

South Dakota Adopts Limits on "All-In" 36% Rate Cap

March 31, 2017 | [Catharine S. Andricos](#)

In March, South Dakota passed two pieces of legislation limiting the application of the "all-in" 36% rate cap approved by South Dakota voters as part of Initiated Measure 21 last November. This recent legislation is a positive development not only for consumers and creditors in South Dakota, but also to the extent that it may serve as a model for those in other states where legislatures (and consumer advocates) may be considering more restrictive usury rate limitations. Through this recent legislation, South Dakota comes closer to effectuating the original intent of Measure 21, which was aimed at curbing alleged abuses by payday and title lenders, without drying up other sources of consumer credit. That said, there are still some unanswered questions of which creditors in South Dakota should be aware.

First, the good news.

After Measure 21 was approved, the South Dakota Division of Banking made waves for South Dakota creditors by broadly interpreting the Measure to mean that: (1) the 36% rate cap and all other substantive provisions of the Money Lending Licenses Act also applied to money lender licensees servicing, acquiring or purchasing retail installment contracts, not just those making loans; and (2) the types of services, products, charges, or fees that must be included in annual rate calculations for purposes of the 36% rate limitation "may, depending on the circumstances, include vehicle service and maintenance contracts, official fees and taxes, guaranteed asset protection waivers, sales taxes, title fees, lien registration fees, dealer documentary fees, returned check fees, attorney fees, and credit life or accident and health insurance." House Bill 1090 significantly reins in the Division's broad interpretation by establishing the following:

- *Carve-Out for Retail Installment Sales Transactions.* House Bill 1090 amends the MLLA to clarify that the rate cap applies only to licensees contracting for or receiving finance charges "pursuant to a loan," and adds a provision making clear that "loan" does not include an "installment sales contract," as defined under South Dakota's Consumer Installment Sales Contracts Act. This amendment makes clear, once and for all, that retail installment sales transactions are not subject to the rate cap or any other substantive provisions of the MLLA.
- *Definition of Fees to be Included in Rate Calculation.* For money lender licensees making loans under the MLLA, House Bill 1090 adds a provision limiting what fees must be included in the rate calculation for purposes of determining compliance with the 36% rate cap. For all loans, the following fees are not "incident to the extension of credit" and are excluded from the rate calculation: late fees, return check fees, and attorney's fees incurred upon consumer default. For vehicle purchase loans, the following fees also are excluded: fees for optional maintenance

agreements and extended service contracts, official fees and taxes, sales tax, title fees, lien registration fees, and dealer documentary fees.

In other good news for commercial lenders, Senate Bill 166 amends the rate cap to clarify that it does not apply to licensees making certain commercial-purpose loans as follows:

- *Carve-Out for Certain Commercial-Purpose Transactions.* Senate Bill 166 amends the rate cap to clarify that it does not apply to licensees making commercial-purpose loans of \$5,000 or more, provided that the loan (a) is not secured by a nonpurchase money security interest in a motor vehicle, and (b) is to a borrower with a federal employer identification number.

What's the bad news? Well, other than that traditional installment lenders are still stuck with the 36% rate cap, not much. But, it is important to note that both pieces of legislation do not take effect until July 1, 2017. Although it seems unlikely that the Division would apply such a broad interpretation of the rate cap in light of the recent legislation, it is not entirely clear how creditors should proceed until the new limitations take effect on July 1, 2017.

So, while there may be calmer waters ahead, it is not yet smooth sailing for creditors in South Dakota.

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