

BANKING AND FINANCE: MONEY AND INTEREST.

In loan made by bank, savings institution, industrial loan association or credit union, lenders and borrowers of \$5,000 or more may agree in contract of indebtedness to imposition of higher interest rate upon failure of borrower to pay loan. Payment of late charge is not considered payment of interest. Five percent late charge limitation is not applicable to loan in initial principal amount of \$5,000 or more.

The Honorable Walter A. Stosch
Member, Senate of Virginia
June 8, 1999

You inquire regarding the application of certain provisions in Chapter 7.3 of Title 6.1 of the *Code of Virginia* regarding money and interest.¹ You first ask whether §§ 6.1-330.61 and 6.1-330.55 permit a lender of \$5,000 or more to raise the contract rate of interest on a loan to consumers should the borrower default on one or more installment loan payments.

Section 6.1-330.61 provides that "[n]o person *shall*"² use any provision of Chapter 7.3 of Title 6.1 or "any other section relating to usury to avoid or defeat the payment of interest, *or any other sum*," in connection with a loan made by "a bank, savings institution, industrial loan association or credit union, provided the initial principal amount of the loan is \$5,000 or more." (Emphasis added.) Section 6.1-330.55 similarly provides that "[i]n the case of any loan upon which a person is not permitted to plead usury, interest *and other charges* may be imposed and collected as agreed by the parties." (Emphasis added.)

Under recognized principles of statutory construction, statutes dealing with the same subject matter must be read together to give effect to the legislative intent.³ Such statutes should not be considered in isolation, but must be construed to produce a harmonious result, giving effect to all provisions if possible.⁴ Consequently, it is my opinion that banks, savings institutions, industrial loan associations and credit unions ("lender"), and their borrowers of amounts of \$5,000 or more, may agree in the contract of indebtedness to the imposition of a higher interest rate should the borrower default on the payment of the loan evidenced by the contract of indebtedness.⁵

You next ask whether §§ 6.1-330.55 and 6.1-330.61 prohibit a borrower from raising as a defense the late charge limitations contained in § 6.1-330.80 when the parties to an installment loan contract have agreed to the imposition of late charges upon failure of the borrower to make the loan payment(s).

Section 6.1-330.80(A) permits "[a]ny lender or seller" to impose a late charge upon borrowers "for failure to make timely payment of any installment due on a debt, ... provided that such late charge does not exceed five percent of the amount of such installment payment and that the charge is specified in the contract between the lender or seller and the debtor." The language of the statute is plain and must be given its clear and unambiguous meaning.⁶ By its plain language, § 6.1-330.80 applies broadly to any "lender" or "seller."

The payment of a late charge has long been considered not to constitute the payment of interest under a traditional usury law analysis.⁷ Regardless of whether a late charge is considered interest, the payment of a late charge clearly constitutes the payment of "any other sum," as that term is used in § 6.1-330.61, and "other charges," as used in § 6.1-330.55.

Statutes relating to the same subject "are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement."⁸ Such statutes must be construed to operate in harmony with the system if their terms, fairly and reasonably considered, will permit such construction.⁹ This rule of

construction is employed when two or more statutes can be reconciled. Construing §§ 6.1-330.61, 6.1-330.55 and § 6.1-330.80 to produce a harmonious result, therefore, it is my opinion that the late charge limitations of § 6.1-330.80(A) are not applicable to loans made by a lender, provided the initial principal amount of the loan is \$5,000 or more. Accordingly, on such loans, I am of the opinion that § 6.1-330.80 may not be used as a defense to the payment of a late charge that exceeds five percent of the amount of the installment loan payment to which the parties have previously indicated agreement in the installment loan contract.

¹Sections 6.1-330.49 to 6.1-330.90.

²Use of the word "shall" indicates that the General Assembly intended the terms of § 6.1-330.61 to be mandatory. See 1986-1987 Op. Va. Att'y Gen. 300, 300, and opinions cited therein.

³See *Commonwealth v. Sanderson*, 170 Va. 33, 195 S.E. 516 (1938).

⁴See *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7 (1957); *Commonwealth v. Jones*, 194 Va. 727, 731, 74 S.E.2d 817, 819-20 (1953); 1995 Op. Va. Att'y Gen. 146, 147; *id.* at 199, 202 n.12.

⁵*But see* 15 U.S.C.A. §§ 1602(aa), 1639(d) (West 1998) (provisions of Home Ownership and Equity Protection Act of 1994 prohibiting certain mortgage loans from including default interest rate higher than interest rate established absent default); 12 C.F.R. § 226.32(d)(4) (1999) (regulation prohibiting increased interest rate after default for certain home mortgage transactions).

⁶*But see* 15 U.S.C.A. §§ 1602(aa), 1639(d) (West 1998) (provisions of Home Ownership and Equity Protection Act of 1994 prohibiting certain mortgage loans from including default interest rate higher than interest rate established absent default); 12 C.F.R. § 226.32(d)(4) (1999) (regulation prohibiting increased interest rate after default for certain home mortgage transactions).

⁷See *Winslow v. Dawson*, 1 Va. (1 Wash.) 153 (1792); *see also* *Barbour v. Handlos Real Est. and Bldg. Corp.*, 152 Mich. App. 174, 393 N.W.2d 581 (1986); *Homewood Inv. Co., Inc. v. Moses*, 96 Nev. 326, 608 P.2d 503 (1980). Recent federal decisions, however, have held that late charges fall within the scope of "interest" for purposes of certain federal banking statutes. See *Greenwood Trust Co. v. Com. of Mass.*, 971 F.2d 818, 830-31 (1st Cir. 1992) (late charges are interest for purposes of Depository Institutions Deregulation and Monetary Control Act of 1980); *accord* *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735 (1996) (holding that Comptroller of the Currency reasonably interpreted term "interest" in National Bank Act to include late-payment fees, and that petitioner failed to establish that Court should not accord its usual deference to Comptroller's interpretation of ambiguous provision of Act).

⁸*Prillaman v. Commonwealth*, 199 Va. at 405, 100 S.E.2d at 7 (quoting former edition of 73 Am. Jur. 2d *Statutes* § 188 (1974)); *see also* 1995 Op. Va. Att'y Gen. 69, 70.

⁹See *School Board v. Town of Herndon*, 194 Va. 810, 816, 75 S.E.2d 474, 478 (1953); *School Board v. Patterson*, 111 Va. 482, 487-88, 69 S.E. 337, 339 (1910).