

46A-1-102  
46A-4-107  
46-6-5d

May 3, 1999

Re: Financing of “points” by non-regulated consumer lenders

Dear \_\_\_\_\_ :

I write in response to your March 23, 1998 letter to Tim Winslow. Please excuse the delay in answering your request. You have inquired whether a non-regulated consumer lender, i.e. a person not licensed under Article 4 of the West Virginia Consumer Credit and Protection Act (the “Act”), may finance certain fees and “points” as part of a consumer credit loan.

West Virginia Code 46A-4-107 allows regulated consumer lenders to charge an “origination fee, points or investigation fee”, subject to certain limitations based on the amount financed, but requires that such charges be included in the calculation of the loan finance charge. This statute also specifically provides that “[t]he financing of such charges shall be permissible and shall not constitute charging interest on interest.” You are concerned that this latter provision, because it only applies to regulated consumer lenders, may imply that non-regulated consumer lenders cannot finance such charges.

Your question is no doubt motivated in part by knowledge that charging interest on interest is generally considered illegal in West Virginia. See, e.g. *Waldron v. Pigeon Coal Co.*, 61 W.Va. 280, 56 S.E. 492 (1907). However, this rule is not absolute as noted by the Court in *Hamilton v. Wheeling Public Service Co.*, 107 S.E. 401, at 403 (1921):

The rule generally recognized and followed in this state is that interest should not bear interest.[citations omitted] But this principle admits of certain exceptions and modifications, even where ordinary obligations to pay money are involved....Enough has been said to show that even where ordinary obligations of indebtedness are involved, the rule that interest does not bear interest, though general, is not universal in its application.

We do not believe that the principle of “*expressio unius est exclusio alterius*” should apply to the provision of WV Code 46A-4-107 cited above and thereby prevent consumer lenders not subject to Article 4 of the Act from also financing origination fees, points and investigation fees. We reach this conclusion because of the history of this

particular statute, and the fact that other provisions of the code and legislative rules have treated and discussed such charges as distinct from interest. Our interpretation is also consistent with the approach of Regulation Z.

I spoke with Tim Winslow regarding the amendment of WV Code 46A-4-107 in 1996. He related that the provision allowing the financing of origination fees, points and investigation fees was added simply because the industry wanted a specific assurance that such charges could be financed as part of the loan amount. It is unlikely that prior to 1996 many lenders avoided financing these fees and points for fear that such loans would constitute charging interest on interest in violation of state usury laws. Indeed, providing for the financing of such charges over many years has likely increased the availability of mortgage loans to citizens of West Virginia who would otherwise be unable to finance the purchase of a home.

As you know, Article 4 of the Act applies only to regulated consumer lenders. It would be inappropriate to apply the statutory principle “*expressio unius est exclusio alterius*” and make a determination limiting the rights and responsibilities of one group of lenders based on the language contained in an article that clearly applies only to an entirely different group of lenders. Any implicit exclusions in Article 4 should apply only to regulated consumer lenders rather than persons not covered at all by the provisions of that Article. This is especially true in light of other portions of the Act and regulations promulgated pursuant to it.

The Act’s definition of “loan finance charge”, at WV Code 46A-1-102(26), indicates that it is comprised of a number of different elements, only one of which is interest:

(26) (a) "Loan finance charge" means the sum of: (i) All charges payable directly or indirectly by the debtor and imposed directly or indirectly by the lender as an incident to the extension of credit, including **any of the following types of charges** which are applicable: Interest or any amount payable under a point, discount or other system of charges, however denominated, premium or other charge for any guarantee or insurance protecting the lender against the consumer's default or other credit loss; and (ii) charges incurred for investigating the collateral or credit worthiness of the consumer or for commissions or brokerage for obtaining the credit, irrespective of the person to whom the charges are paid or payable, unless the lender had no notice of the charges when the loan was made. The term does not include charges as a result of default, additional charges, delinquency charges or deferral charges. (emphasis added)

The concept that “interest” is but one distinct part of the overall finance charge is supported by the “Rule Pertaining to the West Virginia Consumer Credit and Protection Act and the Money and Interest Article of Chapter Forty Seven”, Title 106, Series 1 of

the Code of State Regulations promulgated in 1997. According to its scope, this Rule “establishes general provisions implementing and supplementing the West Virginia Consumer Credit and Protection Act and the Money and Interest Article...” Section 2.3e of Series 1 provides that

2.3.e. The terms "Finance Charge" as used in W. Va. Code §47-6-5d(a) and "finance charge which was required by applicable law to be disclosed" as used in W. Va. Code §47-6-5d(b) both mean "Loan Finance Charge" as defined in W. Va. Code §46A-1-102(26)(a) or "Sales Finance Charge" as defined in W. Va. Code §46A-1-102(44), whichever is applicable.

This provision makes clear that non-regulated consumer lenders providing loans imposing finance charges under the general money and interest statutes may include within that category additional charges beyond mere “interest”.

Section 106-1-3 of the Rule clearly includes investigation fees and origination fees within the scope of a loan finance charge even though they are not “interest”. That section is entitled “Loan Investigation Fee, Loan Origination Fee, Loan Assumption Fee.” It provides that

3.1. The terms "Loan Finance Charge," as defined in W. Va. Code § 46A-1-102(26), and "Sales Finance Charge", as defined in W. Va. Code § 46A-1-102(39), shall include a loan investigation fee, a loan origination fee, a loan assumption fee or any other similar fee for purposes of determining the allowable usury limits on all consumer loans as that term is defined in W. Va. Code § 46A-1-102(15) and all consumer credit sales as that term is defined in W. Va. Code § 46A-1-102(13), regardless of the rate alternative utilized in W. Va. Code § 46A-3-104.

In short, “interest” is but one separate, distinct charge among a variety of other distinct charges, including points or other loan fees, that comprise the overall finance charge allowed by West Virginia law on a consumer loan. Of course, the overall finance charge remains subject to any limitations imposed by statute or order of the West Virginia Lending and Credit Rate Board.

This approach is also consistent with Regulation Z implementing the Truth in Lending Act. Pursuant to Regulation Z at 12 C.F.R. 226.4(b), the “finance charge” includes “interest” **and** other separate items such as points and fees:

(b) *Example of finance charge.* The finance charge includes the following types of charges, except for charges specifically excluded by paragraphs (c) through (e) of this section:

(1) Interest, time price differential, and any amount payable under an add-on or discount system of additional charges.

(2) Service, transaction, activity, and carrying charges, including any charge imposed on a checking or other transaction account to the extent that the charge exceeds the charge for a similar account without a credit feature.

(3) Points, loan fees, assumption fees, finder's fees, and similar charges.

(4) Appraisal, investigation, and credit report fees.

(5) Premiums or other charges for any guarantee or insurance protecting the creditor against the consumer's default or other credit loss.

...

It is our preference that West Virginia law be construed in a manner that is consistent with Truth in Lending regulations wherever possible. This provides a more consistent treatment of consumer credit transactions and reduces the opportunity for confusion over similar terms but different interpretations by state and federal regulators.

I hope this letter answers your concerns. If you need further information, please feel free to contact me.

Sincerely,

Robert J. Lamont  
General Counsel