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# ST. MARY'S LAW JOURNAL

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## INTRODUCTION: TEXAS USURY LAW—SOME INTERESTING ANOMALIES.

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Texas usury laws involve an interesting series of anomalies, inconsistencies and failures to eliminate abuses while catching in the legislative net a significant number of transactions that the Texas legislature probably never intended to outlaw. The Declaration of Legislative Intent, adopted in the 60th Legislature in 1967 as part of a comprehensive revision of Texas laws relating to loans and credit transactions, reveals a deep concern about the victimization of Texas citizens, especially in the context of consumer credit transactions.<sup>1</sup> One finds it difficult to disagree with the Declaration of Legislative Intent for it certainly embodies what the vast majority of citizens would feel is a correct approach toward policy matters relating to credit transactions and the compensation to those who extend credit. The comprehensive scheme adopted by the 60th Legislature is a marked improvement over prior law.<sup>2</sup> Unfortunately, this legislation, the pre-1967 case law, subsequent case law and subsequent statutory changes frequently fail to deal precisely with the evils to be prohibited while punishing conduct that is far from evil.

In a quick review of Texas usury statutes one frequently finds that the highest rates of interest are allowed on loans to those most needy and least able to protect themselves while those who need the least protection are often subject to the lowest maximum interest rates. An example of this is found in article 5069-7.03<sup>3</sup> dealing with the finance charge limitations on motor vehicles. The purchaser of a

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1. See *Declaration of Legislative Intent*, 15 TEX. REV. CIV. STAT. ANN. 1, 1-2 (Vernon 1971).

2. See TEX. REV. CIV. STAT. ANN. arts. 5069-1.01 to 50.06 (Vernon 1971).

3. See *id.* art. 5069-7.03.

new domestic or foreign motor vehicle is subject to a maximum add-on charge of seven and one-half percent per annum<sup>4</sup> while one who purchases a three or four year old car, presumably one whose financial ability is likely to be less than the new motor vehicle purchaser, is subject to an add-on charge of twelve and one-half percent per annum.<sup>5</sup> Furthermore, one who needs to borrow up to \$2,500.00 for personal and family necessities can be charged, under the regulated loans chapter of the code,<sup>6</sup> a far higher rate of interest than a multi-millionaire who borrows money for business purposes in a context not covered by pre-1979 exceptions to the ten percent ceiling such as set forth in articles 5069-1.07(b) and (c) and article 5069-1.08.<sup>7</sup> Another interesting example is that a small businessman who, for whatever reasons, has chosen to incorporate his business can be required to pay up to eighteen percent per annum on loans of \$5,000 or more under article 1302-2.09 of the Texas Miscellaneous Corporation Laws Act,<sup>8</sup> while a conglomerate of multi-billion dollar corporations that forms a partnership for a joint business endeavor and borrows hundreds of millions of dollars may be subject to a ten percent ceiling if the Texas Attorney General is correct in his Opinion No. H-589.<sup>9</sup> The legislature, by enacting Senate Bill 10 in 1979,<sup>10</sup> thereby amending article 5069-1.07(b), has made considerable progress towards eliminating these inconsistencies in the area of large business loans.

The study of usury laws can be divided into several steps. First is the threshold determination whether a given transaction is one subject to the usury laws. Second is the determination of what compensation in connection with the transaction is considered "interest." Third are the computations and calculations that must be made to determine whether a transaction, if it is subject to the usury laws, is in compliance with or in violation of those laws. Fourth is seeking some exemption or exception to the usury laws providing for the transaction to be governed by a lower or higher rate than the general law. Fifth is determining whether the transaction is one

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4. See *id.* art. 5069-7.03(1).

5. See *id.* art. 5069-7.03(1).

6. See *id.* art. 5069-3.15(1).

7. See *id.* art. 5069-1.07(b)(c), 1.08 (Vernon Supp. 1978-1979).

8. See *id.* art. 1302-2.09 (Vernon Supp. 1963-1978).

9. See TEX. ATT'Y GEN. OP. No. H-589 (1975) (partnership composed of two corporations may not agree to interest in excess of ten percent per annum).

10. See 1979 Tex. Sess. Law Serv., ch. 305, § 1, at 704 (Vernon).

governed by the usury law of another jurisdiction either because the parties specifically elect to be governed by the law of another jurisdiction or because, under general conflicts of law rules, the law of another jurisdiction should be applicable. Finally, what procedures, remedies and penalties are applicable in the determination of the rights and remedies of the parties in a transaction found to be in violation of the usury laws.

Under the first heading, the determination whether a given transaction is subject to the usury laws, one can look to the areas of sales transactions, including revolving credit transactions and three-party sales financing; leasing transactions, including sale-leaseback transactions and three-party leasing; joint ventures and other equity investments, and a variety of other transactions such as bank certificates of deposit and the sale of commercial paper. As an initial proposition, the Texas courts have taken the position that a person can charge, and can get the purchaser to pay, whatever he wishes for the sale of his property. When the purchase price is not paid in cash but is deferred, courts have looked carefully to determine whether the purchaser was given a choice between a cash price and a time price.<sup>11</sup> The definition of "interest" in article 5069-1.01(a) specifically excludes the "time-price differential however denominated arising out of a credit sale."<sup>12</sup> In the consumer<sup>13</sup> and motor vehicle<sup>14</sup> context, time price differential is defined and regulated. Outside these two contexts, there appears to be no clear definition or regulation of time-price differential. Despite some unfortunate dictum in *Anguiano v. Jim Walters Homes, Inc.*<sup>15</sup> the recent case of *International Harvester Co. v. Rotello*<sup>16</sup> indicates the continuing vitality of the time-price doctrine. On the other hand, the number of recent cases dealing with the interest charges on open accounts indicates the unwillingness of the legislature and the courts to exempt credit-sale transactions completely from the appli-

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11. See, e.g., *International Harvester Co. v. Rotello*, 580 S.W.2d 418, 421 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); *Standard Supply & Hardware Co. v. Christian-Carpenter Drilling Co.*, 183 S.W.2d 657, 661 (Tex. Civ. App.—Galveston 1944, writ ref'd); *Rattan v. Commercial Credit Co.*, 131 S.W.2d 399, 399-400 (Tex. Civ. App.—Dallas 1939, writ ref'd).

12. TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a) (Vernon 1971).

13. See *id.* art. 5069-6.02(9).

14. See *id.* art. 5069-7.03(1).

15. 561 S.W.2d 249, 252 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.). If the transaction is actually a device to evade the usury law, it is not saved by any attempted difference between a claimed 'cash' price and a claimed 'credit' price. *Id.* at 252.

16. 580 S.W.2d 418, 421 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

cation of Texas usury laws.<sup>17</sup> Presumably, under the time-price doctrine a seller may charge several times the cash price for the privilege the purchaser obtains to pay the purchase price on a deferred basis, at least so long as the cash price and the time price are clearly known to the purchaser; but if the purchaser buys on a unitary pricing basis and is then charged an amount to compensate the lender for the credit the lender has tied up in his account and to encourage rapid payment, the seller may forfeit the entire purchase price of the goods. One questions the wisdom of this result. The recent amendment to article 5069-1.03 has done little to change this unfortunate result for the seller on open account who has failed to get an agreement from his purchaser to pay interest.

In attempting to answer the threshold question whether a lease is a transaction subject to Texas usury laws, the Texas courts appear to have focused largely on the existence and terms of any purchase option granted to the lessee.<sup>18</sup> If the lessee is required by the agreement, either expressly or economically, to exercise the purchase option, then the courts may consider the transaction to be a conditional sale involving interest payments.<sup>19</sup> Again, one questions whether the existence and terms of a purchase option should play such a crucial role in the determination whether the impact of the usury laws should be visited upon a given transaction.

In examining the second area, that of identifying the interest involved in a transaction, one frequently asks the philosophical question: is it more important what the borrower pays or what the lender receives? Stated differently, is the purpose of the usury law to protect the borrower from excessive cost of credit or to penalize the lender receiving excessive compensation for the use, forbearance or detention of money? The author submits that the answer to this question depends largely on the particular context in which it is asked, and that the answer gleaned from the case law in one context is largely inconsistent with and contradictory to the answer in another context. For example, fees paid to third parties for serv-

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17. See *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 221 (Tex. 1979); *Watson v. Cargill, Inc.*, 573 S.W.2d 35, 40-42 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

18. See *Southwest Park Outpatient Surgery, Ltd. v. Chandler*, 572 S.W.2d 53, 55 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *Tom Benson Chevway Rental & Leasing, Inc. v. Allen*, 571 S.W.2d 346, 348 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.); *Davis Bros. v. Misco Leasing, Inc.*, 508 S.W.2d 908, 912 (Tex. Civ. App.—Amarillo 1974, no writ); *Security Life Ins. Co. v. Executive Car Leasing Co.*, 433 S.W.2d 915, 917-18 (Tex. Civ. App.—Texarkana 1968, writ ref'd n.r.e.).

19. See *Tom Benson Chevway Rental & Leasing, Inc. v. Allen*, 571 S.W.2d 346, 348 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.); *Davis Bros. v. Misco Leasing, Inc.*, 508 S.W.2d 908, 912 (Tex. Civ. App.—Amarillo 1974, no writ).

ices rendered do not constitute interest even though they have the effect of increasing the cost of credit to the borrower.<sup>20</sup> Examples of these services include the fees of the lender's independent counsel in preparing loan documents, title policy premiums, surveyor's fees and credit reports.<sup>21</sup> From a reading of these cases one concludes that it is what the lender receives that is crucial. But one reaches the opposite conclusion when looking at the area of payments made by third parties.<sup>22</sup> From these cases, one would conclude that it is what the borrower pays, and not what the lender receives, that is most important.

Another example of the anomalies of Texas usury laws relates to the fee paid to a third party for obtaining, and even guaranteeing, the availability of a loan from a lender. If *X* arranged for a bank to make a loan to *Y*, guaranteed the bank's loan to *Y* and obtained a large fee from *Y* for obtaining and guaranteeing the loan, the fee paid to *X* is not interest. But if *X* made the mistake of borrowing the money from the bank and lending it to *Y* at a rate in excess of the applicable usury ceiling, *X* would be subject to the usury penalties even if the net compensation to *X* was far less than *X* received under the previous example.<sup>23</sup>

In the third area, relating to calculation and computation problems, Texas has been one of the leading states in the number of cases reported by the appellate courts.<sup>24</sup> For many decades Texas has had two lines of cases existing side by side on the question of spreading interest charges over the life of a loan. One line of cases has held that interest is to be judged on a year-by-year basis and not over the life of a loan.<sup>25</sup> The other line of cases, best exemplified

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20. See *Nevels v. Harris*, 129 Tex. 190, 195-96, 102 S.W.2d 1046, 1048-49 (1937).

21. See, e.g., *Nevels v. Harris*, 129 Tex. 190, 195-96, 102 S.W.2d 1046, 1048-49 (1937); *Commerce Sav. Ass'n v. GGE Management Co.*, 539 S.W.2d 71, 79 (Tex. Civ. App.—Houston [1st Dist.]), *aff'd as modified, on other grounds*, 543 S.W.2d 862 (Tex. 1976); *Dewey v. American Nat'l Bank*, 382 S.W.2d 524, 528 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.), *cert. denied*, 382 U.S. 861 (1965).

22. See *Goodman v. Seely*, 243 S.W.2d 858, 859-60 (Tex. Civ. App.—San Antonio 1951, writ ref'd).

23. Compare *Home Sav. Ass'n v. Crow*, 522 S.W.2d 457, 459-60 (Tex. 1975) (charges imposed by broker for arranging loan from third party lender to borrower not interest) with *Walker v. Ross*, 548 S.W.2d 447, 452 (Tex. Civ. App.—Fort Worth) (charges imposed by lender for obtaining funds subsequently loaned to debtor are interest), *writ ref'd n.r.e. per curiam*, 554 S.W.2d 198 (Tex. 1977).

24. See Annot., 84 A.L.R. 1269, 1286-90 (1930).

25. See *Commerce Trust Co. v. Ramp*, 135 Tex. 84, 87, 138 S.W.2d 531, 533 (1940); *Shropshire v. Commerce Farm Credit Co.*, 120 Tex. 400, 405-06, 30 S.W.2d 282, 283-84 (1930),

by *Nevels v. Harris*,<sup>26</sup> has held that interest was to be judged over the full period of the time that the borrower had the use of the money.<sup>27</sup> The Texas Supreme Court has finally resolved this dispute by adopting the *Nevels v. Harris* spreading rule and overruling the no-spreading rule set forth in *Commerce Trust Co. v. Ramp*.<sup>28</sup> In the area of acceleration clauses, Texas has also been a leader in the number of cases.<sup>29</sup> Many of these cases involved the acceleration clauses used by a particular lender.<sup>30</sup> In the consumer credit area, recent cases involving acceleration by the holder of a consumer credit contract have dealt with the concept of "charging" usurious interest.<sup>31</sup>

The fourth area of study is determining the applicable interest rate ceiling or, stated differently, determining whether a transaction is subject to a rate different from the general interest ceiling, which, in Texas, is ten percent per annum. In the consumer context, a variety of higher rates are permitted; such as in chapter 3,<sup>32</sup> dealing with small loans; chapter 5,<sup>33</sup> dealing with secondary mortgage loans; chapter 6,<sup>34</sup> dealing with retail installment sales; and chapter 51,<sup>35</sup> the Texas Pawnshop Act. In addition, higher rates are permitted in contexts sometimes thought of as consumer-oriented but which are not expressly limited to consumer transactions, such as

*cert. denied*, 284 U.S. 675 (1931); *Southwestern Inv. Co. v. Hockley County Seed & Delinting, Inc.*, 511 S.W.2d 724, 732 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam*, 516 S.W.2d 136 (Tex. 1974).

26. 129 Tex. 190, 102 S.W.2d 1046 (1937).

27. *Id.* at 196-97, 102 S.W.2d at 1049; *see, e.g.*, *Adleson v. B.F. Dittmar Co.*, 124 Tex. 564, 566-67, 80 S.W.2d 939, 940-41 (1935); *Eubanks v. Simpson*, 90 S.W.2d 291, 291-92 (Tex. Civ. App.—Amarillo 1936, *writ ref'd*); *Southern States Mortgage Co. v. Lykes*, 85 S.W.2d 780, 783 (Tex. Civ. App.—Amarillo 1935, *writ ref'd*).

28. *See Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777, 786-87 (Tex. 1977); *Commerce Trust Co. v. Ramp*, 135 Tex. 84, 87, 138 S.W.2d 531, 533 (1940); *Nevels v. Harris*, 129 Tex. 190, 196-97, 102 S.W.2d 1046, 1049 (1937).

29. *See Annot.*, 66 A.L.R.3d 650, 667 (1975).

30. *See, e.g.*, *Temple Trust Co. v. Sewell*, 133 Tex. 417, 422-24, 126 S.W.2d 943, 946-47 (1939); *Temple Trust Co. v. Powers*, 133 Tex. 426, 428, 126 S.W.2d 947, 948 (1939); *Walker v. Temple Trust Co.*, 124 Tex. 575, 579-80, 80 S.W.2d 935, 937 (1935).

31. *See Commercial Credit Corp. v. Chasteen*, 565 S.W.2d 342, 344-45 (Tex. Civ. App.—Fort Worth 1978, *writ ref'd n.r.e.*); *General Motors Acceptance Corp. v. Uresti*, 553 S.W.2d 660, 663 (Tex. Civ. App.—Tyler 1977, *writ ref'd n.r.e.*); *Moore v. Sabine Nat'l Bank*, 527 S.W.2d 209, 211-12 (Tex. Civ. App.—Austin 1975, *writ ref'd n.r.e.*).

32. *See TEX. REV. CIV. STAT. ANN.* art. 5069-3.15(1) (Vernon 1971).

33. *See id.* art. 5069-5.02(1).

34. *See id.* art. 5069-6.02(9).

35. *See id.* art. 5069-51.12 (Vernon Supp. 1978-1979).

chapter 4,<sup>36</sup> dealing with installment loans, and chapter 7,<sup>37</sup> dealing with motor vehicle sales. Also, under the Texas Credit Union Act,<sup>38</sup> article 2461, members can be charged up to one percent per month on loans. The most common business exceptions to the ten percent ceiling are the corporate exception,<sup>39</sup> article 1302-2.09 (permitting rates of up to one and one-half percent per month on corporate loans of \$5,000 or more), article 5069-1.07(b)<sup>40</sup> (dealing with certain real estate loans of \$500,000 or more), article 5069-1.07(c)<sup>41</sup> (dealing with certain oil and gas loans of \$500,000 or more), and article 5069-1.08<sup>42</sup> (dealing with margin accounts). The recently enacted Senate Bill 10 amends article 5069-1.07(b) to lower the threshold dollar amount to \$250,000 and to greatly expand the types of transactions covered.<sup>43</sup> Article 5069-1.09<sup>44</sup> attempts to exempt FHA and VA loans from the operation of Texas usury law so long as the loans are in compliance with the federal statutes, rules and regulations relating to FHA and VA loans. In addition, article 5069-1.03,<sup>45</sup> dealing with the "legal" rate (*i.e.*, the rate of interest applicable in the absence of an agreement by the parties about the rate of interest) sets a six percent rate and on open accounts provides for the six percent to commence on the January 1 after the "same are made."<sup>46</sup>

If one steps back from this hodge podge of exceptions to the general ten percent rule, the first observation one reaches is that on small transactions consumers can be charged far greater rates of interest than can businesses. At least on the surface this appears to reach a result contrary to the concerns of the legislature as set forth in the Declaration of Legislative Intent.<sup>47</sup> A second, and closely related, observation is that the smaller the loan and the more necessitous the borrower, the less protection the borrower receives in the form of a maximum interest rate. Again, this appears inconsistent with the Declaration of Legislative Intent. In fairness to the

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36. *See id.* art. 5069-4.01(1)(Vernon 1971).

37. *See id.* art. 5069-7.03(1)(Vernon 1971).

38. *See id.* art. 2462, § 5 (Vernon 1965).

39. *See id.* art. 1302-2.09 (Vernon Supp. 1963-1978).

40. *See id.* art. 5069-1.07(b)(Vernon Supp. 1978-1979).

41. *See id.* art. 5069-1.07(c)(Vernon Supp. 1978-1979).

42. *See id.* art. 5069-1.08(Vernon Supp. 1978-1979).

43. *See* 1979 Tex. Sess. Law Serv., ch. 305, § 1, at 704 (Vernon).

44. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.09 (Vernon Supp. 1978-1979).

45. *See id.* art. 5069-1.03 (Vernon 1971).

46. *See id.* art. 5069-1.03 (Vernon 1971). *But see* 1979 Tex. Sess. Law Serv., ch. 707, § 1, at 1718 (Vernon) (amending article 5069-1.03 so that interest may accrue 30 days after account becomes due).

47. *See Declaration of Legislative Intent*, 15 TEX. REV. CIV. STAT. ANN. 1, 1-2 (Vernon 1971).



legislature, it should be noted that smaller loans to necessitous borrowers frequently involve higher risks and higher administrative costs per dollar loaned than larger business loans. By allowing higher rates on these smaller loans, the legislature has attempted to encourage banks and other reputable financial institutions, subject to regulation, to enter a segment of the market which may otherwise have been left to unscrupulous individuals. A third observation is that a number of these special provisions are applicable only when certain conditions are met and reasonable men could differ in an overall view whether these various conditions make sense. For example, under chapter 4 a lender may not take a lien upon real estate as security for any loan made under that chapter<sup>48</sup> whereas in chapters 5 and 6, a lender who wishes to charge more than ten percent per annum may not take a first lien upon real estate to secure the loan.<sup>49</sup> By contrast, article 5069-1.07(a), dealing with spreading, is applicable only to loans secured by a lien on or interest with respect to real property.<sup>50</sup>

Another interesting observation relates to a comparison of the corporate usury statute with the statutes dealing with large real estate loans, large oil and gas loans and margin account transactions. Presumably, the reason that corporate loans are subject to a higher rate is the notion that businessmen do not need the same protection as consumers. No dollar threshold amount is necessary for the application of article 5069-1.08 dealing with margin accounts.<sup>51</sup> Presumably, one who is sophisticated enough to dabble in the stock market and convince a registered broker-dealer to extend him credit needs less protection than others. Article 5069-1.07(c) requires a \$500,000 threshold amount before it applies.<sup>52</sup> Article 5069-1.07(b), prior to its recent amendment, also required a \$500,000 minimum amount.<sup>53</sup> The author submits that there is no valid reason why the choice by a businessman to do business in the corporate form—as opposed to as an individual or partnership—is in any way rationally related to the degree of protection to which he should be entitled or, conversely, the amount of compensation that should flow to those who provide him with credit. This is brought home especially in the area of tax-sheltered investments,

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48. See TEX. REV. CIV. STAT. ANN. art. 5069-4.04(2)(Vernon 1971).

49. See *id.* art. 5069-5.01(1), 6.05(7).

50. See *id.* art. 5069-1.07(a)(Vernon Supp. 1978-1979).

51. See *id.* art. 5069-1.08 (Vernon Supp. 1978-1979).

52. See *id.* art. 5069-1.07(c)(Vernon Supp. 1978-1979).

53. See *id.* art. 5069-1.07(b)(Vernon Supp. 1978-1979); 1979 Tex. Sess. Law Serv., ch. 305, § 1, at 704 (Vernon).

which are very frequently structured as partnerships. For example, there is no rational reason why the corner druggist who does business in the corporate form, has a net worth of \$10,000 and wishes to borrow \$5,000 should be considered more sophisticated and less in need of protection than a public limited partnership drilling fund that does not qualify for the rather rigid requirements of article 5069-1.07(c).<sup>54</sup> Nor is there any reason why an individual or partnership or business trust, such as a real estate investment trust, borrowing large sums of money on an unsecured basis should be entitled to more protection than the corner druggist. Stated differently, there is no reason why those particular transactions for which statutes provide higher rates comprise a complete "shopping list" of categories of transactions in which a higher rate is necessarily appropriate. The enactment of Senate Bill 10,<sup>55</sup> providing for rates of up to eighteen percent per annum on loans of \$250,000 or more other than certain residential and agricultural and ranching loans will bring a great deal more sense into the general area of exemptions from the ten percent ceiling. Still there remains a question why the choice of a non-corporate format of doing business suggests the need for a loan of fifty times the threshold amount set forth in Article 1302-2.09<sup>56</sup> to the applicability of the higher rate, especially in light of the numerous recent Texas cases permitting a lender to require that the borrower incorporate as a condition to getting a loan and even guarantee payment of the loan.<sup>57</sup>

One analyzing a transaction under Texas usury laws should consider whether Texas law is indeed applicable to the transaction. Texas has a number of cases dealing specifically with the conflicts of law question in the usury context. Texas courts have recognized even in the usury context that the parties may choose the law applicable to the transaction in which they are engaging at least so long as the jurisdiction whose law is chosen has a reasonable relationship to the transaction.<sup>58</sup> Virtually all twentieth century Texas usury conflicts of law cases have held, in the absence of an agreement by

54. See TEX. REV. CIV. STAT. ANN. art. 5069-1.07(c)(Vernon Supp. 1978-1979).

55. See 1979 Tex. Sess. Law Serv., ch. 305, § 1, at 704 (Vernon).

56. See TEX. REV. CIV. STAT. ANN. art. 1302-2.09 (Vernon Supp. 1963-1978).

57. See, e.g., *Hutchison v. Commercial Trading Co.*, 427 F. Supp. 662, 665-66 (N.D. Tex. 1977); *Houston Furniture Distrib., Inc. v. Bank of Woodlake*, 562 S.W.2d 880, 882-83 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *American Century Mortgage Investors v. Regional Center, Ltd.*, 529 S.W.2d 578, 582 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

58. See, e.g., *Dugan v. Lewis*, 79 Tex. 246, 250-51, 14 S.W. 1024, 1025 (1891); *Hi Fashion Wigs Profit Sharing Trust v. Hamilton Inv. Trust*, 579 S.W.2d 300, 302 (Tex. Civ. App.—Eastland 1979, no writ); *Securities Inv. Co. v. Finance Acceptance Corp.*, 474 S.W.2d 261, 271 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).

the parties about which jurisdiction's law should govern, that the determination whether a transaction is usurious is made by reference to the law of the place where the obligation is payable.<sup>50</sup> However, the "sham, guise or subterfuge" exceptions alluded to in *Securities Investments Co. v. Finance Acceptance Corp.*,<sup>60</sup> and *Building & Loan Ass'n v. Griffin*,<sup>61</sup> suggest some limitation on the ability to contract out of the applicability of Texas usury laws.

The penalties enacted in 1967 for a violation of Texas usury laws are, at a minimum, Draconian.<sup>62</sup> By visiting upon the violator a penalty of twice the amount of interest contracted for, charged or received, the legislature inadvertently made the usury penalty more directly proportionate to the length of the loan than the severity of the violation, at least so long as the lender did not exceed double the usury ceiling.<sup>63</sup> The Texas Supreme Court, in *Wall v. East Texas Teachers Credit Union*,<sup>64</sup> engrafted onto the statutory penalty an additional forfeiture by making the obligation of the borrower to pay interest unenforceable.<sup>65</sup> The author submits that this result is directly contrary to the statute and reimposes the penalty as it existed prior to 1967. This is particularly troublesome inasmuch as the pre-1967 penalty, making the obligation to pay usurious interest unenforceable, was specifically repealed.<sup>66</sup> As the courts went further in exploring the idea opened up in *Wall*, they confronted the uneasy question how to deal with the borrower who had already paid some of the interest.<sup>67</sup> Thus, a lender who had contracted for slightly more than ten percent per annum on a 30 year \$50,000 home mortgage loan could suffer a forfeiture, including the inability to collect any interest, of more than \$323,000, while a lender who charged 19.99% on a one-year \$50,000 loan providing for no amortization would

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59. See, e.g., *Lubbock Hotel Co. v. Guaranty Bank & Trust Co.*, 77 F.2d 152, 155-56 (5th Cir. 1935); *Wade v. Darring*, 511 S.W.2d 320, 321 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); *Apodaca v. Banco Longoria, S.A.*, 451 S.W.2d 945, 947 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.).

60. 474 S.W.2d 261, 271 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).

61. 90 Tex. 480, 488, 39 S.W. 656, 659 (1897).

62. See TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1971).

63. See *id.*

64. 533 S.W.2d 918 (Tex. 1976).

65. *Id.* at 921.

66. Compare 1963 Tex. Gen. Laws, ch. 205, § 27, at 550 (usurious contracts void with regard to interest) with TEX. REV. CIV. STAT. ANN. art. 5069-1.04 (Vernon 1971) (contracts for usury subject to appropriate penalties).

67. See *First State Bank v. Miller*, 563 S.W.2d 572, 576-77 (Tex. 1978); *Ferguson v. Tanner Dev. Co.*, 541 S.W.2d 483, 495-96 (Tex. Civ. App.—Houston [1st Dist.] 1976), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977).

forfeit approximately \$30,000. One finds it difficult to believe that any legitimate purpose is served by tying the amount of the penalty to the length of the loan rather than the severity of the violation. House Bill 616,<sup>68</sup> enacted in the latest session of the Legislature, should bring more sense into the usury law by imposing a penalty of three times the usurious portion of the interest contracted for, charged or received.

In conclusion, one studying Texas usury law cannot help but be impressed by the anomalies and inconsistencies and the degree to which conduct that should be severely punished is only mildly punished or not punished at all while conduct that should not be punished is frequently severely punished. The following articles deal with a few of the current issues in Texas usury law. The first is a brief examination of the newly enacted "large loan" statute, dealing with some of the ambiguities in the prior statute and the reasons for the wording of the amendment. The second article examines the issue of interest charges on open account transactions. Recent case law, as well as legislative action, have made a close inspection of all open account interest charges a necessity. The effects and liabilities that may arise from issuing legal opinion letters concerning usury are examined in the third article. The authors deal with various ambiguities in the usury area, and suggest language to be used in issuing these opinions. Another current topic in usury law, that of spreading interest, is discussed in detail in the final article of this symposium. The author traces the judicial history of spreading, and examines a number of the methods in current use for calculating interest rates and maximum permissible front-end fees. The symposium concludes with a student survey of Texas case law dealing with usury. This survey covers various aspects of usury including the elements of usury, practice and procedure in usury cases, remedies and defenses to usury, and an analysis of the fees or other benefits to the lender that might be deemed to be interest by the courts.

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68. See 1979 Tex. Sess. Law Serv., ch. 281, § 1, at 604 (Vernon).