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Usury Trompe L'Oeil

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THE USURY *TROMPE L'OEIL*

JAMES J. WHITE*

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I. INTRODUCTION

This Article demonstrates how the interaction of a federal statute passed in 1864,¹ a case decided by the Supreme Court in 1978,² and modern technology has legally debarred every state legislature from controlling consumer interest rates in its state—but not from passing laws that appear to do so—and has politically debarred the Congress from setting federal rates to replace the state rates. As a consequence, the elaborate usury laws on the books of most states are only a *trompe l'oeil*, a “visual deception . . . rendered in extremely fine detail”³ The presence of these finely detailed laws gives the illusion that local legislatures are guarding their constituents from high rates, but they are not.

Typically, these usury laws deal separately with each particular fragment of the consumer credit market. For example, Minnesota allows a rate of 18% for credit card loans; closed-end loans can be made with rates as

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1. 12 U.S.C. § 85 (1994). The National Bank Act is commonly referred to as the “National Bank Act of 1863,” although it was enacted in 1864.

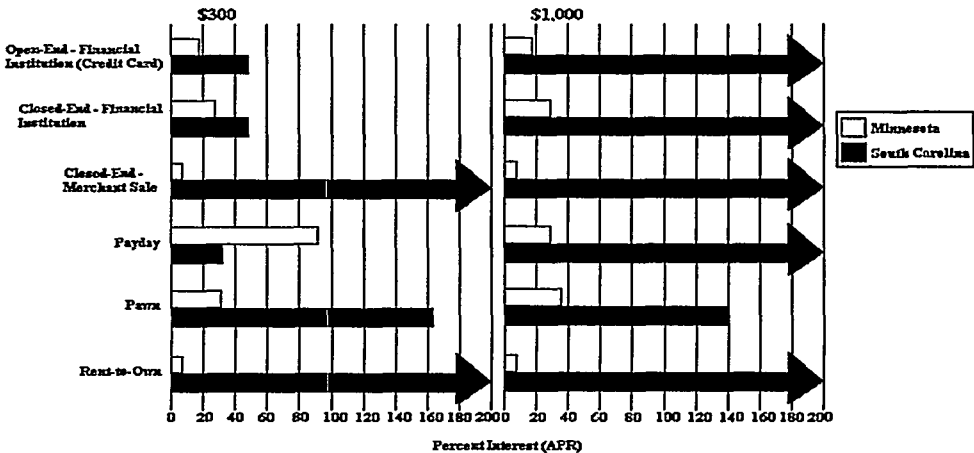
2. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

3. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1518 (1973)

high as 33%,⁴ but economically equivalent credit sales are limited to 8%.⁵ South Carolina permits a rate of 15% per month for deferred presentment⁶ and allows an unlimited interest rate for open-end loans in certain situations.⁷ These usury laws are the product of decades of lobbying by members of particular industries; they follow no understandable pattern and are not logically or economically coherent. To give a taste of these state laws, this Article compares the statutory rules in Minnesota with those in South Carolina. In general, South Carolina is generous to creditors whereas Minnesota is strict. Low ceilings prevail in Minnesota; in South Carolina the ceiling is high, often unlimited.⁸

Minnesota and South Carolina are good foils. In appearance, Minnesota's laws are much more restrictive. The Chart below shows that the nominally permissible rates on identical loans are higher in South Carolina when each state explicitly authorizes the same type of loan.

INTEREST RATE RESTRICTIONS IN MINNESOTA AND SOUTH CAROLINA



4. MINN. STAT. ANN. § 47.59(3)(a) (West Supp. 2000).

5. *Id.* § 334.01(1) (West 1993). Minnesota excludes credit sale contracts from the definition of "loans." *Id.* § 47.59(1) (West Supp. 2000). Therefore, the interest rates for credit sale contracts are not governed by the limits allowed in section 47.59(3)(a) and are instead governed by the general usury limit of 8%. *Id.* § 334.01(1) (1993); see also *id.* § 334.16(1)(a) (excluding closed-end loans from section 334.01).

6. S.C. CODE ANN. § 34-39-180(E) (West Supp. 1999).

7. *Id.* § 37-3-201(1) (Law. Co-op. 1989 & West Supp. 2000)

8. Why Minnesota usury law is more restrictive than South Carolina law is beyond the scope of this paper and beyond my capacity to answer. Perhaps it is no more than a by-product of left-wing politics in Minnesota. Perhaps it is recognition of the traditional political power of debtors in Minnesota (farmers) compared with the more limited political power of the South Carolina debtor class (African-Americans). I cannot explain why the southern populism that has surely affected the law of some southern states, e.g., Arkansas, has not had a larger impact in South Carolina.

The Appendix to this Article provides a full discussion of the data presented above.

Beyond low rate ceilings, the courts of Minnesota have been receptive to debtors' usury arguments.⁹ To the embarrassment of Minnesota, the revolutionary case that brought about the current regime, *Marquette National Bank v. First of Omaha Service Corp.*,¹⁰ was a Minnesota case and was stimulated by the restrictive Minnesota rates. A more recent case from South Carolina has extended the rule.¹¹

But this article is not about Minnesota or South Carolina's statutory rules or case law. I use those states only to show whence we have come and how grand the *trompe l'oeil*. This Article explains how the power to set rates has been taken from the hands of state legislators without their ever appreciating it. I argue that the stern statutory restrictions on rates in Minnesota are an illusion whose only current function is to give the appearance that the state is protecting consumers from high rates.

When Congress adopted section 85 of the National Bank Act of 1863 to permit national banks to charge any rate that was permitted where they were "located," it could hardly have foreseen that consumers in the twentieth century would borrow from a distant bank by the use of a plastic card. That this statute would allow a bank in New York to lend from its South Dakota subsidiary to a resident of New York under South Dakota law, and so escape the New York usury law, would have seemed preposterous to a Civil War congressman. On the other hand, section 85 was a self-conscious use of federal power to protect national banks from discrimination by states. The law under section 85 has plodded along to its present location by one logical, irresistible step after another and without further help from Congress.¹² This progress has been hidden from the public and state

9. Over the last ten years in South Carolina, only one case has dealt with usury. See *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998). *Tilley* was a class action against the seller by buyers of aluminum windows, awnings, and doors. The South Carolina law regarding security interests in real estate requires the lender to ascertain preference of the borrower as to legal counsel. Summary judgment was granted for the buyers; the seller appealed, arguing that the statute of limitations had run. The South Carolina Supreme Court affirmed. *Id.* at 42-43, 508 S.E.2d at 20-21.

In Minnesota a series of cases went to the Minnesota appellate courts. In *Miller v. Colortyme, Inc.*, 518 N.W.2d 544 (Minn. 1994), the district court had held that rental purchase agreements were within the definition of consumer credit sales. The Court of Appeals reversed, holding that these transactions were outside of the definition of consumer credit sales and thus not limited to 8% interest. The Minnesota Supreme Court agreed with the district court and found that the transactions were sales subject to the 8% rule, not leases. *Id.* at 548.

In *Anderson v. Scandinavian U.S. Swim & Fitness, Inc.*, No. C8-98-783, 1998 WL 747297, at *6 (Minn. Ct. App. Oct. 27, 1998), a membership contract to Scandinavian U.S. Swim & Fitness (d/b/a Bally Total Fitness) was usurious because it exceeded the applicable 8% interest limit.

10. 439 U.S. 299 (1978).

11. *Cades v. H & R Block, Inc.*, 43 F.3d 869, 873-74 (4th Cir. 1994).

12. See *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1873). *Tiffany* was the first Supreme Court interpretation of section 85. The Court allowed a national bank located in Missouri to use a nonbank rate of 10%, even though a Missouri-chartered state bank could not use that rate. The Court characterized the National Bank Act as "an enabling statute, not a restraining one." 409 U.S. at 420. It cannot be doubted, in view of the purpose of Congress

legislators by the camouflage of usury laws on the books of almost all states that appear to cover loans to that state's debtors. Day by day these local laws have become a more exaggerated illusion; under the *Marquette* doctrine, the sternest state laws are the first to be undermined and the quickest to fall.

In the Sections that follow I will examine different aspects of usury law that have led it to its current state. Part II discusses the various types of consumer transactions affected by usury laws. Part III analyzes the state and federal competition in banking that produced section 85 and the *Marquette* case. Part IV examines the effects of section 85 and *Marquette* on other federal and state law. Part V looks at the *Marquette* doctrine's extension beyond credit cards. Part VI reviews the doctrine's potential application to the last bastion of local control over usury law—pawns, rent-to-own, and loans by merchants that are not banks. Finally, Part VII considers the wisdom of the current regime compared to other plausible regimes.

II. CONSUMER TRANSACTIONS AFFECTED BY THE USURY LAWS

To understand the usury laws and the issues associated with the intrusion of the *Marquette* case into those laws, one must know something about the consumer-credit market. Consider secured loans. Most secured loans are purchase money loans made to finance the purchase of an item (e.g., a house or a car) that becomes the collateral. Most of these loans are "closed-end" loans—a loan to be paid down in installments that is secured by a particular piece of collateral. Some transactions are treated as purchase money loans in some states and as leases in others,¹³ but these are rent-to-own transactions. In a rent-to-own contract, the lessee (buyer) is free to return the item rented at the end of any rental period; he gets title to the item by completing all of the contemplated payments.¹⁴ Because there is no obligation to keep paying, most states treat this as a lease¹⁵ not subject to the usury law on loans, but some states differ.¹⁶

in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition." *Id.* at 412.

13. See *infra* notes 15 & 16.

14. See James P. Nehf, *Effective Regulation of Rent-to-Own Contracts*, 52 OHIO ST. L.J. 751, 755-56 (1991).

15. See e.g., CAL. CIV. CODE § 1812.622(d) (West 1998) (defining a rental purchase agreement as a true lease); COLO. REV. STAT. §§ 5-10-201(1) & -202(1)(h) (1999) (stating rental purchase agreement statute does not apply to security interests); HAW. REV. STAT. ANN. § 481M-3(a) (Michie 1998) (excluding lease-purchase agreements from statutes on consumer credit sales and UCC Articles 2A and 9); WYO. STAT. ANN. § 40-19-105(a) (Lexis 1999) (excluding rental purchase agreements from laws of security interests and Wyoming Uniform Consumer Credit Code); see also *In re Rigg*, 198 B.R. 681, 685 (Bankr. N.D. Tex. 1996) (finding rental purchase agreement in Texas is a true lease that must be assumed or rejected in bankruptcy); *In re Bowman*, 194 B.R. 227, 228 (Bankr. D. Ariz. 1995) (finding rent-to-own transactions are leases under Arizona law).

16. See *Miller v. Colortyme, Inc.*, 518 N.W.2d 544, 547 (Minn. 1994) (treating rent-to-own contract as a sale); see also *In re Barnhill*, 189 B.R. 611, 615 (Bankr. D.S.C. 1992) (finding rental purchase agreements are security agreements and not leases in South Carolina);

Other secured loans are nonpurchase money, mostly made to debtors at the lower end of the economic spectrum.¹⁷ For example, a small loan company might take a security interest in a consumer's household goods, or a pawnbroker might lend against the jewelry that a consumer owns and offers as collateral.¹⁸

Many consumer loans are unsecured. Chief among these are credit card loans, the typical open-ended loan in which the consumer gets a line of credit that contemplates an infinite series of separate loans and payments. For high-income consumers, there might also be closed-end unsecured loans, and for low-income consumers, there are "payday" loans. Payday loans (and a variation, check-cashing services) are short-term loans against a potential paycheck or against a check of a third party made payable to the borrower.¹⁹ The typical payday loan is unsecured because the loan is made with nothing more than the debtor's assurance that he will bring in his paycheck or that the personal check drawn by the borrower and left with the lender will be good some days hence. Check "cashing," on the other hand, is secured (if it is a loan at all), for the debtor gives the lender a check drawn by a third party.²⁰

Consumer creditors choose to make loans in different ways for various reasons. Some modes of lending respond to the real value of the collateral (cars and homes). Others respond to the debtor's wish to have an option to return goods and end the transaction (rent-to-own).²¹ And some of the variation in loan type within and between states is doubtless caused by the usury laws themselves. If a creditor can make a credit card loan at 18%, but gets only 8% on a closed-end loan, that creditor who would otherwise deal on a closed-end basis is likely to try to recast its loans so that they fit the credit card mold.²² However, the notion that states can effectively

Green v. Continental Rentals, 678 A.2d 759, 766 (N.J. Super. Ct. Law Div. 1994) (classifying rent-to-own contracts as security agreements).

17. See, e.g., Jean Ann Fox, *What Does it Take to be a Loan Shark in 1998? A Report on the Payday Loan Industry*, 772 PRAC. L. INST./COM. 987 (1998) (discussing payday loans); Joseph B. Cahill, *License to Owe: Title-Loan Firms Offer Car Owners a Solution That Often Backfires*, WALL ST. J., Mar. 3, 1999, at A1 (discussing title loans); Jonathan Weil, *Ace Cash Express May Be on Verge of Unchecked Growth, Say Bulls*, WALL ST. J. (Texas), Aug. 13, 1997, at T2 (quoting Professor John Caskey on the effects of the pawn brokers on the poor).

18. See generally S.C. CODE ANN. § 40-39-10(2) & (7) (West Supp. 1999) (defining "pawnbroker" and "pawn transaction"); Willis J. Wheat, *A Study on the Status of the Pawnbrokers Industry in the State of Oklahoma*, 52 CONSUMER FIN. L.Q. REP. 87 (1998) (analyzing the pawnbroking market and its profitability in Oklahoma).

19. See Jonathan Weil, *Ace Cash's Payday-Loan Venture Could Be Catalyst for Stock Growth*, WALL ST. J. (Texas), Sept. 29, 1999, at T2.

20. See Jeff D. Opdyke, *7-Eleven Tests Check-Cashing in Texas Stores*, WALL ST. J. (Texas), Apr. 29, 1998, at T1.

21. Nehf, *supra* note 14, at 756.

22. Numerous cases show that sellers may have been motivated by such concerns. See e.g., Benion v. Bank One, Dayton, N.A., 144 F.3d 1056, 1060 (7th Cir.), *cert. denied*, 119 S. Ct. 406 (1998) (finding credit card issued for satellite dish installation with credit limit only a few hundred dollars above the cost of the installation was an open-end loan for Truth in Lending Act purposes); Perry v. Household Retail Servs., Inc., 180 F.R.D. 423, 437 (M.D. Ala. 1998) (certifying a class of plaintiffs under the Truth in Lending Act after they financed satellite dishes by Sec).

regulate the interest rates creditors offer to consumers is outdated. The *Marquette* case began the process of eroding state power over interest rates—a power that now stands at the vanishing point.

III. MARQUETTE NATIONAL BANK

From the beginning of the nineteenth century until late in the twentieth century, the states and the federal government fought for the power to charter and control commercial banks. This dispute dates back to at least 1816 when Congress enacted legislation that formed the Bank of the United States²³ and 1819 when the Supreme Court ruled that Maryland's attempt to quash it was unconstitutional.²⁴ The high point of state power must have come in 1832 when President Jackson vetoed the extension of the charter for the Bank of the United States.²⁵ Later, the economic demands and difficulties of the Civil War caused Congress to enact the National Bank Act of 1863.²⁶ Even after that Act, state banks maintained their superior position by popularizing checking accounts²⁷ and by giving real estate loans and time deposits.²⁸ Throughout the latter half of the nineteenth century and beyond the middle of the twentieth, the states and the federal government competed for charters, mostly by promising powers (such as greater branching rights, or the power to make particular loans) in their jurisdiction that were not available in the other. In response to those inducements, banks sometimes switched from state to national charters and, in a few cases, even switched back.²⁹

In 1913 the federal government attempted to reduce the advantage of state banks by passing the Federal Reserve Act, which established the Federal Reserve Bank and its twelve district banks.³⁰ Although some banks that were state-chartered converted to national charters, most did not.³¹ "In 1919 the national banks' share of total commercial bank assets fell below 50 percent" and continued to fall in the years that followed.³² To return state and national banks to positions of "competitive equality,"³³ Congress

23. See generally John P.C. Duncan, *The Course of Federal Pre-Emption of State Banking Law*, 18 ANN. REV. BANKING L. 221 (1999) (discussing the federal government's role in bank regulation).

24. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 435 (1819).

25. See President Andrew Jackson's Veto Message (July 10, 1832), reprinted in 3 MESSAGES AND PAPERS OF THE PRESIDENTS, at 1139-54 (James D. Richardson ed. 1897).

26. See Duncan, *supra* note 23, at 221.

27. See *id.* at 221-22.

28. See BENJAMIN J. KLEBANER, AMERICAN COMMERCIAL BANKING: A HISTORY 135 (1990).

29. See Duncan, *supra* note 23, at 221-22.

30. See W.P.G. HARDING, THE FORMATIVE PERIOD OF THE FEDERAL RESERVE SYSTEM 34-35 (1925); JAMES LIVINGSTON, ORIGINS OF THE FEDERAL RESERVE SYSTEM: MONEY, CLASS, AND CORPORATE CAPITALISM, 1890-1913, 219-24 (1986).

31. See KLEBANER, *supra* note 28, at 135.

32. *Id.*

33. See *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) (discussing the legislative history of the McFadden Act of 1927).

adopted the McFadden Act.³⁴ That Act increased the powers of national banks to underwrite securities, make real estate loans, lend larger amounts to a single borrower, and open new branches.³⁵ However, state banks still maintained advantages over national banks, and their share of the banking industry continued to expand.

Faced with the Great Depression and cascading bank failures, Congress created the Federal Deposit Insurance Corporation (FDIC) in 1933 to protect customers of failed banks.³⁶ Though a majority of banks were still state-chartered, over 90% of all banks became FDIC insured.³⁷ This federal protection introduced state banks to federal supervision and, ultimately, to covert Congressional control through legislation that could regulate the behavior of all banks that had chosen to join the FDIC.

Of course, banking and commercial practice also progressed. Starting first as an extension of the traditional seller's "charge account," credit cards were issued by merchants to their customers.³⁸ Then came "third party" cards issued by financial institutions.³⁹ In 1966 Bank of America created the first nationwide credit card, BankAmericard (later renamed Visa).⁴⁰ Though it was not apparent at the time, Bank of America had set the stage for the next battle between the federal and state banking systems.

Visa's network of merchants that agreed to honor any Visa card, wherever issued, enabled Omaha National, headquartered in Nebraska, to make consumer loans to Minnesota residents by issuing cards to them. In the case of *Marquette National Bank v. First of Omaha Service Corp.*,⁴¹ a bank located in Minneapolis sought to enjoin First of Omaha Service Corporation and Omaha National Bank, a Nebraska-chartered national bank, from making credit card loans to residents of Minnesota at interest rates that exceeded Minnesota's usury rates.⁴² Nebraska law permitted interest rates to be charged at a rate of 18% for the first \$999.99, and 12% for any amount owed of \$1000 or more.⁴³ The Minnesota rate was a flat 12%.⁴⁴ Both Marquette Bank and Omaha National were enrolled in the BankAmericard program that allowed purchases of goods and services at participating merchants wherever the merchants were located.⁴⁵

The Minnesota trial court enjoined First of Omaha from using

34. The McFadden Act of 1927, ch. 191, 44 Stat. 1224 (codified as amended at 12 U.S.C. § 36(s) (1994)).

35. See 44 Stat. at 1228; KLEBANER, *supra* note 28, at 135.

36. See *id.* at 142-43.

37. *Id.* at 142.

38. See TERRY GALANOY, CHARGE IT!: INSIDE THE CREDIT CARD CONSPIRACY 20-21 (1980).

39. See *id.*

40. *Id.*

41. 262 N.W.2d 358 (Minn. 1977).

42. *Id.* at 360-61.

43. *Id.* at 359.

44. *Id.*

45. After the case was removed to federal court for diversity reasons, Omaha Bank was dropped as a defendant, and it was remanded to the Minnesota district court; however, the published section of Omaha Bank 3099 still a defendant. See *id.*

Nebraska rates in Minnesota, and First of Omaha appealed.⁴⁶ Relying on *Fisher v. First National Bank*,⁴⁷ and rejecting a contrary district court case from Louisiana,⁴⁸ the Minnesota Supreme Court reversed.⁴⁹

Marquette Bank appealed to the United States Supreme Court,⁵⁰ which affirmed:

Section 85 . . . plainly provides that a national bank may charge interest "on any loan" at the rate allowed by the laws of the State in which the bank is "located." The question before us is therefore narrowed to whether Omaha Bank and its BankAmericard program are "located" in Nebraska and for that reason entitled to charge its Minnesota customers the rate of interest authorized by Nebraska law.⁵¹

First, the Court noted that Congress apparently intended section 85 to give national banks an advantage over state banks.⁵² Second, to determine where Omaha was located for purposes of this section, the Court looked to the history of the National Bank Act of 1863. Congress seemed to assume that a national bank was located in the state identified on its organization certificate.⁵³ The Court held that "Omaha Bank cannot be deprived of this location merely because it is extending credit to residents of a foreign State."⁵⁴ Omaha National's location could not change simply because its customers were conducting transactions with Minnesota merchants.⁵⁵ Finally, responding to Marquette Bank's arguments, the Court found that Congress knew what it was doing when it established the National Bank Act and that this was an intended result.⁵⁶

The Supreme Court explicitly rejected Marquette Bank's argument that Omaha National's marketing of its card to Minnesota residents should subject it to Minnesota usury laws. The Court stated, "Minnesota residents

46. *Id.* at 362.

47. 538 F.2d 1284 (7th Cir. 1976) (holding an Illinois-headquartered national bank can charge Illinois rates to Iowa residents).

48. *See Meadow Brook Nat'l Bank v. Recile*, 302 F. Supp. 62, 75 (E.D. La. 1969) (holding "12 U.S.C. § 85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another state").

49. 262 N.W.2d at 365.

50. *See Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 436 U.S. 916 (1978).

51. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978) (footnote omitted).

52. *Id.* at 314-15.

53. *Id.* at 310.

54. *Id.*

55. *Id.* at 312.

56. *See id.* at 314-15 (finding Congress was aware in 1864 of the potential inequities of an interstate banking system).

were always free to visit Nebraska and receive loans in that State. It has not been suggested that Minnesota usury laws would apply to such transactions."⁵⁷ The Court further stated that the convenience of modern technology did not change the intentions of the drafters of the National Bank Act of 1863—that a bank's location controlled the interest rates it could charge.⁵⁸ If the law of the place of purchase governed, Minnesota residents that traveled to other states would be subject to different laws wherever they went, which would be an intolerable result not only for the creditor but also for the debtor.⁵⁹ So twentieth century technology commanded but one answer from nineteenth century law.

IV. EFFECT ON OTHER FEDERAL AND STATE LAW

With the *Marquette* decision every bank located in Minnesota was at a competitive disadvantage compared to Omaha National. Omaha National could lend to Minnesota residents at the Nebraska rate, but every state and national bank located in Minnesota was limited to the lower Minnesota rate. Worse yet, every state-chartered bank outside of Minnesota was also at a disadvantage by comparison to Omaha National (and with every other national bank located in a state with generous usury laws), for none of the state banks chartered in foreign states enjoyed the benefit of section 85.

To alleviate this disparity, two laws were required—one state and one federal. Only the state of Minnesota could put Minnesota-chartered state banks and Minnesota-located national banks on equal footing with out-of-state competitors for loans to Minnesota residents. Only the federal government could authorize state-chartered banks in Nebraska and other states to carry their rates abroad like a national bank could. The upshot was the modification of federal laws to give state banks essentially the same rights that national banks have under section 85 and to change many states' limits on credit card loans to allow in-state banks to compete with out-of-state banks. This legislative effort was assisted by the fact that interest rates peaked at abnormally high levels in 1979 and 1980 during the last year of President Carter's term.⁶⁰ The intent of Congress was clearly enunciated during the congressional hearings in which the Senate Committee on Banking, Housing, and Urban Affairs recognized that the escalating interest rates of the late 1970s and early 1980s, coupled with recent findings by the Supreme Court, had the effect of strangling state banks.⁶¹ The legislative

57. *Id.* at 310-11.

58. *Id.* at 311.

59. *See id.* at 312 (noting that varying the definition of "located" by each transaction would cause confusion in the interstate system).

60. *See J. PIERRE V. BENOIT, UNITED STATES INTEREST RATES AND THE INTEREST RATE DILEMMA FOR THE DEVELOPING WORLD* 7-8 (1986).

61. *To Equalize Competition Between State and National Banks and for Other Purposes: Hearings on S. 1988 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong. 18-19 (1979) (statement of David Pryor, Senator, Arkansas) [hereinafter *Pryor*].

hearings regarding the relaxation of the regulation on state banks brought forth testimony from those most keenly interested in state banking. Frederick Schultz, Vice Chairman of the Federal Reserve Board, testified, "I would also note that the sponsors of S. 1988 have emphasized the goal of equalizing competition among national banks and other depository institutions. The Board shares the view that, in principle, similarly situated lenders should operate in similar regulatory environments. The bill would achieve partial competitive equality"⁶²

The result was federal legislation passed in 1980 that freed state lending institutions from onerous state usury limitations. The most pressing evidence of Congress's intent to return state banks to the level of national banks can now be found in 12 U.S.C. § 1831d(a):

(a) Interest rates

In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates . . . such State bank or such insured branch of a foreign bank may [charge interest on a loan] . . . *at the rate allowed by the laws of the State, territory, or district where the bank is located*⁶³

Section 1831d applies only to federally insured depository institutions. By dealing only with FDIC-insured banks, Congress could grant powers to state-chartered banks without appearing to infringe upon state prerogatives.

The states also did their part to allow their own banks to compete with out-of-state institutions. For example, in 1982 Minnesota amended its usury laws to allow in-state banks to make credit card loans at 18%; in that same year, South Carolina amended its law to allow unlimited interest rates.⁶⁴ Many other states also amended their usury laws to allow their own state banks to compete with out-of-state national and state-chartered banks.⁶⁵

62. *Hearings, supra* note 61, at 36 (statement of Frederick H. Schultz, Vice Chairman of the Federal Reserve Board).

63. 12 U.S.C. § 1831d(a) (1994) (emphasis added); *see also* 12 U.S.C. § 1785(g)(1) (1994) (stating that all credit unions are allowed to charge interest at the rate allowed by the laws of the state, territory, or district in which they are located if they are federally insured).

64. *See* MINN. STAT. ANN. § 47.59(3) (West Supp. 2000); S.C. CODE ANN. § 37-3-201(2) (Law. Co-op. 1989 & West Supp. 1999).

65. *See* ARK. CONST. amend. 60 (amending, in 1982, article 19, section 13 from allowing only 10% interest on open-ended loans to a floating interest rate set at 5% above the Federal Reserve Discount Rate, capped at 17%); MASS. GEN. LAWS ANN. ch. 140, § 114B (West Supp. 1999) (changing allowable credit card interest rates from 18% for the amount of the balance under \$500 and 12% for the amount above \$500 to a flat 18% APR in 1981); 1982 Pa. Laws 199, No. 68, § 5 (changing Pennsylvania from allowing credit card interest limitations of two-thirds of one percent per month (8% APR) to 18% APR with the codification of 69 PA. CONST. STAT. ANN. § 1501 (West Supp. 1999); 1982 S.C. Acts 385, § 30 (removing South Carolina's interest rate restrictions for certain lenders and codifying removal at S.C. CODE ANN.

V. MARQUETTE TRIUMPHANT

To say that a bank can carry its credit card "rate" to another state is important, but many questions remained after *Marquette*. What about the home state's late fees? What of restrictions on the kinds of loans that can be offered? If the small-loan rate at the bank's location applied to loans up to \$600 but only up to \$300 in the debtor's state, which rate applies? And what about closed-end loans, car loans and the like? How much contact can the bank have with the debtor's state and still bring its own rates from abroad? In the years since *Marquette*, the courts have answered many of these questions.

A first step beyond *Marquette* was *Smiley v. Citibank (South Dakota), N.A.*⁶⁶ *Smiley* allowed a foreign national bank to import its South Dakota late fees to California. Relying on the Comptroller's regulations,⁶⁷ the Court found that the late charges were protected by section 85. It reached this conclusion in the face of a claim not only that the charges were higher than California could have charged, but also that they were "unconscionable." In short section 85 was to be interpreted expansively, so the debtor's state could not achieve its purpose by giving different labels to its restrictions, nor could its courts protect local restrictions by somehow defining foreign charges as something other than interest.

Next came the closed-end cases. These cases are different from *Marquette* in several ways. Consider *Cades v. H & R Block, Inc.*⁶⁸ Mr. Cades engaged H & R Block to prepare his federal tax return. Entitled to a refund, Cades arranged with H & R Block to get a loan for the entire refund, less a finance charge. All he had to do was assign the right to his refund payment to a lending institution, Beneficial National Bank, in Delaware. Cades filled out the loan documents in South Carolina on February 1, 1991. They were sent to Beneficial in Delaware, and he picked up his refund on February 3, 1991, at H & R Block's office in South Carolina.⁶⁹

Like every closed-end loan, Cades's loan differed from the usual

§ 37-3-201); 1982 S.D. Laws 341, § 1 (eradicating South Dakota's open-ended usury limitation in 1982 with the enactment of S.D. CODIFIED LAWS § 54-3-1.1 (Lexis Supp. 1999); see also MD. CODE ANN., COM. LAW II § 12-306 (1990). Maryland changed its usury laws in 1980 from a flat 18% APR, to varying interest rates ranging from 2.75% per month for that part of the loan less than \$500, to 1.35% per month for loans exceeding \$5000. *Id.* § 12-30(a)(2)(i) & (a)(5). Then in 1982, Maryland enacted a temporary lifting of the usury rates for loans made from 1982 through 1985. The new rates were 2.75% per month for that part not exceeding \$1000 on a loan of less than \$2000 to 2% per month for any loan over \$2000. *Id.* § 12-306(a)(6).

66. 517 U.S. 735, 739-40 (1996) (finding credit card late charges within the National Bank Act's definition of interest).

67. See *id.*; see also *Nelson v. Citibank (South Dakota) N.A.*, 794 F. Supp. 312, 320 (D. Minn. 1992) (dismissing a law suit by Minnesota credit card customers against a South Dakota bank that charged late fees and over-limit fees in addition to interest in violation of Minnesota law because section 85 of the National Bank Act completely preempts state law for a nationally chartered bank); *Sherman v. Citibank (South Dakota), N.A.*, 679 A.2d 652, 652 (N.J. 1996) (reinstating a ruling of the New Jersey Appellate Division that allowed importing of late fees).

68. 43 F.3d 869 (4th Cir. 1994).

open-end (credit card) loan in several ways. First, the debtor had no pre-existing line of credit or other association with the lender; the South Carolina intermediary introduced them. Second, because H & R Block prepared the loan documentation and disbursed the proceeds of the loan in South Carolina, the transaction had an explicit and clear relation to the debtor's state. Because it was a one-shot transaction, it did not present the problem that a credit card does because the card issuer cannot be expected to apply different rates to different transactions by the same debtor if the debtor buys in different states, moves from one state to another, or when some distant state changes its law. Here, H & R Block easily could have told Beneficial of the permissible South Carolina rate.⁷⁰

Cades argued that Beneficial, by contracting with H & R Block, was operating an illegal branch in South Carolina.⁷¹ Noting that Beneficial had neither employees nor property in South Carolina, the court rejected that argument.⁷² Presumably, a claim that the loan was actually made by H & R Block also would have been unavailing, for the proceeds were provided by Beneficial, and the risk was taken by them. If Beneficial had recourse against H & R Block and if H & R Block's fee (a finder's fee paid by Beneficial) varied with the size and apparent length of the loan, one might reach a different conclusion about who the real creditor was.

70. *Id.* at 873-74.

71. *Id.* at 874.

72. *Id.* The Court did not cite any case for this proposition, but was likely relying upon *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976), which it did cite earlier in its opinion. See *Cades*, 43 F.3d at 874. *Independent Bankers Ass'n*, in turn, derives its authority from *First National Bank v. Dickinson*, 396 U.S. 122 (1969). See *Independent Bankers Ass'n*, 534 F.2d at 925, n.7. In *Independent Bankers Ass'n* the D.C. Circuit held that a customer-bank communication terminal (CBCT, a term that encompasses the modern-day ATM machine) constitutes a bank branch. See *id.* at 951. In its analysis, the court noted that a CBCT could be distinguished from banking-by-mail and banking-by-phone assistance—services that clearly do not result in the establishment of a branch—because in the latter two, “no place or facility [is] established (i.e., owned or rented) by [the] bank.” *Id.* at 941; see also *Dickinson*, 396 U.S. at 137-38 (concluding that an armored car service (operated by bank employees) and a shopping center banking receptacle (fixed facility owned by bank) constituted branches); *Brown v. Clarke*, 878 F.2d 627, 632 (2d Cir. 1989) (holding that messenger service operated by bank employees is a bank branch); *Bank of the N. Shore v. FDIC*, 743 F.2d 1178, 1180 (7th Cir. 1984) (stating that a CBCT owned and maintained by a bank is treated as a branch); *Missouri ex. rel. Kostman v. First Nat'l Bank*, 538 F.2d 219, 220 (8th Cir. 1976) (holding that use of a CBCT is branch banking). Ownership of a facility or operation by bank employees, however, are neither necessary nor sufficient criteria for determining whether a particular service or facility constitutes a bank. See, e.g., *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 409 (1987) (concluding that a discount brokerage house owned by a bank and operated by its employees was not a branch because it did not offer “core banking functions”); *Red Bird Bank v. Crocker Nat'l Bank*, 667 S.W.2d 885, 886 (Tex. App. 1984) (concluding that loan-production office owned by a bank and operated by its employees was not a branch because its activities were not the equivalent of lending money); *Michigan Nat'l Corp.*, 64 FED. RES. BULL. 127, 131-32 (1978) (concluding that an agreement among a number of subsidiary banks to provide each other's customers with certain banking services resulted in each bank being a branch of each other, despite the fact that no one bank had in fact established or operated any other bank or facility or made its employees available to provide services at the subsidiary bank locations).

The Fourth Circuit refused to distinguish *Marquette*:

Essentially, [Cades] asserts that in *Marquette*, cards were issued, credit was advanced, and finance charges were assessed in the national bank's home state. He argues that in this case, by contrast, the loan transaction occurred in South Carolina: he signed all the relevant documents there; he had face-to-face dealings with Block representatives relating to his loan there; and finance charges were assessed there.

These asserted distinctions are not convincing. It is undisputed that the loan was approved in Beneficial's Delaware office, not in South Carolina. The loan proceeds originated in Delaware and were later transmitted to South Carolina. Both *Marquette* and this case involve face-to-face solicitation of out of state consumers by agents of a national bank. In both instances, the interest rate a national bank may charge is governed by section 85, which looks to the interest rates allowed by the state where the bank is located—not where the borrower is located or where the loan transaction may be said to have occurred.⁷³

*Basile v. H & R Block, Inc.*⁷⁴ goes one step beyond *Cades*. In *Basile* the customer came to an H & R Block store in Pennsylvania, but the loan was arranged with the Delaware subsidiary of Mellon, whose headquarters and principal bank subsidiary were themselves in Pennsylvania.⁷⁵ The only plausible reason for making the loan with the Delaware subsidiary and not with the Pennsylvania subsidiary (that might have been next door to H & R Block) was to avoid the Pennsylvania usury law. The court correctly stated the traditional fiction that a subsidiary is legally distinct from its parent and siblings: "Mellon is located in Delaware."⁷⁶ This approval of the parties' conscious choice of an out-of-state subsidiary, whose profits return to exactly the same place in Pittsburgh as the profits of the in-state subsidiaries, stretches the economic fiction a bit beyond *Cades*.

In a case decided the year before *Basile*, the Supreme Court of Arkansas applied the *Marquette* rule to a garden variety closed-end loan, a loan for the purchase of a car. In *Wiseman v. State Bank & Trust*, the Arkansas court found that a Tulsa national bank can legally make a closed-end loan to two residents of Arkansas who bought a car in Arkansas and

73. *Cades*, 43 F.3d at 873-74.

74. 897 F. Supp. 194 (E.D. Pa. 1995).

75. See MELLON BANK, 1998 ANNUAL REPORT (1999).

76. *Basile*, 897 F. Supp. at 199.

were "referred" to the Tulsa bank.⁷⁷ State Bank happened to be a subsidiary of an Arkansas bank holding company named Arvest Bank Group, Inc. who, like Mellon, did business in its home state through other subsidiaries.⁷⁸ In this case the parties conceded that the loan would have violated the Arkansas usury law had it been made there.⁷⁹ Both the loan application and the loan documents were filled out at the car dealership in Arkansas. The application was faxed to Tulsa, and the loan approval was phoned back to Pine Bluff, Arkansas. The Wisemans first came to the dealership on June 29; they drove their car home after their second visit on July 1.⁸⁰

The *Wiseman* case differs from *Basile* in two ways. First, the Tulsa lender in *Wiseman* was making a true secured loan and would have a balance outstanding in reliance on a car in Arkansas for several years. The extended presence of the collateral in Arkansas is one additional contact with that state. Second, the *Wiseman* loan is a meat and potatoes consumer loan; unlike the unconventional assignment of money due from the federal government in the H & R Block cases, this was a conventional consumer loan of the kind made by thousands of consumers each week. After *Wiseman*, it is hard to imagine a routine middle-class consumer loan that could not be made by a bank under the umbrella of *Marquette* and its federal law offspring.

After *Smiley*, *Cades*, *Basile*, and *Wiseman*, little control is left for the states. I suspect that only loans to the poorest borrowers are still subject to state limits, but I could be wrong even about those. The following section deals with those types of loans.

VI. PAWN, RENT-TO-OWN, AND *MARQUETTE*

The consumer credit market is not homogeneous. The layers extend from the wealthy, who can borrow large amounts by a phone call, to the poorest borrowers, who pawn their shotguns and "rent" their furniture. In the middle are credit card holders of all types, together with the Wisemans of the world, who take out closed-end purchase money loans. I have found no case in which out-of-state lenders have used the *Marquette* doctrine to import rates for the bottom-layer transactions. This dearth of case law is probably due partly to economic constraints and partly to legal prohibitions.

The lenders to the lowest stratum of the consumer credit market are mostly local, although consolidation is on the horizon for some industries and advancing rapidly for others. For example, the pawnshop industry remains highly fragmented. The five publicly traded national pawnshop companies operate fewer than six percent of the total pawnshops in the

77. 854 S.W.2d 725, 726 (Ark. 1993).

78. Arvest Bank Group, Inc. does business in Oklahoma, Arkansas, and Missouri; it has twelve bank subsidiaries in Arkansas. See Arvest, *Bank & Branch Guide* (visited Apr. 2, 2000) <<http://www.arvest.com/branches>>.

79. *Wiseman*, 854 S.W.2d at 726 n.1.

80. *Id.* at 725-26.

United States,⁸¹ estimated at twelve thousand to fourteen thousand nationwide.⁸² Management in the industry believes that the pawnshop industry is in the initial stages of consolidation.⁸³ In contrast, many of the approximately six thousand check-cashing outlets nationwide also remain classic mom-and-pop businesses, but the industry is rapidly consolidating.⁸⁴ One-third of the outlets are operated by six companies, led by the largest, Ace Cash Express.⁸⁵ The rent-to-own industry is experiencing similar consolidation.⁸⁶ According to the Association of Progressive Rental Organizations, a rent-to-own trade association, there are approximately eight thousand rent-to-own stores in the United States.⁸⁷ The largest rent-to-own chain, Rent-A-Center, and its subsidiary, ColorTyme, operate over 2300, or 29%, of those 8000 stores.⁸⁸ Rent-Way, Inc., the second largest rent-to-own company, is not far behind, with 1086 stores.⁸⁹

The use of an unrelated out-of-state bank is unappealing to these low-end lenders for one economic and one legal reason. The parties in the cases that use unrelated out-of-state banks are sellers of goods or services, such as H & R Block or a Pine Bluff car dealer. Presumably, these parties make most of their money by the sale of tax services or of automobiles—not by making loans to their customers. Pawnbrokers and payday lenders, on the other hand, are lenders and lenders only; what they sell would be completely appropriated by an out-of-state lender. To mate with an out-of-state unaffiliated bank is to forfeit their entire gain; thus, such a marriage is not economically appealing. Moreover, the fragmentation of this market has meant that most lenders to low income consumers do not have out-of-state affiliated banks or lack the resources or sophistication to establish out-of-state affiliated banks. Of course, the consolidation of the rent-to-own, pawn, and payday market may change that.

Pawnbrokers or payday lenders that might find importation of rates from an out-of-state affiliate economically sensible and possible (because they have such an affiliate) might still be concerned with certain legal issues.

81. STANDARD AND POOR'S CORPORATE DESCRIPTIONS, FIRST CASH FINANCIAL SERVICES, INC. (2000).

82. Lucy Harr, *The "Loan Shark" is Alive and Well*, CREDIT UNION MAG., Jan. 1998, at 19A (citing estimates from the National Pawnbroker's Association).

83. STANDARD AND POOR'S, *supra* note 81. One of the banners on the web site of EZCORP, for example, one of the five publicly traded companies, reads "Sell Us Your Store." See EZCORP, *Welcome to EZCORP!* (last visited Mar. 21, 2000) <<http://www.ezcorp.com>>.

84. Shelly Branch, *Where Cash is King*, FORTUNE, June 8, 1998, at 201, 202.

85. *Id.*

86. Shelly Branch, *Wayne's New World: Another Trashy Business*, FORTUNE, Feb. 2, 1998, at 29.

87. See APRO, *What is Rent-to-Own?* (visited Mar. 20, 2000) <<http://www.apro-tro.com/content/whatisrto.asp>>.

88. See Rent-a-Center, *Corporate Profile* (visited Mar. 16, 2000) <<http://www.rentacenter.com/corporate.html>>.

89. See Rent-Way, *Company Information* (visited Mar. 16, 2000) <<http://www.rentway.com>>.

Consider a typical pawnshop loan. These are nonrecourse⁹⁰ loans against specific items of personal property: jewelry, guns, musical instruments, etc. Because these loans are nonrecourse, the lender must have a sharp eye for the value of the items pawned. His entire recovery depends on his ability to sell the item for more than the loan if the debtor does not reclaim it. So the skill required to be a successful pawnshop operator is considerable, and it is not clear how that skill could be exercised from a distant place. It is also not clear whether the anxious borrower would be willing to wait for the funds to come from another state. Yet if the decision to make the loan is done in the debtor's state, the fiction of an "out-of-state lender" may have been exceeded. Surely a pawnshop in Texarkana, Arkansas, could position a bank subsidiary across the border in Texas and go through the ritual of having a cashier's check delivered in paper or electronically from Texas, but the critical decisions would have been made in Arkansas; the collateral would be held and, if not redeemed, sold there. Even the most generous cases on importation, *Cades* and *Wiseman*, note that the decision to issue the loan was made outside of the debtor's state.⁹¹ In each of these cases, that fact was decisive in the courts' decisions to permit the lender to charge the higher, out-of-state interest rate.⁹²

Rent-to-own practices face similar legal and economic barriers. The classic rent-to-own contract provides that title to the rented item passes to the renter only if he makes all the payments; the renter can return the item without liability at the end of any payment period. Some states treat these transactions as leases because of the lessee's right to cancel.⁹³ For the states that treat these transactions as loans, the imputed interest rate would be well above most usury limits.⁹⁴ The Minnesota courts have found that rent-to-own contracts are subject to Minnesota usury laws,⁹⁵ and courts in Wisconsin⁹⁶ and New Jersey⁹⁷ are considering similar claims. If the Minnesota rule prevails in other states, it will become important to know whether foreign rates can be imported for these transactions too.

The seller or lessor's decision to enter into a rent-to-own transaction can probably be made from a remote location as easily as a conventional

90. See Jarret C. Oeltjen, *Florida Pawnbroking: An Industry in Transition*, 23 FLA. ST. U. L. REV. 995, 997 (1996) (highlighting the history of pawnbroking in Florida and explaining regulation of that industry).

91. See *Cades v. H & R Block, Inc.*, 43 F.3d 869, 873 (4th Cir. 1994); *Wiseman v. State Bank & Trust, N.A.*, 854 S.W.2d 725, 726 (Ark. 1993).

92. *Cades*, 43 F.3d at 874, *Wiseman*, 854 S.W.2d at 728.

93. See *Mr. C's Rent to Own v. Jarrells (In re Jarrells)*, 205 B.R. 994, 999 (Bankr. M.D. Ga. 1997).

94. See Eligio Pimentel, *Renting-to-Own: Exploitation or Market Efficiency?*, 13 LAW & INEQ. J. 369, 374-75 (1995).

95. See *Miller v. Colortyme, Inc.*, 518 N.W.2d 544, 548 (Minn. 1994).

96. See *Burney v. Thorn Americas, Inc.*, 944 F. Supp. 762, 763 (E.D. Wis. 1996); *LeBakken Rent-to-Own v. Warnell*, 589 N.W.2d 425, 430 (Wis. Ct. App. 1998).

97. See *Green v. Continental Rentals*, 678 A.2d 759, 765-66 (N.J. Super. Ct. Law Div. 1994) (subjecting rent-to-own transactions to the New Jersey Consumer Fraud Act's usury restrictions, N.J. STAT. ANN. § 56:8-1 to :8-2.13 (West 1989)). But see *Ortiz v. Rental Management, Inc.*, 65 F.3d 335, 341-42 (3d Cir. 1995) (applying federal law to determine that rental purchase agreements are not sales for the purposes of the Truth in Lending Act).

loan decision can be. The difficulty for a remote rent-to-own seller comes with the need to take returns and make substitutions for goods that prove defective. Because more than half of the people that rent new goods do not complete the series of payments, more than half of the goods rented must come back.⁹⁸ That means someone must pick up these returned items and offer them for a second sale or lease. Also, someone must fulfill the promise of replacement for goods that do not work properly (free replacement of nonworking goods is an important part of the rent-to-own bargain).⁹⁹ Will the courts treat an out-of-state bank as absent from a state in which it (or an affiliate on its behalf) repossesses, replaces, and re-rents its collateral? The cases give no answer.

Presence in the debtor's state might be legally significant for two reasons. First, the out-of-state bank might be considered to have an illegal branch in the debtor's state. Such a consideration could have all kinds of unhappy consequences for the bank, quite apart from the usury issue. A branch must be approved by the appropriate state or federal authorities and must be permitted under the applicable law.¹⁰⁰ The penalties for failing to get a necessary license and for running an otherwise impermissible branch could be severe.¹⁰¹

Second, the presence of the bank in the debtor's state could bar the use of an out-of-state usury law if the court found that the in-state "affiliate" made the loan. A court that first found an in-state affiliate to be illegal might not be as quick as the federal court in Pennsylvania was to recognize that the loan was actually made in Delaware. A court sufficiently offended by the improper branch might even conclude that the employee in Delaware was acting as the agent of the illegal South Carolina or Pennsylvania branch. If the loan were made in South Carolina, it would have to comply with South Carolina law.

Other credit sellers deal with a slightly more affluent clientele than the usual rent-to-own customer. These credit sellers sell to a working-class clientele on credit at rates that exceed the permissible rates in many states.¹⁰² These sellers may be more like the pawnbroker than H & R Block in the sense that their lending activities are more profitable than their cash sales.¹⁰³

98. See Barkley Clark et al., "Rent-to-Own" Agreements in Bankruptcy: Sales or Leases?, 2 AM. BANK. INST. L. REV. 115, 119 (1994) (citing a 1993 APRO Industry Report).

99. See Michael L. Walden, *The Economics of Rent-to-Own Contracts*, 24 J. OF CONSUMER AFF. 326, 327, 328, 335 (1990).

100. See 12 U.S.C. § 36(c) (1994).

101. See 12 U.S.C. § 93 (1994).

102. Fingerhut, a direct seller in Minnesota, is an example. The average household income of Fingerhut's customers is \$27,700. Joseph B. Cahill, *Where It's Due: Credit Card Companies Find Tough Rival at Bottom of Consumer Market—Fingerhut's Experience Shows 'SubPrime' Lending Takes Gimmicks, a Lot of Grit*, WALL ST. J., Dec. 29, 1998, at A1.

103. Because of the use of the "time-price doctrine," it is sometimes difficult to distinguish profits from "selling" and profits from "lending." See generally NATIONAL CONSUMER LAW CTR., THE COST OF CREDIT: REGULATIONS AND LEGAL CHALLENGES § 10.3.2.1 (1995 & Supp. 1997) (discussing the time-price exception to the usury laws, as well as its demise). To evade the usury laws, some sellers traditionally used a "cash price" and a higher price by which the courts treat the difference between those two prices as a part of the price,

Assume a direct seller, like Fingerhut in Minnesota, runs afoul of the local usury laws.¹⁰⁴ Can this direct seller establish a national bank in South Dakota or Delaware, issue credit cards to its customers from that bank,¹⁰⁵ and so capture the gains from the loans? In none of the cases interpreting *Marquette* has the in-state retailer been affiliated with the out-of-state lender. The *Cades* court evidently thought that this point might be important, for the court took pains to note that H & R Block was not affiliated with Beneficial National.¹⁰⁶

Arguably, the example of Sears and its multistate use of the Discover card shows that *Marquette* permits a retailer to enjoy both the benefits of an out-of-state rate and of being the lender by having an out-of-state affiliated card issuer.¹⁰⁷ Apparently, Fingerhut has also set up an out-of-state affiliate to issue cards to solve its usury problems in Minnesota—so far without challenge.¹⁰⁸

Return now to the question of whether the local operation is to be regarded as a branch of the out-of-state affiliate and so both illegal and guilty of usury. *Cades* rejects that possibility with a reference to the leading case, *Independent Bankers Ass'n v. Smith*,¹⁰⁹ and a dismissive note that Beneficial had neither property nor employees in South Carolina. The issue is not even considered in *Wiseman* or *Basile*.

As I have suggested above, the case is more precarious for a payday lender, a rent-to-own operation, or a pawnshop. Because they are only in the business of lending money, neither a payday lender nor a pawnshop can afford to give its business to an unaffiliated out-of-state bank. Yet if one of these businesses causes its in-state customers to borrow from an out-of-state affiliate, what is the business other than an agent for that affiliate? By hypothesis the in-state operation would only be soliciting business for that

not as interest. In fact it was the economic equivalent of an additional interest charge. By inflating their cash prices, sellers of goods to low income buyers probably use a variation of the time-price doctrine even today.

104. See *Walker v. Fingerhut Corp.*, No. C5-99-881, 2000 WL 136096, at *6 (Minn. Ct. App. 2000) (affirming summary judgment for Fingerhut on the Minnesota usury issue).

105. Fingerhut's credit card, the Axsys Credit Advantage offered through the Axsys National Bank in South Dakota, carries a 25.15% annual percentage rate. See Axsys Credit Advantage, *Terms and Conditions* (visited Mar. 20, 2000) <<http://www.axsysbank.com/cgi-bin/>>.

106. See *Cades v. H & R Block, Inc.*, 43 F.3d 869, 873-74 (4th Cir. 1994).

107. The Discover Card was created in 1986 by Sears's former subsidiary, Dean Witter Financial Services Group, and maintained a comparatively high interest rate of 19.8%. See David Griesling & Leah Nathans Spiro, *Dean Witter's Excellent Adventure*, 3290 BUS. WK., Oct. 26, 1992, at 81. Dean Witter was spun off in 1992, and later merged with Morgan Stanley. See Leah Nathans Spiro, *Class Meets Mass on Wall Street*, 3514 BUS. WK., Feb. 17, 1997, at 78. Sears now has its own credit card for use in its store only. The Sears Card, with its 21% interest rate (24% if one fails to make the required minimum monthly payment for two consecutive billing periods) is issued by the Sears National Bank, located in Arizona. See Sears, *Important Sears Credit Card Terms* (visited Apr. 13, 2000) <http://www.sears.com/jsp-scripts/sears/credit/se_creditapp.jsp>.

108. Fingerhut's credit card, the Axsys Credit Advantage is offered through a subsidiary, Axsys National Bank in South Dakota. See *supra* note 105.

109. See *Cades*, 43 F.3d at 874 (citing *Independent Bankers Ass'n of America v. Smith*, 334 F.2d 920, 921 (9th Cir. 1965)).

affiliate. Does that mean its in-state place of business is in substance owned by the out-of-state affiliate and that its employees are in substance the employees of the out-of-state lender? If a court were to find that the out-of-state bank was the owner and local persons were its employees, this case would be easy. Under *Independent Bankers Ass'n of America v. Smith*, the out-of-state bank would be operating an illegal branch.¹¹⁰

Even if the court refused to pierce the corporate veil, it might still conclude that the in-state activities were branches if it followed the Federal Reserve ruling that finds a cooperative agreement among a number of subsidiary banks to handle the affairs of one another's customers sufficient to make each a branch of the other.¹¹¹ Because the entire purpose of the in-state office would be to find and serve the out-of-state affiliate's customers, this case would be easier than the one considered by Federal Reserve Bulletin.

If the in-state location had some purpose other than making loans (such as selling unredeemed goods along with other goods) and particularly if it had arrangements with several out-of-state banks, the local outlet might escape the branch label under *Independent Bankers Ass'n v. Marine Midland Bank*.¹¹² That case held that an independently owned ATM shared by several banks was not a branch of any of the banks.¹¹³

It will be difficult for pawnbrokers and rent-to-own lenders to make their loans through out-of-state affiliates without running afoul of the branching (and thus of the local usury) laws. Payday lenders might find a way to conduct transactions over the Internet and escape local usury laws entirely (at least if they make the loan through a bank); however, whether such lenders need a face-to-face meeting to properly evaluate their risk and to induce payment remains to be seen.

If the foregoing analysis is correct, the states are left with only a shred of the consumer credit market under their control. Should out-of-state banks and other merchant lenders choose to engage in all modes of consumer lending, it is not clear that any could be foreclosed by state laws. The states have a fair argument only at the lowest end—pawnshops and rent-to-own operations—where a local presence and the prompt availability of the loan proceeds seem important to make the transactions work in practice. Even there, only dicta in the decided cases hint at the applicability of local usury rules.

Of course, the states might try to control lenders' rates by indirect means, but *Marquette* and federal statutory law block this way as well. It would violate section 85 and doubtless other parts of the federal law for a state to require some kind of a license for a national bank to make loans to its citizens.¹¹⁴ The state can set maximum rates for all banks located in the

110. 534 F.2d 921, 951 (D.C. Cir. 1976).

111. *Order Approving Acquisition of Bank*, 64 FED. RES. BULL. 127, 131-32 (1978).

112. 757 F.2d 453 (2d Cir. 1985).

113. *Id.* at 463.

114. See *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 411-12 (1873); 12 C.F.R. § 560.110 (1999); see also *Norwest Bank Minnesota, N.A. v. Sween Corp.*, 1994 U.S. Sup. Ct. L. Ed. (Comm.) 99-1000, 99-1001, 99-1002, 99-1003, 99-1004, 99-1005, 99-1006, 99-1007, 99-1008, 99-1009, 99-1010, 99-1011, 99-1012, 99-1013, 99-1014, 99-1015, 99-1016, 99-1017, 99-1018, 99-1019, 99-1020, 99-1021, 99-1022, 99-1023, 99-1024, 99-1025, 99-1026, 99-1027, 99-1028, 99-1029, 99-1030, 99-1031, 99-1032, 99-1033, 99-1034, 99-1035, 99-1036, 99-1037, 99-1038, 99-1039, 99-1040, 99-1041, 99-1042, 99-1043, 99-1044, 99-1045, 99-1046, 99-1047, 99-1048, 99-1049, 99-1050, 99-1051, 99-1052, 99-1053, 99-1054, 99-1055, 99-1056, 99-1057, 99-1058, 99-1059, 99-1060, 99-1061, 99-1062, 99-1063, 99-1064, 99-1065, 99-1066, 99-1067, 99-1068, 99-1069, 99-1070, 99-1071, 99-1072, 99-1073, 99-1074, 99-1075, 99-1076, 99-1077, 99-1078, 99-1079, 99-1080, 99-1081, 99-1082, 99-1083, 99-1084, 99-1085, 99-1086, 99-1087, 99-1088, 99-1089, 99-1090, 99-1091, 99-1092, 99-1093, 99-1094, 99-1095, 99-1096, 99-1097, 99-1098, 99-1099, 99-1100, 99-1101, 99-1102, 99-1103, 99-1104, 99-1105, 99-1106, 99-1107, 99-1108, 99-1109, 99-1110, 99-1111, 99-1112, 99-1113, 99-1114, 99-1115, 99-1116, 99-1117, 99-1118, 99-1119, 99-1120, 99-1121, 99-1122, 99-1123, 99-1124, 99-1125, 99-1126, 99-1127, 99-1128, 99-1129, 99-1130, 99-1131, 99-1132, 99-1133, 99-1134, 99-1135, 99-1136, 99-1137, 99-1138, 99-1139, 99-1140, 99-1141, 99-1142, 99-1143, 99-1144, 99-1145, 99-1146, 99-1147, 99-1148, 99-1149, 99-1150, 99-1151, 99-1152, 99-1153, 99-1154, 99-1155, 99-1156, 99-1157, 99-1158, 99-1159, 99-1160, 99-1161, 99-1162, 99-1163, 99-1164, 99-1165, 99-1166, 99-1167, 99-1168, 99-1169, 99-1170, 99-1171, 99-1172, 99-1173, 99-1174, 99-1175, 99-1176, 99-1177, 99-1178, 99-1179, 99-1180, 99-1181, 99-1182, 99-1183, 99-1184, 99-1185, 99-1186, 99-1187, 99-1188, 99-1189, 99-1190, 99-1191, 99-1192, 99-1193, 99-1194, 99-1195, 99-1196, 99-1197, 99-1198, 99-1199, 99-1200, 99-1201, 99-1202, 99-1203, 99-1204, 99-1205, 99-1206, 99-1207, 99-1208, 99-1209, 99-1210, 99-1211, 99-1212, 99-1213, 99-1214, 99-1215, 99-1216, 99-1217, 99-1218, 99-1219, 99-1220, 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99-1998, 99-1999, 99-2000.

state, but that is politically and morally unacceptable, for it would punish Abel and benefit Cain.

The states could try to get section 85 and the attendant federal legislation repealed, but they would face insurmountable opposition. National banks and federal bank regulators¹¹⁵ would surely oppose repeal. This opposition would be expressed by representatives of states where national bank issuers of credit cards are headquartered (including at the least New York (Chase and Citigroup),¹¹⁶ North Carolina (Bank of America, Wachovia and First Union),¹¹⁷ Illinois and Ohio (Bank One)¹¹⁸ and California (Bank of America and Wells Fargo)).¹¹⁹ Of course, Delaware¹²⁰ and perhaps a few other courtesans that profit indirectly from the current regime would squeal.

Under my reading of *Marquette*, the states cannot even segment their markets. Under the most-favored lender doctrine, a state or national bank located in a particular state may carry the rate from one form of loan in that state (say rates for industrial loan companies) to other forms in that state (say agricultural loans), but only if the industrial loan company could make an agricultural loan.¹²¹ Or a bank can make loans at small-loan rates in its home state without having a license, but only to the loan-amount ceilings that would apply to a small-loan lender.¹²² However, when a bank incorporates a rate from out-of-state under *Marquette*, it need not concern itself with the local rules on agricultural loans, small loans, first mortgage loans or the like. It incorporates those rules from within its home state. Thus if the bank comes from a state like Delaware whose laws permit consumer

Cir. 1997) (exempting national bank from state requirement for a broker's license).

115. It is commonly claimed that agencies which regulate industries are "captured" by the members of the industry. Although the Federal Reserve and the Comptroller are comparatively independent, they too can be expected to champion the interests of the industries they regulate when those industries are under attack. See Pablo T. Spiller, *Politicians, Interest Groups, and Regulators: A Multiple Principals Agency Theory of Regulation, or "Let Them Be Bribed,"* 33 J.L. & ECON. 65 (1990).

116. See CHASE MANHATTAN, 1998 ANNUAL REPORT 32 (1999); CITIGROUP, 1998 ANNUAL REPORT 2 (1999).

117. See FIRST UNION, 1998 ANNUAL REPORT (1999).

118. See BANK ONE, 1998 ANNUAL REPORT 16 (1999).

119. See WELLS FARGO & CO., 1998 ANNUAL REPORT 2 (1999).

120. Delaware has modified its laws to make them particularly inviting to out-of-state banks. Presumably, the same interest that caused them to attract banks would cause them to defend the bank's position. See Richard P. Eckman, *The Delaware Consumer Credit Bank Act and "Exporting" Interest under Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980*, 39 BUS. LAW. 1264, 1266-67 (1984).

121. See *Walsh v. First State Bank*, 409 N.W.2d 5, 6-7 (Minn. Ct. App. 1987).

122. *Peterson v. Wells Fargo Bank*, 556 F. Supp. 1100, 1108 (N.D. Cal. 1981). The 'most favored lender' provision of the National Bank Act, later codified as 12 U.S.C. § 85 (1994), permits national banks to charge the maximum interest rate on loans or other evidences of debt allowed to competing lending institutions by the laws of the state in which the national bank is located. If the state permits a higher interest rate for a particular type of loan, a national bank may charge the higher rate for such loans. For example, a national bank may charge the rate of interest charged by small loan companies, even though it could not be licensed as a small loan company, provided that the bank makes similar types of loans.

laws diminish the standard of living of those subject to them,¹³¹ if you think that at best they create enclaves of monopoly or oligopoly,¹³² and if you agree that the unavoidable attempts to evade them cause gross inefficiency in the form of expensive subterfuges,¹³³ then emphatically we should not return to the nineteenth century. Contrary to those who claim to befriend the impecunious consumer and who rail against usury laws, I think even the poorest consumers are quite savvy. They understand the alternatives and make choices about borrowing that are wise for them even when the decisions seem foolish or wasteful to middle-class observers. I say let the bankruptcy laws, the restrictions on garnishment and collection, the exemption laws, and the debtors' considerable guile protect them from their creditors. We should not decree abstinence.

To reject usury laws is not to endorse the current state of the law. There must be considerable inefficiencies in making Citibank pretend that it is lending from South Dakota by setting up a subsidiary there¹³⁴ or in requiring H & R Block to arrange a loan from a Delaware bank to a South Carolina debtor.¹³⁵ To measure those inefficiencies is beyond me, but they must be considerable. It would be better if we could avoid them.

Should we then have a federal usury law? For critics of usury laws, there are risks in a federal law too. Under the current regime neither South Dakota nor Delaware dares lower its rates for fear of losing Citibank and its friends as clients. Congress probably lacks the will to overthrow the status quo but, if it did so, it would not thereafter be inhibited by any such fear. In a year in which the populists captured the Congress and the White House, imposing a national usury limit—even one demonstrably below the market rate—might be appealing to those in power. Creditors could not avoid that law by moving from one state to another. It would likely produce subterfuges that would make those practiced heretofore look like fools' play.

Given the choices, the current regime may be the best we can do. It is now difficult and will become increasingly more so for any state to impose stern usury limits on any but a small part of the consumer loan transactions in that state. The inefficiencies in the current system may be a fair price for keeping Senator Kennedy and his successors from doing well-intentioned harm to consumer debtors.

Adam Smith's Case for Usury Laws, in 2 ADAM SMITH 181, 196 (Mark Blaug, ed., 1991) (stating that "where law can improve social well-being [Adam] Smith favors it"); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283 (1995) (defending usury laws).

131. See *Usury Laws: The Bad Side of Town*, *supra* note 130, at 31.

132. See, e.g., Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 46-48 (2000) (discussing the monopolistic effects of organized crime in Japan).

133. See, e.g., *Commissioner v. Bollinger*, 485 U.S. 340, 347-48 (1988); W. J. Boyes & Dale Beck Furnish, *A Note on the Use of Incorporation as an Escape from Usury Ceilings*, 32 J. INDUS. ECON. 365 (1984).

134. See *supra* notes 66-67 and accompanying text.

135. See *supra* notes 68-72 and accompanying text.

A COMPARISON OF INTEREST RATE RESTRICTIONS ON
FINANCIAL TRANSACTIONS IN MINNESOTA AND SOUTH
CAROLINA

A. *Open-End Financial Institution (Credit Card)*

Under Minnesota law, the interest for an open-end credit card loan is limited to 18%.¹ This rate is determined by reviewing the different Minnesota code sections that govern lenders. First, a lender can pay an initial fee of \$500 and, as long as it has at least \$50,000 in liquid assets, qualify as a “financial institution.”² Second, financial institutions have explicit exceptions from the general usury limit of 8% contained in section 334.01.³ Section 47.59 states the following: “With respect to open-end credit pursuant to a credit card, [a] financial institution may contract for and receive a finance charge on the unpaid balance of the principal amount at an annual percentage rate not exceeding 18 percent per year.”⁴ Notably, this section provides an explicit exception from the usury rates for a financial institution that lends pursuant to open- and closed-end loans that do *not* involve credit cards.⁵

The interest rate for a supervised lender in South Carolina is unlimited if the principal is greater than \$600, but is otherwise limited.⁶ Under South Carolina law, supervised lenders are permitted to have higher interest rates than unsupervised lenders.⁷ To become a “supervised lender,” the lender must apply for a license with the State Board of Financial Institutions and must prove assets in excess of \$25,000.⁸ For a supervised lender, section 37-3-201 sets out the interest rate restrictions as follows:

(2) With respect to a consumer loan, including a loan pursuant to open-end credit

(a) on loans with a cash advance not exceeding six hundred dollars, a maximum charge not exceeding the maximum charges imposed in Section 34-29-140 as disclosed as an annual percentage rate

(b) on loans with a cash advance exceeding six hundred dollars, and on all loans, regardless of the dollar amount,

1. MINN. STAT. ANN. § 47.59(3)(a) (West Supp. 2000).

2. *Id.* § 56.02.

3. *Id.* § 47.59(2).

4. *Id.* § 47.59(3)(a).

5. *See infra* Appendix Part B.

6. S.C. CODE ANN. § 37-3-201 (Law. Co-op. 1989 & West Supp. 1999).

7. *Id.*

8. *Id.* § 37-3-503(1)-(2) (Law. Co-op. 1989).

made by Supervised Financial Organizations, any rate filed and posted pursuant to Section 37-3-305; or
 (c) on loans of any amount, eighteen percent per year on the unpaid balances of principal.⁹

Thus, the lender of \$1000 has an unlimited interest rate as long as the disclosure requirements of section 37-3-305 are complied with. For a lender of less than \$600, including the \$300 loan represented in the chart, the code points to section 34-29-140. That section reads in part:

(a) A licensee under this chapter may lend any sum of money not exceeding seventy-five hundred dollars, excluding charges, and notwithstanding the fact that the loan may be repayable in substantially equal monthly installments, may contract for and receive finance charges not to exceed:

....

(2) On loans with a cash advance exceeding one hundred fifty dollars but not exceeding two thousand dollars, twenty-five dollars per one hundred dollars on that portion of the cash advance not exceeding six hundred dollars

In addition to the finance charges authorized in subparagraphs (1) and (2) of this subsection (a), a licensee under this chapter may contract for and receive an initial charge in such an amount as may be agreed upon in writing with the borrower, but not to exceed seven percent of the cash advance or fifty-six dollars, whichever is the lesser¹⁰

Thus the finance charge on the \$300 loan is limited to \$25 per \$100 loaned, plus an initial fee of 7%. Combined, these costs give the borrower an effective rate of 54.6% APR.

B. Closed-End Financial Institution

In Minnesota a lender of \$300 is limited to a 33% interest rate,

9. *Id.* § 37-3-201(2) (West Supp. 1999).
 10. *Id.* § 34-29-140 (West Supp. 1999).

while the lender of \$1000 is limited to a 29.5% rate.¹¹ Minnesota law carries variable interest rates for financial institutions that lend pursuant to a closed-end loan. Thus, for a lender that has complied with the “regulated lender” requirements discussed in Part A of this Appendix, the interest rates are set out in section 47.59 as follows:

(a) With respect to a loan, including a loan pursuant to open-end credit but excluding open-end credit pursuant to a credit card, a financial institution may contract for and receive a finance charge on the unpaid balance of the principal amount not to exceed the greater of:

(1) an annual percentage rate not exceeding 21.75 percent; or

(2) the total of:

(i) 33 percent per year on that part of the unpaid balance of the principal amount not exceeding \$750; and

(ii) 19 percent per year on that part of the unpaid balance of the principal amount exceeding \$750.¹²

Under this statute for financial institutions not lending pursuant to a credit card agreement, any loan of \$3818 or more would carry the rate set out in subsection (1), while loans below that amount would use subsection (2).

In South Carolina, loans by supervised lenders, whether open- or closed-end, are governed by the same statute that allows a filing with the Department of Consumer Affairs to facilitate loans with unlimited interest rates for loans exceeding \$600. For loans below \$600, section 37-3-201 establishes that the borrower will have an effective interest rate of 54.6% APR.¹³

C. Closed-End Merchant Sale

A closed-end credit sale by a Minnesota merchant is subject to the general usury limit of \$8 per year on \$100 borrowed.¹⁴ The definition of a loan in section 47.59 gives financial institutions an exception from this general limit, but adds the following caveat: “‘Loan’ does not include the forbearance of debt arising from a sale or lease, a credit sale contract, or an overdraft from a person’s deposit account with a financial institution which is not pursuant to a written agreement to pay overdrafts with the right to

11. MINN. STAT. ANN. § 47.59(3)(a) (West Supp. 2000).

12. *Id.*

13. S.C. CODE ANN. § 37-3-201(2)(a) (Law. Co-op. 1989 & West Supp. 1999); see

also *supra* Part II.A.

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14. MINN. STAT. ANN. § 33A.01(1) (West 1993).

defer repayment thereof.”¹⁵

In South Carolina a separate chapter of the Consumer Protection Code deals with credit sales. Section 37-2-201(2)(a) exempts a lender in a “consumer credit sale” from all interest restrictions if there is a filing with the Department of Consumer Affairs.¹⁶

15. *Id.* § 47.59(1)(I) (West Supp. 2000) (emphasis added). Under that same definitional subsection, Minnesota defines a “credit sale contract” as follows:

(i) “Credit sale contract” means a contract evidencing a credit sale. “Credit sale” means a sale of goods or services, or an interest in land, in which:

- (1) credit is granted by a seller who regularly engages as a seller in credit transactions of the same kind; and
- (2) the debt is payable in installments or a finance charge is made.

Id. § 47.59(1)(i). Another Minnesota section that exempts some transactions from the general usury limit of \$8 on every \$100 is section 334.16. That section reads:

(a) The sale is a consumer credit sale pursuant to an *open end* credit plan, agreement or arrangement between the buyer and seller under which (1) the seller may permit the buyer to make purchases from time to time from the seller or other sellers, (2) the buyer has the privilege of paying the balance in full or in installments, and (3) a finance charge may be computed by the seller from time to time on an outstanding unpaid balance; and

(b) The terms of the plan, agreement or arrangement provide for a periodic rate of finance charge which does not exceed 1-1/2 percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle; provided a minimum finance charge not in excess of 50 cents per month may be imposed, charged or collected.

Id. § 334.16(1) (West 1993) (emphasis added).

16. That section states:

(1) With respect to a consumer credit sale, including a sale pursuant to a revolving charge account, a seller may contract for and receive a credit service charge not exceeding that permitted by this Section.

(2) The credit service charge, calculated according to the actuarial method, may not exceed the greater of either of the following:

- (a) any rate filed and posted pursuant to § 37-2-305, or
- (b) eighteen (18%) percent per year on the unpaid balances of the amount financed.

S.C. CODE ANN. § 37-2-201 (Law. Co-op. 1989). Section 37-2-305, referred to in section (2)(a), merely sets out the filing requirement so that a lender may use any rate it files. *See id.* § 37-2-305 (West Supp. 1999).

D. Payday

In South Carolina payday loans are treated as closed-end loans. Thus, the interest rate is limited in the same manner as discussed in Appendix Part B. The same is true for payday loans in Minnesota for amounts above \$350;¹⁷ however, Minnesota has a separate statute for small loans that will be paid back in one installment. To be entitled to the higher small-loan rate, the loan must be limited to thirty days and \$350 or else the loan is governed by section 47.59. The statutory finance charge limitations for a \$300 small loan of this type are as follows:

(4) for amounts in excess of \$250 and not greater than the maximum in subdivision 1, paragraph (a), a charge may be added equal to six percent of the loan proceeds with a minimum of \$17.50 plus a \$5 administrative fee.¹⁸

Thus for a \$300 loan paid on the thirtieth day, the APR is 92%.

E. Pawn

Licensed pawnshops in Minnesota can charge 3% per month, or 36% APR.¹⁹ Pawnshops in South Carolina may charge a much higher rate, which is seen in the following statute:

Pawnbrokers may charge interest on loans not exceeding the following amounts:

(1) at the rate of two dollars and fifty cents per thirty-day period for each ten dollars loaned for the first fifty dollars loaned;

(2) at the rate of two dollars per thirty-day period for each ten dollars loaned on that portion of the loan exceeding fifty dollars but not exceeding one hundred dollars;

(3) at the rate of one dollar and fifty cents per thirty-day period for each ten dollars loaned on that portion of the loan exceeding one hundred dollars but not exceeding two hundred dollars;

(4) at the rate of one dollar per thirty-day period for each ten dollars

17. MINN. STAT. ANN. § 47.60(1)(a) (West Supp. 2000)

18. *Id.* § 47.60(2)(a)(4).

loaned on that portion of the loan
exceeding two hundred dollars but not
exceeding one thousand dollars;

(5) at the rate of fifty cents per
thirty-day period for each ten dollars
loaned on that portion of the loan
exceeding one thousand dollars but not
exceeding two thousand dollars.²⁰

Thus a lender of \$300 will receive 13.5% per month, or 162% APR, and a
lender of \$1000 will receive 11.75% per month, or 141% APR.

F. Rent-to-Own

Rent-to-own transactions are treated as closed-end loans in
Minnesota; thus the interest is limited as in Appendix Part B. In South
Carolina the definition of “consumer credit sale” includes rent-to-own
transactions, but with the proper filing with the Department of Consumer
Affairs, there is no usury limitation as discussed in Appendix Part A.