Volume 7 | Number 4 Article 8

12-1-1976

Real Estate Sale-Leaseback Agreements under Texas Usury Law: Circumvention or Sale.

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COMMENTS

REAL ESTATE SALE-LEASEBACK AGREEMENTS UNDER TEXAS USURY LAW: CIRCUMVENTION OR SALE?

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A sale-leaseback agreement involves a sale of property, and as part of the same transaction, the ostensible buyer executes a long-term lease of the property back to the seller, sometimes including an option to repurchase.[1] As a financing device, it is often used by developers who own land which they intend to devote to long-term use in their own business enterprises.[2] Selling the property allows the developer to acquire capital to improve the land, and the leaseback agreement enables him to pursue his business goals without sacrificing the use of the land.[3] For example, a property owner, desiring to build apartments on his land, may convey the property to a grantee who would contemporaneously execute a lease to the grantor. The new lessee may then use the purchase money from the sale to finance the apartments while the lessor collects the rent. Another possible variation might involve an arrangement whereby the new landowner is entitled to a portion of the profits from the apartment enterprise in addition to or in lieu of rental payments.[4] Such participation in the profits of an enterprise under a sale-leaseback agreement avoids claims of usury unlike similar profit participation involving conventional mortgage financing.[5]

Another significant financial advantage of the sale-leaseback agreement is an opportunity for the seller/lessee to obtain 100 percent of the value of the land to finance development or improvement, assuming a fair market price is paid for the property.[6] With a conventional mortgage he generally would be

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1. Various advantages to both developers and investors, combined with a growing concern of developers for high leverage and tax shelters, have made the sale-leaseback a standard real estate financing technique in recent years. Fink, *Joint Ventures, Limited Partnerships, Sale-Leaseback and Other Devices: The Developer's Approach,* 52 CHI. B. REC. 323, 371 (1971); Marcus, *Real Estate Purchase-Leasebacks as Secured Loans,* 2 REAL ESTATE L.J. 664 (1974).

2. Note, *The Expanding Definition of "Security": Sale-Leaseback and Other Commercial Leasing Arrangements,* 1972 DUKE L.J. 1221, 1222.

3. Marcus, *Real Estate Purchase-Leasebacks as Secured Loans,* 2 REAL ESTATE L.J. 664, 666 (1974).

4. *Id.* at 665.

5. Mortgages are subject to the laws of usury while bona fide sale-leasebacks are not. Although a mortgage may be executed wherein the lender participates in the profits of the venture, such an arrangement would remain subject to the laws of usury unless the risk incurred by the lender is substantial, or the amount the lender is to receive is

unable to obtain financing on more than 75 percent of the value of the property.[7] There are also significant tax advantages for the developer in a sale-leaseback transaction. In a conventional mortgage a developer may deduct only that part of the mortgage payment which represents interest plus depreciation charges on the improvements. These deductions may be very small in comparison to the value of the property, whereas with a sale-leaseback agreement rental payments would be larger and are completely deductible.[8] A developer may also be afforded other tax advantages[9] and balance sheet improvements.[10]

For the investor, the sale-leaseback is often preferable to conventional mortgage financing because of the opportunity for a higher return than is normally available on mortgages, particularly if there is an agreement in which the investor receives a percentage of the profits.[11] Any rise in the value

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contingent. This problem of predicting the substantiality of the risk or the degree of contingency is omitted in a bona fide sale-leaseback. *See* Hershman, *Usury and "New Look" in Real Estate Financing*, 4 REAL PROPERTY PROBATE & TRUST J. 315, 319 (1969); Comment, *Lender Participation in Borrower's Venture; A Scheme to Receive Usurious Interest*, 8 HOUS. L. REV. 546, 558-59, 564 (1971).

6. Bernard & Perlstadt, *Sale and Leaseback Transactions*, 1955 U. ILL. L.F. 635, 636; Hershman, *Usury and "New Look" in Real Estate Financing*, 4 REAL PROPERTY PROBATE & TRUST J. 315, 319 (1969); Marcus, *Real Estate Purchase-Leasebacks as Secured Loans*, 2 REAL ESTATE L.J. 664, 666 (1974); Wilson, *Sale and Lease-Back—A Re-Appraisal*, 4 W. RES. L. REV. 318, 322 (1953).

7. In typical cases, a borrower may receive only two-thirds of the value of the property, and must furnish equity for the remainder. Fink, *Joint Ventures, Limited Partnerships, Sale-Leaseback and Other Devices: The Developer's Approach*, 52 CHI. B. REC. 323, 376 (1971); Wilson, *Sale and Lease-Back—A Re-Appraisal*, 4 W. RES. L. REV. 318, 322 (1953).

8. Bernard & Perlstadt, *Sale and Leaseback Transactions*, 1955 U. ILL. L.F. 635, 638; Marcus, *Real Estate Purchase-Leasebacks as Secured Loans*, 2 REAL ESTATE L.J. 664, 667 (1974). If the seller/lessee has taken most of the available depreciation and could only deduct the mortgage payments, his taxes would increase. Thus an ideal point in time to enter a sale-leaseback arrangement is when little depreciation remains on improvements. Wilson, *Sale and Lease-Back—A Re-Appraisal*, 4 W. RES. L. REV. 318, 323 (1953).

9. If the property is sold at a loss and it has been held for more than six months, the loss on the sale will be allowed as an ordinary loss instead of a capital loss, to the extent that it exceeds gains from other property used in the business. INT. REV. CODE OF 1954, § 1001 (a), (c); *see* Bernard & Perlstadt, *Sale and Leaseback Transactions*, 1955 U. ILL. L.F. 635, 642-43; Wilson, *Sale and Lease-Back—A Re-Appraisal*, 4 W. RES. L. REV. 318, 324 (1953).

10. Before the sale-leaseback, land and improvements would be considered fixed assets on the original owner's balance sheet. After the transaction these fixed assets would be replaced by cash, a current asset. Wilson, *Sale and Lease-Back—A Re-Appraisal*, 4 W. RES. L. REV. 318, 322 (1953).

11. The sale-leaseback is but one device used by lenders. *See generally* Hershman, *Usury and "New Look" in Real Estate Financing*, 4 REAL PROPERTY PROBATE & TRUST J. 315 (1969). Other devices are: (a) Mortgagee's Participation in Income. The mortgagee may take a percentage of the gross income, gross income in excess of a set amount, net income or overages. (b) Mortgagee's Participation in Proceeds of Refinancing or Resale. The mortgage would provide that the mortgagor pay a premium based on a

of the property enures to the benefit of the buyer/lessor, and if there is no option to repurchase or if the option is not exercised, the buyer/lessor has an opportunity to acquire a valuable piece of property often complete with improvements.[12] The agreement may also be structured so that the seller/lessee assumes the burden of managing the property, and the investor need only collect the rent.[13]

These advantages are in most instances the incentive for parties to enter into sale-leaseback agreements. There may be, however, an even more compelling reason for selecting the sale-leaseback transaction. The high-risk seller may be unable to obtain a loan or conventional mortgage financing. In this type of situation the sale-leaseback could become a scheme to avoid the usury problems that affect conventional mortgage financing.[14] If the sale-leaseback agreement is properly conceived and executed it would avoid the usury statutes because usury does not apply to bona fide conveyances of property, either in the form of a lease or sale. It only applies to interest on a debt.[15] Yet, there are circumstances under which a dissatisfied seller in a sale-leaseback agreement may be able to prove that the transaction was actually intended as a loan and mortgage within the usury laws.

Texas courts have yet to consider a sale-leaseback transaction for usury, and the case law from other jurisdictions is meager.[16] There are, however, a number of cases from the United States Tax Court and the federal district courts in which a sale-leaseback agreement has been examined by the

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percentage of the proceeds of refinancing. (c) Ownership Interest. The lender may be given an equity position such as an ownership of stock in the corporation, a tenancy in common, an interest in a joint venture, or a partnership. (d) Sale-Buy Back. Through this device the lender buys the property and in the same transaction resells to the seller/developer for the same price on a long term installment sale contract. (e) The "Wrap-Around" Mortgage. In this device the mortgage is secured by real property which is already encumbered by a first mortgage. The lender continues to meet the payments on the first mortgage, and the borrower is left indebted to the lender for the first mortgage and the new funds. (f) The Front Money Loan. The investor contributes the required cash, and the investor and the developer enter into a joint venture, partnership, or form a corporation in which the two share in the stock. If the investor contributed the total cash, there is a provision that the investor may receive his money first. *Id.* at 315-24.

12. Marcus, *Real Estate Purchase-Leasebacks as Secured Loans*, 2 REAL ESTATE L.J. 664, 668 (1974). If the repurchase price is based upon the market value at the time of the option the buyer/lessor would likewise receive the increased value from the improvements. *Id.* at 668.

13. *Id.* at 668.

14. *Id.* at 665.

15. *See* A.B. Lewis Co. v. National Inv. Corp., 421 S.W.2d 723, 727 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.); Rattan v. Commercial Credit Co., 131 S.W.2d 399, 399-400 (Tex. Civ. App.—Dallas 1939, writ ref'd).

16. A possible explanation for the sparse number of cases is that "if a large money borrower challenges a lender, he will never be a large borrower again." Comment, *Lender Participation in Borrower's Venture: A Scheme to Receive Usurious Interest*, 8 HOUS. L. REV. 546, 569 (1971).

Commissioner of Internal Revenue to determine the validity of the transaction for tax purposes, and the reasoning of these cases is useful in analyzing sale-leasebacks as to usury. The future disposition of a Texas court as to a sale-leaseback transaction can further be predicted by an examination of general principles of usury in Texas, as well as analogous cases concerned with whether a transaction was a conditional sale, a loan, or a mortgage.[17]

General Principles of Texas Usury Law

The Texas usury statute fixes the maximum rate of chargeable interest at 10 percent,[18] unless the borrower is a corporation, in which case the maximum rate is one and one-half percent per month.[19] The significance of this statute lies within the severity of the penalties exacted for its violation. The statute provides penalties of twice the amount of interest contracted for and reasonable attorneys' fees for any lender charging over the statutory limit "for the use or forbearance or detention of money."[20]

There are four essential elements which must be proved before a lender can be found guilty of charging usurious interest: (1) a loan of money, as distinguished from an advance of working capital; (2) the existence of an agreement between the parties that the principal shall be paid absolutely; (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower; and (4) an intent to charge usurious interest.[21] It is readily apparent that if a sale-leaseback agreement is what

17. G. Osborne, Mortgages § 87, at 131 (2d ed. 1970). Osborne defines a conditional sale as any conveyance by deed absolute coupled with a separate written contract or option to repurchase. Among the many types of transactions appearing under the general heading of conditional sales, he lists a sale-leaseback with an option to repurchase. *Id.* at 132.

18. Tex. Rev. Civ. Stat. Ann. art. 5069, § 1.02 (1967). This rate is also provided for in the Texas Constitution as amended in 1960 which states, in part, that "in the absence of legislation fixing maximum rates of interest all contracts for a greater rate of interest than ten per centum (10%) per annum shall be deemed usurious." Tex. Const. art. XVI, § 11.

19. Tex. Rev. Civ. Stat. Ann. art. 1302, § 2.09 (Supp. 1975). This rate now applies to non-corporations when the loan is for over $500,000 and it finances improved land, or provides interim financing for construction on real property. Tex. Rev. Civ. Stat. Ann. art. 5069-1.07 (Supp. 1976).

20. Tex. Rev. Civ. Stat. Ann. art. 5069, §§ 1.01, 1.06(1) (1967). The most stringent penalty provision applies to any person who contracts for, charges, or receives double the legal rate of interest; he shall forfeit *all principal* as well as *interest*, and all other charges and reasonable attorneys' fees, and is subject to a fine not to exceed $1,000. *Id.* § 1.06(2). It should be noted that although the statute and penalties are punitive in nature there is some doubt as to whether the statute is or should be given a strict construction. Economic and social changes have affected the statute, with the emphasis no longer on punishing the lender, but rather on balancing between restricting the practices of overreaching lenders and allowing an appropriate return to creditors. *See* Pearce & Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 Sw. L.J. 233, 254, 258-59 (1968).

21. *E.g.* Bexar Bldg. & Loan Ass'n v. Robinson, 78 Tex. 163, 169, 14 S.W. 227, 228

it purports to be, none of these elements would attach. If the transaction is bona fide no loan exists, only an absolute conveyance of property with a contemporaneous lease-back.

The threshold question in any sale-leaseback situation, therefore, will be whether the agreement was a loan, and until the transaction is found to have been intended as a loan, usury laws cannot apply.[22] Once the transaction is determined to be a loan, and the contract is usurious, generally no specific intent to exact usurious interest need be shown.[23] Thus, even though the lender testifies that he did not intend to charge usurious interest, a Texas court could hold the transaction usurious.[24]

The courts, in construing sale-leaseback transactions, follow the principle that where there has been a sale absolute in form, the form of the transaction will be disregarded, and its substance will control in determining whether the transaction is usurious.[25] This substance over form doctrine enables courts to look behind the terms and labels used in an agreement to ascertain the actual intent of the parties.[26] Thus by using the substance over form doctrine in construing sale-leaseback agreements, courts have sought to determine whether the parties intended to create a loan and used the transaction to circumvent the usury law.[27]

(1890); Pansy Oil Co. v. Federal Oil Co., 91 S.W.2d 453, 455 (Tex. Civ. App.—Texarkana 1936, writ ref'd); Campbell v. Oskey, 239 S.W. 332, 334 (Tex. Civ. App.—El Paso 1922, no writ); Pearce & Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 Sw. L.J. 233, 236-37 (1968).

22. C.I.T. Corp. v. Edwards, 418 P.2d 685, 687 (Okla. 1966); *see* Rattan v. Commercial Credit Co., 131 S.W.2d 399, 399-400 (Tex. Civ. App.—Dallas 1939, writ ref'd).

23. Nevels v. Harris, 129 Tex. 190, 198, 102 S.W.2d 1046, 1050 (1937); Terry v. Teachworth, 431 S.W.2d 918, 926 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). But where the contract, on its face is for lawful interest, the borrower must show that there was some agreement or device to conceal the usurious interest, and that the lender was aware of this device or agreement. Slaughter Co. v. Eller, 196 S.W. 704, 708 (Tex. Civ. App.—Amarillo 1917, writ ref'd), *citing* Bank of United States v. Waggener, 34 U.S. (9 Pet.) 378, 400 (1835).

24. Kollman v. Hunnicutt, 385 S.W.2d 600, 601 (Tex. Civ. App.—Fort Worth 1964, no writ) (court held intent apparent from instrument by doctrine of *res ipsa loquitur*).

25. Burr v. Capital Reserve Corp., 80 Cal. Rptr. 345, 349 (1969); Golden State Lanes v. Fox, 42 Cal. Rptr. 568, 570 (Dist. Ct. App. 1965); Kawauchi v. Tabata, 413 P.2d 221, 228 (Hawaii 1966); *see* Stacks v. East Dallas Clinic, 409 S.W.2d 842, 845 (Tex. 1966) (usurious promissory note); Temple Trust Co. v. Sewell, 133 Tex. 417, 425, 126 S.W.2d 943, 946-47 (1939) (purchase of negotiable instrument and contract at a discount).

26. Associates Inv. Co. v. Thomas, 210 S.W.2d 413, 416 (Tex. Civ. App.—Fort Worth 1948, no writ) (conditional sales agreement with hidden financing charge); Commercial Sec. Co. v. Rea, 78 S.W.2d 707, 712 (Tex. Civ. App.—Galveston 1934), *aff'd*, 130 Tex. 11, 105 S.W.2d 872 (1934) (agreement is usurious if it requires payment of usurious interest, even if given another name in contract).

27. Golden State Lanes v. Fox, 42 Cal. Rptr. 568, 570 (Dist. Ct. App. 1965); Kawauchi v. Tabata, 413 P.2d 221, 228 (Hawaii 1966); Gaither v. Clark, 8 A. 740, 744 (Md. Ct. App. 1887); *see* Commercial Sec. Co. v. Rea, 78 S.W.2d 707, 710 (Tex. Civ.

In a sale-leaseback or any other transaction where a conveyance is absolute in form, the one asserting that it is a loan must establish that fact by clear and convincing evidence.[28] Moreover, whether the evidence is sufficient is usually a question of fact for the trial court.[29] If the seller/lessee sustains this burden in proving that the transaction was intended to be a loan, the following charges accruing to the buyer/lessor will be considered interest on a debt: (1) rental that is contracted for, charged or received; (2) money contracted for, charged, or received as income from an agreement that the buyer/lessor take a percentage of the profits; and (3) profit contracted for, charged, or received that is the difference between the repurchase amount and the purchase price.[30] In addition, certain other incidental charges might also be considered interest on a debt.[31] If the total amount considered as interest does not exceed the statutory limit, there is no question of usury even if the transaction is determined to be a loan and mortgage. There may be, however, serious tax consequences even if the transaction is not usurious.[32]

SCRUTINIZING THE TRANSACTION

Preliminary Negotiations—Surrounding Facts and Circumstances

To determine whether the parties intended a loan and mortgage and whether the sale-leaseback transaction was merely a scheme to circumvent usury laws, courts have looked to the preliminary negotiations. The fact that the parties initially negotiated in terms of a loan has been considered

App.—Galveston), *aff'd*, 130 Tex. 11, 105 S.W.2d 872 (1934); Slaughter Co. v. Eller, 196 S.W. 704, 708 (Tex. Civ. App.—Amarillo 1917, writ ref'd).

28. Miller v. Yturria, 69 Tex. 549, 554, 7 S.W. 206, 209 (1888); A.B. Lewis Co. v. National Inv. Corp., 421 S.W.2d 723, 729 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.).

29. Wilbanks v. Wilbanks, 160 Tex. 317, 320, 330 S.W.2d 607, 609 (1960); Cochrane v. Wilson, 106 Tex. 180, 181, 160 S.W. 593 (1913). *But see* Maxey v. Citizens Nat'l Bank, 432 S.W.2d 722, 723 (Tex. Civ. App.—Amarillo 1968, no writ) (whether deed absolute is in fact a mortgage is mixed question of law and fact).

30. *See* Hershman, *Usury and "New Look" in Real Estate Financing*, 4 REAL PROPERTY PROBATE & TRUST J. 315, 320 (1969). Under a recently enacted Texas statute, however, if the loan is secured by real property and is paid in full before the end of the term and the interest paid for the actual time of the loan exceeds the legal rate, the lender is not subject to normal penalties but need only refund the extra interest paid or credit it to the amount still owed. TEX. REV. CIV. STAT. ANN. art. 5069-1.07 (Supp. 1976).

31. Service charges, handling charges, carrying charges, and bookkeeping expenses, if charged to the seller/lessee, may also be considered interest. *See* Pearce & Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 Sw. L.J. 233, 238-39 (1968).

32. Marcus, *Real Estate Purchase-Leasebacks as Secured Loans*, 2 REAL ESTATE L.J. 664, 675-77 (1974). The payment deducted as rent would be considered non-deductible partial payment on the purchase price. *Id.* at 676. The buyer/lessor is not collecting rents taxable as ordinary income, and he is also not entitled to the depreciation deduction or owner-associated tax deductions. *Id.* at 677.

evidence that the transaction was intended to be a loan.[33] Similarly, if the buyer/lessor is normally in the business of lending, or if the seller/lessee urgently needed money prior to the transaction, this would be some indication that the transaction was a loan or mortgage.[34]

The early Texas case of *Cotton v. Cooper*[35] illustrates the importance of evidence that the buyer/lessor is normally in the business of lending. In *Cotton* the defendant operated a chain of "loan offices" in impoverished areas, and the plaintiff entered into an agreement with the defendant which assigned a portion of his wages in return for an advance of $10. The plaintiff was illiterate and had no knowledge of the terms of the agreement. The jury found that the transaction was actually a loan under the guise of an assignment of wages to cloak usury.[36] *Cotton* also illustrates the emphasis which a court or jury will give to the bargaining power of the parties. If there is great disparity in their bargaining power, this might provide evidence of overreaching on the part of the buyer/lessor.[37] Another decision, however, has indicated that if the parties possess equal bargaining power and are sophisticated in business transactions and laws, this is persuasive evidence that each party intended a bona fide sale-leaseback as evidenced by the form and documentation of the transaction.[38]

Another important factor in determining whether a sale-leaseback agreement was intended as a usurious loan and mortgage is the reasonableness of the amount charged in the rental payments. Rent which greatly exceeds the fair rental value of the property is evidence that the lease was intended to disguise a usurious loan. For example, in *Rochester Capital Leasing Corp. v. K. & L. Litho Corp.*,[39] the parties set the rent not on the basis of a fair

33. Kawauchi v. Tabata, 413 P.2d 221, 224 (Hawaii 1966). In Gaither v. Clark, 8 A. 740 (Md. Ct. App. 1887), plaintiff attempted to secure a loan from defendant before selling his farm to him and leasing it back. The Maryland Court of Appeals noted that all negotiations before the sale-leaseback evidenced the making of a loan and obtaining ample security therefor. *Id.* at 743.

34. Lockhart Leasing Co., 54 T.C. 301, 314-15 (1970), *aff'd*, 446 F.2d 269, 271-72 (10th Cir. 1971) (buyer/lessee in business of lending); Banks v. Walters, 130 S.W. 519, 520 (Ark. 1919); Golden State Lanes v. Fox, 42 Cal. Rptr. 568, 571 (Dist. Ct. App. 1965) (plaintiff desperately needed funds to finish project); Kawauchi v. Tabata, 413 P.2d 221, 223-24 (Hawaii 1966) (plaintiff's land encumbered by first and second mortgages which were about to be foreclosed); Peterson v. Philco Fin. Corp., 428 P.2d 961, 966 (Idaho 1967) (buyer/lessee in business of lending).

35. 209 S.W. 135 (Tex. Comm'n App. 1919, jdgmt adopted).

36. *Id.* at 136.

37. *Id.* at 136; *see* Lockhart Leasing Co., 54 T.C. 301 (1970), *aff'd*, 446 F.2d 269 (10th Cir. 1971).

38. *In re* San Francisco Ind. Park, Inc., 307 F. Supp. 271, 274 (N.D. Cal. 1969). In Workmon Constr. Co. v. Weirick, 36 Cal. Rptr. 17 (Dist. Ct. App. 1963), plaintiff had engaged a skilled real estate attorney who prepared the instrument which described the transaction as a deed absolute with an option to repurchase. This was held to be a strong indication that the parties did not intend a mortgage. *Id.* at 20.

39. 91 Cal. Rptr. 827, 830 (Ct. App. 1970).

rental for the property but on the lessee's expected profits, which the California Court of Appeals held to be strong evidence of a loan. Similarly, if the rent is applied toward a fixed purchase price, so that the seller/lessee is building up an equity in the property through his payments under the sale-leaseback agreement, this would be some evidence of a loan because the rental assumes the form of payment of a debt—the purchase price.[40]

In analyzing surrounding facts and circumstances, the most important consideration is the price paid for the property. If a fair price is paid for the property, this evidence could outweigh the combined effect of other extrinsic evidence indicating that the parties intended a loan and mortgage.[41] On the other hand, a great discrepancy between the purchase price and the true market value would provide strong evidence that the parties intended a loan and mortgage.[42] A discrepancy in the price standing alone, however, would not be conclusive in most situations when other evidence points toward an absolute sale. In *Develop-Amatic Eng'r v. Republic Mortgage Co.*,[43] the buyer had expressly stated to the plaintiff that it would not enter into a loan transaction. In addition, the seller was given the power to assign the repurchase option. After the conveyance, the buyer had taken possession, collected rents from a lease which was assigned in the same transaction, paid taxes, and encumbered the property by securing a bank loan, thus exercising rights normally consistent with ownership. The combined effect of these acts was sufficient to show a true conditional sale and not a mortgage, despite the fact that the purchase price was one-half of the value of the property.[44]

Construing the Instrument Itself

It is well settled that a deed, though absolute on its face, will be treated as a mortgage if the parties intended it to secure a debt.[45] Formerly this

40. Breece Veneer & Panel Co., 22 T.C. 1386, 1399 (1954), *rev'd*, 232 F.2d 319 (7th Cir. 1956) (appellate court found facts did not support Tax Court's finding that petitioner was building equity in the property).

41. *See* Calhoun v. Lumpkin, 60 Tex. 185, 189 (1883). A pre-existing debt between the parties had been satisfied and the price was equal to the value of the property. "When we add to these circumstances the fact that the property in the [subsequent] sale . . . brought its full value, and that the vendee took possession under his deed, the case becomes a very strong one to show that no mortgage was intended." *Id.* at 189.

42. Commissioner v. F. & R. Lazarus & Co., 101 F.2d 728, 730 (6th Cir.), *aff'd*, 308 U.S. 252 (1939) (sale-leaseback with option to repurchase and 99 year lease in which property worth over 6 million dollars sold for 3-1/2 million dollars); Kawauchi v. Tabata, 413 P.2d 221, 231 (Hawaii 1966); Gaither v. Clark, 8 A. 740, 743-44 (Md. Ct. App. 1887); *see* Annots., 89 A.L.R.2d 1040 (1963); 90 A.L.R. 953 (1934).

43. 91 Cal. Rptr. 193 (Ct. App. 1970).

44. *Id.* at 196-97.

45. *E.g.*, Fulbright v. Culbertson, 429 S.W.2d 179, 184 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e); Barrera v. Gonzalez, 358 S.W.2d 233, 234 (Tex. Civ.

principle was considered solely equitable in nature and was barred from actions at law because it was thought to violate the parol evidence rule.[46] In Texas, however, the rule is presently stated that a deed absolute on its face may be construed as a mortgage where the evidence, including parol evidence, shows that this was the intention of the parties.[47]

The test used to determine if an instrument is a mortgage is whether there is a subsisting, continuing debt and a continuing debtor-creditor relationship. The existence of a debt is not merely a circumstance tending to show that the conveyance was a mortgage, but is indispensable in proving the agreement to be a mortgage.[48] This continuing debtor-creditor relationship is perhaps the most important consideration in determining whether the parties intended a sale-leaseback with a repurchase option, or a mortgage and loan.[49] If a debt existed between the parties at the time of the execution of the sale-leaseback agreement,[50] or if the transaction was made to secure the debt of a third person, this evidence could be used to prove the existence of a mortgage.[51] If, however, there was no debt in existence at the time of the execution of the sale-leaseback agreement, the only sum that could be construed as a debt would be the money given as the purchase price.

App.—Eastland 1962, writ ref'd n.r.e.); Young v. Fitts, 183 S.W.2d 186, 191 (Tex. Civ. App.—Fort Worth 1944, writ ref'd); Smith v. Koennecke, 73 S.W.2d 933, 934 (Tex. Civ. App.—San Antonio 1934, no writ); Callaway v. Snead, 33 S.W.2d 552, 555 (Tex. Civ. App.—Texarkana 1930, no writ); 1 G. GLENN, MORTGAGES § 11, at 53 (1943); 1 L. JONES, MORTGAGES § 294, at 14 (8th ed. 1964). *See generally* Annots., 155 A.L.R. 1104 (1945); 79 A.L.R. 937 (1932).

46. Town of Reading v. Weston, 8 Conn. 117, 121 (1830) (action at law removed to court of equity); 1 G. GLENN, MORTGAGES § 11, at 54 (1943).

47. *E.g.*, Barrera v. Gonzalez, 341 S.W.2d 703, 704 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.); Smith v. Rozelle, 282 S.W.2d 122, 124 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.); Bradshaw v. McDonald, 211 S.W.2d 797, 799-800 (Tex. Civ. App.—Galveston), *aff'd*, 147 Tex. 455, 216 S.W.2d 972 (1948).

48. *E.g.*, Spataro v. Domenico, 96 Cal. App. 2d 411, 413 (Dist. Ct. App. 1950); First Baptist Church v. Bible Baptist Seminary, 347 S.W.2d 587, 591 (Tex. 1961); Humble Oil & Ref. Co. v. Atwood, 150 Tex. 617, 622, 244 S.W.2d 637, 639 (1951) (court noted definition of mortgage as a grant of fee upon condition of repayment of a debt); Maxey v. Citizens Nat'l Bank, 432 S.W.2d 722, 723 (Tex. Civ. App.—Amarillo 1968, no writ).

49. See Spataro v. Domenico, 96 Cal. App. 2d 411, 413 (Dist. Ct. App. 1950); Kawauchi v. Tabata, 413 P.2d 221, 228-30 (Hawaii 1966); Moewe, *Sale and Leaseback Financing of Real Estate as Mortgages Under California Law*, 48 CALIF. ST. B.J. 555, 618 (1973).

50. Leonard v. Smith, 148 S.W.2d 259, 260 (Tex. Civ. App.—Galveston 1941, no writ) (pre-existing indebtedness was unpaid). When a transaction is in the form of a conditional sale but there was a pre-existing debt, the issue becomes whether the parties intended to cancel the debt. Ruffier v. Womack, 30 Tex. 332, 342-43 (1867). When a deed intended to extinguish a pre-existing debt and a simultaneous agreement give the grantor a right to repurchase after payment of a specified amount, the transaction is a mortgage and not a conditional sale. Bell v. Ramirez, 299 S.W. 655, 657 (Tex. Civ. App.—Austin 1927, writ ref'd).

51. *See* Wilbanks v. Wilbanks, 330 S.W.2d 607, 608-609 (Tex. 1960) (father conveyed land to son as security for money given by that son to another son). Where

Option or Agreement to Repurchase

If the repurchase agreement in the sale-leaseback transaction is absolute and there is an unconditional promise or obligation on the part of the buyer/lessor to reconvey the land upon payment, then the transaction will contain the essential element of a mortgage; that is, the purchase price becomes a debt for which there is an absolute obligation to repay.[52]

It is rare that the instrument stipulates an absolute obligation to repurchase. More often the transaction is in the form of a mere option which may or may not be exercised.[53] The existence of an option is clear proof that the parties intended that the grantor be permitted to regain title to his land. The question then becomes whether the grantor regains ownership by virtue of a contract to repurchase, or by virtue of a mortgagor's right to redeem. This question is answered by analyzing the intent of the parties as evidenced by the surrounding facts and circumstances.[54] The fact that the transaction is so structured that the lessee is economically required to exercise his repurchase option to preserve his interest in the property is very persuasive evidence that the parties intended a loan or mortgage.[55] This so-called "economic compulsion" test is used when the price paid for the property is significantly lower than the true market value at the time of the

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the defendant loaned the plaintiff money and the plaintiff's grandmother executed a deed to the defendant, the transaction was held to be a mortgage and not a sale, as the deed was intended to secure the debt of a third person. Starns v. Adams, 484 S.W.2d 454, 456 (Tex. Civ. App.—Waco 1972, writ ref'd).

52. Golden State Lanes v. Fox, 42 Cal. Rptr. 568, 571 (Dist. Ct. App. 1965) (instrument specifically and unconditionally obligated grantor to repurchase leasehold eight years after date he sold rights under leasehold to grantee); *see* Moores v. Wills, 69 Tex. 109, 111, 5 S.W. 675, 676 (1887); Loving v. Millikin, 59 Tex. 423, 424 (1883) (court found mortgage where agreement provided grantee would reconvey after payment of $300 purchase price plus interest); Little v. Littleton, 341 S.W.2d 484, 487 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.). In Shaver v. Darsey, 87 S.W.2d 516 (Tex. Civ. App.—Beaumont 1935, writ ref'd), an instrument executed simultaneously with a deed stipulated that Darsey would reconvey the land. The court pointed out that it was significant that the instrument did not stipulate that Shaver should have a right to repurchase but that the defendant would absolutely convey. The court held that by its own terms the instrument was a mortgage as a matter of law, and evidence was not admissible to construe it as a deed. *Id.* at 517.

53. Hershman, *Usury and "New Look" in Real Estate Financing,* 4 REAL PROPERTY PROBATE & TRUST J. 315, 320 (1969).

54. *E.g.*, Miller v. Yturria, 69 Tex. 549, 552-53, 7 S.W. 206, 207 (1888); Jones v. Parker, 193 S.W.2d 863, 864-65 (Tex. Civ. App.—Texarkana 1946, writ ref'd n.r.e.); Goodbar & Co. v. Bloom, 96 S.W. 657, 661-64 (Tex. Civ. App. 1906). The two most important factors to be considered in construing an option to repurchase are the existence of a debt, and disparity between the value of the land and the purported resale price. G. OSBORNE, MORTGAGES § 89, at 134-36 (2d ed. 1970). *See generally* Annots., 79 A.L.R. 937 (1932); 155 A.L.R. 1104 (1945).

55. Kawauchi v. Tabata, 413 P.2d 221, 231 (Hawaii 1966); *see* Gaither v. Clark, 8 A. 740, 741, 743-44 (Md. Ct. App. 1887); Plummer v. National Leasing Corp., 114 N.W.2d 21, 23 (Neb. 1962).

sale.[56] The option agreement then stipulates a repurchase price which is also low, and unless the seller exercises his option, he loses the property for less than its value.[57] Where these economic pressures exist, compelling the seller/optionee to do everything within his power to exercise the option, the situation becomes little different from an absolute obligation to repurchase.[58]

An important factor which must be considered with the economic compulsion test is the existence or non-existence of personal liability on the part of the seller. When the agreement gives the grantor only an option to repurchase and there is no express duty to repay the purchase price, there is a split of authority as to whether the transaction may be considered a mortgage.[59] Some authority supports the theory that because a mere option is not a binding personal obligation and the seller is not bound to pay the buyer anything, there can be no mortgage.[60] Therefore, unless the buyer in the first sale could compel the other party to pay the purchase price by exercising the option, there is no individual liability and no mortgage. In other words, unless there is a debt that is enforceable against the person independent of the security, there can be no debtor-creditor relationship, and thus, no mortgage and loan.

The more generally accepted rule is that the existence of an independent, in personam remedy against the mortgagor is not essential, and there need not be a debtor-creditor relationship for there to be a mortgage, since a debt chargeable against property is sufficient.[61] In these jurisdictions, however,

56. Marcus, *Real Estate Purchase-Leasebacks as Secured Loans*, 2 REAL ESTATE L.J. 664, 673 (1974); Moewe, *Sale and Leaseback Financing of Real Estate as Mortgages Under California Law*, 48 CALIF. ST. B.J. 555, 619 (1973).

57. Orlande v. Berns, 316 P.2d 705, 707 (Cal. App. 1957) (land worth $292,000 sold for $178,000 with a repurchase option of $204,000); Kawauchi v. Tabata, 413 P.2d 221, 232 (Hawaii 1966) (land and house worth $175,000 sold for $90,000 with repurchase option good within three years for $117,000).

58. *See* Kawauchi v. Tabata, 413 P.2d 221, 227-28 (Hawaii 1966).

59. Personal liability for the debt secured is not required for a mortgage. Heytle v. Logan, 8 Ky. (1 Marsh.) 529, 531 (1819); Campbell v. Dearborn, 109 Mass. 130, 144 (1872); Welsh v. Griffith-Prideaux, Inc., 158 A.2d 529, 535 (N.J. Super. 1960) (absolute debt strongly indicates mortgage, but may be mortgage without personal liability of mortgagor); *see* G. OSBORNE, MORTGAGES § 89, at 135 (1970). The grantor must be personally liable for the purchase price. Conway's Ex'rs v. Alexander, 11 U.S. (7 Cranch) 218, 237 (1812); *see* Desloge v. Ranger, 7 Mo. 327, 330 (1842) (mortgage of slaves).

60. In Conway's Ex'rs v. Alexander, 11 U.S. (7 Cranch) 218,237 (1812), it is stated that it is a necessary ingredient in a mortgage that "the mortgagee should have a remedy against the person of the debtor." 4 J. POMEROY, EQUITY JURISPRUDENCE § 1195, at 579 (5th ed. S. Symons 1941). *But see* Russell v. Southard, 53 U.S. (12 How.) 139, 152 (1851).

61. Hickox v. Lowe, 10 Cal. 197 (1858); Kawauchi v. Tabata, 413 P.2d 221, 229 (Hawaii 1966); Campbell v. Dearborn, 109 Mass. 130, 144 (1872). One author states that it is not necessary that there be any personal security, and the remedy of the mortgagee may be confined to the land alone. 1 L. JONES, MORTGAGES § 90, at 109 (8th

the want of personal liability and a debtor-creditor relationship is a circumstance to be considered in marginal cases as evidence that the transaction is bona fide.[62]

Texas cases which have dealt with personal liability as affecting an interpretation of a conditional sale as a mortgage have held that such personal liability was a necessity, and that there must be a debtor-creditor relationship for there to be a mortgage.[63] This personal liability on the part of the seller must be such that the buyer could compel payment by proper proceedings.[64] Thus, the absence of an absolute obligation to repurchase or a stipulation in the contract disallowing personal liability in the transaction would support the conclusion that the transaction was not a mortgage.[65] In *Harvey v. Edens*,[66] the Texas Supreme Court noted that if an agreement demands an absolute reconveyance upon payment of a sum of money and this payment is to discharge a debt, it is a mortgage. "But if it be optional with grantor whether he pay[s] or not, then it is only a conditional sale. In other words, the crucial test is whether or not there is a debt to be secured."[67]

The importance of personal liability in the sale-leaseback agreement can be examined best in light of the holding in *Kawauchi v. Tabata*,[68] where the plaintiff sold his property at a fraction of its value to prevent foreclosure of a first and second mortgage. The defendants paid the mortgages, bought the property, and contemporaneously leased it back to the plaintiff, giving him an option to repurchase. When the plaintiff was unable to exercise his option, the defendants terminated his tenancy when the lease expired, and

ed. 1970). Another authority states that the fact that the grantor took an option, which he was not bound to exercise should not weigh heavily against his contention that the transaction was a mortgage because "a mortgage need not necessarily secure a personal obligation." 1 G. GLENN, MORTGAGES § 12, at 61 (1943).

62. Kawauchi v. Tabata, 413 P.2d 221, 229-30 (Hawaii 1966); Boysun v. Boysun, 368 P.2d 439, 441 (Mont. 1962).

63. The test to determine whether an instrument is a mortgage is to look for a subsisting, continuing debt, and a continuation of the relationship of debtor and creditor. Maxey v. Citizens Nat'l Bank, 432 S.W.2d 722, 724 (Tex. Civ. App.—Amarillo 1968, no writ); Golden Spread Oil, Inc. v. American Petrofina Co., 431 S.W.2d 50 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.) (where no promise to pay, lease will not be construed as a mortgage); Young v. Fitts, 183 S.W.2d 186, 191 (Tex. Civ. App.—Fort Worth 1944, writ ref'd); McMurry v. Mercer, 73 S.W.2d 1087, 1089 (Tex. Civ. App.—Dallas 1934, writ ref'd); Bemrod v. Heinzelman, 263 S.W. 951, 953 (Tex. Civ. App.—Fort Worth 1924, writ dism'd); Parks v. Sullivan, 152 S.W. 704, 705 (Tex. Civ. App.—El Paso 1912, no writ).

64. This lack of reciprocity of remedies, because the buyer in a conditional sale could not force payment of the repurchase price, has been held determinative. Young v. Fitts, 183 S.W.2d 186, 191 (Tex. Civ. App.—Fort Worth 1944, writ ref'd); McMurry v. Mercer, 73 S.W.2d 1087, 1089 (Tex. Civ. App.—Dallas 1934, writ ref'd).

65. *See* cases cited note 63 *supra*.

66. 69 Tex. 420, 6 S.W. 306 (1887).

67. *Id.* at 429-30, 6 S.W. at 311.

68. 413 P.2d 221 (Hawaii 1966).

the plaintiff sued to avoid the transaction as usurious. The defendants contended that there could be no debt unless the plaintiff was personally liable for repayment of the money. Without a debt, there could be no mortgage and hence no usury. Thus, unless the defendant could have obtained a personal judgment against plaintiff for the purchase price, the plaintiff's charge of usury had to fail. The Hawaii Supreme Court stated that the weight of authority holds that the absence of personal liability is not conclusive, but is merely a factor to support the claim that a transaction is not a mortgage.[69] Despite this strong evidence of a bona fide sale-leaseback—a mere option with no personal liability—the transaction was held to be a usurious mortgage.[70] The court also stated that, particularly when a question of usury is involved, it would be most unrealistic to establish any absolute requirement that the borrower must be personally liable in order for the transaction to be a mortgage, because "the result would be to provide a ready avenue of escape from the requirements of the usury law."[71]

Although the language of Texas cases clearly seems to indicate that for a transaction to be declared a mortgage the mortgagor must be personally liable,[72] it is unlikely that Texas courts will adhere to this inflexible rule when other elements of the transaction overwhelmingly point to the existence of a mortgage and loan. The Texas courts have not been confronted by a situation in which there existed an economic compulsion to exercise a repurchase option, such as when the purchase and repurchase prices are considerably lower than the true market value. In addition, the decisions to date have not been concerned with a charge of usury, the existence of which would evoke certain public policy considerations. In any event, to retain the inflexible rule of a debtor-creditor relationship and personal liability in a usury case, would preclude an interpretation that a sale-leaseback agreement with a mere option is a mortgage and loan, despite economic compulsion to exercise the option. In *Heytle v. Logan*,[73] the situation was well put, that when the seller is forced to exercise his option to repurchase to save the greater injury of loss of the property, the contract is a device to evade the usury statute "at which the court can not wink."[74]

Risk as Affecting Sale-Leaseback Agreements

The sale-leaseback transaction provides the buyer with an opportunity to participate in the seller's venture by taking a percentage of the profits or

69. *Id.* at 229.
70. *Id.* at 232.
71. *Id.* at 230.
72. Cases cited note 63 *supra*.
73. 8 Ky. (1 Marsh.) 529 (1819).
74. *Id.* at 530.

income from the property in addition to or in lieu of interest.[75] If participation in the profits is a part of the sale-leaseback agreement, it will present another consideration for the court in determining the validity of the transaction. Even if the transaction should be declared a loan and mortgage, the existence of such a risk as might arise through participation in the profits or income may remove the transaction from the protection of the usury laws. The risk of loss doctrine is reserved for those cases wherein the lender has provided unsecured money to persons involved in a hazardous enterprise, making the lender's return contingent upon the success or failure of the enterprise.[76]

Similar to the risk of loss doctrine is the contingency rule which applies when the lender is to receive an uncertain amount of interest.[77] This rule applies when the interest specified is below the statutory maximum, and an additional compensation is to be derived from a participation in the profits.[78] The transaction is usurious if, at the time of contracting, an overall rate of return in excess of the legal rate was reasonably foreseeable.[79] If there is interest specified and the entire interest is subject to a contingency, an agreement that allows interest in excess of the statutory maximum is not usurious.[80]

Effect of Seller's Initiation of the Sale-Leaseback

It is foreseeable that a borrower would suggest using the sale-leaseback format after failing to obtain conventional financing. In jurisdictions which have considered the borrower's initiation of a usurious agreement, most courts have taken the view that the borrower is estopped to set up the defense of usury; he should not be allowed to take advantage of his own wrong.[81]

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75. *See* Comment, *Lender Participation in Borrower's Venture: A Scheme to Receive Usurious Interest*, 8 HOUS. L. REV. 546, 565-66 (1971).

76. Beavers. v. Taylor, 434 S.W.2d 230, 231 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.) (agreement provided that the appellee receive a percentage of the gross sales); *see* Pansy Oil Co. v. Federal Oil Co., 91 S.W.2d 453, 457 (Tex. Civ. App.—Texarkana 1936, writ ref'd).

77. Thomson v. Hague, 430 S.W.2d 293, 296 (Tex. Civ. App.—Fort Worth 1968, no writ); Ragland v. Short, 245 S.W.2d 368 (Tex. Civ. App.—San Antonio 1951, mandamus overruled); Korth v. Tumlinson, 73 S.W.2d 1048, 1050 (Tex. Civ. App.—San Antonio 1934, no writ); *see* Annot., 16 A.L.R.3d 475 (1967).

78. The contingency rule is distinguished from the risk of loss doctrine in that the principal of the loan is absolutely repayable, and the contingency rule applies to interest only. Comment, *Lender Participation in Borrower's Venture: A Scheme to Receive Usurious Interest*, 8 HOUS. L. REV. 545, 558 (1971).

79. Beavers v. Taylor, 434 S.W.2d 230, 231 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.). *See generally* Annot., 16 A.L.R.3d 475 (1967).

80. Beavers v. Taylor, 434 S.W.2d 230, 231 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.).

81. Perry v. Shelby, 118 S.W.2d 849, 850 (Ark. 1938); Nikkel v. Lindhorst, 276 P. 678, 679 (Colo. 1929).

The California courts have taken a modified view as to when such an estoppel arises, holding that the borrower will be estopped only if he knowingly and fraudulently inserted the illegal provisions in the instrument or transaction.[82] The borrower would not, however, be estopped from employing usury as a defense or recovering usurious interest paid, but whether he could claim the statutory penalty for usury would depend upon the relative guilt of the parties.[83]

It is uncertain under Texas law what effect the seller/borrower's initiation of the sale-leaseback transaction will have on an interpretation of the transaction. From two early cases it appears that Texas has taken the view that the borrower's initiation of the transaction does not estop him to set up the defense of usury, or to recover either the usurious interest paid or the statutory penalty for usury.[84] In *Pinedo v. Halper*,[85] an illiterate defendant loaned money to the plaintiff. The instrument, which stipulated usurious interest, was drafted by the plaintiff and his attorney. The El Paso Court of Civil Appeals held that the borrower's drafting of the instrument did not estop him from avoiding the transaction by pleading usury.[86] There was no fiduciary relationship between the parties; therefore, the defendant was charged with a duty of reasonable care to see that the loan was not usurious. Similarly, in *Miles v. Kelly*,[87] the fact that the plaintiff had induced the defendant to purchase usurious notes did not estop his claim of usury.

Some of the other jurisdictions in accord with the Texas view have disallowed estoppel because the usury statutes in those jurisdictions are directed against "knowingly" charging or accepting usurious interest. Their decisions, therefore, are based upon a statutory interpretation, as these courts look to the lender's knowledge and not to the borrower's actions.[88] The Texas statute does not contain the word "knowingly," yet there would be no estoppel to claim usury under Texas law if the borrower initiated the sale-leaseback transaction. This evidence, however, could be used by a court as an indication of intent.[89]

82. Stock v. Meek, 221 P.2d 15, 20 (Cal. 1950); Golden State Lanes v. Fox, 42 Cal. Rptr. 568, 572 (Dist. Ct. App. 1965); Paillet v. Vroman, 126 P.2d 419, 422 (Cal. App. 1942).

83. Golden State Lanes v. Fox, 42 Cal. Rptr. 568, 572 (Dist. Ct. App. 1965); White v. Seitzman, 41 Cal. Rptr. 359, 364 (Dist. Ct. App. 1964).

84. Pinedo v. Halper, 18 S.W.2d 253, 255 (Tex. Civ. App.—El Paso 1929, writ dism'd); Miles v. Kelly, 25 S.W. 724, 725 (Tex. Civ. App. 1894, no writ); *see* A.B. Lewis Co. v. National Inv. Corp., 421 S.W.2d 723 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.).

85. 18 S.W.2d 253 (Tex. Civ. App.—El Paso 1929, writ dism'd).

86. *Id.* at 255.

87. 25 S.W. 724 (Tex. Civ. App. 1894, no writ).

88. Corsentina v. McPherson, 150 So. 609, 610 (Fla. 1933); MacRackan v. Bank of Columbus, 80 S.E. 184, 185 (N.C. 1913); *see* Annot., 16 A.L.R.3d 510, 521-24 (1967).

89. The dissent in *Kawauchi v. Tabata*, 413 P.2d 221 (Hawaii 1966) placed considerable emphasis on the fact that the seller/lessee had instigated the sale-leaseback

CONCLUSION

Structuring and drafting a sale-leaseback agreement that will not violate Texas usury law requires a detailed analysis of not only the instrument, but of all surrounding facts and circumstances. Although a construction of a sale-leaseback agreement necessarily involves an application of general rules, the solution to a particular transaction can be obtained only through a detailed analysis of all the evidence with particular emphasis on the existence of a debt which the transaction was intended to secure. Lenders should avoid entering into a sale-leaseback transaction with their debtors. Lenders should also realize the significance of granting an option to repurchase, particularly when the original purchase price is low; an absolute obligation to demand reconveyance should rarely, if ever, be granted.

Texas courts will be reluctant to avoid a sale-leaseback agreement that is legitimate on its face, and will do so only if it is clear that the parties intended a mortgage and loan. The sale-leaseback is a commercially acceptable device whose usefulness to both financiers and developers is well known. Perhaps even more important is the valuable function served by the sale-leaseback transaction toward the community and economy as a whole. By providing an available mode for high-risk borrowers to obtain funds, the sale-leaseback gives an extra boost to the economy in the form of development that might otherwise not have been possible.

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with knowledge that he could not get a loan because of his bad reputation as a debtor. *Id.* at 239-40.