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Casenotes: Usury — Maryland Annotated Code, Article 49 — a Lender's Retention of Loan Related Costs, Unless Exempted, Constitutes Interest — Unpaid Balance Is That Sum Actually Owed by a Borrower to a Lender. *Tri-County Fed. Sav. & Loan Ass'n v. Lyle*, 280 Md. 69, 371 A.2d 424 (1977)

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USURY — MARYLAND ANNOTATED CODE, ARTICLE 49 — A LENDER'S RETENTION OF LOAN RELATED COSTS, UNLESS EXEMPTED, CONSTITUTES INTEREST — UNPAID BALANCE IS THAT SUM ACTUALLY OWED BY A BORROWER TO A LENDER. *TRI-COUNTY FED. SAV. & LOAN ASS'N v. LYLE*, 280 Md. 69, 371 A.2d 424 (1977).

I. INTRODUCTION

Historically, the exacting of interest upon a loan has had a long and checkered existence. The first exhortation against its practice is at least 2500 years old.¹ Yet, even in Biblical times, usury enjoyed a flourishing traffic and the imaginative entrepreneur even then could find loopholes in its prohibition.² During the Middle Ages, interest in any form was considered usury, severe penalties being meted out to those who engaged in the "filthy lucre."³ Usury was the source of Shakespeare's commentary in *The Merchant of Venice*. No less a logician than Thomas Aquinas found the practice abhorrent and the conventional Calvin dealt with it "as an apothecary doth with poison."⁴

Today, it is almost impossible to imagine a modern society without a uniform practice of charging interest on money. Yet its practice is not left uncontrolled, for statutes in every state regulate its use.⁵ It becomes particularly important, then, for the modern-day lender to fully comprehend and comply with usury statutes in order to avoid seemingly innocuous practices which may result in protracted litigation. This analysis will treat the *Tri-County* decision in light of past case history and underlying considerations of policy. The decisions reached by other jurisdictions on the issues will be compared to Maryland's position. Finally, some implications of the *Tri-County* decision will be discussed as they pertain to the responsibilities of the Maryland lender.

In April of 1974, Deveroe and Florence Lyle executed a \$60,000 note bearing interest at eight percent with the Tri-County Federal Savings & Loan Association of Waldorf. The loan was to cover the costs of a residential lot and construction of a house. Payment of the note was secured by a deed of trust which referred to the note. The terms of the agreement required an immediate disbursement to the Lyles of \$15,000 which was to cover the

1. *Deuteronomy* 23:19 (King James): "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of any thing that is lent upon usury."

2. *Deuteronomy* 23:20 (King James): "Unto a stranger thou mayest lend upon usury; but unto thy brother thou shalt not lend upon usury." It was thought that this passage allowed a Christian to exact interest upon a loan made to a Jew but not to a brother Christian and vice versa.

3. Bernstein, *Background of a Gray Area in Law: The Checkered Career of Usury*, 51 A.B.A.J. 846 (1965).

4. *Id.*

5. Lowell, *A Current Analysis of the Usury Laws: A National View*, 8 SAN DIEGO L. REV. 193 (1971).

purchase price of the lot. Thereafter, the balance of \$45,000 would be paid in nine separate installments as the construction of the home progressed. At the time of the loan settlement, a \$60,000 check was endorsed by the Lyles, \$15,000 of which was paid over to them; the remaining \$45,000 was deposited in an account maintained by Tri-County in an affiliated bank.⁶ Also collected at the settlement were a \$60 appraisal fee, a \$10 credit report fee, and \$90 for nine inspection fees,⁷ each of which was subsequently disbursed to another party.

In September, 1974, the Lyles abandoned their construction plans, and returned the \$15,000 to Tri-County. The interest paid by the Lyles during the period of April to September, 1974 was at all times computed on the full \$60,000 loan. Thereafter, the Lyles brought suit to recover damages from Tri-County pursuant to Article 49, Section 8 of the Maryland Annotated Code, which provided that an aggrieved borrower could recover from a usurious lender the greater amount of \$500 or treble the value paid in excess of the maximum legal rate of charges and interest.⁸

The Lyles advanced two arguments on their behalf. They averred that the \$60 appraisal fee and the \$10 fee for the credit report constituted interest. Such charges, when combined with the interest charged on the loan, exceeded eight percent, thereby rendering the loan usurious. Secondly, the Lyles contended that the interest charged from April 11 to September 24 on the \$45,000, an amount never subject to their control and never used by them, also exceeded the maximum legal rate.⁹

II. LOAN-RELATED COSTS

In *Tri-County*, the Maryland Court of Appeals examined Article 49 of the Maryland Annotated Code. At issue was whether particular practices engaged in by a lender increased the amount of interest on a loan. The first issue raised by the Lyles was whether the fees charged by Tri-County for a credit report and an appraisal constituted interest under Article 49.¹⁰ In Maryland, interest is defined as "any compensation directly or indirectly imposed by a

6. The \$45,000 was deposited to an account maintained by Tri-County at the Bank of Southern Maryland. Tri-County did maintain a record of "loans in process" and the balance kept on hand in its account was said to always be equal to or greater than the total amount committed to loans. *Tri-County Fed. Sav. & Loan Ass'n v. Lyle*, 280 Md. 69, 71, 371 A.2d 424, 425 (1977).

7. Since the construction of the house was later abandoned, the \$90 sum for inspection fees ultimately was returned to the Lyles, thus playing no part in the subsequent action. *Tri-County Fed. Sav. & Loan Ass'n v. Lyle*, 280 Md. 69, 71, 371 A.2d 424, 425 (1977); *Lyle v. Tri-County Fed. Sav. & Loan Ass'n*, 33 Md. App. 46, 48, 363 A.2d 642, 643 (1975).

8. "Any person violating the usury provisions of this article shall forfeit three times the amount of interest and other charges authorized by this article or the sum of \$500.00, whichever is greater." MD. ANN. CODE art. 49, § 8 (1972).

9. 280 Md. at 72, 371 A.2d at 425.

10. *Id.*

lender for the extension of credit for the use or forbearance of money."¹¹ A lender is guilty of usury if he collects interest at a rate greater than the statutory limits.¹² At the time the Lyles' loan was made, the Maryland Code limited interest to six percent, but eight percent could be charged if there was an agreement in writing between the lender and the borrower.¹³ As of this writing, a lender may charge more than eight percent when dealing with small loans,¹⁴ consumer loans,¹⁵ secondary mortgage loans,¹⁶ retail credit accounts,¹⁷ and retail installment sales.¹⁸

In 1968, largely as a result of home financing demands and a tight money market, the Maryland General Assembly made significant changes in Article 49.¹⁹ The new legislation specifically exempted from the definition of interest certain charges paid in connection with a loan, including late charges, limited prepayment penalties, fees collected at the direction of the government, and narrowly prescribed service charges.²⁰ In *Tri-County*, the contro-

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11. MD. COM. LAW CODE ANN. §12-101(e) (1975).
 12. *Id.* §12-101(k). At the time *Tri-County* made the loan, MD. ANN. CODE art. 49, §6 (1972), defined usury.
 13. MD. ANN. CODE art. 49, §3 (1972).
 14. MD. COM. LAW CODE ANN. §12-306 (1977).
 15. *Id.*
 16. *Id.* §12-404(b) (1975).
 17. *Id.* §12-505 (1975).
 18. *Id.* §12-609 to 610 (1975).
 19. *B. F. Saul v. West End Park North, Inc.*, 250 Md. 707, 711, 246 A.2d 591, 594 (1968).
 20. MD. ANN. CODE art. 49, §1(b)(1)-(5) (1972) (Ch. 453, §1, 1968 Md. Laws) (current version at MD. COM. LAW CODE ANN. §12-105 (1977)). (b) The following compensation or charges may be paid in connection with a loan without considering it interest and such compensation or charges collected shall not be interest or deemed usurious under any other provision of this article. (1) A delinquent or late charge of two dollars (\$2.00) or one twentieth ($\frac{1}{20}$ th) of the total amount of any delinquent or late periodic installment of delinquent interest and principal only, whichever is greater, if so provided in the loan contract; the delinquent or late charge shall not be imposed more than once for the same delinquency or lateness; and the delinquent or late charge shall not be imposed until the delinquency has extended for at least fifteen (15) calendar days. (2) A charge or prepayment penalty, for a loan secured by a home or combination of home and business property, agricultural property and commercial loans under \$5,000, only where provided for in the original loan contract, upon prepayment of the principal amount of the loan provided the charge shall not be more than two (2) months advance interest on the aggregate amount of all prepayments made on the loan in any twelve (12) month period, that are in excess of 33 $\frac{1}{3}$ % of the amount of the original mortgage; no such charge may be imposed after the expiration of three (3) years from the date the loan was made. (3) Fees or charges collected at the direction of a government or governmental agency and actually paid thereto. (4) A service charge, where provided for by contract, on a commercial lending transaction if money is advanced on the security of inventory or accounts receivable, for investigation and continuing supervision of collateral. (5) A service charge, where provided for by contract, may by a securities broker or a dealer in securities on a transaction if money is advanced on the security of pledged securities and if services are rendered in the collection of income thereon, the crediting and disbursement thereof, and the furnishing of income tax and other information in connection therewith.

ery focused upon Article 49, Section 1(b)(6)(c) which stated that charges not considered interest were "premiums and costs not retained by the lender for insuring or indemnifying the lender against loss or liability on or in connection with the loan."²¹ The court found that, although appraisal and credit report fees were not specifically exempted from the definition of interest under Article 49, Section 1, such costs, if connected with the loan, would not be interest so long as the lender did not retain the fees.²² If the fees were retained, they would be deemed interest and would add to the cumulative interest on the loan. Since the appraisal fee and the fee for the credit report were paid by Tri-County to others, such charges could not be considered interest under the statute.

This conclusion reflected the court's earlier decision in *B.F. Saul Co. v. West End Park North, Inc.*,²³ a 1968 case in which the court first interpreted the newly enacted language. In *Saul*, the court stated that "in the event of any ambiguity as to whether or not a fee or charge should be included as interest, the determining factor is whether such charge is retained by the lender and, if so, it should be treated as interest."²⁴ The *Saul* court agreed with the lower court's finding that the intent of the legislature was to prevent unscrupulous lenders from realizing additional compensation through "padded" charges.²⁵ Similarly, in *Equitable v. Insurance Comm'r*,²⁶ the court relied on the retention rule as formulated in *Saul*. *Equitable* involved an insurance premium assigned to a lender as additional collateral for the repayment of a residential mortgage loan.²⁷ The court found that the premiums paid Equitable were solely compensation for the insurance and that no portion of such premiums was compensation for the loan. Because Equitable retained the premiums, however, the premiums were considered interest and within the purview of the statute.²⁸ Writing for the court, Judge Finan observed that the Bill, which was eventually codified into Section 1(b)(6)(d), did not include the retention proviso when it was originally introduced. Unlike the original language of the Bill, the enacted version provided that insurance premiums and costs retained by the lender would be deemed interest.²⁹

21. *Id.* 1(b)(6)(c) (1972) (current version at *id.* § 12-105(c)(3)).

22. 280 Md. at 73, 371 A.2d at 426.

23. 250 Md. 707, 246 A.2d 591 (1968).

24. *Id.* at 723, 246 A.2d at 601.

25. *Id.* at 724, 246 A.2d at 602.

26. 251 Md. 143, 246 A.2d 604 (1968).

27. *Equitable* dealt with MD. ANN. CODE art. 49, § 1(b)(6)(d), whereas the decision in *Tri-County* was based upon *id.* § 1(b)(6)(c). Although the subsections dealt with different types of loan-related costs, the retention prohibition was included in both.

28. 251 Md. at 148, 246 A.2d at 607.

29. *Id.*

In both cases, the court stated that charges retained by the lender constituted interest unless they were specifically exempted under Article 49. If the lender acts as a middleman between the borrower and independent parties who perform the service, the fees will not be interest.³⁰

With the retention rule, Maryland has exalted convenience over logic. The mere fact that a lender retains service fees is a questionable standard for determining what constitutes interest charges. In the absence of a statute to the contrary, most jurisdictions hold that the payment by a borrower of reasonable expenses incident to a loan, when made in good faith and not as consideration for the loan, does not constitute interest.³¹ In these jurisdictions, the element of retention does not per se render such costs interest. Typically, the charge must be confined to a specific service or expense incidental to the loan in such a way as to preclude its use as a device through which additional interest on the loan may be exacted.³² The underlying rationale is that expenses incidental to the administration of the loan, which furnish the lender satisfactory security for its repayment, cannot be considered compensation for the use of the money borrowed.³³ If the lender has at its disposal in-house personnel who are capable of performing these services, it is only reasonable for the lender to provide the services and exact reasonable compensation for them.

Most jurisdictions have not adopted the retention language found in Maryland. They generally determine, under the facts of each case, whether a charge is a legitimate loan-related expense.³⁴

Where a transaction is in reality a loan of money, whatever may be its form, and the lender charges for the use of his money a sum in excess of interest at the legal rate, by whatever name the charge may be called, the transaction will be held to be usurious. The law considers the substance and not the mere form or outward appearance of the transaction.³⁵

30. 280 Md. at 73, 371 A.2d at 426.

31. *Klett v. Security Acceptance Co.*, 38 Cal. 2d 770, 242 P.2d 873 (1952); *Ex Parte Fuller*, 15 Cal. 2d 425, 102 P.2d 321 (1940); *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 254 P. 956 (1927), *reh. denied*, 255 P. 805 (1927); *Iowa Sav. & Loan Ass'n v. Heidt*, 107 Iowa 297, 77 N.W. 1050 (1899); *Hansen v. Duvall*, 333 Mo. 59, 62 S.W.2d 732 (1933); *Silver Homes, Inc. v. Marx & Bendorf, Inc.*, 206 Tenn. 361, 333 S.W.2d 810 (1960); *Chakales v. Djiovanides*, 161 Va. 48, 170 S.E. 848 (1933); *see cases collected in Annot.*, 105 A.L.R. 795 (1936); *Annot.*, 63 A.L.R. 820 (1929); *Annot.*, 21 A.L.R. 797 (1922).

32. *Klett v. Security Acceptance Corp.*, 38 Cal. 2d 770, 242 P.2d 873 (1952).

33. *Id.*

34. *Banks v. Flint*, 54 Ark. 40, 14 S.W. 769 (1890); *Klett v. Security Acceptance Co.*, 38 Cal. 2d 770, 242 P.2d 873 (1952); *Schmid v. City Nat'l Bank*, 132 Tex. 115, 114 S.W.2d 854 (1938); *Chakales v. Djiovanides*, 161 Va. 48, 170 S.E. 848 (1933). *See generally Danforth, Usury: Applicability to Collateral Fees and Charges*, 16 S.D.L. REV. 52 (1971).

35. *Ripple v. Mortgage Corp.*, 193 N.C. 422, 424, 137 S.E. 156, 158 (1927).

The form vs. substance approach compels a court to consider the nature of the fee, not its recipient. Several basic considerations, by no means consistently applied, often appear persuasive in such cases. The purpose of usury law is, after all, to regulate the amount of money charged for the use or forbearance of a certain sum. The lender should be able to relate any charge in excess of permissible interest to actual out-of-pocket expenses incidental to the loan; such expense should be of the type commonly incurred and accepted in the lending community for services related to administering the loan.³⁶ The expense should be reasonable in relation to the service rendered.³⁷ The borrower should agree in advance to the payment of the expense.³⁸ If the lender can satisfy these criteria, courts in most jurisdictions will find that the lender has operated in good faith and, therefore, the charges will not be deemed interest.³⁹

One clear message of *Tri-County* is that the mere retention of any costs not specifically exempted will be dispositive of the issue. The lender will be discouraged from providing appraisals, credit reports, and similar services since, if he is to be compensated for them, he must charge a lower rate of interest on the loan in order to keep the cumulative interest within the legal rate. It is not difficult, however, to imagine devices by which lenders may attempt to avoid the retention rule and benefit from the service. Nor is it difficult to predict the questions which may have to be litigated. For instance, if the borrower pays the lender for a loan-related cost and the lender in turn pays the amount to a third party who performed the service, does the lender "retain" the charge within the meaning of the statute if the third party returns a portion of the cost to the lender as a "finder's fee" or some equally euphemistic designation? If the lender sets up a subsidiary corporation which provides loan-related services, can it truly be said that the lender does not profit from the loan-related service? These questions have yet to be addressed by the Maryland courts.

Maryland's retention rule may raise as many questions as it answers. Certainly, as an expedient formula, it has much to recommend it. Simply, if a lender retains loan-related costs, they will be considered interest. To that extent, the rule provides certainty in commercial transactions without initially having to determine

36. *Turner v. Younker Bros., Inc.*, 210 N.W.2d 550 (Iowa 1973).

37. *Altherr v. Wilshire Mortgage Corp.*, 104 Ariz. 59, 448 P.2d 859 (1969); *Kroll v. Windsor*, 259 Minn. 200, 107 N.W.2d 53 (1961); *Brown v. Robinson*, 224 N.Y. 301, 120 N.E. 694 (1918), *reh. denied*, 225 N.Y. 638, 121 N.E.857 (1918); *see cases collected in Annot.*, 91 A.L.R. 2d 1386 (1963).

38. *Pushee v. Johnson*, 123 Fla. 305, 166 So. 847 (1936); *Brown v. Robinson*, 224 N.Y. 301, 120 N.E. 694 (1918); *Life Ins. Co. of Virginia v. Smathers*, 212 N.C. 40, 191 S.E. 851 (1937); *Rossberg v. Hoelsapple*, 128 Utah 544, 260 P.2d 563 (1953).

39. It is the element of good faith with which many courts are chiefly concerned. *E.g.*, *Siebert v. Hall*, 63 F.2d 517 (8th Cir. 1933).

whether the costs are reasonable, as in those states which follow the ad hoc approach. Such certainty diminishes possible litigation. But as the earlier queries suggest, the question of when a lender "retains" such costs may very well present an area of substantial disagreement. Further refinement of the retention rule will be necessary before the status of such charges is definitively established.

III. THE "BALANCE"

The second issue presented to the court was whether Tri-County, by charging eight percent interest on the *full amount* of the loan from the date of settlement, while holding \$45,000 in its own account, was liable for usury under Maryland law.⁴⁰

Article 49, Section 3 of the Maryland Annotated Code states, in relevant part:

Interest may be charged not in excess of the rate of six percent (6%) per annum simple interest on the *unpaid balance*, except that interest may be charged at the rate not in excess of eight percent (8%) per annum simple interest on the *unpaid balance* under an agreement in writing between the lender and the borrower. (Emphasis added.)⁴¹

The Lyles argued that the \$45,000, which had not been disbursed to them at the time of the loan settlement, did not constitute part of the "unpaid balance" and that, therefore, interest collected on the total \$60,000 exceeded the rate of interest allowed under Article 49, Section 3.⁴² Tri-County contended that the \$45,000 was part of the "unpaid balance," since it was at all times ear-marked for the Lyles and committed by Tri-County for the Lyles' use and benefit.⁴³

The issue was one of first impression in Maryland under the 1968 statute. The court found that "balance" clearly meant "that which is owed by a borrower to a lender."⁴⁴ So long as the \$45,000 remained in the sole control of Tri-County, and was not subject to the control of the Lyles, interest on the balance was usurious, because the \$45,000 was not, and could not be, a part of the "balance" of the loan to the Lyles.⁴⁵

40. 280 Md. at 72, 371 A.2d at 425.

41. MD ANN. CODE art. 49, § 3 (1972) (Ch. 453, § 1 1968 Md. Laws) (current version at MD. COM. LAW CODE ANN. § 12-103 (1977)).

42. Brief for Appellee, Tri-County Fed. Sav. & Loan Ass'n v. Lyle, 280 Md. 69, 371 A.2d 424 (1977).

43. Brief for Appellant, Tri-County Fed. Sav. & Loan Ass'n v. Lyle, 280 Md. 69, 371 A.2d 424 (1977).

44. 280 Md. at 76, 371 A.2d at 427.

45. *Id.*

The word "balance" was construed in *Thillman v. Shadrick*,⁴⁶ in which the issue was whether "balance," as used in an affidavit accompanying a declaration of assumpsit, was sufficient in itself to comply with statutory provisions requiring a statement of the particulars of the alleged indebtedness. Writing for the court, Judge McSherry found that the word was unambiguous, stating:

Inasmuch as a balance is claimed, it is perfectly evident that there must be a debit and a credit side to an account from which that balance was taken. The balance so produced is not an account, but the result of an account. It bears to an account precisely the same relation that a conclusion does to the premises of a syllogism.⁴⁷

The court distinguished several cases relied on by Tri-County. In both *White Eagle Polish American Building & Loan Ass'n v. Hart Miller Islands Co.*,⁴⁸ and *New Baltimore Loan & Sav. Ass'n v. Tracey*,⁴⁹ the sums were held by the lender subject to certain conditions while interest accrued unabated. But in both cases, unlike the instant case, the sums were credited to the mortgagors. While the factual situation in *Bettum v. Montgomery Fed. Sav. & Loan Ass'n*⁵⁰ was closer to that in *Tri-County*, the *Bettum* loan had been made before Article 49, Section 3 became effective, and so the case was inapposite.⁵¹

The court's interpretation of "balance" explicitly required a determination of who exercised control over the \$45,000. Having the discretion to withhold or pay progress payments to the contractor evidences control of the sum. In such a transaction, the lender retains this discretion in order to see that the house — the lender's collateral — is constructed in a workmanlike manner. It was not merely the exercise of control by Tri-County that the court found persuasive. Equally important to the holding was the total lack of control over the \$45,000 by the Lyles: they could make no use of the money until construction actually began. The account in which the money was deposited, although a non-interest bearing account,⁵² was in the name of Tri-County;⁵³ Tri-County's control was *exclusive*.

46. 69 Md. 528, 16 A. 138 (1888).

47. *Id.* at 531, 16 A. at 140, cited in *Lyle v. Tri-County Fed. Sav. & Loan Ass'n*, 33 Md. App. 46, 54, 363 A.2d 642, 647 (1975).

48. 168 Md. 199, 178 A. 214 (1934).

49. 142 Md. 211, 120 A. 441 (1923).

50. 262 Md. 360, 277 A.2d 600 (1971).

51. In *Bettum*, the loan transaction took place in 1966. The applicable statute at the time read: "Interest may be charged or deducted at the rate of six percent per annum and the same may be calculated according to the standard laid down in Rowlett's tables." MD. ANN. CODE art. 49, § 1 (1957). Thus, an interpretation of "unpaid balance" proved unnecessary.

52. 280 Md. at 76, 371 A.2d at 427.

The test for usury adopted by the Maryland Court of Appeals in *Tri-County* was that interest must be computed on the amount owed to the lender, that is, the "unpaid balance." In the usury statutes of most states, the term "unpaid balance" does not appear.⁵⁴ The approach taken by these jurisdictions follows from the proposition that interest should only be charged on sums made available to the borrower. In most jurisdictions, if, as a condition of making the loan, the borrower is required to leave part of the money on deposit with the lender, the transaction is usurious if the interest paid for the loan amounts to more than legal interest on the sum actually available for the use of the borrower.⁵⁵ This is certainly true if the amount so retained is used to secure the loan.⁵⁶ However, a casual or brief delay in handing over a portion of the sum to the borrower does not render a transaction usurious in the absence of a usurious intent.⁵⁷ Indeed, at least one court has said that when it does not appear for what purpose a portion of the loan is retained by the lender, it will not be deemed interest without a finding of usurious intent.⁵⁸ In addition, when a transaction is non-usurious, a borrower cannot render it usurious by a voluntary act or omission.⁵⁹ In one opinion, based on a strict reading of a usury statute, a Virginia court decided that the lender's retention of part of the proceeds of a loan did not constitute usury, but merely represented an unlawful withholding of money.⁶⁰

Florida is one state that, in the absence of specific statutory language, has consistently held that such a retention constitutes usury. In *Mindlin v. Davis*,⁶¹ the court stated that since time, as well as the amount of principle, is a factor in the calculation of interest, the retention of a substantial portion of the loan without a corresponding abatement of interest on the amount retained has the effect of substantially increasing the percentum of interest on the

53. *Id.*

54. *E.g.*, CAL. CIV. CODE § 1916-3 (West 1978). FLA. STAT. ANN. § 687.02 (West 1977).

55. 45 AM. JUR. 2d, *Interest and Usury* § 113 (1969). The court of appeals cited to some length this section in its opinion. *Tri-County Fed. Sav. & Loan Ass'n v. Lyle*, 280 Md. 69, 74, 371 A.2d 424, 426. *See Pellerin Laundry Mach. Sales Co., v. Hague*, 219 F. Supp. 629 (W.D. Ark. 1963); *Planters' Nat'l Bank v. Wysong & Miles Co.*, 177 N.C. 380, 99 S.E. 199, *cert. denied*, 250 U.S. 665 (1919).

56. *Vee Bee Service Co. v. Household Fin. Corp.*, 51 N.Y.S.2d 590 (Sup. Ct. 1944), *aff'd*, 55 N.Y.S.2d 570 (1945).

57. 45 AM. JUR. 2d, *Interest and Usury* § 113 (1969); *see cases collected in Annot.*, 12 A.L.R. 1422 (1921).

58. *Ray v. Atlantic Ins. Co.*, 207 N.C. 654, 178 S.E. 89 (1935).

59. *Atlantic Life Ins. Co. of Richmond, Va. v. Wolf*, 54 A.2d 641 (D.C. 1947). The court stated; "A loan transaction which would be free from usury if the loan were paid at the agreed maturity date is not rendered usurious by the borrower's voluntary repayment of the loan before maturity, even though, by reason of such repayment, the amount of interest received by the lender exceeds lawful interest computed to the day the loan is paid." *Id.* at 643.

60. *Chakales v. Djiovanides*, 161 Va. 48, 170 S.E. 848 (1933).

61. 74 So. 2d 789 (Fla. 1954).

62. *Id.* at 793.

actual amount advanced by the lenders and received by the borrowers.⁶² The facts in *Williamson v. Clark*,⁶³ citing *Mindlin* as controlling, were very similar to those in *Tri-County*. The mortgagees exacted interest in advance on a construction mortgage, retained the principle, and advanced it only by installments when required to meet the creditors' bills. Because this procedure materially increased the interest rate, the transaction was deemed usurious.⁶⁴ California reached the same conclusion when a loan was made available to the borrower only in progress installments, and the sum was held subject to conditions, some of which were not under the borrower's control.⁶⁵

In order to avoid the possibility that a borrower will avail himself of a usury theory either as a cause of action or as a defense to a lender's action to collect interest, it will be necessary for Maryland lenders to bear in mind the import of *Tri-County*. Only those funds made available to the borrower and not exclusively controlled by the lender may be considered interest-generating loans. This, however, does not preclude the lender from controlling the allocation of the amount by subjecting it to certain prescribed conditions. The court did not say that the lender must surrender total control of the amount, or that the borrower must have complete and immediate access. A fair reading of the decision requires that for a rate of interest to be usurious, it must have been computed on the sum over which the lender had total control and the borrower had none. Given this reading, even partial control by the borrower would seem to be enough to preclude the charge of usury, when, for instance, the amount is placed in escrow.⁶⁶

IV. SOME ALTERNATIVES

Today, the type of construction loan agreement found in *Tri-County*, a progress payment contract is handled one of two ways.⁶⁷ The first approach is for the lender to disburse only those amounts required by the loan agreement and limit the amount subject to interest to that money actually disbursed. If the lender exacts interest on the amount of the full loan, while retaining some portion, he will run afoul of Article 49, Section 3 if the total rate of interest exceeds the legal limit. One detrimental feature of this approach, however, is that it requires the lender to segregate large sums of

63. 120 So. 2d 637 (Fla. 1960).

64. *Id.* at 639.

65. *Penziner v. West American Finance Co.*, 133 Cal. 578, 24 P.2d 501 (1933).

66. The court said as much when it stated: "At no time was [the amount] under the Lyles' control, or under their partial control, as it might have been had it been held in escrow by others for their account, even though subject to restrictions." 280 Md. at 73, 371 A.2d at 426.

67. Interview with Charles H. Kresslein, Jr., President of the Maryland Savings and Loan League, in Baltimore, Maryland (Feb. 9, 1978).

money, at all times prepared to meet his contractual obligations, while realizing no interest on the dormant funds.

A better solution used by many Maryland lenders today is to place the sum in a separate escrow account. The escrow agent keeps the amount until the performance of a condition or the happening of a certain event. Then, the funds are delivered to the borrower. Although the lender has surrendered its control of the money, its security for the loan is nevertheless protected. Interest may then be charged on the entire amount without subjecting the lender to a possible violation of Article 49, Section 3.

In such a procedure, the escrow agent is usually affiliated with the lender, as in the case of a director of a bank, or house counsel.⁶⁸ Whether a lender's use of an affiliated escrow agent creates complete lender control and negates borrower access may be decided soon by the Maryland Court of Special Appeals. On December 28, 1977, Judge Walter R. Haile of the Circuit Court for Baltimore County had occasion to interpret *Tri-County* in *Hoffman v. Key Sav. & Loan Ass'n*.⁶⁹ In *Hoffman*, a check representing the sum loaned was endorsed by the borrowers and placed in a trust account subject to the control of the trustees who were officers, agents, and employees of the lender.⁷⁰ The issue was whether there was a violation of the Maryland usury law, when the amount loaned was deposited in the lender's institution under the name of the lender-affiliated escrow agent. Judge Haile reasoned that if the money was not in the sole control of the lender, the rationale of *Tri-County* would not apply.⁷¹ Since the trust agreement bound the trustees to make advances upon the satisfaction of certain conditions, the money deposited was not under the exclusive control of the lender.⁷² Judge Haile concluded:

It is not reasonable to infer that because the co-trustees were officers of the association that they would necessarily be acting under the control and direction of the association and on its behalf. It is more reasonable to infer that the co-trustees would have acted in accordance with their duties under the trust agreement.⁷³

The trust agreement provided the necessary control to the borrower, thus distinguishing *Tri-County* in which the lender's control was exclusive.

Judge Haile's conclusion, however, may very well be an example of elevating form over substance. The issue is whether a trust

68. *Id.*

69. No. 96103/108/291 (Balt. Co. Cir. Ct. Dec. 28, 1977).

70. *Id.* at 7.

71. *Id.* at 6.

72. *Id.* at 7.

73. *Id.* at 8.

agreement per se always operates to place enough distance between the loan and the lender to place the sum out of the exclusive control of the lender. Although Judge Haile decided the issue in the affirmative, serious questions remain. The terms of the trust agreement may be so advantageous to the lender that, as a practical matter, the lender has as much control of the sum than had he retained it without such an agreement. For instance, a trust agreement may provide that a director of the bank will act as trustee. Additionally, the agreement may contain an exculpatory clause relieving the trustee of any liability for negligent handling of funds during his tenure. The agreement may further provide that the sum will remain in a non-interest bearing account within the lender's institution until such time as the conditions of the trust agreement are fulfilled. When such terms are included within a trust agreement, what is left of the fiduciary responsibility a trustee owes to a borrower? Moreover, it is difficult to imagine a limit on the variety of such advantageous terms a lender may foist upon a borrower.

While it is true that the trustee has an obligation to the borrower with regard to the escrow funds, the trust agreement adds nothing to the underlying contract; the lender is legally obligated to disburse the amount with or without the existence of the trust agreement. It would be fatuitous to believe that a trust agreement so constructed adds anything to the borrower's control, and one must strain to conclude that such an arrangement, irrespective of its terms, always takes the amount out of the exclusive control of the lender. If the court is genuinely concerned with the substance of the transaction, it may be necessary to go behind the form of the trust agreement in order to determine its particular provisions and how those provisions relate to control of the loan. *Hoffman* may present an opportunity to the court of special appeals to clarify the issue and determine under what circumstances a trust agreement shields a lender from a charge of usury.

V. CONCLUSION

The practical effect of the *Tri-County* decision, with regard to loan-related charges retained by the lender, should not be exaggerated. Since the *Saul* decision, Maryland lenders have been acutely aware of the dangers inhering in loan-related services. *Tri-County* only reaffirmed Maryland's position that such service fees would be considered interest on the loan if retained by the lender. On the other hand, the lender's retention of part of the loan by way of a trust agreement presents a potential issue for future litigation. The trust agreement has long been a feature of Maryland construction loan transactions. If the court of special appeals determines that a trust agreement per se does not protect the lender from a charge of usury,

lending institutions state-wide may be forced to significantly alter existing policies and practices. Those lenders who presently exact interest on the total amount of the loan from the date of settlement by way of a trust agreement may be forced to limit interest on sums actually disbursed to the borrower. In any event, Maryland lenders and borrowers alike need a prompt clarification of the issue raised by the *Tri-County* court.

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