could not be construed to cover the particular amendment in question. Moreover, not only does it fail to include this amendment, but it is actually misleading, because the inevitable inference is that no amendment other than the one mentioned was covered thereby. See the case of *Floyd v. Bennett,* 124 S.C. 483, 117 S.E. 722, 723, which holds that "the title must not be misleading."
>
> If the title of the act had merely stated that it was to amend Section 7986 of the 1932 Code, without more, perhaps it would not have violated the constitutional provision in question, even if not in compliance with proper legislative practice. *Fleming v. Royall,* 145 S.C. 438, 143 S.E. 162. 59 C.J., 816, 817.
>
> But here the title definitely and specifically limits the subject of the act by the language used, and makes quite applicable the following excerpt from the opinion of the Court in the case of *State v. Blease,* 95 S.C. 403, 414, 79 S.E. 247, 252: "While the courts construe the provision of the Constitution in question (that an act shall relate to but one subject, which shall be expressed in its title) very liberally to the end that legislation shall not thereby be needlessly hampered and embarrassed, still, when the title of an act definitely and specifically limits its object, as that of the act of 1892 does, to the redemption of a particular and specified issue of bonds, the court must limit the operation of the act to the subject so expressed in the title.

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the "title" to the amendment. Even if it could so qualify, it would contradict the title in the 1978 Appropriations Act so that the constitutional problem would still exist.

9. 195 S.C. 365, 11 S.E.2d 449 (1940).

Otherwise the provision of the Constitution in question would be set at naught."[10]

10. *Id.* at 371-72, 11 S.E.2d at 452. For other pertinent cases holding acts unconstitutional on similar grounds, see Douglass v. Watson, 186 S.C. 34, 195 S.E. 116 (1938) (misleading title in act providing for the collection of delinquent taxes); Nettles v. People's Bank of Darlington, 160 S.C. 104, 158 S.E. 214 (1931) (statute dealing with bank collection of checks held unconstitutional because the title restricted the act to state banks while the body applied the act to all banks); Robinson v. City of Columbia, 116 S.C. 193, 107 S.E. 476 (1921) (misleading title of tax statute); State v. Blease, 95 S.C. 403, 79 S.E. 247 (1913) (title of act inconsistent with actual wording of the act).

PART V. SUMMARY OF SOUTH CAROLINA INTEREST AND CREDIT SERVICE CHARGE RATES*

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
A. Credit Sales			
1. Consumer credit sales other than sales of motor vehicles, sales involving seller credit cards, and sales of interests in land secured by first lien purchase money morgages. The basic definition of a consumer credit sale is a sale that is made to an individual primarily for a personal, family, or household purpose and the amount financed, except in the case of the sale of an interest in land, does not exceed $25,000. Note: A sale of an interest in land in which "the debt is primarily secured by a first lien which is a purchase money security interest in land" is exempted from the SCCPC. See Chart A(4).	The greater of: (a) 18% per year on the unpaid balance of the amount financed, or (b) 36% per year on the unpaid balance of the amount financed that is $300 or less; 21% per year on the unpaid balance of the amount financed that is over $300, but not more than $1,000; 15% per year on the unpaid balance of the amount financed that is more than $1,000, or (c) a flat fee of $5 when the amount financed does not exceed $75 or $7.50 when the amount financed exceeds $75. § 37-2-201.	a. Additional charges permitted for official fees and taxes; certain property, liability, life, and disability insurance; normal closing costs accompanying covered real estate transactions; and other similar charges authorized by the SCCPC Administrator. § 37-2-202. b. Delinquency charges: the greater of (1) 5% of the unpaid installment or $5; or (2) the permissible deferral charges. § 37-2-203. c. Deferral charges: two methods of calculation authorized—"standard deferral" or the disclosed rate for the entire loan applied to the amount deferred. § 37-2-204. d. Credit service charge on refinancings: not to exceed the rate maximums (see the adja-	Refund of any excess charge plus (a) a civil penalty of not less than $100 nor more than $1,000 and (b) costs and reasonable attorneys' fees to the consumer (amount of the recovery not controlling). The penalty and attorneys' fees are not imposed if (a) unintentional bona fide clerical error, or (b) seller discovers the error and promptly corrects and notifies the consumer of the facts before the consumer notifies the creditor of the excess charge, or (c) excess charge is made in conformity to rule, interpretation, or declaratory ruling of the SCCPC Administration. The statute of limitations for affirmative recovery by the consumer is 2 years from date of overcharge in case of revolv-

*All citations are to *S.C. Code Ann.* unless otherwise designated.

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
A. Credit Sales (Cont'd)		cent column) after taking into account any prepayment rebate due. § 37-2-205. e. **Credit service charge on consolidations:** rate on total as consolidated cannot exceed the maximum rates in the adjacent column. § 37-2-206. f. **Advances for insurance, taxes, etc., by seller on behalf of the buyer:** in cases involving revolving charge accounts, the amount advanced is added to the unpaid balance of the account and bears interest at a rate not to exceed the rate specified in § 37-2-207; in other cases a charge not in excess of the rate disclosed for the sale in question can be made. § 37-2-208. g. **Prepayment and rebates on repayment:** rebate of a portion of the unearned credit charge is due (unless less than $1) on full	ing charge accounts; 1 year after the scheduled or accelerated maturity of the debt in all other cases; however, the refund and penalty may be raised as a defense and used as an offset and counterclaim in any suit brought to enforce payment of the obligation in question. §§ 37-5-202, -205, 37-6-104, -107. Query applicability of § 37-6-416 (see Chart B(1)). **Note: Criminal sanctions** of a fine of up to $5,000 or imprisonment for up to 1 year can be imposed for willful violations. § 37-5-301(1).

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
A. Credit Sales (Cont'd)			
		repayments—essentially under the Rule of 78's if no more than 60 installments and the actuarial method if over 61 installments, or a deferral charge other than a standard deferral is involved. §§ 37-2-209 to -210. h. **Reasonable attorneys' fees** if authorized by written agreement, not in excess of 15% of the unpaid debt after default allowed. § 37-2-413. i. **Reasonable default charges** incurred in realizing on a security interest also authorized. § 37-2-414.	
2. Consumer credit sales of motor vehicles (new and used automobiles, motorcycles, trucks, or other self-propelled vehicles used primarily on public highways).	**Either:** (a) The rates specified in Chart A(1) or (b) The rates specified in § 37-2-211: (1) New motor vehicles:	**Same as Chart A(1).**	**Same as Chart A(1).**

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
A. Credit Sales (Cont'd)			
	$7 per $100 per year—12.68%; (2) One-year old, new or used motor vehicles: $8 per $100 per year—14.45%; (3) Two-year old motor vehicles and new vehicles with three or fewer wheels (*e.g.*, motorcycles): $10 per $100 per year—17.97%; (4) Three-year old used motor vehicle: $15 per $100 per year—26.63%; (5) Used motor vehicles four years and over: $16 per $100 per year—28.32%.		
3. Consumer credit sales pursuant to a revolving charge account (*e.g.*, department store or gasoline credit	18% per year on the unpaid balances that are $1,000 or less and 12% on the unpaid balances that are over $1,000. § 37-2-207.	a. Additional charges for official fees and taxes, etc., same as Chart A(1). In addition, the issuer of a seller credit card	Same as Chart A(1). Note: The statute of limitations for an affirmative suit by the consumer to recover

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
A. Credit Sales (Cont'd)			
card, but not a bank credit card that is a lender credit card).		that allows the cardholder to purchase or lease goods from at least 100 persons not related to the card issuer (*e.g.*, American Express) can impose an annual charge (no maximum specified) for the privilege of using the card. § 37-2-202(1)(c). b. Advances for insurance, taxes, etc., by the seller on behalf of the buyer. The amount advanced is added to the unpaid balance and a credit service charge not exceeding the permissible rates in the adjacent column can be made. § 37-2-208. c. No delinquency or deferral charges are authorized and no rebate is due on prepayment since there is no prepaid but unearned credit service charge in these transactions (*vs.* a precomputed installment sales contract).	from an overcharge from the seller is 2 years from the date of the overcharge.

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
A. Credit Sales (Cont'd)			
4. Credit sales of interests in land primarily secured by a first lien that is a purchase money mortgage.	**No maximum.** § 37-2-605. But note that a sale of an interest in land for personal, family, or household purposes with a mortgage given to the seller that creates a purchase money mortgage, but is not a first lien on the real estate, would be subject to the rate limitations specified for ordinary consumer credit sales in Chart A(1).	**No limitation.** Governed by time-price doctrine as judicially adopted in South Carolina. *E.g., Brown v. Crandall*, 218 S.C. 124, 61 S.E.2d 761 (1950).	**No penalty,** since no limitation on rates or other charges.
5. Credit sales other than Chart A(1) to A(4).	**No maximum.** § 37-2-605. Codification of the time-price doctrine for these transactions as previously adopted judicially in South Carolina for all credit sales (in absence of contrary legislation). *Brown v. Crandall*, 218 S.C. 124, 61 S.E.2d 761 (1950).	**No limitation,** since within time-price doctrine.	**No penalty,** since no limitation on rates or other charges.
B. Loans			
1. Consumer loans other	**a. Supervised loans made by**	**a. Additional charges permit-**	**Refund of any excess charges**

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
than those described in Chart B(2) to B(8) and most loans secured by real estate mortgages (see Chart B(8)-(9)). The definition of a consumer loan is a loan that is made to an individual and incurred primarily for a personal, family, or household purpose; and the amount financed except in the case of a covered debt that is secured by an interest in land, does not exceed $25,000. **Note:** A loan "primarily secured by a first lien which is a purchase money security interest in land" is excluded from the SCCPC. § 37-3-104. See Chart B(9) for the effect of this exclusion.	banks and other supervised lenders (§ 37-1-301(17)), consumer finance companies licensed under Act No. 988 of 1966 that elect to be authorized to make supervised loans (§ 37-9-102), and other lenders licensed as supervised lenders by the Board of Financial Institutions, **the greater of:** (1) **The total of:** (a) 36% per year on the unpaid balances of the principal that is $300 or less; (b) 21% per year on the unpaid balances of the principal that is over $300 but not more than $1,000; (c) 15% per year on the unpaid balances of the principal that is more than $1,000; **or** (2) 18% per year on the unpaid balances of the principal. § 37-3-508. b. **Nonsupervised loans:** 12% per year on the unpaid balances of the principal. § 37-3-201.	ted for official fees and taxes; certain property, liability, life, and disability insurance; normal closing costs accompanying covered real estate transactions; and other similar charges authorized by the SCCPC Administrator. § 37-3-202. b. **Delinquency charges:** **The greater of:** (1) 5% of the unpaid installment or $5 or (2) the permissible deferral charges (see below) applied to the payment in question. § 37-3-203. c. **Deferral charges:** two methods of calculation authorized—"standard deferral" or the disclosed rate for the entire loan applied to the amount deferred. § 37-3-204. d. **Loan finance charge on refinancings:** not to exceed the rate maximums in the adjacent rate column, after taking into	plus (a) a penalty of not less than $100 nor more than $1,000, (b) costs and reasonable attorneys' fees to the borrower (amount of the recovery not controlling). The penalty and attorneys' fees are not imposed if (a) unintentional bona fide clerical error, (b) the lender discovers the error and promptly corrects and notifies the borrower of the facts before the consumer notifies the lender of the excess charge, or (c) the excess charge is made in conformity to a rule, interpretation, or declaratory ruling by the Administrator. The statute of limitations for affirmative recovery by the borrower is 2 years from the date of the overcharge in the case of a revolving loan account and 1 year after the scheduled or accelerated maturity of the debt in

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)		account any prepayment rebate due. §§ 37-3-205, -207. e. **Loan finance charges on consolidations:** the rate on the consolidated total cannot exceed the maximum permissible rates in the adjacent rate column. § 37-3-206. f. **Advances** for insurance, taxes, etc., by the lender on behalf of the borrower. In cases involving revolving loan accounts, the amount advanced is added to the unpaid balance of the account and bears interest at a rate not to exceed the rate permitted for these loans; in other cases a charge not in excess of the rate disclosed for the original loan can be made. § 37-3-208. g. **Prepayment and rebate on prepayment:** rebate of a portion of the unearned loan credit charge (unless less than $1) is	all other cases; however, the refund or penalty may be raised as a defense and used as an offset in any suit brought to enforce the loan. §§ 37-5-202, -205, 37-6-104, -107. **Note 1.** § 37-6-416 provides that any **judgment** "for violation of any provision of this title shall draw **interest** on the judgment at the same rate as initially charged by the lender to the borrower." **Note 2. Criminal sanctions** of up to a $5,000 fine or imprisonment for up to one year can be imposed for willful violations. § 37-5-301(1).

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
		due on full prepayments under the Rule of 78's if no more than 60 scheduled installments, and under the actuarial method if over 61 installments or a deferral charge other than a standard deferral is involved. §§ 37-3-209, -210. h. **Reasonable attorneys' fees:** not in excess of 15% of the unpaid debt after default if authorized in writing, except when the principal is $1,000 or less and the interest rate exceeds 18%, in which case no attorneys' fee permitted. §§ 37-3-404, -514. i. **Reasonable default charges** incurred in realizing on a security interest. § 37-3-405.	
2. Consumer loans pursuant to a lender credit card or similar arrangement.	a. Supervised loans (see Chart B(1)(a): 18% per year on the unpaid balances of the principal. § 37-3-515.	a. Additional charges same as Chart B(1). In addition, issuers of lender credit cards that allow holders to purchase or lease	Same as Chart B(1). Note: The statute of limitations for an affirmative suit

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
	b. Nonsupervised loans: 12% per year on the unpaid balances of the principal. § 37-3-201.	goods from at least 100 persons not related to the issuer (*e.g.*, Bank Americard or Master Charge) can impose an annual charge (no maximum specified) for the privilege of using the card. **b. Advances** for insurance, taxes, etc., by the lender on behalf of the buyer. The amount advanced is added to the unpaid balance and a loan finance charge not exceeding the permissible rates in the adjacent column can be made. § 37-3-208. **c. No delinquency or deferral charges** are authorized and no rebates are due on prepayment since there are no prepaid but unearned loan finance charges (*vs.* precomputed installment loan contracts).	by the consumer to recover from the lender for any overcharge is 2 years from the date of the overcharge.

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
3. "Restricted loans" up to $7,500 made by consumer finance companies licensed under Act 988 of 1966. §§ 34-29-10 to -260.	Size of Cash Advance / Maximum Charge APR (a) $0-150 / $2.50 per month (b) $150.01-$1,000 / (a) $20 per $100 per year on the 1st $100 .35.09%; (b) $18 per $100 per year on the next $200 ....31.72%; (c) $9 per $100 per year on the next $700 ....16.24% (c) $1000.01-$7500 / $7 per $100 per year .12.68% **Note 1.** Each rate category is exclusive; thus the maximum charge for a cash advance of $1,200 would be 12.68% per	a. **Nonrefundable initial charge** that covers attorneys' and brokers' fees, closing costs, etc., as follows: $0 to $200—6% of cash advanced; $200.01 to $1,000—$12; $1,000.01 to $4,000—5% of cash advanced; $4,000.01 to $7,500—flat $200. This charge may not be collected on a renewal or refinancing of the same account within 3 months (12 months in the case of a loan in excess of $1,000) of the original loan but can be charged on the excess if a refinancing within 3 months results in a loan in excess of the original account. b. **Actual fees paid a public official for filing, recording, etc.** c. **Delinquency charges:** 5% of delinquent installment. d. **Deferral charges:** 1% per month on the amount deferred	**Entire loan void ab initio,** unless excess charge made "as the result of an accidental or bona fide error." **Criminal Sanctions:** punishable as a misdemeanor, fine $200-$500 or imprisonment 30 days to 6 months.

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
3. "Restricted loans" (cont'd)	annum on the entire amount. § 34-29-140(a). **Note 2.** The combination and the nonrefundable initial fee make the actual yield on the APR basis for certain small loans higher under Act 988 than under the SCCPC supervised loan rates (under the SCCPC most of the "initial charge" would be included as part of the loan finance charge for a supervised loan). The point where the Act 988 loan rates exceed the supervised loan rates varies with the length of the loan. For a 24-month loan, the Act 988 rates are higher for loans of less than $325; for an 18-month loan, the Act 988 rates	when the original amount of the loan exceeds $500; and 2% per month if the original loan is less than $500. No initial charge permissible; and no delinquency charge permissible for the deferred payment(s) if a deferral charge is made. e. **Prepayment rebates:** Rule of 78's except that in the case of a refinancing within 90 days of the original loan, the refund must be pro rata. f. **Reasonable attorneys' fees, court costs, and expenses of repossession.** g. **Reasonable amounts of property, life, and disability insurance** may be required. §§ 34-29-140, -160.	

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
3. "Restricted loans" (cont'd)			
	are higher for loans of less than $375; for a 12-month loan the Act 988 rates are more attractive for loans of less than $475. For loans higher than the amounts stated, the supervised loan rates are higher than the Act 988 rates.		
4. Loans by credit unions			
a. State chartered credit unions	a. "Reasonable rates of interest, not to exceed one percent per month on unpaid loan balances" — 12% per annum. § 34-27-70.	a. **No statutory provision: common-law rules would apply. See Chart B(8).**	a. **No statutory provision for civil penalty. Possible common-law remedy for recovery of excess interest. Statute of limitations for affirmative recovery is 3 years. § 15-3-540. Criminal penalty for wilful violators (misdemeanor—fine or imprisonment). § 34-31-100.**
b. Federally chartered credit unions	b. 1% per month—12% per annum. 12 U.S.C. § 1757.	b. **The 12% per annum is inclusive of all charges incident to the loan. 12 U.S.C. § 1757(5).**	b. **Forfeiture of all future interest and right to recovery any interest paid. Two year statute of limitations. 12 U.S.C. § 1757 (6).**
Note: All aspects of credit union loans are			

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
excluded from the provisions of the SCCPC by § 37-1-202(10).			
5. Insurance premium loans **a. Loans by insurance premium service companies**	a. ¾ of 1% per month (9%) on the unpaid balance. § 37-27-90(e). **Note:** The authorized $10 initial fee, when added to the permitted maximum charge makes the actual yield much higher than the 9% figure, especially with smaller loans.	a. **(1) Initial nonrefundable $10 charge.** **(2) Delinquency fee of 5% or $1 (whichever is greater) with a maximum $5 on each overdue payment also authorized.** **(3) In the event the policy is cancelled, any premium rebate over the amount due on the premium loan must be returned to the insured within 30 days of receipt. §§ 38-27-90, -100.**	a. **Same as Chart B(1). Only** the rates and other charges for these loans are exempt from the SCCPC. § 37-1-202(6).

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Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
b. Premium advances by insurance agents or producers of record.	b. Either $1.50 per month or 1½% per month (18%). § 38-51-410.	b. None. § 37-51-420. In the event the policy is cancelled, any premium rebate over the amount due on the premium loan must be returned to the insured within 30 days of receipt of the rebate by the agent.	b. Same as Chart B(1).
6. Loans to students pursuant to a government supported education loan program. Note: All aspects of these loans are exempt from the SCCPC. § 37-1-202 (9).	§ 34-13-120, which authorizes a 7% add-on charge (12.68%), probably applies; if not then limited to 8% under § 34-31-30. See also § 34-113-40, which states that the first payment in these loans must be made not later than 4 years from the completion of the course for which the loan was made.	Only limitations appear to be case-law limitations. See Chart B(8).	No specific statutory provision. See Chart B(8)(a)(2)-(4). Criminal penalty as per § 34-31-100.
7. Loans by pawnbrokers.	a. $1 per 30 days per $10 for loans of $50 or less (120% per annum); minimum of 50¢ on loans of less than $10. No maximum term or amount specified. § 40-39-100.	a. Loans falling within § 40-39-100: no statutory limitation but would be subject to common-law rules.	Same as Chart B(1). Only the rates and charges and disclosure of rates and charges on loans of $50 or less of a licensed pawnbroker are exempt from the SCCPC. § 37-1-202(4).

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
	b. If over $50, then a "consumer loan" subject to the rate ceilings specified in Chart B(1).	b. Same as Chart B(1).	
8. Nonconsumer loans other than loans secured by real estate (*e.g.*, loans to or for businesses or for agricultural purposes) and "consumer loans" over $25,000 or not covered by Chart B(1) to B (7).	a. Loans with principal under $50,000: Either (1), (2), (3), (4), or (5) below, whichever produces the greatest yield (assuming the lender has the requisite authority to make the loan in question—see note below). (1) By written agreement making the loan subject to the SCCPC—12%. §§ 37-3-601, -605; or (2) one of the following, to the extent applicable: (a) on single payment loans of less than $50 flat fee not exceeding $3; more than $50 flat fee not exceeding $5; (b) on installment loans of $50 or more and payable in three or more installments, a flat fee not exceeding $7.50 or $1.50 per installment, whichever is the greater. § 34-31-40;	a. (1)* Same as Chart B(1). Consumer loans since subject to the SCCPC. (2) On installment loans, renewal fees limited to $1.50 per installment and no disability or property insurance may be required if an installment loan is under $100; otherwise subject to common-law limitations (see below) § 34-31-40. (3), (4), and (5): No statutory provisions, but subject to case-law limitations, briefly summarized as follows: (a) Any reasonable charge paid to a 3d party for actual services rendered are treated as expenses and not added to the "interest" charge for usury calculations.	a. (1)* Same as Chart B(1): Consumer loans. (2), (3), (4), and (5): National banks: forfeiture of all interest and recovery of twice the interest paid. Statute of limitations is 2 years from the date of payment. 12 U.S.C. § 86. *Numerical references are to subsections in column 2, Chart B(8).

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
	or (3) loans of $10 or more payable in installments in three or more months "for the financing of purchases and for other desirable purposes"—7% add-on rate (12.68% per annum). § 34-13-120;	(b) Reasonable charges for insurance required as part of the loan are treated the same as (a), even if the lender ends up with a portion of the premium as a commission or rebate. (c) No prepayment rebates on unearned interest are necessary; and deferral fees at the maximum allowable rate for the amount deferred (even if that rate exceeds the rate on the original loan) are legitimate. (d) Charges or fees retained by the lender are suspect and unless the lender can prove they were incurred for services necessary for the loan or its collection (*e.g.*, a reasonable delinquency charge), they will be considered as additional interest in determining whether the usury limitations have been exceeded.	

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
	or (4) loans under revolving credit plans "for the financing of purchases and other desirable purposes" (*e.g.*, bank credit cards), 1½% per month (18% per annum) on the unpaid balance. § 34-13-120; or (5) 8%, if in writing; otherwise 6%. § 34-31-30. Note: Various types of lenders may not be authorized to make loans under some of the above statutes. For example, loans under (2), (3), and (4) above can only be made by "banks, banking institutions and other lending agencies," which would seemingly require the loan to be made by someone in the business of making loans. In addition, savings and loan institutions at the present time have very limited authority to make in-		(5) Other than national banks, **forfeiture** of all interest on the loan and recovery of double the amount of interest paid. § 34-31-50. The **statute of limitations** for an affirmative suit to recover the interest paid is 3 years. § 15-3-540. The debtor can recover, however, by way of offset or counterclaim on any suit brought by the lender to collect the debt. Note 1. If the claim is for excessive fees paid to 3d parties, the "excess" is not interest, but the debtor has a 6-month

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
	stallment loans (the specific exceptions for state chartered savings and loan institutions are for mobile homes and home improvement loans). *See* §§ 34-25-130 to -140.		cause of action to recover the excess from the 3d pary. § 34-31-60. **Note 2.** A corporation with $40,000 of issued capital stock cannot plead usury on any loan, regardless of the amount of the loan or the rate of interest. § 34-31-80. **Criminal liability** for willful violation of any interest maximum statutes is a misdemeanor and can result in both a fine and imprisonment (up to maximums prescribed in criminal statutes). This applies to all lenders including national banks. Situations (2)-(5) above. §34-31-100.
	b. Loans of $50,000 or more: no maximum rate. § 37-3-605.	**b. No limitations,** since no maximum rate applicable.	**b. No penalty,** since no maximum rate applicable.

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
9. Loans secured by real estate mortgages. a. First mortgage real estate loans that are "primarily secured by a first lien which is a purchase money security interest in land," not purchased in whole or part or insured by various governmental agencies (FHA, VA, FNMA, GMNA, FHLMC, Farmers Home Administration, or a conventional mortgage purchased in whole or part by the Emergency Home Finance Act of 1970). Note: The rates in the adjacent column apply whether the mortgage covers a personal residence, a factory, a shopping center, a real estate development project, or whatever, as long as it qualifies for such rates.	a.* (1) Mortgages not more than $60,000: 9% per annum. (2) Mortgages over $60,000 but not more than $100,000: 10% per annum. (3) Mortgages over $100,000 but not more than $500,000: 12% per annum. (4) Mortgages over $500,000: No maximum. § 34-31-30. Note 1: The above provisions for first mortgage loans are valid through June 30, 1979. § 34-31-30. After that date unless the Legislature passes additional legislation extending the effective date of the above rates, first mortgage real estate loans not in excess of $50,000 would be limited to an 8% maximum, those in excess of $50,000, but less than $100,000, would be subject	a. (1) Initial charge of up to 1% of the first $25,000 and 1½% of all amounts above $25,000. If rate exceeds 8%, then no prepayment penalty authorized. §§ 34-31-30, -90(8-10). (2) Same as (1). (3) Same as (1) and (2) except no limitation on prepayment penalty. (4) No limitation at all. Note: In cases (1)-(3) above, any charges other than those authorized by statute would be subject to case-law limitations. See Chart B(8)(a).	a. National banks: forfeiture of all interest and recovery of twice the interest paid. Statute of limitations is 2 years from the date of payment. 12 U.S.C. § 86. Other than national banks: forfeiture of all interest on the loan and recovery of double the amount of interest paid. § 34-31-50. The statute of limitations for an affirmative suit to recover the interest paid is 3 years, § 15-3-540; however, the debtor can recover by way of offset or counterclaim in any action brought by the lender to collect the debt. Criminal liability for willful violation of any interest maximum statutes is a misdemeanor and can result in both a fine and imprisonment (up to maximum prescribed in criminal statutes).

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
	to a 10% maximum and those over $100,000 would be subject to the rate maximums specified in (3) and (4) above. **Note 2:** Variable interest rates are authorized on first mortgage loans in excess of $100,000; but otherwise available only if the interest rate is less than 8%. §§ 34-31-30, -90. **Note 3:** As a result of various amendments, a strong argument can be made that § 34-13-120, which authorizes a 7% add-on rate for installment loans could be utilized for real estate mortgages made by banks and "other lending agencies." There is, however, some doubt that state savings		This would apply to all lenders including national banks. § 34-31-100. **Note 1.** If the claim is for excessive fees paid to 3d parties, the "excess" is not interest, but the debtor has a 6-month cause of action to recover the excess from the third parties. § 34-31-70. **Note 2.** A corporation with $40,000 of issued capital stock cannot plead usury on any loan, regardless of the amount of the loan or the rate of the interest. § 34-31-80.

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
	and loans can utilize this section. *Compare* § 34-25-110 *with* §§ 34-25-120, -130 *and* -140. In any case, add-on precomputed loans are unusual as far as first mortgage loans are concerned.		
	Note 4: Consumer finance companies continuing to operate under licenses granted under Act 988 of 1966 are prohibited from taking purchase money mortgage loans of any type, but can take nonpurchase money mortgages. See Chart (B) (9)(c)(2) for applicable rates. § 34-29-140(h).		
	*A provision in the 1978 South Carolina Appropriations Act attempted to raise the interest on first mortgages of $60,000 or		

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
	less from 9 to 10%, effective until July 1, 1979, resulting in all first lien real estate mortgages of $100,000 or less that are not governed by some other statute being eligible for a 10% per annum rate. The constitutionality of this provision is discussed in the Addendum that appears at the end of this article.		
b. First mortgage real estate loans purchased in whole or part or insured by a governmental agency.	b. Exempt from any state statute prescribing or limiting interest rates. §§ 34-31-30, 34-25-150, 31-19-10 to -30; but would be subject to any applicable federal limitations.	b. Common-law limitations or reasonable charges. See Chart B(8)(a)(3)-(5).	b. If no rate limit, then no civil penalty could be incurred; however, a suit to collect excess charges paid to third parties could be brought by the borrower pursuant to § 34-31-60.
c. Real estate mortgages that are not "primarily secured by a first lien which is a purchase money security interest."	c.	c.	c.

Type of Transaction	Maximum Charge or Rate (All % Figures Are Annual Percentage Rate Computations Based on a 12-Month Contract)	Permissible Additional Charges & Fees	Penalties
B. Loans (Cont'd)			
(1) The loan is to an individual primarily for personal, family, or household purposes, regardless of the amount of the mortgage, and is made by other than a restricted lender.	(1) The rates specified in Chart B(1), these loans are consumer loans subject to the SCCPC. §§ 37-3-601, -605.	(1) Same as Chart B(1). Note: In a supervised loan in which the principal is $1,000 or less, no real estate mortgage of any kind is permitted. § 37-3-510.	(1) Same as Chart B(1).
(2) Same as (1) except the loan is made by a restricted lender (Act 988 of 1966-consumer finance company).	(2) Same rates as Chart B(3). Note only nonpurchase money real estate mortgages are authorized by § 34-29-140(h).	(2) Same as Chart B(3).	(2) Same as Chart B(3).
(3) Any other mortgage.	(3) Maximum permissible rate will depend on the amount of the mortgage: (a) If less than $50,000, then either 9% if a first lien and if not, (1) 8% (§ 34-31-30), or (2) if the parties agree in writing that the loan will be governed by the provisions of the SCCPC, 12% (§§ 37-3-601, -605), or (3) 7% add-on (12.56%) (§ 34-13-120) (assum-	(3) (a) If § 37-3-601 agreement in effect then same as Chart B(1); if no agreement, then case-law limitations would be applicable. See Chart B(8)(a)(3), (4)-(5).	(3) (a) Same as Chart B(1) if § 37-3-601 agreement applicable; same as Chart B(8)(a)(2)-(5) in all other cases.

ing that the lender has the requisite authority to make installment loans pursuant to this section). See note 1 to B(8)(a) and note 3 to B(9)(a) above, whichever is higher.		
(b) If the loan is $50,000 or more, no maximum rate. § 37-3-605.	(b) No limitations, since no maximum rate applicable.	(b) No penalty, since no maximum rate applicable.