

168 scholars in 42 states support repeal of OCC true lender rule

June 21, 2021

The Hon. Jesus “Chuy” García
U. S. House of Representatives
Washington, DC 20515

RE: Support S.J. Res. 15 (Van Hollen) and H.J. Res. 35 (J. Garcia), disapproving OCC’s Rule on National Banks and Federal Savings Associations as Lenders

Dear Member of Congress,

The 168 undersigned academics from 42 states and the District of Columbia, including professors of banking law and consumer financial regulation, write in strong support of your resolution, H.J. Res. 35, and the companion resolution that the Senate passed in May, S.J. Res. 15 (Van Hollen), providing for congressional disapproval under the Congressional Review Act of the Office of the Comptroller of the Currency’s (“OCC’s”) final rule, *National Banks and Federal Savings Associations as Lenders* (the “Rule”). The Rule usurps the critical role of states in limiting the interest charged to their citizens by nonbank lenders—a role that states have held since the founding of this country.

The Rule, enacted in October 2020, is a direct reversal of well-established case law. This short-sighted reversal effectively circumvents the long-standing principle of applying a “substance over form” analysis to prevent evasions of usury laws, a principle that has been endorsed by the Supreme Court and state courts since the earliest days of our nation.

Since the time of the American Revolution, states have had usury laws to protect people from the harms of usurious lending. After 1776, all of the states in the new union adopted usury laws.¹ Over the past two centuries, those laws have been amended and exceptions have been carved out in some states for short-term payday loans. More recently, the trend is for voters and legislators to reinstate interest rate caps, which have been broadly popular with voters on a bipartisan basis.² Today, forty-five states and the District of Columbia impose interest rate caps on at least some installment loans, depending on the size.³

Attempts to evade usury laws are as old as the laws themselves. From the earliest days of this country, courts have looked beyond the form of a transaction to its substance to assess whether usury laws are being evaded. In 1825, the Supreme Court remarked:

¹ See James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 ARIZ. ST. L.J. 61, 85 (1981).

² See, e.g., Megan Leonhardt, CNBC, *Nebraska becomes the latest state to cap payday loan interest rates* (Nov. 4, 2020), <https://www.cnbc.com/2020/11/04/nebraska-becomes-the-latest-state-to-cap-payday-loan-interest-rates.html>.

³ See National Consumer Law Center, *State Rate Caps for \$500 and \$2,000 Loans* (March 2021), <http://bit.ly/state-rate-caps>.

Usury is a mortal taint wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender.⁴

In 1835, Chief Justice Marshall explained in greater length in *Scott v. Lloyd*:

The ingenuity of lenders has devised many contrivances, by which, under forms sanctioned by law, the [usury] statute may be evaded. Among the earliest and most common of these is the purchase of annuities, secured upon real estate or otherwise The purchase of an annuity therefore, or rent charge, if a bona fide sale, has never been considered as usurious, though more than six per cent profit be secured. Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the [usury] statute would become a dead letter. Courts, therefore, preceived [sic] the necessity of disregarding the form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it.⁵

Justice Marshall noted that “[t]hough this principle may be extracted from all the cases, yet as each depends on its own circumstances, . . . those circumstances are almost infinitely varied”⁶

Usury laws, and substance-over-form analysis, originally applied to all lenders, including banks. When the National Bank Acts were passed in 1863 and 1864, they gave national banks the choice of two alternative usury caps—a state one or a federal one—both of which were true usury caps.⁷ Well into the mid-20th century, courts were applying substance-over-form doctrine when assessing whether national banks were attempting to evade usury laws:

That public policy [against usury] cannot be defeated by the simple expedient of a written contract, but the real substance of the transaction must be searched out. . . . “No disguise of language can avail for covering up usury, or glossing over an usurious contract. The theory that a contract will be usurious or not, according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substances.”⁸

⁴ *De Wolf v. Johnson*, 23 U.S. 367, 385 (1825).

⁵ *Scott v Lloyd*, 34 U.S. 418, 446–47 (1835).

⁶ *Id.* at 447.

⁷ *See* 12 U.S.C. § 38 (2018).

⁸ *Daniel v. First Nat’l Bank of Birmingham*, 227 F.2d 353, 355 (5th Cir. 1956) (quoting *Pope v. Marshall*, 78 Ga. 635, 4 S.E. 116, 118 (1887)); *see also* *Anderson v. Hershey*, 127 F.2d 884, 886 (6th Cir. 1942) (rejecting the purported form of the transaction as a “device” to collect usury because courts “look behind the form of the transaction to its substance”); *First Nat’l Bank v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975) (“The [NBA usury] section has regard to substance, not merely to form” (quoting *Evans v. Nat’l Bank of Savannah*, 251 U.S. 108,

But after a Supreme Court decision in 1978 allowed national banks to charge, nationwide, any rate permitted in their home state,⁹ and amidst the impacts of high inflation, a wave of deregulation resulted. In the 1980s and 1990s, law changes at the federal and state levels and a race to the bottom among states trying to retain their banks resulted in virtually no banks—federally or state chartered—being subject to any usury cap.¹⁰

Beginning in the late 1990s and early 2000s, payday lenders began trying to take advantage of banks’ exemption from usury caps. Through “rent-a-bank” schemes, payday lenders formed superficial arrangements with banks, put the bank’s name as a lender on the loan agreement, and used the bank as the nominal originator of the loan. In doing so, these high-cost lenders tried to charge borrowers interest rates that were otherwise illegal if the lender made the loan itself.

Applying traditional substance-over-form doctrine, courts analyzed whether the bank or the payday lender was the *true lender*. If the payday lender was the true lender, then state usury laws applied. For example, in *Bankwest v. Oxendine*,¹¹ the court rejected the idea that it should look only at the form of the contract, and instead applied traditional substance-over-form doctrine to determine whether the nonbank was the “true lender”:

To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it, or, stated another way, “[t]he theory that a contract will be usurious or not[,] according to the kind of paper–bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance.”¹²

Courts continued to apply longstanding substance-over-form true lender analysis as high-cost installment lenders began trying to use rent-a-bank schemes to evade state usury laws. In *CashCall v. Morrissey*,¹³ for example, the Supreme Court of Appeals of West Virginia quoted an earlier usury case and cited the 1895 case on which it relied:

118 (1919) (Pitney, J., dissenting); *see also* *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 148 n.15 (5th Cir. 1981) (agreeing that in enforcing the NBA’s usury provision, courts can look beyond disguises that conceal “the actual lender,” but in the instant case there was no dispute about which party “was the lender in fact”).

⁹ *See* *Marquette Nat’l Bank of Minneapolis v. First Omaha Serv. Corp.*, 439 U.S. 299, 318–19 (1978).

¹⁰ New Jersey is one state that retains a usury cap on its state-chartered banks, but that cap does not apply to out-of-state banks operating in New Jersey or those with federal charters.

¹¹ *See* *BankWest, Inc. v. Oxendine*, 266 Ga.App. 771, 779 (2004).

¹² *Id.* at 776 (*quoting* *Pope v. Marshall*, 78 Ga. 635, 640, 4 S.E. 116 (1887)) (refusing to follow an earlier decision that held that the bank “was the true lender despite the fact that ACE [Cash Express] was required to purchase a 95 percent participation interest in loans [the bank] made to ACE’s customers”); *accord* *Ga. Cash Am., Inc. v. Greene*, 734 S.E.2d 67, 73 (Ga. Ct. App. 2012) (finding a triable issue as to whether the true lender was the payday lender or a bank exempt from the Georgia usury statute).

¹³ *CashCall, Inc. v. Morrissey*, 2014 WL 2404300 (W.Va. May 30, 2014).

“The usury statute contemplates that a search for usury shall not stop at the mere form of the bargains and contracts relative to such loan, but that all shifts and devices intended to cover a usurious loan or forbearance shall be pushed aside, and the transaction shall be dealt with as usurious if it be such in fact.”¹⁴

Federal courts of appeals have regularly endorsed looking beyond form to substance to assess whether a bank is the true lender, and thus exempt under federal banking law from the consumer’s state interest rate cap, or whether a nonbank is the true lender.¹⁵

Rejecting this overwhelming history that courts can ignore contrivances and search instead for the truth in order to prevent evasions of usury laws, the OCC’s Rule establishes two hard and fast rules that make the bank the lender for interest rate purposes regardless of other evidence:

- [A] bank makes a loan when the bank, as of the date of origination:
- (1) Is named as the lender in the loan agreement; or
 - (2) Funds the loan.¹⁶

The Rule thus establishes that the bank is to be treated as the “true lender” irrespective of the economic realities of the transaction. The Rule allows nonbank lenders to engage in the same rent-a-bank schemes in which the nonbank lender would “rent” a bank’s charter to evade state usury laws. Online nonbank companies accomplish this by partnering with a bank that serves as the nominal originator of the loan, even though the nonbank has designed, marketed, underwritten, and funded the loan product and holds the predominant economic risk on the loan.

The Rule signs off on this favored technique of high-cost online lenders. Under this Rule, so long as a national bank or federal savings association is indicated as the lender of record for the loan, it is the bank that functions as the entity of reference for application of state usury laws—and banks are largely exempt from state usury laws. As a result of this nominal involvement of a bank, the nonbank online lender can effectively be exempted from the usury laws designed to rein in usurious loan practices, thereby making usury laws obsolete.

¹⁴ *Id.* at *14 (quoting *Carper v. Kanawha Banking & Tr. Co.*, 157 W.Va. 477, 478, 207 S.E.2d 897, 901 (1974)); see *Crim v. Post*, 23 S.E. 613, 616 (W. Va. 1895) (notwithstanding “the various shifts and devices that are often used to cover up the usury[.]. . . the law requires the lender on oath to discover the money really lent, and all bargains, contracts, or shifts relative to such loan; and makes them ineffectual, no matter how complicated such contracts may be. The law evidently intends that the search for usury shall penetrate to the substance.”).

¹⁵ See, e.g., *BankWest, Inc. v. Baker*, 411 F.3d 1289 (11th Cir. 2005), *reh’g granted, op. vacated*, 433 F.3d 1344 (11th Cir. 2005) (en banc), *op. vacated due to mootness*, 446 F.3d 1358 (11th Cir. 2006); *accord* *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1260 (11th Cir. 2011) (denying motion to dismiss RICO claim because plaintiff could “plead facts demonstrating that the Bank was not the actual lender”); *Cmty. State Bank v. Knox*, 523 Fed. Appx. 925, 929 (4th Cir. 2013) (rejecting complete preemption because the Federal Deposit Insurance Act “cannot apply” where the claims are “substantively aimed” at the payday lender and the plaintiff “disputes that [the bank] had authority over the loan terms and was the ‘real lender.’”).

¹⁶ 12 C.F.R. § 7.1031(b) (2019).

These schemes enable unduly expensive loans. When nonbanks are allowed to charge uncapped interest rates, they often charge well over 100% APR on their loans, which are rarely underwritten based on borrowers' actual ability to repay and which frequently result in defaults. Households facing an acute financial crisis are targeted for these destructive forms of credit on these high-cost terms. These pricey loans often result in growing balances, default, and even bankruptcy—all of which have devastating long-term impacts on families who already struggle to make ends meet.

The practical effect of the OCC Rule is, however, to appropriate states' long-standing role in regulating interest rates. Under the Rule, as long as a bank's name is on the loan agreement, the interest rate laws of the state in which that bank is headquartered will govern the terms of the loan. A borrower in California can contract with a nonbank lender in California, for funds from California, and yet, under the Rule, if a bank in Utah is listed as the lender of record, the nonbank lender can charge whatever interest rate it desires, even if it is well in excess of the 36% allowed to nonbank lenders in California.

The result of the OCC Rule will be to strip states of their agency in regulating usurious lending by nonbanks to their citizens. Over 200 years of legal precedent from states and the U.S. Supreme Court will be eliminated by this ill-conceived and overreaching Rule.

It is critically important that Congress overturn the Rule in order to uphold the well-established doctrine of examining the substance of a usurious loan instead of the mere form, as well as the proper and legitimate role of the states in making their own decisions about high-cost lending. If this Rule is not undone, it will spell disaster for untold numbers of Americans who are trying to recover from this time of unprecedented health and economic disaster.

Therefore, we commend you for introducing the resolutions to disapprove of the OCC's true lender Rule, which will eviscerate the power of state interest rate caps and deprive state financial regulators and attorneys general of their most effective tool in combating usurious lending.

Yours very truly,

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