

USURY: Transactions characterized by the following  
INTEREST: are governed by the Retail Credit  
RETAIL CREDIT ACT: Sales Act: (1) the seller is a retail  
seller; (2) the buyer is a retail buyer;  
(3) the subject matter of the transaction consists of goods or  
services having a cash sale price of less than \$7,500; and (4)  
payment therefor, whether lump sum or periodic, is deferred. If  
the transaction is effected pursuant to a retail charge agreement,  
no separate charge may be assessed by the merchant for the buyer's  
failure to pay the amount due within the time stated; in that  
event, the delinquent amount becomes part of the unpaid balance  
subject to the permissible statutory monthly time charge. If the  
transaction is effected under a retail time contract and if the con-  
tract so provides, the merchant can assess a separate charge for  
the buyer's default on an installment due within the permissible  
statutory limits. Finally, the Missouri usury law does not pro-  
hibit merchants from assessing a reasonable charge for handling  
dishonored checks tendered for payment of goods purchased, pro-  
vided the purchaser has prior notice of the merchant's policy. If,  
however, the check was tendered as payment of an amount due under  
a retail charge agreement or retail time contract, the amount or  
rate of such charge would be governed by the Retail Credit Sales  
Act.

OPINION NO. 41

September 10, 1974

Honorable George J. Donegan  
Representative, District 146  
1714-18 East Meadowmere  
Springfield, Missouri 65804



Dear Representative Donegan:

This is in response to your request for an opinion from this office regarding the assessment by merchants of a "finance" or "handling" charge in the following circumstances:

- "(1) A business delivers merchandise or provides services pursuant to a telephone order; during the same month a billing is forwarded to the purchaser bearing the following notation: ALL ACCOUNTS DUE AND PAYABLE THE 10TH OF THE MONTH FOLLOWING MONTH OF PURCHASE; A FINANCE CHARGE OF THREE (3%) PERCENT OF THE UNPAID BALANCE WILL BE CHARGED ON ALL ACCOUNTS NOT PAID WHEN DUE.

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disclosure requirements and limits the time-price differential in certain credit sales.

77 C.J.S. Sales §235 describes a credit sale as follows:

"A transaction whereby property is sold without any expectation of immediate payment is a sale on credit, regardless of the length of time for which payment is deferred, whether one day or a fraction thereof, or a longer period, and whether or not the amount of credit is determined. . . ."

Similarly, Section 408.250(15), V.A.M.S., defines a retail time transaction as follows:

"'Retail time transaction' means a contract to sell or furnish or the sale of or furnishing of goods or services by a retail seller to a retail buyer for which payment is to be made in one or more deferred payments under and pursuant to a retail time contract or a retail charge agreement."

Accordingly, a retail time transaction occurs if payment for the goods or services is deferred, whether payment therefor will be made in a lump sum or in periodic installments. The applicability of the act, however, depends upon the position of the parties and the nature and value of the subject matter of the transaction. A retail time transaction involves a contract to sell or furnish, or the sale or furnishing of goods or services by a retail seller to a retail buyer.

A retail seller is defined in Section 408.250(13), V.A.M.S., as follows:

"'Retail seller' or 'seller' means a person who regularly sells or offers to sell goods or services to retail buyers. The term also includes a person who regularly grants credit to retail buyers for the purpose of purchasing goods or services from any person, pursuant to a retail charge agreement, but shall not apply to any licensee under Chapter 367, RSMo."

A retail buyer is defined in Section 408.250(11), V.A.M.S., as a ". . . person who buys goods or obtains services from a retail

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seller in a retail time transaction." In other words, the act contemplates coverage of retail time transactions involving generally consumer sales.

Goods forming the subject matter of a transaction within the purview of the act are defined in Section 408.250(4), V.A.M.S., as follows:

"'Goods' means all tangible chattels personal having a cash sale price of seventy-five hundred dollars or less and merchandise certificates or coupons having a cash sale price of seventy-five hundred dollars or less issued by a retail seller exchangeable for tangible chattels personal of such seller, but the term does not include motor vehicles, nonprocessed farm products, livestock, money, things in action, or intangible personal property. The term includes tangible chattels personal which, at the time of the sale or subsequently, are to be so affixed to realty as to become a part thereof whether or not severable therefrom."

Services are defined in Section 408.250(16), V.A.M.S., as ". . . work, labor and services having a cash sale price of seventy-five hundred dollars or less furnished in the delivery, installation, servicing, repair or improvement of goods."

In light of the above definitions, it is the opinion of this office that the provisions of the Retail Credit Sales Act apply to all transactions characterized by the following: (1) the seller is a retail seller; (2) the buyer is a retail buyer; (3) the subject matter of the transaction consists of goods or services having a cash sale price of less than \$7,500; and (4) payment, whether lump sum or periodic, is deferred. When all these conditions are met, the transaction is a retail time transaction, whether entered into under a retail time contract or pursuant to a retail charge agreement.

This being the case, if in your hypothetical the goods or services have a cash sale price under \$7,500, and if the transaction is between a retail seller and a retail buyer, then the transaction would be governed by the Retail Credit Sales Act because payment for the goods or services is deferred.

If those conditions are met, it is next necessary to consider what, if any, charge may be assessed by the merchant for the failure of the buyer to pay an amount due within the time specified. The

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answer to this question will depend upon whether the transaction was effected under a retail time contract or pursuant to a retail charge agreement.

A retail charge agreement is defined in Section 408.250(12), V.A.M.S., as follows:

"'Retail charge agreement' means an agreement entered into in this state between a retail seller and a retail buyer prescribing the terms of retail time transactions to be made from time to time pursuant to such agreement, and which provides for a time charge to be computed on the buyer's total unpaid balance from time to time."

In common parlance, such an agreement is a charge account entered into with a retail seller.

A retail time contract is defined in Section 408.250(14), V.A.M.S., as follows:

"'Retail time contract' means an agreement evidencing one or more retail time transactions entered into in this state pursuant to which a buyer engages to pay in one or more deferred payments the time sale price of goods or services. The term includes a chattel mortgage; conditional sales contract; and a contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation for their use a sum substantially equivalent to or in excess of their cash sale price and by which it is agreed that the bailee or lessee is bound to become, or, for no further or a merely nominal consideration has the option of becoming, the owner of the goods upon full compliance with the provisions of the contract."

This definition contemplates one or more retail time transactions evidenced by one agreement and does not contemplate an agreement pursuant to which the buyer, on a continuing basis, would purchase goods or services from the seller.

The distinction between retail charge agreements and retail time contracts is of significance, for the remaining provisions of the act, dealing with disclosure requirements and restrictions

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on time charges, vary according to the nature of the agreement under which a credit transaction is consummated. The disclosure requirements applicable to retail charge agreements are enumerated in Section 408.290. By way of contrast, the disclosure requirements applicable to retail time contracts are enumerated in Section 408.260.

Under a retail charge agreement the time charge is defined in Section 408.250(17), V.A.M.S., as the amount in excess of the cash sale price. The maximum rate at which a time charge under a retail charge agreement may be assessed is limited under Section 408.300 (2) as follows:

"2. Notwithstanding the provisions of any other law the seller and assignee under a retail charge agreement may charge, receive and collect a time charge which shall not exceed the following:

(1) On so much of the unpaid balance as does not exceed five hundred dollars, fifteen cents per ten dollars per month;

(2) If the unpaid balance exceeds five hundred dollars, seven and one-half cents per ten dollars per month on that portion over five hundred.

The time charge under this subsection shall be computed from month to month (which need not be a calendar month) or other regular period, on all amounts unpaid under the agreement at the beginning of each such period. The time charge under this subsection may be computed for all unpaid balances within a range of not in excess of ten dollars on the basis of the median amount within such range, if as so computed such time charge is applied to all unpaid balances within such range. A minimum time charge not in excess of seventy cents per month may be charged, received and collected."

Under a retail time contract the time charge is defined in Section 408.250(17), V.A.M.S., as the amount in excess of the principal balance, which is computed in accordance with subsection 5(6) of Section 408.260. The maximum rate at which a time charge may be assessed under a retail time contract is limited under Section 408.300 (1) as follows:

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"1. Notwithstanding the provisions of any other law the seller or other holder under a retail time contract may charge, receive and collect a time charge, which shall be in lieu of any interest charges, except such as may arise under the terms of sections 408.250 to 408.370 after maturity of the time contract and which charge shall not exceed the following:

(1) On so much of the principal balance as does not exceed three hundred dollars, twelve dollars per one hundred dollars per year;

(2) On so much of the principal balance as exceeds three hundred dollars but is less than one thousand dollars, ten dollars per one hundred dollars per year on that portion over three hundred dollars;

(3) If the principal balance exceeds one thousand dollars, eight dollars per one hundred dollars per year on that portion over one thousand dollars.

The time charge under this subsection shall be computed on the principal balance of each transaction, as determined under subsection 5 of section 408.260, on contracts payable in successive monthly payments substantially equal in amount from the date of the contract to the maturity of the final payment, notwithstanding that the total time balance thereof is required to be paid in one or more deferred payments. When a retail time contract provides for payment other than in substantially equal successive monthly payments, the time charge shall not exceed the amount which will provide the same return as is permitted on substantially equal monthly payment contracts, having due regard for the schedule of payments. The time charge may be computed on the basis of a full month for any fractional portion of a month in excess of ten days. A minimum time charge of twelve dollars may be charged, received, and collected on each such contract."

Subsection 3 of Section 408.300 provides that the time charge includes all charges incidental to investigating and making any retail transaction. Further, it provides:

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". . . No fee, expense, delinquency charge, collection charge, or other charge whatsoever, shall be charged, received, or collected except as provided in sections 408.250 to 408.370."

The act contains only two references to delinquency or collection charges: (a) Section 408.290(1) requires disclosure to the buyer under a retail charge agreement that attorney's fees may be payable upon default if the account is referred to an attorney for collection; and (b) Section 408.330 provides as follows:

"If a retail time contract so provides, the holder thereof may charge and collect: (1) A delinquency and collection charge on each installment in default for a period of not less than ten days in an amount not to exceed five percent of each installment or five dollars, whichever is less; provided, however, that a minimum charge of one dollar may be made; or (2) interest on each delinquent payment thereunder at a rate which shall not exceed the highest lawful contract rate. In addition to such delinquency charge, the contract may provide for the payment of attorney fees not exceeding fifteen percent of the amount due and payable under such contract where such contract is referred for collection to an attorney not a salaried employee of the holder of the contract and for court costs."

In view of the distinctions maintained throughout the act between retail charge agreements and retail time contracts, it is the opinion of this office that under a retail charge agreement, no charge may be assessed for failure of the buyer to pay an amount due under such agreement, except attorney's fees not exceeding fifteen percent of the total unpaid balance if the account is referred to an attorney for collection.

However, the seller under a retail charge agreement is not without recourse with respect to payments not made when due. Subsection 2 of Section 408.300 provides that under a retail charge agreement, the seller must furnish the buyer a statement reciting, among other items, the "total unpaid balance at the beginning and end of the period," together with the amount of the time charge, if any. Under a retail charge agreement the applicable time charge is computed on the basis of the unpaid balance, that is, on ". . . all amounts unpaid under the agreement at the beginning of each such period. . . ." (emphasis added) Section 408.300(2), RSMo 1969. Accordingly, should

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the buyer under such agreement fail to pay the total amount due on the appropriate date, the amount by which he is delinquent becomes an unpaid balance subject to a time charge at the applicable rate.

By designating retail time contracts in Section 408.330 and by omitting therefrom any reference to retail charge agreements, the legislature in our opinion meant to exclude from the delinquency and collection provisions those transactions effected pursuant to retail charge agreements. This interpretation is supported by the distinctions maintained throughout the act between retail charge agreements and retail time contracts. Further, in preserving this distinction, the legislature provided not only different means of computing time charges, but also different rates.

Under a retail charge agreement the seller may assess a monthly rate of one and one-half percent on amounts up to five hundred dollars and three-fourths percent on amounts in excess thereof. Under a retail time contract the seller may assess only an annual rate of twelve percent on amounts up to three hundred dollars, ten percent on amounts in excess of three hundred dollars, and eight percent on amounts in excess of one thousand dollars. On the basis of the foregoing, it is the opinion of this office that the time rate provided for retail charge agreements constitutes the exclusive means by which the seller can be compensated for extending credit initially and for "penalizing" the buyer's delinquency.

When these conclusions are applied to the facts you describe, the assessment of a three percent "finance" charge would be unlawful if the retail time transaction was effected pursuant to a retail charge agreement. In that event, the amount unpaid would be subject only to the time charge as provided in Section 408.300(2). If, however, the transaction had been consummated by means of a retail time contract and if that contract so provided, the seller could assess a delinquency charge, not in excess of five percent or five dollars, whichever is less, on any installment in default past ten days under provisions of Section 408.330.

With respect to the second factual situation you describe, we can find no Missouri statute expressly prohibiting or expressly authorizing merchants to assess a charge for dishonored checks. Absent a specific statutory prohibition, there exist only two theories under which such a practice might be unlawful: (1) if it can be said that the merchant in effect has extended a "loan" to the purchaser whose check was dishonored and that the "handling charge" takes on the character of interest, then the amount or rate of said charge would be governed by the Missouri usury law; or (2) if the check was tendered as payment of an installment due under a retail time contract or as payment on the balance due under a retail charge agreement, then the proper delinquency and collection

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charges would be limited in accordance with the Retail Credit Sales Act.

Considering the first alternative, we assume that the transaction is for cash, at least in the contemplation of the merchant who accepts the check as consideration for the groceries purchased. Although checks are deemed only conditional payment, 77 C.J.S. Sales §238, the acceptance of a check by a merchant does not raise a presumption that he has extended credit. Although upon dishonor, no payment, in effect, has been made and the amount due is still owing, the transaction even at that point cannot be characterized as a "loan" within the purview of the usury law. As previously noted, the Missouri usury law forbids ". . . the exaction or receipt of more than a specified legal rate for the hire of money and not of anything else; . . ." (emphasis added) General Motors Acceptance Corporation v. Weinrich, *supra*. The circumstances you describe ostensibly constitute a cash purchase of goods. Even though the check tendered therefor subsequently is dishonored, a sale of goods, as opposed to the hiring of money, has transpired. Accordingly, it is the opinion of this office that a bad check policy such as you describe is not subject to the Missouri usury law.

Even if we were to conclude that the merchant effectively extends a "loan" when the buyer's check is dishonored, a charge for handling a bad check would not constitute interest for the purposes of the usury law if the amount of the charge was reasonably related to the services performed in connection therewith. Opinion No. 506, Ottinger, December 18, 1969; Cuendet v. Love, Bryan and Company, 57 S.W.2d 701 (St.L.Ct.App. 1933); Hecker v. Putney, 196 S.W.2d 442 (St. L.Ct.App. 1946).

Alternatively, if the check were tendered as payment for an installment due under a retail time contract or as payment on a balance due under a retail charge agreement, the dishonored check would constitute no payment. Accordingly, the buyer would be in default on that installment or balance due, and the provisions of the Retail Credit Sales Act, relating to delinquency and collection charges, would govern the amount or rate of permissible charges, if any, and an arbitrary charge called a "handling charge" would be unlawful.

If the transaction does not fall within the scope of the Retail Credit Sales Act, it is the opinion of this office that a merchant may assess a reasonable charge for handling dishonored checks if prior notice or disclosure of such policy is available to the purchaser, leaving the purchaser free to choose whether to pay with a check or decline to make a purchase from the merchant.

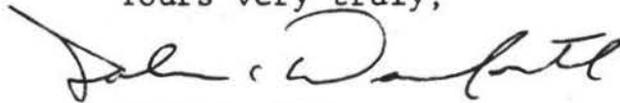
#### CONCLUSION

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It is the opinion of this office that transactions characterized by the following are governed by the Retail Credit Sales Act: (1) the seller is a retail seller; (2) the buyer is a retail buyer; (3) the subject matter of the transaction consists of goods or services having a cash sale price of less than \$7,500; and (4) payment therefor, whether lump sum or periodic, is deferred. If the transaction is effected pursuant to a retail charge agreement, no separate charge may be assessed by the merchant for the buyer's failure to pay the amount due within the time stated; in that event, the delinquent amount becomes part of the unpaid balance subject to the permissible statutory monthly time charge. If the transaction is effected under a retail time contract and if the contract so provides, the merchant can assess a separate charge for the buyer's default on an installment due within the permissible statutory limits. Finally, the Missouri usury law does not prohibit merchants from assessing a reasonable charge for handling dishonored checks tendered for payment of goods purchased, provided the purchaser has prior notice of the merchant's policy. If, however, the check was tendered as payment of an amount due under a retail charge agreement or retail time contract, the amount or rate of such charge would be governed by the Retail Credit Sales Act.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Karen M. Iverson.

Yours very truly,



JOHN C. DANFORTH  
Attorney General