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A CONTINUING HISTORY OF ARKANSAS'S USURY LAW: ON THE VERGE OF EXTINCTION?*

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I. INTRODUCTION

Thirteen years ago we wrote an article for this journal that detailed the long and tortuous history of Arkansas's usury law.¹ That article began with a discussion of the usury provision passed by the Arkansas legislature in 1836 and ended with an explanation of the newest interest rate proposal that was to be presented to voters in the November 1990 general election.² Given that the time period covered by the article ended in the latter part of 1989, there was no opportunity to discuss the results of the election at that point. Moreover, since 1990 several pieces of federal legislation have had a profound effect on Arkansas's usury law.³ Because Arkansas's usury law generated much debate since the original article was published, and continues to generate much discussion even now, we felt that it was time to carry the history of Arkansas's usury law to the end of 2002.

This article is divided into several sections. The first picks up where the original article ended and describes the genesis of (and election results for) the proposed usury amendment (Amendment 2) voted on in the November 1990 general election. The next section outlines the state's efforts to ease restrictions on interstate banking and statewide branching, while the third discusses the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. The fourth section talks about the impact on Arkansas's usury law of expanded interstate banking opportunities after Riegle-Neal, while the next discusses the Gramm-Leach-Bliley Act and its partial solution to Arkansas's usury "problem." The last section draws some tentative conclusions.

* This article is an update of an earlier one published in this journal in 1989.

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1. See Kenneth E. Galchus, et al., *A History of Usury Law in Arkansas: 1836-1990*, 12 U. ARK. LITTLE ROCK L. J. 695 (1989-90).

2. See *id.* at 735.

3. See, e.g., Riegle-Neal Banking and Branch Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (codified in scattered sections of 12 U.S.C.), and the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 U.S.C.).

II. THE 1989 INTEREST RATE CONTROL AMENDMENT (AMENDMENT 2)

The 1989 article ended with a discussion of the proposed usury amendment, which would become known as Amendment 2, to be voted on in 1990. The proposed usury amendment was designed to "fix" some perceived problems with Amendment 60 that had been passed in 1982. For example one of the problems that retailers had with the amendment came about via the Arkansas Supreme Court's interpretation of Amendment 60 in *Bishop v. Linkway Stores, Inc.*⁴ Amendment 60 provided that the interest rate on "general loans" could be a maximum of five percentage points above the federal discount rate.⁵ A separate section stated that consumer loans would be subject to a cap of 17%, but the section did not specify anything about such loans being tied to the federal discount rate.⁶ In fact the legislature intended that Amendment 60 would permit consumer loans to be made at the market rate of interest (and, thus, would not be tied to the discount rate, but would have a cap of 17%), while other loans (business loans) could have an interest rate of no more than 5% over the federal discount rate.⁷ Shortly after the usury amendment passed, however, the Arkansas Supreme Court decided in *Bishop* that, despite legislative intent, the wording of Amendment 60 was such that consumer loans were to be treated in the same way as business loans.⁸ This interpretation meant that the interest rate on consumer loans would also be tied to the federal discount rate. Retailers and other supporters of usury reform complained bitterly about this decision feeling that the court violated both voter and legislative intent.⁹

A second problem that the business and financial community had with Amendment 60 was that they felt that the federal discount rate was not necessarily a good indicator of the market rate of interest. They argued that the discount rate, which is a policy tool of the Federal Reserve System, could lag behind the market rate of interest for a considerable period of time. Thus, because of these perceived problems with Amendment 60, the business and financial community began discussing the possibility of a revised usury amendment less than one year after voters had approved Amendment 60.¹⁰

4. 280 Ark. 106, 655 S.W.2d 426 (1983).

5. ARK. CONST., art. 19, § 13 (2002).

6. *Id.*

7. See, e.g., Doug Smith, *Legal Questions Arise On Amendment 60*, ARK. GAZETTE, Nov. 12, 1982, at A1.

8. *Bishop*, 280 Ark. at 106, 110, 655 S.W.2d at 426, 429.

9. Brenda Tirey, *Interpretation of Amendment Shocks Lenders*, ARK. GAZETTE, July 12, 1983, at A1.

10. See Galchus, *supra* note 1, at 730 (discussing further information relating to the efforts to revise/circumvent Amendment 60).

By the beginning of 1989, efforts were well under way by the business and the financial community to change Amendment 60 to correct the existing problems. The intervening years had seen little progress in this area because the prime rate had been low enough so that the restrictions of Amendment 60 did not present a problem for the Arkansas economy. In 1987 and 1988, however, interest rates began a slow drift upward, and as a result Arkansas began to experience some of the same problems as when the old 10% limit was in effect—loanable funds began to flow to other states, and credit rationing began to reappear.¹¹

As a result of this pressure, the legislature in March of 1989 selected a constitutional amendment to replace Amendment 60 to be presented to voters for approval in the November 1990 general election.¹² Amendment 2 (the popular name was "The 1989 Interest Rate Control Amendment") contained the following provisions: (1) the interest rate on consumer loans (credit cards, home improvement loans, in-store retail financing, automobile financing, etc.) could float freely, but would be subject to a 17% ceiling; (2) business and agricultural loans below \$250,000 would have a maximum rate of 5% above the average auction rate of one-year U.S. Treasury bills (no ceiling on the rate) in the quarter before the loan; and (3) any loans over \$250,000 would have no interest ceiling.¹³

The official campaign to change the state's usury law began on Tuesday, August 14, 1990 in Little Rock with a meeting of retailers, bankers, and others interested in changing what they considered to be the restrictive nature of Amendment 60.¹⁴ T.S. "Ros" Smith, a Conway automobile dealer, chaired the Committee for Amendment 2 (originally called "The Committee for the 1989 Interest Rate Control Amendment"), and Bob Wimberley served as campaign manager.¹⁵ Governor Bill Clinton and his opponent in the November election, Sheffield Nelson, both came out in support of Amendment 2, as did the American Association of Retired Persons (AARP).¹⁶ J. Bill Becker, president of the AFL-CIO and leader of the opposition to Amendment 60, led the opposition to Amendment 2.¹⁷ The arguments on both sides of the issue were now familiar to everyone. Supporters

11. Galchus, *supra* note 1, at 733.

12. James Merriweather, *3 Issues Selected for Ballot: Legislature Submits 1990 Ballot Issues*, ARK. GAZETTE, Mar. 17, 1989, at B3.

13. See Galchus, *supra* note 1, at 734.

14. See Dave Wannemacher, *Economists Help Kick Off Interest Rate Campaign*, ARK. GAZETTE, Aug. 15, 1990, at C2.

15. See, e.g., Mark Oswald, *Interest Rate Amendment Ruled Legal for Ballot*, ARK. DEMOCRAT-GAZETTE, Nov. 1, 1990, at A1.

16. John Reinan, *Clinton, Nelson Hold Mutual Cause: Both Back Change in Interest Law*, ARK. GAZETTE, Aug. 20, 1990, at A1.

17. Karen Rafinski, *Interest Rate Plan Opposed: AFL-CIO Fights Change*, ARK. GAZETTE, Aug. 19, 1990, at B1.

argued that Amendment 2 would make the law what the voters thought it would be when they passed Amendment 60 in 1982. In addition, they argued that Amendment 60's usury restrictions hindered economic development within the state, led to credit rationing when the prime rate approached the legal interest rate limit, and caused capital to flee to other states in this instance. Finally, they argued that the current discount rate was 7% (and so there was a legal limit of 12% under Amendment 60), and if Amendment 2 had been in effect the maximum rate would be 13.25%.¹⁸ The opponents argued that passage of Amendment 2 would increase bankers' and retailers' profits, raise interest costs for consumers, and lead to higher prices for everything that people buy on credit.¹⁹

Hoping to keep Amendment 2 off the general election ballot in November, J. Bill Becker and Jim Clark, AFL-CIO's secretary-treasurer, filed suit on October 5, 1990 asking that Amendment 2 be kept off the November election ballot.²⁰ In addition to other claims, they primarily argued that an extra sentence had mistakenly been added to the ballot title approved by the General Assembly by Secretary of State Bill McCuen's office and that proceeding with the election on Amendment 2 constituted fraud because the title was now misleading and deceptive.²¹ They contended that the additional sentence said that Amendment 2 would establish a maximum rate of interest, whereas in fact the proposed amendment would not set a maximum rate of interest for loans over \$250,000. The Attorney General's Office, which defended the lawsuit, contended that the additional sentence did not constitute fraud, was not misleading, and was at most just a clerical error.²²

In October 1990 Chancellor Lee Munson sided with the defense in the lawsuit, holding that the Amendment 2 ballot title approved for the polls was not misleading and that its use did not constitute fraud.²³ Chancellor Munson, citing a previous state supreme court ruling, held that the purpose of the ballot title was to identify the proposed amendment and not to describe to voters the usury proposal's specifics.²⁴

The plaintiffs appealed the case to the state supreme court, and on October 31, 1990, in a unanimous ruling, the Arkansas Supreme Court decided

18. See Larry Sullivan, *Battle Over Campaign Interest Rates Begin: Change Would Ease Interest Cap*, ARK. GAZETTE, Sept. 2, 1990, at A1.

19. Rafinski, *supra* note 17, at B1.

20. Mark Oswald, *Suit Filed Over Rate Proposal*, ARK. GAZETTE, October 6, 1990, at B1, col. 5.

21. *Id.*

22. See Valerie Smith, *Altered Ballot Title Not Legal Flaw, Attorney Says*, ARK. GAZETTE, Oct. 12, 1990, at C2.

23. See Jim Nichols, *Usury Amendment's Ballot Wording Upheld*, ARK. GAZETTE, Oct. 17, 1990, at A1.

24. *Id.*

that Amendment 2 should stay on the general election ballot.²⁵ The court held that an amendment placed on the ballot by the General Assembly could only be disqualified from the ballot if the plaintiffs could show that the title constituted manifest fraud upon the public. Further, the court stated that the additional language added to the ballot title in this case was not fraud but simply added more information to the title.²⁶

With the battle over the ballot title out of the way, both sides turned their attention to the election that was just a few days away. One of the last polls taken before the election did not lend much encouragement to Amendment 2's supporters. In results that proved to be prophetic, a telephone survey of 865 registered voters showed that only 38% of those interviewed favored Amendment 2, with 48% opposed.²⁷ This figure represented a decline in support from just a few weeks earlier when 44% of those polled said that they supported Amendment 2.²⁸ On election day 65% of the voters soundly rejected Amendment 2.²⁹

There were two main reasons for the overwhelming defeat of Amendment 2. First, many consumers were convinced that the interest rate on consumer loans would automatically soar to 17% if Amendment 2 passed. Even though under Amendment 2, the consumer rate was to float freely (but with a cap of 17%), consumers either could not understand, or perhaps did not want to understand, that competition would prevent the interest rate on consumer loans from rising to 17% unless market conditions warranted it. Consumers also felt that the lack of an interest rate cap on loans over \$250,000 was another attempt by bankers to increase their bottom line. Second, unlike 1981 when the prime rate soared to almost 21%, and the rate on consumer loans was limited to 10%, no such credit crunch existed in 1990. Throughout 1990 the prime rate remained approximately 10% while the maximum rate on consumer loans in Arkansas was 12%, and, thus, the situation was not as desperate as it was in the early 1980s.³⁰

25. *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

26. *Id.* at 487, 798 S.W.2d at 73.

27. See Michael Arbanas, *TV Poll Finds Usury Measure Losing Ground*, ARK. GAZETTE, Nov. 3, 1990, at A1, col. 2. The survey was conducted by Opinion Research Associates of Little Rock and released by KATV, Channel 7. See *id.*

28. Mark Oswald, *Lottery, Interest Amendment Fights Tightening Up, Poll Says*, ARK. GAZETTE, Oct. 25, 1990 at A1, col. 4.

29. Larry Sullivan & Jim Nichols, *Future of Usury Plan Uncertain*, ARK. GAZETTE, Nov. 8, 1990, at B1, col. 4. Supporters of Amendment 2 outspent their rivals by approximately one million dollars (\$1.14 million versus \$31,228). See Mark Oswald, *Interest Rate Backers Outspend Foes*, ARK. GAZETTE, Dec. 11, 1990, at A6, col. 1.

30. The discount rate was 7% in 1990. See Economic Research, Federal Reserve Bank of St. Louis, *Monthly Interest Rate Data*, available at www.research.stloisfed.org/fred/data/irates.html (last visited Apr. 26, 2002).

After the failure of Amendment 2, the issue of "usury law reform" faded from public view. In the ensuing years bankers and retailers were in no mood to bring another reform proposal before voters after the defeat of Amendment 2 in 1990. Also, throughout the period of 1991 to 1993 and even into 1994, the spread between the maximum rate on loans (5% over the discount rate) and the prime rate was 2%, which made the situation from bankers' points of view, if not perfect, at least tolerable. By the beginning of 1995, the spread between the two rates had fallen to 1.25%, but then rose to 1.75% at the end of the year.³¹ From 1996 to 1999, the spread between the two rates fluctuated between 1.5% and 1.75%.³² Thus, over the decade since Amendment 2 had gone down to defeat, Arkansas's usury law did not result in the type of "credit crunch" that had occurred in the early 1980s.

The lack of a crisis situation explains why there was no major push for changes in the state's usury law during this period. There was a force at work, however, that began in the mid 1980s that would soon produce a new problem for Arkansas bankers because of the state's usury law. The force, which began in about 1987 and gathered momentum in the early 1990s, dealt with the twin issues of statewide branching and interstate banking.

III. INITIAL STATE EFFORTS TO EASE RESTRICTIONS ON STATEWIDE BRANCHING AND INTERSTATE BANKING

The Arkansas General Assembly approved interstate banking and expanded branching authority within the state in an emergency session in 1988.³³ The impetus behind Act 12 arose, in part, out of a decision handed down in 1987 by the United States Court of Appeals for the Fifth Circuit. In *Department of Banking and Consumer Finance v. Clarke*,³⁴ the court held that because the state of Mississippi allowed statewide branching of its state chartered savings associations, national banks (which at the time did not have branching authority under state law) should have the same right.³⁵ The court reasoned that Mississippi's savings associations were, in effect, state banks, because they performed essentially the same functions. The court further reasoned that, because federal law permitted national banks the same branching authority as state banks, national banks in Mississippi should be able to branch statewide also.³⁶

31. *Id.*

32. *Id.*

33. Act of July 15, 1988, No. 12, 1988 Ark. Acts 2528; see also James T. Pitts, *Interstate Banking and State Wide Branching in Arkansas: Act 12 of the 76th General Assembly*, 11 U. ARK. LITTLE ROCK L. J. 457, 457 (1988-89).

34. 809 F.2d 266 (5th Cir. 1987).

35. See *id.* at 271.

36. *Id.* at 269; see also The National Bank Act 12 U.S.C. § 36(c) (2003).

Arkansas's situation resembled that of Mississippi's. In Arkansas, state and federally chartered savings and loans were allowed state-wide branching privileges, but commercial banks (both state and national) were restricted to their home counties.³⁷ Based on the decision in *Clarke*, twenty-two national banks in Arkansas submitted requests to the federal Comptroller of the Currency for permission to open branches in various parts of the state.³⁸ Arkansas bankers feared that if national banks were allowed to branch throughout Arkansas, state banks would be at a competitive disadvantage because state law would still restrict them from branching.³⁹ Seeking to thwart the possibility of immediate branching authority of national banks, the General Assembly sought to negate the effect of the decision in *Clarke* by passing Act 12.⁴⁰ Act 12, in effect, took away the authority of state savings and loans to branch statewide which, under the court's reasoning in *Clarke*, would neutralize the effect of that decision. Act 12 had the intended effect and the Comptroller of the Currency announced on September 28, 1988 that all the applications for branching authority previously filed had been withdrawn.⁴¹ Apart from trying to negate the effect of the *Clarke* decision, Act 12 did allow for a gradual phase-in of statewide branching for banks and savings and loans over a ten-year period. Branch banking was to be allowed in contiguous counties in 1994, and statewide branching was to be permitted in 1999.⁴²

In 1988 at the time Act 12 was passed, Arkansas was one of only six states that did not allow interstate banking.⁴³ Up to this point, state law was such that no out-of-state bank could open a branch in Arkansas, and no Arkansas bank could open a branch outside the state.⁴⁴ Act 12, however, allowed interstate banking within the boundaries of a "regional compact" consisting of seventeen states and the District of Columbia.⁴⁵ Under this arrangement, Arkansas banks could buy banks in any of the states that were parties to this "compact" so long as the agreement was reciprocal. Any restrictions imposed by Arkansas on an institution (from a compact state) buy-

37. See scattered sections of Arkansas Code Annotated section 23 for the various provisions restricting interstate, as well as, intrastate branching. For a full discussion of these provisions, see Pitts, *supra* note 33, at 457-61, 470-72.

38. John Reed, *Bankers Call For Action on Session*, ARK. GAZETTE, June 24, 1988, at A9.

39. See Pitts, *supra* note 33, at 458-59, for a discussion of Arkansas's laws prohibiting intrastate branching.

40. See *id.*

41. *Id.* at 461.

42. *Id.* at 472.

43. *Id.* at 458 n.3.

44. *Id.* at 458.

45. See Pitts, *supra* note 33, at 462.

ing a bank in the state would apply equally well to an Arkansas bank seeking to buy an institution in the other state.⁴⁶

IV. THE RIEGLE-NEAL INTERSTATE BANKING AND BRANCHING EFFICIENCY ACT OF 1994

Until the early 1990s, a series of federal laws that had been adopted on an "as needed" basis mainly governed interstate banking.⁴⁷ In addition state laws differed regarding the extent to which each state would permit interstate banking within its borders.⁴⁸ This resulted in a somewhat clumsy, patchwork scheme of interstate banking legislation and prevented the achievement of a true nationwide banking system.⁴⁹ The underlying theme of this federal legislation was to prevent unrestricted interstate banking. Although there were restrictions on establishing a bank branch in another state, it was not impossible to do so. The reason for the restrictive nature of interstate banking legislation up to this point was to maintain the existing local, community-based control over the banking sector. Many believed that liberalization of federal legislation in this area would cause local banks to be swallowed-up by big national institutions which would be insensitive to the credit needs of local communities.⁵⁰ Due to market pressures and the increasing view that the existing laws in this area were archaic in a global environment, however, it was inevitable that the forces seeking nationwide banking would soon prevail. The interplay of these pressures culminated in the passage, with Clinton Administration support, of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.⁵¹

The Riegle-Neal bill essentially removed all geographic barriers to nationwide banking although states were allowed to maintain some regulatory authority over banks within their boundaries acquired by out-of-state institu-

46. *Id.*

47. For a review of federal legislation in this area, see Stacey Stritzel, Note, *The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994: Progress Toward a New Era in Financial Services Regulation*, 46 SYRACUSE L. REV. 161 (1995) (discussing federal legislation in this area). See also Mark D. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 HARV. J. ON LEGIS. 183 (1996).

48. See JoAnn Nestor, *Interstate Branch Banking Reform: Preserving the Policies Underlying the McFadden Act*, 72 B.U. L. REV. 607, 622-23 (1992) (discussing some differences in state laws regarding interstate banking).

49. See Stritzel, *supra* note 47, at 172 n.74 (discussing remarks of Senator Lloyd Benson).

50. *Id.*

51. Pub. L. No. 103-328, 108 Stat. 2338 (1994) (codified in scattered sections of 12 U.S.C.); see also Riegel-Neal Amendments Act of 1997, Pub. L. No. 105-24, 111 Stat. 238 (1997) (codified in scattered sections of 12 U.S.C.) (clarifying some issues regarding the 1994 law).

tions.⁵² One major section of the bill concerned interstate banking, while another dealt with interstate branching.⁵³ Section 101 of the Riegle-Neal bill, dealing with interstate banking, allowed a Bank Holding Company (BHC) in a state to acquire a bank in another state, regardless of the other state's prohibition against an acquisition of this type.⁵⁴ States were permitted, however, to dictate many of the terms under which a BHC could acquire a bank within its boundaries, and thus, states were not entirely preempted by this section.⁵⁵ In addition, there is nothing in Riegle-Neal allowing states to "opt out" of this provision, and, thus, barriers to nationwide banking by BHCs were swept away by this legislation. Section 101 of the Riegle-Neal bill, which was signed into law by President Clinton on September 29, 1994, was to take effect one year after its enactment.⁵⁶ On the other hand, section 102 of the bill, dealing with interstate branching, was not to take effect until June 1, 1997.⁵⁷ Under this section, banks were permitted to branch into states in two different ways. One possibility was for all the existing subsidiaries of a BHC to be consolidated into one bank. The former subsidiaries would then be considered to be branches of the resulting bank. The second possibility was for a bank to acquire a bank in another state and then convert it into a branch of the acquiring bank.⁵⁸ States could "opt out" of this section if they enacted a law to that effect before June 1, 1997. An "opt out" law had to apply equally to all banks, and had to prohibit interstate branching in any way. Also, states could "opt-in" if they wished to take advantage of this section earlier than June 1, 1997.⁵⁹

52. See sections 101 and 102 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338, 2339-52 (1994). See also, Stritzel, *supra* note 47, at 173-82.

53. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338. Generally interstate banking refers to an acquisition of a bank in another state, whereas interstate branching refers to the situation where a bank with headquarters in one state establishes a branch in another state.

54. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 101, 108 Stat. 2338, 2339. The Bank Holding Company (BHC) structure was a way that banks were able to operate in multiple states without violating interstate banking restrictions in effect before Riegle-Neal. Under this type of structure, a bank could operate in multiple states as long as each bank was separately incorporated (with its own separate name) in its state of operation with all the banks unified under the structure of a common BHC. Before Riegle-Neal, states had to have legislation authorizing such acquisitions by a BHC. Riegle-Neal, however, swept away this restriction.

55. See Rollinger, *supra* note 47, at 246.

56. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 101 e, 108 Stat. 2338, 2343.

57. *Id.* § 102.

58. Stritzel, *supra* note 47, at 179.

59. § 102(a)(3)(A).

Section 103 of the Riegle-Neal bill also dealt with interstate branching.⁶⁰ Called de novo branching, this particular section allowed a national bank to establish a new “brick and mortar” branch within another state without acquiring an existing institution. For a national bank to establish a de novo branch within a state, that state must have “opted-in,” and passed legislation specifically authorizing branches of this type within its borders.⁶¹

The Riegle-Neal bill is arguably one of the most important pieces of banking legislation in the United States in the twentieth century. It swept away decades of piecemeal federal and state legislation and established in its place a comprehensive, nationwide system for governing interstate banking and branching. It also can be viewed as part of the overall trend of industry deregulation in the United States.

In early 1997 with the support of the banking community in Arkansas, legislation was introduced in the General Assembly that allowed the state to take advantage of the “opt-in” provision of the Riegle-Neal bill.⁶² This eventually culminated in the passage of The Arkansas Interstate and Branching Act by the state Legislature in late spring.⁶³ The legislation took effect on May 31, 1997, one day before the Riegle-Neal bill put interstate branching into force nationally. The legislation, following the example set by the Riegle-Neal bill, allowed out-of-state banks to establish branches in Arkansas.⁶⁴ The rationale for “opting-in” rather than just letting the law take effect on June 1, 1997 (if no action were taken the state would have automatically been “opted-in”) was that Arkansas, within certain limits, would be able to engage in interstate branching on its own terms. For example the Arkansas Interstate and Branching Act specified that any out-of-state bank wishing to branch into Arkansas could do so only by buying an existing bank in the state.⁶⁵ Also, the existing bank could not be a de novo bank, defined as an institution with a charter less than five years old.⁶⁶

60. *Id.* § 103.

61. *Id.* § 103(a)(1)(A).

62. Don Chaney, *Updating State's Bankruptcy Laws Has Widespread Support*, ARK. DEMOCRAT-GAZETTE, Jan. 12, 1997, at A21.

63. Act of Mar. 10, 1997, No. 408, 1997 Ark. Acts 2163 (codified at ARK. CODE ANN. § 23-45-102, -104, 23-46-207, -304(a), -401, 23-47-710, -801, -907, 23-48-309, -405, -406(a), 23-48-501 to -505, -702, -802, -804, -806, -901 to -911, -1001 to -1011 (LEXIS Repl. 2000 & Supp. 2001)).

64. *See* ARK. CODE ANN. § 23-48-502, -505, 23-48-901, -906 (LEXIS Repl. 2000 & Supp. 2001). Under previous law, out-of-state banks were not permitted to open a branch or to establish a subsidiary in Arkansas. *See* Pitts, *supra* note 33.

65. *See* ARK. CODE ANN. §23-48-502 (LEXIS Repl. 2000 & Supp. 2001). This provision was not part of the original federal legislation. *Id.*

66. *Id.* § 23-48-904(b).

V. THE IMPACT OF EXPANDED INTERSTATE BANKING AUTHORITY ON ARKANSAS'S USURY LAW

One question that arose as the impediments to interstate banking began to crumble was whether out-of-state banks with branches in Arkansas would be able to circumvent the state's usury law by "importing" interest rates from their home states. That is, bankers were justifiably concerned that, while Arkansas banks would be constrained by the state's usury law, branches opened in Arkansas by out-of-state banks could charge the market rate of interest existing in their home states (which could be higher than the rate allowed by the state's usury law).⁶⁷ Framed in a little different way, the question to be answered after Riegle-Neal was whether a bank, state or national, should look to the laws of the home state or the host state in deciding the permissible interest rate to charge on a loan. The Office of the Comptroller of the Currency of the United States (OCC)⁶⁸ and the Federal Deposit Insurance Corporation (FDIC)⁶⁹ answered this question for national banks and state banks, respectively.

In its interpretative letter on this issue, the OCC first pointed out that under 12 U.S.C § 85, a national bank can charge interest at a rate permitted by the state in which the bank is "located," and that the Supreme Court has recognized that a national bank is "located" in the state of its main office.⁷⁰ In addition, the OCC noted that it previously had ruled that a national bank could be deemed to be "located" in a host state (where it had a branch), as well as in its home state.⁷¹ Thus, since a national bank may be "located" in its home state as well as its host state (or perhaps, states), the issue was whether the usury law of the home or host state should apply to the interest rate charged on a loan. In reviewing the legislative history of Riegle-Neal, the OCC concluded that, regardless of the fact that a national bank branch may be considered to be "located" in a host state, the law of the state where the loan was "made" should apply.⁷² Based on the legislative history of

67. Don Chaney, *Branching Out: Arkansas Bankers Expect Little Changes Under Legislation Allowing Interstate Bankers*, ARK. DEMOCRAT-GAZETTE, Feb. 23, 1997, at 1G; see also Don Chaney, *An Issue of Public Interests: New Branching Law Resurrects Concerns About State's Usury Cap*, ARK. DEMOCRAT-GAZETTE, May 25, 1997, at 1G.

68. Interpretative Letter No. 822, [1997-1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-265, at 90,256 (Feb. 17, 1998).

69. Press Release, Federal Deposit Insurance Corporation, General Counsel Opinion on Interest Charges by Branches of Interstate State Banks (May 13, 1998), available at <http://www.fdic.gov/news/press/1998/pr9833.html>.

70. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

71. Interpretative Letter No. 822, *supra* note 68, at 90,257 (discussing national banks); see also Press Release, Federal Deposit Insurance Corporation, *supra* note 69 (discussing this issue relating to state banks).

72. Interpretative Letter No. 822, *supra* note 68, at 90, 260.

Riegle-Neal, the OCC concluded that the loan is "made" in that state where: (1) the loan was approved; (2) credit was extended; and (3) the funds were disbursed.⁷³ If all three functions were performed in the home state, then that state's law governing interest rates would apply. On the other hand, if all three functions were performed at the branch in the host state, that state's law would apply. Finally, the OCC concluded that where a loan could not be considered to have been "made" at a branch in the host state, the home state's rates may always be applied.⁷⁴ The interpretative rules governing importation of interest rates for interstate state bank branches are essentially the same as those for national banks.⁷⁵

It is clear from the OCC's interpretation that out-of-state national banks, as well as state banks, could import their home state interest rates into Arkansas, as Arkansas bankers had feared. Out-of-state banks could always circumvent Arkansas's usury law by configuring the loan process in such a way so as to insure that their home state interest rates would always apply to loans made in Arkansas. The practical effect was that branches in Arkansas of out-of-state banks would not be constrained by the state's usury law, while in-state banks would be. Arkansas bankers were thus concerned that banks based in Arkansas would be at a competitive disadvantage compared with branches of their out-of-state rivals.

VI. THE GRAMM-LEACH-BLILEY ACT AND ITS AFTERMATH

Even before the interpretative guidelines issued by the OCC and the FDIC, Arkansas bankers recognized that the importation of home state interest rates by out-of-state branches was a distinct possibility.⁷⁶ In response to this perceived threat, bankers began calling for federal legislation that would supercede the state's usury law and would allow in-state banks to charge the same rates as branches of out-of-state banks. In order to lend some support to Arkansas bankers on this issue, the state legislative Insurance and Commerce Committee unanimously approved a resolution urging the state's congressional delegation to support federal legislation allowing in-state banks to match interest rates charged by branches of their out-of-state competitors.⁷⁷ Not everyone, however, called for federal override legislation on this issue. The AFL-CIO, for example, opposed any override legislation of the state's usury law, arguing that it would lead to higher in-

73. *Id.*

74. *Id.*

75. Press Release, Federal Deposit Insurance Corporation, *supra* note 69.

76. *See, e.g.,* Chaney, *supra* note 67.

77. Doug Thompson, *Panel Seeks Help Letting State Banks Sidestep Usury Law*, ARK. DEMOCRAT-GAZETTE, Aug. 21, 1998, at B3.

terest rates.⁷⁸ In addition, others felt that it was wrong for the federal government to try to preempt the Arkansas Constitution.⁷⁹ Despite the lack of unanimous support for federal override legislation on this issue, there was no organized opposition as there had been when Amendment 2 was defeated in 1990.

On November 12, 1999, President Clinton signed into law the Gramm-Leach-Bliley Act (also referred to as the "Financial Services Modernization Act") that overhauled depression era banking laws.⁸⁰ The law, which, among other things, repealed part of the 1933 Glass-Steagale Act and the 1956 Bank Holding Company Act, made it easier for banks, insurance companies, and securities firms to enter each other's businesses. The final bill, which enjoyed wide bipartisan support in Congress (as well as full support of the state's congressional delegation), was approved in the Senate by a vote of ninety to eight, and approved in the House by a vote of 362 to fifty-seven.⁸¹ Section 731 (12 U.S.C. § 1831 U-(f)) of the law was of particular interest to Arkansas bankers since it effectively repealed the state's usury law with respect to in-state banks.⁸² Section 731, directed specifically to Arkansas's usury law, provides that the highest interest rate allowed in Arkansas will be equal to either the maximum rate allowed by the home state of any branch located in the state or the rate established by the state's usury law, whichever happens to be greater. Thus, if an out-of-state bank whose home state had no interest rate limit opened a branch in Arkansas, there would be no limit in Arkansas. The practical effect of this legislation was that it leveled the playing field between Arkansas banks (state and national) and branches of out-of-state banks because it allowed Arkansas banks to

78. *Id.*

79. Bill Simmons, *Congressional Candidates Differ on State Interest Law*, ARK. DEMOCRAT-GAZETTE, Aug. 31, 1998, at B4.

80. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 U.S.C.).

81. See 145 CONG. REC. H11513 (1999); see also 145 CONG. REC. S13917 (1999).

82. Section 731 provides in pertinent part:

In the case of any State that has a constitutional provision that sets a maximum lawful annual percentage rate 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 depository institution whose home State is such State shall be equal to not more than the greater of 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 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 . . .

charge the same rate of interest on loans as their out-of-state competitors. It is important to point out, however, that Section 731 applies only to banks, and thus, retailers such as automobile dealers and furniture storeowners are still bound by the state's usury law.

Despite the passage of the Gramm-Leach-Bliley Act, Arkansas bankers were in no rush to test this federal override legislation by raising interest rates on loans and credit cards above the previous legal limit. Rather they waited for a test case to determine the legality of Section 731 before making any interest rate decisions based upon it.⁸³ They did not wait long, for in the early part of 2000, Steve Johnson, a professor at Arkansas State University at Mountain Home, filed suit against the Bank of Bentonville, arguing that the interest rate he was being charged on a personal loan was usurious.⁸⁴ His argument was that Section 731 was unconstitutional, and therefore, the interest rate limit defined by the state's usury law should apply. Johnson alleged that, in passing Section 731, Congress had exceeded its authority under the Commerce Clause.⁸⁵ The Bank of Bentonville, in asking for summary judgment, argued that Congress did have such authority and that there was adequate case law supporting this position. The bank thus argued that Section 731 preempted the state's usury law and that, as a result, it could match the (higher) interest rate imported by out-of-state banks.⁸⁶ In other words, the rate of interest on the loan to the plaintiff, although higher than the state usury law would allow, was not usurious.

In granting the defendant's petition for summary judgment in the case, the district court found that there was adequate legal precedent to support congressional preemption of state usury laws and that federal banking law, in several situations, had specifically been held to preempt Arkansas's usury law.⁸⁷ With respect to Section 731, specifically, the court held that the loan made by the Bank of Bentonville was "substantially related to interstate commerce," thus giving Congress the authority under the Commerce Clause to preempt the state's usury law relating to such loans.⁸⁸ The loan made to Johnson was not usurious, because the bank could match the higher interest rate imported by their out-of-state competitors. On appeal to United States Court of Appeals for the Eighth Circuit, Johnson's arguments were the same

83. Don Chaney, *Banks Follow Fed's Rates, Won't Push Usury Cap Yet*, ARK. DEMOCRAT-GAZETTE, Feb. 3, 2000, at D1.

84. *Johnson v. Bank of Bentonville*, 122 F. Supp. 2d 994 (W.D. Ark. 2000), *aff'd*, 269 F.3d 894 (8th Cir. 2001) (involving a promissory note for \$5,000 with a stated interest rate of 16.5% per year. The bank also charged \$60 in fees which made the effective interest rate on the loan 17.915% per annum. The limit under the state's usury law would have been 10.5% per annum).

85. *Id.* at 999.

86. *Id.* at 999-1001.

87. *Id.*

88. *Id.* at 1001.

as the arguments made at the lower court level.⁸⁹ Without dissent, the Eighth Circuit, using the same reasoning as used by the district court, affirmed the lower court's ruling on October 4, 2001, effectively ending Arkansas bankers 125-year-old struggle to bypass the state's usury law.⁹⁰

Although Arkansas's usury law no longer binds banks located in the state, retailers in the state (such as car dealers, furniture dealers, jewelry stores, and finance companies) are still subject to the constitutional restriction. As a result there have been recent efforts to remove what is left of Arkansas's usury law.⁹¹ At the request of the Arkansas Fair Credit Coalition, Fourth District Congressman Mike Ross, a member of the House Committee on Financial Services, has offered an amendment to house bill 1375, "The Financial Services Regulatory Relief Act of 2003," that would allow non-bank lenders to charge the same rate of interest as banks.⁹² This amendment would offer to non-bank lenders the same relief that the Gramm-Leach-Bliley Act offered to banks.⁹³ At this point Congress has not passed The Financial Services Regulatory Relief Act of 2003, and so it is uncertain whether non-bank lenders will get the relief they seek.

The rationale that non-bank lenders use in seeking relief from Arkansas's usury law is essentially the same as that used by banks when they were still subject to Arkansas's usury provision.⁹⁴ That is, they argue that being subjected to Arkansas's usury law has restricted economic growth, caused capital flight to other states with no such usury restriction, and prevented many Arkansans from gaining credit. As evidence they point to the disappearance of General Motors Acceptance Corporation and Ford Motor Credit from the state, as well as to the fact that many Arkansans with less than perfect credit histories go to other states to buy cars (where they can get financing). While there does not appear to be any organized opposition to this amendment, the arguments that are often heard are the same as those used in the past: that passage of the amendment to house report 3951 would lead to higher interest rates and would mean that a provision of the Arkansas Constitution, adopted by voters, was preempted by federal government action.

89. *Johnson v. Bank of Bentonville*, 269 F.3d 894 (8th Cir. 2001).

90. Neither party appealed the case to the United States Supreme Court.

91. See Gwen Moritz, *More Lenders Look to Congress for Relief from Usury Limit*, ARK. BUSINESS, July 15-22, 2002, at 1.

92. H.R. 1375, 108th Cong. § 504 (2003). Pay-day lenders and check-cashers are specifically excluded from the amendment, and so would still be covered by Arkansas's usury law. Moritz, *supra* note 91, at 1.

93. See H.R. 1375, 108th Cong. § 504 (2003); see also Moritz, *supra* note 91, at 12.

94. *Id.*

VII. CONCLUSIONS

It is mind-boggling when one thinks of the time, effort, and money that have been spent over the years to circumvent Arkansas's usury law. Numerous law suits, millions of dollars, and countless hours have been spent in trying to cope with this provision of Arkansas's constitution. Finally after over 100 years, Arkansas usury provision appears to be all but dead, preempted by federal legislation in the form of Section 731 of the Gramm-Leach-Bliley Act. What Arkansans had been unwilling to do at the local level was finally done for them at the federal level. The federal preemption of Arkansas's usury law must, however, be viewed in the context of the movement toward a more competitive national banking system initiated by removing the geographic barriers to nationwide banking and giving banks the opportunity to operate on a more level playing field.

The one last group still being constrained by the usury law is Arkansas's non-bank lenders. With the economic and political climate being what it is right now, there appears to be no major push to get the Financial Services Regulatory Relief Act of 2003 through Congress. Arkansas bankers, while sympathetic to non-bank lenders plight, do not want any change in Section 731 of the Gramm-Leach-Bliley Act that would include non-bank lenders, either. The fear is that if Section 731 is revisited, any resulting changes might be detrimental to banks. Rather, bankers would prefer a stand-alone measure that would apply exclusively to non-bank lenders. Non-bank lenders lack the direct support of a major lobbying group (Arkansas bankers), and it will be interesting to see whether the non-bank lenders in Arkansas have the political clout to cause the complete demise of Arkansas's usury law.