

OPINION NO. 1577**Syllabus:**

A carrying charge in an employment contract of a flat six percent of the unpaid balance of the employment fee for the privilege of obtaining a sixty day extension for payment violates Section 1343.01, Revised Code, and constitutes a usurious rate of interest. An employment contract containing a provision for such a charge should not be approved by the Division of Licensing.

Any contractual charge made by an employment agency to extend the payment of the placement fee cannot exceed eight per cent and must be computed on a per annum basis from the time of the charge until payment.

To: J. Gordon Peltier, Director of Department of Commerce, Columbus, Ohio
By: William B. Saxbe, Attorney General, December 4, 1964

Your request for my opinion reads as follows:

"Several private employment agencies have contracts with employees whom they have placed in industry, which provide 'add six percent of unpaid fee balance as carrying charge for extended payments, not to exceed sixty days from acceptance'. This means that on any unpaid balance of the fee a six percent charge is made for any part of the fee not paid in cash and that the unpaid balance, plus the six percent charge must be paid in sixty days. This is at a simple interest rate of thirty-six percent, figured on an annual rate.

"Other contracts provide for payment of one percent or two percent per month on the unpaid balance of such payment fee, which would be twelve percent of twenty-four percent at an annual rate.

"These agencies are not lending institutions, nor are they engaged in the business of discounting commercial paper, and they do not have small loan licenses.

"The Division of Licensing, Department of Commerce, is charged with approving contracts of this nature, and said division requests your opinion concerning the above matters as to whether or not this is a usurious rate of interest in violation of Section 1434.01, (sic), Ohio Revised Code. These charges are designated by various names such as, 'Service Charge', 'Carrying Charge', 'Interest Charge', etc."

Section 1343.01, Revised Code, establishes the legal rate of interest in Ohio as follows:

"The parties to a bond, bill, promissory note, or other instrument of writing for the forbearance of payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per cent per annum payable annually."

In order to determine whether an employment contract containing language as set forth in your letter of request is usurious, it is necessary to find that the contract is an instrument for the forbearance of the payment of money, that the so-called carrying charge is in fact interest, and that such interest is in excess of the rate permitted by law.

The purpose for enacting the usury laws of this state was

stated in the case of Midwest Properties Co. v. Renkel, 38 Ohio App., 503, on page 509:

"When one considers the primary purpose of Section 8303 (now Section 1343.01, Revised Code) which fixes the maximum rate of interest which parties may stipulate in certain instruments, it is quite clear that the Legislature intended to guard embarrassed debtors against greed and rapacity of harsh creditors. The need for such protection of debtors seems to us apparent in all cases where the relation of debtor and creditor is formed, whether it be by means of a bond, bill, promissory note, or other instrument of writing for the payment of money at any future time."

Because the prohibition of the usury statutes is directed against the lender or creditor for the protection of the debtor, contracts are construed strongly against the lender or creditor. Bittner v. Jones, 37 Ohio App., 190. The construction favoring the debtor is proper since the statute enforces no penalty against the lender or creditor but only the recalculation of the interest rate and a credit for the payment of interest in excess of the statutory maximum. Insurance Co. v. Carpenter, 40 Ohio St., 260.

As stated in Midwest Properties Co. v. Renkel, *supra*, and other cases, it is the creation of a debtor-creditor relationship upon which the usury laws operate and it is not necessary that there be an actual loan of money between the parties. In Bell v. Idaho Finance Co., 255 P. 2d., 715, 718, the court stated:

"In case of forbearance of an existing debt, the consideration for the obligation, payment of which is deferred, is not important; it may be for money loaned, property sold, services rendered or other consideration sufficient to support a contract."

The term forbearance as used in Section 1343.01, *supra*, is defined in 91 C. J. S. 598, Section 23 as follows:

"The 'forbearance' as used in the usury acts signifies the contractual obligation of the creditor to forbear during a given period to require of the debtor payment of an existing debt then due and payable. Where there is no existing debt there can be no forbearance to collect it, whatever form the transaction may take. The forbearance, or giving time for the payment, of a debt is, in substance, a loan, and when there is an existing and matured debt, a charge made by the creditor for his binding promise to forbear for a definite period to collect it, greater than that allowed by law, will

subject the debt forborne to all the penalties prescribed by the law for usury."

The common definition of interest for money is that compensation allowed by law or fixed by contract and paid by the borrower to the lender, or debtor to the creditor for the use of money or the forbearance of payment. Insurance Co. v. Carpenter, supra, 31 Ohio Jur. 2d., 4 and 5, Section 2. In the case of Heckett Rec'r. v. Kripke, 62 Ohio App., 89, the court clearly held that interest charged for the forbearance of the payment of a debt after maturity cannot exceed the limit fixed by the usury statutes.

Under the terms of the employment contract you have presented it is provided "add six percent of unpaid fee balance as carrying charge for extended payments, not to exceed sixty days from acceptance." The term "acceptance" is defined in Rule V of the Regulations governing Private Employment Agencies as follows:

"5.02 All contracts or agreements between the licensee and the applicant shall include, where applicable, the following provisions (this exact language is not required):

"(A) ACCEPTANCE - A position is accepted when the applicant agrees to begin work on a fixed date at an agreed remuneration."

Pursuant to an employment contract, the applicant agrees to pay a fee to the agency upon his placement in some kind of permanent employment. At the time of acceptance a debt is created for services rendered by the agency and such debt becomes due and payable. By the terms of the contract the agency agrees to forebear the collection of the debt for sixty days and for such forbearance it asks as its compensation to be paid an additional sum of six per cent on the unpaid balance. On the basis of the foregoing it is my opinion that an employment contract as you have described is an instrument for the forbearance of the payment of a debt created at the time of acceptance and that the so-called "carrying charge" is interest within the meaning of Section 1343.01, supra. To conclude otherwise would be to say the six percent charge is a penalty for nonpayment and it is clearly established that courts do not look with favor upon penalties and forfeitures. Heckett Recr. v. Kripke, supra.

The remaining question is whether the interest is in excess of the rate permitted by law. This is easily determined as the rate of interest allowed by law must be computed on an annual basis, and must be computed from the time interest attaches until payment. Under the provision herein proposed to be included in employment contracts, the computation of the charge is a flat six percent of the unpaid balance as of acceptance which as you have indicated would far exceed that permitted under Section 1343.01, supra.

Although intent is an element in establishing usury, it is not necessary for the Division of Licensing to consider intent

in determining whether employment contracts are to be approved. It is only necessary to determine if the agency would subject the applicant for employment to an excessive or illegal rate of interest by the terms of the proposed contract.

Therefore, it is my opinion and you are advised that a carrying charge of a flat six percent of the unpaid balance of the employment fee for the privilege of obtaining a sixty day extension for payment violates Section 1343.01, supra, and constitutes a usurious rate of interest. An employment contract containing a provision for such a charge should not be approved by the Division of Licensing. Any contractual charge made by an employment agency to extend the payment of the placement fee cannot exceed eight per cent and must be computed on a per annum basis from the time of the charge until payment.