

Comment

***149 WHO'S GETTING USED IN ARKANSAS: AN ANALYSIS OF USURY, CHECK
CASHING,
AND THE ARKANSAS CHECK-CASHERS ACT**

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I. INTRODUCTION

Consider the following hypothetical. Ms. Luebbers needs immediate cash for food, and her checking account at Arkansas Bank does not contain the necessary balance. Therefore, she goes to Check Cashers, Inc. and issues a personal check for \$400 payable to its order. Luebbers is the drawer of the check, Check Cashers, Inc. is the payee, and Arkansas Bank is the drawee. By written contract executed between the parties, Check Cashers, Inc. agrees not to present or deposit the check for fourteen days. Ms. Luebbers is given the right to repurchase her check for face value until the fourteen-day period expires. In consideration for the check, Check Cashers, Inc. gives Ms. Luebbers \$350 (in effect charging her \$50). The \$50 charge represents two separate fees: 1) 10% of the face value of the check (that is, \$40), plus 2) a \$10 service fee for holding the check for fourteen days. If Luebbers does not repurchase the check, Check Cashers, Inc. can either deposit the check in its own depository bank or present it to the drawee bank for payment, thus completing the deferred presentment check-cashing transaction. This simple hypothetical has presented controversial issues of legislation relating to usury in Arkansas.

This comment will provide a brief history of the usury laws in Arkansas, discussing how Arkansas has dealt with usury since its constitutional birth. [FN1] It will then examine the purpose of the Arkansas "Check-cashers Act," an act, that in part, essentially permitted usurious lending. [FN2] It will then explain the mechanics of check cashing and describe the statutory construction of the original Check-cashers Act before the Arkansas Supreme Court invalidated that act's section defining interest. [FN3] Following will *150 be a more in-depth explanation of why the Arkansas Supreme Court struck that portion of the Check-cashers Act defining interest and an exploration of how other jurisdictions have addressed check-cashing and deferred presentment transactions. [FN4] The comment will then predict that the Arkansas Supreme Court will rule that deferred presentment fees are interest and thus subject to usury law. Lastly,

measures to allow Arkansas citizens and businesses to continue to engage in check-cashing transactions without running afoul of usury prohibitions will be recommended. [FN5]

II. USURY IN ARKANSAS

Before one can understand the relationship between the Arkansas Check-cashers Act and usurious lending, it is imperative to examine the development of usury in Arkansas.

A. Usury Defined

Usury is the act of charging interest in excess of the amount permitted by state law and can simply be defined as "[t]he charging of an illegal rate of interest." [FN6] When a creditor secures a greater sum of interest than allowed by law based on a loan or forbearance of money, then the loan or forbearance is usurious. [FN7] There are generally four elements required to prove usury: (1) a loan or forbearance; (2) a principal amount that is to be repaid; (3) the exaction of greater profit than allowed by law; and (4) an intention to violate the law. [FN8] The Arkansas Supreme Court has stated that usury occurs when a lender intentionally charges more than the legally permissible maximum rate of interest. [FN9] The legally permissible interest rate is set by the Arkansas Constitution. [FN10] While Arkansas law does not set out all four elements of usury separately, the "interest" concept incorporates *151 the first two elements—a loan and an amount to be repaid.

Regarding the first element, a loan is an advancement of money or other personal property with the obligation of repayment at some future time with an additional sum. [FN11] A court will look to the substance of a transaction to determine if it is a loan and will generally disregard the form of the transaction. [FN12] A forbearance occurs when a creditor "waits for all or part of the money after the consummation of the contract in which the money is involved." [FN13]

The constitutional provision sets the maximum rate of interest at five percent above the Federal Discount Rate at the time of the contract. [FN14] It additionally sets a ceiling of seventeen percent per annum on consumer loans. [FN15] The five percent "floating rate" was enacted to allow the maximum permitted interest rate in Arkansas to remain current with the national economic condition. [FN16]

As indicated above, the constitution differentiates between general loans and consumer loans. [FN17] A consumer loan is "credit extended to a natural person in which the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes." [FN18] The Arkansas courts have determined that consumer loans are subject to both maximum rates; however, the penalty changes when the rate of interest exceeds seventeen percent. [FN19] By setting a floating rate with an ultimate fixed maximum for consumer loans, the general assembly affords greater protection to consumers, who are generally less familiar with ordinary business practices. [FN20]

*152 B. Interpreting the Constitutional Usury Provision

The first usury provision in Arkansas was included in the Arkansas Constitution adopted in 1874. [FN21] Usury regulation in general dates back to pre-Revolutionary English courts, and

the Arkansas courts base their interpretation and construction of usury on settled traditional approaches. [FN22] In its initial interpretations of the constitutional usury provision, the Arkansas Supreme Court made it clear that the general assembly could not enact a statute that violated or avoided the usury provision even if the general assembly were acting in good faith. [FN23] Moreover, the court indicated that any cloak of usury would be invalid and stated that "[n]o shift will enable a man to take more than legal interest upon a loan." [FN24] However, the court did uphold the practice of discounting [FN25] a negotiable instrument. [FN26]

In *Morgan v. Rogers*, [FN27] the court addressed how usury applied in regard to compound interest [FN28] and collateral contracts. [FN29] The court held that compounding interest did not necessarily render the loan usurious. [FN30] However, where the installment dates for compounding were so frequent or unusual as to be used to avoid the law, the loan could be deemed usurious. [FN31]

Likewise, a collateral contract would be valid if the *153 collateral agreement was lawful and in good faith, even if its effect was to exact more than the legal amount of interest. [FN32] However, the court explained that any trick to avoid usury would be closely scrutinized to determine the transaction's true nature. [FN33]

In regard to the parties' requisite mental state in a usurious contract, the court has consistently held that mutual knowledge that the loan was usurious is not necessary. [FN34] Usury laws protect weak debtors from lenders who would violate the law. The court has stated that when looking at the intent of the lender, "[i]t is impossible to wink so hard as not to see, what was expected by [the] contract—that its end was more interest on the money advanced than the law authorized." [FN35] Although the court initially held that a lender was liable regardless of mental state, it later held that the lender must knowingly receive the higher rate of interest. [FN36] The early opinions seemed confused about the mens rea required to find usurious lending. [FN37] The court appeared to take a relaxed view of usury, presuming that at the outset the loan was not usurious. [FN38] However, in a pair of cases handed down on the same day in 1952, the court established a strict reading of usury in Arkansas, closely scrutinizing the loans and emphasizing substance over form to determine if they were in violation of the law. [FN39]

*154 III. PURPOSE OF THE ARKANSAS CHECK-CASHERS ACT

A. Title

The "Check-cashers Act" [FN40] (the "Act") was sponsored by Senator Doyle Webb and submitted to the Arkansas General Assembly on March 3, 1999. [FN41] The bill included an emergency clause on the basis that a delay in implementation could "work irreparable harm on consumers of the State of Arkansas who use such [check-cashing] services." [FN42] The Act was signed into law on April 7, 1999, and became immediately effective. [FN43] The Act's purpose is to license and regulate businesses engaging in check-cashing and deferred presentment transactions. [FN44] The Act essentially provides definitions, administrative guidelines, exemptions, fines, and penalties for check-cashing and deferred presentment transactions. [FN45]

B. The Need for the Check-cashers Act in Arkansas

Prior to the Check-cashers Act, there was no regulation of the check-cashing industry in Arkansas. [FN46] Arkansas consumers had no direct protection from businesses taking advantage of a person's immediate need for cash. The bill's sponsor indicated that the check-cashing industry "[fills] a vast hole in the financial needs of citizens who are disenfranchised from traditional financial institutions." [FN47] The reasons for this "hole" are simple. Banks typically loan only relatively large amounts of money. [FN48] Additionally, small loan companies can generally not afford to make a loan below \$1000. [FN49] Therefore, check cashers are needed to fill the demand that traditional lenders *155 cannot fill.

Documents relied upon by the Act's sponsor in supporting the legislation indicate that the general assembly felt that the "unique nature of the check-cashing industry does not lend itself to traditional lending regulation" and should thus be exempt from such regulation. [FN50] Special regulatory acts were, therefore, deemed necessary. [FN51] This regulation was intended to protect consumers where the advancement of small loans would continue regardless of check-cashing legislation. [FN52]

The delayed deposit transaction [FN53] (i.e., deferred presentment transaction) creates multiple benefits for customers. It allows customers to write a check with significantly less risk of incurring a bounced-check charge and allows customers to receive cash immediately instead of waiting for the processing of a loan application. People use check cashers for a variety of personal reasons. [FN54] Additionally, the typical check-cashing customer usually does not qualify for credit, the amount of money needed by the customer is very small (usually under \$500), and the necessary duration of the loan is generally short (usually thirty-one days or less). [FN55]

Check-cashing customers generally have limited resources available to access immediate cash. As those resources dry up, the customer's prospects worsen, as do his self-esteem and general outlook on life. [FN56] Often check-cashing customers are in a state of desperation and are therefore willing to pay exorbitant *156 fees in order to satisfy their needs. Thus, in order to address such needs and concerns of Arkansas citizens, the general assembly enacted the Check-cashers Act to regulate check-cashing and deferred presentment transactions.

IV. DEFERRED PRESENTMENT v. CHECK CASHING

The check-cashing business can be divided into two separate services. These are commonly referred to as "cashing checks" and "accepting deferred deposit transactions." [FN57] The first service, check cashing, involves charging a service fee for providing instant cash to unbanked customers. [FN58] For example, if Mr. Smith were the payee of a check issued by Ms. Johnson and drawn on a non-local bank, and he did not have a bank of his own to cash the check, a check casher would cash the check and charge Smith a fee for the service.

The second service, a deferred presentment option, involves a loan or an extension of credit. The customer is obligated to pay back the sum advanced plus some "service charge." [FN59] For example, if Smith did not have any cash immediately available to him, for a fee, he could write a check to a check casher who would give him cash and agree not to deposit or present the check for some set period of time. This would allow Smith time to put money in his checking

account in order to avoid a bounced-check charge or an overdraft.

A. Check Cashing

Because check cashing is not an extension of credit, but rather a simple sale of a check, it does not fall within the traditional definition of usury. [FN60] For one to engage in check cashing, the check must have once been given value in the original issuance. [FN61] As discussed below, to give or assign value to a check means that a previous value has been attached to the check by the original parties at the initial issuance of the check. [FN62] Examples of assigned-value checks are government *157 checks, travelers checks, insurance checks, and personal checks from a third party. [FN63] As noted above, check cashing is essentially a sale of a negotiable instrument, and therefore, does not fall under usury provisions.

The check-cashing transaction works in two scenarios. In the first scenario, the drawer issues the check to the payee, and in return the payee gives consideration for the check. At this point, as one court has aptly stated, there is an "assigned value" to the check. [FN64] The "assigned value" label means that the check has been given value by the parties in the form of consideration. For example, Smith issues a check for \$100 to Ms. Johnson in return for her promise to deliver a computer. The parties have now assigned the check a \$100 value for the return consideration of the computer. The payee, Ms. Johnson, can then take the check to a check casher and sell the check at a discount for cash. [FN65]

Diagram 1:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT
DISPLAYABLE

The second scenario arises when the drawer of the check *158 issues a personal check to the check casher for return consideration in the form of instant cash. Here, the check casher buys the check at a discounted amount to assign a value to the check. For example, Smith issues a \$100 check to the check casher for return consideration of \$90. Here, the check has been assigned the value of \$100 for the return consideration of cashing the check and \$90 in cash. [FN66]

Diagram 2:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT
DISPLAYABLE

B. Deferred Presentment

In contrast, the deferred presentment option to check-cashing transactions involves a contract for the extension of credit. Credit is defined by the Uniform Consumer Credit Code as "the right granted by a creditor to a consumer to defer payment of debt, [or] to incur debt and defer its payment" [FN67] A check casher extends credit by deferring presentment [FN68] or deposit [FN69] of the check for a specified time and giving the drawer immediate cash. The customer pays extra fees, limited by the Check-cashers Act, for the deferred presentment of the check. [FN70]

Contemporaneously with the issuance of the check, the customer signs a contract obligating the check casher to forbear *159 on the presentment of the check. [FN71] Essentially, the drawer

has a contract for credit that is protected by the obligation of the deferred presentment. The drawer is promising that the check, when presented, will satisfy the obligation incurred by the drawer under the contract for the extension of credit.

Diagram 3:
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT
DISPLAYABLE

C. A Detailed Overview of a Deferred Presentment Transaction

In order to understand the Act, one must not only understand the general concept of check cashing, but also the detailed mechanics of deferred presentment check cashing. There are two major elements of a deferred presentment transaction.

First, the drawer of the check issues a presently-dated [\[FN72\]](#) check payable to the order of the check casher. A check under Article 3 of the Uniform Commercial Code is defined as a ***160** negotiable instrument drawn on a bank and payable on demand. [\[FN73\]](#) The parties to a check are the drawer, payee, and drawee. [\[FN74\]](#) The check is "bought at a discount" by the payee check casher. The check casher is permitted by law to describe the discount as a service fee for the act of cashing the check. [\[FN75\]](#)

Second, and simultaneously with the purchase of the check, the drawer signs a written contract that refers to the check by its check number. By the terms of the contract, the check casher promises not to deposit the check in its depository bank or to present the check to the customer's bank for some specified time period. The written contract also discloses the amount of fees charged and the annual percentage rate and sets forth the earliest date the check will be presented. [\[FN76\]](#) By the terms of the contract, and as required by the Act, the drawer of the check is also given the right to repurchase the check at face value. [\[FN77\]](#) If the check is not repurchased by the drawer before the date set by the contract, the check casher can then present or deposit the check, thus completing the transaction. [\[FN78\]](#)

For example, Smith issues a check to the check casher for \$100. Smith and the check casher also sign a contract that obligates the check casher to defer presentment or deposit of the check until a specified date and to allow Smith the option to repurchase his check for face value. In consideration of the check casher's forbearance of the right to cash the check and its service of holding the check, Smith receives cash in an amount less than the face value of the check.

***161** V. STATUTORY CONSTRUCTION OF THE ARKANSAS CHECK-CASHERS ACT

The Check-cashers Act can be divided into five sections. The Act first provides definitions of terms used in the statute. [\[FN79\]](#) A deferred presentment option is defined as:

a transaction pursuant to a written agreement involving . . . [a]ccepting a customer's personal check dated on the date it was written; [p]aying that customer an amount of money equal to the face amount of that check less any fees charged pursuant to this chapter; and [g]ranting the customer the option to repurchase [\[FN80\]](#) The terms "delayed deposit" and "deferred deposit" are also defined in the statute as the same type of transaction. [\[FN81\]](#) The second section of the Act requires check-cashing businesses to obtain a permit to do business as a check casher in Arkansas. [\[FN82\]](#) In the third section, the Act sets out the permissible fees for all

check-cashing transactions. [FN83] In the fourth and fifth sections, the Act sets forth required disclosures and miscellaneous terms of check cashing. [FN84]

The fee section of the act is divided into three subsections. Subsection (a) defines operational costs; subsection (b) provides that fees are not interest; finally, subsection (c) limits the permissible fees. [FN85] Subsection (a) allows check cashers to charge for normal operational costs incurred in the regular course of business. [FN86] Some of the general fees allowed here are the costs of copying documents, photographing the drawer, securing and maintaining records and capital, and closing deferred presentment transactions. [FN87] Subsection (b) mandates that these fees should not be classified as interest, and ***162** specifically states that "a deferred presentment option, shall not be deemed to be a loan, loan contract or a contract for the payment of interest" [FN88] Subsection (c) limits permissible fees, [FN89] but in doing so, it does not differentiate generally between a check-cashing and a deferred presentment transaction. [FN90] It does, however, authorize an additional fee of ten dollars for the deferred presentment option. [FN91] In addition, subsection (c) permits different maximum fees to be charged depending on the type of check being cashed. [FN92] The highest permissible fee is that charged for personal checks. [FN93]

The maximum charge allowed for a check issued by a state or federal authority is five percent of the face value; [FN94] for a personal check, the maximum is ten percent of the face value; for all other checks, the maximum is six percent of the face value. [FN95] It appears that by varying the percentage allowable as a fee on different types of checks, the general assembly was attempting to protect unbanked recipients of state or federal benefits.

As explained, the fourth section of the Act describes ***163** general disclosures that the check casher is required to provide. [FN96] These are not disclosures that must be included in the contract; rather, these disclosures must be made at the check casher's premises. [FN97] This disclosure section provides that the check casher must conspicuously post a fee schedule [FN98] for all transactions and a list of acceptable forms of customer identification. [FN99]

The fifth section of the Act sets forth other provisions regulating the check-cashing business. [FN100] The bulk of these provisions reflect regulation of deferred presentment transactions. Subsection (c) of this section requires that deferred presentment agreements be in writing. [FN101] Further, this writing must disclose the date of presentment and must disclose fees in terms of the annual percentage rate (APR). [FN102] Subsection (d) guarantees the drawer of the check a repurchase option [FN103] and limits the time for deferred presentment to between six and thirty-one calendar days. [FN104] The inclusion of this provision guarantees that the customer's check is not presented immediately and ensures the drawer that the check casher will wait a reasonable amount of time before depositing the check. [FN105] Subsection (m) limits the total amount deferred at any one location to \$400, and only allows one check per location to be deferred. [FN106] Subsection (n) prohibits check cashers from renewing or consolidating one deferred presentment transaction with the proceeds of a new deferred presentment transaction. [FN107] ***164** The general assembly was apparently trying to protect customers from having an unreasonable sum of money tied up in deferred presentment transactions by enacting the limitations in subsections (m) and (n).

VI. HOW THE ARKANSAS SUPREME COURT HAS ANALYZED USURY AND DEFERRED PRESENTMENT LEGISLATION

A. Judicial Reactions to Similar Statutes in Arkansas

In 1952, the Arkansas Supreme Court dealt with an act similar to the Check-cashers Act. [\[FN108\]](#) The "Small Loans Act" of 1951 dealt with loans that were less than \$2500. [\[FN109\]](#) The Small Loans Act included language substantially similar to that of section 104(b) of the Arkansas Check-cashers Act. [\[FN110\]](#) In two cases handed down on the same day in 1952, the Arkansas Supreme Court declared the relevant sections of the Small Loans Act unconstitutional and void. [\[FN111\]](#) Two years later, the court reaffirmed the unconstitutionality of the Small Loans Act and applied its ruling retroactively. [\[FN112\]](#)

In the first of the two 1952 cases, *Strickler v. State Auto Financial Co.*, the Arkansas Supreme Court determined that the "fees" defined by the Small Loans Act were additional interest that, in effect, rendered the loan usurious. [\[FN113\]](#) The fees deemed interest by the court were insurance and service fees permitted by the Small Loans Act. [\[FN114\]](#) The lender in *Strickler* did not deny making the loan, but relied on the Small Loans Act of 1951 to authorize the insurance and service fees. [\[FN115\]](#) After considering *165 the service and insurance fees as interest, the court determined that the contract was clearly usurious and void. [\[FN116\]](#) In regard to those fees, and the reliance by the lender on the Small Loans Act, the court stated, "[i]nsofar as the Act purports to authorize the collection of interest in excess of the constitutional maximum of 10% per annum it is a nullity regardless of the definition given or label attached to the particular charge by the Legislature." [\[FN117\]](#)

The court focused on the service and insurance charges and determined that while such fees may represent general business overhead, there was no case law that allowed those charges to be assessed to the borrower. [\[FN118\]](#) Moreover, the court looked to other jurisdictions that condemned these fees as interest. [\[FN119\]](#) The court further recognized that contracts, which specify that certain fees are not interest, have been repeatedly condemned, and have been ineffectual at evading the constitution. [\[FN120\]](#) The court also found the Small Loans Act an attempt by the general assembly to usurp the power of the judiciary. [\[FN121\]](#) In determining that the fees constituted interest, the court stated:

This constitutional inhibition cannot be avoided by any trick or device, and the courts will closely scrutinize every *166 suspicious transaction in order to ascertain its real nature, and if it appears that the contract is merely one for the loan of money with the intention on the part of the lender to exact more than the lawful rate of interest, the contract will be declared usurious and void. [\[FN122\]](#)

On the same day that it issued the *Strickler* opinion, the court handed down *Winston v. Personal Financial Co. of Pine Bluff*, again declaring the Small Loans Act unconstitutional as an attempt to permit usurious lending. [\[FN123\]](#) As in *Strickler*, a lender was charging service fees permitted by the Small Loans Act. [\[FN124\]](#) While the court in *Winston* found that fees charged to help pay for the lender's general overhead constituted interest, the court relied on previous case law to determine that charges related to the inspection of property pledged as collateral would not be classified as interest. [\[FN125\]](#) The court applied the *Strickler* analysis and policy

[FN126] to conclude that the loan was usurious. [FN127] It held that any attempt to cloak interest as fees is an evasion of the clear and unambiguous constitutional usury provision [FN128] and will be considered void. [FN129]

Two years later, in 1954, the Arkansas Supreme Court dealt the final blow to the Small Loans Act when it reaffirmed the invalidity of the act and applied the Winston and Strickler rulings retroactively. [FN130] Relying on the usury provision adopted in the Constitution of 1874, the court declared that if anyone *167 relied on the Small Loans Act in the face of the plain language of the usury provision, he did so at his own peril. [FN131]

B. The Arkansas Supreme Court Strikes the General Assembly's Attempt to Define Fees in the Check-casher's Act

In *Luebbers v. Money Store, Inc.*, [FN132] the Arkansas Supreme Court held that section 104(b) of the Arkansas Check-cashers Act is unconstitutional. However, *Luebbers* is a limited opinion, and the court did not decide whether the deferred presentment transaction itself is a loan and subject to usury law. [FN133] The *Luebbers* court focused on the separation of powers doctrine of the Arkansas Constitution to find that the general assembly was performing a judicial, rather than legislative, function in enacting section 104(b). [FN134]

In *Luebbers, Money Store Inc.*, a check-cashing company, argued that the general assembly by enacting the Check-cashers Act "intended to exempt, and did exempt, check-cashing businesses from the laws pertaining to usurious interest rates." [FN135] The court found that the intent of the general assembly is not an issue in determining if a transaction is a loan or if a fee is interest. Rather, those determinations are reserved solely for the judiciary. [FN136]

The court also found that the fees authorized by the Check-cashers Act were meant to "defray operational costs incurred in the check-cashing business" and were similar to the fees authorized by the Small Loans Act. [FN137] The court explained that the fees authorized in the Small Loans Act were ineffectual at evading the usury provisions of the Arkansas Constitution and had been found to be an unsuccessful attempt by the general *168 assembly to usurp a judicial function. [FN138] Further, the court reiterated that the form of a contract is not material, and that the court will look to the substance of the transaction to determine if it is usurious. [FN139] The court supported its position by citing to the following well-known maxim: "[t]he law shells the covering, and extracts the kernel. Names amount to nothing when they fail to designate the facts." [FN140]

In essence, the *Luebbers* court held that section 104(b) of the Act clearly contradicted the separation of powers doctrine of the Arkansas Constitution. [FN141] Thus, *Luebbers* (the drawer of the check) won the appeal, and the case was remanded with instructions to the trial court to investigate the deferred presentment transaction and to determine if it was usurious. [FN142] In so ruling, the Arkansas Supreme Court did not decide if the deferred presentment transaction itself was usurious. Accordingly, future courts must investigate the true nature of the deferred presentment transaction without regard to the transaction's form in deciding if it is usurious. [FN143]

C. Other Jurisdictions' Approaches to Reconciling Deferred Presentment and Usury

Arkansas is not the first state to be forced to reconcile legislation in the check-cashing industry with usury law. Other jurisdictions, including Virginia, Kentucky and Mississippi, have all been forced to deal with usury as it applies to check cashing, although none of these states have constitutional provisions relating to usury as Arkansas does. [\[FN144\]](#) The courts in both Kentucky and Virginia have merely found that deferred ***169** deposit transactions are short-term loans that are generally subject to state usury law. [\[FN145\]](#) In contrast, the Mississippi Supreme Court stressed substance over form and determined that check cashing was the discounting of a negotiable instrument in advance. [\[FN146\]](#) Nonetheless, the Mississippi court still found the transaction subject to the state usury law. [\[FN147\]](#) Following is more in-depth analysis of each state's treatment of usury as it relates to check cashing.

1. Kentucky

Kentucky's general usury provision is statutory. [\[FN148\]](#) The legislature adopted a statute in 1992 that purported to regulate the check-cashing industry and remove it from usury regulation by providing in part that "[a]ny fee charged by a licensee for cashing a check . . . shall be a service fee and not interest." [\[FN149\]](#) However, in interpreting that statute, Kentucky courts held that it only protected companies engaged in "check cashing," as opposed to "deferred presentment" transactions. [\[FN150\]](#)

In response to those cases, the Kentucky legislature enacted a statute incorporating deferred presentment transactions into the safe harbor of check-cashing usury protection. [\[FN151\]](#) After the enactment of the new statute, deferred presentment in Kentucky is shielded from usury restrictions.

2. Virginia

As in Kentucky, Virginia's general usury provision is statutory. [\[FN152\]](#) However, Virginia's legislature also enacted a statute that permits a person to charge usurious interest if he first ***170** obtains a license. [\[FN153\]](#) The Virginia Supreme Court held that a deferred presentment transaction is a loan; [\[FN154\]](#) thus, one could only operate a check-cashing business utilizing deferred presentment if one first obtained a license. [\[FN155\]](#) In essence, while Virginia prohibits usurious lending, a check casher engaged in deferred presentment transactions can escape the strictures of usury regulation by obtaining a license.

3. Mississippi

Mississippi's general usury provision is also statutory. [\[FN156\]](#) In 1997, the Mississippi Supreme Court held that all deferred presentment transactions were loans that violated the Mississippi civil usury provision. [\[FN157\]](#) In reaction, the legislature statutorily provided a safe harbor for deferred presentment transactions. [\[FN158\]](#)

4. Other States

Over the years, as the check-cashing industry grew, many states statutorily addressed usury issues before litigation occurred. Currently, twenty-two states and the District of Columbia have safe harbor provisions that shield deferred presentment transactions from usury attack. [\[FN159\]](#)

*171 VII. ANALYSIS

A. The Application of Usury to Deferred Presentment in Arkansas

There is little question that check cashers provide two important services to the citizens of Arkansas. Unbanked persons need to have a service to cash a payroll or government check. Moreover, citizens often need to engage in small, short-term loans. However, the Arkansas Constitution is the "first protector" of Arkansas citizens, and it has set limits on interest rates for all loans to protect Arkansas citizens from usurious lending. The usury provision of the constitution should be interpreted to apply to deferred presentment check-cashing transactions, and the constitution should be given deference.

Despite the arguments of check cashers, most commentators and courts addressing the issue conclude that a deferred presentment option in the check-cashing arena is a short-term loan. [FN160] Therefore, the charges tied to that loan should be characterized as interest and should render the loan usurious if the interest charged exceeds the legal maximum. The Arkansas Constitution is nearly unique in containing a usury provision and a remedy for its violation. [FN161] As explained above, that usury provision limits interest on loans to five percent above the Federal Discount Rate and limits the absolute maximum interest rate for consumer loans to seventeen percent. [FN162] The Check-cashers Act and deferred presentment transactions effectively permit interest rates in excess of 2000%. [FN163] This is a clear violation of the Arkansas constitutional usury provision.

The Arkansas Supreme Court has a history of strictly scrutinizing transactions that function as loans. [FN164] Moreover, it has held that the constitution is the first protector of Arkansas citizens who are subject to usurious lending and that the general *172 assembly cannot cloak usurious lending by calling interest a service charge or a fee. [FN165] Accentuating this point, the Arkansas Supreme Court most recently held that section 104(b) of the Act was unconstitutional as a legislative attempt to define a term in the constitution—a power clearly reserved for the Arkansas Supreme Court. [FN166]

The Arkansas Supreme Court is not likely to reinterpret its established strict reading and application of usury law. The court has already held the deferred presentment fee section of the Check-cashers Act void as a violation of the separation of powers doctrine of the Arkansas Constitution. The court will likely hold that deferred presentment transactions are loans and subject to usury law. A contrary ruling would be in violation of the Arkansas Constitution's prohibition of usury. Likewise, following the logic and precedent of the *Winston*, *Strickler*, and *Peterson* line of cases, the court could apply such a ruling retroactively. However, a completely retroactive ruling would likely bankrupt all Arkansas check-cashing companies. The penalty for making a usurious consumer loan with an interest rate above seventeen percent is that the loan is void as to both principal and interest. [FN167] Under this penalty, Arkansas check cashers would be forced to refund to their customers the face value of all checks accepted. This would create a windfall for customers. Prior to *Luebbers*, Arkansas check cashers detrimentally relied on the Check-cashers Act in good faith, and a completely retroactive ruling would seem inequitable. The court could reasonably rule that the check cashers must refund only that amount of interest that was charged above the legal maximum, thus fairly balancing the scope of a retroactive ruling between the customers and the check cashers.

B. Recommendations

In order for the general assembly to enact permissible legislation to provide for and govern all check-cashing services, a constitutional amendment is needed. Such an amendment could repeal the constitutional prohibition on usury and permit ***173** limits to be set by the general assembly. [\[FN168\]](#) Alternatively, an amendment could provide the general assembly with the ability to create exemptions when "special circumstances" exist. [\[FN169\]](#) Such an amendment would retain the general limits on usury set by the constitution but still allow the general assembly to carve out exceptions when necessary to protect the interests of Arkansas citizens.

There are two ways to amend the Arkansas Constitution: [\[FN170\]](#) either the general assembly can propose an amendment or the Arkansas populous can do so through the initiative process. [\[FN171\]](#) It is clear that the Arkansas General Assembly recognizes the need to regulate check cashing and, therefore, a general assembly proposal to amend the usury provision could perhaps be the first step in such an effort. [\[FN172\]](#)

The Arkansas usury provision is old, outdated, and a hindrance to the wheels of commerce. The federal government has repeatedly enacted federal regulations that preempt the usury provision of the Arkansas Constitution, [\[FN173\]](#) a fact that indicates that Arkansas is out of step with lending regulation. Further, ***174** other states that allow their legislatures to enact usury laws have been able to provide adequate protection for consumers. [\[FN174\]](#) As noted, a general assembly proposal to amend the usury provision could possibly be a sound first step towards regulating check cashing in a constitutionally acceptable manner.

An amendment to the constitution would allow Arkansas to be competitive and profitable in the lending industry. Additionally, it would allow short-term lending institutions, such as check cashers, to provide a needed service to citizens. While a complete abolition of the Arkansas constitutional usury provision would be a drastic step, it would definitely be a step in the right direction. However, if the Arkansas General Assembly wishes to take a more moderate course of action and still protect the interest of Arkansas citizens, an amendment modeled after California's usury provision, [\[FN175\]](#) which would allow the general assembly to set the usury limits where "special circumstances" exist, seems to be an appropriate means for reconciling the check-cashing industry and modern lending with usury protections.

***175** APPENDIX A

ARKANSAS DEFERRED PRESENTMENT AGREEMENT
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT
DISPLAYABLE

***176** APPENDIX B

ARKANSAS CHECK CASHER FEE SCHEDULE FOR DEFERRED PRESENTMENT
TRANSACTIONS
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT
DISPLAYABLE

[FN1]. See infra notes 6-39 and accompanying text.

[FN2]. See infra notes 40-56 and accompanying text.

[FN3]. See infra notes 57-107 and accompanying text.

[FN4]. See infra notes 108-59 and accompanying text.

[FN5]. See infra notes 160-75 and accompanying text.

[FN6]. Black's Law Dictionary 1543 (7th ed. 1999).

[FN7]. 45 Am. Jur. 2d Interest & Usury § 84 (1999).

[FN8]. Id. The loan or forbearance can be express or implied. Id. Moreover, there need not always be an intention to violate the law. Id.

[FN9]. Evans v. Harry Robinson Pontiac-Buick, Inc., 336 Ark. 155, 161, 983 S.W.2d 946, 949 (1999).

[FN10]. Id. See also Ark. Const. art. XIX, § 13.

[FN11]. 45 Am. Jur. 2d Interest & Usury § 84.

[FN12]. Id. § § 88, 92.

[FN13]. Sloan v. Sears, Roebuck & Co., 228 Ark. 464, 467, 308 S.W.2d 802, 804 (1957) (citation omitted).

[FN14]. Ark. Const. art. XIX, § 13.

[FN15]. I d.

[FN16]. Kenneth E. Galchus et al., A History of Usury Law in Arkansas: 1836- 1990, 12 U. Ark. Little Rock L. Rev. 695, 724 (1990).

[FN17]. Ark. Const. art. XIX, § 13.

[FN18]. I d.

[FN19]. Southwest Ark. Communications, Inc. v. Arrington, 296 Ark. 141, 753 S.W.2d 267 (1988). When the loan is a consumer loan with an interest rate above seventeen percent, the penalty changes from a discharge of the interest to a discharge of the principal and interest. See Ark. Const. art. XIX, § 13.

[FN20]. Galchus et al., supra note 16, at 729.

[FN21]. See Vahlberg v. Keaton, 51 Ark. 534, 538, 11 S.W. 878, 878 (1889).

[FN22]. In 1889, the Arkansas Supreme Court relied on the construction of the statute of 12 Anne by the English Courts in interpreting the constitutional provision. Vahlberg, 51 Ark. at 540, 11 S.W. at 879.

[FN23]. Id.

[FN24]. Id. at 541, 11 S.W. at 879. Here, the "cloak of usury" occurred when the principal lender exacted the maximum legal rate, and the agent that delivered the money charged a fee. Id. The court held that if the principal had knowledge or should have known that the agent was charging a fee, and total payment was in excess of the legal limit, the loan would be usurious. Id. at 545, 11 S.W. at 880.

[FN25]. "Discounting" is exacting the calculated amount of interest that would accrue on the instrument before the instrument is due. Id. at 541, 11 S.W. at 879.

[FN26]. Id.

[FN27]. 166 Ark. 327, 266 S.W. 273 (1924).

[FN28]. "Compounding interest" occurs when interest is paid on both the principal and the previously accumulated interest. Black's Law Dictionary 817 (7th ed. 1999).

[FN29]. "Collateral contracts" are agreements that are made contemporaneously with and separate from a principal contract. Id. at 319.

[FN30]. Morgan, 166 Ark. at 330, 266 S.W. at 274.

[FN31]. Id.

[FN32]. See, e.g., Wilson v. Whitworth, 197 Ark. 675, 678, 125 S.W.2d 112, 113 (1939).

[FN33]. Id. Compare id. at 679, 125 S.W.2d at 113 (finding that a collateral agreement for insurance was a trick to exact more than the legally permissible amount of interest), with Hartzo v. Wilson, 205 Ark. 965, 171 S.W.2d 956 (1943) (finding that an insurance charge was a reasonable collateral agreement, but a forced collateral agreement for storage of mortgaged chattel was a trick to exact a greater amount of interest).

[FN34]. See, e.g., Brittian v. McKim, 204 Ark. 647, 652, 164 S.W.2d 435, 438 (1942); Whitworth, 197 Ark. at 675, 125 S.W.2d at 114.

[FN35]. Whitworth, 197 Ark. at 679, 125 S.W.2d at 114.

[FN36]. Compare Whitworth, 197 Ark. at 675, 125 S.W.2d at 112 (requiring no intent), with

Brittian, 204 Ark. at 647, 164 S.W.2d at 435, and Hartzo, 205 Ark. at 965, 171 S.W.2d at 956 (requiring knowledge or intent).

[FN37]. See supra note 36 and accompanying text.

[FN38]. See supra note 36 and accompanying text.

[FN39]. See infra notes 108-43 and accompanying text.

[FN40]. Ark. Code. Ann. § § 23-52-101 to -117 (Repl. 2000).

[FN41]. S. 781, 82d Gen. Assem., Reg. Sess. (Ark. 1999).

[FN42]. S. 781, § 21, 82d Gen. Assem., Reg. Sess. (Ark. 1999).

[FN43]. 1999 Ark. Acts 1216, § 21.

[FN44]. S. 781, 82d Gen. Assem., Reg. Sess. (Ark. 1999).

[FN45]. Ark. Code. Ann. § § 23-52-101 to -117.

[FN46]. Several states currently regulate check cashing. See infra note 159 and accompanying text.

[FN47]. Fax from Doyle Webb, Arkansas State Senator, to the author 5 (Aug. 10, 2000) (on file with the Arkansas Law Review) [hereinafter Fax From Doyle Webb].

[FN48]. Id. at 8.

[FN49]. Id. at 9.

[FN50]. Id. at 5 . The documents stated that "[t]he advancement of cash until payday against checks, with a repurchase option, just does not fit the traditional loan model addressed by banks." Id. at 5.

[FN51]. The general assembly was concerned that traditional lenders could not make low-dollar loans profitably. Id.

[FN52]. See Fax from Doyle Webb, supra note 47.

[FN53]. For a discussion of deferred presentment transactions, see infra notes 67-78.

[FN54]. See Fax from Doyle Webb, supra note 47, at 7-8. Senator Webb cites the following as reasons for customers' needing immediate money: (1) an immediate car repair; (2) a sick child; (3) utility bills; (4) past due rent and eviction; (5) food; (6) insurance; (7) no money in the bank; (8) a spouse is unable to get home; (9) no money to live on; (10) children's clothing; (11) a ticket

for emergency travel; (12) special event (birthday, anniversary, etc.); (12) a loved one's death; (13) to buy a sale item that a person really wants or needs; (14) recover pawned items; (15) a security deposit until the previous one is returned; (16) school books until financial aid arrives; (17) a legal calamity; (18) family has a loss of income due to unforeseen circumstances. Id.

[FN55]. Id. at 8.

[FN56]. Id. at 10.

[FN57]. See, e.g., White v. Check Holders, Inc., 996 S.W.2d 496, 499 (Ky. 1999).

[FN58]. Id.

[FN59]. See, e.g., Miller v. HLT Check Exch., 215 B.R. 970, 974 (Bankr. E.D. Ky. 1997).

[FN60]. See infra notes 61-67 and accompanying text.

[FN61]. See State v. Roderick, 704 So. 2d 49, 53 (Miss. 1997).

[FN62]. See infra notes 64-66 and accompanying text.

[FN63]. Greenberg v. Commonwealth ex rel. Attorney Gen. of Va., 499 S.E.2d 266, 268 (Va. 1998). It is important to note that while a personal check can have a previously assigned value, it must have been assigned this value by its original issuance. Id.

[FN64]. Id. The Uniform Commercial Code has not dealt with the problem of check cashing as a usurious transaction, and thus, has not addressed this first step of "assigning value" in check cashing.

[FN65]. In this scenario, Ms. Johnson would likely be unbanked, otherwise she could simply deposit her check in her own bank and avoid the service charges inherent with a check-cashing transaction.

[FN66]. This scenario is very unlikely to occur. The check-cashing service is typically provided for unbanked people, and if Smith were unbanked, it would be unusual for him to have checks. Moreover, if he has the capability to write checks, many general consumer stores would allow him to cash his check (sometimes with a minimal purchase).

[FN67]. Unif. Consumer Credit Code § 1.301(16) (1974) (emphasis added). The Uniform Consumer Credit Code was drafted and approved by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association. Id.

[FN68]. "Presentment" is a demand made by or on behalf of a person entitled to enforce an instrument (here, the check casher) to pay the instrument made to the drawee (here, the customer's bank). U.C.C. § 3-501(a) (1994).

[FN69]. A "deposit" is the act of placing money in one's bank (here, the check casher's bank). Black's Law Dictionary 450 (7th ed. 1999).

[FN70]. See infra notes 85-95 and accompanying text.

[FN71]. See infra appendix A for an example of a deferred presentment contract.

[FN72]. Because the drawer presently dates the check, the check-cashing company may contend that it is buying that negotiable instrument at a discount price. If the check were post-dated, it would appear at the onset to be an extension of credit where the drawer gets immediate cash and the check casher gets a post-dated check or a promise to pay back the cash at a later time.

[FN73]. U.C.C. § 3-104 (1994).

[FN74]. The drawer of the check is the customer in a check-cashing transaction. The payee is the check casher, and the bank of the customer is the drawee.

[FN75]. The check-cashing companies often have a "fee schedule" used to explain to the drawer what the face value of the check must be in order for the customer to receive a specified amount of cash. See infra appendix B for the general Arkansas fee schedule; see also Ark. Code Ann. § 23-52-104(c) (Repl. 2000) (setting forth the maximum fees that may be charged for check-cashing transactions).

[FN76]. Ark. Code Ann. § 23-52-106(c) (Repl. 2000). The time specified for presentment may be no less than six (6) calendar days and no more than thirty-one (31) calendar days. Ark. Code Ann. § 23-52-106(c); see also infra appendix A.

[FN77]. Ark. Code Ann. § 23-52-106(d).

[FN78]. Ark. Code Ann. § 23-52-106(d).

[FN79]. See Ark. Code Ann. § 23-52-102 (Repl. 2000).

[FN80]. Ark. Code Ann. § 23-52-102.

[FN81]. Ark. Code Ann. § 23-52-102(c).

[FN82]. See Ark. Code Ann. § § 23-52-103, -107 to -117 (Repl. 2000) (requiring a permit and setting forth the regulations for obtaining the permit).

[FN83]. See Ark. Code Ann. § § 23-52-104 to -106 (Repl. 2000).

[FN84]. See Ark. Code Ann. § § 23-52-104 to -106.

[FN85]. See Ark. Code Ann. § 23-52-104. This comment will later discuss the constitutionality of subsection (b) and will address whether the Act allows check cashers to engage in usurious

lending. See *infra* notes 160-67 and accompanying text.

[FN86]. Ark. Code Ann. § 23-52-104(a).

[FN87]. Ark. Code Ann. § 23-52-104(a).

[FN88]. Ark. Code Ann. § 23-52-104(b) (Repl. 2000). The Arkansas Supreme Court ruled that this subsection of the statute is unconstitutional. See Luebbers v. Money Store, Inc., 344 Ark. 232, 40 S.W.3d 745 (2001). As indicated earlier, this statute was passed with an emergency clause. See *supra* notes 42-43 and accompanying text. At the time this statute was being passed, there were several actions pending in which check-cashing companies were being sued for usurious lending. George Waldon, Courts Declare Payday Lending Usurious Trade: Lowell's Money Store Inc., Municipal Judge Weighs In, *Nw. Ark. Bus. J.*, Jan. 8, 2001, at 1, 8-9. It is the author's opinion that by passing the Act, the general assembly sought to remove deferred presentment check-cashing from short-term loan regulations so that fees charged for the check-cashing transactions would not be deemed usurious.

[FN89]. Ark. Code Ann. § 23-52-104(c).

[FN90]. See *supra* notes 57-79 and accompanying text (explaining the difference between a check-cashing and a deferred presentment transaction).

[FN91]. Ark. Code Ann. § 23-52-104(c). It is interesting to note that that the Act allows double charging for deferred deposit transactions involving personal checks. Compare Ark. Code Ann. § 23-52-104(a)(6) (allowing charges for "[p]rocessing, documenting, and closing the check-cashing or deferred-deposit transaction"), with Ark. Code Ann. § 23-52-104(c)(2) (allowing an additional fee of ten dollars for a deferred presentment option with a personal check). Incidentally, personal checks are the standard way of conducting a deferred presentment transaction.

[FN92]. Ark. Code Ann. § 23-52-104(c).

[FN93]. Ark. Code Ann. § 23-52-104(c) (Repl. 2000).

[FN94]. Ark. Code Ann. § 23-52-104(c)(1)(A)-(C).

[FN95]. Ark. Code Ann. § 23-52-104(c)(1)(A)-(C).

[FN96]. Ark. Code Ann. § 23-52-105 (Repl. 2000).

[FN97]. Ark. Code Ann. § 23-52-105.

[FN98]. See *infra* appendix B.

[FN99]. Ark. Code Ann. § 23-52-105.

[FN100]. See Ark. Code Ann. § 23-52-106 (Repl. 2000).

[FN101]. Ark. Code Ann. § 23-52-106(c).

[FN102]. Ark. Code Ann. § 23-52-106(c).

[FN103]. See supra notes 77-78 and accompanying text. If a check casher only accepts a partial payment under the repurchase option, then he or she cannot present the check and cannot charge any additional fees. This effectively limits any recourse to the drawer only. Ark. Code Ann. § 23-52-106(d).

[FN104]. Ark. Code Ann. § 23-52-106(d).

[FN105]. Moreover, the Uniform Commercial Code states that a check that has not been presented within ninety (90) days of the date written or issued is "overdue." U.C.C. § 3-304 (1994).

[FN106]. Ark. Code Ann. § 23-52-106(m) (Repl. 2000).

[FN107]. Ark. Code Ann. § 23-52-106(n). This process is also commonly referred to as "rolling over" of debt. Brooks M. Stephens, *Taking Dollars and Making Sense* 344 (1996).

[FN108]. See generally Winston v. Pers. Fin. Co. of Pine Bluff, 220 Ark. 580, 249 S.W.2d 315 (1952); Strickler v. State Auto Fin. Co., 220 Ark. 565, 249 S.W.2d 307 (1952).

[FN109]. 1951 Ark. Acts 203.

[FN110]. Compare 1951 Ark. Acts 203, § 27 (stating that "[t]he charges set forth in such paragraphs ... shall be presumed to bear a reasonable relation to the service ... and such charges shall not be considered to be interest or compensation for the use or forbearance or detention of money"), with Ark. Code Ann. § 23-52-104(b) (Repl. 2000) (stating that "[t]he fee ... shall not be deemed interest for any purpose of law").

[FN111]. See Winston, 220 Ark. at 588, 249 S.W.2d at 319; Strickler, 220 Ark. at 578, 249 S.W.2d at 313.

[FN112]. Pub. Loan Co. of Fayetteville v. Peterson, 224 Ark. 22, 271 S.W.2d 353 (1954).

[FN113]. Strickler, 220 Ark. at 567, 249 S.W.2d at 308.

[FN114]. *Id.*; see 1951 Ark. Acts 203, § § 27(b), (f).

[FN115]. Strickler, 220 Ark. at 567, 249 S.W.2d at 308 .

[FN116]. *Id.* at 573, 249 S.W.2d at 312 . It was also of some concern to the court that the two insurance policies were issued by an Arkansas company that was primarily owned by the father

of the majority owners of the lender corporation. Moreover, the lending corporation retained fifty percent of all life insurance premiums and thirty-five percent of all health and accident premiums paid by the borrower. Id. at 569, 249 S.W.2d at 309. Thus, it is possible that the court was troubled by the collusive nature of the insurance transactions, and this played an important role in the court's decision.

[FN117]. Id. at 572, 249 S.W.2d at 310. In 1954, ten percent interest was the maximum permitted by law. Ark. Const. of 1874, art. XIX, § 13. The court reasoned that the constitutional usury provision constrained the legislature, and the legislature was powerless to deviate from the constitution's commands.

[FN118]. Id. at 572, 249 S.W.2d at 311 .

[FN119]. Id. The court reasoned that the legislature cannot authorize fees for expenses of rents, salaries, and losses on loans and carve out a niche for small loan companies where in doing so flies in the face of the state constitution and would be discriminatory against other lenders. Id. at 573, 249 S.W.2d at 311 (citing Family Loan Co. v. Hickerson, 73 S.W.2d 694 (Tenn. 1934)). The court also cited to Texas case law holding that a lender may not charge the borrower the highest rate of interest and assess a fee upon the borrower to help pay the lender's general business expenses. Id. at 574, 249 S.W.2d at 312.

[FN120]. Strickler, 220 Ark. at 575, 249 S.W.2d at 312 (citing Habach v. Johnson, 132 Ark. 374, 201 S.W. 286 (1918)); Doyle v. Am. Loan Co., 185 Ark. 233, 46 S.W.2d 803 (1932).

[FN121]. Strickler, 220 Ark. at 575, 249 S.W.2d at 312 (citing Habach, 132 Ark. at 374, 201 S.W. at 286); Doyle, 185 Ark. at 233, 46 S.W.2d at 803.

[FN122]. Strickler, 220 Ark. at 577-78, 249 S.W.2d at 313 (citing Wilson v. Whitworth, 197 Ark. 675, 125 S.W.2d 112 (1939)).

[FN123]. See generally Winston, 220 Ark. at 583, 249 S.W.2d at 317.

[FN124]. Id. at 581, 249 S.W.2d at 316.

[FN125]. Id. at 583-84, 249 S.W.2d at 318. It is important to note here that while the court upheld the validity of this particular service charge, it specifically held that after Winston, charges for travel expenses for inspection of collateral would be subject to reconsideration in light of the constitutional inhibition against usury. Id. at 584, 249 S.W.2d at 318.

[FN126]. In some of the amici curiae briefs, lenders argued that the Small Loans Act was intended to protect the general welfare of the poor. Id. at 589, 249 S.W.2d at 320. However, the court held that the constitution is the bedrock by which it will protect all citizens, and the courts will "stand on the [c]onstitution." Id. Moreover, the court stated that it would look "through [the] words used to cloak usury" because "the law shells the covering and extracts the kernel ... and here the 'service charge' [was] a mere shell to conceal the kernel of usury." Id. at 586-87, 249 S.W.2d at 319 (citing Sparks v. Robinson, 66 Ark. 460, 51 S.W. 460 (1899)).

[FN127]. Id. at 588-89, 249 S.W.2d at 319-20.

[FN128]. See Ark. Const. art XIX § 13.

[FN129]. Winston, 220 Ark. at 588-89, 249 S.W.2d at 319-20.

[FN130]. Peterson, 224 Ark. at 22, 271 S.W.2d at 353.

[FN131]. Id.

[FN132]. 344 Ark. 232, 40 S.W.3d 745 (2001). Recall that section 104(b) mandated that fees associated with the deferred presentment check-cashing transaction did not constitute interest. See *supra* note 88 and accompanying text.

[FN133]. Luebbers, 344 Ark. at 240 n.4, 40 S.W.3d at 750 n.4.

[FN134]. See generally id. at 232, 40 S.W.3d at 745. See Ark. Const. art. VII, § § 1,2; Ark. Const. art. XIX, § 13.

[FN135]. Luebbers, 344 Ark. at 236, 40 S.W.3d at 747.

[FN136]. Id. at 239, 40 S.W.3d at 749.

[FN137]. Id.

[FN138]. Id.

[FN139]. Id. at 239, 40 S.W.3d at 749.

[FN140]. Luebbers, 344 Ark. at 239, 40 S.W.3d at 750. This maxim was also cited by the court in 1899. See Sparks v. Robinson, 66 Ark. 460, 462, 51 S.W. 460, 461 (1899).

[FN141]. Luebbers, 344 Ark. at 240, 40 S.W.3d at 750.

[FN142]. Id. at 241, 40 S.W.3d at 750. The court noted that although the parties extensively briefed the issue of whether the fee charged by Money Store, Inc. constituted interest, because the trial court did not rule on the issue, it was not properly before the court on appeal.

[FN143]. As of April 2002, the check-cashing industry was still engaging in deferred presentment transactions.

[FN144]. See *infra* notes 148-59 and accompanying text.

[FN145]. See White v. Check Holders, Inc., 996 S.W.2d 496, 497 (Ky. 1999); Greenberg v. Commonwealth, 499 S.E.2d 266, 268 (Va. 1998).

[FN146]. See infra notes 156-58 and accompanying text.

[FN147]. See State v. Roderick, 704 So. 2d 49, 53 (Miss. 1997). The court also determined that discounting notes in advance is not in itself usurious but noted that discounting is limited to the maximum rate allowed by state law. Id. (citing Evans v. Nat'l Bank of Savannah, 251 U.S. 108, 113-14 (1919)).

[FN148]. See Ky. Rev. Stat. Ann. § 360.010 (Michie 1996).

[FN149]. Ky. Rev. Stat. Ann. § 368.100(2) (Michie 1996).

[FN150]. See generally Hamilton v. York, 987 F. Supp. 953 (E.D. Ky. 1997); Miller v. HLT Check Exch., 215 B.R. 970 (Bankr. E.D. Ky. 1997).

[FN151]. Ky. Rev. Stat. Ann. § 368.020 (Michie 1996).

[FN152]. Va. Code Ann. § 6.1-330.56 (Michie 1999).

[FN153]. Va. Code Ann. § 6.1-249 (Michie 1999).

[FN154]. Greenberg, 499 S.E.2d at 268.

[FN155]. Id.

[FN156]. Miss. Code Ann. § 75-17-1 (2000).

[FN157]. See Roderick, 704 So. 2d at 55 (holding that while deferred presentment may be subject to civil usury penalties, Mississippi's RICO Act is too vague to allow for a criminal prosecution).

[FN158]. See Miss. Code Ann. § § 75-67-501 to -511 (2000).

[FN159]. See Cal. Civ. Code § 1789.30 (West 1998); Colo. Rev. Stat. § 5-3-501 (2000); D.C. Code Ann. § 28-4701 (2000); Fla. Stat. Ann. § 560.201 (West 1997); Haw. Rev. Stat. § § 480F-1 to -7 (2001); Iowa Code § 536.14 (2000); Kan. Stat. Ann. § 16A-2-404 (1999); Ky. Rev. Stat. Ann. § 368.010 (Michie 1996); La. Rev. Stat. Ann. § 9:3577.1 (West 1999); Minn. Stat. Ann. § 47.60 (West 2000); Miss. Code Ann. § § 75-67-501 to -539 (2000); Mo. Rev. Stat. § 408.500 (2001); Mont. Code Ann. § 31-1-701 to -725 (2000); Neb. Rev. Stat. § 45-901 (2000); Nev. Rev. Stat. § 604.010 (1999); N.C. Gen. Stat. § 53-275 (1997); Ohio Rev. Code Ann. § 1315.35 (Anderson 1996); Okla. Stat. tit. 14A, § 3-508B (1996); S.C. Code Ann. § 34-39-110 (Law. Co-op. 1998); Tenn. Code Ann. § 45-17-101 (1999); Utah Code Ann. § 7-23-101 (1999); Wash. Rev. Code § 31.45.010 (2000); Wyo. Stat. Ann. § 40-14-362 (Michie 2000).

[FN160]. See supra notes 144-59 and accompanying text.

[FN161]. California also has a constitutional prohibition on usury; however, the California Constitution gives some deference to the legislature in defining interest. See Cal. Const. art. XV (amended 1979).

[FN162]. Ark. Const. art. XIX, § 13.

[FN163]. See *infra* appendix B.

[FN164]. See *supra* notes 108-43 and accompanying text.

[FN165]. See *supra* notes 108-43 and accompanying text.

[FN166]. See *supra* notes 132-36 and accompanying text.

[FN167]. Ark. Const. art. XIX, § 13.

[FN168]. See *supra* note 161, *infra* note 169, and accompanying text (describing the California constitutional amendment that might serve as a helpful example for the Arkansas General Assembly).

[FN169]. The California Constitution's usury provision provides for several such "special circumstances" under which the legislature may define interest, and reads in part:

[h]owever none of the above restrictions shall apply to any obligations of loans made by, or forbearances of, ... any duly licensed pawnbroker or personal property broker The legislature may from time to time prescribe the maximum rate per annum of, or provide for the supervision, or the filing of schedule of, or in any manner fix, regulate or limit, the fees, bonuses, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge or receive from a borrower in connection with any loan or forbearance of any money, goods or things in action.

Cal. Const. art. XV, § 1(2) (amended 1979).

[FN170]. Ark. Const. art. XIX, § 22 (addressing a proposed amendment by the general assembly); Ark. Const. amend. VII (dealing with a proposed amendment by initiative).

[FN171]. Ark. Const. amend. VII.

[FN172]. For an excellent discussion on the framework for legislatively proposed constitutional amendments, see Stephen B. Niswanger, A Practitioner's Guide to Challenging and Defending Legislatively Proposed Constitutional Amendments in Arkansas, 17 U. Ark. Little Rock L. Rev. 765 (1995). For an analysis of amending the constitution via citizen initiative, see Timothy J. Kennedy, *Initiated Constitutional Amendments in Arkansas: Strolling Through the Mine Field*, 9 U. Ark. Little Rock L. Rev. 1 (1986-87).

[FN173]. See, e.g., *Usury and Consumer Credit Regulation* 17-49 (1993).

[FN174]. See *supra* note 159 and accompanying text.

[FN175]. See supra note 169 for an appropriate model.

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