Washington Law Review

Volume 48 | Issue 2

2-1-1973

Usury—Installment Sales Contracts: Limitation of the Scope of the Time Price Doctrine—National Bank of Commerce of Seattle v. Thomsen, 80 Wn.2d 406, 495 P.2d 332 (1972)

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RECENT DEVELOPMENTS

USURY—INSTALLMENT SALES CONTRACTS: LIMITATION OF THE SCOPE OF THE TIME PRICE DOCTRINE—*National Bank of Commerce of Seattle v. Thomsen*, 80 Wn. 2d 406, 495 P.2d 332 (1972).

In 1965 Greg Thomsen entered into an agreement with Carter Motors for the purchase of an automobile. In addition to signing a purchase order, Thomsen executed a conditional sales contract which provided that payments were to be made to the National Bank of Commerce (NBC) and showed a time price differential[1] of $242.15, the equivalent of a 14.61 percent annual finance charge. A Carter Motors salesman had requested that Thomsen finance the purchase through NBC, which had supplied the contract form and other documents used in the transaction. Carter Motors immediately assigned the contract to NBC pursuant to a financing agreement which provided that Carter Motors would sell to NBC such conditional sales contracts as NBC approved. Thomsen later defaulted on the contract and, when sued by NBC for the remaining payments, alleged that the 14.61 percent finance charge violated Washington's usury statute.[2] The trial

1. The term "time price differential" refers to a figure representing the difference between the cash price of an item and the total cost of purchasing that item on credit. *See* General Electric Credit Corp. v. Lunsford, 209 Va. 743, 167 S.E.2d 414, 418 (1969). The conditional sales contract executed between Greg Thomsen and Carter Motors actually used the term "time price differential." National Bank of Commerce of Seattle v. Thomsen, 80 Wn. 2d 406, 407, 495 P.2d 332, 334 (1972).

2. The usury statute involved in *Thomsen*, WASH. REV. CODE § 19.52.020 (1959), provided:

> Any rate of interest not exceeding twelve percent per annum agreed to in writing by the parties to the contract, shall be legal, and no person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or thing in action than twelve percent per annum.

That statute was amended by the legislature in 1967, and now reads:

> Any rate of interest not exceeding twelve percent per annum agreed to in writing by the parties to the contract shall be legal, and no person shall directly or indirectly take or receive in money, goods or things in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or things in action than twelve percent per annum: *Provided*, That in any loan of money in which the funds advanced do not exceed the sum of five hundred dollars, a setup charge may be charged and collected by the lender, and such setup charge shall not be considered interest hereunder: *Provided Further*, That such setup charge does not exceed four percent of the amount of funds advanced, or fifteen dollars, whichever is the lesser, except that on loans of under one hundred dollars a minimum not exceeding four dollars may be so charged.

WASH. REV. CODE § 19.52.020 (Supp. 1972).

court ruled in favor of NBC, viewing the transaction as a bona fide conditional sales contract outside the purview of the usury statute. On appeal, the Washington Supreme Court reversed. *Held:* The relationship between Thomsen and NBC was that of borrower and lender; thus, the 14.61 percent annual charge constituted interest in excess of the 12 percent maximum allowed by the usury statute. *National Bank of Commerce of Seattle v. Thomsen,* 80 Wn. 2d 406, 495 P.2d 332 (1972).

Courts have long relied upon the dichotomy between interest rates under a loan and time price charges under an installment sales contract in ruling that time price charges are outside of the usury statutes.[3] Although some jurisdictions recently have narrowed the circumstances to which the time price doctrine will be applied,[4] the *Thomsen* decision adopts an agency theory which goes further than any previous case in imposing limitations upon the application of the doctrine. This note examines some of the more important aspects of *Thomsen,* particularly the court's limitation of the scope of the time price doctrine, the failure of the majority to issue a prospective ruling, and the effect of the decision upon the Retail Installment Sales Act.[5]

I. THE TIME PRICE DOCTRINE

Historically, courts have been troubled with the application of usury laws to sales of goods on credit. Since legislative prohibitions generally were couched in terms of interest rates for a "loan" or "forbearance,"[6] sellers contended that even though their credit price exceeded their cash price by more than the lawful interest rate, the transaction was not usurious because there was no loan or forbearance.[7] Courts generally agreed, and the time price doctrine became a well-established exception to the usury laws.[8]

3. *See* Hafer v. Spaeth, 22 Wn. 2d 378, 156 P.2d 408 (1945). *See also* notes 6-8 and accompanying text *infra.*

4. *See* notes 11-12 and accompanying text *infra.*

5. WASH. REV. CODE ch. 63.14 (Supp. 1972).

6. Illustrative of such legislation is WASH. REV. CODE § 19.52.020 (1959). *as amended,* WASH. REV. CODE § 19.52.020 (Supp. 1972), which is set forth in note 2 *supra. See generally* Annot., 14 A.L.R. 3d 1065, 1070-71 (1967).

7. *See* note 9 *infra.*

8. *See, e.g.,* Hogg v. Ruffner, 66 U.S. (1 Black) 115 (1861) (established the time price exception to the usury laws in the United States); Wilson v. J.E. French Co., 214 Cal. 188, 4 P.2d 537 (1931); Hafer v. Spaeth, 22 Wn. 2d 378, 156 P.2d 408

During the last three decades, however, judicial reaction to the time price doctrine has been less favorable. Apparently regarding the distinction between a credit sale and a loan or forbearance as somewhat unrealistic,[9] courts have limited the scope of the doctrine. Since the time price doctrine requires that a bona fide credit sale take place before the transaction falls outside the usury statute,[10] courts have limited its application by finding particular transactions to be only schemes to avoid the usury laws. Such rulings are based upon a number of factors, including a close relationship between the seller and the finance company to which the paper is assigned and the lack of a genuine opportunity for the buyer to choose between a credit and cash price.[11] A few recent decisions have further eroded the time price doctrine by ruling that it is inapplicable to credit sales under a revolving charge arrangement.[12]

(1945). *See generally* Note, *Judicial and Legislative Treatment of "Usurious" Credit Sales,* 71 HARV. L. REV. 1143, 1145-46 (1958); Comment, *Retail Installment Sales—History and Development of Regulation,* 45 MARQ. L. REV. 555, 560-63 (1962).

9. The traditional distinction between a loan or forbearance and a credit sale was based on the position of the borrower. Courts felt that the *borrower* might be desperately in need of financial assistance and therefore at the mercy of the lender, whereas the *buyer* could refrain from making a purchase if he felt that the cash or credit price asked by the seller was too high. *See* General Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 78, 262 S.W. 425, 428 (1924). Regardless of the historical validity of that distinction, present day consumer practices render it obsolete. The installment purchase has become a common method of immediately obtaining those goods that one cannot pay for or afford until some future date. Since it is likely that the modern consumer's demand for goods is, in most instances, as great as his demand for loans to pay medical or other non-purchase expenses, there is no more compulsion to seek a loan than to purchase on time. This demise of the rationale supporting the time price doctrine should lead to its eventual rejection.

10. A bona fide credit sale requires the seller to quote both a cash price and a credit price. *See, e.g.,* Bryant v. Securities Investment Co., 233 Miss. 740, 102 So. 2d 701 (1958); Hafer v. Spaeth, 22 Wn. 2d 378, 156 P.2d 408 (1945); Commercial Credit Co. v. Tarwater, 215 Ala. 123, 110 So. 39 (1926).

11. *See, e.g.,* Daniel v. First National Bank of Birmingham, 227 F.2d 353 (5th Cir. 1955), *aff'd on rehearing,* 228 F.2d 803 (5th Cir. 1956), *second appeal,* 239 F.2d 801 (5th Cir. 1956); Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952); Lloyd v. Gutgsell, 175 Neb. 775, 124 N.W.2d 198 (1963). *See generally* cases cited in Annot., 14 A.L.R.3d 1065, 1124-60 (1967). Note that some courts have continued to apply the time price rule despite the existence of circumstances from which other courts would infer a scheme to avoid the usury laws. *See, e.g.,* Aglio v. Carousel, Inc., 34 Misc. 2d 79, 228 N.Y.S.2d 350 (1962); Equipment Finance, Inc. v. Grannas, 207 Pa. Super. 363, 218 A.2d 81 (1966).

12. *See, e.g.,* Rollinger v. J.C. Penney Co., 192 N.W.2d 699 (S.D. 1971); State v. J.C. Penney Co., 48 Wis. 2d 125, 179 N.W.2d 641 (1970); *But cf.* Sliger v. R.H. Macy and Co., 59 N.J. 465, 283 A.2d 904 (1971); Dennis v. Sears, Roebuck and Co., 223 Tenn. 415, 446 S.W.2d 260 (1969). *See also* Note, 1971 WIS. L. REV. 296. The revolving charge arrangements have been distinguished from the traditional time sale in

The time price doctrine is a recognized exception to the usury laws in Washington. The leading Washington case is *Hafer v. Spaeth,* [13] which involved the purchase of a piano on an installment basis. After the buyer defaulted, the seller assigned his claim against the purchaser to a third party for collection. Although the finance charges exceeded the allowable interest rates under the usury statute, the court held that charges for time purchases under installment sales contracts are outside the usury statute.[14]

When faced with the usury problem again in *Thomsen,* the court observed that many authorities had criticized the rationale of cases like *Hafer* as anachronistic.[15] The majority refused to overrule *Hafer,* however, and instead reached the result in *Thomsen* by finding an *agency* relationship between Carter Motors and NBC.[16] The court found that Carter Motors had represented to Thomsen that NBC would finance the transaction, and that this representation, even if unauthorized, was ratified when NBC accepted the contract.[17] Thus Carter Motors was held to be an agent in transacting a loan between Greg Thomsen and NBC.[18] The majority stated that the arrangement was never a true conditional sale, but constituted a cash sale by Carter Motors and a loan by NBC.

Although the *Thomsen* court's refusal to overrule *Hafer* leaves the time price doctrine intact, it is uncertain to what extent the agency theory utilized by the majority has limited the scope of the doctrine. The opinion does not isolate the particular facts the court relied upon in finding an agency relationship. It appears that the express financing agreement, the request by Carter Motors that Thomsen finance the transaction through NBC, the fact that NBC furnished conditional

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that the agreement is entered into prior to any sale, no time price is quoted to the buyer, and the account may cover a number of sales. For a discussion of other distinguishing characteristics, see *State v. J.C. Penney, supra,* and Note, 1971 WIS. L. REV. 296.

13. 22 Wn. 2d 378, 156 P.2d 408 (1945).

14. The court did note, however, that it would look beyond the form of the transaction to assure that it was a bona fide sale and purchase, and not a mere subterfuge to circumvent the usury laws. *Id.* at 386, 156 P.2d at 412.

15. 80 Wn. 2d at 411, 495 P.2d at 336-37. *See* text accompanying note 19 *infra.*

16. The court's refusal to overrule *Hafer* is consistent with its agency theory. The seller in *Hafer* apparently had no close connections with the assignee which would justify finding, as the court did in *Thomsen,* that the seller was merely the agent of the assignee in negotiating a loan with the purchaser. *See* text accompanying notes 17-18 *infra.*

17. 80 Wn. 2d at 413-14, 495 P.2d at 338.

18. The usury statute expressly provides that the acts of an agent in loaning money shall bind the principal. WASH. REV. CODE § 19.52.030(2) (Supp. 1972).

sales contract forms and other documents to Carter Motors, and the immediate assignment of the conditional sales contract to NBC were important factors in the court's determination. Whether all or only a portion of those factors are required to establish an agency relationship, and whether additional factors will also be deemed relevant are questions left unanswered by *Thomsen*.

It is also uncertain whether the court will limit future rulings to an agency theory. Dictum in *Thomsen* indicates that *Hafer* and the entire time price doctrine may be vulnerable. After acknowledging the criticism of *Hafer's* rationale, the majority stated:[19]

> If it is true that persons who purchase on installment terms automobiles and other items of merchandise which they feel they need are under economic pressure as severe as that which influences borrowers of money to accept oppressive terms, then there is no logical reason to make a distinction between the exacting of excessive charges for deferring payments and the exacting of such charges for loaning money.

Also significant in predicting future judicial trends is the concurring opinion, signed by three majority justices, which stated that *Hafer* should be expressly overruled.[20]

As a practical matter, the present impact of *Thomsen* on conditional sales financing is reduced considerably by the Retail Installment Sales Act,[21] which regulates retail installment sales of consumer goods and services. When Thomsen purchased the automobile in 1965, the Act contained no limitations on service charges.[22] However, in 1967 the legislature amended the Act to impose an 18 percent limitation on service charges,[23] and in 1968 Initiative 245 reduced the ceiling to 12 percent.[24] Thus, since both the usury statute and the Retail Installment Sales Act currently provide 12 percent limitations,[25] the labeling of a

19. 80 Wn. 2d at 411, 495 P.2d at 336-37.

20. 80 Wn. 2d at 416, 495 P.2d at 339. The concurring judges thought that WASH. REV. CODE § 19.52.020 (1959) prohibited finance charges in excess of 12 per cent regardless of the form of the transaction, thus concluding that time price charges under installment sales contracts were finance charges within the purview of the usury statute.

21. WASH. REV. CODE ch. 63.14 (Supp. 1972).

22. "Service charges" are defined essentially as finance charges for the privilege of purchasing on time. WASH. REV. CODE § 63.14.010 (Supp. 1972).

23. Ch. 234, §§ 3,7,8, [1967] WASH. SESS. LAWS 1133, 1139-40 (amended 1968).

24. Ch. 2, [1969] WASH. SESS. LAWS, now incorporated in WASH. REV. CODE §§ 63.14.040, 63.14.120, 63.14.130 (Supp. 1972).

25. Note, however, that the 1967 amendment to WASH. REV. CODE § 19.52.020 allows setup charges. *See* note 2 *supra* for the text of that statute.

transaction as a loan or an installment sale is at least temporarily immaterial in determining allowable finance charges for sales of goods and services to consumers.

However, even with the 12 percent limit imposed by the Retail Installment Sales Act, *Thomsen* is still relevant to present transactions. Since all nonconsumer sales fall outside the scope of R.C.W. ch. 63.14 and continue to be subject to the time price doctrine, the *Thomsen* holding will directly affect any *nonconsumer* credit sale in which the time price differential exceeds the maximum legal interest rate under the usury statute. In addition, future legislative alteration of allowable rates under either the usury statute or the Retail Installment Sales Act would make the *Thomsen* opinion crucial to consumer installment sales.[26] If *Thomsen* is interpreted as applying only where there is such a nexus as that which existed between Carter Motors and NBC, the state legislature can still, for example, raise the service charge ceiling for retail installment sales contracts without changing the usury statute. The only remaining question would be what transactions fall within the ambit of the usury statute under the *Thomsen* analysis. On the other hand, if *Thomsen* foreshadows future court rejection of the time price doctrine, the legislature cannot raise permissible service charges for retail installment sales transactions without raising the interest limitations on loans or redefining the transactions covered by the usury statute so as to explicitly exclude installment sales contracts.[27] Thus, the effect of *Thomsen* on interest rates and service charges may be substantial.

II. LACK OF PROSPECTIVE RULING

The major difficulty with the *Thomsen* opinion is its failure to issue a *prospective* ruling[28] in light of the presumed reliance by the financial community upon the traditional application of the time price doctrine endorsed in *Hafer*. That detrimental reliance in all probability has been extensive; *Thomsen* could jeopardize transactions whose

26. The Washington legislature is frequently presented with proposals for altering allowable finance charges. *See, e.g.,* S. B. 407, H. B. 783, WASH. LEG., 41st SESS. (1969) (proposal to decrease interest rates for consumer installment loans under $5,000).

27. For a discussion of possible legislative action, *see* notes 50-52 and accompanying text *infra*.

28. *See* notes 36-42 and accompanying text *infra*.

aggregate value amounts to millions of dollars.[29] As previously indicated, the Retail Installment Sales Act has prohibited any service charge over 12 percent on installment sales of consumer goods and services since 1968. However, under the time price doctrine approved in *Hafer,* all nonconsumer installment sales outside the purview of R.C.W. ch. 63.14 could legally contain finance charges in excess of 12 percent.[30] It is probable that the time price differential under many of these nonconsumer sales exceeds the 12 percent limit, particularly where discounting is involved.[31] Also, many consumer installment

29. The aggregate value of transactions potentially affected by any decision in the installment sales area is tremendous. In recent years the outstanding short and intermediate term installment consumer credit in the United States, primarily installment sales contracts and direct installment loans for the purchase of consumer goods, has continuously exceeded $100 billion. At the end of 1971 the figure was in excess of $137 billion. A large percentage of that credit consists of installment sales contracts such as that involved in *Thomsen. See* 52 U.S. DEP'T OF COMMERCE, Pub. No. 8, SURVEY OF CURRENT BUSINESS S-17 to S-18 (August 1972); U.S. DEP'T OF COMMERCE, BUSINESS STATISTICS 92-94 (18th biennial ed. 1971). Washington's share of that $100 billion industry is quite substantial. For example, in 1968 consumer installment sales contracts totalling in excess of $200 million were executed in Washington, all of which could, before the December 5, 1968, effective date of Initiative 245, legally contain finance charges in excess of 12 per cent. *See* G. Gordon, J. Wheatley, F. Gaedeke, H. Hallaq & D. McNabb, *The Impact of a Consumer Credit Interest Limitation Law, Washington State: Initiative 245,* 45, 1970 (Graduate School of Business Administration, University of Washington, Seattle, Washington). Nonconsumer installment sales contracts would probably equal or exceed that $200 million per year figure. A retroactive application of the statutory usury penalties (which provide that the debtor can recover twice the interest paid plus interest accrued) to such a vast amount of paper would have a disastrous effect on Washington's financial community. WASH. REV. CODE § 19.52.030 (Supp. 1972).

For a discussion of the applicability of the statute of limitations, *see* note 32 *infra.*

30. Note that *Thomsen* will not affect credit sales to a corporate purchaser, unless an individual is personally liable on the installment sales contract, since corporations are now explicitly excepted from the protection of the usury laws. WASH. REV. CODE § 19.52.030(1) (Supp. 1972). However, there is a vast amount of nonconsumer installment purchasing outside this exception, most notably by farmers and other proprietorships and partnerships.

31. Discounting occurs when the seller exacts a finance charge from the purchaser pursuant to an installment sales contract and then transfers the paper to a lender for consideration which is less than the face amount of the instrument. The initial finance charge plus the discount often exceeds the maximum allowable interest rate. Whether the discount constitutes interest charged to the debtor for usury purposes is not always clear. The general rule is that a bona fide sale of commercial paper cannot be usurious, regardless of the profit made. Baske v. Russell, 67 Wn. 2d 268, 270-71, 407 P.2d 434, 436 (1965). However, where an intermediary transacts the loan and takes part of the principal as a commission, the commission becomes part of the interest paid for the loan. *Id.*

It appears that sellers and lenders in the same position as Carter Motors and NBC previously considered any discount arrangement as a sale of commercial paper by the seller or a loan by the lender to the seller, all outside the purview of the usury statute. *See* Respondent's Answer to Petition for Rehearing at 19-20, National Bank of Commerce of Seattle v. Thomsen, 80 Wn. 2d 406, 495 P.2d 332. However, under the agency theory set forth in *Thomsen* such discounts will presumably become part of

sales transacted before Initiative 245 became effective on December 5, 1968, may contain credit charges in excess of 12 percent.[32]

The severity of the penalties for usury weighs heavily in favor of a prospective ruling. The usury statute specifies that a creditor transacting a usurious loan is entitled only to the principal less twice the amount of any interest paid and less all accrued and unpaid interest.[33] Under this formula, the retroactive application of *Thomsen* would allow the debtor involved in a transaction labeled usurious by this new ruling to recover a substantial sum,[34] particularly if he had paid on

the interest charged the debtor, since the loan is between the buyer and the third party lender, with the seller acting only as an intermediary agent.

32. The vulnerability of these transactions to a retroactive *Thomsen* ruling depends upon an application of the relevant statute of limitations period. There are various statutory provisions covering the question. *See* WASH. REV. CODE § 19.52.032 (Supp. 1972) (six months to initiate declaratory judgment action); WASH. REV. CODE § 19.86.120 (Supp. 1972) (four years to bring action for unfair practices, which under WASH. REV. CODE § 19.52.036 (Supp. 1972) includes transacting a usurious contract); WASH. REV. CODE § 4.16.080(3) (1967) (three year limitation period within which to assert quasi contractual right); WASH. REV. CODE § 4.16.040(2) (1959) (six year statute of limitations for an action upon a written contract). There is an unresolved conflict between the latter two provisions. The three year limitation period was applied in Edwards v. Surety Fin. Co., 176 Wash. 534, 30 P.2d 225 (1934). However, WASH. REV. CODE § 19.52.030(1) (Supp. 1972) impliedly allows a suit by the debtor to recover usury under a contract, referring to an "action on such contract." This could invoke the six year statute of limitations for an action upon a written contract. *See generally* Annot., 48 A.L.R.2d 401 (1956). Usury is also recognized as an affirmative defense. Malotte v. Gorton, 75 Wn. 2d 306, 311, 450 P.2d 820, 823 (1969). Since under WASH. REV. CODE § 4.16.040(2) (1959) an action on a written contract can be commenced within six years, usury presumably could be asserted as a defense throughout the six year period. *See* J. C. Felthouse & Co. v. Bresnahan, 145 Wash. 548, 549, 260 P. 1075, 1076 (1927) (involving fraud), where the court acknowledged "the rule . . . that the statute of limitations never runs against a defense arising out of the transaction sued upon by the plaintiff."

There is also considerable uncertainty concerning when the limitation period commences to run. It may run from each actual payment of usurious interest. *See* Lloyd v. Fidelity Nat. Bank, 169 Wash. 107, 13 P.2d 504 (1932) (application of federal law). However, some jurisdictions hold that the statute of limitations does not commence to run until the loan is fully paid. *See, e.g.*, Shirley v. Britt, 152 Cal. App. 2d 666, 313 P.2d 875, 877 (1957); O'Malley v. United States Building & Loan Ass'n, 50 Idaho 583, 298 P. 675 (1931). Other courts have held that the limitations period commences when the debtor's aggregate payments equal the principal plus lawful interest. *See, e.g.*, Atlanta Sav. Bank v. Spencer, 107 Ga. 629, 33 S.E. 878 (1899). *See generally* Annot., 108 A.L.R. 622 (1937). Present Washington case law does not resolve either the question of which limitations period is applicable or when it commences to run.

33. WASH. REV. CODE § 19.52.030 (Supp. 1972).

34. The statutory language of WASH. REV. CODE § 19.52.030 (1959) initially created uncertainties as to whether the debtor could take affirmative action to recover the usury penalties; the statute could be read as allowing usury only as a defense. However, the Washington Supreme Court has ruled that there is a common law right to recover the usury penalties based upon an action of assumpsit. *See* Edwards v. Surety Fin. Co., 176 Wash. 534, 30 P.2d 225 (1934).

The amendatory provisions of WASH. REV. CODE § 19.52.030(1) (Supp. 1972) now imply that the debtor can sue to recover the usury penalties.

the contract for a lengthy period. In addition to this windfall, the debtor may also recover court costs and a reasonable attorney's fee.[35]

In view of the burden that a retroactive application of the rule in *Thomsen* will impose on lenders, the decision would have been an ideal situation in which to utilize a prospective ruling.[36] Through that device the court could have eliminated a rule it considered outdated without jeopardizing prior contracts entered into in reliance on judicial precedent.[37]

The majority in *Thomsen* did not discuss the possible retroactivity of its opinion, although the decision was applied retroactively to the transaction in question. The court's silence may exclude the possibility of a solely prospective ruling which would insulate similar transactions entered into prior to the *Thomsen* decision. The only utilization of a prospective ruling by the Washington Supreme Court was in *State ex rel. Finance Committee v. Martin*,[38] which involved a challenge to the constitutionality of a bond issue. In overruling a previous decision, the court expressly stated that the ruling was to be applied prospectively, even as to the litigants, from the date the remittitur was filed.[39]

35. WASH. REV. CODE § 19.52.030 (Supp. 1972).

36. For an analysis of various aspects of the prospectivity issue, *see* Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965); Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time*, 79 HARV. L. REV. 56 (1965); Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. REV. 631 (1967); Note, *Prospectivity and Retroactivity of Supreme Court Constitutional Interpretation*, 5 U. RICH. L. REV. 129 (1970).

37. Two other jurisdictions have ruled prospectively when altering the traditional application of the time price rule. *See* Hare v. General Contract Corp., 220 Ark. 601, 249 S.W.2d 973 (1952); Rollinger v. J.C. Penney Co., 192 N.W.2d 699 (S.D. 1971). *See also* Note, 1971 WIS. L. REV. 296, 307.

38. 62 Wn. 2d 645, 384 P.2d 833 (1963).

39. *Id.* at 662, 384 P.2d at 843. In issuing its prospective ruling, the *Martin* court stated:

> So, to do justice, courts have devised a means of getting rid of bad rules, yet, at the same time, preserving stare decisis. Rules of law, like governments, should not be changed for light or transient causes; but, when time and events prove the need for a change, changed they must be.
>
> If rights have vested under a faulty rule, or a constitution misinterpreted, or a statute misconstrued, or where, as here, subsequent events demonstrate a ruling to be in error, prospective overruling becomes a logical and integral part of stare decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected. By means of this doctrine, courts of the most prudent and careful tradition can move boldly to right the very wrong they have been traditionally perpetuating under the old, rigidly-applied, single-minded view of the doctrine of stare decisis. The courts can act to do that which ought to be done, free from the fear that the law itself is being undone.

Id. at 666, 384 P.2d at 845. That statement of the supporting rationale for a prospec-

Thus bonds issued prior to the *Martin* ruling were not jeopardized. *Martin* is relevant because the court expressly ruled as to prospectivity at the time it altered prior case law, not leaving the issue for a future opinion.[40] Thus, the *Thomsen* court's failure to mention prospectivity may imply its rejection of a prospective ruling.[41]

There remains a remote possibility that *Thomsen* will be applied prospectively as to all parties except Greg Thomsen. The majority opinion did not expressly mention retroactivity; thus, the Washington court could later rule that the question was not disposed of by *Thomsen*. Since it is an approved appellate procedure for a court to rule retroactively as to the present litigants and prospectively as to all others,[42] the scope of *Thomsen* still could be limited. Perhaps the Washington court will follow this latter procedure once it squarely faces the possible adverse financial impact of *Thomsen*.

III. RETAIL INSTALLMENT SALES ACT

The judicial philosophy behind decisions such as *Thomsen* is presumably consumer oriented. Thus it is ironic that one possible result of the *Thomsen* court's expansion of the coverage of the usury statute is to curtail drastically the effect of another consumer protection law, the Retail Installment Sales Act. That Act regulates retail installment

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tive ruling is directly applicable to the *Thomsen* case. For a discussion of the prospectivity issue as it existed immediately prior to *Martin, see* Comment, *The Prospective Decision—A Useful "Tool of the Trade,"* 38 WASH. L. REV. 584 (1963).

40. Other jurisdictions limiting an alteration of the scope of the time price doctrine to future transactions have also issued an express statement of prospectivity in the initial decision. *See* Hare v. General Contract Corp., 220 Ark. 601, 249 S.W.2d 973 (1952); Rollinger v. J.C. Penney Co., 192 N.W.2d 699 (S.D. 1971). *See generally* articles cited in note 36 *supra*.

41. The dissenting judges apparently felt that *Thomsen* was to be applied retroactively to all previous transactions when they stated:

> Finally, the opinion [*Thomsen*] may solve one litigant's immediate problem, but it does so by adopting a view that is decidedly minority in nature. It also makes a 180 degree turn which may place in jeopardy thousands of long-time commercial transactions made in good faith and in reliance upon our prior adherence to the view held by most courts and other legal authorities. This not only may have an adverse effect upon assignee banking institutions *but on many small individual assignee holders of such paper.*

80 Wn. 2d at 418, 495 P.2d at 340.

42. *See* Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling,* 42 N.Y.U.L. REV. 631, 638 (1967). For a case in which this procedure was applied, *see* Rollinger v. J.C. Penney, 192 N.W.2d 699 (S.D. 1971). For an analysis of prospectivity, see the articles cited in note 36 *supra*.

sales of consumer goods and services and, in addition to the 12 percent limit it imposes on service charges, provides various protections such as: preservation of the buyer's defenses against an assignee or due course holder,[43] a requirement that any unearned service charge be refunded when the buyer prepays the time balance,[44] a provision under which a customer making subsequent installment purchases before earlier purchases are paid off is entitled to have later payments applied ratably towards the earlier purchases according to the original purchase price,[45] and a "cooling off" period whereby a sale solicited outside the buyer's place of business may be cancelled within three business days.[46]

It appears that under the reasoning of *Thomsen* these protections will be denied to a vast number of consumers. This result could occur because R.C.W. ch. 63.14 applies only to retail installment contracts and charge agreements between retail buyers and sellers;[47] the statute does not apply to cash sales or loans, the labels the court affixed to the *Thomsen* transaction. The *Thomsen* majority eliminated any lingering doubt regarding rejection of the applicability of the Retail Installment Sales Act when it stated:[48]

> Since the act [R.C.W. ch. 63.14] does not purport to regulate third-party financing of purchases of goods or services, it does not cover the question presented in this case.

R.C.W. ch. 63.14 makes no distinction between the service charge limitation and the other protections; therefore, the Act may now apply only to those installment sales where there is not such a nexus between the seller and the third party financier as that which existed between Carter Motors and NBC. Perhaps the court did not intend such a

43. WASH. REV. CODE §§ 63.14.020, .150 (Supp. 1972).
44. WASH. REV. CODE § 63.14.080 (Supp. 1972).
45. WASH. REV. CODE § 63.14.110 (Supp. 1972).
46. WASH. REV. CODE § 63.14.154(1)(c) (Supp. 1972). This three day limit is effective as of January 1, 1973. Under prior law, there was a one day limit.
The Retail Installment Sales Act contains other protections for the consumer, including a prohibition against clauses whereby the buyer consents to suit in a foreign county, WASH. REV. CODE § 63.14.150 (Supp. 1972), and authority for a declaratory judgment action to test the legality of the service charges under a contract, WASH. REV. CODE § 63.14.152 (Supp. 1972).
47. *See* WASH. REV. CODE § 63.14.010 (Supp. 1972).
48. 80 Wn. 2d at 412, 495 P.2d at 337.

result. If it did not, the court in a future opinion could limit the *Thomsen* agency theory to the usury area, thereby preserving the other protections of R.C.W. ch. 63.14 for consumers in the same situation as Greg Thomsen.

CONCLUSION

The *Thomsen* case made significant inroads on the somewhat anachronistic distinction between a loan and a credit sale. In so doing, however, the opinion generated substantial uncertainties for both financial institutions and consumers.[49] The court might easily have accomplished the result it sought in *Thomsen* without creating the accompanying problems if instead of adopting an agency theory it had prospectively overruled *Hafer,* thereby eliminating the time price doctrine. Such a ruling would have avoided the problems of retroactivity and would have preserved the protections of R.C.W. ch. 63.14 for consumer sales. In view of the court's strong suggestion that the future vitality of *Hafer* is in doubt, it is unclear why the court did not take this opportunity to hasten the demise of the time price doctrine.

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49. Another uncertainty presented by *Thomsen* is its impact in the disclosure area. The Retail Installment Sales Act sets forth certain mandatory formalities for disclosing the terms of a financing arrangement. WASH. REV. CODE § 63.14.040 (Supp. 1972). Since the applicability of WASH. REV. CODE ch. 63.14 may have been narrowed considerably by *Thomsen,* credit arrangements such as that involved in *Thomsen* may no longer be subject to those disclosure requirements. However, creditors must still comply with federal truth-in-lending provisions. 15 U.S.C. 1601 *et seq.* (1970); 12 C.F.R. § 226 *et seq.* (Supp. 1972).

Counsel should also take note of the dissenting opinion and its possible future implications. *Thomsen,* 80 Wn. 2d at 417, 495 P.2d at 340. The dissent argues that the decision should have been based upon the single document requirement of WASH. REV. CODE § 63.14.020 (1963):

> Every retail installment contract shall be contained in a single document which shall contain the entire agreement of the parties including any promissory notes or other evidences of indebtedness between the parties relating to the transaction. . . .

Since Greg Thomsen initially signed a purchase order that lacked the essential terms (only later signing a conditional sales contract that set forth the entire agreement), the dissenting judges felt the decision should be based upon that failure. Although a dissenting opinion lacks the force of law, this dissent was signed by three judges and could be indicative of future court action.

Note, however, that for the sale of motor vehicles, WASH. REV. CODE § 46.70.130 (1961) requires a separate itemization of the proposed contract terms. A separate purchase order is also contemplated by WASH. REV. CODE § 46.70.180(4) (1969), which is designed to prevent dealer abuse of such a document. These statutory provisions create doubt as to the validity of the position taken in the dissenting opinion.

Since *Thomsen* dealt almost exclusively with statutory law, it is possible for the state legislature to clarify matters considerably. Remedial legislative action should involve a definitional revision of both the usury statute and Retail Installment Sales Act. Thus, for example, the Retail Installment Sales Act could be drafted so as to apply explicitly to the transaction involved in *Thomsen;* correlatively, a proviso could be added to the usury statute specifically excluding such a transaction.[50] A revision should also eliminate other uncertainties, such as whether a discount of paper to a third party financier is to be considered part of the finance charge subject to statutory limits.[51] An alternative statutory proposal could involve a comprehensive revision of all legislation dealing with loans and credit sales. One example of such a proposal is the UNIFORM CONSUMER CREDIT CODE, presently being considered by the Washington legislature.[52] Regardless of the direction taken by the legislature, it should act quickly to eliminate the ambiguities created by *Thomsen.*

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50. This could easily be accomplished by stating that a "loan" or "forbearance" does not include an installment sales contract even though assigned to a third party financier, and correspondingly, that the Retail Installment Sales Act does cover such a transaction if it involves a retail sale of goods or services to a consumer. Under such a formulation, the definition of an installment sales contract must explicitly encompass transactions such as that involved in *Thomsen* so as to avoid the "direct loan" label affixed to the installment sales contract in that case.

51. *See* note 31 *supra.* Any legislation should also explicitly authorize an action by a debtor to recover the usury penalties and establish a statute of limitations period within which such an action must be commenced. *See* notes 32 and 34 *supra.*

52. S. B. 213, WASH. LEG., 42d SESS. (1971).