State Usury Laws: Are They Effective in a Post-GLBA World

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State Usury Laws: Are They Effective in a Post-GLBA World?

I. INTRODUCTION

Banking in the United States has changed dramatically in the past few decades. No longer constrained by geographic limitations, Americans have expanded to interstate markets due to increased mobility and technology. In response to these changing habits, Congress has enacted legislation intended to restructure an outdated banking system.

Usury laws, which prohibit loans at excessive interest rates, have traditionally been the province of state governments. Under the theory of protecting the citizens, many states impose

1. Mark D. Rollinger, Interstate Banking and Branching Under the Riegle-Neal Act of 1994, 33 HARV. J. ON LEGIS. 183, 210 (1996); see also Tim McCarthy, Refining Product Market Definition in the Antitrust Analysis of Bank Mergers, 46 DUKE L.J. 865, 878 (1997) ("[R]evolutionary changes have shaken the banking industry to the core...."). One of the most dramatic changes in the banking industry includes the introduction of online banking. See Thomas W. Beetham, The Community Reinvestment Act and Internet Banks: Redefining the Community, 39 B.C. L. REV. 911, 920 (1998). Furthermore, changes that have occurred in the banking industry, such as changes in interstate banking and branching, have made several banking laws inefficient. Richard M. Whiting, A Perspective on Financial Services Restructuring, 37 CATH. U. L. REV. 347, 360 (1988).

2. Rollinger, supra note 1, at 192.


4. BLACK'S LAW DICTIONARY 1543 (7th ed. 1999). But see Lissa L. Broome & Jerry W. Markham, Regulation of Bank Financial Service Activities 351-52 (2001)

(Even in those states that regulate interest rates on loans, there are often exemptions from such regulation for corporate borrowers or for large loans, under the theory that corporate borrowers or those who borrow large sums of money are likely to be sophisticated enough to bargain for a reasonable rate of interest.).

strict limitations on interest rates. These limits, however, have proven harmful to both banks and consumers in many states. States with strict usury limitations have been disadvantaged because banks have chosen to locate in states with liberal usury laws. Since capital is necessary for growth, an exodus of capital causes economic stagnation in states that have strict usury laws. For example, both Arkansas and North Carolina have experienced a withdrawal of capital due to strict state usury laws. States such as Delaware, Georgia, and South Dakota, however, have a disproportionately greater concentration of banks due to an absence of usury limits. In an attempt to remedy this and other


8. See, e.g., Carron, supra note 7, at 5; Grooms, supra note 6. Banks will not lend money for a risky loan at ten percent interest in a state with strict usury laws if they can lend the money at fifteen percent interest in another state. See FEDERAL RESERVE BANK OF CHICAGO, CONTROLLING INTEREST: ARE CEILINGS ON INTEREST RATES A GOOD IDEA?, at http://www.chicagofed.org/publications/controlinterest/controlinterest.cfm (last visited Feb. 28, 2002) [hereinafter CONTROLLING INTEREST]. Thus, small businesses and individuals have difficulty obtaining financing due to the risk banks must assume. See Grooms, supra note 6. Furthermore, usury laws are not the only factor banks consider when choosing a home state. For example, despite strict state usury laws, North Carolina is home to two of the five largest banks in the United States—Bank of America and Wachovia. NORTH CAROLINA CITIZENS FOR BUSINESS AND INDUSTRY, ABOUT THE STATE OF NORTH CAROLINA, at http://www.nccbi.org/northl.htm (last visited Feb. 27, 2002).

9. See, e.g., Grooms, supra note 6.

10. See id.; Carron, supra note 7, at 5. North Carolina, a prominent banking state, has experienced a withdrawal of banks that issue credit cards within the state due to strict state-imposed usury laws that prohibit creditors from charging the higher interest rates that are allowed in numerous other states. Carron, supra note 7, at 5.

11. BROOME & MARKHAM, supra note 4, at 351 (explaining that Delaware and South Dakota are among the states that do not limit interest rates on loans); Carron, supra note 7, at 5 ("Delaware and Georgia are among the nation’s leading credit-card employment states because of their liberal laws...."). NationsBank’s credit card business is based in Delaware, Wachovia’s is in Georgia, and Bank of America’s is in Delaware. Carron, supra note 7, at 5; State of 5 Cs, ECONOMIC TIMES, Oct. 13, 2000.
banking problems, Congress has repeatedly preempted state usury laws.\(^{12}\)

This Note discusses federal preemption of state usury laws and the policy issues surrounding legislated interest rates. First, this Note provides a brief legislative and judicial history of usury laws.\(^{13}\) Next, this Note explores how the Gramm-Leach-Bliley Financial Services Modernization Act (GLBA),\(^{14}\) one of the most influential banking legislative acts, affects usury laws.\(^{15}\) The Note then explores the public policy surrounding usury laws.\(^{16}\) Finally, this Note addresses the practical impact of strict usury laws and whether states are well served by retaining such laws.\(^{17}\)

II. PREEMPTION OF STATE USURY LAWS:
A HISTORICAL OVERVIEW

Beginning with the landmark case *McCulloch v. Maryland*\(^{18}\) in 1819, banking law has occupied a prominent position in the federal preemption of state laws.\(^{19}\) The central theme established by the Court mandates that "States have no power . . . to retard, impede, burden, or in any manner control the operations" of a federal banking instrumentality.\(^{20}\) Essentially, *McCulloch* declared that federal law preempts conflicting state law under the authority of the Supremacy Clause of the United States Constitution.\(^{21}\)

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12. *See infra* notes 18-63 and accompanying text. The Supremacy Clause provides that state laws interfering with or contrary to laws made by Congress are preempted and, therefore, invalid. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 77-78 (1824).

13. *See infra* notes 18-32 and accompanying text.


15. *See infra* notes 33-63 and accompanying text.

16. *See infra* notes 64-95 and accompanying text.

17. *See infra* notes 96-116 and accompanying text.


21. *Id.* The Supremacy Clause provides that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall
Since McCulloch, there has been continuous difficulty in balancing federal and state banking authority. "A lingering congressional, judicial and popular ambivalence toward federal and state banking powers, and the difficulty our governmental institutions have had in finding a golden mean, are shown by recent Supreme Court cases sustaining federal pre-emptions of state [usury] limits."\(^2\) In an attempt to preserve the dual federal and state banking system, "Congress occasionally responds to perceived tilts of the Court, regulators, or state legislators to one side or the other with legislative initiatives . . . . Further indication of the continuing strength of the conflict [between national and state chartered banks] is the proliferation of express state law preemption."\(^3\)

Today, through federal preemption, national banks are lawfully permitted to charge at least the same rate of interest that a particular state allows its state banks.\(^4\) Banks are further permitted to charge interest at the same rate allowed by the laws of the state where the bank is "located" rather than at the rate mandated by the host state.\(^5\) This means that banks may charge either the interest rate allowed by the state in which it is doing

\[\text{U.S. CONST. art. VI, cl. 2.}\]
\[\text{22. See Duncan, supra note 19, at 221-23.}\]
\[\text{23. Id. at 222-23; see, e.g., infra notes 24-63 and accompanying text. National banking associations are banks with a national charter and are formed as "instrumentalities of the federal government, created for a public purpose." Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896). The Supreme Court concluded that states may not exercise control over national banks or affect their operation except where allowed by Congress. Id. Thus, federal law rather than state law governs the interest rate that a national bank may charge. Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29, 33-34 (1875). On the other hand, state banks are banks formed under a state charter. BROOME & MARKHAM, supra note 4, at 212.}\]
\[\text{24. 12 U.S.C. § 85 (2000) (originally enacted as section thirty of the National Bank Act of 1864); Tiffany v. Nat'l Bank of Mo., 85 U.S. 409, 412-13 (1874). The Court made the basic inference that Congress simply did not intend national banks to be unfairly suppressed by state laws or to meet their demise from lack of actual competition between national and state banks. Id. at 412-13. Prior to the National Bank Act, a state was able to effectively dictate that a state bank could charge higher rates than a national bank. See id.}\]
\[\text{25. 12 U.S.C. § 85; Tiffany, 85 U.S. at 411 (interpreting 12 U.S.C. § 85 as enabling national banks to charge at least the same rate of interest as in-state banks). Prior to this legislation national banks were limited by the cap host states placed on their state banks. See Tiffany, 85 U.S. at 411.}\]
business or its home state, whichever is higher. Consequently, national banks are able to import a more favorable interest rate from their home state into a state with conservative usury laws. Moreover, late payment fees may be assessed according to the usury laws where a bank is deemed located; therefore, late payment fee rates may be imported into a state with strict usury laws essentially in order to charge consumers higher interest rates.

Once again recognizing the reality of the changing banking market, Congress passed the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal). The Act focused on geographic restrictions for banking operations allowing "a single national bank headquartered in one state, having only one charter, to open branches in other states, whether nearby or

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27. See Tiffany, 85 U.S. at 410. In 1978, the Supreme Court in Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., determined that a national bank is deemed "located" in the state specified in its organization certificate. 439 U.S. 299, 310 (1978). The Court noted that a bank "cannot be deprived of [its] location merely because it is extending credit to residents of a foreign State." Id. The location of credit assessments, location of payments, and location of assessments of finance charges may also contribute to the determination of a bank's "location." Id. at 311-12. Thus, a national bank operating branch offices or making loans in one state, but considered to be "located" in a different state, could lawfully charge an interest rate higher than the maximum lawful rate under state laws. Johnson v. Bank of Bentonville, 122 F. Supp. 2d 994, 997 (W.D. Ark. 2000), aff'd, 269 F.3d 894 (8th Cir. 2001) (citing Wiseman v. State Bank & Trust, 854 S.W.2d 725 (Ark. 1993)). On the other hand, a state bank chartered in a particular state or a national bank "located" in that state, would be restricted by the maximum lawful interest rate specified by that state's usury laws. Id.

28. Smiley v. Citibank (South Dakota), 517 U.S. 735, 745-47 (1996) (holding that the term "interest," as used in 12 U.S.C. § 85, encompasses late payment fees for national banks); Greenwood Trust Co. v. Massachusetts, 971 F.2d 818 (1st Cir. 1992), cert. denied, 506 U.S. 1052 (1993) (holding that state banks may charge interest according to the laws of the state where the bank is located and late-payment fees are considered interest). In Smiley, a class action suit was brought on behalf of Californians who were holders of credit cards issued from a national bank in South Dakota and charged late payment fees in violation of California law. Smiley, 517 U.S. at 735. In Greenwood, the Court took preemption to the next level applying it directly to state banks in addition to national banks under the broad canopy of the Supremacy Clause. Greenwood, 971 U.S. at 831.

Thus, a banking organization is no longer required to operate under a bank holding company structure, which requires maintenance of separately incorporated banks in each state of operation. In passing Riegle-Neal, Congress acknowledged the nationwide banking trend and succeeded in increasing competitive equality between national and state banks in interstate branching.

III. GRAMM-LEACH-BLILEY ACT

In response to years of continuous financial modernization developments, Congress adopted the GLBA on November 12, 1999. GLBA is arguably the most comprehensive federal banking legislation in recent history. Section 731 of GLBA provides:

[A]ny State that has a constitutional provision that sets a maximum lawful annual percentage rate [APR] of interest on any contract at not more than 5 percent above the discount rate... upon the establishment in such State of a branch of any out-of-State insured depository institution in such State under this section, the maximum interest rate... that may be charged... by any insured depository institution whose home State is such State shall be equal to not more than the greater of—
(A) the maximum interest rate... that may be charged... [in] the home State of the out-of-State insured depository institution establishing any such branch...; or

30. Rollinger, supra note 1, at 186. Prior to the enactment of Riegle-Neal, issues of applicable state law to branches of banks were rare due to the absence of interstate branching. Id. at 210.
31. Id., at 186.
34. Id. at 1.
(B) the maximum rate... that may be charged... in a similar transaction by a State insured depository institution chartered under the laws of such State or a national bank or Federal savings association whose main office is located in such State... 35

GLBA preempts state usury laws only where the state has a constitutional provision that sets the "maximum lawful [APR] of interest on any contract at not more than five percent above the discount rate." 36 The preemption clause provides that state or nationally chartered banks may lawfully charge the same interest rate on loans as their competitors, which includes banks chartered in another state that have branched into the state. 37 The purpose and effect of this provision is to "provide for loan pricing parity among interstate and local banks." 38 GLBA changed "the competitive environment for state-chartered banks dramatically... to ensure that [they] can continue to meet all their customers' needs in the new world of financial services and to preserve the state bank charter as a viable platform for conducting the modern business of banking." 39

Section 731 of GLBA directly targeted Arkansas, the only remaining state with a constitutional provision that set the maximum lawful APR of interest at not more than five percent above the Federal Reserve discount rate (discount rate) for ninety-day commercial paper. 40 This specific provision of the Arkansas

36. Id.
37. Id. For example, a state chartered bank or a nationally chartered bank located in a particular state was previously restricted to that state's usury laws while an interstate bank which had branched into that same state could lawfully import a higher interest rate. Johnson v. Bank of Bentonville, 122 F. Supp. 2d 994, 998 (W.D. Ark. 2000), aff'd, 269 F.3d 894 (8th Cir. 2001).
38. Johnson, 122 F. Supp. 2d at 999.
40. See 12 U.S.C. § 1831u(f) (Section 731 of GLBA does not specifically mention Arkansas, but practically this provision applies only to Arkansas since it is the only
Constitution had been in effect since 1981, enacted during a time of high interest rates when the discount rate was as high as fourteen percent.\textsuperscript{41} Recently, however, the discount rate has fallen dramatically,\textsuperscript{42} placing Arkansas state chartered banks at a competitive disadvantage with out-of-state banks with branches in Arkansas, which were able to charge a higher imported interest rate.\textsuperscript{43}

The continuous preemption of state usury laws had resulted in an uneven playing field between national and state chartered banks within Arkansas.\textsuperscript{44} Congress noted that "if an interstate bank can charge a particular interest rate, then a local bank in the State into which the interstate bank has branched, may charge a comparable rate."\textsuperscript{45} Thus, the ability of interstate banks to charge greater interest rates than Arkansas state chartered banks led to Congress' enactment of section 731 of GLBA, whereby all national and state chartered banks within Arkansas have the opportunity to charge the same interest rate.\textsuperscript{46} As a result, banks in Arkansas are lawfully able to charge the highest interest rate allowed in any state from which a bank has branched into Arkansas so long as the rate is not deemed unconscionable.\textsuperscript{47}


\textsuperscript{43} Taylor, \textit{supra} note 41. "Divergent views [in Arkansas between economists, politicians, bankers, and the citizens] created a perception that a remedy to the economic harm caused by the artificial interest limitation might not be possible if a popular vote were sought." Grooms, \textit{supra} note 6.

\textsuperscript{44} See \textit{supra} notes 22-32 and accompanying text.


\textsuperscript{47} \textit{Id.}; Brief in Support of Defendant's Motion for Summary Judgment at 16-20, Johnson v. Bank of Bentonville, 122 F. Supp. 2d 994 (W.D. Ark 2000) (No. 00-3026) [hereinafter Defendant's Brief]. In order to avoid potential litigation, many banks in Arkansas waited until section 731 of GLBA was interpreted in court before raising
Johnson v. Bank of Bentonville illustrates the impact of GLBA's preemption of Arkansas' usury laws.\(^4\) The case developed after Steve Johnson, a citizen and resident of Arkansas, obtained a personal loan from the Bank of Bentonville, a bank organized under Arkansas law with its principal place of business in Arkansas.\(^4\) Prior to GLBA, the Bank of Bentonville was restricted to the interest rate established by the Arkansas constitution while out-of-state banks with a branch in Arkansas were lawfully permitted to charge interest according to the laws of their home state.\(^5\) Relying on GLBA's federal preemption of state usury laws, however, the Bank of Bentonville charged Johnson an interest rate of 16.5%,\(^5\) rather than the maximum legal interest rate of 10.5% allowed under the Arkansas Constitution at the time of the loan.\(^5\)

Johnson filed suit in the United States District Court for the Western District of Arkansas alleging that GLBA section 731 was unconstitutional and the loan therefore was usurious.\(^5\) Johnson argued that Congress exceeded its authority under the Commerce Clause and that the principles of dual sovereignty were violated when Congress preempted the Arkansas State Constitution.\(^5\) The bank, however, contended that GLBA interest rates above the legal limit set in the Arkansas State Constitution. See Susan Wesson, A Cost-Benefit Analysis of the Arkansas Usury Law and Its Effects on Arkansas Residents and Institutions, ACADEMIC FORUM ONLINE, HENDERSON STATE UNIVERSITY, No. 18 (2000-01), at http://www.hsu.edu/faculty/afo/2000-01/wesson.htm (last visited Feb. 22, 2002).

49. Id. at 995-996. "The Arkansas Bankers Association [ABA] was instrumental in finding the plaintiff and defendant in this action. [This is not a "test"] case, but the matter would not have proceeded as it did without the ABA support." Email from Allen W. Bird II, Attorney at Law, to Amanda Hill (Oct. 11, 2001, 02:45:22 EST) (on file with N.C. Banking Institute) Allen W. Bird II was counsel for the Bank of Bentonville in Johnson. 122 F. Supp. 2d. at 994.
50. Johnson, 122 F. Supp. 2d. at 995-997; see McCoy, supra note 26, § 9.04[2][b][v][B].
51. Defendant's Brief, supra note 47, at 1. The bank also charged loan fees that, if counted as interest, would have made the APR 17.915%. Id.
52. Johnson, 122 F. Supp. 2d. at 996. All activity surrounding the loan was contained within the state of Arkansas. Id. at 995-996.
53. Id. at 999; see also 12 U.S.C. § 1831u(f) (2000).
54. Press Release, Arkansas Bankers Association (Oct. 4, 2001) at http://www.arlbankers.org/StaticContent/StaticPages/courtdecision.htm (last visited Feb. 27, 2002). The Commerce Clause permits Congress "to regulate those activities having a substantial relation to interstate commerce... i.e., those activities that
preempted the usury provision of the Arkansas Constitution, thus allowing the bank to apply the interest rate imported by an interstate bank. 55

The district court granted a motion for summary judgment in favor of the Bank of Bentonville and held that "Congress did not exceed the legislative authority granted it by the Commerce Clause when it enacted [section] 731 of the [GLBA]."56 Therefore, Arkansas' state usury laws were preempted, and the loan to Johnson from the Bank of Bentonville at the imported interest rate was not usurious.57

Following the district court's decision, Johnson appealed to the United States Court of Appeals for the Eighth Circuit.58 Johnson once again claimed that "by enacting section 731, Congress violated the principles of dual sovereignty by overriding Arkansas' state constitution and exceeded its power under the Commerce Clause of the United States Constitution."59 On October 4, 2001, the Eighth Circuit upheld the district court's decision stating "[s]ection 731 preempts state law without violating the principles of dual sovereignty.... [and] Congress did not exceed its power under the Commerce Clause by enacting section 731."60

Prior to the enactment of section 731, banks operating within Arkansas were placed at a competitive disadvantage as compared to national banks because of their inability to charge equivalent interest rates, thereby affecting the flow of currency between Arkansas and other states. It was within Congress's power under the Commerce Clause to eliminate this disparity by enacting section 731.

8th Circuit Trumps Constitution, supra note 46.


57. Id.


59. Id.

60. Id. at 895-896. The plaintiff's attorney, Steve Davis, said that he did not expect the Eighth Circuit's decision to be appealed to the United States Supreme Court. David Smith, Demise of Usury Law Possible After Appeals Ruling, ARK. DEMOCRAT GAZETTE, Oct. 5, 2001, at D1.
Ultimately, Johnson is a significant assertion of federal dominance over state usury laws and leaves little room to question federal preemptive authority.\textsuperscript{61} This case clarifies the usury laws in Arkansas, provides for equal competition among banks, and supports the trend for federal preemption of state usury laws.\textsuperscript{62} Critics argue, however, that GLBA section 731 imposes liberal usury laws from other states on Arkansas.\textsuperscript{63}

IV. PUBLIC POLICY SURROUNDING USURY LAWS

As examples from Aristotle to the Bible illustrate, "usury laws have been enacted throughout most of recorded history."\textsuperscript{64} There is conflicting rationale behind the justification and extent to which usury laws should be implemented and whether control should be vested at the state or federal level.\textsuperscript{65} This section explores the public policy positions of various consumer interest groups and the banking industry.

The primary public policy reason supporting usury laws is consumer protection.\textsuperscript{66} Usury laws are enacted with the intent to protect those individuals with poor credit who are uneducated and financially unsophisticated.\textsuperscript{67} Usury laws are intended to assure

\textsuperscript{61} See Johnson, 269 F.3d at 895-96; see also Smith, supra note 60, at D1 ("The ruling may be the end of a decades-long battle to do away with [Arkansas'] usury law.").

\textsuperscript{62} See Johnson, 122 F. Supp. 2d at 997, 1001; 8th Circuit Trumps Constitution, supra note 46; Taylor, supra note 41.

\textsuperscript{63} See, e.g., Smith, supra note 60, at D1 (Arkansas banks "will be willing to loan money now since they can gouge [borrowers] with higher interest rates." (quoting Alan Hughes, president of AFL-CIO in Arkansas)).


\textsuperscript{65} CONTROLLING INTEREST, supra note 8; see infra notes 66-95 and accompanying text.

\textsuperscript{66} BROOME & MARKHAM, supra note 4, at 351.

\textsuperscript{67} Id. "[Sub-prime] borrowers who are unsure about their credit history and loan eligibility or are unaware of mortgage details" are often targets of abusive lending practices. Home Loan Protection Act: A Model State Statute, at AARP
that consumers borrowing from banks pay a reasonable interest rate. The hope is that consumers who are not financially well informed will not fall victim to unfair lending practices.

Individual consumers often have difficulty understanding interest rates and their full implications. Additionally, an uneducated consumer is disadvantaged due to a bank's superior bargaining power and resources. For example, in areas of non-traditional lending such as payday lending and instant tax refunds, consumers are not protected against high interest rates and consequently often pay APRs that exceed 100% interest. Consumer interest groups contend that without strict usury laws, these customers will face lending institutions unprotected.

Consumer interest groups also contend that the poorest segments of the population pay more when usury limits are uncontrolled. To compensate for less than desirable credit, banks will charge those customers higher interest rates than customers that have more resources and higher credit ratings. Consumer interest groups argue that the result is "intensive consumer abuses against people least able to endure them or fight back." The consumer interest groups argue that the repeal of protective state usury laws leads to interest rate gouging in favor of big businesses.

Research Center, at http://research.aarp.org/consume/d17346_loan_1.html (last visited Feb. 27, 2002).
68. Wesson, supra note 47.
69. Id.
71. Schaaf, supra note 70, at 345-347; Wessel, supra note 70, at A1.
72. Schaaf, supra note 70, at 345-347; Wessel, supra note 70, at A1.
73. Schaaf, supra note 70, at 345-347; Wessel, supra note 70, at A1.
75. Schaaf, supra note 70, at 345-347; Wessel, supra note 70, at A1. Banks consider "risk return" when assessing potential customers: if banks do not receive more profit when extending "risky" loans, then high risk customers will be unable to obtain financing due to a higher anticipated default rate. See Sandra J. McLaughlin, Usury Relief Is Essential for a Healthy Bank Card Industry, AM. BANKER, Sept. 21, 1981, at 10; see Taylor, supra note 41.
76. Nader, supra note 74.
77. Id.
Another concern voiced by consumer groups is that if interest rates are unregulated, banks will charge as much as the market can bear, squeezing out large segments of the population. Such unregulated "competition leads to insufficient credit rationing" which in turn leads to marginalization of the poor who are unable to escape their financial situation. Among other reasons, consumer interest groups oppose the practice of charging what the market would bear based on moral grounds. They advocate that it is virtually impossible for the poor and financially unsophisticated to improve their financial situations without the ability to obtain reasonable interest rates on loans.

The banking industry, on the other hand, presents the alternative viewpoint of the public policy debate. First, banks argue that consumers considered high credit risks are more likely to have access to financing if there is increased flexibility in the level of interest charged based on the risk of the transaction.


80. Broom & Markham, supra note 41, at 351.

81. See Scully & Wysham, supra note 78. For example, without the ability to obtain a loan at a reasonable rate, many consumers are unable to purchase homes or cars. See Nader, supra note 74. These consumers will often participate in the rent-to-own phenomena, purchasing appliances and furniture at two to three times the cash price. Id. Furthermore, the rent-to-own industry targets "low-income consumers by advertising in ethnic media, public transportation, and housing projects." Id.

82. Taylor, supra note 41; see Paul Beckett, Risky Business: Exploiting a Loophole, Banks Skirt State Laws On High Interest Rates, WALL ST. J., May 25, 2001, at A1 (discussing that a high credit risk consumer was able to receive a loan with an annualized interest rate of 443% as a result of "banks' right to trump state usury laws."); see also Joseph A. Smith, Jr., The Federal Banking Agencies' Guidance on Subprime Lending: Regulation With a Divided Mind, 6 N.C. BANKING INST. 73 (2002) (discussing regulation of banks in the subprime market). But see Margot Saunders, The Increase in Predatory Lending and Appropriate Remedial Actions, 6 N.C. BANKING INST. 111, 141 (2002) ("To the industry's cry of reduced credit availability, the [consumer] advocacy community responds: only bad credit will be reduced, not good credit. . . . 'A borrower does not benefit from . . . expanded access to credit if the credit is offered on unfair terms or involves predatory practices.'" (internal citations omitted)).
rates are set artificially low, without regard to risk profiles, there will be credit rationing. This economic reality is a result of the financial risk banks must assume when lending money to those individuals with credit records that are poor or are simply not well established. "Moreover, in times of inflation, fixed upper limits on interest rates may make borrowed funds totally unavailable [to the entire market] if market rates exceed the fixed interest rate limit." Second, the banking industry notes that banks provide desirable employment and capital. In light of federal preemption, however, banks are choosing to locate in states with liberal usury laws. These banks are then allowed to export favorable interest rates from their home states into the legislatively conservative states. Therefore, a state with strict usury laws risks the loss of highly desirable banking jobs and capital as its banks relocate their "homes" to other states.

Furthermore, prior to the provisions of GLBA section 731, credit markets were stagnant in areas where certain banks were restricted to low interest rates while other banks had greater freedom. As a result of these new provisions, the restricted banks saw an increased independence and flexibility. They established interest rates that were able to appeal to a wider range of consumers, thereby increasing their profits.

Finally, federal preemption of state usury laws provides banks with additional freedom when choosing where to locate and establish their charter. As usury laws become increasingly standardized, banks are more likely to look at other factors when choosing a headquarters. These factors may include other

83. Wesson, supra note 47.
84. Taylor, supra note 41.
85. BROOME & MARKHAM, supra note 4, at 351. Prior to the enactment of GLBA section 731, some consumers in Arkansas were unable to obtain loans. Taylor, supra note 41.
86. See Grooms, supra note 6; see Taylor, supra note 41; see, e.g., supra notes 8-11 and accompanying text.
88. See supra notes 24-28 and accompanying text.
89. See Grooms, supra note 6.
90. Id.
91. Id.
92. Id.
93. Id.
banking regulations in the state, the presence of other businesses, availability of desirable consumers, and externalities such as lifestyle and cost of living in a particular state." Banks are increasingly able to consider these multiple factors since federal law allows banks to import interest rates and use the same rates available to other banks within the state.95

V. PRACTICAL IMPACT: WHETHER STATE LEGISLATURES ARE WELL SERVED BY RETAINING STRICT USURY LAWS

Federal preemption of state usury laws has long been a source of disagreement and debate.96 Scholars have noted that "[c]onflicts inhere in permitting a meaningful role to fifty state governments despite a constitutionally mandated supremacy of federal law."97 Traditionally state governments have regulated usury laws with the intent of protecting consumers from high interest rates, but the modern trend has favored federal preemption.98 As a result of this preemption, banking rules are becoming more standardized and there is movement towards a uniform nationwide banking system." Therefore, in light of the current banking market, it may be necessary for state legislative bodies to reexamine whether strict usury laws are actually beneficial, burdensome, or inapplicable to their citizens.100

While many bankers and economists recognize that strict usury laws can be harmful to state economies, citizens perceive the state usury limitations as protective.101 Often it is difficult to educate millions of voters who are unfamiliar with banking and business practices about the unintended consequences of restrictive usury limits.102 This public perception makes it politically difficult for elected officials to recommend removing

94. Grooms, supra note 6.
95. Id.
96. Duncan, supra note 19, at 221.
97. Id.
98. See Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 828 (1st Cir. 1992), cert. denied, 506 U.S. 1052 (1993); Brady & Purpura, supra note 3, at 257.
99. Brady & Purpura, supra note 3, at 263.
100. See Grooms, supra note 6.
101. Id.
102. Id.
restrictive usury limits. Additionally, depending on the climate in a state, it can be detrimental to a political career to advocate for less restrictive usury laws.

Prior to the level of federal preemption that exists today, national (and some state) banks were disadvantaged regarding interstate branching and interest rates that could lawfully be charged. Disadvantaged banks were unable to compete with their dual banking system counterparts because they were competing against other banks that had imported more lenient usury restrictions. Today, however, preemption has reached a level in which the various banks operate on a more even playing field. The question remains, however: are usury laws meeting their purpose of consumer protection?

For example, usury laws do not apply to all financial transactions. Payday lenders and other non-traditional lenders circumvent usury laws and charge customers outrageous amounts of interest by forming partnerships with banks that hold national charters. The loans are technically issued through the national bank; therefore, state usury laws are largely avoided. Consumers with less than desirable credit and a lack of financial knowledge are the primary customers of nontraditional banking services; therefore, usury laws are not meeting the goals of

103. Id.
104. See id.
105. See supra notes 33–63 and accompanying text.
106. 8th Circuit Trumps Constitution, supra note 46.
107. Taylor, supra note 41.
protecting the disadvantaged.\textsuperscript{111} Perhaps the current emphasis on predatory lending practices and proposed legislation to regulate sub-prime lending practices would help to protect the public; however, this must be done in a manner that does not restrict credit availability or unduly burden the financial community.

The usury laws, however, are not altogether inapplicable. In-state lenders that are not banks, such as Household Finance Corporation, are still required to follow state usury laws and are not part of the group of banks covered under GLBA.\textsuperscript{112} This means that these non-bank lenders are unable to compete on a level playing field with traditional lenders and may be forced out of business.\textsuperscript{113} Ultimately, competition among various lenders is suppressed and the market suffers.

Therefore, even though State legislatures have a noble goal in protecting their citizens, strict state usury limits have not actually achieved this intended goal. Moreover, states with strict usury limits have seen capital and jobs leave their states.\textsuperscript{114} For example, the North Carolina Deputy Commissioner of banks estimated that the state has experienced a loss of several thousand jobs over the years as state legislators refused to loosen credit card regulations.\textsuperscript{115} In 1997 alone, Branch Banking and Trust Company (BB&\textsuperscript{T}) (a bank based in Winston-Salem) moved its credit card business from North Carolina to Georgia, and Raleigh-based First Citizens Bank opened their credit card operations in Virginia.\textsuperscript{116}

These observations suggest that state legislatures may be well served to reevaluate the current laws and reconsider their grip

\textsuperscript{111} See id.


\textsuperscript{113} See Taylor, supra note 41. Household Finance does not serve customers in Arkansas due to the strict interest rates. See Frequently Asked Questions, Household Finance Corporation, at http://www.householdfinance.com/ln/lnhf_faq5.jsp (last visited Feb. 27, 2002). In addition to Arkansas, Household Finance does not do business in Alaska, Hawaii, Maine, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming. Id.

\textsuperscript{114} Carron, supra note 7, at 5.

\textsuperscript{115} Id. Otis Meacham was the North Carolina Deputy Commissioner of banks in 1997. Id. "North Carolina laws prohibit creditors from charging late fees and cash advance fees, along with the higher rates allowed in some other states." Id.

\textsuperscript{116} Id.
on usury limits. Unfortunately, there are no simple solutions to the complex problems that have surrounded usury limits for decades. Furthermore, the difficult challenge of reforming usury laws would be most effective if each state participates. Ultimately, in light of the current economy, it might be advantageous for state legislatures to revisit usury laws in search of an ideal system that would strike a balance between serving the public policy goal of consumer protection and allowing businesses to make a fair profit.

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