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Usury--A Primer on the West Virginia Law

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USURY—A PRIMER ON THE WEST VIRGINIA LAW

Interest is "compensation for the use of the money of another or for delay in paying a debt due another." Laws concerning interest have been in existence since ancient times. One of the first was delivered to the children of Israel by the prophet Moses. At English common law interest was not prohibited but a maximum rate was imposed by statute in 1545. In Virginia the first maximum interest statute was passed in 1730, legalizing a 6% rate. The first enactment of the West Virginia Code adopted a similar provision.

The Supreme Court of Appeals of West Virginia in maintaining that a contract containing interest provisions that is lawful when executed should be enforced according to the intent of the parties, recognized the legitimacy of charging interest. The court has also recognized that even absent an express promise to pay interest, a promise to do so may be implied by the court, unless it appears the parties intended that no interest be charged.

Usury is the reservation of interest exceeding the lawful rate, taken directly or indirectly, for the loan or forbearance of money, goods or other thing. This definition of usury has been the consistent statement of law in West Virginia since 1868, and before this that of Virginia. This statement, however, is merely a definition unsupported and unqualified by the substantial case law and statutory law needed to understand usury and its application. This Note proposes to discuss the elements of usury needed for a practical understanding and application of its laws and principles to credit sales under installment contracts for the purchase of personal property, services or interests in real estate. It is hoped that this Note may also explain in a simplified way the most commonly

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3. 37 Hen. 8, c. 9 (1545).
   Reger v. O'Neal, 33 W. Va. 159, 10 S.E. 375 (1889).
used means of computing interest or finance charges which are provided for in the statutes.\textsuperscript{12} Simple, add-on, discount and actuarial interest will be discussed.\textsuperscript{13} It is not within the scope of this

\textsuperscript{12} W. VA. Code §§ 47-6-5, -5a, 46A-3-101(2) (1976 Replacement Vol.).

\textsuperscript{13} Simple interest is defined in the language of the usury statute as "the rate of... dollars upon one hundred dollars for a year, and proportionately for a greater or less sum, or for a longer or shorter time..." W. VA. Code § 47-6-5 (1976 Replacement Vol.). Simply stated, this means that a person borrowing one hundred dollars for one year at 6% simple interest will owe at the end of the year one hundred six dollars and not more; if the period of the loan were two years he would owe $112, if three years he would owe $118.

In simple interest loans the full amount of the loan or forbearance on which the interest is calculated (the principal) is transferred to the borrower. He retains and utilizes all the principal until it is repaid upon demand or at the end of the term of the loan. The borrower pays the stated (nominal) rate of interest on the loan each full year it is outstanding, or proportionately less for each part of a year. This simple interest principle may be stated as: the interest charge or finance charge in dollars is equal to the principal times the interest rate times the term of the loan in years. Since there is no repayment of the principal amount in this type of loan until maturity, the nominal rate is equal to the annual percentage rate (APR). The term APR is used by the Truth in Lending Act, 15 U.S.C. §§ 1601-1665 (1970), to describe what finance mathematicians would term the actual, true, or effective rate of interest. M. Neifeld, Neifeld's Guide to Installment Computations 37-56 (1951). Simple interest in not extensively used today, except in oral loan contracts and short term demand notes, because rates computed by other methods yielding a higher APR are now allowed by law in most loan transactions.

In the add-on method of calculating installment loan payments, the interest charge in dollars is first computed on the whole amount of the loan using the stated nominal rate. The resulting amount is then multiplied by the number of years of the loan and added to the loan principal. This sum is repaid, usually in equal monthly installments, over the period of the loan. For example, when $100 is borrowed for one year at a 6% add-on rate of interest and principal and interest is repaid in equal monthly installments, the interest charge is computed at 6% per year and the resulting $6 is added to the principal. Dividing this sum ($106) by 12, the monthly payment is $8.33. The key to this method is that the interest is added to the principal to be repaid in installments. E. Mock, R. E. Schultz, R. G. Schultz & D. Shuckett, Basic Financial Management 379-80 (1968).

In the discount method, rather than adding the interest to the principal in advance of repayment, the borrower prepays the interest charge. The creditor computes the interest charge on the loan principal for the whole term of the loan and then deducts the interest amount in advance from the loan principal. Then he hands the borrower the difference, called "the loan proceeds." The amount to be repaid, however, is still the principal amount the borrower originally requested. For example, if the borrower requests a loan of $100 and the creditor makes a 6% discount loan, the interest amount will be calculated by the nominal rate at $6. One hundred dollars less the $6 interest charge equals $94, the loan proceeds. The amount due at the end of the loan term is, however, $100. The discount method produces a higher APR than the add-on method since the borrower has less initial
money to use over the loan period. Because the ratio of loan proceeds to loan principal will diminish as the term increases, this method will generally be used where money is loaned for fairly short periods. A borrower would be unlikely to agree to the $40 proceeds that would result from a ten-year term $100 discount loan. Ordinarily, the discount rate method will not be applied to credit sales transactions. M. Neifeld, Neifeld's Guide to Installment Computations 85-95 (1951).

The requirement of installment repayment of the principal amount of the loan introduces a noticeable difference into a simple interest loan. In add-on interest loans, the stated nominal interest rate will no longer reflect the true interest cost of using the money borrowed. In discount interest loans, the existing disparity between the stated rate of interest and the true rate of interest increases. Installment repayment of a loan results in an APR which is approximately double the stated rate. The borrower pays interest at the original stated rate on the whole principal during the whole term of the loan but, because the buyer repays in each installment a portion of the principal as well as the interest due, the amount of the principal available for his use declines with each monthly payment. On the average, over the life of the loan he will have the use of about half the money borrowed.

With the adoption of the federal Truth in Lending Act, the effective rate of interest charged in a transaction must be disclosed to the borrower as the APR. While there are several methods of calculating effective rates, the actuarial method produces the true rate and is the effective rate method embodied in the APR. Use of the APR in the more recently adopted West Virginia Consumer Credit and Protection Act, W. Va. Code Ch. 46A (1976 Replacement Vol.), reflects the modern trend in maximum interest rate laws. Its use is the result of the disclosure requirements of the Truth in Lending Act and the underlying need for a universal rate that accurately reflects the true cost of using money. Regardless of how a loan contract is constructed in terms of time, number of payments and finance charge, or how the interest rate is initially stated, the APR accurately represents a true rate of interest the borrower may use to evaluate competing credit opportunities. The interest calculations in many bank loan transactions and most credit sales transactions are now based strictly on the APR.

While the actuarial method produces the true rate it also involves extremely difficult calculations. The formula is displayed in Supplement I to Regulation Z, of the Truth in Lending Act, 12 C.F.R. 226.5(b) (1977), as follows:

\[
\text{Principal} = \frac{P_1}{(1 + i)^{t_1}} + \frac{P_2}{(1 + i)^{t_2}} + \ldots + \frac{P_n}{(1 + i)^{t_n}}
\]

\[P_1, P_2, \ldots = \text{amount of first and each consecutive payment}\]

\[P_n = \text{amount of last payment}\]

\[i = \text{monthly interest rate}\]

\[t_1, t_2, = 1, 2\]

\[t_n = \text{total no. of payment periods}\]

If a loan involved repayment over several years the computation would be immense; a loan over just four years would involve numbers raised to the 48th power. Fortunately the rate may be found in APR tables. The official source of these tables is Board of Governors of the Federal Reserve System, Truth in Lending, Regulation Z Annual Percentage Rate Tables, Volumes I, II. This source also includes information concerning computation of the finance charge and other factors needed to use the tables, and includes applications of the tables to various loan transactions.
Note to discuss open-ended credit arrangements such as credit cards or revolving charge accounts. The purpose of this Note then, is to define usury, set out and explain relevant statutes, discuss statutes of limitations, consider the major defense to a charge of usury—the time-price doctrine, and identify the penalties and forfeitures which may be assessed. It is critical to this end to bear in mind that the usury law was amended in 1968, 1969, 1974 and 1978, and that the West Virginia Consumer Credit and Protection Act to an extent displaced the usury statutes in 1974. The result of these changes is that the causes of action, defenses and penalties that are applied to contracts differ according to the date and nature of the contractual transaction.

Usury

Since its original enactment, the West Virginia usury statute has always declared that “all contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest” than allowed by law shall be

Using this information and the tables, the APR involved in a loan transaction may be computed or verified. Where the lawful rate applicable to a transaction is stated in terms of add-on or discount interest, the verified APR can be located in “APR to add-on” or “APR to discount” tables found in various publications, such as in D. Thorndike, The Thorndike Encyclopedia of Banking and Financial Tables (1973).

Under open-ended credit arrangements the borrower is granted an extension of credit, in advance, and he uses it at his discretion in increments as he purchases goods. The borrower repays the creditor at his discretion either the whole amount, a minimum amount or any amount he wishes until principal and interest is repaid.

Discussions of open-ended credit and relevant calculations of interest under those arrangements may be found in Cardi, The West Virginia Consumer Credit and Protection Act, 77 W. Va. L. Rev. 401 (1975), and in the federal Truth in Lending Act, 15 U.S.C. §§ 1601-1665 (1970); Regulation Z, 12 C.F.R. § 226 (1977).

The Truth in Lending Act does not include any provisions setting maximum interest rates or finance charges; it is a disclosure act. In part, it mandates the method of calculating the “annual percentage rate” (essentially the effective rate) that must be disclosed to borrowers. The state usury laws which provide for maximum rates of interest are neither annulled, altered or affected by the act. Consumer Credit Protection Act of 1968; § 111(b), 15 U.S.C. § 1601(b) (1976). Interest rates in open-ended credit arrangements are regulated by the West Virginia Consumer Credit and Protection Act, W. Va. Code Ch. 46A (1976 Replacement Vol.); disclosure requirements are regulated by the Truth in Lending Act. These and other federal interest provisions are beyond the scope of this note.

As will be more fully developed later, these amendments are not to be retroactively applied to prior contracts. See Carper v. Kanawha Banking & Trust Co., 207 S.E.2d 897, 908, 914 (W. Va. 1974).
usurious and subject to legal sanction. 17 Throughout most of the statute's history the Supreme Court of Appeals of West Virginia interpreted the language to exclude its application to credit sales of property, both real and personal. 18 The court had interpreted the phrase "for the loan or forbearance of money" 19 narrowly to include only transactions in which the exchange of money or its equivalent was intended. 20

If a transaction ostensibly involving goods was to be found usurious it was necessary to show that, although the writing alleged property as consideration in the transaction, in fact the contract was for the borrowing and lending of money and that the allegation of property was a shift or device to cover a usurious loan or forbearance. 21 Although this interpretation of the law gave meaning to the statutory phrase "made directly or indirectly," and allowed the courts to look behind the form of the contract to the substance and intent of the parties, it did not allow the courts to apply the sanctions of usury to bona fide sales of property. It was the court's opinion that a note for the payment of a sum of money given bona fide as purchase money for property, and not a cover for a usurious loan transaction, is not usurious even where excess interest is called for in the form of a percentage on the principle sum, is called interest and is above that rate allowed by law if such interest is in fact a part of the consideration for the purchase. 22

17 W. Va. Code § 47-6-6 (1976 Replacement Vol.). Comparison of the statute in prior codes, beginning with the 1923 amendment to this section, and in the court's statements of statutory law in cases decided as early as 1858 (Brakeley v. Tuttle, 3 W. Va. 86), shows that the quoted phrase has been consistent throughout its history. The amendments to this section have been concerned with the sanctions and presumptions.


19 The distinction between loan and forbearance is that a loan is a contemporaneous transaction involving the creation of a debt to be repaid, whereas a forbearance is a subsequent agreement between a creditor and debtor that permits the delayed payment of a debt previously created and already matured, that is, due and payable. Carper v. Kanawha Banking & Trust Co., 207 S.E.2d 897, 909 (W. Va. 1974).


21 Crim v. Post, 41 W. Va. 397, 404, 23 S.E. 613, 616 (1895). Although the court cites a Georgia case for this caveat which broadened the extent to which a court may look to find usury, the principle had been expressed earlier in Brakeley v. Tuttle, 3 W. Va. 86, 135 (1868).

22 Id.; Reger v. O'Neal, 33 W. Va. 159, 166, 10 S.E. 375, 377 (1889); Morris,
This exemption from the requirements of the usury laws is a court-made rule characterized as the "time-price doctrine."\textsuperscript{23}

**Modern Time-Price Doctrine**

In 1974, the Supreme Court of Appeals of West Virginia was squarely faced with the problem of the validity of the time-price doctrine as an exception to the usury laws in a modern retail installment sales transaction involving consumer credit.\textsuperscript{24} Since the doctrine had not been questioned or construed since 1895,\textsuperscript{25} the court chose to reconsider its validity and establish a new general rule for the credit sale of property.\textsuperscript{26}

"If the negotiation between the seller and the buyer involves a bona fide quotation of both a cash price and a credit price, the transaction does not involve usury, even though the quoted credit price is such as to exceed the cash price plus lawful interest thereon."\textsuperscript{27} Under the new rule the seller must in fact quote during the sales negotiation the total sum that will be due if the buyer chooses repayment under a credit arrangement (the credit price or time price), as well as the sum that might be paid immediately in cash for the property.\textsuperscript{28} Under the old rule, the seller need only quote the cash price and the interest rate and negotiate the buyer's agreement.\textsuperscript{29} It is necessary, if the seller is to avoid the usury law, that the quotation of cash price and credit price be bona fide, that is, in fact be made during negotiation. It is not enough that the two prices are later inserted into a conditional sales contract, even when the buyer signs it after its completion. If the sale of property is really made on a cash estimate but time is given to pay the price quoted and the amount is greater than the cash price plus legal interest the transaction may, in fact, be usurious.\textsuperscript{30} "If a transaction is actually a device to evade usury laws, it is not saved by any

\textsuperscript{24} Id. at 910.
\textsuperscript{25} Crim v. Post, 41 W. Va. 397, 23 S.E. 613 (1895).
\textsuperscript{26} Carper v. Kanawha Banking & Trust Co., 207 S.E.2d 897, 910 (W. Va. 1974). The Court noted that this rule is generally recognized in the other jurisdictions.
\textsuperscript{27} Id.
\textsuperscript{28} Id. at 912, 913. The federal Truth in Lending Act requires additional timely disclosures. Regulation Z, 12 C.F.R. § 226.8 (1977).
\textsuperscript{29} Reger v. O'Neal, 33 W. Va. 159, 166, 10 S.E. 375, 377 (1889).
attempted differential between a claimed 'cash price' and a claimed 'credit price.' "31 It is a question of fact for the jury whether the sale is bona fide, and exempt from usury prohibitions, or not bona fide, and part of a device to evade the usury statutes.32

The West Virginia court recognized four indicia that the jury may use to test the presence or absence of usury. First, the jury may look to whether both prices were seasonably and adequately disclosed, that is, to whether the buyer was given a realistic opportunity to choose between a cash price and a credit price. Second, where credit terms are expressed and calculated in terms of interest or percentage, an indicia in favor of usury arises. Third, the use of terminology which is easily understood only by the commercially sophisticated, such as "time-price differential," 33 "finance charge" 34 or "add-on" and "discount" rate, 35 are further indicia of a usurious loan covered by a shift or device. Fourth, usury is indicated in a sales-financing arrangement involving a third-party lender, where a close relationship between the seller and lender exists to the extent that the seller is arranging the financing, getting a kickback of part of the interest or splitting profits from insurance premiums or other charges. Another indication that this type of relationship exists is where form papers, often supplied by the lender, are signed at the time of the sales transaction by the buyer-borrower in blank. These practices raise the indicia that the sale involved a bargain based on a cash price followed by a claimed time price which may be among the financial terms of the conditional sales contract but not seasonably and adequately disclosed. 36

This last indicia is important where the buyer seeks to claim the usury penalties against both the seller and lender or where the

31 Id. at 910, 911.
32 Id.
33 This term is used to speak of the difference between an offered cash price and a credit price for goods and is often used interchangeably with "interest charge" as a cover for high rates. Id.
34 Finance charge is another term often used synonymously with interest charge, but may include fees other than interest such as credit investigation reports and default insurance. It is a legal word of art, however, under both the federal Truth in Lending Act, 15 U.S.C. §§ 1601, 1605(a) (1970) and the WVCCPA. In the latter act, "loan finance charge" includes the sum of all fees, including interest imposed on the creditor by the lender, directly or indirectly as an incident to the extension of credit. W. Va. Code § 46A-1-102(23) (1976 Replacement Vol.).
35 See text accompanying note 13 supra.
seller is attempting to hide behind what appears in form to be a cash sale paid out of the proceeds of an independent consumer cash loan. In the former situation, if the contract was made on or after September 14, 1968, the party paying usury may legitimately ask the jury for a double recovery in the amount of a maximum penalty from each, both seller and lender. If the transaction did, in fact, involve a completely independent cash loan at an interest rate above the lawful rate, the lender would clearly be liable for a usury violation as he could not assert the time-price doctrine as a defense.

Commonly the third-party lender will supply the credit financing through the seller's assignment of the conditional sales contract to the third-party lender. Since a contract is usurious at the time it is consummated or not at all, and since only the consumer and the seller are parties to the contract, if it is usurious vis a vis the seller it will be usurious in the lender's hands even though he would be allowed a greater rate in an independent loan transaction.

Essentially, the time-price doctrine is a fiction indulged in by the courts. On analysis it can be seen that the seller has actually sold the good, financing the sale himself by lending the buyer the purchase price. The difference between the cash and credit price is interest on this loan, no matter what language the parties chose to place in the contract.

In cases falling under the WVCCPA, the legislature has apparently eliminated the time-price doctrine by requiring that any

39 There is no one lawful rate for all lenders. The lawful rate as provided by statute depends on the statutory class of lender and is varied by the type and amount of the sale or loan involved; the range is 6% to 36%.
40 Often in the close-relationship situation the ultimate financer will supply the conditional sales contract forms which will include a notice of potential assignment of the instrument to itself for collection.
42 For example, a "supervised lender," while not exempt from usury laws, may charge higher interest rates than the seller himself could charge; these rates vary up to a maximum of 18, 24 and 36 per cent depending on the amount borrowed. W. Va. Code § 46A-4-107 (1976 Replacement Vol.).
time-price differential must be included as part of the finance charge on a consumer loan or sale agreement.\(^4\) Since including the differential will raise the rate of finance charge and since that charge is subject to a statutorily set maximum rate, creditors will no longer be permitted to rely on the doctrine to charge consumers usurious interest rates. Although the time-price doctrine is still partially alive in West Virginia,\(^5\) the Supreme Court of Appeals has expressed its disdain for the doctrine in cases arising under the usury statutes and now requires close scrutiny of a transaction when the doctrine is relied on by a lender.\(^6\) Thus, the judicial stage is set for elimination of the time-price doctrine in all cases involving potentially usurious interest charges.\(^7\)

**Charges Included in Interest**

Before a transaction can be found usurious, it is necessary to determine whether incidental charges that may have been made are includable as interest, or are legitimate, separate expenses properly paid by the borrower. If the transaction falls under the WVCCPA this determination can be made by looking to the relevant provisions.\(^8\) If, however, the action arises under the usury statutes, one must look to past cases for guidance on this question. The Supreme Court of Appeals of West Virginia has dealt with this issue under the long standing rule that “a contract is usurious when any premium, profit, bonus, or charge is exacted or required by the lender in excess of the money actually loaned, which in addition to the interest stipulated, renders the return to the lender greater than the lawful rate of interest.”\(^9\)

The court has found usury when, in addition to the lawful rate of interest the following charges were made on a loan: when the lender, as a condition to a loan, required the borrower to pay past judgments entered in the lender’s favor;\(^10\) when a bonus was given as consideration for an extension of time to repay a loan;\(^11\) and,

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\(^7\) The time-price doctrine is also going by the wayside in other states. The leading case is *Wisconsin v. J. C. Penney Co.*, 48 Wis. 2d 125, 179 N.W.2d 641 (1970).


\(^10\) *Id.*

when an interest in oil and gas was conveyed as additional consideration for a loan.\textsuperscript{52} In one case a borrower sought a loan from a West Virginia lender. The lender received the proceeds of the loan from a third party and turned them over to the borrower. Although the court allowed charges made for services rendered by the West Virginia lender, it disallowed charges, allegedly for brokerage and underwriter's fees, made by the third party, finding the third party to be the real party in interest to the loan transaction.\textsuperscript{53}

Charges that generally would not constitute a premium or bonus under the rule, and therefore would not be "interest," include: reasonable and necessary incidental expenses, such as title examination fees or inspection costs on land offered as security for the loan;\textsuperscript{54} and premium on credit life insurance where the premium charged does not exceed the premium charged to other persons who do not obtain loans.\textsuperscript{55} Interestingly, the court has not found usury where finder's fee charges are involved, at least where the finder's fee is paid to a third party who is not a true party to the loan.\textsuperscript{56}

\textbf{Holder in Due Course}

The taint of usury will follow notes\textsuperscript{57} into the hands of purchasers for value even though the purchasers are without actual notice.\textsuperscript{58} Prior to September 14, 1968, relief from usury was limited to avoidance of the excess interest charged.\textsuperscript{69} It was settled in West Virginia that this avoidance was not affected by principles of negotiable instrument law.\textsuperscript{60} Therefore the holder in due course (HDC) was not protected from the forfeiture. With the passage of the 1968

\textsuperscript{52} Davisson v. Smith, 60 W. Va. 413, 55 S.E. 466 (1906).
\textsuperscript{53} Hall v. Mortgage Sec. Corp. of America, 119 W. Va. 140, 192 S.E. 145 (1937).
\textsuperscript{54} Liskey v. Snyder, 55 W. Va. 610, 46 S.E. 996 (1904).
\textsuperscript{56} Hall v. Mortgage Sec. Corp. of America, 119 W. Va. 140, 192 S.E. 145 (1937). In this case the parties also stipulated the following charges to be payable by the borrower: survey costs, appraisal fees, recording fees, and the premium on title insurance. \textit{Id.} at 143-44, 192 S.E. at 147.

\textsuperscript{57} A promissory note is an \textit{unconditional} promise to pay a sum certain in money on demand or at a definite time, signed by the maker. W. VA. CODE § 46-3-104 (1966).
\textsuperscript{58} Hall v. Mortgage Sec. Corp., 119 W. Va. 140, 147, 192 S.E. 145, 149 (1937); Artrip v. Peters, 144 W. Va. 819, 821, 174 S.E. 524, 525 (1934).
\textsuperscript{59} W. VA. CODE § 47-6-6 (1966) (current version at W. VA. CODE § 47-6-6 (1976 Replacement Vol.)).
\textsuperscript{60} Morris, \textit{supra} note 22, at 335.
amendment to the forfeitures and penalties section, the legislature gave recognition to the HDC status in usury law to the limited, albeit important, extent of exemption of the HDC from the newly enacted penal sum. The statute left him still unprotected from the forfeiture of unlawful interest.

Where there is only a conditional sales contract involved in the transaction there can never be an HDC, since no West Virginia case elevates a conditional sales contract to the status of a negotiable instrument. Thus, "any purchaser of a nonnegotiable claim which is tainted with usury, even though he is an innocent purchaser and is unaware of the usury, is . . . liable to the borrower . . . ." Furthermore, if an instrument which would be negotiable in every other way calls for an unlawful rate of interest, the instrument is not negotiable as the terms of interest provide the purchaser with actual notice of a potential claim and as negotiability is determined by what appears on the face of the instrument itself.

Although the legislature had given limited recognition to the HDC status in the usury laws in 1968, in 1974 with the passage of the WVCCPA it withdrew that support from lenders involved in consumer credit sales, consumer loans and consumer leases. On or after September 1, 1975, a seller-creditor may not lawfully take

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41 W. Va. Code § 47-6-6 (1976 Replacement Vol.).
42 Id. The borrower-debtor may recover a penalty of up to four times the interest agreed to be paid and in any event no less than one hundred dollars.
43 The lender is liable in the sense that he may not collect any unlawful interest and, to the extent that the borrower-consumer has already paid such interest it may be applied to any part of the principle still due. Reger v. O'Neal, 33 W. Va. 159, 165, 10 S.E. 375, 377 (1889); Morris, supra note 22, at 334.
44 The penal provisions of the West Virginia usury laws are not applicable to national banks doing business in this state as these are controlled by federal law; however, federal law does require that national banks obey the maximum interest rate provisions of state law in the state in which they are located, except that they may charge more interest, one percent above the discount rate, when the Federal Reserve discount rate is higher than the maximum interest rate permitted by state law. 12 U.S.C. §§ 85-86 (1974).
45 A contract in which the obligor transfers possession of the merchandise immediately, but delays transfer of the title until the condition of payment by the obligee is satisfied. M. Neifeld, Neifeld's Guide to Installment Computations (1951).
47 Id.; citing Morris, supra note 22, at 333.
49 This is the operative date of the WVCCPA. W. Va. Code § 46A-8-101 (1976 Replacement Vol.).
a negotiable instrument, other than a currently dated check, as evidence of the buyer-borrower's obligation to pay for goods, services or an interest in land, thereby limiting the seller to nonnegotiable instruments such as the conditional sales contract. Furthermore, a HDC of a negotiable instrument taken in violation of the WVCCPA is subject to all claims and defenses arising out of the sale to which the original seller would be subject. For negotiable instruments made and arising out of consumer credit sales after September 14, 1968, and before September 1, 1974, the holder in due course may validly raise his HDC status as a defense to a claim for the penal sums allowed by the usury laws. Thereafter the HDC may not raise the defense since the WVCCPA applies to limit his status and also fixes new penal sums to displace the old penalties for consumer credit sale transactions involving excess interest charges.

Burden of Proof

Two standards of proof have been mandated by the Supreme Court of Appeals of West Virginia for use in usury litigation. They are the burden of proving the violation by a clear and satisfactory preponderance of the evidence and the burden of proving the violation by a mere preponderance of the evidence. The former is applied in cases where a contract in its terms provides for charges which do not exceed lawful interest under the usury laws. In this situation the instrument is afforded the presumption of regularity and the proof of usury, by parol or otherwise, must be strong to overcome that presumption.

The latter standard of proof is applied where the instrument in question shows on its face by its terms that the interest charged exceeds the lawful rate. "Public policy is offended," the intent is apparent and there is no room for presumption. Where the

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70 Id.
72 Id. §§ 46A-3-101, -102.
73 Id. § 46A-1-103.
74 Davisson v. Smith, 60 W. Va. 413, 422, 55 S.E. 466, 470 (1906).
76 Id. at 917, 918.
77 Id. at 917.
instrument would be usurious but for the time-price doctrine, the standard must be that of a mere preponderance of the evidence.\textsuperscript{79}

Choice of Law

When an action is litigated in West Virginia and a question arises as to whether the maximum interest law of the forum state or some other state will apply, it appears that the appropriate choice of law rule is the rule normally governing the construction of contracts.\textsuperscript{80} In the absence of anything in West Virginia public policy inhibiting such a contract, the law of the state in which it was made and is to be performed governs a contract’s construction.\textsuperscript{81}

The place of the making of the contract is where the final binding act of execution is performed. Generally, this is the place of its acceptance.\textsuperscript{82} If the facts of the case indicate the place of


\textsuperscript{80} A full discussion of usury and the conflict of laws is beyond the scope of this note. Generally, however, a continuum of views exists on this question. One view notes that courts evidence a desire to uphold potentially usurious transactions whenever possible, finding the contract valid if it may be sustained by any law having a substantial relationship to the contract. See, H. Goodman, \textit{Handbook of the Conflict of Laws} § 111 (4th ed. 1964). The Restatement (Second) has taken the position that the reasonable expectations of the contracting parties should be enforced, so generally the interest rate stated in the contract should be binding upon them. Thus the restatement has adopted the rule that a contract will be sustained if its rate of interest is permitted by any state to which the contract is substantially related and is not greatly in excess of the rate permitted by the state whose law would otherwise govern the contract. Restatement (Second) of the Conflict of Laws § 203 (1971). The view most favoring the borrower, adopted in the WVCCPA, holds that usury is contrary to public policy, therefore the borrower should be afforded the protection of the interest laws of his home state. W. Va. Code § 46A-1-104 (1976 Replacement Vol.); See, Note, \textit{The Doctrine of Lex Debitoris}, 55 Calif. L. Rev. 123 (1967). Since the Supreme Court of Appeals of West Virginia often prefaced the rule with the words “in absence of anything in West Virginia public policy inhibiting such a contract,” State v. Hall and White Co., 91 W. Va. 648, 653, 114 S.E. 250, 251 (1922), and since both the court and legislature have indicated that usury is against the strong public policy of West Virginia, (Carper v. Kanawha Banking & Trust Co., 207 S.E.2d 897 (W. Va. 1974); Hall v. Mortgage Sec. Corp. of America, 119 W. Va. 140, 192 S.E. 145 (1937)), the path is obviously clear to apply the last of the three views set forth in this footnote to all usury cases litigated in West Virginia where a choice of law question arises.


execution is in issue, parol evidence may be introduced, and the question should be submitted to the jury.\textsuperscript{83} However, when the transaction is a consumer credit sale, the interest charged cannot exceed the amount permitted under the WVCCPA.\textsuperscript{84}

The Amendments

The usury laws\textsuperscript{85} that regulate maximum interest rates have undergone considerable legislative change in recent years.\textsuperscript{86} Amendments or additions were made in 1923, 1931, 1968, 1969, 1974 and 1978.\textsuperscript{87} As a result, creditors and borrowers, as well as their attorneys, need to be aware that actions on contracts made at different times involve different permissive rates of interest and other considerations.

As a practical matter, the amendments of 1923 and the addition of a section in 1931 need not concern us since the lives of installment loan contracts, except some real estate loans, and the time periods of relevant statutes of limitations are relatively short. The amendments and additions to the usury law are not retroactive. The legislature expressly declared that the WVCCPA is not

\begin{quote}
\textsuperscript{84} W. VA. CODE § 46A-1-104 (1976 Replacement Vol.).
\textsuperscript{85} The usury provisions of the West Virginia Code are found at W. VA. CODE §§ 47-6-5 through -10 (1976 Replacement Vol.).
\textsuperscript{86} Economically, a lender who is free to choose among alternative uses of capital will choose the investment which brings the highest return commensurate with the degree of risk he wishes to assume. Should the market rate of interest on investments with risk factors similar to loans normally made by the lender rise above the statutorily set maximum rate that such lenders can charge, lenders will direct their capital away from normal loan channels into more profitable uses. As a result, sources of credit will dry up. When the market rate of alternative uses of loan capital continues to rise, creditors and credit seekers turn to the legislature to ask for an increase in the maximum permissible rate that can be charged on loan transactions. In answer to this problem the legislature has amended the usury statutes four times in the past ten years and has passed the WVCCPA. Since none of these laws are retroactively applied, a determination of the type and year of the transaction must be made before one can locate the appropriate statutory maximum interest rate and statutory remedy applicable to the transaction. The 1978 amendment of the usury statute exemplifies the preceding discussion. As the reader will see from the discussion of the statutory law, the legislature has responded to this undulation in market rates by allowing the Commissioner of Banking to set a monthly maximum rate for a limited class of loans, and this allows the law to respond quickly to changes in market forces.
\end{quote}
retroactive and many times the court has held that the usury law in effect at the time the parties become bound by an agreement is the law that must be applied.

Pre-1968 Usury Law

The legal rate of interest remains the same today as it was in 1860—6% simple interest. Prior to September 14, 1968, the maximum lawful rate of interest that could be reserved in an oral or a written contract for the loan or forbearance of money or other thing was also 6% simple interest, except as otherwise specially provided by law.

In addition to providing for maximum interest the pre-1968 statutes provide that:

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* The legal rate is the rate of interest allowed when an obligation calls for interest but the parties did not specify any rate. Morris, supra note 22, at 327.
* Except in case where it is otherwise specially provided by law, legal interest shall continue to be at the rate of six dollars upon one hundred dollars for a year, and proportionately for a greater or less sum, or for a longer or shorter time, and no person upon any contract shall take for the loan or forbearance of money, or other thing, above the value of such rate: Provided, that a charge of one dollar may be made for any loan or forbearance of money or other thing, where the interest at the rate aforesaid would not amount to that sum, and the same shall not be a usurious charge or rate of interest.


* Some other pre-1968 maximum interest rates specially provided by statute include:

(1) state and national banks—6% discount. W. Va. Code § 31-4-20 (1966). Sections 31-4-1 to 20 were repealed by the Act of February 26, 1969, ch. 7, 1969 W. Va. Acts 91, effective July 1, 1969, which also enacted a new chapter 31A, relating to banks and banking. The new chapter provided for interest at the rate of 8% simple interest on written contracts, and on installment loans at the rate of 6% add-on or 6% discount interest. W. Va. Code § 31A-4-30 (1971 Cum. Supp.) (current version at § 31A-4-30 (1975 Replacement Vol.).) An amendment in 1974 limited the
(1) Any contract or assurance shall be void as to any interest charged above six per cent.\(^5\)

(2) In any case involving a loan or forbearance where excess interest is paid, the debtor may bring an action against the creditor with whom the contract was made or to whom the assurance was given to recover back the excess interest paid and he may bring it against the original creditor even though he paid the excess to the creditor’s assignee or indorsor.\(^6\) By utiliz-

\(^5\) The effective rate on the 6% discount method to 15% and the WVCCPA incorporated this rate at W. Va. Code § 46A-3-104 (1976 Replacement Vol.).

\(^6\) Building and loan associations—any rate of add-on or discount interest as fixed by the association’s bylaws. This rate has not been altered. W. Va. Code § 31-6-17 (1975 Replacement Vol.). This section has been incorporated into the WVCCPA. W. Va. Code § 46A-3-104 (1976 Replacement Vol.).

(3) Industrial loan companies—6% discount on loans of no more than two years. W. Va. Code § 31-7-6 (1966) (current version at W. Va. Code § 31-7-11 (1975 Replacement Vol.). This article was rewritten and the section was amended in 1974 to provide for interest at the lawful rate (W. Va. Code §§ 47-6-5, -5a (1976 Replacement Vol.) discounted. W. Va. Code § 31-7-11(5) (1975 Replacement Vol.). This section was incorporated into the WVCCPA. W. Va. Code § 46A-3-104 (1976 Replacement Vol.).

(4) Credit unions—1 1/2% per month on the unpaid balance. This rate is unchanged. W. Va. Code § 31-10-16 (1975 Replacement Vol.). The section is incorporated into the WVCCPA. W. Va. Code § 46A-3-104 (1976 Replacement Vol.).

(5) Licensed lenders under the Small Loans Act—3% per month on any amount up to $200, 2% per month on amounts from $201 to $600, 1 1/2% per month on loans from $601 to $800, and 6% simple interest for interest for any amount over $800. W. Va. Code §§ 47-7A-13, -15 (1966). Sections 47-7A-1 to 47-7A-26 were repealed by the Act of March 5, 1974, ch. 12, 1974 W. Va. Acts 58, effective September 1, 1974, which also enacted a new chapter, Ch. 46A—WVCCPA. Included in this chapter is the Small Loans Act written and renamed “Supervised Lenders.” This new article provides for a maximum loan finance charge, by the actuarial method, at the rate of 36% on the first $200, 24% on any amount of $201 to $600, 18% from $601 to $1200 and 6% simple interest on any amount exceeding $1200. However, the actual rate may exceed the maximums as the section permits the lender to make the finance charge on all principal amounts within a specified range. W. Va. Code §§ 46A-4-107, -111 (1976 Replacement Vol.). Supervised lenders may not make multiple loans to avoid the declining interest requirement as prescribed in the article. W. Va. Code § 46A-4-108 (1976 Replacement Vol.). For a complete discussion of the law applicable to supervised lenders see, Note, Consumer Law—The Supervised Loan in West Virginia, 80 W. Va. L. Rev. 256 (1978).

\(^5\) All contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than six per cent, except where such greater rate is specially allowed by law, shall be void as to any excess of interest agreed to be paid above that rate, and no further except where otherwise specially provided by law. W. Va. Code § 47-6-6 (1966) (current version at W. Va. Code § 47-6-6 (1976 Replacement Vol.).

\(^6\) If an excess beyond the lawful interest be paid in any case for the loan or forbearance of money or other thing, the person paying the same
ing these two sections an affirmative claim may be brought by the debtor. He may ask a court or jury to declare the contract usurious and to award him the forfeiture of any excess paid by way of damages or a credit of that sum against any principal that remains unpaid.  

(3) Any defendant to an action brought on a contract or assurance for payment by a creditor may plead generally that the agreement is usurious. It is mandatory that the court prepare forms for a special verdict on the usury plea as required in the statute unless waived by the defendant.

The submission of interrogatories to the jury and the special form of the verdict are not available to a creditor, whether he be a plaintiff or defendant, as the statutory language is clear and the

may in a suit or action recover the full amount of such payment from the person with whom the contract was made or to whom the assurance was given; and it may be so recovered from such person notwithstanding the payment of the excess be made to his indorsee or assignee.  


77 Carper v. Kanawha Banking & Trust Co., 207 S.E.2d 897, 919-20 (W. Va. 1974); Reger v. O'Neal, 33 W. Va. 159, 165, 10 S.E. 375, 377 (1889). The court states in Carper, at 920, that whenever usury is found by the trier of fact the statute, by operation of law, voids the interest and the court must see that the verdict avoids it. To reach the correct result, the court may amend a jury award.

78 Any defendant may plead in general terms that the contract or assurance on which the action is brought was for the payment of interest at a greater rate than is allowed by law, to which plea the plaintiff shall reply generally, but may give in evidence upon the issue made up thereon any matter which could be given in evidence under a special replication. Under the plea aforesaid, the defendant may give in evidence any fact showing, or tending to show, that the contract, or assurance, or other writing upon which the action was brought, was for an usurious consideration. Upon such plea the court shall direct a special issue to try and ascertain: (a) Whether or not the contract, assurance or other writing is usurious; (b) if usurious, to what extent; (c) whether or not interest has been paid on such contract, assurance or other writing, above the legal rate, and if so, to what extent; (d) if a verdict be found for the defendant upon the plea of usury, a judgment shall be rendered for the plaintiff for the principal sum due, with interest at the legal rate, and, if any interest has been paid above the legal rate, the excess over and above that rate, shall be entered as a credit on the sum due; but if nothing be found due after applying all credits and all excesses of interest paid above the legal rate, judgment shall be entered for the defendant; and if the total of such credits and interest paid exceed the principal sum due with legal interest thereon, the defendant shall have judgment for the difference.

defense of usury is personal to the debtor. The defense of usury is an affirmative plea, and it must always be pleaded or it is waived even if it appears on the face of the instrument under which the debt is claimed.

(4) Any debtor may compel the creditor in law or in equity to answer under oath interrogatories that would prove a transaction usurious if he cannot himself prove it. He may demand to know the amount loaned, the actual interest, and all bargains, contracts or shifts relative to the loan. He may also get injunctive relief to prevent the sale of any security pending the suit.

This section also provides that when the debtor resorts to it for discovery and relief the creditor shall recover his principal and lawful interest. This section was designed to allow the debtor to compel the creditor to discover the usury without subjecting himself to a penalty other than forfeiture of excess interest.

(5) Corporations may not benefit either affirmatively or defensively from a plea of usury.

One element of usury that the statutes did not expressly pro-

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103 Any borrower of money or other thing may exhibit a bill in equity against the lender, and compel him to discover upon oath the money or thing really lent, and all bargains, contracts, or shifts relative to such loan, and the interest or consideration of the same; and, if it appear that more than lawful interest was reserved, the lender shall recover his principal money or other thing with six percent interest only, but shall recover no costs. If property has been conveyed to secure the payment of the debt, and a sale thereof is about to be made, or is apprehended, an injunction may be awarded to prevent such sale pending the suit.

W. VA. CODE § 47-6-8 (1966) (current version at W. VA. CODE § 47-6-8 (1976 Replacement Vol.)).
104 Id.
105 Id.
106 No corporation shall interpose the defense of usury in any suit or proceeding at law or in chancery, nor shall any bond, note, debt, or contract of a corporation be set aside, impaired, or adjudged invalid by reason of anything contained in the laws prohibiting usury.

vide but which the case law does require is intent to exact usurious interest. Usurious intent is essential. Thus, if the rate of interest called for is above the lawful rate due to mistake of fact or miscalculation, \textsuperscript{107} it is not usury. \textsuperscript{108} However, whether a transaction is usurious depends solely on the terms made or expressed at the time of the bargain and not on the inward belief or intention of the parties. \textsuperscript{109} Where it is clear that the rate is excessive, courts should require that the creditor-lender show good faith by the strongest available evidence and not permit uncorroborated denials of knowledge. \textsuperscript{110}

1968 Amendments

The 1968 amendments to the usury laws, effective September 14, 1968, made three important changes:

1. The lawful rate was increased to 8\% simple interest including points \textsuperscript{111} for contracts in writing for the loan or forbearance of money or other things. Permissible interest under oral contracts remained at 6\% simple interest. \textsuperscript{112}
2. The 1968 revision increases the forfeiture by declaring void all interest charged in a usurious contract. In addition to the avoidance of all interest this amendment provides that the debtor-borrower may also recover a penalty from the original lender or creditor or other holder not in due course of up to four times all interest agreed to be paid but the penalty must be at least $100. \textsuperscript{113}

Prior to this amendment the only penalty for usury was the forfeiture of excess interest. The debtor may now legitimately ask to recover the whole amount of the penalty from each and all the parties named in the statute in a proper case. Arguably, the debtor

\textsuperscript{107} Stuart v. Livesay, 4 W. Va. 45, 50 (1870).
\textsuperscript{109} Kelley v. Lewis, 4 W. Va. 455, 459, 461 (1871).
\textsuperscript{110} Haymond v. First Nat. Bank, 115 W. Va. 345, 349, 176 S.E. 239, 241 (1934).
\textsuperscript{111} The amendment also defined "points" as the amount of money or other thing received by the lender as a consideration for making the loan in addition to interest. Points is a premium expressed in percentage points of the principal charged for making a loan and normally used in real estate loans. Act of September 14, 1968, ch. 6, 1968 W. Va. Acts 2d Extraordinary Sess. 1381 (current version at W. Va. Code § 47-6-5 (1976 Replacement Vol.)).
\textsuperscript{112} Id.
\textsuperscript{113} W. Va. Code § 47-6-6 (1976 Replacement Vol.).
may double or triple his recovery of up to four times the interest agreed to be paid.\textsuperscript{114}

(3) The amendment codifies the common law as to intent in usury cases as it states that every usurious contract shall be presumed to have been wilfully made by the creditor. Where the debtor can show that an unlawful rate has been charged on the face of the contract his burden of showing intent has been met. The amendment also provides the creditor the opportunity to avoid a violation of the penalty provision by correcting a bona fide error within fifteen days of notice of an excess charge.\textsuperscript{115}

1969 Amendments

In 1969, a section that specifically applies to installment loans was added to the usury laws. This section, effective March 6, 1969, provides more liberal interest rates to lenders.\textsuperscript{116}

(1) It allowed a contract in writing to carry an interest charge of 6\% add-on or 6\% discount so long as the total of all charges of any kind or character was included with the interest in the rate calculation.\textsuperscript{117} For example, this provision raised to approximately 11.5\% the effective\textsuperscript{118} lawful interest rate on these transactions when repaid in equal monthly installments over a period of one year.

(2) It provided as an alternative the 8\% simple interest rate, including points previously allowed.\textsuperscript{119}

1974 Amendments

Two amendments were made in 1974. The first of these, effective June 3, 1974, changed the section concerning loans payable in installments by:

(1) Limiting the effective rate of interest that could be charged under the 6\% discount method, which had been permit-


\textsuperscript{115} W. Va. Code § 47-6-6 (1976 Replacement Vol.).


\textsuperscript{118} See note 13 supra.

\textsuperscript{119} See note 111 supra.
ted in 1969, to 15% computed by the actuarial method.\textsuperscript{120}
(2) Deleting the requirement of including all charges of any kind or character, in the interest rate calculation when the 6% add-on or 6% discount methods provided by the section are used to compute interest.\textsuperscript{131}
(3) Adding some rules and guidance for the allocation of charges and calculation of rebates.\textsuperscript{122}

The second amendment provided for a temporary increase in the lawful interest rate allowed on loans made for the purchase, construction, addition or improvement of single or multi-family housing. Nine percent simple interest including points was permitted to be contracted for in writing from June 25, 1974, until July 1, 1975. To satisfy this provision the contract must have specified that there would be no prepayment penalty and must not have contained an escalation of interest clause which would allow future increases in the rate charged.\textsuperscript{123}

\textit{1978 Amendments}

In 1978 the legislature added a new section to the usury law.\textsuperscript{124} The coverage of this section is limited to nonprecomputed\textsuperscript{125} loans of money secured by mortgages or deeds of trust on real property located in West Virginia. This act has no effect on installment loans or on the usury laws applicable to installment loans.

The legislative purpose of the section is to enable the growth of credit for the construction and purchase of adequate housing and for the construction and purchase of buildings and improve-

\textsuperscript{120} W. VA. CODE § 47-6-5a (1976 Replacement Vol.). "Actuarial method" means the method of allocating payments made on a debt between principal and interest pursuant to which a payment is applied first to the interest and the balance is applied to the unpaid principal. W. VA. CODE § 46A-1-102(1) (1976 Replacement Vol.).
\textsuperscript{121} Id. § 47-6-5a.
\textsuperscript{122} Id. § 47-6-5.
\textsuperscript{123} Id. § 47-6-5b.
\textsuperscript{124} Id. § 47-6-5b(b). "Nonprecomputed" refers to a non-installment loan in which the total interest charge and the amount of payment required each period are not computed in advance. Normally this type of loan is referred to as a demand loan; the principal and the interest rate are known and although the terms of payment are negotiated the borrower will usually be required to make at least the accrued interest payments until the principal becomes due. A loan is precomputed if the debt is expressed as the total of principal and precomputed interest for the known loan term. Both add-on and discount loans are precomputed. New Rules on Consumer Credit Protection, CONS. CRED. GUIDE (CCH) ¶ 4028 (1969).
ments for businesses and agricultural enterprises in this state. The lawmakers have found this end will be served by affording lenders a competitive return on their money, thereby increasing the amount and availability of this type of credit at reasonable rates.\(^\text{122}\)

To carry out this legislatively stated purpose:

(1) The state commissioner of banking is empowered to prescribe each month the maximum permissible rate of interest on such loans.\(^\text{127}\) The rate may not exceed a monthly index of long-term United States government bond yields for the preceding calendar month plus one and one-half percent.\(^\text{128}\)

(2) Any contract interest rate set under the provisions of this section shall be valid for the term of the loan contract even though the maximum rate fixed by the commissioner might change from time to time.\(^\text{129}\)

Contracts may not include provisions for increases in the rate during the term of the current contract, that is, the parties may not directly contract for a floating rate of interest based on the monthly maximum rate.\(^\text{130}\) However, the parties may agree to short due dates and then recontract repeatedly.

(3) Commitments to make nonprecomputed loans in the future are treated as contracts fixing the future contract interest


\(^{\text{127}}\) Parties may elect to contract at any alternative rate of interest authorized by another code provision. For example, the parties may choose the alternative provided in W. Va. Code § 47-6-5 (1976 Replacement Vol.) (setting the interest rate for contracts in writing) and in W. Va. Code § 47-6-5a (1976 Replacement Vol.) (setting the rate for installment loans). W. Va. Code § 47-6-5b(f) (Cum. Supp. 1978).

\(^{\text{128}}\) W. Va. Code § 47-6-5b(c) (Cum. Supp. 1978). It may be fixed at a lower rate than the result of this computation would allow; the commissioner may consider other factors in his decision each month. Some of these factors are prevailing economic conditions, yields on housing mortgage and deed of trust loans in the United States and on high quality corporate securities and the actual availability of the subject credit at reasonable rates in West Virginia. Id. The commissioner must publish by the twentieth of each month for the public and lenders alike the maximum rate that will be effective on the first day of the next succeeding month. Id. § 47-6-5b(d).


\(^{\text{130}}\) Id. A commitment to make a nonprecomputed loan in the future at a rate of interest not exceeding the maximum rate within the month of commitment constitutes a legally binding obligation on the lender to make that loan at the agreed upon rate of interest even though the permissible rate has increased by the time of consummation. The commitment may not include a condition allowing increase to a higher permissible rate in effect at the consummation date. Id.
rate within the maximum rate allowed during the commitment month.131

(4) The commissioner of banking must promulgate rules and regulations requiring lenders to file with him quarterly reports on loans subject to this section.132

It is not completely clear whether persons acting in their private capacity may make this type of loan at the rates allowed by this statute. For example, may a homeowner finance the sale of his home at this new rate? The answer is probably no, as it appears that the legislature intended this act to apply only to regulated lending institutions such as banks, savings and loan associations and other similar financial institutions.133

West Virginia Consumer Credit and Protection Act

With the enactment of the West Virginia Consumer Credit and Protection Act in 1974,134 the makeup of consumer credit usury was radically changed. Effective September 1, 1974, the Act displaced the usury laws as they are applied to most consumer credit sales or loans.135

A consumer transaction is defined as a loan for the purchase of goods, services, or interests in land, or a credit sale thereof, to natural persons for primarily personal, family, household or agricultural purposes, by a seller or lender regularly extending credit, where the amount financed does not exceed $25,000 and the purchase is not made with a lender credit card or on a revolving charge account. When a transaction falls within this definition, the act will prescribe the maximum interest rate and provide penalties for its violation.136 It prescribes maximum charges for all creditors making consumer credit installment sales and consumer installment loans, and, as to the transactions covered, displaces any existing remedies and penalties for usury as well as statutes regulating the maximum interest rate.137

131 Id. § 47-6-5b(h).
132 Id. § 47-6-5b(j).
133 Id. § 47-6-5b(b)-(j).
134 W.Va. Code Ch. 46A (1976 Replacement Vol.).
135 The exclusions are: 1) credit to government, 2) sale of insurance, 3) transactions under public utility or common carrier tariffs if governmentally regulated, and 4) transactions by licensed pawnbrokers and secondary mortgage lenders. W.Va. Code § 46A-1-105 (1976 Replacement Vol.).
137 Id. § 46A-1-103.
The act also provides for the dismantlement of the holder in due course protection previously given to holders of negotiable instruments made in consumer credit and loan transactions. Holders in due course are subject to all claims and defenses one year after the operative date of the act, that is, from September 1, 1975, and possibly before then to a somewhat limited extent under the provision allowing for a one year transition period. The transition rule involves creditor notification to the debtor of his negotiation of an instrument and debtor notice to the creditor of any claims and defenses within one hundred eighty days of creditor notification.138 The act also provides that an assignee, and a lender making a consumer loan to enable a consumer sale, shall be subject to all claims and defenses the consumer may have against the seller. These provisions also involve a transition period in which the assignee or lender must notify the consumer-debtor and the consumer-debtor must preserve his claims and defenses.139

Any claim or defense of excess charges may be asserted as a setoff, defense or affirmative action at any time140 subject to the provision that no action may be brought more than one year after the due date of the last scheduled payment on the contract upon which the action could be brought.141 However, such claim may be asserted as a defense, setoff or counterclaim at any time, without regard to the limitation on actions.142

The forfeitures and penalties called for are more moderate than previously provided in the usury laws. The debtor may recover the excess finance charge and in addition an amount determined by the court of not less than one hundred nor more than one thousand dollars. The creditor has no liability for the penalty if within fifteen days of discovery of an error and prior to the institution of an action he corrects the error.143 Furthermore, once a suit is filed, if the creditor can establish by a preponderance of the evidence that the violation was unintentional or the result of a bona fide error of fact and that it occurred in spite of his maintenance of procedures reasonably adapted to avoid such errors and violations, he will not be liable for the penalty and the transaction will remain valid.144 On the other hand, if a supervised lender vio-

138 Id. § 46A-2-101.
139 Id. §§ 46A-2-102, -103.
140 Id. §§ 46A-2-101(7), -102(7), -103(6).
141 Id. § 46A-5-101(4).
142 Id. § 46A-5-102.
143 Id. §§ 46A-5-101(4), -(7), -(8).
144 Id. § 46A-5-101(8).
lates the interest provisions the loan is void and the debtor need not pay the principal or interest and may recover any payments already made.\textsuperscript{145}

The maximum finance charge applicable to consumer credit sales and consumer loans including those repayable in install-ments, other than those made by supervised lenders,\textsuperscript{146} is 18\% per year "on that part of the unpaid balances of the amount financed which is fifteen hundred dollars or less" and 12\% per year on that part of the unpaid balances in excess of fifteen hundred dollars.\textsuperscript{147} These rates are equivalent to a one and one-half percent per month and a one percent per month finance charge on the unpaid balances, respectively. The section provides that the finance charge may be calculated by add-on, discount or otherwise as long as the finance charge does not exceed that rate permitted.\textsuperscript{148} The interest rates applicable to consumer credit sales of real estate,\textsuperscript{149} those involving retained title or a purchase money lien, and to loans and sales involving amounts in excess of $25,000, remain those set out in the usury statutes.\textsuperscript{150}

If the consumer credit sale involves a motor vehicle, the seller may receive 12\% on the unpaid balance when the sale is made less than one year after the model year of the vehicle. If the sale is made one year but less than two years after the model year of the vehicle, the seller may charge up to 16\% per year. If the sale is two years after the model year designation the seller may charge 18\% per year on the unpaid balance.\textsuperscript{151}

\textit{Statute of Limitations}

It is clear that the statute of limitations on the right to bring an action demanding the statutory usury \textit{penalty} does not begin to run until after the last installment payment is due or made on a usurious loan or forbearance. However, it is not equally certain that the same limitation applies to the other actions that may be brought under the authority of the usury laws. The facts and hold-ings of the cases and the language of the statutes support the application of the statutory limitation applied generally to actions

\begin{itemize}
\item \textsuperscript{145} Id. § 46A-5-101(2).
\item \textsuperscript{146} See note 94 supra.
\item \textsuperscript{147} W. Va. Code § 46A-3-101(1) (1976 Replacement Vol.).
\item \textsuperscript{148} Id. § 46A-3-101(2).
\item \textsuperscript{149} Id. §§ 47-6-5, -5a.
\item \textsuperscript{150} Id. § 46A-3-102.
\item \textsuperscript{151} Id. § 46A-3-101(6).
\end{itemize}
on contracts. An action to recover money on a contract must be brought within five years for an oral contract or within ten years on a written contract after the right to bring the action has accrued. W. Va. CODE § 55-2-6 (1968). An action to foreclose on a lien secured by any trust deed or mortgage on real estate may be brought within twenty years of the time the original debt becomes due; the creditor may extend this period. W. Va. CODE § 55-2-5 (1966).

155 Id. §§ 46A-5-101(1), -(4), 47-6-6, -7, -8, -9 (1976 Replacement Vol.).

156 An action to recover money on a contract must be brought within five years for an oral contract or within ten years on a written contract after the right to bring the action has accrued. W. Va. CODE § 55-2-6 (1968). An action to foreclose on a lien secured by any trust deed or mortgage on real estate may be brought within twenty years of the time the original debt becomes due; the creditor may extend this period. W. Va. CODE § 55-2-5 (1966).

157 Id. § 46A-5-101(1), -(4). With respect to open-ended loans and credit arrangements this section permits an action for excess interest charges or the penalty if it is brought within four years of the time the violation occurred.

158 Id.

159 Snodgrass v. Sisson's Mobile Home Sales, Inc., 244 S.E.2d 321, 327 (W. Va. 1978). The amount of the penalty demanded may be based upon the whole amount of the interest charge. Id. at 326; Carper v. Kanawha Banking & Trust Co., 207 S.E.2d 897, 905 (W. Va. 1974); W. Va. CODE § 47-6-6 (1976 Replacement Vol.).


161 G.T. Fogle & Co. v. King, 132 W. Va. 224, 236-37, 51 S.E.2d 776, 784 (1948). In Michigan Nat'l Bank v. Mattingly, 212 S.E.2d 754 (W. Va. 1975), the court permitted the defaulted debtor to interpose the usury defense some six years after the last installment payment was due.


The WVCCPA contains a limitation of actions section which plainly permits an action to recover the penalty until the passage of one year after the due date of the last scheduled payment. The Act also provides for the recovery of excess interest within the same time period. With respect to transactions made prior to the WVCCPA, the Supreme Court of Appeals of West Virginia recently held that a one year statute of limitations applies to an action to recover the usury penalty provided for by the usury statute.

In the case of a demand note a lender-creditor may bring an action anytime within ten years of its execution. If the note is payable in installments, the action may be brought within ten years of the debtor’s default. Substituting a five-year limitation, the same rules apply to equivalent oral contracts. The debtor-defendant may plead usury in defense of these contract actions and may recover any excess interest paid in the form of a credit against the principal or, in the case where the credit exceeds the principal due, in the form of a judgment against the plaintiff-creditor. Actually, it is consistent with the acts of the legislature and public
policy to assume the debtor must, after the amendments of 1968, recover as a credit or judgment the whole amount of the interest charged if the court or jury should find the contract usurious, although the specific language of the applicable statute would only allow the excess above the legal rate.\textsuperscript{160}

The usury law provides the debtor-borrower two affirmative causes of action to recover excess or void interest already paid. The first statute voids all interest called for in a usurious contract and, as was discussed earlier, also provides for a penalty after 1968. The debtor in Carper v. Kanawha Banking & Trust Co. brought his suit on this statute.\textsuperscript{162} The second statute provides for the recovery of the full amount of any excess interest paid above the lawful rate.\textsuperscript{163}

The statute of limitations applicable to the right to bring an action under these sections of the usury law is the statute applied to contracts in general—five years on oral contracts and ten years on written contracts.\textsuperscript{164} Furthermore, these usury statutes provide

\textsuperscript{160} Prior to the 1968 amendment to the usury statute section 6 voided only the excess interest charged in a usurious contract. Consistent with that expressed policy and purpose, section 7 of the usury law provided for a setoff against the debt principal of only the excess above the legal rate (the legal and lawful rates were identical prior to the 1968 amendment). The legislature strongly exhibited the public policy purpose behind penalties against usury when it amended section 6 to void all interest charged and to allow an additional penalty of up to four times all the interest charged. It appears, in view of this legislative statement of strong public policy against usury, that at the same time the legislature overlooked the logical and consistent need to amend section 7. This oversight is further supported by the fact that the legislature has repeatedly overlooked the need to delete the last sentences of sections 7 and 8 which refer to the former article seven of the same chapter concerning small loans which was repealed by their acts of 1933. Furthermore, section 7 has not been amended since before 1923. The language of this section is inconsistent with the language of section 6 and inconsistent with the intent and public policy purpose of the legislature expressed in 1968. Courts should read the statutes together and allow the defendant debtor a credit or judgment of all the interest charge found in a usurious contract. W. Va. Code §§ 47-6-6 to -8 (1976 Replacement Vol.).

\textsuperscript{161} W. Va. Code § 47-6-6 (1976 Replacement Vol.). See text accompanying notes 113 and 114.

\textsuperscript{162} 207 S.E.2d 897 (W. Va. 1974).

\textsuperscript{163} W. Va. Code § 47-6-9 (1976 Replacement Vol.).

that all the usurious interest may be avoided, or, if usurious interest has been paid, the full amount of the excess may be demanded within the period of the limitation.165

Another section of the usury law provides a remedy in equity to compel a creditor to discover the usury for the debtor. He must under oath divulge the true consideration loaned and all contracts, bargains or shifts used to hide the usury, as well as the actual interest charged.166 Since the creditor is compelled to discover for the court his own wrong, the statute in equity forbids the exaction of a penalty. Only the interest above six percent may be recovered.167 The courts continue to apply the laches principle in equity,168 but only when the discovery will work a hardship or inju-

executed a note in 1884 and made payments of interest at a rate in excess of the lawful rate until 1900. In January, 1901, the maker's administrator repaid the principal and the last year's interest. In the fall of 1901 the administrator brought an action to recover all usurious interest paid on the note from 1885 to 1901. The circuit court refused to apply any statute of limitations to the contract and awarded the full amount of the excess to the debtor's personal representative. The Supreme Court of Appeals of West Virginia affirmed the judgment of the lower court holding that upon the facts presented no statute of limitations could be applied to the yearly payments of usurious interest.

The court explained that since the excess interest was void by statute the creditor had no legal right to collect it and the excess payments should have been applied to the principal due. The court stated that, while "a court of equity is bound by the statute of limitations, ... when the law applies usurious payments of interest as partial payments on the principal no cause of action accrues for the recovery of usurious interest paid until the payments together exceed the principal and legal interest," the statute does not begin to run until the cause accrues. Lorentz v. Pinnell, 55 W. Va. at 118, 46 S.E. at 797-98.

The present court recently supported this law in Snodgrass v. Sisson's Mobile Home Sales, Inc., 244 S.E.2d 321 (W. Va. 1978). It stated that an action could be brought without regard to the time of execution of a contract as long as the usury was being paid. Id. at 326. Presumably, consistent with Lorentz, and other prior case law, the court was stating positively that the statute did not begin to run at the time of contract execution; but, rather, it begins to run at the time the last payment is made or becomes due. This inference is consistent with the court's holding in Snodgrass, 244 S.E.2d at 327, that the statute of limitations on the right to bring an action for a usury penalty begins to run with the last payment. Of course, an action to recover void and excess interest may be brought when excess is paid anytime during the life of the contract; the debtor need not wait until he has paid off the loan. Carper v. Kanawha Banking & Trust Co., 207 S.E.2d 897 (W. Va. 1974).

165 W. Va. Code § 47-6-6, -9 (1976 Replacement Vol.).
166 Id. § 47-6-8.
Usury upon an innocent party such as a purchaser of notes without actual notice of the usury. Absent this situation the debtor should still be able to bring an action for discovery and excess interest within the otherwise applicable statute of limitations on contracts.

Usury Statutes and the WVCCPA: An Application

To illustrate the application of the body of law under discussion, we may assume that the factual situation in Carper v. Kanawha Banking & Trust Co. occurred in several different years. In Carper, the plaintiff purchased a mobile home from defendant Fairmont Mobile Homes, Inc. The mobile home dealer arranged financing with defendant Kanawha Banking and Trust Company, and had the purchaser sign a conditional sales contract for $9,144. Of this $9,144, $3,128.40 was characterized as finance charge, and the remainder was identified as the amount financed. These figures were obtained by calculating interest using the six and one half percent add-on method. The plaintiff brought an action against both Kanawha Banking & Trust and Fairmont Mobile Homes alleging that the transaction was usurious and requesting damages of four times all interest agreed to be paid, or $12,513.60. This amount is the maximum amount recoverable under the statute and is more than twice the original cost of the mobile home purchased by the plaintiff.

The defendants maintained that the transaction was, as a matter of law, exempt from the usury statutes under the time-price doctrine. The Supreme Court of Appeals of West Virginia held that whether the transaction was within the time-price doctrine was a jury question and affirmed the jury's verdict of $2,500 against Fairmont Mobile Homes and $2,500 against Kanawha Banking & Trust Co.

If the Carper case had occurred in 1967 the maximum interest rate allowed by law for this type of transaction would have been six percent simple interest and plaintiff's remedy would have been to void the excess interest charged. The transaction actually did occur after September, 1968, when the maximum interest charge

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110 207 S.E.2d 897 (W. Va. 1974).
111 W. VA. CODE § 47-6-6 (1966) (current version at W. VA. CODE § 47-6-6 (1976 Replacement Vol.).)
was 8% simple interest and because the effective annual rate charged was 11.23% the transaction was usurious. The remedy was mandatory voiding of all interest on the loan and a penalty of up to four times all the interest agreed to be paid,172 $12,513.60. Had the transaction occurred after March 6, 1969, the provision on installment loans would have been controlling. Since the 6 ½% add-on rate charged by the lender exceeded the 6% add-on rate allowed by statute, the transaction would have been usurious.173 The remedy available to the plaintiff would have been the same as that allowed by the 1968 amendment. If it had occurred on or after June 3, 1974, the court would have been faced with the question of whether a 6 ½% add-on loan that bears an actuarial interest rate of less than the 15% maximum provided in the statute for 6% discount loans would be usurious. Reading the statute literally, as the court in Carper implied it would, the transaction would be considered usurious and the plaintiff could have asked for a judgment of $12,513.60 and an order voiding all interest on the loan.

If, however, the transaction had arisen after the effective date of the WVCCPA, September 1, 1974, the maximum interest rate would have been 18% on the first $1500 of unpaid balance, and 12% on the remaining unpaid balance.174 Thus the transaction would not have been in violation of the interest laws. The assumption that the interest charged was greater than allowed brings to light the disparities in remedies under the usury statutes and the WVCCPA. Since the transaction would be a consumer credit sale under the WVCCPA, the plaintiff's remedy would have been to recover the excess interest charged and a penalty of up to $1000.175 Under the WVCCPA the maximum possible recovery in this case is more than $11,000 less than under the usury statute.

Conclusion

For many, many years the lawful interest rate was set at the traditional six percent. This rate was probably adequate prior to the industrial revolution for aside from commercial needs there was little private worker demand for credit. The economy was set

175 Id. § 46A-5-101(4).
up on a cash and carry basis. Gradually, after the economic revolution brought on by the industrial revolution, the economy turned to the present day buy-now-pay-later system—the consumer credit economy.\textsuperscript{178}

As the demand rose for a scarce supply of money some unethical creditors took the opportunity to make usurious loans. Many creditors, in the complexity of modern financial transactions, inadvertently charged usurious rates of interest.

Into the midst of all this complexity, intent, and lack of intent, came the intense inflation of the 1960's and 1970's. There was much demand that lawful interest rates be raised so creditors could compete and the supply of credit money available to debtors could meet their demand. Interest rates were raised in just seven years to levels three times greater than what they had been for nearly one hundred years.

In this state of flux and multiple change in the usury law, it is very easy for one to let this body of usury knowledge go unlearned, become forgotten, or become outdated. Since 1968 the lawful interest rate has been raised repeatedly. More likely than not, usury violations have declined in numbers, but over the same period the maximum penalties have increased. Many usurious contracts have been written upon which the statute of limitations has not yet run and the practitioner should be prepared to recognize usury for the benefit of his clients who are or have been subject to debt obligations.

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\textsuperscript{178} B. Curran, \textit{Trends in Consumer Credit Legislation} 1-2 (1965).}