Commonwealth Of Kentucky
Franklin Circuit Court
Division I
Case No. 07-CI-00196

AMERICREDIT FINANCIAL SERVICES, PLAINTIFF

v.

Motion Of American Financial Services Association And Kentucky Bankers Association For Leave To File A Brief As *Amici Curiae*

EDDIE M. TILLMAN, DEFENDANT

* * * * * * *

AMERICAN FINANCIAL SERVICES ASSOCATION and KENTUCKY BANKERS ASSOCIATION (collectively, the "Associations") move the Court for leave to file their brief as *amici curiae* in support of the Plaintiff's motion to reconsider this Court's Order entered March 4, 2008, which declared unconstitutional the Kentucky statute (KRS 190.110) regulating finance charges in motor vehicle retail installment sales contracts. The Associations also respectfully request permission to participate in any hearing or oral argument the Court may schedule in support of the motion to reconsider.

IDENTITY OF THE MOVANTS

A. The Kentucky Bankers Association.

The Kentucky Bankers Association (the "KBA") is a trade association of 229 national and state banks and savings banks which constitute virtually all of the commercial banking industry in Kentucky. Since its founding in 1891, the Association has worked to develop sound, uniform and workable rules governing financial transactions engaged in by its members.

Those financial transactions include taking assignments of motor vehicle retail installment sales contracts entered into pursuant to the Kentucky Motor Vehicle Retail Installment Sales Act, KRS 190.090 to KRS 190.140 (the "MVRISA" or the "Act"). Those financial transactions also

include making loans to retail sellers of motor vehicles whose businesses depend upon certainty regarding the laws under which those sales are governed. Hundreds of millions of dollars of these types of financial transactions occur annually in Kentucky.

The KBA regularly appears in courts of the Commonwealth of Kentucky as an *amicus curiae* on issues of industry-wide significance. Such participation included the KBA's participation before both the Kentucky Court of Appeals and the Kentucky Supreme Court in the last case which generated a published decision interpreting the provisions of the Kentucky MVRISA – Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d 287 (Ky. 1991). As the KBA explains in its *amici curiae* brief, the Court of Appeals' decision in that case (affirmed on other grounds by the Supreme Court) refutes this Court's conclusion that KRS 190.110 must be declared unconstitutional on vagueness grounds.

B. The American Financial Services Association.

Founded in 1916, the American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry. AFSA's current membership consists of nearly 350 Active (consumer credit, industrial bank and commercial finance companies with over 10,000 branch offices nationwide), Associate (industry suppliers), Affiliate (state associations) and Foreign financial services companies. Like the KBA, AFSA regularly appears as an *amicus curiae* in cases of significance affecting the consumer credit industry.

A major group of AFSA's members are involved in the financing of the purchase of motor vehicles by consumers in the Commonwealth. These members include the major finance companies affiliated with motor vehicle manufacturers that provide motor vehicle financing (*e g* , American Honda Finance Corporation, DaimlerChrysler Financial Services Americas, LLC, GMAC, LLC, Ford Motor Credit Company, Harley-Davidson Financial Services, Inc., Nissan Motor Acceptance

Corporation, Toyota Motor Credit Corporation, and World Omni Financial Corporation). AFSA's member companies also include other entities that provide indirect financing to automotive dealers of new and pre-owned vehicle customers (*e g* , Capital One Auto Finance, Inc., CitiFinancial Auto Credit, Inc., Reliable Credit Association, Inc., HSBC Auto Finance, Inc., Mission Financial Services, LLC, and Wells Fargo Auto Finance, Inc.).

THE INDUSTRY AFFECTED

This case involves a retail sale in 2000 of a used Mazda B2300. According to the U.S. Census Bureau in 2000, there were 54.8 million retail sales of new and used motor vehicles in the United States with a transaction value of $737 billion. See U.S. Census Bureau, Table 1026 (Retail Sales And Leases Of New And Used Vehicles: 1990 to 2005 (http://www.census.gov/compendia/statab/cats/wholesale_retail_trade/motor_vehicle_sales.html).

Assuming that Kentucky had only 1/50th of this amount, retail sales in Kentucky would involve 1.09 million motor vehicle sales totaling almost $15 billion. Transactions in these volumes and dollar amounts reflect the critical role motor vehicles perform in the modern economy. Indeed, the Kentucky Motor Vehicle Commission lists over 3,465 businesses currently holding motor vehicle dealer's licenses issued under KRS 190.030. See Kentucky Motor Vehicle Commission Dealer List (http://www.mvc.ky.gov/licensee). The number of employees and other persons in Kentucky whose livelihoods depend upon such businesses is in the tens of thousands.

THE MATTERS TO BE PRESENTED BY THE ASSOCIATIONS

On March 4, 2008, this Court *sua sponte* declared that the finance charge provisions of KRS 190.110 were unconstitutional and applied the general usury statute of KRS 360.010 to declare the motor vehicle retail installment sale contract at issue to be usurious. It ordered Plaintiff, AmeriCredit Financial Services ("AmerCredit"), to forfeit all "interest".

The Associations' tendered *amici curiae* memorandum addresses four points which demonstrate why the March 4, 2008, Order should be set aside.

1. The History Of The MVRISA, The Industry's Reliance Upon It, And The Court Of Appeals' Finding In The Capitol Cadillac Olds Case That The Statute Is "Clear".

The Associations respectfully disagree with a conclusion that a statute that has been followed by an entire industry since 1956 is unconstitutionally vague.

Indeed, in the last case involving the MVRISA and resulting in a reported decision (Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d 287 (Ky. 1991)), the Kentucky Court of Appeals found that it was "clear to us" that the proper way of interpreting KRS 190.110 was the interpretation presented by AmeriCredit. In that case, the Court of Appeals noted that the language in Subsection (2) of KRS 190.110 stated that "the finance charge shall be computed proportionately," and applied this provision to conclude that "the statute allows the total finance charge to be adjusted up or down in relation to the length of the loan." This resolved the time period issue that this Court discussed in its March 4, 2008, Order. A copy of the Court of Appeals' opinion in Capitol Cadillac Olds, Inc. v. Roberts is included in the appendix to the memorandum of law tendered by the *amici*.

2. The Kentucky Supreme Court's Decision In Munson v. White That The General Usury Statute Does Not Apply To A Motor Vehicle Retail Installment Sale Means Invalidation Of KRS 190.110 Removes All Rate Regulation.

Moreover, the consequence of eliminating the 1956 statute is not the application of the interest rate limits of KRS 360.010. Rather, under the "Time Sale Doctrine" and the express holding in 1949 of the Kentucky Supreme Court in Munson v. White, 339 Ky. 293, 217 S.W.2d 641 (1949), the transaction is not a loan, the payments are not interest, and "the usury statute, KRS 360.020, is not applicable." Id. at 643. Thus, the conclusion that KRS 190.110 is invalid means that there is no limit on the amount of the finance charge that can be contracted for.

The General Assembly in 1956 responded to this 1949 ruling and enacted the MVRISA and its finance charge limits. The Court's decision would return to the unregulated pre-1956 era.

3. If KRS 360.010 Applies, It Was Misinterpreted By This Court Because There Is Not A 19% Rate Allowed For Contracts Of Less Than $15,000 In The Current Rate Environment.

Even if KRS 360.010 were applicable, it was misinterpreted by this Court. It appears that the Court believes that KRS 360.010 allows a 19% interest rate on loans of less than $15,000 in all cases. That is not the case. KRS 360.010(1) provides that on loans of $15,000 or less, the parties may agree to an annual interest rate in excess of 8% provided the interest rate agreed "is not to exceed four percent (4%) in excess of the discount rate on ninety (90) day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the transaction is consummated or nineteen percent (19%), whichever is less."

On February 8, 2000 (the date of the installment contract at issue), the Federal Reserve Bank's discount rate for 90-day commercial paper was 5.25%. See Federal Reserve Board's Statistical Release H.15 (Selected Interest Rates) (http://www.federalreserve.gov/releases/h15/data.htm#fn2). Thus, on February 8, 2000, if applied to Mr. Tillman's purchase of the Mazda B2300 for a principal balance (the "amount financed" using TILA terminology) of $11,961.90, the "usury rate" under KRS 360.010 would be the lesser of 19% or 9.25% (5.25% + 4%).

Today, the Federal Reserve Bank's discount rate is 3.25% resulting in a "usury rate" of 8% for loans of less than $15,000.[1] This is because the "lesser of" rate of 7.25% (4% + 3.25% discount rate) is less than the 8% general limit of KRS 360.010(1). This is dramatically below the rates

[1] Technically, 3.25% is the discount rate for primary credit from the Federal Reserve Bank for the District of New York which lowered its discount rate from 3.5% by .25% on March 17, 2008, to deal with the current "credit crunch." As of the printing of this motion, the Federal Reserve Banks for the Districts of Cleveland and St. Louis (in which Kentucky is located and whose rates are those applied under KRS 360.010(1)) have not yet lowered their rate to follow the lead of the District of New

authorized by KRS 190.110. Thus, for transactions below $15,000, a much more restrictive credit environment will exist for motor vehicle dealers than that apparently contemplated by the Court in its March 4, 2008, Order. Under such restrictions, retail installment credit sales of motor vehicles by motor vehicle dealers, particularly for older vehicles, will effectively cease.

On the other hand, if the principal balance for the motor vehicle is more than $15,000, then there is no usury limit under KRS 360.010 even though there would be a limit under KRS 190.110.

4. The Court's Order Does Not Discuss The "Knowingly Done" Requirement Under KRS 360.020 For A Forfeiture Of Interest.

In ordering a forfeiture of all interest, this Court did not address the requirement of KRS 360.020 that a forfeiture only applies to a usurious transaction "when knowingly done." The Associations find it inconceivable that their members might be found to have "knowingly" engaged in a usurious transaction when their members have been following a statute that has been in force since 1956 (and even has twice been amended since then to deal with changing economic circumstances). The Associations do not believe that the General Assembly contemplated, or permitted, the penalties of KRS 360.020 to be applied retroactively to retail installment sales contracts which followed the longstanding interpretation of KRS 190.110 simply because a Court finds that statute to be unconstitutionally vague.

If the Court intends to stand by its ruling that KRS 190.110 is unconstitutionally vague, the Associations' memorandum explains why the Court should make clear that the ruling does not apply to any transaction entered into prior to the time the order becomes final and all appeals of such ruling have been fully and completely resolved.

York, although they are expected to do so shortly.

REQUEST FOR LEAVE TO APPEAR

This Court should permit the Associations to file their brief as *amici curiae* so that the Court can have the perspective of the motor vehicle financing industry on the legal issues raised by declaring KRS 190.110 unconstitutional. The Associations should also be permitted to participate, by counsel, in any hearing or oral argument the Court may schedule so that the Association's counsel may answer any questions the Court may have about their *amici curiae* filings.

An appropriate order is tendered herewith.

Respectfully submitted,

MORGAN & POTTINGER, P.S.C.

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CERTIFICATE OF SERVICE

I certify that copies hereof together with the accompanying "*Amici Curiae* Brief Of American Financial Services Association And Kentucky Bankers Association" and the Appendix Of Authorities were served in the method indicated this 11th day of March 2008, on the following: (1) hand delivered and emailed to **Thomas L. Canary, Jr.**, Mapother & Mapother, P.S.C., 300 East Main Street, Suite 340, Lexington, KY 40507, tcanary@mapother-atty.com, Counsel for Plaintiff; (2) mailed, first-class, postage pre-paid to **Eddie M. Tillman**, 166 Centennial Drive, Frankfort, KY; and (3) mailed, first-class, postage pre-paid to **Todd Leatherman**, Office of the Attorney General of the Commonwealth of Kentucky, Division Of Consumer Protection, 1024 Capital Centre Drive, Frankfort, KY 40601.

_____
Counsel For Amici Curiae

Commonwealth Of Kentucky
Franklin Circuit Court
Division I
Case No. 07-CI-00196

AMERICREDIT FINANCIAL SERVICES, PLAINTIFF

v. **ORDER**

EDDIE M. TILLMAN, DEFENDANT

* * * * * * *

The motion of American Financial Services Association and Kentucky Bankers Association for leave to file a brief as *amici curiae* in the above-styled action is granted, and said brief is ordered filed.

So **Ordered** this the ___ day of March, 2008.

_____
JUDGE, FRANKLIN CIRCUIT COURT

Date: _____, 2008.

TENDERED BY:

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Franklin Circuit Court
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AMERICREDIT FINANCIAL SERVICES, PLAINTIFF

v.

EDDIE M. TILLMAN, DEFENDANT

***Amici Curiae* Brief Of**
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CERTIFICATE OF SERVICE

I certify that copies hereof together with the accompanying "Motion Of American Financial Services Association And The Kentucky Bankers Association For Leave To File A Brief As *Amici Curiae*" and the Appendix of Authorities were served in the method indicated this 11th day of March 2008, on the following: (1) hand delivered and emailed to **Thomas L. Canary, Jr.**, Mapother & Mapother, P.S.C., 300 East Main Street, Suite 340, Lexington, KY 40507, tcanary@mapother-atty.com, Counsel for Plaintiff; (2) mailed, first-class, postage pre-paid to **Eddie M. Tillman**, 166 Centennial Drive, Frankfort, KY; and (3) mailed, first-class, postage pre-paid to **Todd Leatherman**, Office of the Attorney General of the Commonwealth of Kentucky, Division Of Consumer Protection, 1024 Capital Centre Drive, Frankfort, KY 40601.

Counsel For *Amici Curiae*

Table Of Contents

Appendix:

Tab 1: Van Asperen v. Darling Olds, Inc., 254 Minn. 62, 93 N.W.2d 690 (1958)

Tab 2: April 21, 1989, Opinion of Court of Appeals in Roberts v. Capitol Cadillac Olds, Inc., aff'd on other grounds, Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d 287 (Ky. 1991).

INTRODUCTION

This case involves a motor vehicle retail installment sales contract entered into pursuant to the Kentucky Motor Vehicle Retail Installment Sales Act, KRS 190.090 to KRS 190.140 (the "MVRISA" or the "Act"). Included in the Act, at KRS 190.110, are statutory provisions regulating the "rates" of the "finance charge" that the purchaser may be required to pay. Since its enactment in 1956, millions of motor vehicles have been sold by thousands of licensed Kentucky motor vehicle dealers through retail installment sales without any question as to the validity of this rate regulation.

On March 4, 2008, this Court *sua* sponte and without prior notice to either the parties or the Kentucky Attorney General,[1] entered an Order which declared unconstitutional the provisions of KRS 190.110 as being "void for vagueness." In its Order and based upon KRS 360.020, the Court further ruled that Plaintiff, AmeriCredit Financial Services ("AmeriCredit"), should forfeit of all the finance charges agreed to in the motor vehicle retail installment sales contract signed by Defendant, Eddie M. Tillman. The Court ordered this forfeiture even though there was no evidence that AmeriCredit had "knowingly" engaged in a usurious transaction as is required to be shown by KRS 360.020 (assuming the statute applies, which it does not). Indeed, it is difficult to see how there could ever be such a showing when KRS 190.110 was believed to be the applicable rate regulation until this Court's March 4th Order.

American Financial Services Association ("AFSA") and Kentucky Bankers Association ("KBA") (collectively, the "Associations"), as *amici curiae*, submit the following brief in support of

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[1]To prevent the disruption that inevitably follows when a statute is declared unconstitutional, the General Assembly enacted KRS 418.075(1) which requires "[i]n any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard . . ." See also Stewart v. Estate of Cooper, 102 S.W.2d 913, 915 & n. 4 (Ky. 2003) (it is improper for a court to rule on a constitutional challenge to a statute when KRS 418.075 has not been complied with).

the motion filed by AmeriCredit requesting the Court reconsider its March 4th Order. The Associations respectfully disagree with a conclusion that a statute that has been followed by an entire industry since 1956 is unconstitutionally vague. Rather, they believe that with an explanation of the history of the statute, its language and judicial interpretations, and the consequences of the Court's March 4th Order, the Court will conclude and declare that KRS 190.110 is now, and has been since its enactment in 1956, an understandable and constitutional regulation of the finance charges that can be imposed in a motor vehicle retail installment sale.

I. KRS 190.110 IS NOT UNCONSTITUTIONALLY VAGUE.

The Associations respectfully disagree with a conclusion that a statute that has been consistently interpreted and followed by an entire industry since 1956 is unconstitutionally vague.

In its March 4, 2008, Order, the Court expressed concern about how to apply the "dollar per hundred" rates in KRS 190.110 to a multiyear transaction. That question is answered by the "computed proportionally" language of KRS 190.110(2), the Court of Appeal's decision in the case of Roberts v. Capitol Cadillac Olds, Inc., No. 87-CA-1245 (4/21/89), aff'd on other grounds, Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d 287 (Ky. 1991), and decisions from Minnesota, Pennsylvania and Texas interpreting their similar motor vehicle installment sales statutes.

The Association believes that much of the Court's frustration with the application of the MVRISA stems from the fact that KRS 190.110(1) was enacted in 1956 in an era when there were not computers or financial calculators to easily compute annual percentage rates or amortizing monthly payments under the remaining balance method. Thus, the statute referred to a commonly used "rate per hundred" or "Add-On" methodology that calculated the maximum finance charges using simple arithmetic. Indeed, in the 1950's, the form and language of Kentucky's MVRISA was

being adopted by legislatures nationwide as part of a trend to deal with the post-WWII growth of the automobile industry. Thus, the Associations now turn the historical background of the statute.[2]

A. Installment Sales And The Time Sale Doctrine.

Prior to the adoption of statutes specifically addressed to regulating finance charges in the installment sales of motor vehicles, Kentucky and all other states had only enacted general usury statutes. See 1893 Ky. Acts ch. 234 (now KRS 360.010). These statutes prohibited a loan or forbearance of money, repayable absolutely, at a charge in excess of the interest allowed by law.

However, most jurisdictions, including Kentucky, did not view installment sales as being within the scope of these general usury statutes. Rather, they viewed such sales under the "Time Sale Doctrine" which allowed a seller to offer a product at two different prices, one a cash price and the other at a time or installment payment price. Courts reviewing these transactions viewed them as outside the scope of the general usury statutes because there is neither a loan of money or forbearance - there being no money received by the purchaser from the seller. Under the "Time Sale Doctrine," the courts held that the transaction was merely a sale at a higher price which the seller was entitled to charge to cover the risks of selling on time. See generally, Comment, Retail Installment Sales -- History and Development of Regulation, 45 Marq. L. Rev. 555, 560 (1962) ("The majority position in the United States is that the general usury statutes do not apply to installment sales.") (hereinafter "Marquette Historical Review.").

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[2]It is appropriate to review this historical background as courts are entitled "to give consideration to contemporaneous circumstances throwing light on the legislature's intent." Hamilton v. Int'l U. of Op. Eng., 262 S.W.2d 695 (Ky. 1953). Furthermore, a court "may take judicial notice of the historical setting and conditions out of which an Act was promulgated." Id. See also Martin v. Louisville Motors, 276 Ky. 696, 125 S.W.2d 241, 245 (1939). Indeed, Kentucky courts have often taken judicial notice of the trade practices of the automobile industry in interpreting statutory or contractual provisions. Rash v. North British & Mercantile Ins. Co., 246 S.W.2d 990, 991-992 (Ky. 1951) (taking judicial notice of practice of test drives); Elizabethtown Lincoln Mercury v. Jones, 313 Ky. 321, 231 S.W.2d 42, 43-44 (1950) (notice taken of dealer waiting lists); State Auto Mut. Ins. Co. v. Cox, Ky., 309 Ky. 480, 218 S.W.2d 46, 47-48 (1949) (dealer waiting lists).

The leading English and United States cases developing the Time Sale Doctrine are Beete v. Bidgood, 7 B. & C. 453, 108 Eng. Rep. 792 (K.B. 1927) and Hogg v. Ruffner, 66 U.S. (1 Black) 115 (1861). In Kentucky, the two leading cases applying the Time Sale Doctrine in the context of motor vehicle installment sales are Munson v. White, 309 Ky. 295, 217 S.W.2d 641 (1949), and Cartwright v. C.I.T. Corp., 253 Ky. 690, 70 S.W.2d 388 (1934). See generally, Britton & Ulrich, The Illinois Retail Installment Sales Act -- Historical Background and Comparative Legislation, 53 Nw. U.L. Rev. 137, 141 (1958).

B. The States Begin Regulating Motor Vehicle Installment Sales.

With the advent of mass production in the automobile industry during the early 1900's, retail installment sales increased dramatically and began to attract the attention of state legislatures. From less than one billion dollars in 1918 installment sales increased to $14.7 billion in 1950 and to $33.1 billion in 1958. See Ill. Bus. Rev., Nov. 1958, p. 5. More importantly, nearly $15 billion of this $33 billion consisted of automobile paper. Id. See also Federal Reserve System Board of Governors, Consumer Installment Credit, Part I: Consumer Instalment Credit, Growth and Import, Vol. 1 at 22-24 (1957) (hereinafter "Federal Reserve's Installment Credit Report").

State regulation of motor vehicle retail installment sale began in 1935 when Wisconsin enacted legislation which required certain disclosures and set forth the maximum finance charge rate. See Wis. Laws 1935, c. 474 (codified at Wis. Stat. §218.01(6) (1939)). The Wisconsin statute was summarized as follows:

> The Wisconsin act divides motor vehicles into four classes: 1.) new vehicles—on which a financing charge of $7.00 per $100 per annum is permitted; 2.) vehicles not more than 2 years old—on which a financing charge of $9.00 per $100 per annum is permitted; 3.) vehicles not more than 5 years old—on which a charge of $12.00 per $100 per annum in permitted; and 4.) all other vehicles—on which a charge of $13.00 per $100 per annum is permitted. This classification of the automobile based upon its age recognizes the seller's higher security risk on older automobile.

See Marquette Historical Review at pp. 579-580. Interestingly, Wisconsin has now abandoned its historical rate regulation of motor vehicle installment sales. Wis. Stat. §218.0142(3) now provides that "a retail installment sale made after October 31, 1984, is not subject to any maximum finance charge limit."

In addition to Wisconsin's 1935 legislation, in that same year Indiana enacted a law addressed to all installment sales with a cash price not in excess of $2,500 but delegating to the Department of Financial Institutions the authority to set the maximum permissible charges. See Ind. Stat. Ann. § 58-926 (1951).[3]

World War II interrupted the manufacture of automobiles and other consumer durables, thereby delaying pressures to regulate installment sales.[4] However, beginning in the 1950's, the issue of regulating installment sales was widely discussed. Numerous law review articles were written on the topic.[5] Both the National Conference of Commissioners on Uniform State Laws and the Council

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[3]Indiana currently regulates the credit service charge for consumer sales other than revolving charges accounts at rates that range from 15% to 36% per year calculated according to the actuarial method and depending upon the amount of the credit sale amount not paid at the time of purchase. See I.C. 24-4.5-2-201(2). Indiana expressly allows use of "add-on" "discount" and other methods of calculation so to as the resulting service charge does not exceed the maximum amount allowed using an actuarial method calculation. See I.C. 24-4.5-2-201(3).

[4]Britton & Ulrich, The Illinois Retail Installment Sales Act -- Historical Background and Comparative Legislation, 53 Nw. L. Rev. 137, 150 (1958).

[5]Donaldson, Retail Installment Sales Legislation, 19 Rocky Mt. L. Rev. 135 (1947); Note, Recent Statutory Regulation of Consumer Sales Financing As Exemplified by Automobile Sales Finance Acts, 101 U. Pa. L. Rev. 530 (1953); Note, The Retail Installment Financing of Motor Vehicles -- A Survey of Recent Iowa Legislation, 7 Drake L. Rev. 65 (1957); Comment, Retail Installment Sales -- History and Development of Regulation, 45 Marq. L. Rev. 555 (1962); Warren, Regulation of Finance Charges in Retail Installment Sales, 68 Yale L. J. 839 (1959); Britton & Ulrich, The Illinois Retail Installment Sales Act -- Historical Background and Comparative Legislation, 53 Nw. U. L. Rev. 137 (1958); Anderson, Retail Installment Sales and Revolving Credit Acts: Missouri Constitution Article III, Section 44, 25 Mo. L. Rev. 239 (1960).

for State Governments formed committees which analyzed such legislation.[6] State legislatures prepared reports.[7]

By far the most comprehensive report on consumer installment credit was the four part, six volume Federal Reserve Installment Credit Report prepared in 1957 at the direction of President Eisenhower. It described in great detail the nature of automobile financing in spring 1956, the exact period when KRS 190.110 was enacted. It stated:

> The finance charge [on automobile retail installment contracts] is ordinarily calculated by applying a percentage, known as an "add-on" rate, to the sum of the unpaid balance on the car and whatever insurance premiums are included. For example, a "6 percent" add-on rate involves a finance charge of $6 per year for each $100 of credit the buyer receives.

See Federal Reserve Installment Credit Report, Part IV: Financing New Car Purchases, at 73 (footnote omitted) (emphasis added).

The use of the add-on rate methodology in their legislation by Kentucky, Wisconsin and other states reflects the simplicity of its use in an era without computers or financial calculators. A motor vehicle dealer or the customer could sit at a table and with pencil and paper easily calculate the maximum permissible finance charge.

In a transaction like Mr. Tillman's – a 3-year-year old truck with an amount financed[8] of $11,961.90 which the purchaser wishes to have 5 years to pay. The dealer could take the amount financed ($11,961.90) and multiply it by rate/hundred for a 3-year-old motor vehicle ($15/$100 or

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[6]See "Report of Special Committee on Uniform Retail Instalment Sales Finance Act," Handbook of the National Conference of Commissioners on Uniform State Laws (1959) at 205-207. Council of State Governments: Suggested State Legislation for 1957 at 171-173.

[7]Illinois Legislative Council, Bulletin 2-590, "Regulating Installment Financing, With Special Reference to Automobile Purchases," (March 1956).

[8]The MVRISA uses the term "principal balance". See KRS 190.110(2) and KRS 190.100(2)(f). The regulations implementing the federal Truth And Lending Act ("TILA") uses the term "amount financed". See 12 C.F.R. §226.18(b). Since Mr. Tillman's contract contained the "Truth In Lending Disclosures" box conspicuously disclosing the payment terms using the TILA terminology, the Associations will principally use

.15) and multiply that by the number of years of repayment (5 years). This results in an amount which is the maximum permissible finance charge ($8,971.42 = $11,961.90 x .15 x 5). If the total finance charge is less than that number, the agreement is permissible.

Another way of approaching the calculation is from a monthly payment perspective since many customers make installment purchasing decisions based upon monthly payment amounts. Knowing that the total maximum that can be charged for a 5-year repayment period is $20,933.32 ($11,961.90 + $8,971.42) allows the dealer to calculate easily a maximum monthly payment over 60 months of $348.89 ($20,932.32 ÷ 60). Thus, the dealer can negotiate with the purchaser concerning the amount of the customer's 60 monthly payments knowing that any range from $199.36 (no finance charge; $11,961.90 ÷ 60) to the maximum charge of $348.89 [9] If the customer wants to pay off the car faster than 5 years, the dealer can easily, and with pencil and paper, recalculate the maximum monthly payment for any other period of time.[10]

In 1956 (and even today), the simplicity of this calculation is one of its major virtues. Indeed, Professors Dalsted and Gutierrez noted in the "Calculating Loan Interest" article cited by the Court that a "major difference" between the "remaining balance method" of interest rate calculation and the "add-on method" is "the complexity of the mathematical calculations" required under the remaining balance method. See Dalsted & Gutierrez, "Calculating Loan Interest," at p. 2

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the TILA at terminology here.

[9] With the enactment of the federal Truth In Lending Act in 1968, the customer would also be told the annual percentage rate for the monthly payment ultimately selected. See 12 C.F.R. §226.18(e).

[10] For example, if the customer wants to repay in 48 months, the dealer recalculates the maximum finance charge ($11,961.90 x .15 x 4 = $7,177.14). The dealer then adds this to the amount financed to get the maximum total amount the customer can pay ($19,139.04 = $11,961.90 + $7,177.14). The dealer then divides that by 48 to get a maximum monthly payment over 60 months of $398.73. Thus, the dealer can negotiate with the purchaser concerning the amount of the customer's 48 monthly payments knowing that any range from $249.21 (no finance charge; $11,961.90 ÷ 48) to the maximum charge of $398.73 is legal.

The Associations find it quite revealing that Professors Dalsted and Gutierrez can provide on page 2 a simple calculation formula for the "periodic payment" under the Add-On Method ($B_n = (A + I)/N$) but cannot do so under the Remaining Balance Method. Indeed, their article requires the use of an amortization table to calculate a payment amount under the Remaining Balance Method which is equal over the total repayment period. Id. at pp. 2-3 and Amortization Table 3. As explained more fully below, Kentucky's legislature in 1956 did not enact an amortization table nor require dealers to calculate or obtain one in order to lawfully engage in their business.

C. Kentucky And Minnesota Enact Similar Statutes Regulating Motor Vehicle Installment Sales And The Minnesota Supreme Court In 1958 Resolves How To Apply The Dollar/Hundred Formula Over Time.

Following the post-war nationwide trend, Kentucky enacted the MVRISA in 1956. See 1956 Ky. Acts ch. 105. The following year (1957), Minnesota enacted its equivalent statute which also used the "rate per hundred" methodology used in Kentucky. See 1957 Minn. Laws Ch. 266. The Associations direct the Court's attention to the Minnesota legislation because (a) its language mirrors the Kentucky language and (b) in 1958 the Minnesota Supreme Court addressed in Van Asperen v. Darling Olds, Inc., 254 Minn. 62, 93 N.W.2d 690 (1958) (**Appendix Tab 1**), the timing issue that so concerned this Court in its March 4th Order.

The following table compares the Kentucky and Minnesota legislation, in relevant part, as initially enacted:

Kentucky: **1956 Ky. Acts ch. 105, §3** **KRS 190.110 Finance charges -- Rates -- Computation.**	**Minnesota:** **1957 Minn. Laws Ch. 266** **Sec. 7. [168.72] Time Price Differential.**
(1) The finance charge in a retail instalment sale shall not exceed the following rates: Class 1. Any new or used motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made -- nine dollars ($9.00) per one hundred dollars ($100). Class 2. Any new motor vehicle not in class 1 and any used motor vehicle designated by the manufacturer by a year model of one (1) or two (2) years prior to the year in which the sale is made -- thirteen dollars ($13.00) per one hundred dollars ($100). Class 3. All other motor vehicles not in class 1 or 2 -- fifteen dollars ($15.00) per one hundred dollars ($100).	(a) The time price differential authorized by this act in a retail installment sale shall not exceed the following rate: Class 1. Any motor vehicle designated by the manufacturer by a year model of the same or not more than one year prior to the year in which the sale is made -- $8 per $100 per year. Class 2. Any motor vehicle designated by the manufacturer by a year model of two or three years prior to the year in which the sale is made -- $11 per $100 per year. Class 3. Any motor vehicle not in Class 1 or Class 2 -- $13 per $100 per year plus a flat charge of $3 for each such retail installment sale.
(2) Such finance charge shall be computed on the principal balance as determined under KRS 190.100(2) on contracts payable in successive monthly payments substantially equal in amount extending for a period of one (1) year. On contracts providing for instalment payments extending for a period less than or greater than one (1) year, the finance charge shall be computed proportionately.	(b) Such time price differential shall be computed on the principal balance as determined under section 6(b) of this act and shall be computed at the rate indicated on contracts payable in successive monthly installment payments substantially equal in amount for a period of one year. On contract providing for installment payments extending for a period of less than or greater than one year, the time price differential shall be computed proportionately.
(3) When a retail instalment contract provides for unequal or irregular instalment payments, the finance charge shall be at the effective rate provided in subsection (1) hereof, having due regard for the schedule of payment.	(c) When a retail installment contract provides for unequal or irregular installment payments, the time price differential shall be at the effective rate provided in subsection (a) hereof, having due regard for the schedule of payment.

In 1958, Minnesota's addressed its statute in Van Asperen v. Darling Olds, Inc., 254 Minn. 62, 93 N.W.2d 690 (1958) (**Appendix Tab 1**), and resolved the question that concerned this Court.

In Van Asperen, the debtor claimed that his contract was usurious because the finance charge was not computed on declining balances. The car dealer, relying in part on Minnesota's equivalent of KRS 190.110(2), argued that the maximum finance charge should be calculated in the same manner as that proposed by both AmeriCredit and the Associations. Indeed, the following calculation which was set forth in the Van Asperen opinion may be compared to that proposed by the Associations:

Van Asperen Opinion at p. 694		Associations' Interpretation (applied to the facts of Mr. Tillman's contract)
"$2,665.71	Unpaid Principal balance	$11,961.90
x .08	times $8.00 per $100.00 equals	x $15/$100
_____	the maximum allowable	_____
213.26	charge per year, times the	$1,794.29
x 3	term of the contract in years,	x 5
_____	equals the maximum time	_____
639.78	price differential allowable."	$8,971.25

In rejecting the debtor's argument and in adopting the car dealer's, the Van Asperen court relied on the "proportionately" language of the Act and stated:

> Against plaintiff's contention, the defendants propose and argue that the term "proportionately" as used in said subsection refers to the computation of the time price differential by multiplying for example $8 (the maximum provided) per $100 per year by the period of time it will take to liquidate the balance on the automobile. Defendants further contend that the same method of computation applies whether the contract is for a period of 1 year, less than 1 year, or greater than one year. We think the contentions of the defendants coincide with the intention the legislature had in mind both when the act was proposed and when enacted and that . . . they have left no ambiguity as to the purpose and the application of . . . §168.72(b), which includes the provision that "the time price differential shall be computed proportionately."

93 N.W.2d at 697 (Emphasis added).

What is critical to this case and the "void for vagueness" conclusion drawn by the Court in its March 4, 2008, Order is the following -- the Van Asperen court found that there was "**no ambiguity**" as to the statute.

The Van Asperen method of calculation has also been used by the courts of Pennsylvania and Texas, two states whose Motor Vehicle Retail Installment Sales Acts are similar to Kentucky's. See Dear v. Holly Jon Equipment Co., 423 A.2d 721, 725 (Pa. Super. 1980); Yates Ford, Inc. v. Ramirez, 692 S.W.2d 51, 54 (Tex. 1985). To the Association's knowledge, no court with a MVRISA like Kentucky's has declared such a statute to be unconstitutionally vague.

D. In 1989 The Kentucky Court Of Appeals Finds KRS 190.110 Is "Clear" And Adopts Americredit's And The Associations' Interpretation Of The Statute In The Capitol Cadillac Olds Case.

In the late-1980's, it was Kentucky's turn to decide how to apply the formula of KRS 190.110. The case was a lawsuit brought Gary and Angie Roberts concerning their purchase of a 1985 Oldsmobile Calais. They filed suit after the dealer, Capitol Cadillac Olds (sometimes referred to as "CCO") was unable to fix alleged defects in the vehicle to their satisfaction. Among the Roberts' various claims was that their installment sales contract was usurious and that they were entitled to recover under KRS 360.020 the amounts they had paid before they returned the Calais to CCO.

After losing in the trial court, the Roberts' appealed and reasserted their usury argument. In its April 21, 1989, Opinion, the Court of Appeals rejected the usury argument and found that it was "clear" that KRS 190.110 is applied in the manner urged in this case by AmeriCredit and the Associations. The Court of Appeals wrote:

> CCO counterclaimed against the appellants [the Roberts] after it paid the judgment against it in favor of the bank in order to recover that amount from the appellants. Appellants answered, alleging that the contract violated KRS 190.110(1) which in relevant part states:
>
> > (1) The finance charge in a retail installment sale shall not exceed the following rates:

> Class 1. Any new or used motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made -- $11.00 per $100.00.
>
> The amount financed in the contract between CCO and appellants was $10,997.31. The appellants contend that the maximum finance charge permissible under this statute is arrived at by dividing that figure by 100 and multiplying the quotient by 11, a sum which equals $1,209.70. The actual finance charge appearing in the contract is $4,873.89.

CCO argues that the finance charge was correctly computed, citing KRS 360.010. That statute concerns general usury law pertaining to interest rates, so it is not pertinent here. CCO also urges consideration of other inapplicable statutes. They are: KRS 190.100(5) which concerns assignment of the sale contract; KRS 190.110(4) which concerns the method of computing the finance charge, not what is the maximum permissible finance charge; and KRS 287.215 which conerns a bank's purchase of the sales contract. We find none of these statutes applicable.

Although the interpretation of KRS 190.110 advanced by the appellants is appealing, we are convinced by the amicus briefs filed in this case that KRS 190.110(2) supports the appellee's calculation of the finance charge. This section of the statute reads:

> (2) Such finance charge shall be computed on the principal balance as determined under KRS 190.100(2) on contracts payable in successive monthly payments substantially equal in amount extending for a period of one (1) year. On contracts providing for instalment payments extending for a period less than or greater than one (1) year, the finance charge shall be computed proportionately. [Emphasis added.] [by the Court]

It seems clear to us that this portion of the statute allows the total finance charge to be adjusted up or down in relation to the length of the loan. As the total finance charge was less than that allowed, there was no violation of KRS 190.110.

See Court of Appeals' Opinion at pp. 7-8 (underlined language was underlined in Court's opinion; bold language added by *amici* for emphasis).[11]

[11] The Court of Appeals' opinion does not give all details of the Roberts' contract. It showed an amount financed of $10,997.31. This was calculated taking the cash price of the Oldsmobile of $11,213.18, subtracting a trade-in vehicle worth $750.18 and adding $534.31 for insurance and title fees. The Roberts agreed to 60 equal monthly payments of $264.52 for a total payment of $16,621.38. The difference between the total of the 60 payments less the trade-in and the amount financed ($16,621.38 - $10,997.31 - $750.18 = $4,873.89) is the amount the Court of Appeals cited as the finance charge. Using the $11/$100 rate for Class 1 vehicles, meant that CCO could charge up to $6,048.52 as the finance charge [$6,048.52 = $10,997.31 x $.11 x 5).

Neither Capitol Cadillac Olds nor the Roberts sought discretionary review of the portion of the Court of Appeals' opinion discussing the permissible finance charge calculation under KRS 190.110. Thus, this issue was not considered by the Kentucky Supreme Court when it rendered its published opinion on August 29, 1991. See Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d 287 (Ky. 1991). Accordingly, a copy of the April 21, 1989, Court of Appeals' Opinion (which was to be published) is included in the Associations' Appendix at **Tab 2**.

The Court of Appeals' decision in Capitol Cadillac Olds that KRS 190.110 provides for an annual add-on rate is consistent with the reading given to the statute in the 1950's by the various authors reporting on the evolving regulation of motor vehicle installment sales. For example, the rate maxima set forth in these statutes was described in Professor Warren's 1959 survey as follows:

> Rate maxima for current models vary from the six dollars per one hundred dollars per annum figure in Michigan and Pennsylvania to the nine dollars per one hundred dollars per annum limit in Kentucky and Maryland. Allowable charges on models over four years old run as high as Florida's rate of seventeen dollars per one hundred dollars per annum.

68 Yale L. J. at 852 (footnotes omitted) (emphasis added).

Professor Warren was not alone in his understanding that the finance charge in KRS 190.110 was an annual rate that would be increased "proportionately" for multi-year retail installment sales. A 1957 survey published in the Drake Law Review noted:

> The following is representative of the permissible finance charges allowed by other state statutes.... Kentucky, $9, $13 and $15 per hundred principal balance per year....

Note, The Retail Installment Financing of Motor vehicles -- A Survey of Recent Iowa Legislation, 7 Drake L. Rev. 65, 72, n.38 (1957) (emphasis added).

E. KRS 190.110 Cannot Be Unconstitutionally Vague When The Kentucky Court Of Appeals Has Found Its Meaning "Clear" And The Minnesota Supreme Court Has Found An Almost Identical Statute To Have "No Ambiguity".

If KRS 190.110 was a newly enacted statute without any history of interpretation or industry usage, then it might be appropriate to consider if the statute was unconstitutionally vague. However, after 50+ years of industry utilization and two court decisions finding the language to be "clear" and with "no ambiguity," a finding of unconstitutional vagueness is untenable.

Kentucky's Supreme Court has placed limits on how unintelligible a statute may be. At some point, a court may declare an incomprehensible statute to be unconstitutional under a "void-for-vagueness" doctrine. See generally Board of Trustees of the Judicial Form Retirement System v. Attorney General, 132 S.W.3d 770, 778-781 (Ky. 2004). In the context of statutes prohibiting private conduct otherwise lawful, the basis for the doctrine "is the Due Process Clause of the Fifth and Fourteenth Amendments." Id. at 781. A related basis is a "separation of powers" concern since a court facing an unintelligible statute inevitably intrudes upon the legislative power because it "can do nothing but conjecture, and in doing so it would allocate to itself legislative functions." Id.

The test for declaring a statute unconstitutional on void-for-vagueness grounds was detailed in Folks v. Barren County, 232 S.W.2d 1010 (Ky. 1950):

> It is not for us to say the Legislature does not have the right to be indirect where it could be direct, or to be obscure and confusing where it could be clear and simple. But where the law-making body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared to be inoperative and void. But this is done only where the court is unable by the application of known and well accepted rules of construction to determine with any degree of certainty the meaning and intent of an act of the legislature because of vagueness, incompleteness or irreconcilable conflict in its provisions.

> However, the regard for legislative power, with the consequent reluctance of the judiciary to interfere, requires that the court draw all inferences and implications from the act as a whole and thereby, if possible, sustain the validity of the act and expound it. It is competent for the court to resolve to clearness and to deduce therefrom its constitutionality and freedom from the objection of indefiniteness urged against it. Mere imperfections may be cured by judicial construction. Clarification may be had by considering the character and nature of the statute, and the purpose to be accomplished.

Folks v. Barren County, 232 S.W.2d at 1013.

The Folks Court's observation that "mere imperfections may be cured by judicial construction" dovetails with the approach used by the United States Supreme Court to address claims that a statute is unconstitutionally vague. In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Court held that the determination of whether a statute is vague is not based solely upon the text of the provision but additionally upon how that text has been construed by the courts. In that case, the Supreme Court considered the New Hampshire Supreme Court's interpretation of a state criminal statute before deciding that the statute was not unconstitutionally vague and indefinite.

Concerning KRS 190.110 and the very issue this Court addressed in its March 4th Order, the Kentucky Court of Appeals in Capitol Cadillac Olds found the statute to be "clear to us." In the Van Asperen case, the Minnesota Supreme Court found "no ambiguity" in the equivalent Minnesota statute. Where two appellate courts have been able to interpret the statutory language of KRS 190.110, it is erroneous to declare it unconstitutionally vague.

The 1980 and 1984 amendments to KRS 190.110 further refute any contention that the statute is incomprehensible. In 1980, the General Assembly amended KRS 190.110(1) to increase the finance charge rate maximum for Class 1 vehicles from $9.00 per hundred to $11.00 per hundred. See 1980 Ky. Acts ch. 321, §2. Had the General Assembly viewed the industry's approach as being

inconsistent with the way the legislature intended or incomprehensible, it would not have limited its amendment to simply increasing the Class 1 rate by $2/$100.

Moreover, in 1986, the General Assembly added a new Subsection (4) to KRS 190.110 in response to the growing availability of personal computers which enhanced the ability of motor vehicle dealers to perform more complex interest rate calculations.[12] The new Subsection (4) read:

> (4) The finance charge allowed by this section may be pre-computed by using an add-on method. Alternatively, the seller may, at his option, compute the finance charge on a simple interest basis, at a fixed or variable rate, but in such case the amount of finance charge that the seller may collect shall not exceed the amount that could be collected if the finance charge were pre-computed.

See 1986 Ky. Acts ch. 391, §3.

This statutory change reflected the evolution in the ability of motor vehicle dealers and customers to make complex finance charge calculations, but the calculations were still tied to the old pre-computed add-on methodology. By 1986, that pre-computed methodology had been used for thirty years, including in the Roberts' 1985 contract with Capitol Cadillac Olds, Inc. which was ultimately upheld in 1989. When the General Assembly tied the 1986 calculation options to the historical add-on rates, there is absolutely no indication that the General Assembly considered the statute's historic usage to be based upon language that was incomprehensible or upon practices that were improper.

In sum, consideration of the "computed proportionately" language of KRS 190.110(2) combined with the historical development of the MVRISA and its judicial interpretations plainly demonstrate that the statute is constitutional.

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[12] The Apple II personal computer was introduced in 1977, and the IBM Personal Computer (Model 5150) was introduced in 1981. In 1983, the Personal Computer was the first non-human to be announced as "Person Of the Year" by Time Magazine.

II. THE KENTUCKY COURT'S DECISION IN MUNSON V. WHITE THAT THE GENERAL USURY STATUTE DOES NOT APPLY TO A MOTOR VEHICLE RETAIL INSTALLMENT SALE MEANS INVALIDATION OF KRS 190.110 REMOVES ALL RATE REGULATION.

This Court concluded that the consequences of invalidating KRS 190.110 was the application of the usury rates of KRS 360.010.

However, the consequence of eliminating the 1956 statute is not the application of the interest rate limits of KRS 360.010. Rather, under the "Time Sale Doctrine" and the express holding in 1949 of the Kentucky Supreme Court in Munson v. White, 339 Ky. 293, 217 S.W.2d 641 (1949), the transaction is not a loan, the payments are not interest, and "the usury statute, KRS 360.020, is not applicable." Id. at 643. Thus, the conclusion that KRS 190.110 is invalid means that there is no limit on the amount of the finance charge that can be contracted for.

In Munson v. White, Mr. Munson purchased a used Studebaker in 1946 for $1,440.60. He paid $150 as a charge for the privilege of making installment payments. He sued the seller claiming the transaction was usurious. The Court summarily rejected the argument applying the Time Sale Doctrine. The Court wrote:

> Our next question is whether or not there was any usury involved in the transaction. This automobile was sold under a conditional sales contract, and part of the purchase price was to be paid over a period of time in installments. By virtue of this transaction, appellant paid as finance, or service charges, an additional $150. If this sum constituted interest, the transaction was usurious. It has been held by this Court, however, that charges of this nature constitute part of the consideration for the sale, and the usury statute, KRS 360.020 is not applicable. Cartwright v. C.I.T. Corporation, 253 Ky. 690, 696, 70 S.W.2d 388.

Id. at 642 (emphasis added).[13]

[13] This Court cited KRS 360.010 as the applicable interest rate upon declaring KRS 190.110 unconstitutional. The statute cited in Munson v. White – KRS 360.020 – is the statute that creates a civil penalty for knowingly violating KRS 360.010

The General Assembly in 1956 responded to the 1949 ruling in Munson v. White and enacted the MVRISA and its finance charge limits. The result of declaring KRS 190.110 unconstitutional is the complete elimination of any finance charge limits as Kentucky returns to the unregulated era of the Time Sale Doctrine.

III. IF KRS 360.010 APPLIES, IT WAS MISINTERPRETED BY THIS COURT BECAUSE THERE IS NOT A 19% RATE ALLOWED FOR CONTRACTS OF LESS THAN $15,000 IN THE CURRENT RATE ENVIRONMENT.

Even if KRS 360.010 were applicable, it was misinterpreted by this Court. It appears that the Court believes that KRS 360.010 allows a 19% interest rate on loans of less than $15,000 in all cases. That is not the case.

KRS 360.010(1) provides that on loans of $15,000 or less, the parties may agree to an annual interest rate in excess of 8% provided the interest rate agreed "is not to exceed four percent (4%) in excess of the discount rate on ninety (90) day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the transaction is consummated or nineteen percent (19%), whichever is less."

On February 8, 2000 (the date of the installment contract at issue), the Federal Reserve Bank's discount rate for 90-day commercial paper was 5.25%. See Federal Reserve Board's Statistical Release H.15 (Selected Interest Rates) (http://www.federalreserve.gov/releases/h15/data.htm#fn2). Thus, on February 8, 2000, if applied to Mr. Tillman's purchase of the Mazda B2300 for a principal balance (the "amount financed" using TILA terminology) of $11,961.90, the "usury rate" under KRS 360.010 would be the lesser of 19% or 9.25% (5.25% + 4%).

Today, the Federal Reserve Bank's discount rate is 3.25% resulting in a "usury rate" of 8% for loans of less than $15,000.[14] This is because the "lesser of" rate of 7.25% (4% + 3.25% discount rate) is less than the 8% general limit of KRS 360.010(1). This is dramatically below the rates authorized by KRS 190.110. Thus, for transactions below $15,000, a much more restrictive credit environment will exist for motor vehicle dealers than that apparently contemplated by the Court in its March 4, 2008, Order. Under such restrictions, retail installment credit sales of motor vehicles by motor vehicle dealers, particularly for older vehicles, will effectively cease.

On the other hand, if the principal balance for the motor vehicle is more than $15,000, then there is no usury limit under KRS 360.010 even though there would be a limit under KRS 190.110.

IV. THE COURT'S ORDER DOES NOT DISCUSS THE "KNOWINGLY DONE" REQUIREMENT UNDER KRS 360.020 FOR A FORFEITURE OF INTEREST.

In ordering a forfeiture of all interest, this Court did not address the requirement of KRS 360.020 that a forfeiture only applies to a usurious transaction "when knowingly done." The Associations find it inconceivable that their members might be found to have "knowingly" engaged in a usurious transaction when their members have been following a statute that has been in force since 1956 (and even has twice been amended since then to deal with changing economic and technological circumstances). The Associations do not believe that the General Assembly contemplated the penalties of KRS 360.020 to be applied to them retroactively because a Court finds another statute to be unconstitutional.

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[14] Technically, 3.25% is the discount rate for primary credit from the Federal Reserve Bank for the District of New York which lowered its discount rate from 3.5% by .25% on March 17, 2008, to deal with the current "credit crunch." As of the printing of this memorandum, the Districts of Cleveland and St. Louis (in which Kentucky is located) have not yet lowered their rate to follow the lead of the District of New York, although they are expected to do so shortly.

If the Court intends to stand by its ruling that KRS 190.110 is unconstitutionally vague, the Court should make clear that the ruling does not apply to any transaction entered into prior to the time the order becomes final and all appeals of such ruling have been fully and completely resolved.

CONCLUSION

For all the foregoing reasons, this Court should grant AmeriCredit's motion for rehearing, withdraw its Order declaring KRS 190.110 as void for vagueness, and restore the certainty in the retail sale of motor vehicles that had existed in Kentucky until March 4, 2008.

Respectfully submitted,

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[M&P – 03/17/08]

Commonwealth Of Kentucky
Franklin Circuit Court
Division I
Case No. 07-CI-00196

AMERICREDIT FINANCIAL SERVICES, PLAINTIFF

v.

EDDIE M. TILLMAN, DEFENDANT

Appendix Of Authorities To
***Amici Curiae* Brief Of**
American Financial Services Association
And Kentucky Bankers Association

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03/17/08

pectancy of 34 years at the time of his death. His wife had a life expectancy of 39.15 years.

In its brief, defendant does not seriously challenge the amount of the verdicts and points to nothing to indicate that they were motivated by passion or prejudice. Under the circumstances, we do not feel that the trial court abused its discretion in refusing to grant a new trial because of the amount thereof.

Affirmed.

Nick VAN ASPEREN, Appellant,

v.

DARLING OLDS, INC., and American National Bank, Respondents.

No. 37525.

Supreme Court of Minnesota.

Dec. 12, 1958.

Case arising under Motor Vehicle Retail Installment Sales Act. The District Court, Ramsey County, Albin S. Pearson, J., granted a motion to dismiss, and plaintiff appealed. The Supreme Court, Nelson, J., held that a vendor may well fix upon his property one price for cash and another for credit, and mere fact that credit price exceeds cash price by greater percentage than is permitted by usury laws is a matter of concern to parties, but not to courts, barring evidence of bad faith, and if parties have acted in good faith, such transaction is not a loan, and is not usurious.

Affirmed.

1. Usury ⇐31

A sale of personalty is not a loan or forbearance of money and is not within usury law unless the sale is a mere form or device to evade usury law.

2. Usury ⇐32

Increase of credit price for purposes of conditional sales contract does not convert what otherwise would be a sale into a loan, and fact that credit price exceeds cash price by a greater percentage than is permitted by usury law does not make transaction usurious, since transaction is a sale and not a loan.

3. Usury ⇐119

Whether there was bona fide sale or mere pretense to evade usury law is a question of fact.

4. Usury ⇐1

The test of a usurious contract is whether its performance will result in producing to lender a greater return for use of money loaned then is allowed by law and whether that result was intended.

5. Usury ⇐16

In deciding whether any given transaction is usurious or not, courts will disregard form which it may take and look only to substance of transaction in order to determine whether all of requisites of usury are present.

6. Usury ⇐11

Requisites of usury are: (1) unlawful intent, (2) subject matter consisting of money or money's equivalent, (3) a loan or forbearance, (4) a sum absolutely payable and (5) an exaction of something in excess of what is allowed by law.

7. Usury ⇐31

Any person owning property may sell it at such price and on such terms as to time and mode of payment as he may see fit, and such sale, if bona fide, cannot be usurious, however unconscionable it may be.

8. Usury ⇐32

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credit, and mere fact that credit price exceeds cash price by greater percentage than is permitted by usury laws is a matter of concern to parties, but not to courts, barring evidence of bad faith, and if parties have acted in good faith, such transaction is not a loan, and is not usurious.

9. Automobiles ⇐19

The Motor Vehicle Retail Installment Sales Act was enacted by legislature as a means of regulating credit charge for purchase of automobile over a contractually specified period of time and, by controls and regulations therein provided, to standardized maximum credit charge for financing of automobiles purchased in state. M.S.A. § 168.66 et seq.

10. Automobiles ⇐19

It was legislative intent that effective rate for all contracts was to be substantially the same and that same method of computation should be applicable whether contract was for period of one year, less than one year, or greater than one year, and in Motor Vehicle Retail Installment Sales Act subdivision, providing that time-price differential on contracts providing for installment payments extending for a period less than or greater than one year should be computed "proportionately", quoted word did not mean that time differential was to be calculated on a descending balance which would be recast from year to year during term of transaction. M.S.A. §§ 168.72(a–c), 168.74.

See publication Words and Phrases, for other judicial constructions and definitions of "Proportionately".

11. Statutes ⇐206

A statute is to be read and construed as a whole so as to harmonize and give effect to all of its parts.

12. Statutes ⇐206, 212.4

Various provisions of same statute must be interpreted in light of each other, and legislature must be presumed to have understood effect of its words and to have intended entire statute to be effective and certain. M.S.A. §§ 168.74, 645.08, 645.16, 645.17(2).

Syllabus by the Court.

1. The owner has the right to determine the price at which he will sell his property. He may fix one price for cash and another price for credit. A sale of personal property is, therefore, not a loan or a forbearance of money and is not within the usury law unless the sale is a mere form or device to evade the usury law.

2. The increase of the credit price for the purposes of a conditional sales contract does not convert what otherwise would be a sale into a loan, and the fact that the credit price exceeds the cash price by a greater percentage than is permitted by the usury law does not make the transaction usurious for the very reason that the transaction is a sale and not a loan.

3. The power to determine the extent of the increase of the credit over the cash selling price is incident to the owner's right to fix the latter and is a matter of contract between the parties. The owner in calculating the addition to the cash price in order to arrive at the credit price may consider all factors which influence vendors in that regard, such as profit, return on investment, overhead, handling charges, risks involved, insurance, sale discount of contract for deferred payments, and such other items as may properly find a place in ascertaining how a merchant may profitably sell upon time. This rule when applied to automobile sales involving a conditional sales contract is now limited, governed, and controlled by the Motor Vehicle Retail Installment Sales Act, L.1957, c. 266 (M.S.A. § 168.66, et seq.).

4. The test of a usurious contract is whether its performance will result in producing to the lender a greater return for the use of the amount loaned than is allowed by law and whether such result was intended. In deciding whether any given transaction is usurious or not, the courts will

disregard the form which it may take, and look only to the substance of the transaction in order to determine whether all the requisites of usury are present, these requisites being: (1) An unlawful intent; (2) the subject matter which must be money or money's equivalent; (3) a loan or forbearance; (4) the sum loaned must be absolutely, not contingently, repayable; (5) and there must be an exaction for the use of the loan of something in excess of what is allowed by law.

5. Whether a transaction constitutes a bona fide sale or a mere pretense to evade the usury laws is regarded as a question of fact. This court has never held as a matter of law that a sale involving a cash price plus a finance charge equalling a credit price is usurious. It has carefully distinguished between the situation involving a cash price plus a finance charge equalling a credit price and one which is closed wholly at a credit price, no cash price being involved.

6. The Motor Vehicle Retail Installment Sales Act was enacted by the 1957 legislature as a means of regulating the credit charge for the purchase of an automobile over a contractually specified period of time, and, by the controls and regulations therein provided, to standardize a maximum credit charge for the financing of automobile purchases in this state.

7. The legislature has provided, through § 168.74, constituting a part of the Motor Vehicle Retail Installment Sales Act, under what circumstances computation shall be made based upon descending balances. Section 168.74 is in no wise applicable to the facts of the instant case and we decline to follow plaintiff's contention that we have before us either a usurious contract or a contract wherein the maximum time price differential shall be computed on descending balances.

8. The Motor Vehicle Retail Installment Sales Act is not an "interest statute." In the instant case the computation to be applied is governed by the provision contained in § 168.72(b), providing that "the time price differential shall be computed proportionately." The proper method of computing the maximum time price differential under § 168.72 on a contract less than or greater than 1 year is the same as the method for computing the time price differential on a 1-year contract, and the maximum charge for a contract less than or greater than 1 year is to be computed according to the proportion (ratio) between the period of the contract under computation and 1 year.

Fred Albert, Minneapolis, Warren Dirks, St. Paul, of counsel, for appellant.

Samuel Saliterman and Michael Robins, Minneapolis, Liptschultz, Altman, Geraghty & Mulally, St. Paul, for respondent.

Mackall, Crounse, Moore & Helmey, Minneapolis (Commercial Credit Co. and General Motors Acceptance Corporation), Jerome B. Simon and Bundlie, Kelley & Maun, St. Paul (Industrial Credit Co.), Clarence O. Holten, Minneapolis (Minnesota Automobile Dealers Ass'n), Raymond J. Julkowski, Minneapolis (Minnesota Bankers Ass'n), Claude H. Allen and Allen, Courtney & Keyes, St. Paul (Minnesota Finance Conference), amici curiae.

NELSON, Justice.

This litigation arises under the Motor Vehicle Retail Installment Sales Act enacted by the legislature effective July 1, 1957, by L.1957, c. 266 (M.S.A. § 168.66, et seq.), and involves the purchase of a 1957 Oldsmobile under a conditional sales contract between plaintiff as purchaser and defendant Darling Olds, Inc., an automobile dealer, as seller, executed on or about August 12, 1957.

The cash sale price of the vehicle was $4,097.95. Plaintiff was given a trade-in allowance of $1,153 on his 1956 Oldsmobile and made a downpayment of $279.24 in cash, leaving an unpaid balance of $2,665.71.

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It was necessary for him to pay off the balance by means of a conditional sales contract providing for installment payments over a period of greater than 1 year; i. e., 36 equal monthly installments, these to include finance charges amounting to $560.25, described in the conditional sales contract as a time price differential. The credit price was therefore $4,658.20. After completion of the transaction the contract was sold and assigned to defendant American National Bank.

It is plaintiff's claim according to the complaint that the time price differential of $560.25 specified in said conditional sales contract exceeds the maximum permitted under the aforesaid 1957 act. The defendant Darling Olds, Inc., moved the court below for an order dismissing plaintiff's claim against it for failure to state a claim upon which relief might be granted, said defendant further stating that it sought relief upon grounds as provided by the Minnesota rules of civil procedure and upon such other grounds as to the court might seem just and equitable. For the purposes of the motion it admitted all of the allegations and facts as set forth in plaintiff's complaint to be true. The court granted the motion to dismiss, and plaintiff appeals from the order.

Plaintiff contends that one of the questions involved is: "Whether the time price differential shall be computed on the original principal balance for duration of the indebtedness notwithstanding regular periodic payments, or whether the time price differential shall be computed on the declining balances." Plaintiff apparently has no fault to find with the statute where an installment contract provides for payments extending for a period of 1 year or less but contends that, if the installment payments extend for a period greater than 1 year, then the time price differential should be computed on the declining balances only. Plaintiff also urges that because sellers of automobiles under an installment plan are required to set a cash price as though the sale were for cash instead of under an installment plan, the deferred payments thereby become a "forbearance," and that it follows that under such a situation such unlicensed seller must be regulated by the interest laws of our state; namely, M.S.A. § 334.01. Plaintiff further suggests another question as being involved on this appeal; namely, "Whether or not plaintiff was entitled to an injunction enjoining the defendants from interfering with his use and possession of the vehicle, and leave to pay his installments into court pending disposition of the case." It is clear, however, that the latter question does not go to the main issue involved on this appeal.

Defendants contend that the time price differential charge is well within the maximum amount permitted by the 1957 act and that had defendants insisted upon the full price differential permitted under its provisions the same would have amounted to $639.78 under § 168.72, which provides:

"(a) The time price differential authorized by sections 168.66 to 168.77 in a retail installment sale shall not exceed the following rates:

"Class 1. Any motor vehicle designated by the manufacturer by a year model of the same or not more than one year prior to the year in which the sale is made—$8 per $100 per year.

"Class 2. Any motor vehicle designated by the manufacturer by a year model of two or three years prior to the year in which the sale is made—$11 per $100 per year.

"Class 3. Any motor vehicle not in Class 1 or Class 2—$13 per $100 per year plus a flat charge of $3 for each such retail installment sale.

"(b) Such time price differential shall be computed on the principal balance as determined under section 168.71(b) and shall be computed at the rate indicated on contracts payable in successive monthly installment payments substantially equal in amount extending for a period of one year. On contracts

providing for installment payments extending for a period less than or greater than one year, the time price differential shall be computed proportionately.

"(c) When a retail installment contract provides for unequal or irregular installment payments, the time price differential shall be at the effective rate provided in subsection (a) hereof, having due regard for the irregular schedule of payment.

"(d) The time price differential shall be inclusive of all charges incident to investigating and making the contract, and for the extension of the credit provided for in the contract and no fee, commission, expense or other charge whatsoever shall be taken, received, reserved or contracted for except as provided in sections 168.66 to 168.77."

It appears that the main contention on the part of the plaintiff is that the time price differential was computed proportionately over a 3-year period under the provisions of § 168.72(b). Had the time price differential in this case been arrived at upon the basis of $8 per $100 per year for the time period it will take to liquidate the balance due on the automobile here involved, the figures would have been as follows:

$2,665.71	Unpaid principal balance,
x .08	times $8.00 per $100.00, equals
	the maximum allowable
213.26	charge per year, times the
x 3	term of the contract in years,
	equals the maximum time
639.78	price differential allowable.

It stands conceded that the time price differential charge in the instant case was $560.25.

[1, 2] 1–2–3. The credit price charged as the purchase price of an automobile sold on time has long been interpreted, practically uniformly, by the courts as including an additional sum to which the seller is entitled in consideration for his deferring the payment of the purchase price. See, Dunn v. Midland Loan Finance Corp., 206 Minn. 550, 289 N.W. 411; In re Bibbey, D.C.D.Minn., 9 F.2d 944; Hogg v. Ruffner, 1 Black 115, 66 U.S. 115, 17 L.Ed. 38.

The aforesaid rule has become well settled in this state, and we have held, as was stated in the Dunn case (206 Minn. 554, 289 N.W. 413):

"* * * A sale of personal property is not a loan or forbearance of money and is not within the usury law unless the sale is a mere form or device to evade the usury law. * * * The increase of the credit price for the purposes of the conditional sales contract does not convert what otherwise would be a sale into a loan. The owner has the right to determine the price at which he will sell his property. He may fix one price for cash and another price for credit. The fact that the credit price exceeds the cash price by a greater percentage than is permitted by the usury law does not make the transaction usurious for the very plain reason that the transaction is a sale and not a loan. [Citing cases] * * *

* * * * * *

"The power to determine the extent of the increase of the credit over the cash selling price is incident to the owner's right to fix the latter and is a matter of contract between the parties. Courts have observed that in calculating the addition to the cash price the owner may consider all factors which influence vendors, such as profit, return on investment, overhead, handling charges, risks involved, insurance, sale discount of contract for deferred payments, and perhaps other items. [Citing cases.]"

[3–7] 4–5. The foregoing decision in the Dunn case we think settled, definitely, in Minnesota that a bona fide installment sale does not come within the purview of the

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usury statute when in accord with the principles as discussed therein. This court has never held as a matter of law that a sale involving a cash price plus a finance charge equalling a credit price is usurious. Whether the transaction is a bona fide sale or a mere pretense to evade the usury laws is regarded as a question of fact. It has carefully distinguished between the situation involving a cash price plus a finance charge equalling a credit price and one closed wholly at a credit price, no cash price being involved. The Dunn case has been distinguished in Midland Loan Finance Co. v. Lorentz, 209 Minn. 278, 296 N.W. 911, and Midland Loan Finance Co. v. Madsen, 217 Minn. 267, 14 N.W.2d 475.[1]

In Lassman v. Jacobson, 125 Minn. 218, 219, 146 N.W. 350, 351, 51 L.R.A.,N.S., 465, 466, Ann.Cas.1915C, 774, 775, this court held the test of a usurious contract to be as follows:

"* * * Will its performance result in producing to the lender a greater return for the use of the amount loaned than is allowed by law, and was that result intended?"

In In re Bibbey, D.C.D.Minn., 9 F.2d 944, 945, the court stated the following in the course of its decision:

"In deciding whether any given transaction is usurious or not, the courts will disregard the form which it may take, and look only to the substance of the transaction in order to determine whether all the requisites of usury are present. These requisites are: (1) An unlawful intent; (2) the subject-matter must be money or money's equivalent; (3) a loan or forbearance; (4) the sum loaned must be absolutely, not contingently, repayable; (5) and there must be an exaction for the use of the loan of something in excess of what is allowed by law. If all these requisites are found to be present, the transaction will be condemned as usurious, whatever form it may assume, and despite any disguise it may wear. But, if any one of these requisites is lacking, the transaction is not usurious, although it may bear the outward marks of usury. * * *

"It is manifest that any person owning property may sell it at such price and on such terms as to time and mode of payment as he may see fit, and such sale, if bona fide, cannot be usurious, however unconscionable it may be. A vendor may well fix upon his property one price for cash and another for credit, and the mere fact that the credit price exceeds the cost price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties, but not to the courts, barring evidence of bad faith. If the parties have acted in good faith, such a transaction is not a loan, and not usurious."

The court came to the conclusion in the Bibbey case that there is no question but what the seller may name a greater price when he sells upon time than when he sells for cash; that following that course is not an unusual practice and custom in merchandising; that in calculating the amount of addition to the cash price, where the goods are sold upon time, there is necessarily taken into consideration what would be a proper interest charge upon the investment; also taken into account are the chances of loss and failure to pay, the insurance necessary to cover the transaction, and the overhead expense for carrying on a business of that kind, all of which find a place in ascertaining how a merchant may profitably sell upon time and the price to be charged. The conclusion was that this does not make a usurious contract; that it does

1. See, 10 Minn.L.Rev. 550, 651; 30 Minn. L.Rev. 744 to 750 and cases cited; also, see Annotations, 48 A.L.R. 1442, 67 A.L.R. 880, and 152 A.L.R. 508, with reference to "Advance in price on credit sale as compared with cash sale as usury," and with reference to usury as affecting conditional sale contract.

not make it a loan of money; that the collection of interest under the circumstances is merely a method by which the seller calculates the amount that he must charge when selling upon time to make a profit; and furthermore that it is quite well known that automobile companies expect to discount their sales contracts as they make them, that companies have been and are being formed for that express purpose, and that the automobile companies, when they have made such a time sale, usually discount their sales contracts, and are paid therefor by the companies the cash price at which the automobile was sold when a cash customer is found. Such a contract is therefore by its plain terms a sale upon time at a conditional or credit price over the cash price. We decline to follow the plaintiff's view and contention that we have before us a usurious contract.[2]

[8] 6. Undoubtedly the Motor Vehicle Retail Installment Sales Act was enacted by the 1957 legislature to protect the purchasers of automobiles from the activities of a few individuals who had been guilty of inequitable practices in particular situations. It thereby sought to regulate the credit charge for the purchase of an automobile over a contractually specified period of time. The usury laws did not protect a person purchasing an automobile on a retail installment contract, commonly referred to as a conditional sales contract, inasmuch as the courts had long since come to recognize the right of a merchant to sell at one price for cash and at another price if payments were to be made on an installment basis. Our legislature stated in the title to the foregoing act the purposes thereof as follows:

"An act defining and regulating certain installment sales of motor vehicles; prescribing the conditions under which such sales may be made and regulating the financing thereof; regulating and licensing persons engaged in the business of financing such sales; prescribing the form, and contents used in connection with such sales and the financing thereof; prescribing certain rights and obligations of buyers, sellers, persons fi
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2. It would appear that up to this time some 21 states have enacted motor vehicle installment sales acts presently in effect. Some of the various provisions of the act vary from state to state, but there is much consistency in the provisions which deal with methods of computing rebates. They are:
1. California: West's Ann.Civil Code of California 1949, §§ 2981, 2982.
2. Colorado: C.R.S.1953, § 13-16-6.
3. Connecticut: G.S. of Conn.1949, § 6899.
4. Florida: Laws of Florida 1957, c. 57-709.
5. Illinois: Illinois Rev.Stat.1957, c. 121½, § 223 et seq.
6. Iowa: I.C.A. § 322.17 et seq.
7. Kentucky: K.R.S. § 190.090 et seq.
8. Maine: Rev.Stat. of Maine 1954, c. 59, § 249 et seq.
9. Massachusetts: Ann.Laws of Massachusetts, c. 255, § 12.
10. Michigan: M.S.A.1957, § 23.628(1) et seq., Comp.Laws Supp.1956, § 402.101 et seq.
11. Minnesota: L.1957, c. 200.
12. Nevada: N.R.S. § 97.010 et seq.
13. New Jersey: N.J.S.A. § 17:16B-1 et seq.
14. New York: 40 McKinney's Consol. Laws of New York Ann.Personal Property Law, § 301 et seq.
15. North Dakota: North Dakota Rev. Code of 1943 (1957 Supp.) § 51-1301 et seq.
16. Ohio: Baldwin's Ohio Rev.Code Ann. (2 ed.) § 1317.01 et seq.
17. Oregon: Oregon Rev.Stat. § 83.510 et seq.
18. South Dakota: Session Laws of South Dakota 1957, c. 241.
19. Utah: Utah Code Ann.1953, § 15-1-2 et seq.

The two states not named above, Indiana and Wisconsin, have provisions that the state commission shall issue regulations setting out the formula for computing rebates. In both instances the state commission has adopted the method included in the Minnesota act and which has been followed in this state since its inception. Burns Indiana Stat.Ann.1951, § 58-001 et seq.; 1 Indiana Rules & Regs.1947 (1948 Supp.) p. 154; Wisconsin Stat.1957, § 218.01; 1 Wis.Adm.Code, Rules of Banking Dept. § 70.01.

sellers, persons financing such sales and others; limiting incidental charges in connection with such instruments and fixing maximum charges for delinquencies, extensions and time sale differentials; authorizing investigations and examinations of persons engaged in the business of making or financing such sales; prescribing penalties for violations, and providing for enforcement of compliance by injunction."

The purposes of the act as stated in the title indicate a legislative policy to bring both regulatory control and uniformity into the field of automobile financing. Legislative action was brought about by the fact that several states had enacted some form of regulation aimed particularly at automobile installment sales because the bona fide cost of installment credit had actually exceeded the rates generally allowed under usury statutes. Whatever complaints there may be that the legislature has fallen short in any respect of its purpose to protect the general public, the remedy is to seek legislation.

[9-12] 7-8. Plaintiff argues that declining balances must be taken into account when computing the time price differential applicable to the regular monthly contract under § 168.72(a), "Class 1," and § 168.72 (b), even though the legislature did not refer to declining balances in those provisions but in another section of the act (§ 168.74) provided that declining balances are to be taken into consideration when computing the time price differential applicable to any regular payment contract. It seems clear that when the legislature required that an irregular or unequal installment contract be computed (§ 168.72[c]) "at the effective rate provided in subsection (a)" the legislature thereby disclosed its basic intention that the effective rate for all contracts (i. e., 1 year, more or less than 1 year, irregular or unequal installment contracts) is to be substantially the same.

The plaintiff contends that the word "proportionately" as used in § 168.72(b) means that the time differential is to be calculated on a descending balance which would be recast from year to year during the term of the transaction. Against plaintiff's contention, the defendants propose and argue that the term "proportionately" as used in said subsection refers to the computation of the time price differential by multiplying for example $8 (the maximum provided) per $100 per year by the period of time it will take to liquidate the balance on the automobile. Defendants further contend that the same method of computation applies whether the contract is for a period of 1 year, less than 1 year, or greater than 1 year. We think the contentions of defendants coincide with the intention the legislature had in mind both when the act was proposed and when enacted and that having provided for those situations where computations are to be made on descending balances they have left no ambiguity as to the purpose and the application of § 168.72(a), "Class 1," and § 168.72(b), which includes the provision that "the time price differential shall be computed proportionately."

It will be noted that a class 1 transaction under § 168.72(a, b) of the Motor Vehicle Retail Installment Sales Act for 1 year (the differential being $8 per $100 per year) is equivalent to an effective rate of 14.45 percent per year; that a class 1 transaction for 2 years computed proportionately by doubling the price differential for 1 year is equivalent to an effective rate of 14.67 percent per year; and that a class 1 transaction for 3 years computed proportionately by tripling the time price differential, for 1 year, is equivalent to an effective rate of 14.54 percent per year. The yields as stated aforesaid are all approximate in that they may be carried out to many more decimal places. It will be seen, therefore, that except for the small deviations of less than .3 of 1 percent caused by mathematical aberrations, the effective rate on a 1-, 2-, or 3-year contract remains the same whenever the time price differential is computed proportionately.

It is to be further noted that the plaintiff has in fact conceded that the legislature's method of computing the maximum differential on a 1-year contract produces an effective rate of 14.45 percent. In fact applying the method of computation adopted administratively in this state since the adoption of the 1957 act, we also find that the effective rate remains constant over every contract length with minor variations.

The plaintiff insists that a contract for a period greater than 1 year must be computed on the descending balances, only. We think it clear that the legislature was fully aware of the descending-balance method of computation and the appropriate phraseology for expressing it when drafting the 1957 act. Undoubtedly, if the legislature intended that method to be applied to the situation here involved, they would have used the term of art "descending balance" as applied to the class 1 provision and not the term "proportionately." [3]

It is well known that the object of all interpretation of laws is to ascertain and effectuate the intent of the legislature. Section 645.16. We apply the fundamental rule of statutory construction that a statute is to be read and construed as a whole so as to harmonize and give effect to all its parts. Moreover, various provisions of the same statute must be interpreted in the light of each other, and the legislature must be presumed to have understood the effect of its words and intended the entire statute to be effective and certain. See, §§ 645.08 and 645.17(2); Kollodge v. F. and L. Appliances, Inc., 248 Minn. 357, 80 N.W.2d 62; City of St. Louis Park v. King, 246 Minn. 422, 75 N.W.2d 487; Gale v. Com'r of Taxation, 228 Minn. 345, 37 N.W.2d 711; Paul v. Faricy, 228 Minn. 264, 37 N.W.2d 427; Governmental Research Bureau, Inc. v. Borgen, 224 Minn. 313, 28 N.W.2d 760; Christensen v. Hennepin Transp. Co., Inc., 215 Minn. 394, 10 N.W.2d 406, 147 A.L.R. 945; Volk v. Paramount Pictures, D.C.D. Minn., 91 F.Supp. 902. We are bound to conclude that the method of computation advanced by plaintiff, as applicable to the contract in question, is inconsistent with and contradictory to the legislative intent as expressed in the 1957 act and that the proper method of computing the maximum time price differential under § 168.72(a, b), class 1, is according to the proportion (ratio) between the period of the contract under computation and 1 year.

The record indicates that the banking department of this state has understood the 1957 act as herein interpreted since its inception and likewise that the entire automobile industry has so understood the provisions of the act. It might be well to further point out that there is nothing unusual or unique about this method of computing charges on an installment contract since this is the method of computation permitted

3. The legislature has stated when computation shall be made based on descending balances in M.S.A. § 168.74, which reads as follows:

"The holder of a retail installment contract, may, upon agreement with the retail buyer, extend the schedules due date, or defer the schedules payment of all or part of any installment payment or payments, or renew the balance of such contract. In any such case the holder may restate the amount of the installments and the time schedule therefor, and collect as a refinance charge for such extension, deferment or renewal, a flat service fee not to exceed $5 and a total additional charge not exceeding an amount equal to one percent *per month simple interest* on the respective *descending balances* computed from the date of such extension, deferment or renewal." (Italics supplied.)

It is clear that this provision would have served no useful purpose if the legislature had not intended that, in general and otherwise, time price differentials under the act should be computed without consideration being given to the descending balances. It must be equally clear that this specific provision which provides for computation based on descending balances in the case of refinance contracts indicates that descending balances are not to be considered in computing time price differentials on contracts that are not being refinanced.

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William MINDI

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No. 3

Supreme Court

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Action for injuri
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by § 48.153 for computing charges to be made by banks on installment loans. The legislature has made it clear in what particular situations the descending balance method of computation shall be used. It has made it equally clear by § 168.72(a, b) under what circumstances the time price differential shall be computed proportionately when applied to class 1 motor vehicles.

The trial court properly granted defendants' motion to dismiss. The plaintiff has failed to establish any grounds entitling him to the relief prayed for.

Affirmed.

William MINDER, Appellant,

v.

Alfred PETERSON and Charles Lair, co-partners d.b.a. Goodhue County Limo Spreader Service, et al., Respondents.

No. 37466.

Supreme Court of Minnesota.

Dec. 19, 1958.

Action for injuries sustained in a collision between an automobile owned by plaintiff and a truck owned by defendants at an intersection. The jury found neither plaintiff nor defendants negligent and the trial court entered its order for judgment for the defendants and plaintiff moved for judgment notwithstanding the verdict or in the alternative for a new trial and from an order of the District Court, Goodhue County, William C. Christianson, J., denying such motion the plaintiff appeals. The Supreme Court, Knutson, J., held that where the evidence presented a fact issue as to whether the driver of the truck knew or should have known that his brakes were defective plaintiff was not entitled to a directed verdict and was not entitled to a judgment notwithstanding the verdict; that the emergency rule was properly applied; and that a new trial for newly discovered evidence or in the interest of justice was properly denied.

Affirmed.

1. Trial ⇐178

A motion for a directed verdict presents a question of law only and contemplates for the purpose of the motion the credibility of evidence for the adverse party and every inference which may be fairly drawn from such evidence.

2. Trial ⇐142

When motion for a directed verdict is made on the ground of a manifest preponderance of the evidence, it should be denied if different persons might reasonably draw different conclusions from the evidence.

3. Automobiles ⇐245(38)
Judgment ⇐199(3.17)

In action for injuries sustained in the collision of automobile and truck at an intersection, evidence presented a fact issue as to whether the driver of the truck knew or should have known that his brakes were defective and hence plaintiff was not entitled to a directed verdict and was not entitled to judgment notwithstanding the verdict. M.S.A. §§ 169.20 and subd. 1, 169.67 and subds. 1, 5.

4. Evidence ⇐589

In action for injuries sustained in an automobile-truck collision, jury was not bound to accept as conclusive testimony of driver of truck as to condition of the brakes on the truck prior to time immediately preceding accident, in view of other testimony of the driver.

5. Automobiles ⇐245(38)

In action for injuries sustained in an automobile-truck collision at an intersection evidence presented a fact issue as to

Commonwealth Of Kentucky

Court Of Appeals

NO. 87-CA-1245-MR

GARY H. ROBERTS
and ANGIE ROBERTS — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE RAY CORNS, JUDGE
ACTION NO. 85-CI-1194

CAPITOL CADILLAC-OLDS, INC.
and GENERAL MOTORS CORPORATION — APPELLEES

ORDER

* * * * *

BEFORE: HOWERTON, Chief Judge, McDONALD and HAYES,* Judges.

The Court, having considered the motion of the Kentucky Bankers Association for leave to file an amicus curiae brief, the motion of Citizens Fidelity Bank and Trust Company, Farmers Bank & Capital Trust Company, First National Bank of Louisville, First Security National Bank and Trust Company, Liberty National Bank and Trust Company of Louisville, and Republic Bank and Trust Company for leave to file an amicus curiae brief, and the like motion of General Motors Acceptance Corporation, Ford Motor Credit Corporation, and Chrysler Credit Corporation, as well as

* Judge John P. Hayes substitutes for Justice Dan Jack Combs who presided at the oral argument of this case and who has since been elected to the Supreme Court of Kentucky.

the responses thereto filed by the appellants, Gary and Angie Roberts, and being otherwise sufficiently advised, ORDERS that the motions be and they hereby are GRANTED, and the tendered briefs of the movants are FILED as of the date of the entry of this order.

Further, the Court, having considered the petition for rehearing by the appellee, General Motors Corporation, as well as the response thereto, ORDERS that the same is hereby DENIED. The Court has also considered the merits of the petition for rehearing filed by the appellee, Capitol Cadillac-Olds, Inc., and the appellants' response, and ORDERS that the petition is GRANTED in part. The opinion originally rendered in this case on October 21, 1988, is hereby WITHDRAWN and a new opinion is SUBSTITUTED therefor.

ENTERED: April 21, 1989

JUDGE, COURT OF APPEALS

RENDERED: OCTOBER 21, 19[illegible]; 3 P.M.
TO BE PUBLISHED
WITHDRAWN & REISSUED: APRIL 21, 1989; 3 P.M.

Commonwealth Of Kentucky

Court Of Appeals

NO. 87-CA-1245-MR

GARY H. ROBERTS
and ANGIE ROBERTS — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE RAY CORNS, JUDGE
ACTION NO. 85-CI-1194

CAPITOL CADILLAC-OLDS, INC.
and GENERAL MOTORS CORPORATION — APPELLEES

AFFIRMING IN PART,
REVERSING AND REMANDING IN PART

* * * * *

BEFORE: HOWERTON, Chief Judge, McDONALD and HAYES,** Judges.

McDONALD, JUDGE. Appellants, Gary and Angie Roberts, husband and wife, appeal the dismissal of the lawsuit they brought in the Franklin Circuit Court against appellees Capitol Cadillac-Olds (CCO), General Motors Corporation (GM), and State National Bank (bank). Appellants filed suit in an attempt to recover damages that they allegedly incurred when they purchased a 1985 Oldsmobile Calais from CCO.

Appellants first noticed a problem with the automobile on

** On petition for rehearing, Judge John P. Hayes substitutes for Justice Dan Jack Combs who presided at the oral argument of this case and who has since been elected to the Supreme Court of Kentucky.

January 15, 1985, the date they purchased it. They first drove the automobile to the home of one of their parents. The residence is located on a steep incline, and when the car was parked it made a grinding or roaring noise that came from the front end or transmission. They continued to hear the same noise whenever they parked the car on an incline. It would last for only a few seconds each time. Gary's description of the noise was metal grinding on metal. Appellants promptly reported the problem to CCO. The problem was not corrected at that time.

Appellants left the car with CCO on April 12, 1985, for minor warranty repairs. While CCO was servicing the car a ceiling lamp fell across the front of the car while the car was on a lift. The lamp shattered and scarred the paint on the car.

CCO had made three unsuccessful attempts to correct the grinding noise and five unsuccessful attempts to satisfactorily repaint the car when appellants, on advice of counsel, returned the car and the keys to CCO and tendered their written revocation of acceptance (rescission) of the car. This was July 3, 1985.

Appellants filed suit against CCO, GM, and the bank which was the assignee of the note between CCO and the appellants. They alleged breach of warranty, revocation of acceptance, and mismatched paint. All three defendants answered and the bank filed a counterclaim against the appellants and a cross-claim against CCO for the amount of the assigned note. The bank was granted summary judgment against CCO for $12,888.94 with 15.5% annual interest until satisfied, and attorney's fees in the amount of $900. The bank never obtained a judgment against the

appellants. CCO paid the bank.

The trial court later granted summary judgment for CCO and GM on the revocation claim. Appellants amended their complaint, and CCO counterclaimed against the appellants to recover the amount that they had paid the bank. Appellants answered, alleging that the retail installment sales contract was usurious, and that CCO had improperly used the car while it was in their custody by driving it hundreds of miles.

GM and CCO moved for summary judgment against appellants on their amended complaint. The trial court granted both motions, and overruled a motion of appellants that challenged the propriety of the amount of the summary judgment previously entered in favor of the bank.

Appellants did prevail on their claim of negligent repainting of the car, and the jury returned a verdict for them on that count in the amount for $925. The trial court entered judgment accordingly and added in the same order that the appellants owed CCO $13,907.74 plus 15.5% annual interest until satisfied, and $2,000 worth of attorney's fees. The trial court also dismissed appellants' claim against CCO for improper use of the car.

We agree with the appellants that it was error for the trial court to grant summary judgment in favor of CCO and GM on appellants' claims of breach of warranty and revocation of acceptance.

The sale of the new automobile included an express limited warranty. The grinding noise, covered by the warranty, was not

remedied by CCO. This brings us to the portions of Article 2, Sales, of the Kentucky Commercial Code which address this situation.

KRS 355.2-719(2) provides that:

> Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter.

KRS 355.2-608(1)(a) provides that:

> The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured . . . .

The preceding law means that under the facts of this case the seasonable failure of the remedial measures taken by CCO and the impairment to the value of the automobile to the appellants were genuine issues of material facts for the jury to have decided. The noise inside the car was noticed immediately by the appellants, and they immediately informed CCO about the problem. CCO attempted to fix the problem on the three different occasions and failed each time. These failures extended over a period of nearly six months. Appellants were understandably anxious about operating the vehicle in its condition.

Appellees argue that the value of the car was not substantially impaired for the appellants because they continued to drive it, and even drove it to and from Dayton, Ohio. GM argues that the only defect was the grinding noise and it was not substantial, but merely annoying. GM argues that CCO was not permitted a reasonable time to remedy the defect. GM says that one of the appellants testified that another dealer offered to

purchase the automobile for "merely" $1,500 less than the original purchase price. CCO additionally argues that the car only made the noise in limited situations.

What the appellees say is all well and good, but taken with the appellants' evidence does nothing more than create genuine issues of material facts. The sharp contrast between the two versions makes resolution of the question by summary judgment improper. Certainly, Ford Motor Co. v. Mayes, Ky. App., 575 S.W.2d 480 (1979), decided that when the selling dealer fails within a reasonable time to correct a defect which substantially impairs the value of a new motor vehicle, the buyer is entitled to revoke acceptance of the vehicle. CCO tried three times over nearly six months to correct the grinding noise. Surely the issue of whether the warranty's remedy failed should have gone to the jury. CCO moves no closer to summary judgment by pointing out that the grinding noise was only noticeable when the car was parked on a hill. A new roof is no less defective because it only leaks during rainy weather. The issue of whether the defect substantially impaired the value of the car to the appellants should have gone to the jury.

GM convincingly argues that it cannot be liable on the count of revocation of acceptance because it did not enter into any contract with appellant and therefore no privity exists between them; thus it was proper for GM to be dismissed from the count of revocation. However, it was still improper for GM to gain summary judgment on the count of breach of warranty, Volvo of America Corp. v. Wells, Ky. App., 551 S.W.2d 826 (1977).

Appellants' amended complaint alleged that GM's and CCO's practices violated Kentucky's Consumer Protection Act, KRS Chapter 367. They sought punitive damages from CCO pursuant to the act. The trial court granted GM and CCO summary judgment on the count. Sufficient evidence of unfair and unconscionable trade practices was presented to make summary judgment on this claim improper.

CCO failed five times to satisfactorily repaint the appellants' car. CCO and CCO's attorney more than once misrepresented the status and quality of the paint job. Appellants were told that it was necessary to order the paint from the factory when evidence tended to show that CCO had purchased it from a local auto parts store. Thus, a jury question on this issue was presented.

Appellants filed a counterclaim against CCO alleging that CCO had improperly used the car after appellants had returned it. The car had been driven over six hundred miles. The trial court dismissed their counterclaim. This counterclaim should not have been dismissed because whether the appellants succeeded on their revocation claim should have gone to the jury. If the jury had found that revocation was proper, then CCO's use of its own vehicle was not improper. If the jury had found that revocation was improper, then CCO improperly used the appellants' vehicle.

Appellants argue that the trial court erred by not instructing the jury that it could have awarded appellants punitive damages on their complaint for negligently painting the car. The jury returned a verdict in favor of the appellants on

the negligence claim. Appellants contend that because CCO's conduct surrounding the repainting was not only negligent but outrageous, an instruction on punitive damages was proper, citing Horton v. Union Light Heat & Power Co., Ky., 690 S.W.2d 382 (1985). We believe that there was sufficient evidence of outrageous conduct on the part of CCO (stated earlier in this opinion) to have called for the instruction.

CCO counterclaimed against the appellants after it paid the judgment against it in favor of the bank in order to recover that amount from the appellants. Appellants answered, alleging that the contract violated KRS 190.110(1) which in relevant part states:

> (1) The finance charge in a retail installment sale shall not exceed the following rates:
>
> Class 1. Any new or used motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made - $11.00 per $100.00.

The amount financed in the contract between CCO and appellants was $10,997.31. The appellants contend that the maximum finance charge permissible under this statute is arrived at by dividing that figure by 100 and multiplying the quotient by 11, a sum which equals $1,209.70. The actual finance charge appearing in the contract is $4,873.89.

CCO argues that the finance charge was correctly computed, citing KRS 360.010. That statute concerns general usury law pertaining to interest rates, so it is not pertinent here. CCO also urges consideration of other inapplicable statutes. They are: KRS 190.100(5) which concerns assignment of the sale contract; KRS 190.110(4) which concerns the method of computing

the finance charge, not what is the maximum permissible finance charge; and KRS 287.215 which concerns a bank's purchase of the sales contract. We find none of these statutes applicable.

Although the interpretation of KRS 190.110 advanced by the appellants is appealing, we are convinced by the amicus briefs filed in this case that KRS 190.110(2) supports the appellee's calculation of the finance charge. This section of the statute reads:

> (2) Such finance charge shall be computed on the principal balance as determined under KRS 190.100(2) on contracts payable in successive monthly payments substantially equal in amount extending for a period of one (1) year. On contracts providing for instalment payments extending for a period less than or greater than one (1) year, the finance charge shall be computed proportionately. [Emphasis added.]

It seems clear to us that this portion of the statute allows the total finance charge to be adjusted up or down in relation to the length of the loan. As the total finance charge was less than that allowed, there was no violation of KRS 190.110.

Appellants argue that the trial court assessed attorney's fees against them for an amount that exceeds that allowed by law. The sales contract provided that the parties were agreed that a reasonable attorney's fee would be an amount equal to 15% of the amount due and payable under the contract. KRS 190.100(1)(d) caps the amount for attorney's fees recoverable pursuant to retail installment contracts for the purchase of a motor vehicle at 15% "of the amount due and payable under such contract."

The amount due and payable under the contract would have been the balance due at the time of default, or $13,007.74. The maximum attorney's fee allowable was 15% of that figure, or

$1,951.16.

Appellants also argue that the trial court erred by not requiring a more detailed accounting of the amount of attorney's fees claimed by CCO. CCO submitted its attorney's affidavit which stated that his firm had billed CCO $2,832.50 in fees for litigating this case. Appellants say that CR 8.04(c) requires more. That rule does require proof of allegations that claim a "sum which may by computation be made certain." Attorney's fees are in that category, but we believe that proof by the billing attorney filing an affidavit is adequate. Simply because the sum is one that may be made certain by computation, it does not necessarily follow that the computation must be made part of the proof. The trial court has some discretion in this regard. See Whaley v. Whaley, 289 Ky. 241, 158 S.W.2d 416 (1942). Whenever the attorney's affidavit states a figure that to the trial court appears exorbitant, it may require additional proof.

Appellants next argue that the interest on the judgment was incorrectly calculated. The judgment amount can be and frequently is different than the amount due and payable under the contract. The parties were free to contract that attorney's fees would be computed based upon the full amount due and payable. Yet, when judgment results due to acceleration upon default, what interest attaches to the judgment is differently considered. The judgment interest, under KRS 360.040, will be fixed at the percentage stated in the note--in this case 15.5% per annum. However, judgment on notes that become due by reason of acceleration cannot bear interest beyond the time when the note

became due and payable by reason of the acceleration. Duff v. Bank of Louisville & Trust Company, Ky., 705 S.W.2d 920 (1986), citing Credit Alliance Corp. v. Adams Construction Corp., Ky., 570 S.W.2d 283 (1978). Therefore, CCO could at most receive a judgment that included the interest accrued up to the time of acceleration. That judgment amount would then carry a judgment interest of 15.5% per annum.

Appellants incorrectly argue that the trial court erred by not allowing their tendered jury instruction for damages as a result of their loss of the use of the vehicle and inconvenience. This type of damage is permissible only if the vehicle is necessary to the injured party's business. Anderson v. Shields, Ky., 234 S.W.2d 739 (1950).

Lastly, appellants argue that the trial court erred by refusing to permit testimony from a witness whose job was automobile paint and body work. The witness was employed by CCO. Appellants sought to elicit testimony from him concerning the difference between work that is billed as "customer pay" and that billed as "warranty pay." The terms are somewhat self-explanatory, but "warranty pay" is the amount charged when the work done is covered by the warranty, and those amounts are to be paid by GM. "Customer pay" is the amount charged when the work done is not covered by warranty, and those amounts are to be paid by the customer. The witness stated by avowal that the amount of time devoted to working on the car would have been tripled had it been billable as customer pay. The trial court correctly resolved this issue because that testimony was

irrelevant since the car was under warranty at the times in question.

The judgment of the Franklin Circuit Court is hereby affirmed in part and reversed and remanded in part for a new trial consistent with this opinion.

ALL CONCUR.

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