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How the Poor are Getting Poorer: The Proliferation of Payday Loans in Texas via State Charter Renting.

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COMMENTS

HOW THE POOR ARE GETTING POORER: THE PROLIFERATION OF PAYDAY LOANS IN TEXAS VIA STATE CHARTER RENTING

CHRISTOPHER KONNEKER*

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I. Introduction

Exercise caution in your business affairs, for the world is full of trickery. But let this not blind you to what virtue there is; many persons strive for high ideals, and everywhere life is full of heroism.[1]
-Max Ehrmann

In the summer of 2004, Mario Leyva Jr. was faced with a difficult situation; he was already working two jobs in San Antonio, Texas: a work-study job and a part-time job at his father's landscaping business.[2] Due to the drought that summer, Mr. Leyva's father's business was slow, meaning money was tight for Mr. Leyva and his family because he was the only one in the family able to work.[3]

During this summer, Mr. Leyva lived with his father and sister, as well as his mother who was disabled—a transplant patient requiring constant

1. MAX EHRMANN, *Desiderata* (1927), *reprinted in* THE DESIDERATA OF HAPPINESS: A COLLECTION OF PHILOSOPHICAL POEMS 10 (1995).

2. Interview with Mario Leyva Jr., in San Antonio, Tex. (Nov. 3, 2010) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). The landscaping business consisted of mowing services. *Id.*

3. *Id.*

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care.[4] To him, the only solution for getting the additional money needed to pay the family's monthly expenses—mortgage payments, groceries, utilities—was to get a loan.[5] But neither he nor his father, who had bad credit, could secure a loan from a traditional lender.[6] Mr. Leyva felt that the only option left was to get a payday loan.[7]

Accordingly, he went to a payday lender and requested $500, but the payday lender only approved him for $225 due to Mr. Leyva's credit rating.[8] Mr. Leyva accepted this amount, even though it was not enough to completely meet his financial needs.[9] The payday lender gave him a maximum of two months to repay the loan, with a warning that after that period, the fees would increase.[10] When Mr. Leyva asked what would happen if he went over the two-month period, the payday lender said that "grace extensions" might be possible.[11]

Unfortunately, Mr. Leyva could not meet the two-month deadline, but the payday lender offered to readjust the terms of the original loan, allowing a six-month period to pay the loan back.[12] During the initial two-month period, he could only afford to pay the interest and nothing towards the principal, thus the balance did not go down.[13] As a result of the readjustment, the interest rate went up by two to three points, which in turn made the original $225 required repayment amount increase to nearly $400.[14]

After the payday lender readjusted the interest rate, Mr. Leyva's situation became dire.[15] Not able to find an alternative lender, he began to fall behind on his mortgage payments and other bills.[16] In order to meet his expenses, he was forced to sell personal property.[17] Thankfully, seven months after the loan origination Mr. Leyva was finally able to gather enough money to pay off the payday loan.[18] After factoring the accrued

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4. *Id.*
5. *Id.*
6. *Id.*
7. Interview, *supra* note 2.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Interview, *supra* note 2.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Interview, *supra* note 2.
18. *Id.* He was only able to do so because the landscaping business began to acquire more work and therefore his income increased. *Id.*

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interest, Mr. Leyva paid the lender a total of $800 on the initial $225 loan, effectively paying an interest rate of over 250%.[19]

It does not take a large stretch of the imagination to imagine individuals in situations like Mr. Leyva. Nearly everyone at one time or another has needed money when there was simply not enough. The reasons may range from pleasure to absolute necessity, e.g., having to pay bills, or providing food for a family. Unfortunately, those who are economically disadvantaged are more likely to have to resort to getting a payday loan, as they may not be able to get a loan from a more traditional source such as a bank, or perhaps they live in an area without reputable banks—this is especially true in San Antonio, Texas.[20]

Due to a lack of access to more traditional banking loans, some individuals resort to payday lenders to meet their financial needs. Payday loans are usually for a short period of time, for a small amount of money, have an exorbitant interest rate, and often include various fees that all too often force the borrower to refinance the loan, slipping into a downward spiral of debt.[21] Furthermore, while there has been some success in enacting statutes in Texas to protect borrowers, there are still loopholes by which payday lenders can charge enormous interest rates and fees.[22]

This Comment focuses on the nature of payday loans in Texas, including what a payday loan is, its cost to borrowers, and a brief discussion of how the payday loan industry is thriving. Part III discusses the problems borrowers typically experience in obtaining these loans, which include: a

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19. *Id.* This was the interest rate for the seven-month period, which when viewed as an annual rate is around 428%. *Id.* Upon reflecting on the whole experience of receiving a payday loan, Mr. Leyva regretted his decision, and was specifically upset about how quickly the payday lender was able to change the terms of the loan. *Id.*

20. *See* William Pack, *Bank Branches: Following the Money,* SAN ANTONIO EXPRESS-NEWS, Dec. 17, 2006, at 1K (indicating that individuals living in East Side communities and the West Side of the inner-city have fewer options for banking at larger, more established branches). According to this article, San Antonio's "inner-city areas are less likely to see new [bank] branches than the more affluent areas to the north and west." *Id.*

21. BANKING LAW: PREDATORY LENDING: RECENT INITIATIVES TO DEFINE AND ELIMINATE LENDING ABUSE § 5[1], at SP-50 (Mia T. Smith & Marjorie Grodd Brown eds., 2001) [herinafter BANKING LAW] (characterizing payday loans). It is possible for borrowers to have more than one payday loan at a time. *Id.* at SP-51.

22. *See* Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1152 (2008) (footnote omitted) (mentioning that "credit service organizations" may charge additional fees for setting up the loan between the borrower and the lender, allowing payday lenders to remain in compliance with state law while ignoring price limits). In such arrangements, "the underlying loan itself generally complies with state law, but the companies also assess a brokering fee that generates a price that is far in excess of the usury limit." *Id.* For details regarding Texas usury laws, see Title 4 of the Texas Finance Code, *available at* http://www.statutes.legis.state.tx.us/Docs/FI/htm/FI.303.htm.

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lack of alternative loans that forces individuals to get payday loans, a disparate bargaining power between the borrower and lender, and the usurious nature of the loans themselves. In order to understand these problems, a review of the relevant Texas usury laws as well as Texas statutes and the scope of their coverage as they relate to payday loans will be examined. Furthermore, the most favored lender doctrine as well as the exportation doctrine will be discussed, as these two doctrines permit payday lenders to avoid Texas law. Then, the unique relationship between payday lenders and federally regulated, state-chartered banks will be analyzed, as the nature of this relationship raises several concerns.

After the problems with payday loans are identified and the relevant statutes and case law are discussed, this Comment will then shift focus to possible reform. This will include suggestions for change such as prohibiting lenders from being able to target the economically disadvantaged, and legislation that not only would end the harm being done, but also impose severe penalties on lenders who take advantage of borrowers. In addition, a number of solutions will be proposed, which include (1) having the Federal Deposit Insurance Corporation (FDIC) properly regulate the state-chartered banks they insure, (2) creating new Texas law that, instead of attacking the usurious interest rates, seeks to eliminate the practice of payday lending in Texas, and (3) providing borrowers with low credit an alternative to payday loans that does not trap them in a cycle of debt.

II. Legal Background

A. *What is a Payday Loan?*

Before any discussion about the relevant laws and problems associated with payday loans, the very nature of payday loans must be examined and understood. These loans are generally "small, short-term loans that are intended to bridge the borrower's cash-flow gap between paydays."[23] The average amount borrowed ranges from $100 to $500, generally with a two-week period given to repay the loan.[24] In addition, payday loans are often characterized by "extremely high interest rates and fees, and are

23. Shane M. Mendenhall, *Payday Loans: The Effects of Predatory Lending on Society and the Need for More State and Federal Regulation*, 32 Okla. City U. L. Rev. 299, 301 (2007). Another characteristic of payday loans is that they are "unsecured loans with an enormously high interest rate." *Id.*

24. Peterson, *supra* note 22, at 1123–24. Even though "there is no agreed upon source of information for payday loans, the Center for Responsible Lending estimates a typical charge of $52 for a $325 loan." *Id.* at 1123.

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refinanced frequently."[25] They may also be known as "payday advances, deferred deposit loans, cash advance loans, check advance loans, post-dated check loans, or delayed deposit check loans."[26]

As illustrated by Mr. Leyva's story, a two-week payback period is often unreasonable; Mr. Leyva spent approximately seven months paying off his loan.[27] What typically begins as one loan often turns into a series of additional loans; basically, "a high-risk debtor [who previously obtained a $325 payday loan] lacking $325 of liquid assets on any given day is reasonably unlikely to have $377 two weeks later."[28] Obviously, the desperate circumstances that drive individuals to obtain a payday loan in the first place means that they will likely struggle with paying back both the loan and the associated fees. The cycle of debt that payday loan borrowers may become trapped in is due to the effect of "rolling over" loans; basically, the lender offers another loan, where "the lender typically rolls over the loan into an additional loan, with additional fees."[29] This may occur more than once for each borrower—on average, borrowers engage in ten to twelve transactions with a payday lender each year.[30] In es-

25. BANKING LAW, *supra* note 21. In order to get a payday loan, a borrower usually provides a post-dated check to be cashed in the future. *Id.*

26. Mendenhall, *supra* note 23. Although payday lending may not be a new concept, it did see a reemergence in Tennessee in the early 1990s and then spread nationwide. *Id.*

27. *See* Interview, *supra* note 2 (indicating that Mr. Leyva took more than two weeks to repay the payday loan he received).

28. Peterson, *supra* note 22, at 1124. Numerous authorities agree that "payday borrowers tend to fall into recurring debt patterns." *Id.* at 1126. With the high prices and a lack of an accurate assessment of a borrower's ability to repay the payday loan, the duration of a payday loan is likely to be more than a few weeks. *Id.* at 1124–26. It may be "economically more accurate to think of payday loans as medium-term debts with modest prepayment rates." *Id.*

29. BANKING LAW, *supra* note 21. The frequent refinancing of the loans places a borrower in a situation where "little or none of the payment has been applied to the loan principal," and this in turn leads to the borrower "owing much more money than they originally borrowed due to the rapid buildup of finance charges." *Id.* On top of everything, a borrower may be subjected to illegal collection practices by the lender, creating even more pressure on the borrower. *Id.*

30. Karen E. Francis, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 TEX. L. REV. 611, 617 (2010). There is very little data available as to how borrowers use payday loans. *Id.* However, at least one study identified the reasons payday borrowers used the payday loans; according to the Georgetown study, "65.7% reported that their most recent advance was obtained because of emergencies." *Id.* at 618 (citing GREGORY ELLIEHAUSEN & EDWARD C. LAWRENCE, CREDIT RESEARCH CTR., MONOGRAPH NO. 35, PAYDAY ADVANCE CREDIT IN AMERICA: AN ANALYSIS OF CUSTOMER DEMAND 47, *available at* http://faculty.msb.edu/prog/CRC/pdf/mono35.pdf, which characterized emergencies as either being an unplanned expense or a temporary income reduction. Of the total new advances analyzed 47.2% were based on the former definition). This means that at least one-third of payday borrowers may not be using payday loans for emergencies, resulting in a class of borrowers who might be "making a mis-

sence, payday lenders are profiting from a borrower's inability to pay, both at the onset of the loan and later on because of further debt.

The cycle of debt is a problem that persists for borrowers, and payday lenders continue to exploit borrowers' weakened financial situations in light of the current economic climate. Within the last decade there was significant growth in the number of payday lenders; for example, between 2000 and 2004, payday lenders "more than doubled from 10,000 to 22,000."[31] The availability of payday lenders will continue to grow, and by 2011 the number of payday lenders is expected to exceed 40,000.[32] Such rapid growth flows from the great profits available from often powerless borrowers; at least one study indicates that "approximately [ninety percent] of payday lending revenues are based on fees stripped from trapped borrowers."[33] Furthermore, "[i]ndustry observers estimate that . . . most payday lenders earn a return on assets between ten and twenty times greater than traditional banks."[34] Payday lending is simply an alternative to traditional loans that creates problems for those who obtain them. Payday lending stores are found predominantly "in poor and minority neighborhoods" as well as "around military bases with large populations of enlisted personnel."[35]

It should come as no surprise that such prevalent access to payday loans, combined with a thriving payday lending business, affects borrowers in a negative way. With an understanding of payday loans and their impact on borrowers, a discussion of the relevant agencies and laws that govern them is necessary to further realize how large a problem the loans really are, especially in Texas.

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take in obtaining these payday loans and could be [ ]biased in such a way that keeps them from making this mistake." *Id.* at 618.

31. Peterson, *supra* note 22, at 1127.

32. *Id.* The number of payday lenders in Texas has tripled since 2007. Enrique Rangel, *Rangel: Payday Lenders Still Unregulated*, AMARILLO GLOBE-NEWS, May 29, 2011, http://amarillo.com/opinion/opinion-columnist/2011-05-29/rangel-payday-lenders-still-unregulated. Recent reports put the number of payday lender locations in Texas somewhere above 3500. *Id.*

33. Peterson, supra note 22, at 1127.

34. *Id.* Even when a borrower only procures a small number of extensions on the loan, "a borrower can find that she has repaid more than the original balance but still [owe] the same principal," and "the average payday loan borrower repays $793 for a $325 loan." *Id.*

35. *Id.* at 1126. In response to the increased number of payday lenders that gathered around military bases, in 2006 "Congress adopted a [thirty-six percent] interest-rate cap on loans to all military personnel and their dependents." *Id.* at 1128; John Warner Nat'l Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, sec. 987, § 670(a), 120 Stat. 2083, 2266 (codified at 10 U.S.C. § 987(b)).

B. *Relevant Authorities That Govern Payday Lenders in Texas*

i. Texas Office of Consumer Credit Commissioner

Under the Texas Finance Code, the Office of Consumer Credit Commissioner (OCCC) is authorized to oversee payday loans in Texas.[36] The OCCC is tasked with enforcing Subtitles B and C under Title 4 of the Texas Finance Code, which regulates loans and financed transactions, and pawnshops respectively.[37] In addition, payday loans are subject to Subchapter F of the Texas Finance Code, which covers alternate charges for certain loans, and are also supervised by the OCCC.[38] The OCCC requires payday lenders that operate in Texas to be licensed,[39] but due to the exportation of out-of-state interest rates (a concept that will be discussed in Part III.B below) the OCCC does not have control over this practice by payday lenders.[40]

ii. Finance Commission of Texas

The Finance Commission of Texas (FCT), comprised of appointees by the Governor of Texas, is the oversight body of the OCCC.[41] Duties of the FCT include adopting appropriate banking rules under the Texas Finance Code[42] that "preserve or protect the safety and soundness of state

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36. TEX. FIN. CODE ANN. § 14.101 (West 2006). Specifically, it is the commissioner of the OCCC who "shall enforce this chapter, Subtitles B and C of Title 4, and Chapter 394 in person or through an assistant commissioner, examiner, or other employee of the office." *Id.*

37. *Id.*

38. SUBCOMM. ON CONSUMER CREDIT LAWS, S. COMM. ON ECON. DEV., INTERIM REP. TO THE 77TH TEX. LEG., at 12 (2000), *available at* http://www.senate.state.tx.us/75r/senate/commit/archive/c510/pdf/Consumer/Consumer_credit_Laws_report.pdf.

39. TEX. FIN. CODE ANN. § 342.051 (West 2006). A license is necessary in order to:

> (1) engage in the business of making, transacting, or negotiating loans subject to this chapter; or (2) contract for, charge, or receive, directly or indirectly, in connection with a loan subject to this chapter, a charge, including interest, compensation, consideration, or another expense, authorized under this chapter that in the aggregate exceeds the charges authorized under other law.

Id. Exceptions to the licensing requirement exist if a person is: "(1) a bank, savings bank, or savings and loan association organized under the laws of the United States or under the laws of the institution's state of domicile; or (2) subject to Chapter 651, Insurance Code." *Id.*

40. Deena Reynolds, *A Look at Payday Loans & Current Regulation in Texas*, 8 TEX. TECH. ADMIN. L.J. 321, 330–31 (2007).

41. Home, TX. FIN. COMM'N, www.fc.state.tx.us (last visited Sept. 28, 2011). Specifically, the Finance Commission of Texas is "composed of nine members appointed by the governor with the advice and consent of the senate." TEX. FIN. CODE ANN. § 11.101 (West 2006).

42. *See* TEX. FIN. CODE ANN. § 11.301 (West 2006) (reading in pertinent part that "[t]he finance commission may adopt banking rules as provided by Section 31.003").

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banks" and "grant the same rights and privileges to state banks that are or may be granted to national banks domiciled in this state."[43]

iii. Federal Deposit Insurance Corporation

The Banking Act of 1933 created the Federal Deposit Insurance Corporation (FDIC).[44] The FDIC is essentially a federal insurance company that regulates state banks, which are not members of the Federal Reserve System.[45] The FDIC provides insurance to state banks, and under the Federal Deposit Insurance Corporation Improvement Act of 1991, the FDIC has the authority to regulate the business conducted by these banks.[46] State banks that are regulated by the FDIC partner with payday lenders,[47] and it is this partnership that creates the loophole in which payday lenders are able to avoid liability under Texas law.

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43. TEX. FIN. CODE ANN. §§ 31.003(a)(2)–(3) (West 2006). The notion of fairness between state and national banks is analogous to the most favored lender doctrine, *infra* III.B.i.

44. Banking (Glass-Steagall) Act of 1933, 73 Pub. L. 66, Sec. 8, § 12B, 48 Stat. 162, 168 (codified at 12 U.S.C. §§ 265–66); CARL FELSENFELD & DAVID L. GLASS, BANKING REGULATION IN THE UNITED STATES 165 (3d ed. 2011). In 1933, the federal Banking Act was also known as the Glass-Steagall Act, but this name "has been used more recently to describe only those portions of the Act that deal with the securities activities of banks." FELSENFELD & GLASS, *supra*. Insurance under the FDIC was a result of a New Deal program, which helped protect banks financially by insuring deposits. *Id.* at 166. Even though the FDIC is the "primary federal regulator of the insured, nonmember state banks," it does not actually charter state banks—these banks are chartered and regulated "by their state bank regulators." *Id.*

45. Banking (Glass-Steagall) Act § 12B; *see* FELSENFELD & GLASS, *supra* note 44, at 13 (discussing the nature of FDIC regulation of nonmember state banks). Banks that are members of the Federal Reserve System, including national and state banks "are required by law to have FDIC insurance." FELSENFELD & GLASS, *supra* note 44, at 13. Even though it appears that state nonmember banks are not subject to that requirement, "[o]ver [ninety-eight percent] of state banks, however, do have FDIC insurance." *Id.* The FDIC imposes affirmative regulations on banks whose deposits it guarantees to ensure that the banks' actions do not "unduly endanger the insurance fund." *Id.*

46. Federal Deposit Insurance Corporation Improvement Act of 1991, 102 Pub. L. No. 242, § 303, 105 Stat. 2236, 2349 (codified at 12 U.S.C.§ 1831(a) note); FELSENFELD & GLASS, *supra* note 44, at 13. The grant of authority over state banks to the FDIC requires that "an insured state bank may not engage in any business not allowed to a national bank unless the FDIC gives its approval under certain prescribed standards." FELSENFELD & GLASS, *supra* note 44, at 173

47. JEAN ANN FOX, CONSUMER FED'N OF AM., UNSAFE AND UNSOUND: PAYDAY LENDERS HIDE BEHIND FDIC BANK CHARTERS TO PEDDLE USURY 11 (2004), *available at* http://www.consumerfed.org/elements/www.consumerfed.org/file/finance/pdlrentabankreport.pdf. In essence, the payday lender does all of the work associated with making the loan, with the state bank only allowing the payday lender to use its name and charter status. Reynolds, *supra* note 40, at 332.

When an FDIC-regulated state bank partners with a payday lender, a loophole allowing for the sidestepping of Texas law is created. In Texas, payday lenders appear to only partner with FDIC-regulated banks.[48] Before one can understand how this arrangement enables payday lenders to avoid Texas law, it is first helpful to understand what a state bank is.

A state bank is "any bank, banking association, trust company, savings bank, industrial bank . . . which—(A) is engaged in the business of receiving deposits, other than trust funds . . . and (B) is incorporated under the laws of any State."[49] However, the term that most closely resembles the particular kind of state bank that payday lenders partner with is called a state nonmember bank. These are banks that are not members of the Federal Reserve System (FRS).[50] State nonmember banks are not controlled by the FRS but instead are subject to their respective state's regulatory agency, and in order to be insured by the FDIC they have to apply for approval—upon such approval, they then fall under the supervision of the FDIC.[51] Because an FDIC-regulated bank is able to use the law and interest rates from the state where it is located, *instead* of the state where the payday lender is located, the problem of payday loans exists.[52]

In order to understand how this is possible, consider the following: state A is where the FDIC-regulated state nonmember bank is, and state B is where the payday lender conducts its business. State A does not have any regulation concerning payday lending or interest rate caps, while state B offers some protection. When the payday lender in state B partners with the bank in state A, the nature of that relationship allows the payday lender to use the governing law of state A in state B.

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48. Reynolds, *supra* note 40, at 337. Since the FDIC allows the exportation of usurious interest rates from its member banks to Texas, and "[ninety-six percent] of licensed payday lenders in Texas [export] out-of-state interest rates," the problem of this partnership is apparent. *Id.* at 335.

49. 12 U.S.C. § 1813(a)(2) (2006).

50. § 1813(e)(2). The FRS is essentially the central bank of the United States, and its duties include overseeing the money supply and interest rates; this is accomplished by the FRS deciding loan rates on short-term loans among banks. FELSENFELD & GLASS, *supra* note 44, at 11. Under the Federal Reserve System (FRS), all national banks are members, but for state banks membership is a choice. *Id.* at 12. A possible reason state banks are not typically members of the FRS is due to the "comparatively little benefit and considerable detriment that derives from membership." *Id.* If a state bank does become a member of the FRS, that bank "accepts all the regulation imposed on a member bank and little in the way of increased power," which explains why so few state banks are members. *Id.*

51. 12 U.S.C. § 1815(a)(1) (2006).

52. Reynolds, *supra* note 40, at 334. Payday lenders and state-chartered banks enter into a "'brokering' relationship" whereby the payday lender "asserts it makes loans on the bank's behalf." *Id.*

This arrangement is allowed by the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA).[53] The purpose behind allowing FDIC state banks to do this was to avoid any discrimination against them by national banks, which in essence allows FDIC state banks to have the "same 'most favored lender' status and right to export interest enjoyed by national banks."[54] The FDIC concluded that DIDA preempts the laws that exist in a borrower's home state.[55] As a result, payday lenders may use interest rates that are found outside of Texas. There may be a way to avoid preemption, and this is possible if the "override proposal . . . *explicitly and by its terms* indicate[s] that the state is overriding the preemption."[56] Changing state law or amending the Texas constitution to reflect the override proposal mentioned by the FDIC can accomplish this,[57] but it remains a lofty goal.

Not all states have similar regulations when it comes to interest rates and payday loans, as there are three categories of regulation—(1) authorize payday loans but regulate them, (2) authorize payday loans but do not regulate them, or (3) ban payday loans outright.[58] Texas belongs to the first category, and it is likely that payday lenders seek to export interest rates into Texas from states of the second category, no regulation.[59]

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53. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, Title V, § 521, 94 Stat. 132, 164 (codified at 12 U.S.C. § 1831d(a)). This statute as amended now reads:

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than [one] per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

12 U.S.C. § 1831d(a)(2006).

54. FDIC Advisory Op., FDIC-93-27 (July 12, 1993), *available at* http://www.fdic.gov/regulations/laws/rules/4000-8160.html#fdic400093-27.

55. *Id.*

56. *Id.*

57. *Id.* Indeed, the legislative intent behind DIDA provides no reference to any intent by Congress to "carve out state common law from the preemptive sweep of [S]ection 521." *Id.*

58. Reynolds, *supra* note 40, at 337.

59. *Id.* Within this category, states differ as to how they address payday lending, especially with regard to the rolling over of loans. *Id.* at 338. This may include prohibiting or

Texas could benefit from adopting the policies of a state like Georgia.[60] Georgia made it a felony, via racketeering statutes, for payday lenders to engage in charter renting as well as imposing possible civil liability on payday lenders via class-action lawsuits.[61]

C. *Filing a Claim Under Texas Usury Law*

The laws in Texas that govern the interest rates charged by payday lenders are known as usury laws, which are found in the Texas Finance Code[62] and in the Texas Constitution.[63] Payday loans are brought within the scope of the Texas Finance Code via § 83.604(b) of the Texas Admin-

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limiting rollovers, and for "states that prohibit rollovers, some require a duty to inquire upon the payday lender, while others do not." *Id.* As for limiting rollovers by providing information to the borrower, this only consists of certain "requir[ed] written or verbal warnings." *Id. See also* ACE CASH EXPRESS, ACE PAYDAY ADVANCE (2008) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (this pamphlet, available to patrons at each ACE location, contains several notices regarding the refinancing option for borrowers who need more time to repay the loan). Under the frequently asked questions portion, the pamphlet gives borrowers the option of "[i]nstead of repaying the loan in full, just bring in the fees and you can refinance up to [four] times." *Id.* If a borrower needs more than four times to refinance the loan, ACE Cash Express allows the borrower to apply for another loan. *Id.*

60. Georgia outlawed the exportation of usurious interest rates, which effectively minimized the harm that payday lenders inflict. Reynolds, *supra* note 40, at 338. The law passed by Georgia was a "response to an increasing concern about its military personnel." *Id.*

61. *Id.* In addition, this law specified certain practices by payday lenders regarding military personnel that would no longer be allowed, including "banning the garnishment of a soldier's wages, collection practices against deployed personnel, and communication with a soldier's superior." *Id.* at 339.

62. TEX. FIN. CODE ANN. §§ 342.251–.259 (West 2006). Subchapter F of the Texas Finance Code covers: maximum cash advances, alternate interest charges, maximum interest charges for loans with a single repayment, the disallowance of other charges, maximum loan terms, refunds, default charges and deferment of payments, schedules for installments, and loans with larger advances. *Id.*

63. TEX. CONST. art. XVI, § 11. The text of this portion of the Texas constitution reads as follows:

> The Legislature shall have authority to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest; provided, however, in the absence of legislation fixing maximum rates of interest all contracts for a greater rate of interest than ten percent (10%) per annum shall be deemed usurious; provided, further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six percent (6%) per annum. Should any regulatory agency, acting under the provisions of this Section, cancel or refuse to grant any permit under any law passed by the Legislature; then such applicant or holder shall have the right of appeal to the courts and granted a trial de novo as that term is used in appealing from the justice of peace court to the county court.

Id.

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istrative Code.[64] The two subtitles that make up the Texas Finance Code are (A) "Interest," covered by chapters 301 to 339, and (B) "Loans and Financed Transactions," covered by chapters 341 to 352. Subtitle A focuses on typical commercial and consumer transactions. This Comment focuses on the material covered by Subtitle B, which governs usury actions for consumer loans, e.g., retail installment contracts, open-end accounts, and payday loans.

The Texas Constitution generally prohibits interest rates that exceed ten percent, unless there is legislation that sets a different cap on interest rates—in that instance the legislation governs the cap instead of the Texas Constitution.[65] Payday lenders in Texas are prohibited from charging an interest rate in excess of a maximum interest rate determined by the Office of Consumer Credit Commissioner (OCCC). As of September 13, 2011, the maximum interest rate allowed by the OCCC for payday loans is eighteen percent.[66] Assuming that a payday lender imposes on a borrower more than eighteen percent interest, a cause of action for usury may lie. This cause of action entails several elements: (1) the defendant loans money to the plaintiff,[67] (2) the plaintiff has an obligation to pay back the loan,[68] and (3) the defendant contracts for, charges, or receives

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64. 7 TEX. ADMIN. CODE § 83.604(b) (West 2011). The relevant portion authorizing payday loans reads as follows:

> A licensee may engage in a payday loan or deferred presentment transaction under this chapter and subject to the provisions of Texas Finance Code, Chapter 342, Subchapter F. A payday loan or deferred presentment transaction is a loan of money. The check given in the transaction may serve as security for the payment of the loan. A person who negotiates, arranges, or acts as an agent for an authorized lender in a payday loan or deferred presentment transaction that has an effective annual rate of greater than [ten percent] is required to be licensed.

Id.

65. Art. XVI, Section 11. If the contract contains no agreed upon interest rate, the cap is six percent. *Id.*

66. Office of Consumer Credit Comm'r, *Notice of Rate Ceilings*, 31 TEX. CREDIT LETTER 11 (2011), *available at* http://www.occc.state.tx.us/pages/publications/ccl/2011/0913.pdf. The Office of Consumer Credit applies the eighteen percent cap to payday loans that are "for personal, family, or household use." *Id.*

67. TEX. FIN. CODE ANN. § 301.002(a)(2)(B) (West 2006). This statute defines "credit card transaction" as "a transaction for personal, family, or household use in which a credit card, plate, coupon book, or credit card cash advance check may be used or is used to debit an open-end account in connection with . . . a loan of money." *Id.*

68. Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 96 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). In this case, "Anglo-Dutch did not have an absolute obligation to repay the principal amounts that appellees invested," and without the absolute obligation, the usury claims failed as a matter of law. *Id.* at 96–97 (citing Rinyu v. Teal, 593 S.W.2d 759, 761 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.)).

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interest that exceeds the maximum amount allowed by law.[69] The "exceeding of the maximum interest allowed" portion of the third element is the crucial element that payday lenders sidestep and, thus, avoid liability.[70]

i. Defedant Loans Money to the Plaintiff

In order for a usury action to lie, it must first be established that the defendant loaned money to the plaintiff. The classification of a defendant depends upon which subtitle of the Texas Finance Code a plaintiff brings suit under, either A or B. If the plaintiff sues under Subtitle A, the defendant has to be a creditor.[71] For plaintiffs who have been aggrieved by a payday lender, they are more likely to sue under Subtitle B, where the defendant can be any person who contracts for, charges, or receives a usurious amount; in addition, the defendant does not have to be a creditor in order to be liable.[72]

The plaintiff, under either Subtitle A or B, has to be an obligor.[73] An obligor is defined as "a person to whom money is loaned to or credit is

69. TEX. FIN. CODE ANN. §§ 305.001–.002, 349.001–.002 (West 2006). Under these sections, the penalties imposed depend on (1) if the person is "contracting for, charging, or receiving" either interest or a time price differential, or (2) if the person made a charge other than interest or a time price differential. *Id.* The former situation will make the person liable "for an amount equal to: (1) twice the amount of the interest or time price differential contracted for, charged, or received; and (2) reasonable attorney's fees set by the court." *Id.* If the person is found to have made a charge other than interest or a time price differential, that person will be liable:

> [F]or an amount equal to: (1) the greater of: (A) three times the amount computed by subtracting the amount of the charge authorized by this subtitle from the amount of the charge contracted for, charged, or received; or (B) $2,000 or [twenty] percent of the amount of the principal balance, whichever is less; and (2) reasonable attorney's fees set by the court.

Id. Finally, if a person is found to have charged twice the amount that is authorized, under § 349.002, that person is also liable "for all principal or principal balance, as well as all interest or time price differential." *Id.* This liability includes all reasonable attorney's fees. *Id.*

70. Brendan Case, *With Payday Loans, Poor Get the Loans, Firms Get the Payday*, DALL. MORNING NEWS, July 26, 2010, http://www.dallasnews.com/business/personal-finance/headlines/20100726-with-payday-loans-poor-get-the-loans-firms-get-the-payday.ece.

71. FIN. § 305.001. A creditor is defined as "a person who loans money or otherwise extends credit," and "does not include a judgment creditor." FIN. § 301.002(a)(3). A judgment creditor is "a person to whom a money judgment is payable." *Id.* at § 301.002(a)(5).

72. *See* FIN. §§ 349.001–.002 (defining the liability for those in violation of Subchapter A of Chapter 349 of the Texas Finance Code).

73. FIN. §§ 305.001–.002, 349.001–.002.

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extended."[74] In order for a plaintiff to recover, he or she has to be an immediate party to the loan transaction.[75] The plaintiff's status as an obligor, for the purpose of establishing standing, is a question of law for the court to determine.[76]

After establishing that the plaintiff is an obligor, it must next be shown that there was an actual loan of money from the defendant to the plaintiff. A loan is considered to be "an advance of money that is made to or on behalf of an obligor," with the principal amount owed by the obligor to the creditor.[77] Much like determining if the plaintiff is an obligor, the question of whether the transaction is a loan will be a question for the court, determined by the circumstances and the intentions of the parties.[78]

ii. Plaintiff has an Obligation to Pay Back the Loan

The second hurdle required to bring a successful usury action is that the plaintiff must prove that there was an absolute obligation for the loan to be repaid.[79] Furthermore, the understanding that the principal is absolutely repayable must exist between the parties.[80] An exception to the loan being an absolute obligation is when the promise to pay the loan is contingent, and it remains unclear if the borrower would pay a usurious

74. FIN. § 301.002(a)(13). The definition of an obligor "does not include: (A) a judgment debtor; or (B) a surety, guarantor, or similar person." *Id.* A judgment debtor is defined as "a person obligated to pay a money judgment." *Id.* at § 301.002(a)(6).

75. Allee v. Benser, 779 S.W.2d 61, 62 (Tex. 1988). The general rule in a usury cause of action is that the "usury cause of action is personal to the obligor." *Id.* In this case, the petitioners, argued that a junior lien holder is an exception to this rule, but the Texas Supreme Court ruled that only immediate parties to the transaction may bring a usury cause of action, dismissing petitioners argument. *Id.*

76. El Paso Ref., Inc. v. Scurlock Permian Corp., 77 S.W.3d 374, 383 (Tex. App.—El Paso 2002, pet. denied). The question of standing is a question of law to be decided by the court, not the jury. *Id.* The trial court below erred in permitting the jury to answer a question of law, however such a jury instruction that included a question regarding a party's status as an obligor was not harmful error. *Id.*

77. FIN. § 301.002(a)(10). This definition does not include judgments. *Id.*

78. Bray v. McNeely, 682 S.W.2d 615, 617 (Tex. App.—Houston [1st Dist.] 1984, no writ). In this case the contract was for the purchase of an interest in property. *Id.* There was a letter between the parties that was held to be "probative evidence of the sale of an interest in property." *Id.* at 618. Thus, the transaction was not considered a loan but rather an interest in property. *Id.* at 620.

79. Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 96 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

80. Korth v. Tumlinson, 73 S.W.2d 1048, 1049 (Tex. App.—San Antonio 1934, no writ). Here, there was no language in the contract that required the principal to be paid absolutely, as the contract failed to state that Mrs. Tumlinson "was to repay Korth the amount of money advanced by him." *Id.*

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amount—here, the loan is not considered an absolute obligation.[81] Even so, if the contingency interest amount is mentioned in the contract, the loan is usurious when, should the contingency occur, the borrower is obligated to pay that usurious amount.[82]

iii. Defendant Contracted for, Charged, or Received Interest That Exceeded the Maximum Amount Allowed by Law

Finally, under the Texas Finance Code, the plaintiff must prove that the interest charged exceeds the maximum rate under the law and is therefore usurious.[83] As noted previously, the OCCC determines the maximum interest rate, which as of September 13, 2011, is eighteen percent.[84] In order to understand this critical element, interest must be defined. As defined by the Texas Finance Code, interest is the compensation allowed by law "for the use, forbearance, or detention of money."[85] Any additional fees, which are supported by consideration that is in addition, separate, and not the lending of money, is not considered interest and thus does not violate usury law.[86] The label given to a charge, on its face, is not the critical part that courts look to when considering if the charge will qualify as interest, the courts have to look beyond the label—this is cru-

81. *See Anglo-Dutch Petroleum*, 193 S.W.3d at 96–97 (holding that, per the agreements between the parties, there was no obligation from Anglo-Dutch to repay the investments made, which in turn renders the agreements non-usurious).

82. *See* Dixon v. Brooks, 678 S.W.2d 728, 729 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (denying appellants' argument that the contingent late charge of ten percent in the contract was considered to be usurious). Accordingly, the court held that:

> The appropriate calculation is to combine the interest paid and the late charge that could have been collected and to apply that total to the entire principal balance due from the accrual date to the date of payment; since that total does not exceed ten percent per annum, the contract is not usurious.

Id. at 731.

83. TEX. FIN. CODE ANN. § 301.002(a)(17) (West 2006).

84. Office of Consumer Credit Comm'r, *supra* note 66.

85. FIN. § 301.002(a)(4). The statute reads further:

> The term does not include time price differential, regardless of how it is denominated. The term does not include compensation or other amounts that are determined or stated by this code or other applicable law not to constitute interest or that are permitted to be contracted for, charged, or received in addition to interest in connection with an extension of credit.

Id.

86. First Bank v. Tony's Tortilla Factory, Inc., 877 S.W.2d 285, 287 (Tex. 1994). The insufficient fund fees at issue in this case were each a "separate and additional consideration for processing each bad check," and were thus not considered to be interest. *Id.* at 288.

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cial because sometimes when a charge is initially not labeled as interest, it invariably ends up as such.[87]

Although Texas usury law appears to protect borrowers against usurious interest rates, the usury laws in Texas are rendered useless by the practice of FDIC-regulated state banks partnering with payday lenders. Through a combination of agencies and statutes, borrowers in Texas are afforded little protection against out-of-state interest rates charged by payday lenders.

III. The Problem of State Charter Renting

A. *The Laws in Texas That Govern Interest Rates for Payday Lenders*

i. Texas Usury Law

As previously mentioned, Subtitle B of the Texas Finance Code covers usury actions for payday loans.[88] The crux of the problem under Texas usury law is exceeding the interest rate cap, as payday lenders are able to charge more than the legal interest rate in Texas.

ii. Interest Rate Caps

The Office of Consumer Credit Commissioner (OCCC) authorizes interest rates for payday loans in Texas to be no more than eighteen percent.[89] If a payday lender attempts to charge more than this, then a cause of action for usury will lie because the Texas Finance Code is clear in determining that any interest exceeding the cap is usurious.[90] In addition, the duration of the payday loan is also subject to regulation.[91]

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87. Gonzales Cnty. Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976). The court reasoned that "[s]uch a rule is to be fairly applied to both borrowers and lenders alike," and that "[l]abels put on particular charges are not controlling." *Id.* However, if the fee "commits the lender to make a loan at some future date," then the fee does not fall under the aforementioned definition, and in this scenario "the lender may charge extra for this consideration without violating the usury laws." *Id.*

88. *See supra*, Part II.C; Tex. Fin. Code Ann. §§ 342.251–59 (West 2006) (listing several areas under subchapter F of subtitle B, which governs usury causes of action for payday loans).

89. Tex. Fin. Code Ann. § 342.201 (West 2006); Office of Consumer Credit Comm'r, *supra* note 66.

90. Tex. Fin. Code Ann. Fin. § 301.002(a)(17) (West 2006).

91. Tex. Fin. Code Ann. § 342.508 (West 2006). Under this statute:

> A lender may not enter a loan contract under Section 342.201(a) or Section 342.201(e) under which the borrower agrees to make a scheduled payment of principal more than: (1) [thirty-seven] calendar months after the date on which the contract is made, if the contract is for a cash advance of $1,500 or less; (2) [forty-nine] calendar months after the date on which the contract is made, if the contract is for a cash advance of

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iii. Other Remedies

Assuming that an aggrieved borrower meets all of the elements to bring a successful cause of action for usury, the borrower has several remedies available. One must realize that since the usury laws are penal in nature, only those penalties explicitly set out in the governing statutes are recoverable.[92] In addition, the remedies available turn upon what subtitle of the Texas Finance Code is applicable to the transaction—since Subtitle B applies to payday loans, we turn our attention there.

If a defendant in a usury cause of action is determined to have charged interest greater than the amount authorized by Subtitle B, he will be liable for twice the amount of interest charged.[93] Furthermore, if a defendant is found to have charged more than twice the limit under Subtitle B, he will additionally be liable for the entire principal or principal balance plus all the interest.[94] A charge of a criminal misdemeanor (not exceeding $100) is also possible when a defendant charges more than twice the allowed amount of interest.[95]

As a limit to recovery, a borrower may only obtain one form of recovery for multiple violations occurring in the same transaction, although it may be possible for a plaintiff to recover more than once as borrowers may engage in more than one "transaction" when they roll-over their loans.[96]

Another consideration in filing a usury action is the statute of limitations, which is again dependent on which subtitle of the Texas Finance

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> more than $1,500 but not more than $3,000; or (3) [sixty] months after the date on which the contract is made, if the contract is for a cash advance of more than $3,000.

Id.

92. *See, e.g.*, Steves Sash & Door Co. v. Ceco Corp., 751 S.W.2d 473, 476 (Tex. 1988) (requiring that the statutes governing usury are to be strictly construed since they are penal in nature); Domizio v. Progressive Cnty. Mut. Ins. Co., 54 S.W.3d 867, 872 (Tex. App.—Austin 2001, pet. denied) (requiring that usury statutes be strictly construed).

93. Tex. Fin. Code. Ann. § 349.001(a)(1) (West 2006).

94. Tex. Fin. Code Ann. § 349.002 (West 2006).

95. Tex. Fin. Code Ann. § 349.501 (West 2006). In full, this statute reads:

> (a) A person commits an offense if the person contracts for, charges, or receives interest, time price differential, and other charges that in an aggregate amount exceed twice the total amount of interest, time price differential, and other charges authorized by this subtitle. (b) An offense under this section is a misdemeanor punishable by a fine of not more than $100. (c) Each contract or transaction that violates Subsection (a) is a separate offense.

Id.

96. *See* Bray v. McNeely, 682 S.W.2d 615, 617 (Tex. App.—Houston [1st Dist.] 1984, no writ) (explaining that a court looks to the surrounding circumstances to consider whether the transaction is a loan). Thus, if a court determined that a consumer's refinance or rollover of their debt is a transaction, then multiple remedies for usury may lie.

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Code governs. Usury actions under Subtitle B must be brought before the later occurrence of either (1) four years after the loan in which the violation occurred, or (2) two years after the violation occurred.[97]

Of course, there are defenses that a defendant in Texas can assert to avoid liability from a usury cause of action, one of which is particularly relevant here. In a Texas usury cause of action a defendant can claim federal preemption to avoid liability, as is the case with state-chartered banks that are federally insured.[98] However, this is only one part of the problem in Texas, as payday lenders can also sidestep Texas law by partnering with out-of-state banks, which is discussed in Part III.C.

B. *How State-Chartered Banks Avoid Texas Laws and Export Interest Rates into Texas*

There is clearly a problem when interest rates on loans from payday lenders are typically anywhere from 450% to 880% APR (annual percentage rate) for a two-week loan of $200.[99] It should come as no surprise then that Texas payday lenders reap huge profits by preying on borrower desperation, which can stem from financial emergencies, a reduction in wages, and having no alternative credit option, although this is not an exhaustive list.[100]

i. Most Favored Lender Doctrine

In order to understand how banks located in another state are able to export interest rates into Texas, an examination of the "most favored lender doctrine" (MFLD) is necessary.[101] The MFLD was first articu-

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97. FIN. § 349.402(a). As for actions regarding open-end credit transactions, there is a two-year limitation after the date of the violation in order to bring an action. *Id.*

98. *See* FDIC Advisory Op., FDIC-93-27 (July 12, 1993), *available at* http://www.fdic.gov/regulations/laws/rules/4000-8160.html#fdic400093-27 (stating that usury and other state common law claims against federally insured state-chartered banks are preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980).

99. FOX, *supra* note 47, at 13. The APR rate comes from a survey in Texas conducted by the Consumers Union's Austin office in 2003. *Id.* This survey "found that none of the [payday lenders] came close to the 178.98% APR cap for a two-week $200 loan." *Id.*

100. Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 103 (2002). While the author recognizes that "although the image of the typical payday loan customer remains incomplete," it is not hard to imagine that payday loans are seemingly one of the few remaining options available to those in need of money. *Id.* *See* Emily Jeffcott, Comment, *The Mortgage Reform and Anti Predatory Act of 2007: Paving a Secure Path for Minorities in the Midst of the Subprime Debacle*, 10 SCHOLAR 449, 470 (2008) (indicating that "[a]lthough there has been demonstrated success in state anti-predatory lending legislation, federal preemption statutes now limit their effectiveness").

101. *See* 12 U.S.C. § 1831d(a) (2006) (applying the MFLD to state-chartered banks).

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lated in *Tiffany v. National Bank of Missouri*,[102] where the Court recognized that national banks need the ability to compete with state banks.[103] The MFLD is codified in 12 U.S.C. § 1831d(a), and the initial purpose behind it was to prevent any discrimination against nationally chartered banks from the state in which they are headquartered.[104] National banks were allowed to charge interest on loans that complied with the usury laws in the state they were located.[105] The MFLD was later extended under the exportation doctrine (ED) to include state-chartered banks.[106]

ii. Exportation Doctrine

The exportation doctrine incorporated the most favored lender doctrine in a way that forms the crux of the problems associated with payday loans; this is seen in the case of *Marquette National Bank of Minneapolis v. First Omaha Service Corp.*,[107] where Justice Brennan held that a national bank headquartered in one state may use that state's interest rates when charging customers located in another state, even if the rate charged is higher than the rate allowed where the customer resides.[108] In plain language, national and state banks are allowed to have most favored lender status, and thus are allowed to export interest rates into other states, even if the interest rate cap in the receiving state is lower.[109] However, one important limitation to the MFLD is that the doctrine only applies to banks under the purview of the Federal Deposit Insurance Act.[110]

If a federally insured state-chartered bank is considered to be a most favored lender, they are then permitted to charge interest at the greater rate of either (1) one percent above the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the district where the bank is located, or (2) the rate allowed by the laws of the state where

102. 85 U.S. 409 (1873).

103. Tiffany v. Nat'l Bank of Mo., 85 U.S. 409, 412–13 (1873) (explaining that Congress intended to give national banks a way in which they can operate in light of competing state banks and any adverse state law). Justice Strong reasoned that it would be unfair to national banks "to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks." *Id.* at 413.

104. 12 U.S.C. § 1831d(a) (2006).

105. *Id.*

106. *See* Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp., 439 U.S. 299, 308 (1978) (giving national banks the ability to take MFL status across state lines and sidestep the borrower's home state laws via the exportation doctrine).

107. 439 U.S. 299 (1978).

108. *Marquette Nat'l Bank*, 439 U.S. at 301.

109. *Id.* at 308.

110. 12 U.S.C. § 1813(a)(2) (2006) (setting forth the scope of the MFLD, where the state bank must be receiving deposits).

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the bank is located.[111] This latter point for most favored lender banks is what allows the exportation of interest rates.

C. *"Rent-a-Charter" Arrangements Between Payday Lenders and FDIC-Regulated State-Chartered Banks*

Payday lenders, in order to avoid Texas's and other states' usury laws, partner with state-chartered banks via "rent-a-charter" or charter renting arrangements; this allows the payday lender to make loans for the bank in the borrower's home state, and afterwards they buy the loan from the bank and subsequently claim that the borrower's home state usury laws are inapplicable.[112] Simply put, the out-of-state bank makes the loan, and it is quickly purchased by the payday lender; this business relationship allows the payday lender and the out-of-state bank to share the profits from the loan.[113]

The problem in Texas is compounded by the fact that payday lenders partner with state-chartered banks that are headquartered in a state that is either minimally regulated or not regulated at all; therefore, there is no cap on the interest rates that are exported to Texas.[114] A quick distinction between the three levels of regulation regarding payday loans that exist in the United States is necessary to understand the problem.

The three levels of state regulation regarding payday loans are (1) allow but regulate, (2) prohibit them, or (3) no regulation at all.[115] Texas is a member of the first category—allow but regulate. As previously discussed in Part II, Texas law provides protection for its residents against predatory lending, yet the advent of payday lenders partnering with out-of-state banks renders Texas law ineffective in this area.

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111. § 1831d(a).

112. Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 582–83 (2004). A reason for why payday lenders and banks enter into such business relationships is that payday lenders benefit from the exportation doctrine applicable to banks; one such example is seen between Goleta National Bank and ACE Cash Express: "ACE purchased a [ninety percent] participation in each loan made by the bank, bore [ninety percent] of the loss on any loan that defaulted, received the loan payments, paid collection costs, and kept the loan records." *Id.* at 583.

113. Mendenhall, *supra* note 23, at 321. Due to this process, the lender is immune to any state usury causes of action, and can "charge any rate permitted by the laws of the state where the out-of-state bank is located." *Id.*

114. § 1831d(a); Reynolds, *supra* note 49, at 334.

115. Reynolds, *supra* note 40, at 337–39.

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There is criticism of all three methods of regulation, and it appears that only Congress has the ability to halt the "rent-a-charter" methods employed by payday lenders.[116]

D. *The FDIC's Regulation of Out-of-State Banks: Is it Enough?*

Since FDIC-regulated state-chartered banks are a primary focus of this Comment, an analysis of the breadth of FDIC's regulatory scope as it pertains to such banks is warranted. The FDIC is a corporation, which essentially allows it to sue as well as be sued.[117] It is governed by a board of directors that consists of five members: (1) the Comptroller of the Currency, (2) the Director of the Office of Thrift Supervision, and (3) three U.S. citizens, with one of these citizens having experience in state bank supervision.[118]

The FDIC has the power to examine FDIC-regulated state-chartered banks that are not members of the Federal Reserve System.[119] Thus, the banks that partner with payday lenders fall under the scope of the FDIC. In addition, the FDIC can examine its insured banks for insurance purposes.[120] Most importantly, the FDIC is capable of removing a bank's insured status if they are found to have engaged in unsafe and unsound banking practices.[121] The discretion for such a finding lies with the

116. Johnson, *supra* note 100, at 126. The author believes that "Congress should amend banking law to prevent banks from being a tool for payday lenders to ignore state law and exploit consumers." *Id.* at 127. Quoting North Carolina Attorney General Roy Cooper, the author furthers this point: "'We don't believe bank charters were created to enable companies to circumvent laws that are designed to protect consumers.'" *Id.*

117. 12 U.S.C. § 1819(a) (2006). The sue and be sued provision reads: "Fourth. To sue and be sued, and complain and defend, by and through its own attorneys, in any court of law or equity, State or Federal." *Id.*

118. 12 U.S.C. § 1812(a)(1) (2006).

119. *See* 12 U.S.C. §§ 1814, 1820(a) (2006) (demonstrating that all insured banks are subject to the reach of FDIC, and that it may utilize the resources of other Federal agencies to examine any such bank).

120. § 1820(b). This section provides for the examination procedures for any insured depository institution's insured status:

> In addition to the examinations authorized under paragraph (2), any examiner appointed under paragraph (1) shall have power, on behalf of the Corporation, to make any special examination of any insured depository institution whenever the Board of Directors determines a special examination of any such depository institution is necessary to determine the condition of such depository institution for insurance purposes.

Id.

121. 12 U.S.C. § 1818 (2006). This applies to any insured depository institution that is not "(A) a national member bank; (B) a State member bank; (C) a Federal branch; (D) a Federal savings association; or (E) an insured branch which is required to be insured under subsection (a) or (b) of section 3104 of this title . . . ." *Id.* If the Board of Directors determines that an insured depository institution has engaged in unsafe or unsound banking practices, the Board must notify the appropriate agency "not less than [thrity] days

FDIC.[122] "Unsafe and unsound banking practices" have been defined by some courts as those practices that involve "conduct deemed contrary to accepted standards of banking operations," and if allowed to persist, would significantly damage the bank, shareholders, or other agencies that disperse insurance funds.[123] There are, however, other grounds in which the FDIC may terminate a bank's insured status. One such additional ground for insured status termination is if the bank violated any law or order from the FDIC,[124] but such termination is generally imposed only if the FDIC also finds that the bank itself is engaging in "unsafe and unsound banking practices."[125]

Even with these guidelines the FDIC has continued to insure banks that are from states with no usury cap and participate in charter rentals; some examples include Reliabank Dakota, American Bank & Trust, and Bryant State Bank—all based in the state of South Dakota, which has no usury cap.[126] Another problem with the FDIC is its willingness to permit a state-chartered bank to switch regulators; this was the case with First Bank of Delaware which was a Federal Reserve member bank.[127] Furthermore, while it is true that the FDIC issues guidelines, they do not replace state regulation of lenders, and they are not applied in a timely fashion.[128]

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before the notice required by subparagraph (B)," unless this period is waived by the agency. *Id.* An insured depository institution subject to the possibility of having its insured status revoked still has the right to an administrative hearing. *Id.*

122. *See* FDIC v. Bank of Coushatta, 930 F.2d 1122, 1125 (5th Cir. 1991) (mentioning that the FDIC has discretion in determining whether the failure to maintain capital rose to the level of being an unsafe or unsound banking practice).

123. Oberstar v. FDIC, 987 F.2d 494, 502 (8th Cir. 1993). The FDIC failed to prove that Oberstar's conduct rose to the level of being an unsafe and unsound banking practice, as the conduct in question was "attending the August 6 shareholders' meeting and voting the Kronholm shares to reelect incumbent directors." *Id.* Oberstar previously attempted to buy Kronholm's eighty-four percent interest in the failing bank, Boundary Waters State Bank of Ely, Minnesota, so that something could be done about the bank's situation. *Id.* at 498. The FDIC denied such an agreement, claiming that Oberstar "lacks the competence and integrity to have a controlling voice in a troubled bank." *Id.*

124. § 1818(a)(2).

125. *Oberstar*, 987 F.2d at 502.

126. Fox, supra note 47, at 20.

127. *Id.* First Bank of Delaware, a Delaware State chartered bank, was a member of the Federal Reserve until 2003 when it told the S.E.C., that it would like to terminiate its payday lending business. *Id.* Rather than terminate the lucrative business The FDIC suggested they merely reliquish their membership in the Federal Reserve. *Id.* With the FDIC allowing First Bank of Delaware to be subject to its regulatory authority, it appears that the FDIC "is willing to accept banking practices that the Federal Reserve Bank of Philadelphia likely rejected." *Id.* at 21.

128. *Id.* at 22, 24. The FDIC guidelines do not set limits for payday loans, but instead consider several other aspects of lending programs, including: treating loans for longer

From the foregoing, it appears that the FDIC lacks the will to effectively deal with the problem of payday lenders and FDIC-regulated state-chartered banks.

IV. Possible Solutions

At first glance, it appears that Texas law has little or no effect when it comes to the regulation of payday lenders. However, there are several possible solutions. First, the FDIC should take further action, beyond mere warnings, against the banks they regulate. Second, to replace the predatory loan scheme certain programs (with little modification) could serve to provide an effective alternative loan mechanism to those who are in need. Lastly, instead of focusing on addressing usurious interest rates in Texas, the state should enact legislation that bans the practice of payday lending.

A. *The FDIC Should Take Further Action to End Their Insured Banks from Partnering with Payday Lenders*

The FDIC, along with the Office of the Comptroller of the Currency (Comptroller), are the primary regulators of banks who rent their charters.[129] The Comptroller has denounced the practice of payday lenders partnering with banks generally, yet they only regulate national banks.[130] It is the FDIC along with various state-regulating authorities that oversee state-chartered banks.[131]

The FDIC continues to allow state-chartered banks to enter into arrangements with payday lenders as long as there are risk avoidance guidelines in place to protect borrowers.[132] These risk avoidance guidelines should be strengthened to specifically include a review of an insured bank's policies when it comes to partnering with payday lenders; in other

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than sixty days as a loss, identifying the limits on rollovers and refinancing, inquiring as to a borrower's ability to repay if requested, and whether there are any waiting periods for additional loans. *Id.* at 22–23. However, these guidelines appear to "fall far short of the state laws or regulations evaded by payday lender-bank partnerships." *Id.* at 23. On top of that, "[t]he FDIC [has] also failed to provide guidance to regional offices that have to interpret the guidelines." *Id.* at 24.

129. 2 Kenneth M. Lapine et al., Banking Law § 30.03[2][a], at 30–12 to –13 (Matthew Bender 2011).

130. *Id.* While it is true that the Office of the Comptroller of the Currency has effectively eliminated "rent-a-bank schemes involving national banks," FDIC-insured institutions "continue arrangements with payday lenders that allow payday lenders to avoid state usury laws." *Id.*

131. *Id.*

132. *Id.* at § 30–13. Thus, although payday lenders are prohibited from dealing with national banks, they "may still enter into arrangements with out-of-state state banks because of the differences between FDIC and OCC policies." *Id.*

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words, the FDIC should review a "bank's risk assessment and strategic planning, as well as the bank's due diligence process for selecting a competent and qualified third party provider."[133] In addition, FDIC examiners should consider several factors when reviewing the partnership between FDIC-regulated banks and payday lenders; ideally, the partnership should: list the "responsibilities of each party," state that each party will adhere to the regulatory laws, clarify which party (the bank or payday lender) will disclose the relevant laws and regulations to the borrower, permit the bank to oversee the payday lender's activities which includes being able to review all of the transaction records, provide for indemnity against the bank from the payday lender from its activities, and adequately address any complaints from the borrower.[134]

In a March 1, 2005 letter by Michael J. Zamorski, the Director of the Division of Supervision and Consumer Protection Department of the FDIC, payday loans should not be "provided to customers who have had payday loans outstanding from any lender for a total of three months in the previous [twelve] months."[135] Furthermore, if a borrower does have loans from other lenders that are in excess of three months within a period of one year, then the "institutions should offer the customer, or refer the customer to, an alternative longer-term credit product that more appropriately suits the customer's needs."[136] These recommendations by the FDIC appear to have one central theme—more oversight that will lead to fewer problems with payday lenders.

However, although more oversight by the FDIC may be a possible solution to the problem of payday lending, it will not address one of the central problems of payday loans in Texas—the ability of payday lenders to avoid Texas law regarding usurious interest rates. Instead of the FDIC taking direct action against the banks they insure, they may have more success in addressing the problem of payday lenders by providing small-dollar loans or encouraging other organizations doing the same.

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133. FDIC, FIL-14-2005, PAYDAY LENDING PROGRAMS: REVISED GUIDELINES FOR PAYDAY LENDING (2005), *available at* http://www.fdic.gov/news/news/financial/2005/fil1405.html.

134. *Id.*

135. *Id.*

136. *Id.* In the Financial Institution Letter Mr. Zamorski states that FDIC-regulated institutions were instructed to produce written plans as to how they will incorporate the FDIC's recommendations, and he mentions the possibility of "using a mystery shopper program in conjunction with its examination process of institutions involved in payday lending." *Id.*

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B. *Alternative Loan Programs by the FDIC and ACCIÓN Texas Louisiana*

i. The FDIC Pilot Program

Although it is not a direct solution to the problem of payday lending, the FDIC recently conducted a pilot of an alternative loan program, which proved to be successful.[137] The pilot program ran for two years—from December 2007 through December 2009.[138] The program was designed to gauge the effectiveness and feasibility of small-dollar loans offered by FDIC-insured banks.[139] According to a 2007 press release by the FDIC, another reason why the program was created was to build a working relationship between a borrower and the bank; as a prerequisite to obtaining a payday loan, a borrower needed a checking account, and instead of borrowers going to payday lenders it was thought to be beneficial for them to use their own bank for their small-loan needs.[140]

One important benefit for borrowers who used this program includes giving borrowers a "meaningful opportunity to repay based on their circumstances."[141] Thus, the FDIC appears to be promulgating a program that considers an individual borrower's situation, with the added benefit of furthering a business relationship.

Another benefit to using this program has to do with the very nature of the relationship between a borrower and a lender; payday loans are typically more heavily advertised and available, but if instead a borrower can use their own bank, then not only will they have the benefit of an existing relationship with the bank, but the loan itself will come through faster

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137. FDIC, FIL-31-2010, SMALL-DOLLAR LOAN PILOT RESULTS RELEASED: PILOT STUDY RESULTS IN CREATION OF SAFE, AFFORDABLE AND FEASIBLE TEMPLATE FOR SMALL-DOLLAR LOANS (2010), *available at* http://www.fdic.gov/news/news/financial/2010/fil10031.pdf [herinafter FIL-31-2010]. The actual program was "designed to illustrate the feasibility of banks offering alternatives to high-cost credit products, such as payday loans and fee-based overdraft programs." *Id.* It consisted of "loan amounts up to $2,500; annual percentage rates of [thirty-six] percent or less; low or no fees; streamlined underwriting; and loan terms of [ninety] days or more." *Id.*

138. Rae-Ann Miller et al., *A Template for Success: The FDIC's Small-Dollar Loan Pilot Program*, 4 FED. DEPOSIT INS. CORP. Q., no. 2, 2010 at 28, 37, *available at* http://www.fdic.gov/bank/analytical/quarterly/2010_vol4_2/FDIC_Quarterly_Vol4No2.pdf. The results proved that banks could offer effective alternatives to payday loans. *Id.*

139. *Id.* The program appears to be successful, as "[a]lmost all of the pilot bankers indicated . . . that they will continue their small-dollar programs beyond the pilot." *Id.*

140. Press Release, FDIC, PR-52-2007 FDIC Issues Final Guidelines on Affordable Small-Dollar Loans (June 19, 2007), *available at* http://www.fdic.gov/news/news/press/2007/pr07052a.html.

141. *Id.* Eventually, once a borrower has had a chance to strengthen their credit history, they may get "other more significant asset-building loans, such as home mortgage loans and small business loans." *Id.*

due to the bank's familiarity with the borrower—this is critical for a borrower's emergencies and other expenses.[142] As an added layer of protection, the program recommended that FDIC-insured banks carefully oversee a borrower's loan, so that the bank can render appropriate financial advice; this ultimately "help[s] these borrowers become better customers and improve long-term relationships."[143]

Over the two-year pilot period, many of the participating banks reported that the program allowed for the building and retaining of customers.[144] The banks also indicated that a beneficial characteristic of the program was the element of time given to repay the loan; this was vital as "it gave consumers more time to recover from a financial emergency than a single pay cycle for payday loans."[145]

It remains to be seen whether the rest of the FDIC-insured banks that did not participate in this pilot-program will begin providing alternative loans. Even if other FDIC-insured banks do not offer these kinds of loans, there appear to be various non-bank alternatives to payday loans.

ii. ACCIÓN Texas-Louisiana

ACCIÓN Texas-Louisiana (ATL), is a non-profit organization that seeks to provide entrepreneurs and small businesses with loans that are not available to them via traditional banks.[146] According to ATL's 2009 Annual Report, ATL has made over 10,500 loans to over 7,000 clients to date.[147] ATL is prospering, and a very simple although lofty goal would be to expand the scope of ATL's loans to the kind that the FDIC suggested via its pilot program. In doing so, not only would borrowers have another option in obtaining a loan, but it would also ensure that even if

142. *Id.*

143. *Id.*

144. Miller et al., *supra* note 138. As for how likely the program was to succeed, it depended largely on "strong senior management and board of director support." *Id.* A challenge to the success of the program depended on how well the alternative loan service was promoted, especially when this service was one among so many. *Id.*

145. *Id.*

146. ACCIÓN TEXAS-LOUISIANA, http:/www.acciontexas.org (last visited Sept. 21, 2011). The mission statement of ACCIÓN Texas-Louisiana reads: "The mission of ACCIÓN Texas-Louisiana is to provide credit and services to small businesses that do not have access to loans from commercial sources and to provide leadership and services to the micro lending field on a national level." *Id.*

147. ACCIÓN TEXAS-LOUISIANA, 2009 ANNUAL REPORT 2 (2010), *available at* http://www.acciontexas.org/download/ACCION%202009%20Annual%20Report%20Web.pdf. [hereinafter ANNUAL REPORT] According to ACCIÓN Texas-Louisiana's 2009 Annual Report the organization manages a portfolio of approximately $25.82 million, and during 2009 made 958 loans for a total of $15.87 million, serving 611 new clients. *Id.* In addition, they expanded into Louisiana for the first time in 2009, making twenty-five new loans for $273,145 to start with. *Id.*

an FDIC-insured bank did not provide alternative small dollar loans, a borrower could look to ATL rather than resorting to a payday lender.

There is also the possibility that banks, instead of adopting the pilot program suggested by the FDIC, can still contribute to the availability of alternative loans. In August of 2008, Citibank partnered with ATL in a deal to purchase up to $30 million of ATL loans for a five-year term; in just a year, ATL loaned $6 million to borrowers under this deal with Citibank.[148]

While ATL could possibly expand their operations to include alternative loans that would hopefully replace the need for payday lending services, the biggest drawback is readily apparent: lack of funds. ATL operates on the basis of grants; upon receiving a borrower's payment on the loan, the money is then redistributed to other prospective borrowers.[149] Although various organizations like the Meadows Foundation, the Economic Development Administration, and the North American Development Bank have donated funds,[150] it isn't clear if ATL will be able to also include alternative small-dollar loans in its scope of services to borrowers.

Ultimately, if the FDIC's pilot-program is not widely adopted, or if ATL is unable to implement a loan program that focuses on the personal needs of borrowers other than for small businesses, there may have to be action taken by the local legislature. Although in Texas perhaps the best solution is to eliminate payday lending altogether.

C. *Banning Payday Loans in Texas*

As previously discussed, Texas was listed as one of the states that tolerates but regulates payday loans and lenders. However, the problem of payday lenders circumventing Texas law still persists, due to the allowance of the importation of usurious rates from out-of-state banks. Instead of focusing on the usurious rates themselves and trying to reach a compromise between the payday lenders that prey on borrowers and the laws that "tolerate but regulate," Texas should follow Georgia's example and legislatively eliminate payday lending altogether.[151]

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148. *Our History*, ACCIÓN TEXAS-LOUISIANA, http://www.acciontexas.org/our-history.html (last visited Sept. 21, 2011).

149. *Id.* (discussing the start up funding received for ACCIÓN's start up in San Antonio). "The team learned the value of building personal relationships with borrowers to ensure loan payback." *Id.*

150. ANNUAL REPORT, *supra* note 147.

151. Reynolds, *supra* note 40, at 339. In order to prevent lenders from evading Texas usury law, "an effective solution to restore authority to Texas regulation and the OCCC is to prohibit the out-of-state exportation of interest rates into Texas." *Id.*

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Georgia's passing of Senate Bill 157 in May 2004 delivered several critical blows to payday lenders: (1) out-of-state banks were prohibited from exporting usurious rates into Georgia, (2) the out-of-state banks were subjected to racketeering laws should they continue to export usurious interest rates, and (3) payday lenders could be subjected to class-action lawsuits.[152] This bill was passed in response to payday lenders "preying on economically unsophisticated soldiers around Georgia bases."[153] The interim report from Texas also recognizes the problem of the increasing debt of military personnel in Texas, where roughly "ten percent of active duty soldiers . . . needed financial counseling because of debt incurred by payday and other short-term lending schemes."[154]

Due to the payday-lending problem in Texas, the interim report specifically mentions the Texas Office of Consumer Credit Commissioner and asserts that this agency cannot meet its goals of regulating payday lenders effectively—the only solution then is to ban them completely.[155]

V. Conclusion

By adopting the two-pronged approach of providing a sufficient alternative to payday loans and eliminating payday lending in Texas, the problem of payday lending in Texas can be avoided. In doing so, not only can the problem be prevented, but there can also be another solution for those who are left without an alternative for obtaining money. Through the adoption of alternative loan programs, such as those piloted by the FDIC, borrowers can meet their immediate need for money without being trapped in a cycle of debt.[156] Additionally, by prohibiting payday loans in Texas, borrowers will no longer be taken advantage of by payday lenders.

This is especially relevant today, with unemployment in the United States reaching approximately 9.1% in August of 2011, it means that

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152. S. Comm. on Veteran Affairs & Military Installations, Interim Rep. to Tex. Lt. Governor David Dewhurst 78th Leg., at 23 (2004), available at http://www.senate.state.tx.us/75r/senate/commit/c650/downloads/2004VAMI.pdf. In addition, payday lenders in Georgia are prohibited from garnishing wages from military members, attempting to collect against deployed military members, and contacting the commanding officer of a military member. *Id.*

153. *Id.*

154. *Id.* The report discusses the negative impact on currently deployed reservists, "many of whom receive less pay than they did in civilian life." *Id.*

155. *Id.* Some of the recommendations by the Texas Senate Committee on Veteran Affairs and Military Installations include requiring counseling prior to a loan being made or before a renewal is given and limiting loan terms to a minimum of fourteen days. *Id.*

156. *See generally* FIL-31-2010, *supra* note 137 (detailing the pilot program for alternative loans under the FDIC).

some 14 million unemployed individuals are struggling.[157] The problem of payday lending is not a marginal issue, as there is a clear need for providing people facing a dire economic situation, like Mr. Leyva, with a less arduous path to economic survival.[158]

However, due to the greed and indifference of payday lenders, many like Mr. Leyva are forced into financial situations where instead of paying back a loan within a short period of time, the borrower is trapped in a cycle of debt. Mr. Leyva was faced with a situation in which he was doing everything he could to stay afloat; he worked two jobs, took care of his ill mother, and was still unable to pay off his payday loan until seven months later—at a cost of well over $500 in interest and fees, in addition to the original loan amount of $225.[159]

The situation Mr. Leyva faced is not uncommon, for the sheer rate of payday lending that occurs suggests that many borrowers may very well be in a situation where money is needed, but more traditional loans could not be obtained.[160] However, it may be argued that the decision to get a payday loan is one that the borrower should live with, as it is their decision. This is a mistaken belief, for it is not a *decision* on the part of the borrower. It is, instead, a *necessity* if there is no alternative to begin with. Mr. Leyva did not have a choice, so why then should he, or anyone for that matter, have an additional, prolonged burden of exorbitantly enhanced debt?

Furthermore, the rhetoric from the government of enduring the state of the economy[161] means little to the substantial number of individuals who must take out loans in order to survive. As with Mr. Leyva, a reasonable response to economic hardship is to take out a short-term loan under the belief that conditions will improve, thus allowing the loan to be

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157. News Release, Bureau of Labor Statistics, Dep't of Labor, The Employment Situation–August 2011 (Sept. 2, 2011), *available at* http://www.bls.gov/news.release/pdf/empsit.pdf.

158. *See* Interview, *supra* note 2 (detailing the hardships that Mr. Leyva was facing at the time he obtained a payday loan).

159. *Id.* Mr. Leyva at one point was forced to sell some of his family's personal property just to ensure that he could make the payments on the payday loan. *Id.*

160. *See* Reynolds, *supra* note 40, at 322 (estimating that payday lenders extend "$40 billion in more than 22,000 payday advance locations").

161. *See generally* President Barack Obama, Remarks of the President in the State of the Union Address (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address (identifying that the United States is facing many challenges that impact the economy, including unemployment, education, housing, and healthcare).

paid back. However, that has not been the case, as the economy is still recovering.[162]

In addition, the payday loans that are available are fueled by greed and rank opportunism, when in a compassionate society they should be fueled at least in part by a desire to actually help individuals recover, especially in light of the currently sputtering economy. There is no such desire from payday lenders, but thankfully the problem is being recognized by the government; President Barack Obama, in the 2010 State of the Union Address, remarked that "[w]e need to make sure consumers and middle-class families have the information they need to make financial decisions."[163]

By working closely with borrowers while keeping in mind a goal of recovery and not of excessive profit, such a goal is possible, both for the individual and the economy. This is seen in the efforts of ACCIÓN Texas-Louisiana as they provide a framework that can and should be utilized for individuals in need of a loan.[164] ATL already provides small business loans for individuals who cannot otherwise obtain more traditional loans,[165] thus it would not be unfathomable for ATL or another similar entity to work with individuals to meet their immediate financial needs.

Besides using ATL's model of recovery and the FDIC's pilot program for alternative loans, there is movement in the right direction in addressing the payday-lending problem; in Texas, "[t]he National Credit Union Administration recently adopted a new rule allowing federal credit unions to make short-term, small-amount loans designed to provide consumers with an alternative to borrowing from payday lenders."[166] These loans are characterized by an interest rate maximum of twenty-eight percent (a rate maximum in line with the maximum rates of many widely used credit cards), a loan amount from $200 to $1000 lasting one to six months, and a limit on the amount of loans and loan rollovers to an individual during a six-month period.[167] It remains to be seen what effect this

162. *See id.* (addressing the concerns of United States citizens, President Obama begins the state of the union by focusing on the economy). President Obama recognizes that "[o]ne in [ten] Americans still cannot find work. Many businesses have shuttered. Home values have declined." *Id.* The President goes on to comment on the state of the workers in America: "People are out of work. They're hurting. They need our help." *Id.*

163. *Id.*

164. ACCIÓN TEXAS-LOUISIANA, *supra* note 146.

165. *Id.*

166. Rob Robertson, *Regulators Approve Payday Loan Alternative*, FORT WORTH BUS. PRESS, Oct. 13, 2010, Banking and Finance (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

167. *Id.*

The Scholar: St. Mary's Law Review on Race and Social Justice, Vol. 14 [2022], No. 2, Art. 5

particular alternative loan has, both for borrowers and in being a reliable alternative to payday loans.

The problem of payday lending must not be ignored. While the previously mentioned two-pronged approach may be effective, the only way the true culprit, greed, may be fought is if it is countered with a sincere desire to help individuals overcome their financial difficulties.

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