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Consideration Paid for Loan Option Is Bona Fide Commitment Fee, Not Interest, Despite Label Attached and Amount Charged.

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USURY—Commitment Fees—Consideration Paid for Loan Option Is Bona Fide Commitment Fee, Not Interest, Despite Label Attached and Amount Charged

Stedman v. Georgetown Savings & Loan Association,
595 S.W.2d 486 (Tex. 1979).

C. T. Stedman applied for a permanent loan commitment from Georgetown Savings and Loan Association to finance a construction project.[1] His loan application was approved, and a commitment letter was issued on June 30, 1975. Georgetown Savings offered Stedman an eight month option to secure a permanent loan of $60,000 for fifteen years at ten percent interest. Interest was to accrue from date of acceptance of the commitment offer. On June 30, 1975, Stedman accepted and was subsequently billed monthly for "interest due" until he exercised the option to take the permanent loan on February 2, 1976.[2] The loan made by Georgetown Savings on February 20, 1976, provided for interest at ten percent per annum on the $60,000 advanced. On October 22, 1976, Stedman filed suit alleging Georgetown Savings had exceeded the statutory maximum interest rate by charging ten percent interest on the committed funds in addition to ten percent on the full amount of the loan after the proceeds were disbursed.[3] The trial court held the charge made for "interest due" during the commitment period constituted a bona fide

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1. A commitment for a permanent or long term loan was required before Stedman could obtain interim funds for the construction of a Dairy Queen restaurant. Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 487 (Tex. 1979). Interim financing is applied directly to the cost of construction and thus entails a higher risk to the lender than long term loans because of potential delays in completion of the project. Upon completion, lenders seek prompt repayment from the proceeds of prearranged permanent loans. *See* Altherr v. Wilshire Mortgage Corp., 448 P.2d 859, 861 (Ariz. 1968) (en banc). *See generally* Riverdrive Mall, Inc. v. Larwin Mortgage Investors, 515 S.W.2d 5, 6 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

2. Stedman paid a total of $3,383.31, amounting to 5.6 percent of the $60,000 principal. Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 487 (Tex. 1979).

3. Stedman sought statutory penalties of $118,517.04, double the amount of interest for which he contracted, in addition to the recovery of all interest paid and attorney fees. *Id.* at 487; *see* 1967 Tex. Gen. Laws, ch. 274, § 1.06(1), at 610 (formerly Tex. Rev. Civ. Stat. Ann. art. 5069-1.06 (Vernon 1971)). Article 5069-1.06(1) was amended in 1979 to lessen the applicable penalties. *Compare* 1967 Tex. Gen. Laws, ch. 274, § 1.06(1), at 610 (penalty of double the total amount of interest contracted for, charged, or received) *with* TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon Supp. 1971-1979) (penalty of treble the amount of interest over the legal rate contracted for, charged, or received). *See generally Student Symposium—A Study of Texas Usury Law,* 10 ST. MARY'S L.J. 825, 855-57 (1979). Stedman's suit was brought under article 1.06(1) as originally enacted. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 487 (Tex. 1979); 1967 Tex. Gen. Laws, ch. 274, § 1.06(1), at 610.

commitment fee and, therefore, was not interest as defined by the usury statutes. The Fort Worth Court of Civil Appeals affirmed,[4] and Stedman appealed to the Supreme Court of Texas. Held—*Affirmed.* Consideration paid to a lender for the option to secure a loan is a bona fide commitment fee, not interest, despite the label attached and amount charged.[5]

Statutes governing loan transactions and interest rates exist in all jurisdictions in the United States.[6] Their aim is redress of the unequal bargaining position that consumers have traditionally occupied with respect to lenders.[7] The state derives its authority to enact usury legislation through its police power.[8] Consumer protection in this area conflicts with the freedom of contract,[9] and, therefore, the legislature is responsible for deciding when "a voluntary economic transaction constitutes an abuse of economic freedom and thus an act of usury."[10]

In Texas the legislation affording protection from usury in consumer transactions is contained in the Consumer Credit Code.[11] Interest is de-

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4. Stedman v. Georgetown Sav. & Loan Ass'n, 575 S.W.2d 415, 416 (Tex. Civ. App.—Fort Worth 1978), *aff'd*, 595 S.W.2d 486 (Tex. 1979).

5. Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 490 (Tex. 1979).

6. *See* Lowell, *A Current Analysis of the Usury Laws: A National View*, 8 SAN DIEGO L. REV. 193, 193 (1971). Laws regulating interest rates have been in existence since Biblical times. Originally, usury referred to all interest derived; consequently, lenders as a class were held in moral disrepute. *See* Prather, *Mortgage Loans and the Usury Laws*, 16 BUS. LAW 181, 183 (1960). Following the Reformation in the 16th century, the concept of usury narrowed to encompass only those interest rates deemed excessive. *See* Pearce & Williams, *Punitive Past to Current Convenience—A Study of the Texas Law of Usury*, 22 SW. L.J. 233, 234 (1968). For a complete discussion of the historical development of usury, see Bernstein, *Background of a Gray Area in the Law: The Checkered Career of Usury*, 51 A.B.A. J. 846 (1965); *Student Symposium—A Study of Texas Usury Law*, 10 ST. MARY'S L.J. 825, 825-29 (1979).

7. *See* Southwestern Inv. Co. v. Mannix, 557 S.W.2d 755, 761 (Tex. 1977) (usury statutes protect citizens from credit abuses); Hershman, *Usury and the Tight Mortgage Market*, 85 BANKING L.J. 189, 199 (1968). In opposition to usury laws, it has been argued that restricting interest rates has the effect of reducing the supply of funds available to the borrower since lenders will seek other forms of investment from which they can derive a more profitable return. *See* Shanks, *Practical Problems in the Application of Archaic Usury Statutes*, 53 VA. L. REV. 327, 329-31 (1967).

8. *See* Griffith v. Connecticut, 218 U.S. 563, 569 (1910); Cesary v. Second Nat'l Bank, 369 So. 2d 917, 921 (Fla. 1979); Smith v. Director, Corp. & Sec. Bureau, 261 N.W.2d 228, 231 (Mich. Ct. App. 1977).

9. *See* Prather, *Mortgage Loans and the Usury Laws*, 16 BUS. LAW. 181, 184 (1960).

10. TEX. CONST. art. 16, § 11, comment.

11. *See* TEX. REV. CIV. STAT. ANN. arts. 5069-1.01 to -51.19 (Vernon 1971 & Supp. 1971-1979). The declared intent of the legislature in enacting the Credit Code was "to protect the citizens of Texas from abusive and deceptive practices now being perpetrated by unscrupulous operators, lenders and vendors in both cash and credit consumer transactions." *Declaration of Legislative Intent*, 15 TEX. REV. CIV. STAT. ANN. 2 (Vernon 1971). The Texas Constitution confers upon the legislature the right to classify loans and lenders, define interest,

fined as the "compensation allowed by law for the use, forbearance or detention of money,"[12] and the maximum rate of interest is fixed at ten percent per annum,[13] except as otherwise authorized by law.[14] Any interest charge exceeding the statutory maximum is deemed usurious[15] and subjects the guilty party to a penalty of treble the amount of usurious interest contracted for, charged, or received.[16]

A loan transaction is usurious when the following elements are present: a loan, forbearance, or detention of money or its equivalent;[17] absolute obligation of repayment;[18] exaction of compensation in excess of that permitted by law;[19] and intent to violate the usury statute.[20] Determinations

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and fix maximum interest rates. *See* TEX. CONST. art. 16, § 11.

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

13. *Id.* art. 5069-1.02. It is further provided that unless otherwise authorized by law, parties to a contract may agree to any interest rate not in excess of ten percent, but when no rate is stipulated, a maximum six percent shall be allowed. *See id.* arts. 5069-1.03 (Vernon Supp. 1971-1979), 5069-1.04 (Vernon 1971).

14. Some of the statutory exceptions to the maximum ten percent interest rate include: TEX. REV. CIV. STAT. ANN. arts. 1302-2.09 (Vernon Supp. 1963-1979) (loans to corporations); 5069-1.07(b) (Vernon Supp. 1971-1979) (loans of $250,000 or more); 5069-1.07(c) (Vernon Supp. 1971-1979) (loans for oil and gas exploration exceeding $500,000); 5069-1.08 (Vernon Supp. 1971-1979) (monthly debit balances of customers of registered brokers); 5069-1.09 (Vernon Supp. 1971-1979) (loans insured by the Federal Housing Administration or Veterans' Administration). For a general discussion of these exceptions see *Student Symposium—A Study of Texas Usury Law,* 10 ST. MARY'S L.J. 825, 876-80 (1979).

15. TEX. REV. CIV. STAT. ANN. art. 5069-1.02 (Vernon 1971).

16. *Id.* art. 5069-1.06(1) (Vernon Supp. 1971-1979).

17. *See, e.g.,* Crow v. Home Sav. Ass'n, 522 S.W.2d 457, 460 (Tex. 1975) (fee charged by broker not interest since broker was not lender); Maloney v. Andrews, 483 S.W.2d 703, 705 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.) (late fee charged under lease agreement not interest since no loan involved); Swenson v. Dudley, 293 S.W. 312, 312-13 (Tex. Civ. App.—El Paso 1927, no writ) (lender's agreement to extend time for payment of loan was forbearance under usury laws).

18. *See, e.g.,* Beavers v. Taylor, 434 S.W.2d 230, 231 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.) (contract not usurious when lender to receive uncertain value in return); Campbell v. Oskey, 239 S.W. 332, 335 (Tex. Civ. App.—El Paso 1922, no writ) (absolute agreement between parties that principal was to be repaid); Burton v. Stayner, 182 S.W. 394, 395 (Tex. Civ. App.—San Antonio 1916, writ ref'd n.r.e.) (no usury since principal not to be recovered unless business venture successful).

19. *See, e.g.,* Windhorst v. Adcock Pipe & Supply, 547 S.W.2d 260, 260 (Tex. 1977) (lawful interest rate exceeded by monthly finance charge assessed unilaterally by lender); Shropshire v. Commerce Farm Credit Co., 120 Tex. 400, 412-15, 30 S.W.2d 282, 285-86 (1930) (creditor's right to charge unearned interest upon default of borrower rendered contract usurious); Maxwell v. Estate of Bankston, 433 S.W.2d 229, 233 (Tex. Civ. App.—Texarkana 1968, no writ) (contract requiring payment of additional sum for use of money usurious since maximum interest rate exceeded).

20. *See, e.g.,* Miller v. First State Bank, 551 S.W.2d 89, 98 (Tex. Civ. App.—Fort Worth 1977) (intent to make agreement involved in loan transaction sufficient to establish usury), *aff'd as modified,* 563 S.W.2d 572 (Tex. 1978); Ferguson v. Tanner Dev. Co., 541 S.W.2d

of usury are based upon the terms agreed to by the parties at the inception of the contract.[21] When the provisions of the contract permit the lender to collect more than the legal interest, the transaction is usurious whether or not illegal interest is actually received.[22]

Allegations of usury are often raised when the lender assesses a number of "front-end" charges or fees in addition to interest on the loan.[23] These fees are generally collected by the lender at the time the loan is advanced and are not designated interest.[24] A lender may make a legitimate extra charge for an actual service or benefit provided over and above the mere lending of money.[25] When a fee is not attributable to an ascertainable cost, expense, risk, or service for which reimbursement is proper, it will be deemed interest.[26] In determining whether a charge is legitimate or merely a device to collect usurious interest, courts look beyond the form to the substance of the transaction.[27] The label by which a fee is desig-

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483, 492-93 (Tex. Civ. App.—Houston [1st Dist.] 1976) (intent to charge usurious interest presumed by provisions in loan instruments), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977); Townsend v. Adler, 510 S.W.2d 175, 176 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (intent to make bargain renders contract usurious although excessive interest charged in ignorance of usury laws).

21. *See* D & M Dev. Co. v. Sherwood & Roberts, Inc., 457 P.2d 439, 446 (Idaho 1969); Pinemont Bank v. DuCroz, 528 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

22. *See* Shropshire v. Commerce Farm Credit Co., 120 Tex. 400, 411, 30 S.W.2d 282, 285 (1930) (any contingency by which lender may get more than legal interest rate renders contract usurious); TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon Supp. 1971-1979) (usury penalties applicable to person who contracts for, charges, *or* receives illegal interest).

23. *See, e.g.*, Kissel Co. v. Gressley, 591 F.2d 47, 52 (9th Cir. 1979) (loan fee); Altherr v. Wilshire Mortgage Corp., 448 P.2d 859, 864 (Ariz. 1968) (en banc) (interim financing fees, processing fees, attorneys' fees); Terry v. Teachworth, 431 S.W.2d 918, 924 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (origination fee).

24. *See* Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1341 (5th Cir. 1972) (charges for "costs, expenses, and legal fees" deducted from amount of loan advanced); Nevels v. Harris, 129 Tex. 190, 192, 102 S.W.2d 1046, 1048 (1937) (lender charged fee for making loan and deducted fees for inspector and attorney); *Student Symposium—A Study of Texas Usury Law*, 10 ST. MARY'S L.J. 825, 881 (1979).

25. *See* Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1343 (5th Cir. 1972) (inspection and legal fees); D & M Dev. Co. v. Sherwood & Roberts, Inc., 457 P.2d 439, 445 (Idaho 1969) (commitment fee); Morris v. Miglicco, 468 S.W.2d 517, 519 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.) (broker's fees); Rodriguez v. R.P. Youngberg Fin., Ltd., 241 S.W.2d 815, 820 (Tex. Civ. App.—El Paso 1951, no writ) (credit insurance).

26. *See, e.g.*, Greever v. Persky, 140 Tex. 64, 69, 165 S.W.2d 709, 712 (1942) (commission); Trinity Fire Ins. Co. v. Kerrville Hotel Co., 129 Tex. 310, 318, 103 S.W.2d 121, 125 (1937) (handling charge); Terry v. Teachworth, 431 S.W.2d 918, 924 (Tex. Civ. App. —Houston [14th Dist.] 1968, writ ref'd n.r.e.) (origination fee). *See generally* Lowell, *A Current Analysis of the Usury Laws: A National View*, 8 SAN DIEGO L. REV. 193, 202-06 (1971).

27. *See, e.g.*, Schmid v. City Nat'l Bank, 132 Tex. 115, 117, 114 S.W.2d 854, 855 (1938)

nated is one aspect of form not necessarily dispositive of the true nature of the charge.[28] Reasonableness is also an indication of whether an extra charge is only intended as reimbursement for a bona fide cost or service.[29]

One example of an additional non-interest charge is a commitment fee.[30] In *Gonzales County Savings & Loan Association v. Freeman*[31] the Texas Supreme Court held a lender may charge a bona fide commitment fee in addition to the maximum statutory interest since such a fee is consideration for the option to secure a loan rather than compensation for actually making the loan.[32] A loan commitment permits the prospective borrower to purchase the right to obtain a loan at any time during a specified period, thereby obligating the lender to loan the funds agreed upon if the borrower exercises the option.[33] If the loan is not subsequently made, usury is not an issue.[34]

(fee deducted from proceeds reduced actual amount of loan though borrower liable for entire amount); Delta Enterprises v. Gage, 555 S.W.2d 555, 557-58 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) (escalating purchase price for real estate not interest); Rodriguez v. R.P. Youngberg Fin., Ltd., 241 S.W.2d 815, 820 (Tex. Civ. App.—El Paso 1951, no writ) (charge for "credit insurance" not interest since borrower received actual benefit therefrom).

28. *See* Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 908 (Tex. 1976) ("loan fee" alleged to be reasonable expense or valid commitment fee). *Compare* Delta Enterprises v. Gage, 555 S.W.2d 555, 558 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) ("interest" charge held payment for option) *with* Thrift Fin. Co. v. State, 351 S.W.2d 653, 655 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.) ("service fee" held interest).

29. *See, e.g.,* Abramowitz v. Barnett Bank, 356 So. 2d 329, 330 (Fla. Dist. Ct. App. 1978) (costs assessed to borrower must be reasonably related to service actually performed); Morris v. Miglicco, 468 S.W.2d 517, 520 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.) (broker's fee must be reasonably related to services performed); Sapphire Homes, Inc. v. Gilbert, 426 S.W.2d 278, 282 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (reasonable charges for special services).

30. A commitment fee is consideration paid by the borrower for the lender's promise to make a loan in the future. *See, e.g., In re* Four Seasons Nursing Centers of America, Inc., 483 F.2d 559, 601 (10th Cir. 1973); Pivot City Realty Co. v. State Sav. & Trust Co., 162 N.E. 27, 29 (Ind. Ct. App. 1928); Goldman v. Connecticut Gen. Life Ins. Co., 248 A.2d 154, 158 (Md. 1968). A small percentage of the contemplated loan amount is the usual charge for a commitment, and it is generally nonrefundable in the event the borrower elects not to take the loan. *See* Goldman v. Connecticut Gen. Life Ins. Co., 248 A.2d 154, 157 (Md. 1968); Sintenis, *Current Treatment of the Nonrefundable Commitment Fee and Related Problems,* 86 BANKING L.J. 590, 609-10 (1969).

31. 534 S.W.2d 903 (Tex. 1976).

32. *See id.* at 906; Financial Fed. Sav. & Loan Ass'n v. Burleigh House, Inc., 305 So. 2d 59, 63 (Fla. Dist. Ct. App. 1974), *overruled on other grounds,* 369 So. 2d 922 (Fla. 1979); D & M Dev. Co. v. Sherwood & Roberts, Inc., 457 P.2d 439, 445 (Idaho 1969).

33. *See, e.g., In re* Four Seasons Nursing Centers of America, Inc., 483 F.2d 599, 601 (10th Cir. 1973); D & M Dev. Co. v. Sherwood & Roberts, Inc., 457 P.2d 439, 445 (Idaho 1969); Goldman v. Connecticut Gen. Life Ins. Co., 248 A.2d 154, 158 (Md. 1968).

34. *See* Prather, *Mortgage Loans and the Usury Laws,* 16 BUS. LAW. 181, 188 (1960);

Prior to the decision in *Freeman*, Texas courts provided little guidance for identifying a bona fide commitment fee, and, consequently, its status under the usury laws was uncertain.[35] The holding in *Freeman* resolved that a fee intended only as consideration for holding a loan available is not interest; however, the court indicated not every commitment fee is bona fide.[36] Occasionally, such a fee serves as a device through which the lender attempts to circumvent the usury laws.[37] When doubt exists concerning the true purpose of an alleged commitment fee, the reasonableness of the charge is indicative of whether it is legitimate or a means to exact usurious interest on the subsequent loan.[38] The *Freeman* court suggested a determination of reasonableness based upon the risk borne by the lender.[39] Additional factors considered by federal and state courts in evaluating reasonableness of the fee include: whether the fee is compara-

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cf. Paley v. Barton Sav. & Loan Ass'n, 196 A.2d 682, 685 (N.J. Super. Ct. App. Div. 1964) (commitment fee cannot be usurious since no loan involved); Crow v. Home Sav. Ass'n, 522 S.W.2d 457, 460 (Tex. 1975) (when no loan exists, usury cannot be alleged).

35. *Compare* Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976) (bona fide commitment fee not interest) *with* Imperial Corp. of America, Inc. v. Frenchman's Creek Corp., 453 F.2d 1338, 1343 (5th Cir. 1972) (applying Texas law) ("loan" or "commitment" fee held interest as a matter of law) *and* Micrea, Inc. v. Eureka Life Ins. Co. of America, 534 S.W.2d 348, 353 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) ("commitment fee" held interest) *and* Laid-Rite, Inc. v. Texas Indus., Inc., 512 S.W.2d 384, 388 (Tex. Civ. App.—Fort Worth 1974, no writ) (lender admitted "commitment fee" to be interest). The different result in *Freeman* is attributable to the fact the alleged commitment fees in the latter three cases did not involve consideration for a loan option. *See* 54 TEXAS L. REV. 1487, 1494 (1976).

36. Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976); *accord*, Kissel Co. v. Gressley, 591 F.2d 47, 52 (9th Cir. 1979); Altherr v. Wilshire Mortgage Corp., 448 P.2d 859, 864 (Ariz. 1968) (en banc).

37. *See* Altherr v. Wilshire Mortgage Corp., 448 P.2d 859, 864 (Ariz. 1968) (en banc); Gratton v. Dido Realty Co., 391 N.Y.S.2d 954, 956 (App. Div. 1977); Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976).

38. *See, e.g.*, Kissel Co. v. Gressley, 591 F.2d 47, 52 (9th Cir. 1979); Fikes v. First Fed. Sav. & Loan Ass'n, 533 P.2d 251, 265 (Alaska 1975); Altherr v. Wilshire Mortgage Corp., 448 P.2d 859, 864 (Ariz. 1968) (en banc). *See generally* Lowell, *A Current Analysis of the Usury Laws: A National View*, 8 SAN DIEGO L. REV. 193, 210-11 (1971).

39. Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976); *accord*, Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). In making a commitment for a future loan, the lender is subject to the risk that prevailing interest rates will rise before the borrower exercises his option. The risk is present when the lender's commitment provides for an interest rate below the legal maximum. If market interest rates rise before the option is exercised, the lender's rate of return on the subsequent loan may be unprofitable. *See* D & M Dev. Co. v. Sherwood & Roberts, Inc., 457 P.2d 439, 445 (Idaho 1969) (reasonable for lender to shift risk of money market to borrower). *See generally* Sintenis, *Current Treatment of the Nonrefundable Commitment Fee and Related Problems*, 86 BANKING L.J. 590, 610 (1969); 54 TEXAS L. REV. 1487, 1497 (1976).

ble to the current rates charged within the community for similar agreements;[40] the value of the loan commitment to the borrower;[41] and whether expenses were incurred in reviewing the loan application for which the lender has not requested separate reimbursement.[42] A commitment fee is bona fide when reasonable considering the particular circumstances surrounding the lender's promise to make a specified loan at a future date.[43]

In *Stedman v. Georgetown Savings & Loan Association*[44] the Texas Supreme Court held a fee that constitutes consideration for the granting of an option to secure a future loan is a bona fide commitment fee and, therefore, not interest within the meaning of the usury laws.[45] Neither Georgetown Savings' characterization of the monthly charge as "interest due" nor the total amount of the fee was relevant to the court's decision.[46] Instead, the court relied on the fact Stedman was under no obligation to close the loan. His right to accept and the association's commitment to lend the funds were conditioned upon his payment of the fee, as is characteristic of an option contract.[47] The majority concluded no allegations of usury can be raised against the lender when the charge in ques-

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40. *See In re* Four Seasons Nursing Centers of America, Inc., 483 F.2d 599, 601 (10th Cir. 1973) (three percent fee in line with prevailing rates); Financial Fed. Sav. & Loan Ass'n v. Burleigh House, Inc., 305 So. 2d 59, 63 (Fla. Dist. Ct. App. 1974) (one percent fee customary in trade); Paley v. Barton Sav. & Loan Ass'n, 196 A.2d 682, 687 (N.J. Super. Ct. App. Div. 1964) (one percent fee reasonable); Prather, *Mortgage Loans and the Usury Laws*, 16 BUS. LAW. 181, 188 (1960) (commitment fees should not be out of line with prevailing rate within community).

41. *See* Regional Enterprises, Inc. v. Teachers Ins. & Annuity Ass'n of America, 352 F.2d 768, 771 (9th Cir. 1965) (value in obtaining interim financing); D & M Dev. Co. v. Sherwood & Roberts, Inc., 457 P.2d 439, 445 (Idaho 1969) (value of guaranteed interest rates in rising money market).

42. *See* Lowe v. Massachusetts Mut. Life Ins. Co., 127 Cal. Rptr. 23, 32 (Ct. App. 1976) (expense incurred in reviewing and verifying data in loan application); Goldman v. Connecticut Gen. Life Ins. Co., 258 A.2d 154, 155 (Md. 1968) (expenses incurred in processing loan); Continental Assurance Co. v. Van Cleve Bldg. & Constr. Co., 260 S.W.2d 319, 324 (Mo. Ct. App. 1953) (compensation for expense, time, and trouble of investigating loan application).

43. *See* Kissel Co. v. Gressley, 591 F.2d 47, 52 (9th Cir. 1979); Altherr v. Wilshire Mortgage Corp., 448 P.2d 859, 864 (Ariz. 1968) (en banc); Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). *See generally* Perich, Fields & Hurt, *A Topic of Interest: An Analysis of the Status of the Usury Laws in Texas*, 19 S. TEX. L.J. 525, 540 (1978).

44. 595 S.W.2d 486 (Tex. 1979).

45. *See id.* at 490.

46. *See id.* at 488-89. The majority stressed the necessity of looking beyond form to substance and found that the "interest" label was not controlling. *See id.* at 489; *cf.* Delta Enterprises v. Gage, 555 S.W.2d 555, 558 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) (payments labeled interest held part of escalating price at which option to purchase property could be exercised).

47. Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 488 (Tex. 1979); *see* Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976).

tion serves as a bona fide commitment fee, no matter how unreasonable in amount.[48]

In a lengthy dissent it was argued the charges made to Stedman prior to his exercise of the option to take the loan did not constitute a bona fide commitment fee.[49] The dissent found the characteristics and purpose of the fee to be more consistent with an interest charge than with consideration for an option.[50] Further, Georgetown Savings' consistent reference to the disputed charge as interest was deemed to preclude the court from disregarding the label.[51] Criticism was directed at the majority opinion for deciding the commitment fee was bona fide without determining whether it was reasonable under the circumstances.[52] The dissent contended the court ignored its previous statement in *Freeman* that an unreasonable commitment fee may serve as a device to collect usurious interest.[53] Fi-

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48. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 489 (Tex. 1979). Before a transaction can be deemed usurious, there must be an overcharge by the lender for the use, forbearance, or detention of money. *See id.* at 489; Crow v. Home Sav. Ass'n, 522 S.W.2d 457, 460 (Tex. 1975). A bona fide commitment fee is not charged for this purpose, but for a separate consideration, and thus does not constitute interest. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 489 (Tex. 1979).

49. *See id.* at 492 (Spears, J., dissenting). There was also a dissenting opinion by Justice Pope in which he argued the consistent terminology used by Georgetown Savings in reference to the disputed fee indicated a clear intent to charge interest before the loan was made. *See id.* at 502 (Pope, J., dissenting). Reference in this casenote to the dissent will hereafter be confined to the opinion of Justice Spears.

50. *See id.* at 497 (Spears, J., dissenting). Some of the characteristics noted as peculiar to an interest charge were: the accruing nature of the fee throughout the period of the commitment; the intent to compensate the lender for the risk of the enterprise; and the lender's failure to distinguish the disputed payments from interest for accounting purposes. *Id.* at 493-96 (Spears, J., dissenting); *see* Fikes v. First Fed. Sav. & Loan Ass'n, 533 P.2d 251, 265 (Alaska 1975).

51. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 499 (Tex. 1979) (Spears, J., dissenting); *cf.* Miller v. First State Bank, 551 S.W.2d 89, 102 (Tex. Civ. App.—Fort Worth 1977) (trial court precluded from contrary finding when bank president admitted facts establishing usury), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978).

52. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 491 (Tex. 1979) (Spears, J., dissenting). The dissent asserted "a legitimate, bona fide commitment fee must be both reasonable and intended only as consideration for having the future loan available." *Id.* at 491; *see* Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976).

53. Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 491 (Tex. 1979) (Spears, J., dissenting); *see* Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976). *See generally* Fikes v. First Fed. Sav. & Loan Ass'n, 533 P.2d 251, 265 (Alaska 1975); Altherr v. Wilshire Mortgage Corp., 448 P.2d 859, 863 (Ariz. 1969) (en banc); D & M Dev. Co. v. Sherwood & Roberts, Inc., 457 P.2d 439, 445 (Idaho 1969). The dissent argued the fee charged to Stedman was unreasonable in relation to the risk assumed by Georgetown Savings. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 492 (Tex. 1979). (Spears, J., dissenting).

nally, concern was expressed that the majority opinion would encourage lenders to evade the usury laws by collecting additional compensation on subsequent loans through excessive commitment fees.[54]

Texas courts have traditionally sought to evaluate the terms and circumstances of each loan transaction to determine the validity of usury allegations.[55] In *Stedman* the majority correctly noted substance must predominate over form when there is any dispute concerning the true nature of the transaction.[56] Accordingly, the court examined the charges levied on Stedman prior to his accepting the loan and concluded they were characteristic of payment for an option although labeled "interest" and assessed periodically.[57] In substance, the fee was held to constitute consideration for the loan commitment; thus, the interest label was discarded as a vestige of form.[58]

The majority's conclusion demonstrates only partial adherence to its professed duty to look beyond form in deciding the true nature of the disputed charge.[59] As noted by the dissent, the majority failed to inquire further whether the commitment fee was bona fide.[60] Before the fee could

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54. *See id.* at 500 (Spears, J., dissenting). An automatic "commitment period" during which time the lender would collect interest on the loan before disbursing the funds. was envisioned by the dissent *See id.* at 500 (Spears, J., dissenting).

55. *See, e.g.*, Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1344 (5th Cir. 1972) (applying Texas law); Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 781 (Tex. 1977); Walker v. Temple Trust Co., 124 Tex. 575, 578, 80 S.W.2d 935, 936 (1935).

56. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 489 (Tex. 1979); *cf.* Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 908 (Tex. 1976) (question whether "loan fee" was bona fide commitment fee or charge for reasonable expense); Schmid v. City Nat'l Bank, 132 Tex. 115, 117, 114 S.W.2d 854, 855 (1938) (deduction of fee from loan proceeds in effect reduced loan amount for which borrower was liable); Delta Enterprises v. Gage, 555 S.W.2d 555, 558-59 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) (payments labelled "interest" were part of price for option).

57. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 489 (Tex. 1979); Delta Enterprises v. Gage, 555 S.W.2d 555, 558 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

58. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 489 (Tex. 1979).

59. *Cf.* Stacks v. East Dallas Clinic, 409 S.W.2d 842, 845 (Tex. 1966) (interest collected by Clinic not usurious since Clinic received no benefit but forwarded interest to third person); Schmid v. City Nat'l Bank, 132 Tex. 115, 117-18, 114 S.W.2d 854, 855 (1938) (check given lender at loan closing rendered transaction usurious since borrower liable for greater sum than he actually received).

60. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 491 (Tex. 1979) (Spears, J., dissenting) (contending majority relied on trial court's finding commitment fee bona fide although no such fact finding or conclusion of law made); *cf.* Kissel Co. v. Gressley, 591 F.2d 47, 52 (9th Cir. 1979) (when fees and interest exceed statutory maximum rate, lender must prove charges were for actual services or reasonable commitment fees); Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976) (commitment fee may be device to conceal usury if not bona fide).

be conclusively determined not to be a cloak for interest, a finding of its legitimacy was necessary.[61] In holding the commitment fee bona fide without ascertaining that it was intended only to compensate Georgetown Savings for granting the loan option, the majority ignored one of the substantive aspects of a valid commitment fee.[62] Failure to consider reasonableness a necessary element of a bona fide commitment fee is the primary deficiency in the majority's analysis.[63] Since the loan was both committed and subsequently made at the statutory maximum interest rate,[64] it is questionable whether the sole purpose of the ten percent per annum commitment fee was to remunerate Georgetown Savings for having the future loan available.[65] In agreeing to make a loan at the maximum rate allowed by law, Georgetown Savings did not subject itself to the vicissitudes of the money market and, thus, incurred no risk of rising interest rates it could justifiably pass to Stedman.[66] The only risk Georgetown Savings could be said to have assumed was the possibility that Stedman would secure more advantageous terms from another lender and choose not to exercise his option.[67]

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61. *See* Fikes v. First Fed. Sav. & Loan Ass'n, 533 P.2d 251, 265 (Alaska 1975) (loan fee for conditional commitment held interest if unreasonably large); Altherr v. Wilshire Mortgage Corp., 448 P.2d 859, 864 (Ariz. 1968) (en banc) (unreasonable commitment fee may conceal usurious interest); Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (commitment fee held bona fide since reasonable in light of risk borne by lender).

62. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 491 (Tex. 1979) (Spears, J., dissenting). *Compare id.* at 489 (reasonableness of commitment fee is irrelevant since fee is not interest) *with* Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976) (when dispute whether charge is device to conceal usury, reasonableness of fee is indication of its validity).

63. *Cf.* Kissel Co. v. Gressley, 591 F.2d 47, 52 (9th Cir. 1979) (alleged commitment fee deemed interest since not shown to be reasonable); Gratton v. Dido Realty Co., 391 N.Y.S.2d 954, 956 (App. Div. 1977) (commitment fee not disguised interest but reasonable charge), *aff'd*, 405 N.Y.S.2d 1001 (App. Div. 1978); Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (commitment fee reasonable in light of lender's risk, therefore not interest).

64. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 487 (Tex. 1979); TEX. REV. CIV. STAT. ANN. art. 5069-1.02 (Vernon 1971).

65. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 491 (Tex. 1979) (Spears, J., dissenting); *cf.* Kissel Co. v. Gressley, 591 F.2d 47, 52 (9th Cir. 1979) (when statutory maximum interest rate exceeded, lender must prove additional charges for services or reasonable commitment fees); Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 908 (Tex. 1976) (burden on lender to establish loan fee was valid commitment fee intended only as compensation for agreeing to make future loan).

66. Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 492 (Tex. 1979) (Spears, J., dissenting); *see* D & M Dev. Co. v. Sherwood & Roberts, Inc., 457 P.2d 439, 445 (Idaho 1969); Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

67. *See* Goldman v. Connecticut Gen. Life Ins. Co., 248 A.2d 154, 158 (Md. 1968).

The commitment fee assessed to Stedman exceeded the usual rates charged by Georgetown Savings and by lenders within the Central Texas area.[68] While acknowledging the accruing charge was larger than the usual commitment fee, the majority disposed of the issue of reasonableness by stating the charge would have been less had Stedman moved sooner to exercise his option.[69] The majority thus holds Stedman responsible for the apparent unreasonableness of the fee despite the fact usury may inhere in the terms of the loan although the lender does not actually collect an excessive rate of return.[70] Georgetown Savings clearly contracted for the charges received, and, therefore, the court should not have surmised what might have transpired in different circumstances.[71]

The majority did not consider any of the usual indices of reasonableness to determine whether the larger than usual commitment fee was legitimate under the circumstances.[72] Further, overreliance on form is evident from the majority's failure to distinguish the option contract involved in *Delta Enterprises v. Gage*[73] from that in *Stedman*. In *Delta*

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68. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 498-99 (Tex. 1979) (Spears, J., dissenting). The dissent noted that according to the president of Georgetown Savings, the usual commitment fee charged by the bank and by other lenders within the community was one or two percent of the amount of the loan. The charge made to Stedman accrued monthly at the rate of ten percent per annum and constituted 5.6 percent of the total loan at the time he exercised his option. For a one year option the total commitment fee would have been ten percent. *See id.* at 498-99 (Spears, J., dissenting); *cf.* Spanish Village, Ltd. v. American Mortgage Co., 586 S.W.2d 195, 198 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (parties stipulated commitment fees of one percent and one-half of one percent not interest).

69. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 489 (Tex. 1979). *But see* Fikes v. First Fed. Sav. & Loan Ass'n, 533 P.2d 251, 265 (Alaska 1975) (unreasonably large fee for commitment may be deemed interest); Kamrath v. Great Southwestern Trust Corp., 551 P.2d 92, 94 (Ariz. Ct. App. 1976) (lender may not make unreasonable charges in addition to lawful interest).

70. *See* Shropshire v. Commerce Farm Credit Co., 120 Tex. 400, 411, 30 S.W.2d 282, 286 (1930); TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon Supp. 1971-1979); *cf.* W.E. Grace Mfg. Co. v. Levin, 506 S.W.2d 580, 584 (Tex. 1974) (contract did not expressly provide for usurious interest since term for repayment uncertain).

71. *See* Shropshire v. Commerce Farm Credit Co., 120 Tex. 400, 411, 30 S.W.2d 282, 286 (1930) (court rejected lender's argument that acceleration clause would not have been activated had borrower avoided default); Pinemont Bank v. DuCroz, 528 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (court should judge what actually transpired rather than what could have transpired).

72. The majority merely alluded to the value of the commitment to Stedman in enabling him to obtain interim financing. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 488 (Tex. 1979). There was no discussion, however, of the concomitant risk assumed by Georgetown Savings. As noted by the dissent, the administrative costs involved in processing the loan application were separately billed to Stedman. *See id.* at 494 (Spears, J., dissenting).

73. 555 S.W.2d 555 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

Enterprises the Fort Worth Court of Civil Appeals held charges denominated interest were in fact part of the price for real estate which varied according to when the option to purchase was exercised.[74] Noting the similarity of the question presented, the *Stedman* court intimated the accruing fee assessed to Stedman for the loan commitment was analogous to the variable price at which the option holder in *Delta Enterprises* could exercise his right to purchase.[75] Although both charges were designated "interest" and became more expensive as the life of the option progressed, *Stedman* involved an option to execute a loan; whereas, *Delta Enterprises* was concerned with an option to purchase property.[76] A distinction should have been drawn between the two cases since courts presented with allegations of usury have long recognized that the legitimacy of a front-end charge depends upon the individual facts of each transaction.[77]

As a result of its decision, the majority renders inconsequential the distinction between bona fide and ostensible commitment fees previously noted by the court in *Freeman*.[78] For the proposition that the reasonable-

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74. *See id.* at 558. Delta paid Gage for three year options to purchase land. Upon exercising one of the options, Delta was billed for "interest" from the date of the option agreement. The appellate court affirmed the trial court's holding that the payments were not interest, but part of the purchase price for the property which varied depending on when the option was exercised. *Id.* at 558.

75. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 498 (Tex. 1979); Delta Enterprises v. Gage, 555 S.W.2d 555, 558 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

76. Courts have distinguished between a transaction involving a loan of money and a loan from the seller to finance the purchase of real estate. *See* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 787 (Tex. 1977); Rattan v. Commercial Credit Co., 131 S.W.2d 399, 399 (Tex. Civ. App.—Dallas 1939, writ ref'd n.r.e.); *Student Symposium—A Study of Texas Usury Law*, 10 ST. MARY'S L.J. 825, 887 (1979). The primary difference is found in the method of calculating the interest rate on the respective loans. *See* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 786 (Tex. 1977); TEX. REV. CIV. STAT. ANN. art. 5069-1.07(a) (Vernon Supp. 1971-1979); St. Claire, *The "Spreading of Interest" Under the Actuarial Method*, 10 ST. MARY'S L.J. 753, 773-82 (1979).

77. *Compare* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 786-87 (Tex. 1977) (prepayment of interest did not render loan transaction usurious) *and* Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (front-end commitment fee not usurious interest but reasonable fee in light of circumstances) *with* Kissel Co. v. Gressley, 591 F.2d 47, 52 (9th Cir. 1979) (loan fee deemed interest since not a reasonable commitment fee as alleged) *and* Sapphire Homes, Inc. v. Gilbert, 426 S.W.2d 278, 284 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (broker's fee rendered loan usurious since no bona fide broker's services were provided).

78. *Compare* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 498 (Tex. 1979) (reasonableness of commitment fee not relevant to determination of usury since commitment fee not interest) *with* Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976) (commitment fee may be deemed interest if unreasonable in light of risk borne by lender) *and* Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ.

ness of the amount charged for a loan commitment is irrelevant to questions of usury, the majority erroneously relies on its earlier decision in *Crow v. Home Savings Association.*[79] *Crow* did not involve a commitment fee, but a commission paid to a broker for arranging a loan.[80] In Crow's suit for usury penalties against the intermediary, Home Savings, the Texas Supreme Court held the reasonableness of the commission was not at issue because usury laws are applicable only to lenders and Home Savings was not the lender in this case.[81]

The import of the majority holding in *Stedman* is that commitment fees charged by lenders subject to Texas law need not be reasonable.[82] Thus, an arbitrary and unwarranted distinction has been drawn between judicial review of commitment fees and that of other front-end charges assessed by the lender.[83] A commitment fee is now subject to a minimal degree of scrutiny when its validity is questioned since reasonableness is not a prerequisite to a finding of legitimacy.[84] It is submitted that all fees levied in addition to interest should be reviewed according to the same standards and held valid only if reasonable and actually attributable to consideration distinct from the use of the money itself.[85]

App.—Tyler 1978, writ ref'd n.r.e.) (commitment fee held bona fide since reasonable in light of risk borne by lender).

79. 522 S.W.2d 457 (Tex. 1975); *see* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 488-89 (Tex. 1979).

80. *See* Crow v. Home Sav. Ass'n, 522 S.W.2d 457, 459 (Tex. 1975).

81. *See id.* at 460; Stacks v. East Dallas Clinic, 409 S.W.2d 842, 845 (Tex. 1966).

82. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 489-90 (Tex. 1979). *But see* Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (bona fide commitment fee must be reasonable).

83. *Compare* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 489 (Tex. 1979) (reasonableness not element of bona fide commitment fee) *with* Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1343 (5th Cir. 1972) (applying Texas law) (charges for legal services and inspection costs valid since reasonable) *and* Morris v. Miglicco, 468 S.W.2d 517, 519-20 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.) (broker's fee bona fide only if reasonable in relation to actual services rendered).

84. *Compare* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 489 (Tex. 1979) (reasonableness of commitment fee need not be considered) *with* Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976) (whether commitment fee bona fide may depend on reasonableness in relation to risk borne by lender) *and* Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (commitment fee bona fide since reasonable in relation to lender's risk in holding future loan available).

85. *See* Kissel v. Gressley, 591 F.2d 47, 52 (9th Cir. 1979) (loan fee deemed interest since not shown to be reasonable commitment fee or charge for services rendered); Abramowitz v. Barnett Bank, 456 So. 2d 329, 330 (Fla. Dist. Ct. App. 1978) (loan related costs not interest if compensation for actual services and reasonable in relation to service performed); Sapphire Homes, Inc. v. Gilbert, 426 S.W.2d 278, 284 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (additional charges for special services bona fide if expenses are rea-

While the dissent correctly points out the majority's omission of the reasonableness requirement, the opinion goes on to conclude the fee assessed to Stedman was intended not as consideration for the loan option but as interest on the committed funds.[86] The contention that the predisbursement charges were interest as a matter of law fails upon recognizing the loan had not yet been executed.[87] Although Georgetown Savings would have cancelled the loan commitment had Stedman discontinued making the payments, this practice is consistent with the purchase of an option and does not warrant a finding that the payments were exacted for the use of money.[88] A commitment fee cannot be challenged under the usury laws if the borrower does not exercise his option to receive the committed funds.[89] If an alleged commitment fee is to be deemed usurious, it must be determined to be a facade for the exaction of excessive interest upon the subsequent loan.[90]

In *Stedman* the Texas Supreme Court has apparently eliminated the distinction made previously in *Freeman*.[91] It was recognized in *Freeman* that a commitment fee which was substantively unreasonable could be utilized by a lender to derive usurious interest.[92] In contrast, *Stedman*

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sonable and actually incurred); Perich, Fields & Hunt, *A Topic of Interest: An Analysis of the Status of the Usury Law in Texas*, 19 S. TEX. L.J. 525, 539-40 (1978).

86. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 497 (Tex. 1979) (Spears, J., dissenting).

87. *Id.* at 497 (Spears, J., dissenting); *see* Paley v. Barton Sav. & Loan Ass'n, 196 A.2d 682, 685 (N.J. Super. Ct. App. Div. 1964) (no loan, no usury).

88. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 500-01 (Tex. 1979) (Spears, J., dissenting); *cf.* Regional Enterprises v. Teachers Ins. & Annuity Ass'n, 352 F.2d 768, 770 (9th Cir. 1965) (commitment agreement void and consideration retained if borrower fails to comply with conditions).

89. *See* Prather, *Mortgage Loans and the Usury Laws*, 16 BUS. LAW. 181, 188 (1960); *cf.* Continental Assurance Co. v. Van Cleve Bldg. & Constr. Co., 260 S.W.2d 319, 324 (Mo. Ct. App. 1953) (per curiam) (sum due for loan commitment not synonymous with statutory interest); Paley v. Barton Sav. & Loan Ass'n, 196 A.2d 682, 685 (N.J. Super. Ct. App. Div. 1964) (usury not involved since no loan of money).

90. *See* Altherr v. Wilshire Mortgage Corp., 448 P.2d 859, 864 (Ariz. 1968) (en banc); Lowell, *A Current Analysis of the Usury Laws: A National View*, 8 SAN DIEGO L. REV. 193, 211 (1971); *cf.* D & M Dev. Co. v. Sherwood & Roberts, Inc., 457 P.2d 439, 445 (Idaho 1969) (commitment fee not cloak for interest since not unreasonable).

91. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 491 (Tex. 1979) (Spears, J., dissenting); Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976). The *Gonzales* opinion was expressly limited to bona fide commitment fees, defined as "intended *only* as compensation for having the future loan available *and for no other purpose.*" Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976) (emphasis added).

92. *See* Gonzales County Sav. & Loan Assn. v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976); Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

holds, in effect, that a commitment fee is bona fide if it has the appropriate form, regardless of its reasonableness.[93] Reasonableness should be required of a valid commitment fee as of all other front-end charges incident to a loan.[94] Otherwise, the true nature of an additional charge cannot be accurately assessed.[95] By its seeming elevation of form over substance, the majority in *Stedman* may allow lenders to abrogate usury laws through excessive commitment fees.[96]

Sara Greenwood

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93. *Compare* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 489 (Tex . 1979) (reasonableness of amount charged not relevant to determination of bona fide commitment fee) *with* Gratton v. Dido Realty Co., 391 N.Y.S.2d 954, 956 (App. Div. 1977) (commitment fee not disguised interest when reasonable), *aff'd*, 405 N.Y.S.2d 1001 (App. Div. 1978) *and* Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (commitment fee held bona fide since reasonable in light of risk borne for having future loan available).

94. *See* Kissel Co. v. Gressley, 591 F.2d 47, 52 (9th Cir. 1979) (loan fee deemed interest since not shown to be reasonable commitment fee or charge for services rendered); Fikes v. First Fed. Sav. & Loan Ass'n, 533 P.2d 251, 265 (Alaska 1975) (unreasonably large loan fee for bank's commitment may be deemed interest); Altherr v. Wilshire Mortgage Corp., 448 P.2d 859, 864 (Ariz. 1968) (en banc) (reasonable commitment fee not interest); Lowell, *A Current Analysis of the Usury Laws: A National View*, 8 SAN DIEGO L. REV. 193, 211 (1971) (unreasonable commitment fee may constitute additional interest on accompanying loan); Perich, Fields & Hunt, *A Topic of Interest: An Analysis of the Status of the Usury Law in Texas*, 19 S. TEX. L.J. 525, 540 (1978) (commitment fee should be reasonably commensurate with risk); Sintenis, *Current Treatment of the Nonrefundable Commitment Fee and Related Problems*, 86 BANKING L.J. 590, 610 (1969) (fee of one percent of loan committed recommended as most reasonable); *cf.* Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1343 (5th Cir. 1972) (applying Texas law) (charges for legal services and inspection costs valid since reasonable); Morris v. Miglicco, 468 S.W.2d 517, 520 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.) (broker's fee bona fide only if reasonable charge for services); TEX. REV. CIV. STAT. ANN. art. 852a-5.07 (Vernon 1964) (Texas Savings & Loan Act) (reasonable expenses incurred in connection with real estate loans may be charged to borrower); Hershman, *Usury and the Tight Mortgage Market*, 85 BANKING L.J. 189, 205 (1968) (charges incident to loan must be reasonably related to actual expenses); Prather, *Mortgage Loans and the Usury Laws*, 16 BUS. LAW. 181, 187 (1960) (charges for specific services which are reasonable in amount are legitimate).

95. *See* Kamrath v. Great Southwestern Trust Corp., 551 P.2d 92, 94 (Ariz. Ct. App. 1976) (charge labelled broker's fee was camouflage for excessive interest since no actual broker's service rendered); Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 908 (Tex. 1976) (substance of fees charged by savings and loan associations may be determined by reasonableness of expenses); Greever v. Persky, 140 Tex. 64, 69, 165 S.W.2d 709, 712 (1942) (lender not entitled to collect extra commission since no service rendered other than lending money); State v. Abbott Loan Serv., 195 S.W.2d 416, 419 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.) (usury may exist in form of ordinary business transaction if not bona fide under circumstances).

96. *See* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 500 (Tex. 1979) (Spears, J., dissenting). *See generally Declaration of Legislative Intent*, 15 TEX. REV. CIV. STAT. ANN. 1-2 (Vernon 1971) (purpose of usury laws to protect consumers from unscrupulous lenders).