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THE OPEN ACCOUNT IN TEXAS IN LIGHT OF *HOUSTON SASH*

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Creditors across Texas are faced with potential liability that could jeopardize all of their accounts receivable. This danger was spawned by the Texas Supreme Court's decision in *Houston Sash and Door Co. v. Heaner.*[1] The first sentence of the opinion poses the legal question:

> This is a case which presents a question of first impression whether the charging of interest on an open account during the interest-free period specified in Article 5069-1.03 constitutes interest in excess of double that allowed by Article 5069-1.01, *et seq.*, thereby subjecting the creditor to loss of principal, twice the interest charged, all other charges, and debtor's reasonable attorneys' fees as provided by Article 5069-1.06(2).[2]

An affirmative answer follows a concise statement of the facts and summary of the law.[3]

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1. 577 S.W.2d 217 (Tex. 1979).

2. *Id.* at 218 (footnote omitted); *see* TEX. REV. CIV. STAT. ANN. arts. 5069-1.01, 1.03, 1.06(2) (Vernon 1971). Article 5069-1.03 provides that in the absence of an agreement for interest between the parties, interest is allowed at a rate of six percent per annum on all open accounts from the first day of January after the charges on the account are made. *Id.* art. 5069-1.03. The "interest-free" period referred to by the court is thus the period between the time when the open account sale is made, and the first of January that follows. *See* Houston Sash & Door Co. v. Heaner, 577 S.W.2d 217, 218 (Tex. 1979). Article 5069-1.06(2) provides for a forfeiture of twice the interest contracted for, charged, or received; all principal, interest, and other charges; and reasonable attorney's fees in cases in which the interest exacted exceeds twice the allowable rate. TEX. REV. CIV. STAT. ANN. art. 5069-1.06(2) (Vernon 1971). Both of these statutes were amended by the legislature in 1979. Although subsection two of article 5069-1.06 was not changed, the amendment to subsection one alters the penalty for double usury. Effective August 27, 1979, the penalty for double usury will be a forfeiture of three times the amount that the interest exacted exceeds the allowable rate, all principal, interest and other charges, and reasonable attorney's fees. The penalty applies to all transactions except those pending in litigation on the effective date of the act. *See* 1979 Tex. Sess. Law Serv., ch. 281, §§ 1-2, at 604-05 (Vernon). Article 5069-1.03 was also amended to eliminate the prohibition against charging interest on open accounts until the first of January after the accounts are made. Under the amended statute, legal interest will be allowed on open accounts at six percent from the thirtieth day after the account is due. *See id.* ch., 707, § 1, at 1718 (Vernon). The new statute is set out at footnote 6 *infra.*

3. *See* Houston Sash & Door Co. v. Heaner, 577 S.W.2d 217, 218 (Tex. 1979). By the

On May 31, 1973, John E. Heaner executed a letter agreement guaranteeing payment of all sums owed Houston Sash and Door Company by Bedford Corporation.[4] Shortly after Mr. Heaner executed the guaranty, Bedford commenced purchasing building supplies and materials from Houston Sash on open account. In February of 1975 Houston Sash filed suit against Bedford and Heaner to collect debts incurred between January 15, 1974, and March 28, 1974.

At trial it was established that each invoice delivered to Bedford stated under "TERMS OF SALE" that interest at the rate of twelve percent per annum would be charged on all past due accounts. The invoices also disclosed that the charges actually had been made on the Bedford account. Since there was no agreement to pay interest on the open account itself, the court determined that article 5069-1.03 was applicable.[5] Under that statute, which authorizes an interest rate of six percent in absence of an agreement for greater interest between the parties, no interest charges are authorized on open accounts until the first of January following the date that the accounts are made.[6]

Houston Sash conceded that it had charged interest on Bedford's accounts prior to the January 1 following the creation of the accounts, but argued that it was not subject to loss of principal and other penalties for charging interest in excess of double the amount of interest allowed "by this Subtitle."[7] In a losing cause Houston

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court's reasoning, since no interest is allowed on open accounts under article 5069-1.03 until January first after the charges on the account are made, then any interest charge made during the interest-free period constitutes a charge in excess of twice the lawful rate; "*i.e.* in excess of twice zero." *Id.* at 221.

4. *See id.* at 218. Mr. Heaner was Chairman of the Board of Bedford Corporation. The guaranty agreement, which was in writing, provided for twelve percent interest per annum. *See id.* at 218.

5. *See id.* at 221; TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1971).

6. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1971).

> When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable; and on all open accounts, from the first day of January after the same are made.

Id. The article, as amended by the 66th Legislature, provides:

> When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all accounts and contracts ascertaining the sum payable, commencing on the thirtieth (30th) day from and after the time when the sum is due and payable.

See 1979 Tex. Sess. Law Serv., ch. 707, § 1, at 1718 (Vernon).

7. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.06(2) (Vernon 1971).

Sash argued that the allowable interest referred to in article 5069-1.06(2) is the ten percent interest limit of article 5069-1.02[8] and not the six percent limit of article 5069-1.03. The court had little difficulty dealing with this argument, finding that the article 5069-1.06(2) penalty for "double usury" was applicable to all of the interest rates allowed by subchapter one of the credit code.[9] Thus, the court ruled that Bedford Corporation was entitled to an offset equal to the amount of principal, twice the interest charged, all other charges, and debtor's reasonable attorney's fees.[10]

One of the reasons that the Houston Sash opinion is so concise and devastating is because the creditor conceded a number of important issues that may prove pivotal in future litigation. Specifically, (1) "Houston Sash had neither pleaded nor proved that Bedford had agreed to pay interest on its open account";[11] (2) "Houston Sash concedes that it charged interest on Bedford's account at a time when it was not authorized to charge any interest";[12] and (3) "It is undisputed that Houston Sash charged interest on Bedford's account during the calendar year in which it was made".[13] The court merely determined which penalty provision applied under the posed facts.

In obvious response to the *Houston Sash* opinion, the 66th Legislature passed House Bill 41 amending article 5069-1.03.[14] Under the amended statute legal interest will still be allowed on open accounts at six percent, but the interest may begin to accrue thirty days after

8. *See id.* art. 5069-1.02.

9. *See* Houston Sash & Door Co. v. Heaner, 577 S.W.2d 217, 221 (Tex. 1979).

10. *See id.* at 221. Since Heaner was not a co-obligor on the account, but rather a guarantor, the court found a number of distinctions between the co-defendants. First, the written guaranty agreement, which established a rate of interest between the creditor and guarantor, did not establish an agreed upon rate of interest between the creditor and the primary obligor, Bedford. Thus, article 5069-1.03 was applicable between Bedford and Houston Sash, while article 5069-1.04, which establishes a maximum ten percent per annum rate of interest for written contracts, was applicable between Heaner and Houston Sash. *See id.* at 221-22. Second, since Heaner was obligated on his guaranty agreement, and not primarily liable on the open account, the court determined that he could not interpose the usury defense to which Bedford was entitled, and which included a complete forfeiture of principal. Finally, since the guaranty agreement provided for twelve percent interest, Heaner was entitled to a defensive setoff of twice the interest "contracted for" under article 5069-1.06(1), though he remained liable for the balance of the open account. *See id.* at 222.

11. *Id.* at 219.

12. *Id.* at 220.

13. *Id.* at 221.

14. *See* 1979 Tex. Sess. Law Serv., ch. 707, § 1, at 1718 (Vernon). The text of the amendment is set out at footnote 6 *supra*.

the time that the account is due.[15] The amendment brings the legal rate statute more into line with commercial reality. There is no rational basis for differentiating debtors on the basis of the time of year in which their purchases are made. This was the precise effect of the interest-free period under the statute prior to the amendment; a debtor purchasing on open account in January had an eleven month interest-free debt, while an open account debt incurred in December was interest-free for only one month. Under the new statute all open accounts are treated uniformly, and each debt is interest-free for only thirty days after the debt is due.

The amendment, however, does not resolve all of the problems raised by the *Houston Sash* opinion. Although the interest-free period has been altered, the amended statute still provides for a period of thirty days during which no interest is authorized.[16] A question arises whether a court, under the reasoning set out in *Houston Sash*, will interpret the statute to absolutely prohibit interest charges during the thirty-day interest-free period. If the statute were to be construed, then, as in *Houston Sash*, *any* interest charges during the interest-free period would constitute double usury with the accompanying forfeiture of principal. The statute could be construed, on the other hand, so that any interest charges during the interest-free period merely increase the interest exacted during the period in which interest is allowed. It is questionable, however, whether this construction will be forthcoming in light of the *Houston Sash* opinion.[17]

The effective date of the amendment to article 5069-1.03 is August 27, 1979.[18] The amendment makes no reference to whether it

15. *See id.*

16. *See id.* Interestingly, the amendment also alters the legal rate applicable to contracts that do not provide for a rate of interest. The word "written" was deleted from the statute, although the contract still must be one "ascertaining the sum payable." Presumably, as with an open account, the creditors' records will be the means by which the sum payable is ascertained. Furthermore, the amendment imposes a thirty-day interest-free period from the date that the contract debt is due, while the statute as it existed prior to the amendment allowed interest to accrue from the date that the debt was due and payable. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1971); 1979 Tex. Sess. Law Serv., ch. 707, § 1, at 1718 (Vernon).

17. *See* Houston Sash & Door Co. v. Heaner, 577 S.W.2d 217, 221 (Tex. 1979). The court's words could be easily applied to the new statute. "The Article clearly permits no interest on open accounts" for thirty days after the time when the debt is due. *See id.* at 221. The court also stated in the course of its opinion, however, that cases interpreting statutes that have been replaced are of little value in interpreting the replacement. *See id.* at 220.

18. *See* 1979 Tex. Sess. Law Serv., ch. 707, § 2, at 1718 (Vernon).

will be retroactive to encompass accounts in existence prior to its effective date.[19] Thus the general rule that a transaction is to be tested for usury according to the law in existence at the time of the transaction[20] will probably control the accounts and interest charges made prior to the effective date of the new statute.[21] Since the statute of limitations for usury actions is four years,[22] the effect of the holding in *Houston Sash* will probably be felt for quite some time.

Creditors in future litigation will avoid the harsh result of *Houston Sash* if they can establish that the debtor agreed to pay interest. If there is an agreement for interest, the creditor is entitled to collect more than six percent per annum,[23] and more importantly for those in the position of Houston Sash and Door Company, the interest accrues from the date of the agreement rather than from the following January. Thus there would be no hiatus during which any interest charges would constitute "double usury." Under the Texas Business and Commerce Code an agreement is defined as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade."[24]

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19. *See id.*

20. *See, e.g.*, Southwestern Inv. Co. v. Hockley Seed & Delinting, Inc., 511 S.W.2d 724, 731 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam*, 516 S.W.2d 136 (Tex. 1974); Thompson v. Hague, 430 S.W.2d 293, 294 (Tex. Civ. App.—Fort Worth 1968, no writ); Seymour Opera-House Co. v. Thurston, 45 S.W. 815, 817 (Tex. Civ. App. 1898, writ ref'd).

21. "A statute should not be given retroactive effect unless such construction is required by explicit language or by necessary construction." Alvarado v. Gonzales, 552 S.W.2d 539, 542 (Tex. Civ. App.—Corpus Christi 1977, no writ); *see, e.g.*, Government Personnel Mut. Life Ins. Co. v. Wear, 151 Tex. 454, 461, 251 S.W.2d 525, 529 (1952); National Carloading Corp. v. Phoenix-El Paso Express, Inc., 142 Tex. 141, 148, 176 S.W.2d 564, 568 (1943); Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280, 283-84 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

22. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (3) (Vernon 1971).

23. By agreement, the creditor may charge up to ten percent interest per annum. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.02 (Vernon 1971). Additionally, for amounts over five thousand dollars, corporations may agree to pay up to one and one-half percent per month interest. *See id.* art. 1302-2.09 (Vernon Supp. 1963-1978). Although a charge of one, or one and one-half percent interest per month may give rise to a penalty for usury, the interest charges will not, unless compounded, exceed twice the maximum rate and would thus not give rise to a forfeiture of principal. *See id.* art. 5069-1.06 (1) (Vernon 1971). Furthermore, the penalty for simple usury was reduced by the legislature in 1979 and goes into effect on August 27, 1979. Under the amended statute, the penalty will be only three times the amount that the interest exacted exceeds the allowable rate. *See* 1979 Tex. Sess. Law Serv., ch. 281, § 1, at 604-05 (Vernon).

24. TEX. BUS. & COM. CODE ANN. § 1.201 (3) (Tex. UCC) (Vernon 1968).

As was the case in *Houston Sash* many sales on an open account are between merchants. The Uniform Commercial Code recognizes the special nature of transactions between merchants. As adopted in Texas, section 2.207[25] reads as follows:

> (a) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (b) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (1) the offer expressly limits acceptance to the terms of the offer;
>
> (2) they materially alter it; or
>
> (3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (c) Conduct by both parties which recognized the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such cases the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this Act.[26]

Does an invoice constitute an expression of acceptance or a written confirmation which is delivered to the debtor? Arguably a provision on the invoice providing for interest on all past due accounts may be different from the original offered or agreed terms. But as set forth in paragraph (b)(2) of section 2.207, between merchants the imposition of an interest charge becomes a part of the contract because it is not a material alteration of the bargain.[27]

Debtors will claim that the punitive nature of the usury provisions of the credit code indicate that imposing an interest charge is a material alteration of the bargain. Official comment 5 to section 2.207 is helpful on this point. "Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: . . . a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the

25. *Id.* § 2.207.
26. *Id.* § 2.207.
27. *Id.* § 2.207(b)(2).

range of trade practice and do not limit any credit bargained for . . . ."[28]

Attorneys representing creditors must remember that the Texas Business and Commerce Code recognizes trade practices and course of performance. For example, section 2.208(a)[29] states:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.[30]

Thus, if the debtor previously paid interest, the debtor may have acquiesced or ratified the interest charge. This legal argument should be followed with equitable arguments of estoppel.[31]

Establishing trade practice will not be difficult in light of the number of creditors using invoices similar to those used by Houston Sash and Door Company. In this regard a creditor that finds itself in the same situation as Houston Sash should request the production of the invoice forms used by its adversary in billing its customers. Presumably many of those invoices are as offensive as the creditor's forms.

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28. TEX. BUS. & COM. CODE ANN. § 2.207, comment 5 (Tex. UCC) (Vernon 1968). Clauses providing for interest on an overdue debt should not be viewed as a material alteration since the creditor would be entitled to interest if he was forced to reduce his claim to a judgment. Prejudgment interest "is recoverable as a matter of right where an ascertainable sum of money is determined to have been due at a date certain prior to judgment." Republic Nat'l Bank v. Northwest Nat'l Bank, 578 S.W.2d 109, 116 (Tex. 1978). Prejudgment interest may be awarded based on the "legal interest" statute, article 5069-1.03, or, at the court's discretion, on equitable principles. *See* Phillips Petroleum Co. v. Stahl Petroleum Co., 569 S.W.2d 480, 485 (Tex. 1978); Larcon Petroleum, Inc. v. Autotronic Systems, Inc., 576 S.W.2d 873, 879 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ). Postjudgment interest is set at nine percent per annum, unless the cause of action is based upon a transaction involving a greater rate. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (Vernon Supp. 1978-1979).

29. TEX. BUS. & COM. CODE ANN. § 2.208(a) (Tex. UCC) (Vernon 1968).

30. *Id.*

31. It is important to remember that merely agreeing to an interest charge is not the same as agreeing to the rate of interest. Article 5069-1.03 is applicable "when *no specified rate* of interest is agreed upon by the parties." TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1971) (emphasis added). Thus, a mere agreement to pay interest, without specifying the rate, may give rise to the application of article 5069-1.03. *Id; see* Autocredit of Forth Worth v. Pritchett, 223 S.W.2d 951, 953 (Tex. Civ. App.—Fort Worth 1949, writ dism'd).

> While it is true that there should be a contract to pay usurious interest, such contract may be oral or by acquiescence. . . . The fact that appellant knowingly requested that appellee pay the excessive sum found by the jury and that appellee complied with such request is sufficient evidence to establish a contract and acquiescence therein between the parties to collect and pay usurious interest.

Id. at 953.

Two early Texas Supreme Court decisions deal with attempts to prove agreements to pay interest although no writing indicated such a promise. In *Adriance v. Brooks*[32] the court ruled that a contract to pay interest will not be inferred from previous dealings of the parties that had called for interest. Any contract, either oral or written, would be enforced, "[b]ut we will not go farther, and scrutinize the acts of the parties, to judge whether an implied obligation to pay interest, as an instant of the debt, has been created."[33] This opinion makes a strong case against reliance on prior course of dealing, but the case is of limited use under the mandate of the Texas Business and Commerce Code.[34]

In contrast to *Adriance,* the supreme court looked beyond the contract in *Pridgen v. Hill*[35] and found that the plaintiff's evidence of a contract to pay interest was sufficient to support a verdict in his favor.[36] In this case, however, the facts were overwhelmingly in the plaintiff's favor. The defendant admitted in interrogatories that the account was correct, that he was in the habit of paying interest at the rate of eight percent per annum on his accounts with the plaintiff, and that he expected to pay the same amount on current accounts.[37]

An extensive body of law concerning the existence of written contracts based on invoices exists under the exceptions to the general venue rule.[38] Most of the cases deal with the same issue—whether "confirmatory memoranda" are contracts in writing within article 1995.[39] A recent example is found in *N.K. Parrish, Inc. v. Navar,*[40] when the court of civil appeals determined that the confirmatory

32. 13 Tex. 279 (1855).

33. *Id.* at 284-85.

34. *See* TEX. BUS. & COM. CODE ANN. §§ 2.207, 2.208 (Tex. UCC) (Vernon 1968). See notes 15-21 *supra* and accompanying text. Furthermore, although the *Adriance* court states that a contract for interest will not be implied from prior contracts, it does not state that additional terms to the contract in question cannot be raised by the acts of the parties. *See* Adriance v. Brooks, 13 Tex. 279, 284-85 (1855).

35. 12 Tex. 374 (1854).

36. *Id.* at 379.

37. *Id.* at 379.

38. *See* TEX. REV. CIV. STAT. ANN. art. 1995 (5)(a) (Vernon Supp. 1978-1979).

39. *See, e.g.,* Macpet v. Oil Field Maintenance Co., 538 S.W.2d 240, 243 (Tex. Civ. App.—Corpus Christi 1976, no writ); Public Serv. Life Ins. Co. v. Corpus, 494 S.W.2d 200, 203 (Tex. Civ. App.—Tyler 1973, no writ); Harrison v. Facade, Inc., 355 S.W.2d 543, 545-46 (Tex. Civ. App.—Dallas 1962, no writ).

40. 555 S.W.2d 216 (Tex. Civ. App.—Amarillo 1977, no writ).

memoranda are a part of the litigant's contract, even if never signed or executed.[41] If the parties have actually come to terms prior to the "confirmations," then the subsequent memoranda cannot enlarge the agreement. But when the debtor agrees to subsequent finalization of the agreement expressly or by prior custom, the confirmatory memoranda may become part of the contract.[42] The *Parrish* opinion also recognizes that a debtor may acquiesce to additional terms in later writings, and that such acquiescence becomes a part of the agreement.[43] In future litigation involving facts similar to *Houston Sash*, acquiescence may prove to be a significant argument by creditors.

When the supreme court stated: "It is undisputed that Houston Sash charged interest on Bedford's account during the calendar year in which it was made,"[44] another important question was overlooked. Why did the court assume that the account was created in the same year in which the interest accrued? According to the opinion, Bedford's debt was established between January 15, 1974, and March 28, 1974.[45] But Mr. Heaner executed his guaranty agreement on May 31, 1973, and logically that corresponded to the date Bedford formalized its arrangement with Houston Sash. If Houston Sash had established that the account was created in May of 1973 rather than 1974, the decision may have been different.

If the "account" is created for the purposes of article 5069-1.03 when the parties first strike a bargain, potentially difficult arithmetic problems are avoided.[46] What if the debt in *Houston Sash* was incurred between May 31, 1973, and March 28, 1974? Based on the court's reasoning the transaction would continue to be usurious, but

41. *See id.* at 218.

42. *See id.* at 218.

43. *See id.* at 218.

44. *See* Houston Sash & Door v. Heaner, 577 S.W.2d 217, 221 (Tex. 1979).

45. *See id.* at 218-19.

46. Difficulties may arise, for example, in cases in which the debtor has purchased items on account during two or more consecutive years. If interest has been charged on the account in both years, then all of the principal would be subject to forfeiture. If interest is charged on both years' principal during the second year only, this also is a charge of twice the allowable interest with the consequent forfeiture of principal, although interest could legally be charged at six percent on the first year's principal. In this case, the courts apparently would be required to distinguish between the legal portion of the interest charges and the usurious portion, and only that principal upon which usurious interest charges were made would be forfeited. *See id.* at 220-21; TEX. REV. CIV. STAT. ANN. art. 5069-1.03, 1.06(2) (Vernon 1971).

interest at the rate of six percent per annum would accrue on that portion of the debt created prior to January 1, 1974.[47]

Carrying this analogy one step further, what advice can an attorney give his client concerning compliance with article 5069-1.03. Creditors appear to be required to differentiate between purchases made in the current calendar year versus prior years, and interest charges may accrue only on purchases in prior years. Additional problems are created when a customer makes a partial payment. It appears inequitable for the creditor to apply payments to this year's purchases rather than to earlier purchases; however, this procedure is the only system that insures legal interest charges[48] on those accounts not covered by the amendment to article 5069-1.03.

Equally perplexing are the problems created if interest is charged on this year's purchases as well as prior purchases. Does the creditor forfeit just the principal amount created in the current year, or does the creditor lose the entire principal reflected on the "account"? Similarly, how much interest charge is deemed usurious in this situation? Should a duty be imposed on creditors to maintain two ledgers on each customer, one reflecting purchases in prior years, and the second reflecting purchases during the current year? Not only would this work an undue hardship on creditors, but trial courts would find great difficulty when required to make these calculations.

All of these problems are avoided if an "account" is created only once—at the inception of the relationship between the parties. The logic of this approach is hampered, however, by court opinions containing language implying that a new account is created when each debt accrues.[49] In *Windhorst v. Adcock Pipe and Supply*[50] the supreme court stated: "Where there is no agreement upon interest rate . . . the statutory 6% interest from January 1 following the *date the debt is incurred* is 'read into' the agreement by article 5069-1.03."[51]

Article 5069-1.03 presented the Waco Court of Civil Appeals with

47. *See* Houston Sash & Door, Co. v. Heaner, 577 S.W.2d 217, 220-21 (Tex. 1979); TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1971).

48. *But see* Watson v. Cargill, Inc., 573 S.W.2d 35, (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (payments applied by court to prior year's purchases); 1979 Tex. Sess. Law Serv., ch. 707, § 1, at 1718 (Vernon).

49. *See* Windhorst v. Adcock Pipe & Supply, 547 S.W.2d 260, 261 n.2 (Tex. 1977); Watson v. Cargill, Inc., 573 S.W.2d 35, 42 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

50. 547 S.W.2d 260 (Tex. 1977).

51. *Id.* at 261 n.2 (emphasis added).

an interesting problem. In *Watson v. Cargill, Inc.*[52] the court ruled that the seller of goods charged interest prior to the time set forth in article 5069-1.03.[53] In this particular case the "interest" took the form of a "delinquency charge" reflected on a written invoice. None of the interest was collected, but the court accessed the full penalty of article 5069-1.06 because the interest was "charged."[54] The majority opinion relied on *Windhorst* in reaching its decision.[55] In *Windhorst* the supreme court held that article 5069-1.06 applied when unauthorized interest is contracted for, charged, *or* collected.[56] Houston Sash and Door Company filed a petition alleging a debt that included not only the sums charged for goods sold to Bedford, but also the interest previously charged and recorded on invoices. Consequently, the court did not consider whether or not the terms of the sale on the invoice constitutes a "charge" under article 5069-1.01. A court of civil appeals opinion in *Thomas Conveyor Co. v. Portec, Inc.*[57] recognized an important aspect of trade practice. That court held that interest is not "charged" merely because of an invoice provision when the creditor took no other action to collect the interest.[58]

Faced with a problem in allocating payments, the majority of the court in *Watson* believed that payments should be applied to the oldest accounts first in order to reduce the pre-January 1 account balance upon which statutory interest could be charged.[59] A pursuasive dissenting opinion preferred to analysis of the entire relationship of the parties, instead of a consideration of the individual charges and credits on the account.[60] The total unpaid balance after the applicable January 1 remained larger than the balance as of

52. 573 S.W.2d 35 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

53. *See id.* at 42.

54. *See id.* at 42.

55. *See id.* at 42; Windhorst v. Adcock Pipe & Supply, 547 S.W.2d 260, 261 (Tex. 1977).

56. *See* Windhorst v. Adcock Pipe & Supply, 547 S.W.2d 260, 261 (Tex. 1977).

57. 572 S.W.2d 361 (Tex. Civ. App.—Waco 1978, no writ).

58. *See id.* at 363; Killebrew v. Bartlett, 568 S.W.2d 915, 917 (Tex. Civ. App.—Amarillo 1978, no writ).

59. *See* Watson v. Cargill, Inc., 573 S.W.2d 35, 39 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.). The majority based its opinion on the settled rule that "where there is a running account with various items of charges and credit occurring at different times, and no direction of payment has been made by the debtor, payments on the account as a whole are applied by law to the oldest unpaid portion of the account." *Id.* at 39; Prowell v. Berry-Barnett Grocery Co., 462 S.W.2d 53, 54 (Tex. Civ. App.—Waco 1971, writ ref'd).

60. *See* Watson v. Cargill, Inc., 573 S.W.2d 35, 42-43 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (dissenting opinion).

January 1, and the dissent believed that it would be acceptable to charge interest after January 1 on the entire amount unpaid as of that date.[61] The dissent in *Watson* poses a more accurate view of accounts on the books of most creditors. January 1 may be an important date under the law, but it has no reasonable relationship to the purchase and sale of goods. Further, the majority opinion in *Watson* ignores the plights of the creditor who has extended credit to a customer but who is unable to collect any interest on the extension of credit until the following January.[62]

Fortunately, this disparity of application and many of the computation difficulties have been remedied by the 1979 amendment to the legal interest statute.[63] Although the amendment retains an interest-free period of thirty days, the creditor will be able to impose interest charges on each item of the account thirty days after it is due, and on the entire account thirty days after the last item is due. The newly amended penalty statute defines usurious interest as interest in excess of that authorized by law, and calls for a forfeiture of only three times the excess.[64] Since, under *Watson v. Cargill, Inc.*[65] each item on an open account constitutes a separate transaction, then an interest charge on an account containing items for which legal interest is authorized as well as items that are still interest-free should not call for a forfeiture of the entire principal, nor a penalty for the authorized portion of the interest charge.[66]

Another alternative available to creditors faced with liability similar to the forfeitures that Houston Sash suffered is to challenge the nature of the transaction. An open account, as used in the Texas statutes, is an unliquidated account based on sales creating the relationship of debtor and creditor by course of dealing. The term excludes isolated special contracts, and the term does not apply to accounts created for services rendered.[67] If the transaction in question does not constitute an open account, then although there is no

61. *See id.* at 43 (dissenting opinion).

62. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1971).

63. *See* 1979 Tex. Sess. Law Serv., ch. 707, § 1, at 1718 (Vernon).

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

65. 573 S.W.2d 35, 39 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

66. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1971); 1979 Tex. Sess. Law Serv., ch. 281, § 1, at 604 (Vernon).

67. *See* Meaders v. Biskamp, 316 S.W.2d 75, 78 (Tex. 1958); McDaniel v. National Steam Laundry Co., 112 Tex. 54, 58, 244 S.W.135, 137 (1922); Routon v. Phillips, 246 S.W.2d 223, 227 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.).

agreement for interest, the *Houston Sash* problem would not arise since there would be no interest-free period. Instead, the creditor would be entitled to six percent interest per annum from the time that the debt is due and payable.[68]

Another tactic not to be ignored by creditors is to shift the burden to the debtor to show that an agreement does not exist. In *Miles v. W.C. Roberts Lumber Co.*[69] the court held that the debtor had the burden of proving the absence of an agreement between the parties.[70] In *Miles* the debtor failed to request or submit an issue concerning the presence of an agreement in the trial court. Since the evidence did not conclusively establish that there was no agreement, that issue, as well as the debtor's recovery under article 5069-1.03, was waived.[71] In *Houston Sash* the supreme court stated that the creditor had failed to plead or prove an agreement, and consequently the court assumed that no agreement existed.[72] The evidence in that case was far from conclusive on whether or not an agreement existed between the parties. The invoices called for interest on overdue accounts, and Mr. Heaner, who was closely associated with Bedford, had signed a separate guaranty agreement.[73]

Whether or not an open account exists is an important consideration when dealing with possible usurious interest, but in a broader sense the significance of the term wains. For example, a sale on an open account must create some form of contract or there would be no requirement for payment on the part of the recipient. Once a contract is established it may not be difficult to determine that one of the terms of the contract requires the payment of interest. If this position has any merit, as between merchants the only occasion on which interest from the date of the "account" would not accrue would be those when no writing or invoice is prepared or when the invoice or writing makes no reference to interest charges.

Failing to treat an open account in the proper manner may create unanticipated problems under the Statute of Frauds. Section 2.201(1)[74] of the UCC provides:

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68. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1971).
69. 561 S.W.2d 256 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).
70. *See id.* at 258.
71. *See id.* at 258.
72. *See* Houston Sash & Door Co. v. Heaner, 577 S.W.2d 217, 219 (Tex. 1979).
73. *See id.* at 218-19.
74. TEX. BUS. & COM. CODE ANN. § 2.201(1) (Tex. UCC) (Vernon 1968).

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500.00 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a *contract for sale* has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker . . . .[75]

Section 2.201(2) provides an exception between merchants if within a reasonable time a writing in confirmation of the contract is received.[76] If a standard invoice is not sufficient confirmation of a contract, then the Statute of Frauds will preclude the enforcement of more contracts than I care to imagine.

On first reading, the supreme court's opinion in *Houston Sash* appears to resolve the issue of interest on an open account. On reflection, however, it is apparent that courts facing similar facts will be called upon to interpret and rule on questions not raised in the earlier opinion. The new amendment to article 5069-1.03 will unquestionably aid the open account creditor by allowing him to charge interest much sooner than he could under the prior statute. Nevertheless, creditors would be wise to review and revise their open account practices, since there is still no statutory authorization for interest charges in excess of six percent per annum in the absence of an agreement to the contrary.

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75. *Id.* (emphasis added).
76. *Id.* § 2.201(2).