

Contents

Online Version of This Treatise	vii
---------------------------------------	-----

Part I **General Principles**

Chapter 1 Background

1.1	About This Treatise	1
1.1.1	Print and Online Versions	1
1.1.2	Topics Covered and Relation to Other NCLC Treatises	1
1.1.3	Why This Treatise	2
1.1.4	Treatise’s Organization and Appendices	2
1.1.5	Pleadings, Primary Sources, and Practice Tools	3
1.1.6	How to Use This Treatise	3
1.1.7	Other Resources	3
1.2	Historical Development of Usury Laws	4
1.2.1	Early Attitudes Toward Interest	4
1.2.2	General Usury Statutes in the United States	5
1.2.3	The Development of “Special” Usury Laws	6
1.2.4	The Treatment of Sales	7
1.2.5	Deregulation of Usury Law	8
1.2.6	Steps Toward Reregulation to Address the Resurgence of Abusive Lending	9
1.3	Purpose of Consumer Credit Regulation	11
1.3.1	Unfettered Consumer Credit Market Leads to Extensive Abuse	11
1.3.2	Does Regulation Increase the Cost of Consumer Credit?	13
1.3.3	Does Regulation Limit the Supply of Credit?	14
1.3.4	Is Limiting the Supply of High-Priced Credit a Bad Thing?	16
1.4	Types of Creditors	17
1.4.1	Distinctions Between Depository and Non-Depository Creditors	17
1.4.2	Banks	18
1.4.3	Savings and Loan Associations	18
1.4.4	Credit Unions	19
1.4.5	Finance Companies and Other Licensed Lenders	19
1.4.6	Retail Sellers	20
1.4.7	Convenience Creditors	20
1.5	Types of Credit	21
1.5.1	Loans vs. Credit Sales	21
1.5.2	Open-End vs. Closed-End Credit	21
1.5.3	Security Taken in Credit Transactions	22

Chapter 2 Statutes Restricting Credit Terms

2.1	Introduction	23
2.2	Federal Statutes and Rules Regulating Credit Terms	23
2.2.1	Regulation of Federal Depository Institutions	23
2.2.2	The Truth in Lending Act	23
2.2.2.1	Disclosure and Substantive Protections for Non-Mortgage Lending	23
2.2.2.2	TILA Remedies	24
2.2.2.3	Relationship Between TILA and State Law	24

2.2.3	Federal Rebate Statute	25
2.2.4	Servicemembers Civil Relief Act	25
2.2.5	Military Lending Act	25
2.2.5.1	Overview	25
2.2.5.2	Covered Loans Generally	26
2.2.5.3	Covered Vehicle Title Loans	27
2.2.5.4	Covered Refund Anticipation Loans	27
2.2.5.5	Identification of Covered Members and Dependents; Safe Harbor	27
2.2.5.6	Requirements for Covered Loans	28
2.2.5.7	Calculating the Cap.	28
2.2.5.8	Attacking Spurious Open-End Credit	29
2.2.5.9	State and Federal Enforcement	30
2.2.5.10	Private Enforcement and Defenses	30
2.2.5.10.1	Damages and other relief.	30
2.2.5.10.2	Defenses	32
2.2.5.11	Jurisdiction and Limitations Period	32
2.2.5.12	Application of State Protections to Military	32
2.2.6	The Dodd-Frank Act	32
2.2.6.1	Key Features of the Act.	32
2.2.6.2	CFPB UDAAP Rulemaking Authority	33
2.2.6.2.1	General standards	33
2.2.6.2.2	CFPB enforcement based upon the abusive standard	34
2.2.6.2.3	Covered creditors.	35
2.2.6.2.4	UDAAP rule enforcement.	35
2.2.7	FTC Credit Practices Rule.	35
2.3	State Statutes Regulating Credit.	36
2.3.1	Introduction	36
2.3.2	General and Criminal Usury Laws	36
2.3.3	Small Loan Laws and Their Progeny.	37
2.3.4	Industrial Loan Laws.	38
2.3.5	Installment Loan Laws	38
2.3.6	Retail Installment Sales Acts.	38
2.3.7	Insurance Premium Finance Statutes	39
2.3.8	Open-End Credit Laws	39
2.3.9	Pawnbroker Statutes	40
2.3.10	Comprehensive Consumer Credit Codes.	41
2.3.11	State Laws Regarding Specific Fringe Lenders.	41
2.3.11.1	Overview.	41
2.3.11.2	Payday Loan Laws	42
2.3.11.3	Auto Title Loan Laws	42
2.3.11.4	Rent-to-Own Laws	42
2.3.12	State Credit Services Laws	42
2.3.12.1	Introduction.	42
2.3.12.2	Coverage	42
2.3.12.3	Substantive Prohibitions	43
2.3.12.4	Private Causes of Action.	43
2.3.12.5	High-Rate Lenders' Use of Credit Services Laws to Evade State Usury Caps	43
2.4	Other Statutes and Theories of Liability Relevant to Consumer Credit.	44
2.4.1	State UDAP Statutes	44
2.4.1.1	Introduction.	44
2.4.1.2	Does the State UDAP Statute Cover Credit Transactions and Creditors?.	44
2.4.1.3	UDAP Statutes' Substantive Prohibitions.	44
2.4.1.3.1	Overview	44
2.4.1.3.2	Overreaching, unfairness.	45
2.4.1.3.3	Loan padding and similar manipulations	46

2.4.1.3.4	Violation of state or federal credit statute as UDAP violation	46
2.4.1.3.5	Deception and nondisclosure.	47
2.4.1.4	UDAP Remedies and Limitations.	48
2.4.2	State and Federal Fair Lending Laws	48
2.4.3	Federal and State Wage and Hour Laws	48
2.4.4	Fraud	49
2.4.4.1	Elements of a Fraud Claim; Parties Liable	49
2.4.4.2	Misrepresentation of Loan Terms	50
2.4.4.3	Hidden Fees and Other Credit Practices	51
2.4.4.4	Falsification and Forgery.	51
2.4.4.5	Constitutional and Statutory Restrictions on Punitive Damages	52
2.4.5	Negligent Misrepresentation	53
2.4.6	Breach of Fiduciary Duty	53
2.4.6.1	Overview.	53
2.4.6.2	Existence of a Fiduciary Relationship	53
2.4.6.2.1	Formal fiduciary, quasi-fiduciary, and special relationships	53
2.4.6.2.2	When is a creditor a fiduciary?	54
2.4.6.3	Principal-Agent relationship	56
2.4.6.4	Duties of a Fiduciary.	57
2.4.7	Breach of Duty of Due Care As Negligence	58
2.4.8	Unconscionability	58
2.4.8.1	Statutory and Common Law Sources of Prohibition Against Unconscionability	58
2.4.8.2	Elements of a Claim of Unconscionability	59
2.4.8.3	Unconscionability As Outer Limit on Price of Credit	62
2.4.8.4	Improvident Lending As Unconscionable.	63
2.4.8.5	Challenging Terms Other Than Interest Rate As Unconscionable	64
2.4.8.6	Remedies for Unconscionability.	66
2.4.9	Unjust Enrichment.	66
2.4.10	Contract Claims.	67
2.4.11	Duty of Good Faith and Fair Dealing	67
2.4.11.1	Nature of the Duty	67
2.4.11.2	Remedies for Violation of Duty of Good Faith.	70
2.4.12	Other Theories of Liability	70
2.4.12.1	Financial Abuse and Older Consumers.	70
2.4.12.2	Estoppel.	70
2.4.12.3	Conversion	71
2.5	Regulation of Electronic Credit Transactions	71
2.5.1	Introduction.	71
2.5.2	Scope and Interrelationship of E-Sign and UETA	71
2.5.3	E-Sign’s Consumer Consent Requirements.	72
2.5.4	Effects of E-Sign and UETA on Timing and Format Requirements.	73
2.5.5	Validity and Enforceability of Electronic Contracts and Signatures Under E-Sign and UETA.	74

Chapter 3 Federal Preemption and the Applicable State Statute

3.1	Getting Started	77
3.1.1	Overview	77
3.1.2	Identifying the Nature of the Originating Lender	77
3.1.2.1	Introduction: Depository vs. Non-Depository Lenders	77
3.1.2.2	Banks and Savings Associations.	78
3.1.2.3	Credit Unions	78
3.1.2.4	Industrial Loan Companies.	79
3.1.2.5	Bank Subsidiaries and Finance Companies	79
3.1.3	Checklist: When to Read Each Section	79

3.2	OCC Preemption of State Law Regarding Matters Other Than Interest	79
3.2.1	Scope of This Section	79
3.2.2	Statutory Standards for OCC Preemption	80
3.2.2.1	General	80
3.2.2.2	Reinstatement of the <i>Barnett Bank</i> “Significantly Interferes” Standard	80
3.2.2.3	No Field Preemption	81
3.2.2.4	No Preemption of State Laws That Parallel Federal Requirements	81
3.2.2.5	Case-by-Case Preemption Determinations; Procedures	82
3.2.2.6	Limited OCC Preemption of State Laws of General Applicability	82
3.2.2.7	Dodd-Frank Act’s Effective Date and Impact on Prior Law	83
3.2.3	OCC Preemption Regulations	83
3.2.3.1	Overview of the 2011 OCC Rules	83
3.2.3.2	Differences Between OCC’s 2004 and 2011 Rules	84
3.2.3.3	Do the 2011 OCC Regulations Comply with the Dodd-Frank Act?	84
3.2.4	Application of Preemption Principles and OCC Rules to Non-Mortgage Lending	85
3.2.4.1	Introduction	85
3.2.4.2	Licensing, Registration, or Reports	85
3.2.4.3	Insurance and Other Credit Enhancements or Risk Mitigants; Debt Cancellation Contracts	86
3.2.4.4	Loan-to-Value Ratios	86
3.2.4.5	Credit Terms	86
3.2.4.6	Escrow Accounts	87
3.2.4.7	Security Interests	87
3.2.4.8	Access to and Use of Credit Reports	87
3.2.4.9	Disclosure and Advertising	87
3.2.4.10	Disbursements and Repayments	88
3.2.4.11	Rates of Interest on Loans; Non-Interest Fees and Charges	89
3.2.4.12	Interpretation of the Savings Clause	90
3.2.4.12.1	Overview	90
3.2.4.12.2	Contract and UCC claims	90
3.2.4.12.3	Fraud and UDAP claims	91
3.2.4.12.4	State laws regarding debt collection and repossession	92
3.2.5	OCC Preemption Does Not Apply to Subsidiaries, Affiliates, or Agents	92
3.2.6	OCC Preemption’s Indirect Effect on State-Chartered Depositories	93
3.3	Preemption Applicable to Federal and State Credit Unions	93
3.4	Rate Exportation: Federal Law Specifying Which State’s Usury Cap Applies	94
3.4.1	General	94
3.4.2	Rate Exportation Rules Vary by Type of Depository	95
3.4.2.1	National Banks and Federal Savings Associations	95
3.4.2.2	Federal Credit Unions	95
3.4.2.3	State-Chartered Depositories: Banks, Savings Associations, and Credit Unions	95
3.4.2.3.1	General	95
3.4.2.3.2	State’s right to opt out of rate exportation for state-chartered depositories	96
3.4.2.3.3	State’s right to opt out applies to loans “made” in that state	96
3.4.2.4	FDIC-Insured Industrial Loan Companies/Industrial Loan Banks	96
3.4.2.5	Special Rule for Arkansas State Banks	96
3.4.2.6	Operating Subsidiaries of Depositories	97
3.4.3	Application of Rate Exportation to Assigned Loans	97
3.4.3.1	Rate Exportation Applies Only When Depositories Originate, Not Purchase Loans	97
3.4.3.2	Is a Federal Depository or Other Entity the Real Loan Originator	98
3.4.3.3	Rate Exportation and Non-Bank Assignee’s New Interest Charges	98
3.4.4	Determining a Branch Bank’s Home State	99
3.4.4.1	General	99
3.4.4.2	Background on Branch Banking	99

	3.4.4.3 Banking Agencies Provide Banks with Maximum Flexibility	99
	3.4.4.4 What Constitutes a Branch?	101
	3.4.4.5 Electronic Banking	101
3.4.5	Definition of “Interest Rate” for Rate Exportation Purposes	101
	3.4.5.1 Introduction.	101
	3.4.5.2 OCC Definition of Interest	101
	3.4.5.3 The Supreme Court’s <i>Smiley</i> Decision and Subsequent Court Rulings	102
3.4.6	Remedies Where Rate Exceeds Depository’s Home State Cap.	103
3.5	Most Favored Lender Doctrine.	103
	3.5.1 General	103
	3.5.2 Depositories That Can Take Advantage of the Most Favored Lender Doctrine	104
	3.5.3 Where Lender’s Home State Specifies No Interest Cap	104
	3.5.4 Does the Doctrine Apply Only to the Most Favored <i>State</i> Lender?	104
	3.5.5 State Rate Cap Must Be for Same Type of Loan.	105
	3.5.6 Most Favored Lender Must Comply with “Material” State Restrictions	105
	3.5.7 Other Lenders Need Not Have Made Loans Under the Applicable State Law	106
3.6	State “Parity” Statutes: State Depository Use of Federal Depository’s Interest Caps	106
	3.6.1 Enormous Variation in Applicable Legislation	106
	3.6.2 Scope of State Parity Statutes	108
	3.6.3 Authority Given to State Depositories	108
	3.6.4 Limits to State Parity Statutes’ Grant of Authority	108
	3.6.5 State Parity Statutes’ Surprising Ricochets	109
	3.6.6 Are Parity Statutes Constitutional?	109
3.7	Manufactured Home Credit Preemption	109
	3.7.1 Introduction	109
	3.7.2 DIDA Interest Rate Preemption	109
	3.7.3 AMTPA Preemption of State Restrictions on Loan Structure.	110
	3.7.4 FHA- and VA-Insured Manufactured Home Loans	111
	3.7.5 RHS Direct and Guaranteed Manufactured Home Loans.	112
3.8	State Choice of Law Standards	112
	3.8.1 Introduction	112
	3.8.2 Contractual Choice of Law Clauses	112
	3.8.3 State Statutes Explicitly Governing Choice of Law	114
	3.8.4 Rule for Special Usury Statutes	115
	3.8.5 Rule for General Usury Statutes	115
	3.8.5.1 General	115
	3.8.5.2 Substantial Relationship Test Under the <i>Restatement of Conflict of Laws</i>	116
	3.8.5.3 The <i>Restatement’s</i> “Not Greatly in Excess” Requirement; Public Policy Considerations	117
	3.8.6 Military Small Loan Companies	117
3.9	Which Usury Statute in the Applicable State Applies?	118
	3.9.1 Substance Rather Than Form Controls; Opting In	118
	3.9.2 Opting In	119
	3.9.3 Is the Loan for Consumer or Business Purposes?	119
	3.9.3.1 General	119
	3.9.3.2 Criteria for Business vs. Personal Purpose	120
	3.9.3.3 Consumer’s Incorporation or Affidavit of Business Purpose	120
	3.9.3.4 Intermediaries	121
	3.9.3.5 Refinancing	121
	3.9.4 Open-End vs. Closed-End Credit	122
	3.9.5 Loans vs. Credit Sales; Body-Dragging	123
	3.9.6 Statutes Applying Only to Those “In the Business” of Extending Credit	123
	3.9.7 Licensed Lenders.	124
	3.9.7.1 General	124
	3.9.7.2 Licensing Requirement’s Relationship to Assignees	125
	3.9.7.3 Creditor’s Efforts to Evade Licensing Requirements	125

3.9.8 Distinctions Based on Loan Size: Loan Splitting and Loan Packing 126
3.9.8.1 Loan Splitting 126
3.9.8.2 Loan Packing; Lending More Than Requested. 126
3.9.9 Where a Loan Includes a Home As Security. 127
3.9.10 Criminal Usury Statutes 127
3.10 Retroactive Amendment of Usury Statutes 128
3.10.1 General 128
3.10.2 Variable or Floating Usury Ceilings Distinguished. 129

Chapter 4 Interest, Points, Fees, and Delinquency Charges

4.1 Introduction 131
4.2 What Is “Interest” 131
4.2.1 General Interpretation of “Interest”. 131
4.2.2 Statutes That Exclude Enumerated Charges from Interest or the Finance Charge 133
4.3 Points, Commitment Fees, and Other Percentage Fees 134
4.3.1 General 134
4.3.2 Legal Considerations. 135
4.3.3 Commitment Fees 136
4.4 Hidden Interest When Principal Amount Is Overstated 137
4.4.1 Introduction 137
4.4.2 Fees Added to Principal; General Methods of Overstating Principal 137
4.4.3 Indexing Loan Principal 139
4.4.4 Compensating Balances 139
4.4.5 Inflating the Sale Price 140
4.4.6 Seller’s Points 140
4.5 Payments for Third-Party Services. 141
4.5.1 General Principles 141
4.5.2 Subterfuges 142
4.5.2.1 Sham Third Parties 142
4.5.2.2 Upcharges, Kickbacks, Unexpended Fees, and Fees for Products Different from Those Represented 142
4.5.2.3 Services That Primarily Benefit the Lender 143
4.5.2.4 Sham Services. 144
4.5.3 Broker Fees 144
4.5.3.1 Where Broker Is Related to the Lender 144
4.5.3.2 Where Lender and Broker Split the Broker Fee 146
4.5.3.3 State Statutes Regulating Brokers. 146
4.6 Document Preparation Fees 147
4.6.1 Statutory Caps on Document Preparation Fees 147
4.6.2 Are Document Preparation Fees Interest?. 147
4.6.3 Whether Charging a Document Preparation Fee Amounts to Unauthorized Practice of Law 147
4.7 Non-Cash Compensation and Side Agreements 148
4.8 Delinquency Charges 149
4.8.1 The Nature of Late Fees 149
4.8.2 Late Fees As Interest; Contingency. 150
4.8.3 Late Fee Statutes 151
4.8.4 Approaches When Usury Statute Is Inapplicable; Challenging Late Fees As Penalties 152
4.8.5 Pyramiding Late Charges 153
4.8.6 Other Charges Imposed Upon Default 154
4.8.6.1 Deferral Charges 154
4.8.6.2 Property Inspection Fees 154
4.8.6.3 Attorney Fees upon Default 155
4.8.6.4 Default Interest Rates 155
4.8.7 Other Post-Consummation Charges 156

Chapter 5

Credit Math: Calculating Interest and Rebates

5.1	Introduction	157
5.2	Interest Calculations: Single Payment Transactions	157
5.2.1	Calculation Rules	157
5.2.2	Payday Loan Interest and APR Calculations	158
5.3	Interest Formulae for Installment Credit:	
	Actuarial Interest, Add-On Interest, and Discount Interest	158
5.3.1	Introduction	158
5.3.1.1	Three Different Ways to Express Interest Rate Caps	158
5.3.1.2	Amortizing Credit Explained; Actuarial or Simple Interest Calculations	159
5.3.1.3	Negative Amortization; Non-Amortizing Credit; Balloon Payments	162
5.3.1.3.1	How negative amortization works	162
5.3.1.3.2	Balloon payments	163
5.3.2	Add-On Interest	164
5.3.2.1	Basic Calculations	164
5.3.2.2	Add-On Interest in Split Rate Transactions	165
5.3.2.3	Irregular Payment Periods and Other Computational Issues	166
5.3.3	Discount Interest	166
5.3.3.1	Description of Discount Interest	166
5.3.3.2	Examples of Discount Interest Calculations	166
5.3.3.3	Calculating Discount Interest for a Given Principal	167
5.3.4	Split Rate Interest—Graduated Rates	168
5.3.5	Open-End Credit	170
5.3.5.1	Calculation Distinctions Between Open- and Closed-End Credit	170
5.3.5.2	Methods of Calculating Interest on Open-End Credit	171
5.3.6	Variable Rates	172
5.3.6.1	Variable Rate Transactions Described	172
5.3.6.2	Determining the Current Rate	173
5.3.6.3	Amortizing Variable Rate Loans over Fixed Time Periods	174
5.3.6.4	Caps and Floors in Variable Rate Transactions; Explanation and Requirements	174
5.3.6.4.1	Caps and floors on variable rates	174
5.3.6.4.2	Payment caps and their relationship to adjustable rates	175
5.3.6.4.3	Recapture clauses	175
5.3.6.5	Legal Issues in Variable Rate Credit	176
5.4	Truth in Lending APR and Finance Charge Distinguished	177
5.4.1	Purpose of the Truth in Lending APR; Finance Charge Explained, Distinguished from Interest	177
5.4.2	Calculation and Accuracy of the Annual Percentage Rate	178
5.5	Special Calculation Problems	179
5.5.1	Compound Interest	179
5.5.1.1	When Does Compounding Occur?	179
5.5.1.2	Legal Restrictions on Compounding	181
5.5.1.2.1	Whether state law prohibits compounding	181
5.5.1.2.2	Framing compounding as a usury violation	182
5.5.2	Odd Payment Periods and Odd Payment Amounts	184
5.5.2.1	General	184
5.5.2.2	Weekly, Bi-Weekly Payment Periods; Legal Issues	186
5.5.3	Date Finance Charge Can Begin to Accrue	187
5.5.4	Daily Interest Rates and the 365/360 Method	187
5.5.4.1	General	187
5.5.4.2	365-Day Method	187
5.5.4.3	360-Day Method	188
5.5.4.4	365/360-Day Method: “The Bankers’ Year”	188
5.5.4.5	Effect of Late Posting of Payments	190

5.5.5	Rounding	191
5.5.6	Spreading	191
5.5.6.1	A Calculation Defense to Usury Claims in Fixed Term Loans	191
5.5.6.2	Spreading in Open-End, Variable-Rate Transactions	193
5.5.6.3	Spreading in Special Situations	194
5.5.6.4	Contract Argument Against Spreading	195
5.5.7	Minimum Finance Charges or Service Charges	195
5.6	Points and Origination Charges	195
5.6.1	Calculation of Points	195
5.6.2	Legal Issues Arising in Calculation of Points	196
5.7	Calculation of Late Charges and Deferral Charges	197
5.7.1	Late Charges	197
5.7.2	Deferral Charges	198
5.8	Rebates of Unearned Charges	200
5.8.1	Overview	200
5.8.2	Consumer’s Entitlement to Rebate of Unearned Interest	200
5.8.3	When Are Charges Unearned? Distinction Between Precomputed and Interest-Bearing Credit	201
5.8.3.1	Introduction	201
5.8.3.2	Interest Bearing	201
5.8.3.3	Precomputed	203
5.8.4	What Constitutes Prepayment	204
5.8.4.1	Early Voluntary and Involuntary Termination	204
5.8.4.2	Partial Prepayments	205
5.8.5	What Charges Are Subject to Rebate?	205
5.8.5.1	General: Contract Interest in Precomputed Transactions; Other Charges and Fees	205
5.8.5.2	Rebates of Points and Other Origination Charges	206
5.8.5.2.1	Are points and other prepaid finance charges “earned at consummation”?	206
5.8.5.2.2	Treatment of points under the federal rebate statute	208
5.8.6	What Is the Date of Prepayment?	209
5.8.6.1	Fixing the Date for the Rebate Calculation	209
5.8.6.2	Intervals: Rounding the Time Calculation	209
5.8.7	Rebate Formulae	210
5.8.7.1	Determining Which Formula to Use	210
5.8.7.1.1	Introduction	210
5.8.7.1.2	Federal rebate statute	210
5.8.7.1.3	The Truth in Lending Act’s rebate requirements for mortgage loans	211
5.8.7.1.4	Rebate requirements for manufactured home financing	211
5.8.7.1.5	Bankruptcy law	211
5.8.7.1.6	State rebate law	212
5.8.7.1.7	Relationship between federal and state rebate requirements	212
5.8.7.2	Pro Rata Rebates	213
5.8.7.3	Rule of 78s	214
5.8.7.3.1	Background and legal status	214
5.8.7.3.2	Calculating a Rule of 78s rebate: a simplified step-by-step guide for mathphobes	215
5.8.7.3.3	The explanation of the Rule of 78s for those who care (optional reading for the practitioner)	216
5.8.7.3.4	Sum of the balances method: a variant on the Rule of 78s	217
5.8.7.4	Actuarial Rebates	218
5.8.7.4.1	Legal status	218
5.8.7.4.2	Calculation of actuarial rebates	218
5.8.7.4.3	Actuarial rebates under actuarial split rate statutes	219

5.8.8	Remedies for Rebate Violations	220
5.8.8.1	Failure to Give a Required Rebate As a Usury Violation	220
5.8.8.2	Usury upon a Contingent Event	221
5.8.8.3	Intent; What Constitutes “Charging,” or “Collecting” Unearned Charges	221
5.8.8.3.1	Whether intent is required	221
5.8.8.3.2	Does the contract show the creditor’s intent to charge unearned interest?	221
5.8.8.3.3	Has the creditor failed to give the rebate the contract requires?	222
5.8.8.4	Special Issues Regarding Remedies for Violation of the Federal Rebate Statute	223
5.8.8.5	Framing Rebate Issues As Prepayment Penalty Questions	223
5.9	The Mathematics of Loan Flipping	224
5.9.1	Overview	224
5.9.2	Refinancing, Consolidation, and Flipping Defined	225
5.9.3	The Elements of the Price Escalator	225
5.9.4	Small Loan Example	226
5.9.5	Evaluating the Calculations When a Loan Is Refinanced	228
5.9.5.1	Calculating Proper Rebates	228
5.9.5.2	Compounding	228
5.9.5.3	Non-Rebatable Charges on Old Loan	228
5.9.5.4	Imposition of Additional Charges on the New Loan	229
5.9.5.5	Is the New Rate Proper?	229
5.9.6	Refinancing Calculations in Action: Another Walk-Through Case Study	230
5.10	Proving Mathematical Issues in Court	232
5.11	Practical Tips	234
5.11.1	Developing a System for Analyzing Consumer Credit Issues	234
5.11.2	Gathering Information from the Client	234
5.11.3	Gathering Information from Creditor and Other Parties	235
5.11.4	Calculations and Analysis	235

Chapter 6 Credit Insurance and Debt Protection Products

6.1	Introduction	241
6.2	Credit Insurance	241
6.2.1	Overview	241
6.2.2	Benefits to Creditor	242
6.2.2.1	Creditor Compensation from Sale of Insurance	242
6.2.2.2	Creditor Benefits from the Insurance Coverage	243
6.2.2.3	Creditor Receives Interest on the Premium	243
6.2.3	Excessive Cost of Credit Insurance	243
6.2.3.1	Low Loss Ratios Demonstrate Excessive Cost	243
6.2.3.2	Reverse Competition; Market Failures	245
6.2.4	Types of Credit and Credit-Related Insurance Products	245
6.2.4.1	Overview	245
6.2.4.2	Credit Life Insurance	246
6.2.4.2.1	Decreasing term credit life insurance	246
6.2.4.2.2	Level term credit life insurance	246
6.2.4.2.3	Joint and single credit life insurance and term limits	246
6.2.4.3	Credit Disability/Accident and Health	246
6.2.4.4	Involuntary Unemployment Insurance	247
6.2.4.5	Credit Personal Property	248
6.2.4.6	Non-Credit Insurance Distinguished	248
6.3	Credit Card Debt Suspension and Debt Cancellation Products	248
6.3.1	Overview of Industry	248
6.3.2	Nature of Debt Protection Products	249
6.3.3	Debt Protection Products May Be Overpriced	250

6.3.4	Regulation of Debt Protection Products	252
6.3.5	Abusive or Deceptive Practices in the Sale of Debt Protection Products	254
6.3.5.1	Nature of Abusive or Deceptive Sales Practices	254
6.3.5.2	Government Enforcement and Private Litigation over Abusive and Deceptive Sales Practices	254
6.4	Credit Insurance Regulation and Consumer Claims	255
6.4.1	Introduction	255
6.4.2	Rate Regulation	256
6.4.2.1	General	256
6.4.2.2	Problems with Prima Facie Rates	257
6.4.2.3	Deviations	257
6.4.2.4	Challenging Prima Facie Rates	257
6.4.2.5	Filed-Rate Doctrine	258
6.4.3	Non-Rate Insurance Regulation	259
6.4.3.1	NAIC Model Act Governing Credit Life and Disability Insurance	259
6.4.3.2	NAIC Model Act Governing Credit Personal Property Insurance	260
6.4.3.3	State Licensing Requirements	261
6.4.4	Insurance Premium Financing Laws	261
6.4.5	State Credit Statutes	261
6.4.5.1	General Restrictions	261
6.4.5.2	Can a Credit Insurance Premium Lead to a Usury Claim?	262
6.4.6	Unfair and Deceptive Acts and Practices	263
6.4.6.1	General UDAP Statutes	263
6.4.6.2	UNIP Statutes	264
6.4.7	Breach of Fiduciary Duty; Bank Holding Company Act	264
6.4.8	Gramm-Leach-Bliley Regulation of Banks and Preemption of State Law	265
6.4.8.1	Joint Banking Agency Regulations	265
6.4.8.2	Preemption of State Regulation	266
6.4.9	TILA Regulation of Credit Insurance Covering Manufactured Home Credit	268
6.5	Voluntariness in Sale of Credit Insurance	268
6.5.1	General: The Law and the Practice	268
6.5.2	Truth in Lending Act	269
6.5.3	State Regulation of Compulsory Insurance	269
6.5.3.1	General	269
6.5.3.2	Choice of Insurers	270
6.5.4	UDAP	271
6.5.5	Antitrust Challenges	272
6.5.5.1	Sale of Credit Insurance As an Unlawful Tie-In	272
6.5.5.2	McCarran-Ferguson Act's Impact on Antitrust, Other Challenges to Credit Insurance Practices	273
6.5.6	Banking Holding Act and Regulation Y	275
6.5.7	Proving Coercion	275
6.6	Excessive Cost of Credit Insurance	278
6.6.1	Calculating Credit Insurance Charges	278
6.6.1.1	Introduction	278
6.6.1.2	Credit Life	278
6.6.1.3	Credit Accident and Health	280
6.6.1.4	Credit Personal Property Insurance	281
6.6.2	Excess Premium Charges As Usury	281
6.6.2.1	General	281
6.6.2.2	Creditor Compensation As Interest	283
6.6.3	Excess Coverage As Illegal Overcharge	285
6.6.3.1	Level Term Credit Life Insurance	285
6.6.3.2	Amount of Coverage	285
6.6.4	Special Credit Personal Property Issues	286
6.6.4.1	Scope of Insurable Interest	286
6.6.4.2	Phantom Coverage	287

6.7	Insurance Packing	287
6.7.1	Overview	287
6.7.2	Packing to Exceed Critical Statutory Thresholds	287
6.7.3	Packing with Sales of Non-Credit Insurance and Other Ancillary Products.	288
6.7.4	Unnecessary Collateral, Duplicative Insurance.	289
6.7.5	Non-Filing Insurance.	290
6.8	Credit Insurance Claim Denials and Coverage Limitations.	291
6.8.1	Challenging the Sale of Insurance to Borrowers Unlikely to Benefit	291
6.8.2	Incomplete Coverage.	292
6.8.3	Collecting the Benefits of the Insurance Bargain	293
6.8.3.1	Types of Improper Denial of Coverage.	293
6.8.3.2	Theories of Recovery Against the Insurer.	293
6.8.3.3	Theories of Recovery Against the Creditor.	295
6.9	Surpluses, Secondary Beneficiaries	297
6.10	Rebate of Unearned Insurance Premiums	297
6.10.1	The Requirement of a Rebate	297
6.10.2	Rebates upon Default and Acceleration of the Debt	298
6.10.3	Calculating the Rebate.	299
6.10.4	Consumer Remedies	300

Chapter 7

Litigation

7.1	Introduction	301
7.2	Construction of State Usury Statutes	301
7.2.1	Broad vs. Narrow Construction of Usury Statutes	301
7.2.1.1	Introduction.	301
7.2.1.2	Invoking the History and Purpose of Usury Statutes	301
7.2.1.3	Remedial vs. Penal Purposes	301
7.2.1.4	The Purpose of Special Usury Laws.	303
7.2.2	<i>Expressio Unius Est Exclusio Alterius</i> : Limiting the Creditor’s Ability to Add Extra Charges Not Specifically Authorized	304
7.2.3	Deference to Administrative Interpretations	304
7.3	Right to Jury Trial	305
7.4	Arbitration Requirements.	306
7.4.1	Introduction	306
7.4.2	Statutory Limits on the Enforceability of Arbitration Agreements.	306
7.4.2.1	No Arbitration Requirement for Manufactured Home Loans.	306
7.4.2.2	State Insurance Law Can Prohibit Arbitration	307
7.4.2.3	Limits on Arbitration Involving Military Personnel	307
7.4.2.4	Potential CFPB Limits on Arbitration.	307
7.4.2.5	Arbitration Is Consistent with CROA.	307
7.4.2.6	Arbitration When Consumer Files Bankruptcy.	307
7.4.3	Is There a Binding Contract?.	307
7.4.3.1	Defendant Must Produce the Arbitration Agreement	307
7.4.3.2	Was the Agreement Properly Formed?	308
7.4.3.3	Where NAF Is the Sole Designated Arbitration Forum	308
7.4.3.4	Has the Arbitration Agreement Been Superseded by Another Contract?	308
7.4.3.5	Where Usury Voids the Contract.	308
7.4.3.6	Has the Creditor Waived the Arbitration Requirement?	308
7.4.3.7	Is the Arbitration Agreement Unconscionable?	308
7.4.4	Does the Arbitration Agreement Apply to the Dispute and to the Parties?	308
7.4.5	Does the Court or Arbitrator Determine Arbitrability?	309
7.4.6	Class Arbitration	309
7.4.7	Punitive Damages	309
7.5	Elements of a Prima Facie Case.	310
7.5.1	General	310
7.5.1.1	Overview of Elements.	310

	7.5.1.2	Burden of Proof	310
	7.5.1.3	Standard of Proof	311
	7.5.1.4	Contract Construction	311
7.5.2		Loan or Forbearance	312
	7.5.2.1	Introduction	312
	7.5.2.2	Credit Sales and the Time-Price Doctrine	314
		7.5.2.2.1 Time-price exception to usury laws	314
		7.5.2.2.2 The erosion of the time-price doctrine: direct regulation of consumer credit sales and RISAs	316
	7.5.2.3	Forbearance and Detention	317
7.5.3		Absolute Obligation to Repay Principal; Joint Ventures	319
7.5.4		Interest Overcharge	320
	7.5.4.1	General	320
	7.5.4.2	Charging, Contracting For, or Receiving Excess Interest	320
	7.5.4.3	“Interest” or Regulated Charge	322
	7.5.4.4	Proving That the Charge Is Excessive	323
7.5.5		Intent	324
	7.5.5.1	When Proof of Intent Is Required	324
	7.5.5.2	Usury Apparent on Face of Contract; Bona Fide Error	324
	7.5.5.3	Usury Not Apparent on Face of Contract	326
	7.5.5.4	Inference of Intent	327
7.6		Usury Claims in “Deregulated” States	328
	7.6.1	Exceeding an “Agreed Rate” Cap	328
	7.6.2	Hidden Interest in Agreed Rate Transactions	330
7.7		Creditor Defenses	332
	7.7.1	Standing to Assert Usury	332
		7.7.1.1 Requirement of Standing	332
		7.7.1.2 Guarantors and Sureties	332
		7.7.1.3 Assignees	333
		7.7.1.4 Other Standing Issues	334
	7.7.2	Estoppel and Waiver	334
		7.7.2.1 Overview	334
		7.7.2.2 Borrower’s Knowledge	335
		7.7.2.3 False Contractual Statements	336
		7.7.2.4 Waiver	337
	7.7.3	Usurious Taint in Refinanced Obligations	338
		7.7.3.1 Continuation of Taint in Renewal Transactions	338
		7.7.3.2 No Taint If First Debt Forms No Part of Consideration of Subsequent Debt	338
		7.7.3.3 Novation and Waiver	339
		7.7.3.3.1 Purging of usury through a novation	339
		7.7.3.3.2 Waiver as an alternate approach	340
	7.7.4	Res Judicata	340
	7.7.5	Voluntary Payment Defense	342
		7.7.5.1 Nature and Origin of the Voluntary Payment Doctrine	342
		7.7.5.2 Does the Voluntary Payment Doctrine Apply Beyond Tax Payments?	342
		7.7.5.3 Usury Cases	343
		7.7.5.4 Exceptions to the Doctrine	344
	7.7.6	Statutes of Limitations	344
	7.7.7	Whether Usury Can Be Asserted Against a Holder in Due Course	346
	7.7.8	<i>De Minimis</i> Violations	347
	7.7.9	Industry Custom and Usage	348
	7.7.10	Usury Saving Clauses	349
	7.7.11	Correction of Error As a Defense	350
	7.7.12	Exhaustion of Administrative Remedies	351
	7.7.13	Special Defenses When FDIC Becomes Receiver for Failed Bank	352
7.8		Remedies for Illegal Overcharges; Traditional Usury Remedies	352
	7.8.1	Introduction	352

7.8.2	State Statutory Remedies	353
7.8.2.1	Overview; Implying a Remedy When Statute Is Silent	353
7.8.2.2	Forfeiture of Creditor’s Right to Recover Principal, Interest, Other Illegal Overcharges, or to Collect Attorney Fees	354
7.8.2.2.1	Statutes that void the contract interest or other charges	354
7.8.2.2.2	Statutes that void the entire obligation	355
7.8.2.3	Borrower’s Recovery of Payments Made	356
7.8.2.3.1	Introduction	356
7.8.2.3.2	Statutes allowing recovery	357
7.8.2.3.3	Implying the right to recover payments made when obligation is void or voidable	357
7.8.2.3.4	Common law action for recovery of usurious interest that has been paid	358
7.8.2.4	Statutory Penalties	359
7.8.2.5	Attorney Fees	360
7.8.3	Equitable Remedies	360
7.8.3.1	Courts’ Authority to Impose Equitable Remedies	360
7.8.3.2	Rescission	360
7.8.3.3	Reformation of Contract	361
7.8.4	Unjust Enrichment and Similar Claims As an Alternate Theory	362
7.8.4.1	Unjust Enrichment	362
7.8.4.2	Money Had and Received	364
7.8.4.3	Constructive Trust	365
7.8.4.4	Obstacles to Equitable Remedies	365
7.8.4.4.1	Requirement of no adequate remedy at law	365
7.8.4.4.2	Existence of an express contract	366
7.8.4.4.3	The voluntary payment defense	367
7.8.5	Consumer Remedies for Creditor’s Failure to Obtain a License	369
7.8.5.1	Unlicensed Lending	369
7.8.5.2	Remedies Where Licensed Creditor Violates Conditions of Licensure Statute	371
7.8.6	Federal Remedies	371
7.8.6.1	Remedies Under the National Bank Act and DIDA	371
7.8.6.2	RICO	371
7.8.6.2.1	Overview of RICO	371
7.8.6.2.2	Racketeering activity and the pattern requirement	372
7.8.6.2.3	Alleging a RICO claim based on the collection of an unlawful debt	373
7.8.6.2.4	The “injury” element	374
7.8.6.2.5	RICO and creditor overcharges	375
7.8.6.2.6	State RICO statutes	377
7.8.7	Class Actions	377
7.9	Jurisdiction	378
7.9.1	Federal Jurisdiction and Removal of Consumer Suits to Federal Court	378
7.9.1.1	Introduction	378
7.9.1.2	Federal Question Jurisdiction in Consumer Credit Cases	378
7.9.1.3	Complete Preemption and <i>Beneficial Bank</i>	379
7.9.1.3.1	Nature of complete preemption	379
7.9.1.3.2	Complete preemption under the National Bank Act	379
7.9.1.3.3	Assignees, non-banks, and state-chartered banks	380
7.9.1.3.4	No complete preemption under other banking laws	381
7.9.1.4	Diversity Jurisdiction	381
7.9.1.5	Jurisdiction under the Class Action Fairness Act	381
7.9.2	Long-Arm Jurisdiction over Out-of-State Lenders	381
7.9.2.1	Overview	381
7.9.2.2	Jurisdiction over Internet-Based Lenders	382

7.9.2.3	Personal Jurisdiction over Securitization Trusts	383
7.9.2.4	Jurisdiction in Bankruptcy Court and over Counterclaims	385
7.9.2.5	Jurisdiction over Parent Companies and Holding Companies	385

Part II Specific Types of Credit

Chapter 8 Credit Cards: Abuses, Regulation, and State Law Claims

8.1	Introduction	387
8.1.1	Background	387
8.1.1.1	Widespread Adoption of Credit Cards	387
8.1.1.2	Historical Perspective	387
8.1.2	The Massive Credit Card Debt Burden	387
8.1.3	Escalating Debt Loads Caused by Industry Practices	388
8.1.4	Disparate Impact of High Rates and Fees	389
8.2	Overview: Regulation of Credit Card Lending	390
8.2.1	From Regulation to the Wild West and Back	390
8.2.2	The Credit CARD Act: Scope, Rulemaking, Private Enforcement	391
8.2.3	Benefits of the Credit CARD Act	392
8.2.4	Industry’s Argument	392
8.2.4.1	The “Democratization of Credit”	392
8.2.4.2	New Abuses: Business Credit Cards	393
8.2.5	Other Federal Regulation	393
8.3	Interest Rate Increases	393
8.3.1	Pricing and Interest Rate Abuses	393
8.3.1.1	Introduction	393
8.3.1.2	Common Repricing Abuses	394
8.3.1.2.1	Penalty rates	394
8.3.1.2.2	Universal default	394
8.3.1.2.3	Any time, any reason repricing	395
8.3.2	Limits on Price Increases for an <i>Outstanding</i> Balance	395
8.3.2.1	Overview	395
8.3.2.2	Allowable Rate Increases	395
8.3.2.2.1	Promotional rate exception	395
8.3.2.2.2	Variable rate exception	396
8.3.2.2.3	Sixty days’ delinquency exception	396
8.3.2.2.4	Rate increases permitted on future transactions—	
	Advanced notice exception	396
8.3.2.2.5	Workout or temporary hardship arrangement exception	396
8.3.2.2.6	Servicemembers Civil Relief Act exception	397
8.3.2.3	Repayment Protections for Outstanding or “Protected” Balances	397
8.3.2.4	Protections for the First Year of an Account	397
8.3.3	Mandatory Re-Evaluation of Rate Increases	397
8.3.4	Double Cycle Billing	398
8.4	Credit Card Fee Abuses	398
8.4.1	Background	398
8.4.1.1	Skyrocketing Fees	398
8.4.1.2	Fee Proliferation	399
8.4.1.3	Potential Challenges to Abusive Fees	399
8.4.2	Requirement for Reasonable and Proportional Penalty Fees	400
8.4.2.1	General	400
8.4.2.2	Rules to Determine If a Fee Is Reasonable	400
8.4.2.2.1	General	400
8.4.2.2.2	Prohibited fees	400
8.4.3	Specific Penalty Fees	401

	8.4.3.1	Late Fees	401
	8.4.3.1.1	Background	401
	8.4.3.1.2	Restrictions on late fees	401
	8.4.3.2	Over-the-Limit Fees	401
	8.4.3.2.1	Background	401
	8.4.3.2.2	Impact of the Credit CARD Act	402
	8.4.3.2.3	Opt-in requirement	402
	8.4.3.2.4	Prohibited over-the-limit practices	403
	8.4.3.2.5	Other restrictions on over-the-limit fees	403
	8.4.4	Other Fees	404
	8.4.4.1	Balance Transfer Fees	404
	8.4.4.2	Currency Conversion Fees	404
8.5		Subprime and Secured Credit Cards	404
	8.5.1	Background	404
	8.5.1.1	Introduction	404
	8.5.1.2	Common Abuses	405
	8.5.1.3	Fee Harvester Cards After the Credit CARD Act	406
	8.5.2	Limits on Fees Charged to a Subprime Credit Card Account	407
	8.5.2.1	Prohibition of Fees and Security Deposits That Exceed 25% of the Credit Limit	407
	8.5.2.2	Types of Fees Counted Toward the Limit	407
	8.5.2.2.1	Included fees	407
	8.5.2.2.2	Excluded fees	407
	8.5.2.2.3	Security deposits charged to the account	408
	8.5.2.3	Intersection with Other Fee Prohibitions	408
	8.5.3	Prior Regulatory Guidance on Subprime Credit Cards	408
8.6		Abuses Involving Payments	408
	8.6.1	Overview of Abuses	408
	8.6.2	Twenty-One Day Requirement for Mailing Statements	409
	8.6.3	Prompt Crediting of Consumer Payments	410
	8.6.4	Payment Due Date Restrictions	410
	8.6.4.1	No Cut-Off Time Before 5:00 p.m.	410
	8.6.4.2	Same Due Date Each Month	410
	8.6.4.3	Weekend and Holiday Due Dates	410
	8.6.5	Address for Payment	411
	8.6.5.1	Change in Address	411
	8.6.5.2	In-Person Payments	411
	8.6.6	Limit on Fees Related to Method of Payment	411
	8.6.7	Payment Allocation Order	411
	8.6.8	Tiny Minimum Monthly Payments	412
	8.6.8.1	Background	412
	8.6.8.2	Minimum Payment Repayment Disclosures	413
8.7		Abuses in the Opening of Accounts	413
	8.7.1	Deceptive Marketing	413
	8.7.2	Aggressive Solicitation and Account Opening	413
	8.7.2.1	Background	413
	8.7.2.2	Credit CARD Act's Ability-to-Pay Requirement	414
	8.7.2.3	Marketing to Younger Consumers	415
	8.7.2.3.1	Introduction	415
	8.7.2.3.2	Consideration of ability to repay for young consumers	415
	8.7.2.3.3	Restrictions on marketing of credit cards to college students	416
8.8		Deferred Interest Plans	416
	8.8.1	Background	416
	8.8.2	Rules Governing Deferred Interest Plans	417
	8.8.2.1	Summary of Disclosures for Deferred Interest Plans	417
	8.8.2.2	Credit CARD Act Provisions for Deferred Interest Plans	417
	8.8.2.3	Minimum Payment Requirements for Deferred Interest Plans	418

8.9	Unilateral Changes in Terms	418
8.9.1	Expansive Change-in-Terms Provisions in Credit Card Contracts	418
8.9.2	Problems Created by Unilateral Changes in Terms	419
8.9.3	Credit CARD Act Provisions Relevant to Changes in Terms	420
8.9.3.1	Change-in-Terms Notices	420
8.9.3.2	Limited Right to Reject Changes	420
8.10	Other Credit Card Abuses	420
8.10.1	Debt Collection Abuses	420
8.10.2	Use of Mandatory Arbitration Clauses	422
8.10.3	Credit Card Reward Programs	423
8.10.4	Add-On Products	423
8.11	State Claims Challenging Credit Card Abuse	423
8.11.1	Introduction	423
8.11.2	Breach of Contract	423
8.11.3	State UDAP Statutes	425
8.11.4	Other Claims	426
8.11.5	Preemption and Credit Cards	427
8.11.5.1	General	427
8.11.5.2	TILA Preemption	427
8.12	Assisting Consumers Overwhelmed by Credit Card Debt	428

Chapter 9 Payday Loans

9.1	Background	429
9.1.1	Introduction	429
9.1.2	How Payday Loans Work	430
9.1.3	Is the APR a Fair Cost Measurement for Payday Loans?	431
9.1.4	Description of the Borrowers	432
9.1.5	Problems and Abuses	433
9.2	Banking Law Applications to Payday Lending	435
9.2.1	Conditioning Payday Loan on EFT Repayment	435
9.2.2	Repeated Presentment of Borrower’s Check	435
9.2.3	Bad Check Prosecutions	436
9.2.4	Adding Fees to the Face Amount of a Check or Electronic Fund Transfer	436
9.2.5	Early Presentation of Post-Dated Checks	437
9.2.6	Unauthorized Payments and Charges	437
9.2.7	Manipulating the Form of the Payment to Avoid Legal Protections	437
9.2.8	Stop Payment Orders	438
9.2.9	Closing Accounts	439
9.3	State Regulation of Payday Lending	439
9.3.1	General	439
9.3.2	Alabama	440
9.3.3	Alaska	440
9.3.4	Arizona	440
9.3.5	Arkansas	440
9.3.6	California	440
9.3.7	Colorado	441
9.3.8	Connecticut	441
9.3.9	Delaware	441
9.3.10	District of Columbia	441
9.3.11	Florida	442
9.3.12	Georgia	442
9.3.13	Hawaii	442
9.3.14	Idaho	442
9.3.15	Illinois	443
9.3.16	Indiana	443

9.3.17	Iowa	443
9.3.18	Kansas	444
9.3.19	Kentucky	444
9.3.20	Louisiana	444
9.3.21	Maine	444
9.3.22	Maryland	444
9.3.23	Massachusetts	445
9.3.24	Michigan	445
9.3.25	Minnesota	445
9.3.26	Mississippi	446
9.3.27	Missouri	446
9.3.28	Montana	446
9.3.29	Nebraska	447
9.3.30	Nevada	447
9.3.31	New Hampshire	447
9.3.32	New Jersey	448
9.3.33	New Mexico	448
9.3.34	New York	448
9.3.35	North Carolina	448
9.3.36	North Dakota	449
9.3.37	Ohio	449
9.3.38	Oklahoma	450
9.3.39	Oregon	450
9.3.40	Pennsylvania	450
9.3.41	Puerto Rico	450
9.3.42	Rhode Island	450
9.3.43	South Carolina	451
9.3.44	South Dakota	451
9.3.45	Tennessee	451
9.3.46	Texas	451
9.3.47	Utah	452
9.3.48	Vermont	452
9.3.49	Virginia	452
9.3.50	Washington	453
9.3.51	West Virginia	453
9.3.52	Wisconsin	453
9.3.53	Wyoming	454
9.4	Federal Regulation of Payday Lending	454
9.4.1	Talent-Nelson Military Lending Act	454
9.4.2	Federal Banking Agency Guidance on Payday Lending	454
9.4.2.1	Introduction	454
9.4.2.2	OCC Guidance	454
9.4.2.3	FDIC Guidance	456
9.4.2.3.1	Guidelines for payday lending and deposit advance loans	456
9.4.2.3.2	Affordable small loan guidelines	457
9.4.2.3.3	Guidance on payment processor relationships	457
9.4.2.4	Federal Reserve Board Guidance	458
9.4.3	TILA and the ECOA	458
9.5	Financial Institution Payday Loans	458
9.5.1	Bank Payday Loans	458
9.5.2	Prepaid Card Payday Loans	459
9.5.3	Credit Unions and Payday Loans	460
9.5.3.1	General	460
9.5.3.2	Federal Credit Union Interest Rate Caps	460
9.5.3.3	Higher Interest Cap for Short-Term, Small Loans	460
9.5.3.4	Rollover Ban on STS Loans	461

9.5.3.5	STS Loan Amortization Requirement and Fee Restriction	461
9.5.3.6	Restrictions on STS Payment Method	461
9.5.3.7	STS Loans and the MLA	462
9.5.3.8	Other NCUA Guidance for All Credit Union Loans	462
9.5.3.9	Credit Union Service Organizations	462
9.6	Attempts to Evade State Regulation.	463
9.6.1	Rent-a-Bank.	463
9.6.2	Internet Payday Loans	463
9.6.3	Tribal Payday Loans	464
9.6.3.1	General	464
9.6.3.2	Overview of Tribal Sovereign Immunity	465
9.6.3.3	Application of State and Federal Law to Tribal Activities	466
9.6.3.4	Who Can Claim Tribal Sovereign Immunity	467
9.6.3.4.1	Individuals	467
9.6.3.4.2	Arm of the tribe	468
9.6.3.5	Abrogating or Waiving Tribal Sovereign Immunity	469
9.6.3.6	Litigation Against Tribal Payday Lenders.	471
9.6.4	Spurious Open-End Credit	472
9.6.5	Brokers and Credit Service Organizations	473
9.6.6	Other Attempts to Evade Regulation.	474
9.7	Private Litigation Issues	475
9.8	Local Ordinances	475
9.9	Payday Lending and Bankruptcy	476

Chapter 10

Installment Loans

10.1	Overview	477
10.1.1	Installment Loans Defined.	477
10.1.2	The Non-Bank Lenders Addressed by This Chapter.	477
10.1.3	The Disappearance and Resurgence of Installment Loans	478
10.1.4	Types of Installment Loan Legislation	478
10.1.5	Little Federal Preemption of State Installment Loan Legislation	479
10.1.6	State Installment Loan Laws' Anti-Evasion Provisions	479
10.1.7	State Installment Loan Law Remedies	480
10.1.8	Other Legal Claims	480
10.2	Limitations on Interest Rates and Related Charges	480
10.2.1	State Law Interest Rate Caps.	480
10.2.2	Relationship of Loan Fees to Interest Rate Cap	481
10.2.3	Uncapped Loan Fees	482
10.2.4	Loan Fees Masquerading As Third Party Fees	482
10.2.4.1	General	482
10.2.4.2	Credit Service Organization Fees	483
10.2.5	Loan Splitting	483
10.2.6	Limits on Loan Charges in States Without Interest Caps; Unconscionability	484
10.2.7	Federal Interest Rate Limits for Servicemembers.	485
10.3	Credit Insurance and Other Add-On Products	485
10.4	Payment Schedules, Length of Loan Term, and Rebates	486
10.4.1	Payment Schedules	486
10.4.2	Limits on the Length of Loans	487
10.4.3	Rebates	488
10.5	Ability to Repay	488
10.6	Restrictions on Security and Collateral	489
10.6.1	Security Interests	489
10.6.2	Wage Assignments	490
10.6.3	Post-Dated Checks and Preauthorized Payment Methods.	490

10.7	Late Fees and Post-Maturity Interest Rates	491
10.7.1	Late Fees	491
10.7.2	Post-Maturity Interest Rates	491
10.8	Licensure	491
10.9	Open-End Credit As Evasion of Installment Loan Regulation	492
10.9.1	Why High-Cost Lenders May Structure Loans As Open-End Credit	492
10.9.2	Does State Law Authorize Non-Bank Lenders to Extend Open-End Credit?	492
10.9.3	Can Open-End Loans Evade Closed-End Regulation?	493
10.9.4	Caps on Open-End Interest Rates and Loan Fees	493
10.9.4.1	Federal Law Limits	493
10.9.4.2	States That Cap Both Open-End Interest and Fees	493
10.9.4.3	Where State Law Only Caps the Interest Rate, Not Fees	493
10.9.4.4	State Open-End Statutes Without Any Numerical Caps	495
10.9.4.5	Interpreting Caps on Fees	495
10.9.5	Ability-to-Repay Requirements	495

Chapter 11 Motor Vehicle, Manufactured Home, and Other Installment Sales

11.1	Getting Started: Organization of This Chapter	497
11.2	How Retail Credit Is Structured	497
11.2.1	Retail Installment Sales	497
11.2.2	“Buy-Here Pay-Here” Vehicle Dealers	498
11.2.3	Direct Financing	498
11.2.4	Auto Leasing	499
11.2.5	Auto Rent-to-Own	499
11.2.6	Credit Card Financing	499
11.2.7	Non-Purchase Auto Finance	500
11.3	State Retail Installment Sales and Motor Vehicle Retail Installment Sales Acts	500
11.3.1	Background	500
11.3.2	Scope	501
11.3.2.1	General	501
11.3.2.2	Direct Loans Distinguished; RISA Inapplicability	502
11.3.2.3	Revolving Charge Accounts	502
11.3.2.4	Coverage of Leases	503
11.3.2.5	Rate Exportation and Federal Preemption	503
11.3.3	Licensure	503
11.3.4	Limits on Credit Terms and Insurance	504
11.3.4.1	Limits on Finance Charges	504
11.3.4.2	Limits on Term and Payment Schedule	504
11.3.4.3	Limits on Insurance Sold with the Credit Sale	504
11.3.5	Deferral and Late Charges, Rebates of Unearned Interest	505
11.3.5.1	Deferral Charges	505
11.3.5.2	Late Fees	505
11.3.5.3	Rebates of Unearned Interest	506
11.3.6	Security Interests and Repossession	506
11.3.7	RISA Disclosure Requirements	506
11.3.8	The Single Document Rule; Contract Completion and Delivery	507
11.3.8.1	Single Document Rule	507
11.3.8.2	Contract Completion and Delivery Requirements	509
11.3.9	RISA Remedies	510
11.4	Special Issues in Motor Vehicle Finance	511
11.4.1	Background	511
11.4.2	Dealer Markups	512
11.4.3	Hidden Interest in Inflated Cash Prices	513
11.4.3.1	The Practices Described	513
11.4.3.2	Potential Truth in Lending Claims	513
11.4.3.3	RISA Claims and the Time-Price Doctrine	514

11.4.3.4	Establishing a Hidden Finance Charge	514
11.4.3.4.1	General	514
11.4.3.4.2	Use of a discount to purchase the car paper	515
11.4.4	Limits on Document Fees	516
11.4.5	Yo-Yo Sales, a.k.a. Spot Delivery	517
11.4.6	Negative Equity—Driving “Upside Down”	518
11.4.6.1	Described	518
11.4.6.2	Consumer Harm from Dealer’s Hiding Negative Equity	518
11.4.6.3	Consumer Remedies	519
11.4.6.3.1	Truth in Lending Act	519
11.4.6.3.2	State credit statutes	519
11.4.6.3.3	Other claims	520
11.4.6.3.4	Damage issues	520
11.5	Add-Ons and Payment Packing	521
11.5.1	How Payment Packing Works	521
11.5.2	Overview of Claims Arising from Add-On Products and Payment Packing	521
11.5.3	Service Contracts, Extended Warranties, and Breakdown Insurance	522
11.5.4	Insurance and Insurance-Like Products	522
11.5.4.1	Implications If Product Is Regulated As Insurance	522
11.5.4.2	Vehicle Protection Products	523
11.5.4.3	Credit Insurance	524
11.5.4.4	Guaranteed Asset Protection (GAP) Products	524
11.5.4.5	Vendor’s Single Interest (VSI) Insurance Purchased at Origination	525
11.5.4.5.1	General	525
11.5.4.5.2	Application of Truth in Lending	525
11.5.4.5.3	State RISA application	526
11.5.4.6	Force-Placed Insurance	526
11.6	Manufactured Home Finance	528
11.6.1	Background	528
11.6.2	Classification of Homes As Real or Personal Property	528
11.6.2.1	How Manufactured Homes Are Classified	528
11.6.2.2	Implications of Classification	529
11.6.2.3	Determining Proper Classification	530
11.6.3	What Law Applies	530
11.6.3.1	Overview	530
11.6.3.2	State Installment Sales and Other Credit Statutes	530
11.6.3.3	Truth in Lending Act	531
11.6.3.4	Real Estate Settlement and Procedures Act	531
11.6.3.5	State UDAP Statutes	532
11.7	Raising Seller-Related Claims Against the Installment Sales Contract Holder	532
11.7.1	Holder-in-Due-Course Doctrine Inapplicable	532
11.7.2	Assignee Liability and Waiver of Defense Clauses	533
11.7.3	FTC Holder Rule	533
11.7.3.1	Critical Importance of the Holder Rule	533
11.7.3.2	Notice Required by Rule Provides Consumer Rights	533
11.7.3.3	The Consumer’s Maximum Recovery	534
11.7.3.4	Where Notice Improperly Omitted	534
11.7.4	Assignee Liability Provisions of State RISAs	534
11.7.5	Assignee’s Liability for TILA and ECOA Violations	535
11.7.6	Assignee’s Involvement in the Dealer’s Actions	535

Chapter 12 Auto Title Loans

12.1	Overview	537
12.1.1	Nature of Auto Title Lending	537
12.1.2	How Auto Title Lenders Disguise Their Loans	537

12.2	Leaseback and Buyback Schemes	538
12.3	Auto Title “Pawns”	539
12.4	Other Schemes and Disguises	540
12.5	Auto Title Loan Statutes	541
12.5.1	Overview	541
12.5.2	Potential Claims in States That Authorize High-Cost Auto Title Lending	542
12.5.3	Other State Statutory Limitations on Auto Title Lending	542
12.5.4	Interstate Title Pawn Lending	543
12.5.5	State Auto Title Lending Statutes Summarized	543
12.5.5.1	Introduction	543
12.5.5.2	Alabama	543
12.5.5.3	California	543
12.5.5.4	Delaware	543
12.5.5.5	Florida	543
12.5.5.6	Georgia	544
12.5.5.7	Idaho	544
12.5.5.8	Illinois	544
12.5.5.9	Iowa	544
12.5.5.10	Kentucky	545
12.5.5.11	Louisiana	545
12.5.5.12	Maine	545
12.5.5.13	Minnesota	545
12.5.5.14	Mississippi	545
12.5.5.15	Missouri	545
12.5.5.16	Nevada	545
12.5.5.17	New Hampshire	546
12.5.5.18	New Mexico	546
12.5.5.19	Ohio	546
12.5.5.20	Oregon	546
12.5.5.21	South Carolina	546
12.5.5.22	South Dakota	547
12.5.5.23	Tennessee	547
12.5.5.24	Texas	547
12.5.5.25	Utah	547
12.5.5.26	Virginia	547
12.5.5.27	Wisconsin	547
12.6	The Military Lending Act	548

Chapter 13 Rent-to-Own

13.1	Introduction to Rent-to-Own	549
13.2	Evolution of the RTO Industry	549
13.3	The Lease vs. Installment Contract Debate	551
13.3.1	How RTO Contracts Are Structured and Marketed	551
13.3.2	Legal Challenges Based on Treating RTO Contracts As Installment Sales	553
13.3.2.1	Introduction	553
13.3.2.2	Application of State Retail Installment Sales Acts	553
13.3.2.3	Truth in Lending Disclosure Requirements for Credit Sales	554
13.3.2.4	UCC Article 9	554
13.3.3	Industry-Friendly RTO Legislation	554
13.4	Challenging Current Practices	555
13.4.1	Laws That Apply to RTO Transactions	555
13.4.2	Pricing and Fees	555
13.4.2.1	Industry Practices	555
13.4.2.2	Unconscionability and Unfairness	556

13.4.2.3	State Price Controls	557
13.4.2.4	Liability Damage Waivers	558
13.4.3	Disclosures	558
13.4.3.1	Consumer Leasing Act	558
13.4.3.2	State Laws	559
13.4.4	Loss of Equity	559
13.4.5	Repossession	559
13.4.6	Discrimination	560
13.4.7	Arbitration	561
13.5	Other High-Cost Credit Disguised As RTOs	561

Chapter 14 “Sale” of Future Payment Streams

14.1	Introduction	563
14.2	Legal Consequences of Characterizing the Transaction As a Loan or Assignment	563
14.3	Determining the True Nature of an Income Purchase Transaction	564
14.3.1	Substance, Not Form, Dictates	564
14.3.2	Features of a Loan As Distinct from a Sale or Assignment	565
14.3.3	Relationship Between Lender and the Original Obligor	566
14.3.4	Borrower’s Obligation to Repay; Other Features Minimizing Lender’s Risk	567
14.4	Military Pensions and Benefits	569
14.5	Settlements or Judgments (“Factoring”)	571
14.6	Litigation Financing	572
14.7	Other Limits on Assignment of Future Income	573

Chapter 15 Tax-Time Financial Products: RALs, RACs, and Assignments

15.1	Types of Products	575
15.1.1	Refund Anticipation Loans	575
15.1.2	Pay Stub RALs	576
15.1.3	Refund Anticipation Checks	576
15.1.4	Tax Refund Assignments	576
15.2	Federal Regulation of RALs and RACs	577
15.2.1	Truth in Lending Act Claims	577
15.2.1.1	TILA Claims and RALs	577
15.2.1.2	TILA and Pay Stub RALs	577
15.2.1.3	TILA and RACs	578
15.2.1.4	The Federal Rebate Act	578
15.2.2	Military Lending Act	578
15.2.3	Federal Regulatory Policy and Guidance	578
15.2.3.1	OCC Policy Statements	578
15.2.3.2	IRS Rules on RALs	579
15.3	State Regulation of RALs and RACs	579
15.3.1	State Usury Laws	579
15.3.2	State RAL/RAC Disclosure Laws	580
15.4	State Law Claims in RAL/RAC Litigation	581
15.4.1	Claims Against Tax Preparers	581
15.4.2	Claims for Unfair and Deceptive Practices	582
15.4.3	Cross-Lender Debt Collection	582
15.4.4	Loan Broker and Credit Service Organization Statutes	582
15.4.5	Challenging Tax Refund Assignments As Loans	583
15.4.5.1	Sale of Chose in Action vs. Loan	583
15.4.5.2	Where Consumer Liable for Shortfall in the Refund	583
15.4.5.3	Precedent That Assignments Are Disguised Loans	584

15.5	Federal Enforcement	584
	15.5.1 FDIC and OCC 2009 Actions	584
	15.5.2 FDIC’s 2011 Action Against Republic Bank	585
	15.5.3 CFPB Action Against Southwest Tax Loans	585
	15.5.4 Federal Enforcement Actions Against Tax Preparers for Tax Fraud	585
15.6	State Regulatory Activity	586
	15.6.1 State Enforcement Actions	586
	15.6.2 State Warning Letters and Informal Actions	587

Appendices

Appendix A	Federal Credit Regulation		
	A.1 Military Lending Act		589
	A.1.1 The Act		589
	A.1.2 Department of Defense Regulations		591
	A.2 Servicemembers Civil Relief Act—Selected Provisions		595
	A.3 Federal Rebate Statute		596
	A.4 Credit Practices Rule, Unfair Late Charges		597
	A.5 TILA Credit Card Provisions		597
	A.5.1 Selected Statutory Provisions		597
	A.5.2 Selected Regulation Z Provisions		604
	A.5.3 Selected Provisions of the Staff Interpretations of Regulation Z		621
	A.6 OCC Regulation on Debt Cancellation and Suspension Agreements		682
Appendix B	State Lending Statutes		
	B.1 Summary of State Lending Statutes		687
	B.2 Summary of State Usury Statutes		699
Appendix C	Summaries of State Retail Installment Sales Acts		703
Appendix D	Summaries of State Closed-End Installment Loan Statutes		761
Appendix E	Summaries of State Open-End Credit Statutes		827
Appendix F	Rate Exportation		
	F.1 National Banks		869
	F.1.1 Selected Statutory Provisions		869
	F.1.2 Selected Regulations		870
	F.1.3 Summary of OCC Interpretative Letters		871
	F.2 Federal Savings Associations		872
	F.2.1 Selected Statutory Provisions		872
	F.2.2 Selected Regulations		872
	F.2.3 Summary of OTS Interpretative Letters		873
	F.3 State Banks and Savings Associations		873
	F.3.1 Selected Statutory Provisions		873
	F.3.2 Summary of FDIC Interpretation Letters		874

F.4	State Credit Unions	875
F.4.1	Selected Statutory Provisions	875
F.4.2	Summary of NCUA Formal Statement of Interpretation and Policy	876
Appendix G	Preemption Based on OCC Regulation of Federal Depositories	
G.1	Dodd-Frank Standards for Preemption Determinations.	877
G.2	Selected OCC Regulations.	879
G.3	OCC/OTS Interpretations.	883
Appendix H	Preemption of Manufactured Home Loan Interest Rates	
H.1	Depository Institutions Deregulation and Monetary Control Act (DIDA)	885
H.2	DIDA Regulations	886
Appendix I	Federal Credit Unions	
I.1	Selected Provisions of the Federal Credit Union Act.	891
I.2	Selected NCUA Regulations	892
I.3	NCUA Interpretative Letters	894
I.4	Formal Statements of Interpretation and Policy	897
	Index.	899