

1-1-1973

## Finance Rates in Consumer Installment Credit Sales: The Time-Price Doctrine in Montana

R. Keith Strong

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

---

### Recommended Citation

R. Keith Strong, *Finance Rates in Consumer Installment Credit Sales: The Time-Price Doctrine in Montana*, 34 Mont. L. Rev. (1973).

Available at: <https://scholarworks.umt.edu/mlr/vol34/iss1/8>

This Note is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact [scholarworks@mso.umt.edu](mailto:scholarworks@mso.umt.edu).

**FINANCE RATES IN CONSUMER INSTALMENT CREDIT SALES:  
THE TIME-PRICE DOCTRINE IN MONTANA**

**R. Keith Strong**

*INTRODUCTION*

Although Montana's usury statute provides that parties shall agree to no more than ten per cent per year,<sup>1</sup> the purchaser of consumer goods in this state may find himself paying a finance charge of up to nineteen per cent of the cash price of the goods annually for the privilege of buying in instalments.<sup>2</sup> The legal theory exempting finance charges on sales from regulation by the usury statute is known as the time-price doctrine. The doctrine originated in the courts but Montana's supreme court has yet to face it. A glance at the advertisements in any newspaper offering easy financing for credit sales reveals the profound influence of the time-price doctrine on this state's economy.

In the nation as a whole the past two decades have witnessed an erosion of the doctrine's status as sole regulator of finance rates in consumer credit sales. New cases have limited the doctrine; new legislation has abolished it. The flurry of developments encourages an investigation of the relevancy of the time-price doctrine to consumer credit sales in this state. This note will sketch the history and characteristics of the time-price doctrine, examine its current status in the nation and in Montana, and briefly look at an alternative solution to the problem of regulating consumer credit sale finance rates.

*THE TIME-PRICE DOCTRINE AT WORK*

Consumer instalment credit plays a significant<sup>3</sup> and rapidly expanding<sup>4</sup> role in the national economy. The significance of instalment credit is largely due to the prevalence of instalment sale credit.<sup>5</sup> An illustration of the application of the time-price doctrine will show how it encourages the extension of consumer sale credit.

<sup>1</sup>REVISED CODES OF MONTANA §§ 47-125, 47-126 (1947) [hereinafter cited as R.C.M. 1947].

<sup>2</sup>R.C.M. 1947, § 74-608(1). A major source of confusion before the enactment of the Truth-In-Lending Act, 15 U.S.C. § 1601 (1968) was that finance rates might be stated in several different manners: as a total dollar sum, as a percentage, or as a number of dollars per hundred dollars per year. The Truth-In-Lending Act provides a formula for conversion of all these methods into one standard percentage rate. A statement of the formula is found at 34 *Fed. Reg.* 2017 (1969). Applying this formula to the eleven dollars per 100 dollars per year allowable rate found in R.C.M. 1947, § 74-608 yields a rate of 19 per cent.

<sup>3</sup>At the end of June, 1972, \$114,567,000,000 in consumer installment credit (excluding real estate mortgages) was outstanding in the United States. Of this total, \$9,791,000,000 was advanced in June alone. 58 FEDERAL RESERVE BOARD BULLETIN, AO.8 pp. A56, A58 (Aug. 1972).

<sup>4</sup>The 1972 figure compares with the \$4,503,000,000 outstanding at the end of 1939. *Id.* p. A56.

<sup>5</sup>Some indication of the amount of sale credit is given from the fact that in June, 1972, automobile paper outstanding alone was worth \$41,104,000,000. *Id.* p. A56.

The person who intends to buy consumer goods but who either cannot or does not want to pay with funds he already has, faces two choices. He may borrow from an institutional lender and pay the cash price with the proceeds of the loan. He must then repay the advance with interest. The other alternative is to finance the goods through the seller. The buyer who chooses this course will sign a contract with the seller obligating himself to pay, usually in instalments, the cash price of the goods as well as a charge for the privilege of paying over time.

The importance of the time-price doctrine is due to the different way courts have chosen to treat these two means of accomplishing the same end. If the buyer chooses the first course, courts hold, except where small loan laws apply, that the usury statute regulates the amount of interest the lender may charge for his loan.<sup>6</sup> The second option is the typical time-price sale.<sup>7</sup> The majority of courts hold that in a time-price sale the usury statute does not apply to regulate the finance charge,<sup>8</sup> thus the charge may greatly exceed the rate of return permissible under the usury statute.<sup>9</sup> Most courts cling to this position when the seller does not collect the finance charge but instead sells the contract to a finance agency at a discount equal to the amount of the finance charge.<sup>10</sup> Some courts even apply the exemption, the time-price doctrine, when the consent of a finance agency to accept the buyer as a credit risk is a condition of the sale and the seller extends no credit at all.<sup>11</sup>

Several justifications are commonly given for the courts' persistent exemption of time-price sales from the limits of the usury laws. Chief among them is the assertion that the transaction is neither a loan nor a forbearance of an existing debt,<sup>12</sup> so that the generally accepted definition of usury does not apply.<sup>13</sup> Some courts still quote the old adage that, although he may borrow from necessity, a person buys from choice and can simply refuse to buy if he does not like the price of the credit.<sup>14</sup> It is sometimes argued that the doctrine merely reflects

<sup>6</sup>R.C.M. 1947, §§ 47-125, 47-126. On loans of \$1000 or less the provisions of the Montana Consumer Loan Act, R.C.M. 1947, § 47-205 allow licensed lenders to charge higher rates. For a more detailed description of the retail instalment sale see: B. CURRAN, TRENDS IN CONSUMER CREDIT, 91 (1965); Warren, *Regulation of Finance Charges in Retail Instalment Sales*, 68 YALE L.J. 839, 845, (1959).

<sup>7</sup>See the list of cases cited in *Dennis v. Sears, Roebuck and Co.*, 223 Tenn. 415, 446 S.W. 2d 260, 263 (1960); See, cases annotated at 14 A.L.R. 3d 1065, 1077-1082 (1967).

<sup>8</sup>*Lundstrom v. Radio Corporation of America*, 17 Utah 2d 114, 405 P.2d 339 (1965).

<sup>9</sup>*Languille v. Central-Penn National Bank* 38 Del. Ch. 566, 156 A.2d 410 (1959).

<sup>10</sup>*Atlas Security Co. v. Copeland*, 124 Kan. 393, 260 P. 659 (1927).

<sup>11</sup>*Hogg v. Ruffner*, 66 U.S. 115 (1861).

<sup>12</sup>The elements generally held necessary to constitute usury are:

- (a) an unlawful intent;
- (b) money or its equivalent;
- (c) a loan or forbearance;
- (d) the understanding that the loan is to be repaid;
- (e) the exaction of a higher rate for the use of the money than is allowed by law.

*State v. J.C. Penney*, 48 Wis.2d 125, 179 N.W.2d 641, 645 (1970).

<sup>14</sup>*Languille v. Central-Penn National Bank of Philadelphia*, 38 Del. Ch. 382, 153 A.2d 211, 213 (1959).

the theory, basic to the free enterprise system, that a seller should be able to charge whatever the market will bear for his goods.<sup>15</sup> Another influence is the continued need for credit in an expanding economy.<sup>16</sup> All of these arguments carry some weight. For an understanding of regulation of finance rates for consumer credit sales, however, as Justice Holmes said: "A page of history is worth a volume of logic."<sup>17</sup> A short look at the history of the time-price doctrine offers a more convincing explanation of the continued existence of the doctrine.

### EVOLUTION OF THE DOCTRINE

#### HISTORY

*Beete v. Bidgood*,<sup>18</sup> decided in England in 1826, is the earliest case stating that the difference between the cash price of goods and a higher price for deferred payment is not interest. The allegedly usurious transaction was a sale of land. The buyer gave the seller promissory notes aggregating the cash price of the land. The notes had staggered due dates and bore what the contract for sale called "interest" at a rate higher than that allowed by the applicable usury statute. The court saw only one difficulty in the case: the parties had referred to the charge on the notes as interest. The substance of the contract, according to the court, was a sale of land. The usury statute did not apply to the cost of paying over time rather than with cash, regardless of what labels the parties used. The transaction was a sale and not a loan.<sup>19</sup>

The doctrine was brought to the United States soon after, and became a permanent feature on the landscape of American law in the United States Supreme Court case, *Hogg v. Ruffner*.<sup>20</sup> There, as well, a sale of land was attacked as usurious. The Court made this classic statement of the time-price rationale:

[A] vendor may prefer \$100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit; . . . such a transaction has none of the characteristics of usury; it is not for the loan of money or forbearance of a debt.<sup>21</sup>

In this land sale case, decided 110 years ago, are articulated the same justifications that are given today: the seller should be able to charge what the market will bear; and the transaction is neither a loan nor a forbearance but a sale. Considered in the context of a long-term contract for sale of land the arguments are persuasive. The bargaining power of the parties was equal; the buyer was not forced to buy; there

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* See also, discussion in *Uni-Serv Corp. of Massachusetts v. Commissioner of Banks*, 349 Mass. 283, 207 N.E.2d 906 (1965) as an example of the reluctance of courts to overturn the principle because of the need for credit and the reliance on the time-price form.

<sup>17</sup>*New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

<sup>18</sup>*Beete v. Bidgood*, 108 Eng. Rep. 792 (K.B. 1827).

<sup>19</sup>*Id.* at 794.

<sup>20</sup>*Hogg v. Ruffner*, *supra* note 12.

<sup>21</sup>*Id.* at 118-119.

was no finance agency involved and so the device could hardly have appeared to cloak a loan. These arguments were taken out of the land-sale context, however, and used in consumer credit sales when the industrial revolution started to flood the market with consumer goods.

*Hogg v. Ruffner*<sup>22</sup> had been established law for more than half a century when the credit boom of the early part of the twentieth century hit the United States. The relatively high cost of such goods as automobiles brought a concomitant demand for credit.<sup>23</sup> Available evidence indicates that consumer instalment credit is legitimately more expensive than most usury statutes would allow.<sup>24</sup> When legislatures passed no laws to regulate the new phenomenon, courts fell back on the time-price doctrine to fill the gap.<sup>25</sup> The effect of the application of the time-price doctrine to finance charges, however, was to remove all upper bounds. Rates skyrocketed.<sup>26</sup>

The demand for a reasonable upper limit on the rates collected as finance charges stirred state legislatures into action. In 1935, states began enacting legislation designed to correct some of the worst abuses of the time-price doctrine.<sup>27</sup> These acts, known as retail instalment sales acts, codify the judicially-created time-price doctrine. They apply to the typical closed end credit sale, a purchase of one fairly expensive item resulting in a sale contract for a fixed amount including a set finance charge to be paid in a set number of instalments.<sup>28</sup> These acts require that the retail instalment sale contracts be in writing and that they limit the finance charges and place requirements for disclosure in such contracts.<sup>29</sup> The story of the regulation of consumer credit sale finance charges is largely told in the adoption and refinement of these acts.<sup>30</sup> Since retail instalment sale acts did not attempt a new approach to sale finance regulation, states which did not adopt such acts relied upon the time-price doctrine. Where neither time-price

<sup>22</sup>*Id.*

<sup>23</sup>Britton and Ulrich, *The Illinois Retail Instalment Sales Act—Historical Background and Comparative Legislation*, 53 N.W.U.L.R. 137 (1958).

<sup>24</sup>For detailed studies of the effects of limiting returns on consumer credit transactions to the 10% allowed by one usury statute see: Lynch, *Consumer Credit at Ten Per Cent Simple: The Arkansas Case*, 1968 UNIV. OF ILL. L.F. 592; Student Article, *An Empirical Study of the Arkansas Usury Law: "With Friends Like That . . ."*, 1968 UNIV. OF ILL. L.F. 544.

<sup>25</sup>*Berger v. Lodge*, 90 Cal. App. 19, 265 P. 515 (1928).

<sup>26</sup>See, *Berger, Usury in Instalment Sales*, 2 LAW AND CONTEMP. PROB. 148, 153 (1935), indicating that 86% charges for three month periods were not unheard of.

<sup>27</sup>Warren, *supra* note 7 at 843, describes these early acts.

<sup>28</sup>For a detailed discussion of the closed end credit sale see Curran, *supra* note 7, 10-12.

<sup>29</sup>Britton and Ulrich, *supra* note 23, treat the provisions in a typical retail instalment sale act.

<sup>30</sup>For an idea of the evolution of these acts in recent years, see, Warren, *supra* note 7 generally for a discussion of the situation in 1958. Compare that discussion with the state of the law in 1966 as portrayed in CURRAN, *supra* note 7 at 256-278 and as it currently exists, 1 OCH CONSUMER CREDIT GUIDE 1401 *Chart: Retail Instalment Sales*.

194 MONTANA LAW REVIEW [Vol. 81]

doctrine nor retail instalment sale act exist, consumer instalment sale finance rates are governed by the usury statute.<sup>31</sup>

When finance charge regulation had developed to this extent the waters were muddied even more by the addition of an entirely new credit arrangement. Known as open-end or revolving credit and seen in the bank credit card or retail charge card, the arrangement involves an agreement between the buyer and the card issuer,<sup>32</sup> allowing the buyer to purchase one or many items on credit and to pay at the end of a set billing period. If the buyer chooses not to pay the entire balance at the end of the billing period he must, according to the terms of the credit agreement, pay some stated fraction of the balance each subsequent billing period along with a finance charge on the outstanding balance.<sup>33</sup> Since this arrangement differs from closed end credit, the one-item, set-term, contract contemplated by the time-price doctrine and the retail instalment sale acts, most states have adopted acts specifically to regulate open-end credit.<sup>34</sup> Some states rely solely upon the time-price doctrine.<sup>35</sup>

This, then, is the traditional<sup>36</sup> law regulating finance charges on consumer credit sales in this country. At the foundation is the usury statute. Exceptions are made for valid time-price sales. The time-price doctrine is held in check by retail instalment sale acts; and open-end credit is controlled by either the time-price doctrine itself, a retail instalment sale act<sup>37</sup> or a special act.<sup>38</sup> To answer the question of how closely these laws apply to today's consumer sale credit market it is necessary to determine in detail how courts decide when a transaction is a valid time-price sale.

#### THE TIME-PRICE DOCTRINE IN THE COURTS

The evolution just described has not been a quiet process; the time-price doctrine has been the target of frequent litigation. As a result, although the basic doctrine may be stated simply, it is difficult to find uniformity in treatment of time-price cases. A review of the elements of the time-price sale along with some of its most frequent qualifications will give some idea of the problem.

<sup>31</sup>Arkansas is the only state relying solely on its usury statute. See, discussion *supra* note 24.

<sup>32</sup>Not only merchants but also finance agencies issue cards establishing open end credit accounts. See, Brandel and Leonard, *Bank Charge Cards: New Cash or New Credit?*, 69 MICH. L.R. 1033 (1971).

<sup>33</sup>*Id.* for a more detailed discussion of the arrangement.

<sup>34</sup>1 CCH CONSUMER CREDIT GUIDE 2501, *Chart: Open End Credit*.

<sup>35</sup>Massachusetts: *Uni-Serv Corporation of Massachusetts v. Commissioner of Banks* 349 Mass. 283, 207 N.E. 2d 906 (1965); Tennessee: *Dennis v. Sears, Roebuck and Co.*, *supra* note 8.

<sup>36</sup>New legislation has been adopted by seven states which eliminates the multiplicity of statutes characteristic of most states. See, discussion of the UNIFORM CONSUMER CREDIT CODE, *infra*.

<sup>37</sup>Montana is one of few jurisdictions taking this approach. See, discussion of Montana law *infra*.

<sup>38</sup>UNIFORM CONSUMER CREDIT CODE, *infra*.

### A. *Elements of a valid time-price sale*

The essence of the time-price doctrine is the buyer's ability to freely choose his own course of action after weighing the relative merits to him of buying with cash or paying a higher price for credit.<sup>39</sup> Full knowledge of both the cash and the time prices is necessary to make the buyer aware of the implications of his choice. A general statement of the rule is that the finance charge of a credit sale is not interest in the meaning of the usury statute if the seller, in good faith, discloses to the buyer both the cash and credit prices of the goods.<sup>40</sup> Courts, however, have not left the doctrine so simple.

### B. *Qualifications of the doctrine*

Historically courts have tended to closely scrutinize transactions which might be devices to evade the usury statutes.<sup>41</sup> Alleged time-price sales are examined in this light. Qualifications of the basic doctrine have emerged when courts have found overreaching in any detail of the transaction. For the purposes of this note, cases in which courts have refused to accept the argument that a particular transaction was actually a sale rather than a loan may be divided roughly into two general fact situations. Courts find alleged sales usurious when the seller fails to disclose both prices. There is also an increasingly high frequency of refusal to apply the time-price doctrine when too close a relationship exists between the seller and a finance agency which ultimately buys the consumer's contract.

If the two-price requirement of the time-price doctrine is aimed at providing the buyer with enough information to make an intelligent choice between cash and credit buying, incomplete disclosure would avoid the goal. The majority of courts hold strictly that incomplete disclosure in any material particular makes the transaction usurious.<sup>42</sup> It follows that a failure to disclose either the time or cash prices is fatal to a time-price sale<sup>43</sup> as may be a contract signed in blank<sup>44</sup> or the inclusion of ambiguous<sup>45</sup> or unlabelled charges.<sup>46</sup> The connection of other cases to the time-price doctrine is more difficult to understand. Some courts, for example, hold that the necessity of full and good faith disclosure requires that if the time-price is determined by applying a rate table to the cash price a loan rather than a sale has taken place.<sup>47</sup>

<sup>39</sup>*Languille v. Central-Penn National Bank of Philadelphia*, *supra* note 14.

<sup>40</sup>Warren, *supra* note 10 at 841.

<sup>41</sup>For a discussion of the place of the time-price doctrine in the theory of the general usury statutes see: Benfield, *Money, Mortgage and Migraine—The Usury Headache*, 19 CASE W. RES. L.R. 819, 844 (1968); Shanks, *Practical Problems in the Application of Archaic Usury Statutes*, 53 VA. L.R. 327 (1967).

<sup>42</sup>*Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W. 2d 973 (1952).

<sup>43</sup>*Id.*

<sup>44</sup>*Midland Loan Finance Co. v. Lorentz*, 209 Minn. 278, 296 N.W. 911 (1941).

<sup>45</sup>*Hare v. General Contract Purchase Corp.*, *supra* note 42.

<sup>46</sup>*Beatty v. Franklin Investment Co.*, 115 App. D.C. 311, 319 F.2d 712 (D.C. Cir. 1963).

<sup>47</sup>*Lloyd v. Gutzsell*, 175 Neb. 755, 124 N.W.2d 198 (1963).

Further qualifications of the doctrine have arisen when some courts have found a close relationship between the seller and a finance agency to be indicative of the existence of a loan rather than a sale.<sup>48</sup> For example, even when the buyer is quoted two prices, some courts find an agreement usurious when the finance agency must consent to accept the buyer as a credit risk as a condition of a sale.<sup>49</sup> That the seller has been furnished contracts and rate tables by a finance agency has been held to make an agreement usurious.<sup>50</sup> A recent case holds that whenever a seller makes a credit sale with the reasonable expectation that the contract will be discounted to a finance agency, the difference between the time and the cash prices will be held to be interest, and as such, regulated by the usury statutes.<sup>51</sup>

The doctrine has also been criticized in cases of open-end credit. The reasons are found in the two price disclosure requirements and in the nature of open-end credit. It is impossible to tell the open-end credit buyer beforehand exactly how much the total finance charge will be since the buyer decides whether to pay immediately or to spread his payments out. Stating that open-end credit is simply too different from traditional time-price sales to be covered by the doctrine, two states have recently held that open-end credit transactions are usurious.<sup>52</sup>

#### *THEORY AND FACT:*

#### *THE TIME-PRICE DOCTRINE AND THE CREDIT SALE INDUSTRY*

As seen above, several arguments are advanced to justify the continuing existence of the time-price doctrine. Most notable are the assertions that:

- (a) since the buyer is free to choose between cash and time payment he cannot complain that he picked the more expensive;
- (b) the doctrine allows the seller to get what he can for his goods;
- (c) the transactions governed by the doctrine are fundamentally different from loans and should be exempted from usury laws; and
- (d) the demand for consumer instalment sale credit necessitates the continuance of the doctrine.

None of these arguments is borne out by fact.

The first argument is that the freedom of the buyer to choose between cash and time prices changes the nature of the transaction from a loan to a sale. The argument originated when credit sales were of luxuries which the buyer could simply choose not to purchase. Those

<sup>48</sup>See, cases annotated at 14 A.L.R.3d 1065, 1128 (1967).

<sup>49</sup>Atlas Security Co., v. Copeland, *supra* note 11.

<sup>50</sup>Lloyd v. Gutgsell, *supra* note 47.

<sup>51</sup>National Bank of Commerce v. Thomsen, 80 Wash.2d 406, 495 P.2d 332 (1972).

<sup>52</sup>Wisconsin: *State v. J. C. Penney*, 48 Wisc.2d 125, 179 N.W.2d 641 (1970); South Dakota: *Bollinger v. J. C. Penney*, 192 N.W.2d 699 (1972).

who borrowed money of necessity were protected from overreaching by usury statutes.<sup>53</sup> It is simply no longer true that only luxuries are sold on credit. The argument is still advanced. One expert refers to this state of affairs as "manifestly anachronistic."<sup>54</sup>

In light of the prevalence of the practice of discounting the contracts to a finance agency<sup>55</sup> the argument that the transaction is a sale rather than a loan also stands out as a fiction. The seller himself extends no credit.<sup>56</sup> When such discounting takes place the only difference between the time-price sale and an outright loan to the buyer is the amount of interest the finance agency is allowed to collect.

The same facts dispose of the contention that the seller should be able to set such prices for his goods as the market will bear. In practice the seller merely recovers his cash price when he discounts the contract. The finance agency benefits from the credit price.

The final argument for the retention of the time-price doctrine is more compelling. There is a great demand for consumer sale credit; to some extent the time-price doctrine has met the demand. When all of the qualifications of the doctrine are considered, however, it is questionable exactly how well the doctrine has answered the call for reasonable regulation. The person who would extend credit must be able to base his actions on reliable law. The time-price doctrine is being limited in state after state.<sup>57</sup> It can no longer be argued that there is no alternative to the time-price doctrine. New legislation is available to regulate consumer credit sale finance charges and at the same time avoid the difficulties of the time-price approach.<sup>58</sup> Even the demand for consumer sale credit is no longer a valid argument for retaining the doctrine.

That the status of the time-price doctrine is somewhat unstable in the nation as a whole, however, is not a persuasive argument for changing the law in Montana. An examination of Montana's law regulating consumer instalment sale credit shows that this state as well suffers from the nation-wide weakness of the time-price doctrine.

### FINANCE RATE REGULATION IN MONTANA

The Montana supreme court has yet to decide whether or not the

<sup>53</sup>See, material *supra* note 41.

<sup>54</sup>Warren, *supra* note 7 at 843.

<sup>55</sup>See, the figures for automobile sales alone, *supra* note 5.

<sup>56</sup>See, the discussion of the relationship in *National Bank of Commerce v. Thomsen*, *supra* note 51, when the contract was discounted with recourse.

<sup>57</sup>Arkansas: *Sloan v. Sears, Roebuck and Co.*, 228 Ark. 464, 308 S.W.2d 802; Nebraska: *Lloyd v. Gutgsell*, *supra* note 47; South Dakota: *Rollinger v. J. C. Penney*, *supra* note 51, have all recently either abandoned or severely limited the time-price doctrine. In addition six states have adopted the UNIFORM CONSUMER CREDIT CODE and avoided the problem. 1 CCH CONSUMER CREDIT GUIDE 1291, *Chart: Uniform Consumer Credit Code*.

<sup>58</sup>See, the discussion of the UNIFORM CONSUMER CREDIT CODE, *infra*.

time-price doctrine is part of this state's law.<sup>59</sup> Since 1959, however, the Montana Retail Instalment Sale Act<sup>60</sup> has regulated consumer instalment sales. A convincing argument may be made that by adoption of the Act the legislature at least tacitly, if not expressly, accepted the time-price doctrine.<sup>61</sup> With respect to closed end credit, however, it makes little difference whether the act embodies the doctrine. The Act speaks directly to the retail instalment sale contracts held by finance agencies<sup>62</sup> as well as to the activities of sellers<sup>63</sup> and thus avoids the problems some states have encountered with the relationships between sellers and finance agencies.<sup>64</sup>

The few cases concerned with the application of the Act have centered around the constitutionality of the Act in light of a provision of the Montana constitution of 1889 prohibiting special laws regulating the rate of interest on money.<sup>65</sup> The problem was first raised in a federal district court case, *B-W Acceptance Corporation v. Torgerson*.<sup>66</sup> Judge Jameson considered the problem sufficiently close to invoke the doctrine of judicial abstention. The issue was for the state courts to decide.<sup>67</sup> The matter rested there until May of 1972 when a summary judgment was handed down in *Cecil v. Allied Stores*.<sup>68</sup> The decision holds in part that the Act is unconstitutional as a special interest act because it allows retail sellers under the special rates of the Act<sup>69</sup> to sell goods for credit at a higher finance charge than that allowed other sellers. In reaching this conclusion the court relied upon the decisions of the

<sup>59</sup>The court's discussion in *Favero v. Wynacht*, 140 Mont. 358, 371 P.2d 858, 867-870 (1962) comes close. The result in that case, however, was the finding that the transaction questioned was merely a secured loan.

<sup>60</sup>R.C.M. 1947, §§ 74-601 *et seq.*

<sup>61</sup>Britton and Ulrich, *supra* note 23 at 139, discuss the relationship of time-price doctrine and retail instalment sale acts in detail.

<sup>62</sup>See, especially R.C.M. 1947, §§ 74-603, 74-604. See also, Note, *Montana Legislative Summary 1959, Retail Instalment Sales*, 20 MONT. L.R. 136 (1959).

<sup>63</sup>R.C.M. 1947, §§ 74-601 *et seq.* generally.

<sup>64</sup>The Washington decision to restrict the application of the time-price doctrine may be attributed in part to the Washington Retail Instalment Act, REVISED CODE OF WASHINGTON ANNOTATED §§ 63.14 *et seq.* (1963) which deals only with sellers and does not speak to finance agencies. See, discussion in *National Bank of Commerce v. Thomsen*, *supra* note 51 at 337.

<sup>65</sup>MONT. CONST. art. V, § 25 (1889):

The legislative assembly shall not pass local or special laws in any of the following cases, that is to say: . . . regulating the rate of interest on money; . . .

The corresponding provision of the Montana Constitution of 1972, which does not become effective until July 1, 1973, is found in article V, § 12 and reads: "The legislature shall not pass a special or local act when a general act is, or can be made, applicable." Whether this section will have a different effect than its predecessor is uncertain.

<sup>66</sup>234 F. Supp. 214 (D. Mont. 1964).

<sup>67</sup>*Id.* at p. 217.

<sup>68</sup>The text of this summary judgment may be found at 4 CCH CONSUMER CREDIT GUIDE 89, 080, § 99, 181.

<sup>69</sup>R.C.M. 1947, § 74-608.

Supreme Court of Nebraska<sup>70</sup> which came to a similar result when faced with the interpretation of an identical constitutional provision.<sup>71</sup> In the expected appeal of *Cecil*, the constitutionality of the Act as a whole will be squarely before the Montana supreme court.

The same case, *Cecil v. Allied Stores*,<sup>71</sup> raises another fundamental problem of Montana instalment sale credit law. If the Retail Instalment Sale Act deals reasonably effectively with closed end credit, the same cannot be said with regard to open-end credit. When the Act was passed it not only placed limits upon finance charges<sup>72</sup> but also set certain requirements for the retail instalment sale contracts which are made an incident of any valid credit sale.<sup>73</sup>

A contract must disclose: the amount of time-price;<sup>74</sup> the amount of the cash price;<sup>75</sup> the amount of each instalment;<sup>76</sup> and the due date of each instalment.<sup>77</sup> In 1971 the Act was amended to include open-end credit transactions.<sup>78</sup> The general provisions of the Act regarding disclosure were not changed. Open-end credit was not excluded from these requirements. The result of the amendment is that the same requirements placed on disclosure in closed-end credit transactions where total finance charge and number and size of instalments are agreed upon in advance apply to open-end credit sales.

This burden of disclosure is impossible for a seller to meet. The essence of the open-end sale is the flexibility given the buyer. He may pay all of the outstanding balance of his account before any finance charge is due or he may extend his payments. The decision is his alone. The seller cannot know in advance how many, if any, instalment payments will be necessary or what finance charge if any will be paid. He can have no idea what amount the buyer will pay in any one instalment if the buyer decides to buy over time. The seller can and does reveal beforehand what his service charge will be for deferred payment. He can, however, only state the charge in terms of a percentage of the outstanding balance. This is clearly not the disclosure required by the Act.<sup>79</sup> The type of disclosure requirements originating

<sup>70</sup>In *Elder v. Doerr*, 175 Neb. 483, 122 N.W.2d 528 (1963) the Nebraska court was called upon to evaluate the Nebraska Retail Instalment Sale Act in light of Article III § 18 of the Nebraska Constitution which reads:

The legislature shall not pass local or special laws in any of the following cases, that is to say:

... regulating the interest on money.

The court said that the act authorized an instalment loan in the guise of a sale and called the act "unreasonable, arbitrary and capricious." *Id.* at 537.

<sup>71</sup>*Cecil v. Allied Stores*, *supra* note 68.

<sup>72</sup>R.C.M. 1947, § 74-608.

<sup>73</sup>R.C.M. 1947, § 74-607.

<sup>74</sup>R.C.M. 1947, 74-607(f)(8).

<sup>75</sup>R.C.M. 1947, 74-607(f)(1).

<sup>76</sup>R.C.M. 1947, 74-607(f)(8).

<sup>77</sup>*Id.*

<sup>78</sup>LAWS OF MONTANA, Ch. 416 (1971).

<sup>79</sup>R.C.M. 1947, § 74-611(b) forbids anyone in violation of R.C.M. 1947, § 74-607 from collecting any finance charge on the sale.

in the time-price doctrine and codified in the Retail Instalment Sale Act simply do not apply to open-end credit. This question will also face the Montana supreme court in the expected appeal of *Cecil v. Allied Stores*.

Some of the possible answers to the questions raised by *Cecil* are not pleasant. A finding that the Retail Instalment Sale Act is unconstitutional would leave the usury statute the only regulator of consumer instalment sale finance charges. Only one state is in a similar situation and the results there have not been satisfactory.<sup>80</sup> If the Act is declared constitutional the problem of open-end credit remains. It is difficult to see how the requirements of the Act can be met in consumer open-end credit transactions.

The dilemma facing the court is an example of the basic problem: a case-by-case approach cannot deal effectively with the complexities of sale credit. Neither can a piecemeal legislative attack. What is needed is a comprehensive program of legislation based on the realities of the modern credit industry. Only the legislature can provide such a law, and the legislature has failed to act. A stumbling block has been the difficulty and expense of drafting the needed laws. The drafting has now been done, however, and legislation is available which would solve the problems created by the time-price approach to finance charge regulation.

### THE UNIFORM CONSUMER CREDIT—AN ALTERNATIVE

In 1968 the Uniform Consumer Credit Code (UCCC) was released by the Conference of Commissioners on Uniform State Laws and approved by the American Bar Association for adoption by the states. The UCCC is an attempt to codify the law of consumer credit transactions much as the Uniform Commercial Code has codified the law of commercial transactions in general.<sup>81</sup> Two states<sup>82</sup> quickly enacted the UCCC. It was then the subject of a battle in the law reviews.<sup>83</sup> To the surprise of the drafters, much of the criticism of the UCCC came from consumers and their advocates, notably the National Consumer Law Center which drafted its own National Consumer Act to correct the flaws the Center found in the UCCC.<sup>84</sup> The upshot of the controversy is the current re-drafting of the UCCC to meet some of these criticisms.<sup>85</sup>

<sup>80</sup>See, material cited *supra* note 24.

<sup>81</sup>See, Prefatory Note to 1968 Revised Final Draft UCCC.

<sup>82</sup>LAWS OF OKLAHOMA (1969), H. 1001; LAWS OF UTAH (1969), Ch. 18; LAWS OF COLORADO (1961), Ch. 207; LAWS OF IDAHO (1971), Cr. 299; LAWS OF INDIANA (1971), S. 5; LAWS OF WYOMING (1971), Ch. 191.

<sup>83</sup>See, articles cited in Braucher, *Consumer Credit Reform: Rates, Profits and Competition*, 43 TEMP. L.Q. 313 (1970) at 313, note 1.

<sup>84</sup>Printed in full in B. CLARK AND J. FONSECA, *HANDLING CONSUMER CREDIT CASES* (1972).

<sup>85</sup>All citations in this note are to the most recent result of this redrafting, to be found in CCH *INSTALLMENT CREDIT GUIDE*, CONSUMER CREDIT EXTRA EDITION, Issue no. 195, no. 101 (Sept. 8, 1972).

The Revised UCCC is divided into nine articles. The seventh and eighth are empty, reserved for future use. Article Nine contains the effective date and repealer of the act. Of the remaining six articles the first sets the stage by providing general provisions and definitions.

Article Two of the Revised UCCC is the critical part with respect to regulation of finance rates for consumer credit sales. Acting on the theory that usury statutes have failed to protect consumers and have restricted the availability of credit for those who do not need protection, the Revised UCCC repeals usury statutes.<sup>86</sup> The remainder of Article Two sets maximum rates as well as methods of rate calculation for closed-end credit sales,<sup>87</sup> open-end credit sales<sup>88</sup> and loans. One part sets licensing regulations for lenders.<sup>90</sup> The result of this section is to eliminate the uncertainties inherent in the time-price doctrine and to simplify the law of consumer credit transactions in general.

Article Three of the UCCC is entitled "Regulations of Agreements and Practices." The article contains several far-reaching changes in the law of consumer-merchant relations. Some examples are: limitations on the use of security in consumer credit transactions;<sup>91</sup> prohibitions of assignment of earnings and confessions of judgment;<sup>92</sup> and strict limitations on the holder in due course doctrine.<sup>93</sup> Part Five of Article Three attempts to eliminate some of the abuses of home solicitation sales.<sup>94</sup> Article Four of the UCCC regulates insurance.

The two remaining articles of the UCCC provide the means of implementing the other provisions. Article Five sets limits on creditors' remedies and provides remedies for consumers.<sup>95</sup> The article imposes criminal penalties for creditors violating certain parts of the act. Article Six establishes the office of an administrator whose function is to work in conjunction with a council of advisors to enforce the UCCC.

The UCCC is not perfect. It is an improvement over present law. Adoption of the UCCC would solve both the problems raised in this state by *Cecil v. Allied Stores*. The law regulating finance rates would become more simple and more rational. These are both benefits not offered by the time-price doctrine and legislation based upon it.

<sup>86</sup>REVISED UCCC § 2-601 (Comment).

<sup>87</sup>REVISED UCCC § 2-201.

<sup>88</sup>REVISED UCCC § 2-202.

<sup>89</sup>REVISED UCCC §§ 2-401, 402.

<sup>90</sup>REVISED UCCC §§ 2-301 through 2-309.

<sup>91</sup>REVISED UCCC §§ 3-301 through 3-303.

<sup>92</sup>REVISED UCCC §§ 3-305, 3-306.

<sup>93</sup>REVISED UCCC §§ 3-307, 3-404, 3-405.

<sup>94</sup>REVISED UCCC §§ 3-501, 3-505.

<sup>95</sup>REVISED UCCC §§ 5-501 through 5-203.

<sup>96</sup>REVISED UCCC §§ 5-301, 302.

### CONCLUSION

The time-price doctrine was born in another time and another role. It was used with the advent of consumer instalment credit to answer the question of how to provide the high rates necessary to consumer instalment credit sale, a question left unanswered by the legislatures. Since the doctrine was first applied, the field has become more complex, and the doctrine has been twisted to meet the increasing demands. Now the Montana supreme court faces the problem forced upon several courts in the recent past—how to fit the doctrine and its offshoots into the pattern of modern finance. The task is not easy. With every modification of the doctrine a new question springs up. Now, as when the doctrine was first applied to consumer sales, the solution does not lie with the courts. An over-all approach to sale finance regulation has been made. The result is the Uniform Consumer Credit Code and legislation like it. The legislature now bears the responsibility for making more modern and more rational the regulation of finance rates in consumer credit sales.