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The Current State of Usury Law in Texas.

Michele M. Hightower

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THE CURRENT STATE OF USURY LAW IN TEXAS

MICHELE M. HIGHTOWER*

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* Associate, Foreman & Dyess, Houston, Texas. B.S. 1976, Texas A & M University; J.D. 1982, University of Houston; Member of the Texas Bar. The author wishes to express her sincere thanks to Sanford A. Weiner, Partner, Vinson & Elkins, Houston, Texas, for his invaluable aid in the preparation of this article.

I. INTRODUCTION

"[Compensation for the use of money] generally is called interest by those who think it lawful, and usury by those who do not so."¹

Usury laws in Texas have recently undergone dramatic changes. Enactment of "an Act relating to alternative ceilings on rates of interest or time-price differential applicable to certain transactions; providing penalties,"² hereinafter referred to as "H.B. 1228" or "the Act," has caused some confusion among Texas lenders and their attorneys since it became effective on May 8, 1981.³ This paper examines the current options available for lending transactions. It also discusses problems in interpretation and application of the new Act and some possible solutions. This is not to be considered an in-depth survey of the new Act.

II. OVERVIEW OF THE USURY LAWS IN TEXAS

Although not the subject of this paper, a quick review of the history of Texas usury laws may be helpful in understanding their current status. The basis for Texas usury law can be found in the Texas Constitution.⁴ The constitution of 1876 originally provided that, unless otherwise agreed, contracts charging an interest rate above eight percent per annum were usurious.⁵ This provision permitted the parties to agree to a rate not exceeding twelve percent per year.⁶ Contracts which set interest charges exceeding the constitutional maximum were declared void.⁷ In 1891, the constitution was amended and these maximum ceilings were reduced.⁸ Agree-

1. 2 W. BLACKSTONE, COMMENTARIES *455.

2. 1981 Tex. Gen. Laws, ch. 111, at 271 (H.B. No. 1228) (amending TEX. REV. CIV. STAT. ANN. arts. 1302-1.01 to -7.05 (Vernon 1980 & Supp. 1982-1983); arts. 2461-4.01, -7.01 (Vernon Supp. 1982-1983); arts. 5069-1.01 to -51.19 (Vernon 1971 & Supp. 1982-1983); TEX. INS. CODE ANN. art. 24.20 (Vernon 1981)).

3. See *id.* at ch. 111, § 29, at 287.

4. See TEX. CONST. art. XVI, § 11.

5. See *id.* See generally *id.* interp. commentary (Vernon 1955). (Vernon 1955) (constitution originally indicated rate of interest limited to eight percent in absence of agreement specifying higher rate).

6. See *id.* See generally 42 TEX. JUR. Usury § 3, at 880 (1936) (constitution of 1875 allowed lenders and debtors to consent to interest rate not to exceed twelve percent).

7. See 1876 Tex. Gen. Laws, ch. 137, § 3, at 228, 8 H. GAMMEL, LAWS OF TEXAS 1064 (1898); 42 TEX. JUR. Usury § 3, at 880 (1936).

8. Compare TEX. CONST. art. XVI, § 11 (1891 amendment provided contracts restricted

ments which failed to set the interest to be charged were limited to a six percent per year ceiling.⁹ The contract could provide, however, for an interest rate not to exceed ten percent per annum.¹⁰

In 1960, the Texas Constitution was again amended. The change gave the Texas Legislature the authority to classify credit transactions and lenders, define interest rates, and establish interest rate ceilings.¹¹ The amendment also provided that contracts which exacted a greater rate of interest than ten percent per annum were still usurious unless legislation set alternate maximums.¹² Further, contracts without specific provision for a rate of interest were limited to six percent per annum as the maximum rate.¹³

Pursuant to this constitutional authority, the Texas Legislature occasionally supplemented the constitutionally allowed maximum interest rates by enacting statutes intended to protect Texas citizens from victimization by lenders.¹⁴ Not only did this legislation

to six percent interest, but agreement can provide otherwise up to ten percent interest) *with id.* (agreements originally limited to interest rate of eight percent, but parties may contract for rate up to twelve percent).

9. *See id.*; *see also id.* interp. commentary (Vernon 1955) (when agreement does not set interest rate, rate shall not surpass six percent per annum).

10. *See* *Wooton v. Jones*, 286 S.W. 680, 683 (Tex. Civ. App.—Austin 1926, writ *dism'd*); TEX. CONST. art. XVI, § 11.

11. *See, e.g.*, *Shakour v. State*, 400 S.W.2d 916, 918 (Tex. Crim. App. 1966) (1960 constitutional amendment permits legislature to regulate lenders and authorized enactment of Texas Regulatory Loan Act); *Wagner v. Austin Sav. & Loan Ass'n*, 525 S.W.2d 724, 729 (Tex. Civ. App.—Beaumont 1975, no writ) (legislature granted greater freedom to define usury and categorize lenders by 1960 amendment to constitution); TEX. CONST. art. XVI, § 11 (legislature authorized to characterize loans and lenders, regulate sources of loans, and set interest rate limits). *See generally* Comment, *The Regulation of Interest: Practice and Procedure*, 10 ST. MARY'S L.J. 825, 830 (1979) (constitution as amended in 1960 empowers legislature to set interest rate ceiling and regulate credit exchanges).

12. *See* *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 221 (Tex. 1979); *Community Fin. & Thrift Corp. v. State*, 343 S.W.2d 232, 234 (Tex. 1961); TEX. CONST. art. XVI, § 11; *see also* *Farabee & Dodds, Recent State and Federal Developments in Interest Rate Regulation*, 44 TEX. B.J. 879, 879 (1981) (interest rate limited to ten percent absent statute authorizing another rate).

13. *See* TEX. CONST. art. XVI, § 11; *see also* 13 TEX. JUR. 3D *Consumer and Borrower Protection Laws* § 28, at 60 (1981) (rate limited to six percent when no interest charge specified); 58 TEX. JUR. 2D *Usury* § 2, at 65 (1964) (contract to bear six percent interest when no rate agreed upon).

14. *See, e.g.*, *Southwestern Inv. Co. v. Mannix*, 557 S.W.2d 755, 769 (Tex. 1977) (Consumer Credit Code designed to prevent illicit credit transactions); *O.R. Mitchell Motors, Inc. v. Bell*, 528 S.W.2d 856, 860 (Tex. Civ. App.—San Antonio 1974, writ *ref'd n.r.e.*) (purpose of Consumer Credit Code to deter abusive conduct by lenders); *Autocredit of Fort Worth, Inc. v. Pritchett*, 223 S.W.2d 951, 954 (Tex. Civ. App.—Fort Worth 1949, writ

affect loans and interest rates in general, but many statutes covered special lending situations as well. For example, in 1967 the legislature authorized a maximum interest rate of one and one-half percent per month (eighteen percent per annum) on loans of \$5,000 or more made to domestic and foreign corporations other than charitable or religious corporations.¹⁵ Another "special lending situation" involved loans secured by liens on residential property which contained either single-family homes or dwelling units that held no more than four families.¹⁶ In this instance, interest is allowed at rates permitted by "other applicable law" or the lesser charge of twelve percent or a charge based upon the average yearly yield rate on ten year treasury notes increased by two percent and evened to the nearest quarter percent.¹⁷

Articles 5069-1.02 to -1.06 were the general usury statutes of Texas until enactment of H.B. 1228 in 1981.¹⁸ Article 5069-1.02, the heart of the usury provision, reiterated the constitutional limitation of interest to ten percent per year absent a statute authorizing another rate.¹⁹ Article 5069-1.02 also declared usurious agreements to be violative of public policy and subject to the punishments outlined in article 5069-1.06.²⁰ Article 5069-1.06 called for a penalty equal to double the amount of interest contracted for, charged, or received.²¹ The consequence of the law was

dism'd) (usury statutes meant to prohibit unlawful acts by lenders); *see also* Glenn v. McCarty, 130 S.W.2d 295, 301 (Tex. Civ. App.—Amarillo 1939) (legislature intended usury laws to protect consumers and police lenders), *aff'd*, 137 Tex. 608, 155 S.W.2d 912 (1941); 1967 Tex. Gen. Laws, ch. 274, § 1, at 608-09 (Consumer Credit Code to safeguard consumers from oppressive credit practices); 1963 Tex. Gen. Laws, ch. 205, § 1, at 550-51 (Texas Regulatory Loan Act meant to control lenders and eliminate unlawful conduct).

15. *See* TEX. REV. CIV. STAT. ANN. art. 1302-2.09 (Vernon 1980). *See generally* Perich, Fields, & Hunt, *A Topic of Interest: An Analysis of the Status of the Usury Law in Texas*, 19 S. TEX. L.J. 525, 532 (1978) (legislature enacted statute affecting corporate lending in 1967).

16. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.07, § (d)(1) (Vernon Supp. 1982-1983).

17. *See id.* § (d)(1).

18. *See* 1967 Tex. Gen. Laws, ch. 274, § 2, at 609-10; *see also* Perich, Fields & Hunt, *A Topic of Interest: An Analysis of the Status of the Usury Law in Texas*, 19 S. TEX. L.J. 525, 526 (1978) (arts. 5069-1.01 to -1.06 identified as general usury law).

19. *Compare* 1967 Tex. Gen. Laws, ch. 274, § 2, at 609 (interest may not exceed ten percent unless allowed by statute) *with* TEX. CONST. art. XVI, § 11 (interest limited to ten percent per annum unless legislation permits another rate).

20. *See* 1967 Tex. Gen. Laws, ch. 274, § 2, at 609.

21. *See, e.g.,* Pinemont Bank v. Du Croz, 528 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ *ref'd n.r.e.*) (art. 5069-1.06 designed to penalize lend-

to impose harsher penalties on long-term loans rather than on loans with higher rates of interest as long-term loans over the duration of the contract would assess more interest than a short-term loan with an interest rate a few points higher.²² This anomaly was corrected in 1979 with the enactment of House Bill 616 which made the penalty three times that portion of the interest contracted for, charged, or collected which exceeded the legal rate.²³ Thus, the penalty was directly related to only the amount of interest which was usurious rather than the entire amount of interest exacted, lessening the impact of the penalty on long-term loans.²⁴ Although a long-term loan would still assess a larger amount of interest over the period of the agreement, the amended penalty affected only the illegal portion.

Another significant amendment allowed interest on loans secured by realty to be prorated and amortized in equal parts over the full period of the loan term.²⁵ This process is commonly referred to as "spreading." The amendment also contained a section dealing with large real estate lending transactions, article 1.07(b).²⁶ This change allowed loans exceeding \$500,000 which were made for interim financing for building on property or for financing or refinancing of improved real estate to charge the same rate of interest as that charged to corporations.²⁷

In 1979, 1.07(b) was revised to its current form and provided for eighteen percent per annum maximum interest on loans of \$250,000 or more rather than \$500,000 or more.²⁸ The amended

ers exacting usurious interest by requiring payment of two times excessive interest); *Lafferty v. A.E.M. Developers & Builders Co.*, 483 S.W.2d 279, 282 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.) (subdivision one of art. 5069-1.06 establishes penalty of double usurious interest); 1967 Tex. Gen. Laws, ch. 274, § 2, at 610 (payment of twice excessive interest imposed on lenders charging usurious rate).

22. See Weiner, *Introduction: Texas Usury Law—Some Interesting Anomalies*, 10 ST. MARY'S L.J. 687, 696 (1979).

23. See TEX. REV. CIV. STAT. ANN. art. 5069-1.06, § (1) (Vernon Supp. 1982-1983).

24. Compare *id.* § (1) (Vernon Supp. 1982-1983) (penalty is three times that part of interest which exceeds legal limit) with 1967 Tex. Gen. Laws, ch. 274, § 2, at 610 (penalty is double amount of interest received).

25. See 1975 Tex. Gen. Laws, ch. 26, § 1, at 47. See generally Wallenstein & St. Claire, *Property, Annual Survey of Texas Law*, 30 Sw. L.J. 28, 44 (1976) (art. 5069-1.07 affects usury law as applied to real estate dealings).

26. See 1975 Tex. Gen. Laws, ch. 26, § 1, at 48.

27. See *id.* § 1, at 48.

28. See TEX. REV. CIV. STAT. ANN. art. 5069-1.07, § (b) (Vernon Supp. 1982-1983); see

1.07(b) also removed the restriction that the statute applied solely to loans intended as interim financing for building on parcels of land or as financing or refinancing of improved land.²⁹ Because the higher interest rates only applied to lending transactions with corporations, the higher rates could not be used on loans secured by one-to-four family residences whose occupant was obligated to pay the note or loans intended primarily for agricultural or ranching purposes.³⁰

On May 8, 1981, Governor Bill Clements signed into effect the Texas Omnibus Usury Bill, H.B. 1228.³¹ The Act was a clear attempt to meet current economic pressures caused by rising inflation and interest rates throughout the United States.³² As the prime rate bumped up against usury ceilings in many states, banks began curtailing loans to potentially risky clients such as new business ventures and small businesses.³³ Supporters of the Act argued that without a change in existing Texas usury laws, consumers and commercial borrowers would not be able to obtain loans when inflationary interest rates began approaching state ceiling rates because lenders would have to forego their profit margin.³⁴

also Roberts, *The Revised Article 5069-1.07(b)*, 10 ST. MARY'S L.J. 699, 700 (1979) (art. 5069-1.07, § (b) amended to affect \$250,000 loan).

29. Compare TEX. REV. CIV. STAT. ANN. art. 5069-1.07, § (b) (Vernon Supp. 1982-1983) (applicable to all loans over \$250,000 except exempt transactions) with 1975 Tex. Gen. Laws, ch. 26, § 1, at 48 (applicable to loans over \$500,000 made for interim construction financing or financing of improved real estate).

30. See TEX. REV. CIV. STAT. ANN. art. 5069-1.07, § (b) (Vernon Supp. 1982-1983); Roberts, *The Revised Article 5069-1.07(b)*, 10 ST. MARY'S L.J. 699, 703 (1979).

31. See 1981 Tex. Gen. Laws, ch. 111, §§ 1-29, at 271-87 (H.B. No. 1228) (amending TEX. REV. CIV. STAT. ANN. arts. 1302-1.01 to -7.05 (Vernon 1980 & Supp. 1982-1983); arts. 2461-4.01, -7.01 (Vernon Supp. 1982-1983); arts. 5069-1.01 to -51.19 (Vernon 1971 & Supp. 1982-1983); TEX. INS. CODE ANN. art. 24.20 (Vernon 1981)); see also Farabee & Dodds, *Recent State and Federal Developments in Interest Rate Regulation*, 44 TEX. B.J. 879, 882 (1981) (H.B. 1228 effective May 8, 1981).

32. Cf. Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 1 (March 11-12, 1982) (available in Texas Tech University Law Library) (main purpose of H.B. 1228 to increase allowable interest rates on credit transactions); Farabee & Dodds, *Recent State and Federal Developments in Interest Rate Regulation*, 44 TEX. B.J. 879, 880 (1981) (interest rate explosion pushed national loan rate beyond Texas statutory maximum). For example, in December 1980, the prime rate jumped to twenty-one percent and bankers and economists predicted increases to twenty-two and twenty-three percent in early 1981. See Foldessy, *Big Banks Lift Prime Rate to 21% Spurring Fears of Economic Plunge*, Wall St. J., Dec. 17, 1980, at 3, col. 1.

33. See Wall St. J., Dec. 24, 1980, at 3, col. 1.

34. See Bonavita, *Borrowers Likely to Hit Ceiling Over Proposed Interest Rate Bills*,

How effective the Act will be in meeting future economic demands remains to be seen. Already, many questions have arisen involving interpretation of the complex changes enacted. Prior to looking into these questions, the provisions of the Act will be considered.

III. H. B. 1228

With interest rates rising to unprecedented heights, the legislature apparently concluded it is in the best interest of Texas borrowers to give up their pound of flesh rather than be locked out of the lending market altogether.³⁵ To effectuate this purpose, the legislature attempted to construct a flexible statute that would allow interest rate ceilings to rise with high money costs.³⁶ Further, the statute would require the ceilings to fall as money costs lowered.³⁷ In this way, the ceiling could float with the economy.³⁸

The Act's complexity is partially attributable to this floating ceiling. Obviously, a statute with a stationary maximum ceiling would have been simpler to draft. One faction in the legislature

The Houston Post, Feb. 22, 1981, at A-21, col. 1; cf. Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 2 (March 11-12, 1982) (available in Texas Tech University Law Library) (Act intended to permit rate ceiling to rise when lenders subjected to high money costs).

35. See W. Shakespeare, *Merchant of Venice*, Act IV, scene i, in A NEW VARIORUM EDITION OF SHAKESPEARE 215 (H. Furness 11th ed. 1916). Portia said to Shylock:

Why this bond is forfeit,
And lawfully by this the Jew may claime
A pound of flesh, to be by him cut off
Neerest the Merchants heart; be mercifull,
Take thrice thy money, bid me teare the bond.

Id. at 215.

36. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (b)(1) (Vernon Supp. 1982-1983); see also Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 2 (March 11-12, 1982) (available in Texas Tech University Law Library) (H.B. 1228 meant to allow interest maximum to increase as money costs rise).

37. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (b)(1) (Vernon Supp. 1982-1983); see also Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 2 (March 11-12, 1982) (available in Texas Tech University Law Library) (statute requires rate ceiling to decrease when creditors experience reduced money costs).

38. See, e.g., TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (b)(1) (Vernon Supp. 1982-1983) (interest rate ceiling not to be less than 18% or greater than 24%); Farabee & Dodds, *Recent State and Federal Developments in Interest Rate Regulation*, 44 TEX. B.J. 879, 882 (1981) (art. 5069-1.04 allows interest rate maximums to float); Bonavita, *Borrowers Likely to Hit Ceiling Over Proposed Interest Rate Bills*, The Houston Post, Feb. 22, 1981, at A-21, col. 1 (H.B. 1228 would allow rate ceiling to fluctuate).

was pushing for a twenty-eight percent maximum ceiling on all transactions.³⁹ The legislature would have probably rejected such a high fixed rate;⁴⁰ however, it was felt that a lower cap would not have assured Texans access to the lending market as money costs rose nationwide.⁴¹

The complexity is a result of several other factors as well. These include the legislature's attempt to meet specific needs, such as credit card transactions;⁴² vague definitions, such as with open-end accounts;⁴³ the inevitable lack of case law as with any new comprehensive statute; and difficulties in determining the correct application of the statutory language to specific situations, such as applying article 1.04 ceilings to contracts existing prior to enactment of H.B. 1228.⁴⁴ Many questions have yet to surface. The focus of this

39. See Bonavita, *Borrowers Likely to Hit Ceiling Over Proposed Interest Rate Bills*, The Houston Post, Feb. 22, 1981, at A-21, col. 1.

40. See, e.g., Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 2 (March 11-12, 1982) (available in Texas Tech University Law Library) (fixed ceiling would have been rejected by legislature); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-1 (1982) (flexible rate maximum easier to obtain from legislators than stationary rate maximum); Bonavita, *Borrowers Likely to Hit Ceiling Over Proposed Interest Rate Bills*, The Houston Post, Feb. 22, 1981, at A-21, col. 1 (legislature does not favor permanently higher rate ceiling).

41. See Bonavita, *Borrowers Likely to Hit Ceiling Over Proposed Interest Rate Bills*, The Houston Post, Feb. 22, 1981, at A-21, col. 1. The Act was designed to insure the availability of credit and the Office of the Consumer Credit Commissioner has indicated it "attempt[s] to keep in mind this overall concept when formulating [its] position on questions involving H.B. 1228." Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 2 (March 11-12, 1982) (available in Texas Tech University Law Library). The Consumer Credit Commissioner further stated that "[w]e also assume that the Legislature wanted this legislation to 'work' for both creditors and the borrowing public, and we try to give weight to pragmatic considerations as well as to the statutory language and to what we perceive to be legislative intent." *Id.* at 2.

42. See TEX. REV. CIV. STAT. ANN. arts. 5069-15.01 to -15.11 (Vernon Supp. 1982-1983); see also Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 17-18 (March 11-12, 1982) (available in Texas Tech University Law Library) (bank credit card amendment to H.B. 1228 resulted in many problems); cf. CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-2, at 1 (1981) (language in credit card amendment ambiguous and conflicts with former language of Chapter 15).

43. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 3 (1981); Farabee & Dodds, *Recent State and Federal Developments in Interest Rate Regulation*, 44 TEX. B.J. 879, 883 (1981).

44. Compare CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-30, at 2 (1981) (floating rate note executed prior to Act unable to utilize rate maximums authorized by Act) with *id.* No. 82-7, at 3 (1982) (pre-H.B. 1228 variable note with provision that rate not to exceed rate permitted by "applicable law" subject to ceilings allowed by H.B. 1228).

article is merely to summarize the basic provisions of the Act, discuss areas of particular difficulty and suggest possible solutions, and evaluate H.B. 1228's ability to fulfill the purposes for which it was enacted.

A. Basic Rate Structure

Article 1.04 of H.B. 1228 establishes a minimum usury ceiling of eighteen percent and two maximum ceilings: twenty-four percent and twenty-eight percent.⁴⁵ The eighteen percent minimum ceiling can be used for all transactions in which the parties agree in writing,⁴⁶ with the exception of home solicitation transactions.⁴⁷ The twenty-eight percent maximum can be used on business, commercial, or investment loans, or extensions or renewals of such loans, which exceed \$250,000.⁴⁸ The twenty-eight percent rate does not affect any other type of transaction which is intended mainly for individual, family, domestic, or agricultural use.⁴⁹ For all other loans the maximum usury limit is twenty-four percent per year.⁵⁰

The availability of the higher ceilings is connected to the twenty-six week treasury bill (hereinafter "T-bill") rate and can be determined by one of four methods.⁵¹ These are the indicated rate ceiling (also called "weekly ceiling"), monthly ceiling, quarterly ceiling, and annual ceiling. The appropriate ceiling is determined

45. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (b)(1), (2) (Vernon Supp. 1982-1983).

46. See, e.g., *id.* § (b)(1) (Vernon Supp. 1982-1983) (minimum interest rate ceiling set at 18% per year); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-19, at 3 (1981) (18% rate always available for contract); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-3, at 1 (1981) (rate of 18% may always be agreed to under art. 5069-1.04, § (b)(1)).

47. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (q) (Vernon Supp. 1982-1983). A home solicitation transaction is a sale of goods valued over \$25, excluding farm equipment and insurance, or realty valued over \$100, which takes place at the residence of the customer. See *id.* art. 5069-13.01, § (5). The parties to a home solicitation transaction may agree to an interest charge not to exceed ten percent per year. See TEX. CONST. art. XVI, § 11. Should the credit contract concerning the home solicitation transaction fail to establish the interest rate, the interest rate is deemed to be six percent per annum. See *id.*

48. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (b)(2) (Vernon Supp. 1982-1983).

49. See *id.*

50. See *id.* § (b)(1); see also Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-2 (1982) (24% ceiling applicable to loans exempt from 28% maximum).

51. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (a), (c) (Vernon Supp. 1982-1983); Farabee & Dodds, *Recent State and Federal Developments in Interest Rate Regulation*, 44 TEX. B.J. 879, 882 (1981).

by the type and structure of the loan involved in the transaction.⁵² The maximum allowable rate is computed according to a specified formula set out in the statute.⁵³ If the calculations yield a figure less than eighteen percent, then the final ceiling allowable will be eighteen percent per year on all loans.⁵⁴ If the formula produces a rate greater than twenty-eight percent, and the transaction concerns a business, commercial, or investment loan over \$250,000, then the final ceiling available will be twenty-eight percent per year.⁵⁵ For similar types of loans, if the formula produces a rate between eighteen percent and twenty-eight percent, then the final ceiling will be equal to this initial ceiling calculation rounded to the nearest one-quarter percent.⁵⁶

For consumer, agricultural, and commercial loans under \$250,000, if the calculations yield a figure over twenty-four percent, the maximum rate is limited to twenty-four percent per year.⁵⁷ If the calculations produce a rate between eighteen percent and twenty-four percent, then the available interest charge is equivalent to this initial ceiling calculation.⁵⁸ Thus, the Act allows the ceiling to float between eighteen percent and twenty-four percent or twenty-eight percent, depending on the type of credit transaction and the current T-bill rates.⁵⁹

The first of the four methods is the indicated rate ceiling or weekly ceiling. Available in all transactions, the Act directs the weekly ceiling be determined from:

[T]he auction average rate quoted on a bank discount basis for 26-week treasury bills issued by the United States government, as pub-

52. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2-3 (Nov. 19, 1981); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-2 to Z-4 (1982).

53. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (a)(1), (c), (d) (Vernon Supp. 1982-1983).

54. See *id.* § (b)(1).

55. See *id.* § (b)(2).

56. See *id.* § (b)(1), (2).

57. See *id.*

58. See *id.* § (b)(1).

59. See, e.g., *id.* § (b)(1), (2) (minimum ceiling set at 18% while maximum rate is either 24% or 28%); Farabee & Dodds, *Recent State and Federal Developments in Interest Rate Regulation*, 44 TEX. B.J. 879, 882 (1981) (rate floats between 18% and 24% or 28%); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-2 (1982) (minimum interest ceiling is 18% and maximum interest ceiling is 24% or 28%).

lished by the Federal Reserve Board, for the week preceding the week in which the rate is contracted for, multiplied by two, and rounded to the nearest one-quarter of one percent⁶⁰

One problem arising from this definition is the ambiguity as to which week is the relevant week.⁶¹ Does the statute refer to the week of auction, issuance, or publication as the basis for computing the rate ceiling? Because of vague draftsmanship, it is possible to interpret the phrase as meaning either of these distinct time periods. The auction date, however, is the most logical time period to utilize.⁶² This conclusion is buttressed by the fact that the monthly, quarterly, and annualized ceilings all rely on averages of computations of the weekly ceiling *for auctions* occurring during the preceding month, quarter, or year.⁶³

The proper usury ceiling is determined on the date on which the rate is contracted.⁶⁴ The Commissioner has interpreted this term as the date on which the parties to the agreement settle on an interest rate.⁶⁵ Thus, the ceiling may be the commitment date if the commitment includes an agreement on the rate to be assessed or the appropriate ceiling might not be fixed until the date of closing or funding if that is when the parties agreed upon a rate.⁶⁶ Further, if it is agreed that at some future date the interest rate charged will be revised, the subsequent change will be governed by the ceil-

60. TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a)(1) (Vernon Supp. 1982-1983); *see also* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 2 (1981) (indicated ceiling based upon double T-bill rate for week prior to week in which rate contracted).

61. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 2 (1981); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-3 (1982).

62. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 2 (1981); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-3 (1982).

63. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (c), (d) (Vernon Supp. 1982-1983); *see also* Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-3 (1982) (monthly, quarterly, and annual computations stress week of auction).

64. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a)(1), (2) (Vernon Supp. 1982-1983); *cf. id.* § (1) (maximum rate for renewal or extension of note is ceiling allowed by Act when contract made).

65. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981); *cf.* Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 6 (March 11-12, 1982) (available in Texas Tech University Law Library) (ceiling in existence at time of agreement should be related to lender's money cost).

66. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981).

ing in effect at the time the rate is altered.⁶⁷

Obviously, the weekly ceiling rate is extremely sensitive to changes in T-bill rates. Although it allows for the maximum rate chargeable in periods of rising interest rates, it places greater burdens on lenders who must keep up with weekly changes and the frequency of rate change results in increased possibilities for error.⁶⁸ In particular, use of the weekly ceiling on a fixed-rate open-end contract requires weekly adjustments for each new charge or loan rather than fixing a particular week's ceiling for the entire term of the account.⁶⁹ Consequently, the interest rates will vary depending on which week a charge was made. For customers making purchases once a week, the account potentially could reflect different interest rates for each charge.

The second method is "the average of all the computations [of initial weekly ceilings] for auctions occurring during the preceding calendar month . . ."⁷⁰ Use of the monthly ceiling is restricted to variable-rate loans that are not for personal, family, or household use.⁷¹ The rate of interest allowable must change once each month.⁷² Notably absent from the monthly ceiling's list of excluded loan categories are agricultural transactions. While agricultural, personal, family, and household loans are subject to the lesser twenty-four percent ceiling,⁷³ the Act places agriculture into the same class as business, commercial, investment, and similar loans for all other treatment.⁷⁴ This inconsistency in the approach

67. See *id.* at 3.

68. See *id.* No. 81-22, at 2 (1981); cf. Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in *TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z*, at Z-3 (1982) (primary drawback is need for repeated changes in ceiling rate).

69. See *CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22*, at 2 (1981).

70. See *TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c)* (Vernon Supp. 1982-1983). Note that the monthly ceiling is based upon the average of the raw weekly computations, i.e., figures unaffected by the 18% or 28% maximums. See *id.* After deriving the monthly figure, it is then subject to the appropriate ceiling limitation. See *id.*

71. See *id.*

72. See *CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7*, at 2 (1981); see also Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in *TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z*, at Z-4 (1982) (monthly ceiling to be used for individual, family, or household loans where rate changes each month).

73. Compare *TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (b)(1)* (Vernon Supp. 1982-1983) (rate for loans may fluctuate between 18% and 24%) with *id.* § (b)(2) (personal, family, household, or agricultural credit transactions exempt from 28% ceiling).

74. See Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in *TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z*, at Z-2 (1982) (agricultural loans receive "special

towards agricultural credit loans adds to the complexity of interpreting the Act; however, the inconsistency seems to be warranted. The agricultural community, a business highly dependent on loans, would likely protest interest rates as high as twenty-eight percent.⁷⁵ As a result, the legislature has given that area of production some measure of protection while in all other respects treating it as a business.⁷⁶

The quarterly ceiling is the third method available. It "is the average of all the computations [for the initial weekly ceilings] for auctions occurring during the three calendar months preceding the computation date. . . ."⁷⁷ Like the weekly ceiling, the quarterly ceiling is available for all transactions.⁷⁸ Although not as sensitive to rate changes as the weekly ceiling, the quarterly ceiling will be higher than the weekly ceiling during periods of dropping interest rates. There is also a lesser administrative burden with a quarterly ceiling.⁷⁹ Should a creditor elect to use the quarterly or annualized ceilings on a majority of open-end accounts, however, then any future open-end account must use the ceiling which was implemented on the majority of accounts opened during the time period.⁸⁰

Finally, the fourth method is the annualized ceiling. It is computed like the quarterly ceiling except it is based on T-bill auctions occurring during the twelve calendar months preceding the

treatment" only in area of lower rate ceiling).

75. Cf. TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (b)(2) (Vernon Supp. 1982-1983) (28% rate unavailable for agricultural loans); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-2 (1982) (agricultural credit favored only to extent it is subject to 24% ceiling).

76. See Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-2 (1982) (restriction to 24% ceiling only "special treatment" accorded farm credit transaction).

77. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (d) (Vernon Supp. 1982-1983).

78. See Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 4 (March 11-12, 1982) (available in Texas Tech University Law Library) (prepared ceiling chart showing quarterly rate available for all types of agreements).

79. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22, at 2 (1981).

80. See, e.g., TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (j) (Vernon Supp. 1982-1983) (annualized or quarterly ceiling affecting majority of open-end accounts applies to newly opened accounts); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22, at 3 (1981) (new customers may be subject to quarterly or annualized ceiling which is applicable to majority of open-end accounts); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-18, at 3 (1981) (creditor implementing annualized ceiling to majority of accounts must use same ceiling on future accounts).

computation date.⁸¹ The annualized ceiling is available only for open-end transactions regardless of the purpose for the loan.⁸² Obviously, the annualized ceiling will be the least rate-sensitive method.⁸³

The Act requires the Consumer Credit Commissioner⁸⁴ to compute the quarterly and annualized ceilings on December 1, March 1, June 1, and September 1 for the next succeeding three month period effective January 1, April 1, July 1, and October 1, respectively.⁸⁵ The monthly ceiling is to be computed by the Commissioner on the first business day of each calendar month.⁸⁶ The indicated ceiling, of course, is calculated weekly.⁸⁷ The annualized, quarterly, and monthly maximum interest rates must be published in the Texas Register within eleven days from the day of calculation.⁸⁸ The Act does not specify when the weekly ceiling is to be published.⁸⁹ The Commissioner, however, publishes a weekly Credit Code Letter which sets forth computations of each of the four ceilings and summaries of interpretive letters issued during the preceding week.⁹⁰

81. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (d) (Vernon Supp. 1982-1983).

82. See *id.* § (e); see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (annualized ceiling unavailable for closed-end agreements).

83. See Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-4 (1982).

84. See TEX. REV. CIV. STAT. ANN. art. 5069-2.02 (Vernon Supp. 1982-1983). The Consumer Credit Commissioner is appointed by the Finance Commission and is responsible for the enforcement of Chapters 2 through 9 and Chapter 15 of the Consumer Credit Code. See *id.* §§ (1), (4). Various questions have been raised concerning who the Consumer Credit Commissioner actually is. See Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-1 (1982).

85. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (d) (Vernon Supp. 1982-1983); see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 3 (1981) (computation dates for quarterly and annualized ceilings and dates when ceilings become effective).

86. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983); see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 2 (1981) (although art. 5069-1.04, § (c) calls for monthly maximum to be calculated on "first business day" of month, phrase construed to mean "first calendar day" of month).

87. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a)(1) (Vernon Supp. 1982-1983); see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 2 (1981) (new weekly maximum effective on Monday of each week).

88. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (k)(1) (Vernon Supp. 1982-1983).

89. See *id.*

90. See Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-1 (1982). A person can subscribe to The Credit Code Letter at a cost of \$40 per year by writing the Office of Consumer Credit Commission of the State of Texas, P. O. Box 2107, Austin, Texas, 78768. See *id.* at Z-1.

B. Definitions

The Act defines an open-end account as "any account, under a written contract under which the creditor may permit the obligor to make purchases or borrow money from time to time, and under which interest or time price differential may from time to time be computed on an outstanding unpaid balance."⁹¹ This definition assumes added importance due to the lack of a definition of closed-end accounts. Clearly, closed-end accounts must be the opposite of open-end accounts. Many questions have been raised as to whether a lending transaction falls into the open-end or closed-end category, particularly advancing promissory notes, such as for interim real estate construction loans.⁹²

The Consumer Credit Commissioner has discussed an inability to set forth specific attributes of an open-end account which can be adapted to all potential fact situations.⁹³ This inability to clarify these elements makes it difficult to ascertain whether a contract represents an open-end transaction.⁹⁴ As the Commissioner has pointed out, however, the definition of open-end accounts is apparently based upon the definition contained in Regulation Z.⁹⁵ Therefore, the Commissioner's office is construing the phrase to

91. See TEX. REV. CIV. STAT. ANN. art. 5069-1.01, § (f) (Vernon Supp. 1982-1983).

92. See, e.g., CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-28, at 2 (1981) (commercial construction loans not considered open-end transactions); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (standard interim construction transaction not open-end account); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 4-5 (1981) (advancing note not considered open-end transaction while readvancing note deemed open-end transaction).

93. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 4 (1981); see also Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 6 (March 11-12, 1982) (available in Texas Tech University Law Library) (impossible to clearly delineate what constitutes open-end account).

94. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 4 (1981); see also Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 5 (March 11-12, 1982) (available in Texas Tech University Law Library) (effort to define open-end transaction continues to cause problems).

95. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 3 (1981). Compare TEX. REV. CIV. STAT. ANN. art. 5069-1.01, § (f) (Vernon Supp. 1982-1983) (open-end account is one from which borrower may make purchases or withdraw cash intermittently and interest may be figured upon unpaid balance) with 12 C.F.R. § 226.2(x) (1982) (open-end credit allows obligor to make purchases or borrow money from time to time and pay off account in installments and creditor may charge interest on outstanding balance). See generally Maxwell, *Consumer Laws Affecting Real Estate Transactions*, in TEX. BAR ASS'N 1ST ANN. ADV. REAL EST. L. COURSE § W, at W-28 (1979) (discussing Regulation Z).

conform with the meaning included in Regulation Z as much as possible.⁹⁶

The Act's definition includes non-exclusive examples of open-end accounts.⁹⁷ These are open-end line of credit arrangements with a bank, savings and loan, or licensed lender; retail and revolving charge agreements; and bank-type credit cards.⁹⁸ From the similarities existing in the examples, together with the approach taken with Regulation Z, certain important characteristics of an open-end account have been particularized: (1) the contract must be in writing, (2) the debtor must be allowed to make purchases or borrow additional funds from time to time, (3) the interest charge may be based upon the unpaid part of the account, and (4) the creditor and the borrower do not know the total amount of money which will be loaned under the agreement or the exact amount of each extension of credit under the agreement.⁹⁹

Despite being unable to provide a universally applicable definition, the Commissioner has stated that a general approach to open-end accounts may be used.¹⁰⁰ If "the central and primary purpose of an agreement is that future and probably undetermined transactions can be permitted under the contract and added to the balance owing on the contract, and the other elements previously mentioned are present, an 'open-end account' exists."¹⁰¹ If not, it will be considered a closed-end account. Thus, a typical interim construction loan is not an open-end account.¹⁰² Generally, such

96. See *id.* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 3 (1981).

97. See TEX. REV. CIV. STAT. ANN. art. 5069-1.01, § (f) (Vernon Supp. 1982-1983). The term includes, but is not limited to, accounts under agreements specified in articles -3.15(4) and -4.01(4) and in chapters 6 and 15 of Title 79. See *id.*

98. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 4 (1981).

99. See *id.* at 4; see also Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-6 (1982) (significant elements of open-end account are that it revolves and value of credit and number of advances unknown at time of agreement).

100. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 4-5 (1981).

101. See *id.* at 5.

102. See, e.g., CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (interim construction loan not open-end transaction); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 4-5 (1981) (open-end account excludes typical interim construction loan); Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 7 (March 11-12, 1982) (available in Texas Tech University Law Library) (interim construction loan not considered open-end account).

loans are of a definite amount advanced as initially agreed upon.¹⁰³ Although an interim construction loan may be advanced in more than one funding, it does not revolve.¹⁰⁴ In effect, it is only one loan.¹⁰⁵

An open-end account has several advantages. In an open-end account there is the availability of the annualized ceiling¹⁰⁶ and the applicability of article 1A.01 which allows a creditor to implement the Act's higher ceilings on accounts existing on H.B. 1228's effective date.¹⁰⁷ If a loan is a closed-end transaction, the creditor cannot unilaterally amend the contract to implement new rates.¹⁰⁸ Furthermore, if the closed-end loan has a variable rate, the agreement cannot be switched from the quarterly to the weekly ceiling as it could in an open-end account.¹⁰⁹

H.B. 1228 permits parties to enter into a variable-rate transaction by allowing them to contract for an interest rate to be computed from time to time according to an agreed index or calculation.¹¹⁰ Of course, this interest charge may not surpass the legal maximum rate which is in force and applicable to such con-

103. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981).

104. See, e.g., CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-28, at 2 (1981) (residential construction loan and advancing note have fixed principals and do not revolve); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (interim construction loan is definite amount which does not revolve); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 4-5 (1981) (typical interim construction loan constitutes one loan and debtor cannot intermittently borrow money).

105. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 4 (1981).

106. Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 4, 12, 15 (March 11-12, 1982) (available in Texas Tech University Law Library); see, e.g., TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983) (annualized ceiling not to be used for closed-end account); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (closed-end account cannot utilize annualized maximum rate); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-4 (1982) (annualized maximum interest charge cannot be used for closed-end arrangement).

107. See TEX. REV. CIV. STAT. ANN. art. 5069-1A.01 (Vernon Supp. 1982-1983); see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-11, at 2-3 (1981) (account determined to be open-end is subject to art. 5069-1A.01).

108. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (h)(1), (i)(1) (Vernon Supp. 1982-1983) (unilateral change of account's terms only in open-end account); see also Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-7 (1982) (unilateral amendment of interest rate not permitted in closed-end transaction).

109. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 5 (1981).

110. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (f) (Vernon Supp. 1982-1983).

tracts.¹¹¹ If a creditor uses a variable-rate contract, he cannot use add-on or precomputed interest or time price differential charges in determining the cost of the loan.¹¹²

There is no statutory definition of a fixed-rate contract within the Act.¹¹³ Presumably, it must be the opposite of a variable-rate contract. The Credit Commissioner has identified certain transactions that do not create variable-rate contracts.¹¹⁴ These transactions include, for example, a contract for repayment of a loan at one fixed rate the first year (or prior to occurrence of a specified event, such as a leasing requirement) and another fixed rate thereafter.¹¹⁵ A loan which provides for interest at the "highest lawful rate allowable" upon default does not by itself create variable rates.¹¹⁶ Likewise, agreements which provide the lender with a specific percentage of future rentals or equity participation, or contracts which provide the lender with optional rate review prior to contract maturity, are not variable rate agreements.¹¹⁷

Interest rates on open-end accounts will be periodically adjusted to reflect the change in the appropriate usury ceiling.¹¹⁸ Determin-

111. See *id.*; CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 5 (1981).

112. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (f) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 1 (1981).

113. See Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 5 (March 11-12, 1982) (available in Texas Tech University Law Library).

114. See CONSUMER CREDIT COMM'R LETTER INTERP. Nos. 81-31, at 2 (1981); 81-27, at 1 (1981).

115. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 1 (1981); see also Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 8 (March 11-12, 1982) (available in Texas Tech University Law Library) (agreement to charge one rate for first year and another rate for second year not variable-rate arrangement).

116. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 1 (1981); see also Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 8 (March 11-12, 1982) (available in Texas Tech University Law Library) (note providing for charge at "highest lawful rate" if debtor defaults not variable-rate contract).

117. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-31, at 2 (1981); see also Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-8 (1982) (equity participation arrangement or agreement allowing share of rentals not considered variable-rate transaction).

118. See, e.g., CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 5 (1981) (statute provides ceilings that intermittently change on open-end accounts); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22, at 1 (1981) (rate cannot be "locked-in" on open-end transaction); Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 6 (March 11-12, 1982) (available in Texas Tech University Law Library) (open-end account not to be subjected to permanent interest rate).

ing when the new usury ceiling becomes effective as to the account, however, depends on whether a variable-rate open-end loan or a fixed-rate open-end loan is involved.¹¹⁹ This discrepancy between correct dates of adjustment illustrates one of the complexities of the Act. The Commissioner has indicated that, insofar as variable-rate open-end accounts are concerned, the interest rate is to be adjusted on each implementation anniversary date established in article 1.04(h)(2).¹²⁰ Fixed-rate open-end contracts, on the other hand, are to be adjusted upon the expiration of either a three month or twelve month period, depending on whether the quarterly or annualized ceiling method is being employed.¹²¹ Thus, the rate which is initially applied to the account remains in force for the entire quarter or year.¹²² There is no need to change the ceiling rate on the dates established by the statute unless the lender has chosen that particular date as the time when the new ceiling is to become effective.¹²³ This differing application is due to the fact that article 1.04(h)(1), which deals with fixed-rate open-end accounts, expressly states that the lender may impose a rate, limited by the appropriate ceiling, when that rate becomes operative as to the particular account.¹²⁴ Conversely, article 1.04(h)(2), dealing with variable-rate open-end transactions, does not contain such

119. Compare CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-18, at 2 (1981) (interest charge affects fixed-rate program for three months or twelve months) with *id.* No. 81-7, at 2-3 (1981) (new interest rate implemented on statutory dates for variable-rate open-end arrangements).

120. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 2-3 (1981); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-10 (1982).

121. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-18, at 2 (1981); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-11 (1982).

122. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22, at 2-4 (1981); see also *id.* No. 81-18, at 2 (1981) (rate applies for either three month or twelve month period).

123. See *id.* No. 81-18, at 2 (1981).

124. See, e.g., TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983) (rate may be implemented for three months or twelve months from date it becomes "effective as to an account"); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-18, at 2 (1981) (noting that art. 5069-1.04, § (h)(1) indicates rate change made when rate is applicable to account); Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 13 (March 11-12, 1982) (available in Texas Tech University Law Library) (art. 5069-1.04, § (h)(1) states new rate to be initiated at time rate becomes effective as to account).

language.¹²⁵

Although the rules for variable-rate open-end accounts differ from those for fixed rate open-end accounts, this variance is most likely related to the nature of the loans extended under each category.¹²⁶ A variable-rate open-end account may be, for example, a revolving bank loan.¹²⁷ Banks offering such revolving loans generally bill the customer-debtor on a certain day of the month because they have a predetermined schedule of accounts due.¹²⁸ Because of this established schedule, it is simpler to effect changes in the rate on particular dates.¹²⁹ As a result, the legislature logically specified the implementation dates for such rate changes in article 1.04(d).¹³⁰ On the other hand, fixed-rate open-end accounts, such as credit card transactions, differ in that the charges outstanding on an individual account are incurred at various times each month.¹³¹ Due to this timing factor, it is difficult to bill customer-debtors on a regular, first-of-the-month basis; thus, such accounts are typically billed throughout the month.¹³² Consequently, article 1.04(h)(1) permits rate changes to be initiated upon expiration of the three month or twelve month period, depending on the ceiling

125. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-18, at 2 (1981). Compare TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983) (rate implemented for appropriate period when it becomes "effective as to an account") with *id.* § (h)(2) (annualized, quarterly, and indicated ceilings adjusted every twelve months, every three months, and every week, respectively).

126. See CONSUMER CREDIT COMM'R LETTER INTERP. Nos. 81-22, at 2 (1981); 81-18, at 2 (1981).

127. Telephone Interview with Richard W. Moore, Executive Vice President of First City Bank of Austin (Jan. 7, 1983).

128. *Id.*

129. Cf. TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (d) (Vernon Supp. 1982-1983) (ceiling change effected January 1, April 1, July 1, and October 1); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-18, at 2 (1981) (1.04, § (h)(2) accounts change rate on statutory dates while 1.04, § (h)(1) arrangements change rate only after three month or twelve month period to avoid "split rate" billing problems); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 3 (1981) (1.04, § (h)(2) contracts to be adjusted on appropriate statutory dates).

130. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (d) (Vernon Supp. 1982-1983); see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 3 (1981) (rate ceilings covered by art. 5069-1.04, § (h)(2) change rate on dates set out in statute).

131. See Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 13 (March 11-12, 1982) (available in Texas Tech University Law Library).

132. See *id.* at 13; cf. CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22, at 2 (1981) (art. 5069-1.04, § (h)(1) designed to prevent rate changes on open-end accounts from becoming unmanageable).

method being used.¹³³ The difference in these approaches represents a rational response to the distinct needs of the different types of creditors.

C. *The Four Loan Categories*

The first issue to address in any type of loan under the Act should naturally be which interest rate ceilings are applicable. H.B. 1228 sets up four categories of credit, each of which has different ramifications and requirements.¹³⁴

1. Fixed-Rate Closed-End Contracts

For fixed-rate closed-end transactions, only the weekly or the quarterly ceilings may be used.¹³⁵ The Consumer Credit Commissioner has determined that there is no requirement to designate a specific ceiling in this type of contract.¹³⁶ Once the rate is set in accordance with the Act, however, it does not change during the term of the contract.¹³⁷ Examples of fixed-rate closed-end contracts include car loans and conventional home mortgages.

133. See, e.g., CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22, at 2 (1981) (rate may be implemented for twelve months or three months); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-18, at 2 (1981) (interest ceiling effective for twelve or three month period); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-11 (1982) (ceiling applicable to account for twelve months or three months). The Consumer Credit Commissioner's Office has promulgated a convenient ceiling chart that summarizes which ceilings are available for each of the four loan categories in both consumer and non-consumer settings. See Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 4 (March 11-12, 1982) (available in Texas Tech University Law Library). This chart is set forth in the Appendix.

134. See, e.g., TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (a), (c) (Vernon Supp. 1982-1983) (parties to agreement may provide for indicated, monthly, quarterly, or annualized ceiling); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 1 (1981) (art. 5069-1.04 creates four types of rate maximums); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-3 to Z-4 (1982) (discussing four ceilings authorized by Act).

135. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (a), (c), (e) (Vernon Supp. 1982-1983); see also Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-9 (1982) (weekly or quarterly maximum available for fixed-rate closed-end transaction).

136. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981); Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 9 (March 11-12, 1982) (available in Texas Tech University Law Library).

137. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-9 (1982).

2. Variable-Rate Closed-End Contracts

Variable-rate closed-end loans are somewhat more complex since the ceiling rate will float.¹³⁸ Although the monthly ceiling is available under limited circumstances, only the weekly or quarterly ceiling may generally be used in such transactions.¹³⁹ The Act does not specifically require that the selected ceiling be disclosed, but the Consumer Credit Commissioner has concluded that, unless the parties expressly contract for the quarterly or monthly rate maximum, the weekly usury ceiling will apply.¹⁴⁰ This Commissioner-made rule exists so that the interest charge in variable-rate closed-end loans can be intermittently determined as mandated by H.B. 1228.¹⁴¹ Without knowing which ceiling is relevant, it would be impossible to determine what the rate should be. The monthly ceiling can be utilized only when the loan is not made for individual, family, or household purposes and the interest rate changes once each month.¹⁴² The annualized ceiling can never be used in a variable-rate closed-end contract since the annual ceiling is not available for any closed-end contract.¹⁴³

3. Fixed-Rate Open-End Contracts

The weekly, quarterly, or annualized ceilings, but not the monthly ceiling, may be used for fixed-rate open-end loans.¹⁴⁴ Be-

138. See CONSUMER CREDIT COMM'R LETTER INTERP. Nos. 81-27, at 2 (1981); 81-21, at 2 (1981); cf. TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (f) (Vernon Supp. 1982-1983) (interest contracted for not to be greater than ceiling which may from time to time apply to arrangement).

139. Compare TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (a), (e) (Vernon Supp. 1982-1983) (parties may agree to either weekly or quarterly ceiling under all circumstances) with *id.* § (c) (monthly rate can be utilized only for loans not intended for individual, family, or household purposes).

140. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 4-5 (1981); see also Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 11-12 (March 11-12, 1982) (available in Texas Tech University Law Library) (although language ambiguous, weekly rate applicable unless contract provides otherwise).

141. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 5 (1981).

142. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981).

143. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-9 (1982).

144. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a), (c) (Vernon Supp. 1982-1983); see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (fixed-rate open-

cause the weekly interest rate ceiling is subject to frequent adjustment,¹⁴⁵ it is difficult to employ with such contracts.¹⁴⁶ The weekly maximum in effect when a particular loan or charge is extended remains applicable to that loan or charge throughout the term of the contract.¹⁴⁷ As a result, creditors may be well advised to choose a rate permitted under the quarterly or annualized ceiling regarding current or future balances.¹⁴⁸ If a creditor opts to use the quarterly or annualized ceiling, the ceiling must be periodically adjusted to reflect any rate decrease even though it is a fixed-rate account.¹⁴⁹

If the quarterly ceiling is implemented, it stays in effect as to each account for a three month period after which the ceiling on each account must be adjusted to reflect the current rate.¹⁵⁰ The annualized ceiling, on the other hand, would stay in effect twelve months.¹⁵¹ It is not required that the contract state a particular ceiling applies as long as the debtors are advised of the rate implementation dates and periods for which the new rates are applicable or the time at which the ceiling is to be adjusted.¹⁵² It must be kept in mind that if a majority of the creditor's accounts use either the quarterly or annualized ceiling, the Act specifies that this ceil-

end arrangements may use weekly, quarterly, or annualized ceiling).

145. See Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-3 (1982).

146. See *id.* at Z-3.

147. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22, at 3 (1981).

148. See *id.* at 2; see also Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-3 (1982) (fixed open-end transactions should not use weekly ceiling).

149. See CONSUMER CREDIT COMM'R LETTER INTERP. NOS. 81-27, at 2 (1981); 81-22, at 3-4 (1981).

150. See, e.g., TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983) (interest charge not above quarterly ceiling may be implemented for three months from date ceiling applies to account); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22, at 2 (1981) (quarterly maximum can be implemented for three months); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-11 (1982) (quarterly rate affects account for three month period).

151. See, e.g., TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983) (annualized ceiling effective for twelve months from date it applies to account); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-18, at 2 (1981) (annualized rate remains in effect for twelve months); Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 13 (March 11-12, 1982) (available in Texas Tech University Law Library) (annual maximum applicable for twelve months from time ceiling effective as to arrangement).

152. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 4 (1981).

ing is to apply to all new accounts the creditor opens during this time frame.¹⁵³

4. Variable-Rate Open-End Contracts

In all variable-rate open-end contracts, either the weekly, quarterly, or annualized ceiling may be used.¹⁵⁴ Furthermore, as with any variable-rate contract, the monthly ceiling is available as long as the loan is not intended for personal, family, or household use and the rate changes only once each month.¹⁵⁵ The Act specifically prohibits switching from the weekly to the quarterly ceiling in any given contract.¹⁵⁶ Whichever ceiling the creditor and obligor agree upon must be disclosed in the contract.¹⁵⁷

Adjustment of the ceiling on variable-rate open-end contracts occurs on a weekly or monthly basis, depending on the ceiling method used.¹⁵⁸ If the quarterly or annualized ceiling is employed, then the adjustment is made on the appropriate statutory implementation date.¹⁵⁹ In other words, if an agreement calls for use of the annualized ceiling, the initial maximum rate equals that annualized ceiling effective during the three month period established by statute in which the agreement was made.¹⁶⁰ If the agreement

153. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (j) (Vernon Supp. 1982-1983); see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22, at 3 (Sept. 30, 1981) (creditor applying annualized or quarterly ceiling to most accounts can also use same ceiling to future accounts).

154. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981).

155. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981).

156. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983); see also Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-9 (1982) (cannot switch from weekly ceiling to quarterly ceiling in variable-rate arrangement).

157. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 4 (1981); see also Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 16 (March 11-12, 1982) (available in Texas Tech University Law Library) (parties must specify ceiling effective to open-end variable-rate contract).

158. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (c), (h)(2) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 2 (1981).

159. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(2) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 3 (1981).

160. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 3 (1981). The annualized ceiling rate is computed four times each year and becomes applicable to an account on January 1, April 1, July 1, or October 1. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (d)

was reached in August, for example, the annualized ceiling is due for adjustment on July 1 of the following year even though the contract would not have been in existence for twelve months.¹⁶¹ The same method applies if the quarterly ceiling is specified in the contract except that the adjustment would occur on each of the quarterly implementation dates rather than at the end of the twelve month ceiling period.¹⁶²

D. *Special Considerations*

1. Spreading of Points

A crucial area of concern to lenders involves the "spreading of points" concept.¹⁶³ The Act provides that in variable-rate contracts

(Vernon Supp. 1982-1983). The annualized rate effective on January 1 is the relevant ceiling for contracts utilizing the annualized maximum which are entered into during January, February, and March. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 3 (1981). Thus, the annualized ceiling which is computed on the appropriate date remains operative for a three month period. See *id.* at 3.

161. See Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 16 (March 11-12, 1982) (available in Texas Tech University Law Library). The annualized rate which is implemented on July 1 is applicable to agreements executed in July, August, or September. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 3 (1981). The rate is then subject to amendment on July 1 of the following year. See *id.* at 3. Consequently, for an agreement which was reached in September adopting the annualized ceiling, the change in the rate would be made on July 1 of the next year even though the agreement itself had not existed for an entire year. See *id.* at 3; see also Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 16 (March 11-12, 1982) (available in Texas Tech University Law Library) (rate modified even though contract not in existence for twelve months).

162. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 3 (1981); Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 16 (March 11-12, 1982) (available in Texas Tech University Law Library).

163. "Spreading" refers to a means of allocating interest charges over the term of a loan. See St. Claire, *The "Spreading of Interest" Under the Actuarial Method*, 10 ST. MARY'S L.J. 753, 755 n.10 (1979). "Points" represent an interest charge of one percent per year or a front-end charge equal to one percent of the face value of the loan. See *id.* at 755 n.11. Article 5069-1.07, § (a) of the Credit Code provides:

On any loan or agreement to loan secured or to be secured, in whole or in part, by a lien, mortgage, security interest, or other interest in or with respect to any interest in real property, determination of the rate of interest for the purpose of determining whether the loan is usurious under all applicable Texas laws shall be made by amortizing, prorating, allocating, and spreading, in equal parts during the period of the full stated term of the loan, all interest at any time contracted for, charged, or received from the borrower in connection with the loan

TEX. REV. CIV. STAT. ANN. art. 5069-1.07, § (a) (Vernon Supp. 1982-1983). The Commissioner has indicated that enactment of H. B. 1228 did not affect existing notions of "spread-

the rate produced may not exceed the ceiling that may from time to time be in effect.¹⁶⁴ The Consumer Credit Commissioner believes that this statement should be viewed literally.¹⁶⁵ Further, the Commissioner is of the opinion that a percentage of the profit from operation or sales of financed buildings should be considered interest.¹⁶⁶ Thus, profits received would be restricted to an amount below that which would result in a usury ceiling violation.¹⁶⁷ As the Commissioner points out, "some very good lawyers take a different view."¹⁶⁸

If the more financially sophisticated members of the bar are having difficulty determining how the Act applies, how can the public at large be expected to know when the interest rate being charged is not usurious? Most consumers will not know to check the Texas Register to discover the current usury limits. At best, consumers may know that charges should not exceed twenty-four percent. Consequently, unscrupulous lenders can easily prey on unsuspecting borrowers with little fear of retribution. Therefore, the possibility of claims being initiated has been diminished by the complexity of the Act. This could potentially cause a significant

ing" of interest. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 6 (1981); see also Weiner, *Update on Texas Omnibus Usury Bill (H. B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-14 (1982) (Act not meant to repeal 1.07, § (a)). Consequently, judicial interpretations of the concept set forth in *Nevels v. Harris*, 129 Tex. 190, 196, 102 S.W.2d 1046, 1047-48 (1937) and *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777, 787 (Tex. 1977) remain in force. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 6 (1981).

164. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (f) (Vernon Supp. 1982-1983); see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 6 (1981) (variable rate not to exceed maximum from time to time in effect according to article 1.04, § (f)).

165. See Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 20 (March 11-12, 1982) (available in Texas Tech University Law Library). The Commissioner noted that he is "inclined to think [1.04, § (f)] means that at no time during the life of the variable-rate contract may the rate produced exceed the ceiling applicable to the contract." *Id.* at 20.

166. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-31, at 2 (1981); see also Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 20 (March 11-12, 1982) (available in Texas Tech University Law Library) (equity participation and profit percentage deemed interest).

167. See Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 20 (March 11-12, 1982) (available in Texas Tech University Law Library); cf. CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-31, at 2 (1981) (equity share considered interest).

168. See Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 20 (March 11-12, 1982) (available in Texas Tech University Law Library).

decrease in the normal policing of Texas lenders by their obligors.

2. Notice Requirements

If a creditor decides to charge a lesser rate of interest than the parties initially agreed upon or a decrease in the interest rate is required,¹⁶⁹ there is an implied assent to this reduction by the obligor unless otherwise provided.¹⁷⁰ As a consequence, no notice is required with most interest rate reductions. In all variable-rate credit contracts extended primarily for individual, family, or household purposes, the agreement or any proposed change must state in at least ten point type that the debtor may be subject to an interest charge up to twenty-four percent per year.¹⁷¹ Of course, the notice can be amended to reflect an agreement for less than twenty-four percent per year.¹⁷² If federal law calls for some form of disclosure, either by law, regulation, or interpretation, the notice required by H.B. 1228 is not applicable.¹⁷³

If the creditor alters the interest rate in a variable-rate open-end account used for personal, family, or household purposes, notice of the change must be given on or with the billing invoice or by a separate instrument on or before the beginning of the first cycle for which the change is effective.¹⁷⁴ Any open-end account agreement may, however, specify the method by which future modifications are to be implemented.¹⁷⁵ If the contract allows for future changes merely by notice to the debtor rather than by amendment to the contract, the creditor must disclose the following: (1) the new interest charge or the calculation to be used to determine the charge, (2) the time at which the charge will become operative, (3)

169. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 82-2, at 2 (1982); see also *id.* No. 81-22, at 3 (1981) (Act not intended to permit ceiling to be "locked in" even though ceiling became lower).

170. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (g) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 82-2, at 2 (1982).

171. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (f)-(1) (Vernon Supp. 1982-1983).

172. See *id.*

173. See *id.*; see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-35, at 2 (1981) (art. 5069-1.04(f)-(1) notice not needed if federal disclosure requirements met).

174. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(2) (Vernon Supp. 1982-1983); see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 6 (1981) (notice requirements of art. 5069-1.04, § (h)(2) operative as to open-end arrangement for individual, family, or household purposes).

175. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (i)(1) (Vernon Supp. 1982-1983).

the period for which the charge is effective or subject to readjustment and whether the charge applies to present and future balances, (4) the debtor's rights in this situation and how these rights may be invoked, (5) the creditor's address where notice of cancellation of the account may be sent, and (6) if the interest charge is increased, the notice must state in at least ten point type that the debtor can terminate the account if he or she is dissatisfied with the new interest charge.¹⁷⁶

Along with this notice, the creditor must enclose a form on which the obligor may cancel the account by marking the appropriate box and then return it to the creditor at the creditor's expense.¹⁷⁷ The debtor has twenty-one days from the date the notice was sent to inform the creditor of termination of the account or else acceptance of the modified terms will be implied.¹⁷⁸ The debtor will also be deemed to have accepted the new terms if he accepts or uses any extension of credit after five days have expired from the date notice was mailed.¹⁷⁹ Notice is sufficient if mailed to the last known address of the debtor.¹⁸⁰ If the obligor rejects the alteration of the agreement, he or she may pay off the existing balance at the former rate and time period and under the same minimum payment terms.¹⁸¹ Rejection of the new terms cannot result in acceleration of the balance due.¹⁸²

By imposing the notice requirement, the legislature has made an attempt to protect the consumer in open-end loan accounts, such as with bank card and retail credit card transactions. In variable rate agreements, the obligor must be informed of the potential for future rate changes and must consent to the arrangement when he opens the account.¹⁸³ In fixed-rate open-end accounts, however, the news of a change in the interest rate generally comes as a surprise to consumers who have grown accustomed to the previous rate.¹⁸⁴ Allowing the consumer to terminate the account is inadequate pro-

176. *See id.*

177. *See id.* § (i)(2).

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.*; *see also* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-8, at 3 (1981) (debtor can pay off balance at former rate and terms).

182. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (i)(2) (Vernon Supp. 1982-1983).

183. *See id.* §§ (f)-(1), (h)(2).

184. *Cf. id.* § (f)-(1) (only variable rate arrangement must notify debtor of possible rate

tection because any use of the account within five days of the date that notice was mailed negates the consumer's right to pay off at the previous rates and terms.¹⁸⁵ The unpredictability of the postal service coupled with this short five day time limit on notice of cancellation raises the possibility that consumers will lose their right to terminate the account without ever having received notice of the modified terms. Furthermore, by allowing the notice to be sent with the monthly billing statement rather than as a separate piece of mail,¹⁸⁶ there is a greater likelihood that consumers may overlook the notice. The chance for overlooking this notice is also enhanced by the increasing volume of advertisements riding piggy-back with billing statements.

To lessen the possibility of such an occurrence, it should be required that notice be sent in a separate mailing. Further, requiring the debtor to affirmatively give notice of acceptance of the new terms would provide additional protection. This would insure that each debtor received notice of the change in the account's terms and accepted or rejected these terms. Although this may be too impractical because of the heavy burden placed upon creditors, such a requirement would result in a more informed group of obligors and reduce the impression that consumers are merely victims of their creditors.

Another provision of the Act gives the creditor a less troublesome alternative for increasing the interest rate on any type of contract.¹⁸⁷ Although not as expeditious, this method can be utilized even though the contract contains no provisions regarding amendments.¹⁸⁸ Under article 15.05, a creditor can unilaterally amend an agreement or account simply by giving the obligor writ-

high as 24%); *id.* § (h)(2) (notice of change in open-end account may be sent from time to time).

185. *See id.* § (i)(2).

186. *See id.* § (h)(2).

187. *See id.* art. 5069-15.05. Chapter 15 of the Credit Code is applicable to bank credit card programs. *See* Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 17 (March 11-12, 1982) (available in Texas Tech University Law Library). Various provisions of this chapter have caused considerable difficulty for the Consumer Credit Commissioner's Office. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-2, at 3-4 (1981); *see also* Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 17 (March 11-12, 1982) (available in Texas Tech University Law Library) (bank credit card area has resulted in many problems).

188. *See* TEX. REV. CIV. STAT. ANN. art. 5069-15.05 (Vernon Supp. 1982-1983).

ten notice ninety days in advance of the change.¹⁸⁹ Under this provision, the consumer is protected as any adverse change does not affect current balances or future extensions of credit until the start of the first billing period occurring over ninety days after notice of the alteration to the debtor.¹⁹⁰

The Act fails to mention whether the ninety day notice period is measured from the time when the creditor mails the notice or when the obligor receives the notice. In order to provide adequate protection for the consumer, the clause should be construed to mean from the time the customer receives the notice. This is a more appropriate construction even though it would present difficult proof problems. Additionally, the creditor may be impliedly required to send the notice of the change to the obligor's correct address if the creditor decides to employ this easier method since the pertinent section, unlike article 1.04(i)(2), does not indicate that notice is sufficient if sent to the debtor's last known address.¹⁹¹

Federal law regarding notice requirements takes precedence over the Act's requirements in the event of any conflict.¹⁹² Thus, if a conflict does occur, a creditor can modify any relevant notice requirements in order to comply with federal laws, regulations, or interpretations.¹⁹³

3. Application to Existing Loans

Nothing in the Act indicates that it should be applied retroactively to existing loans.¹⁹⁴ Therefore, the proper interest rate is one within the limitations applicable to the transaction at the time the

189. *See id.*

190. *See id.*

191. *Compare id.* (lender can unilaterally amend contract) *with id.* art. 5069-1.04, § (i)(2) (notice mailed to borrower's last known address effective to bind obligor if unanswered within five days).

192. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (r) (Vernon Supp. 1982-1983).

193. *See id.* § (r).

194. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-30, at 2 (1981); *cf.* Griffin's Estate v. Summer, 604 S.W.2d 221, 230 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.) (laws effective when contract executed become part of agreement); Frank v. State Bank & Trust Co., 263 S.W. 255, 258 (Tex. Comm'n App. 1924, judgment adopted) (interest statute enacted subsequent to contract not applicable), *holding modified on other grounds*, 10 S.W.2d 704 (1928, judgment adopted).

parties originally agreed upon the rate.¹⁹⁵ Generally, a subsequent enactment which affects the rate of interest recoverable or the right to interest does not apply when there is an existing express or implied contract which fixes the rate of interest recoverable.¹⁹⁶ The Consumer Credit Commissioner has adopted this view, noting that there is no evidence of any legislative intent that the interest rates authorized by H.B. 1228 be retroactively effective.¹⁹⁷

As a result, the creditor of a floating-rate loan in existence prior to May 8, 1981, the effective date of H.B. 1228, is unable to utilize the interest rates sanctioned by the Act.¹⁹⁸ In addition, interest rate limitations in force when the contract was formed govern agreements reached prior to enactment of H.B. 1228 even though the contract may have provided for interest at the "highest lawful rate" after default.¹⁹⁹ Only the highest lawful rate allowable at the time the contract was entered into can be charged.²⁰⁰ This result does not necessarily follow, however, in situations where the contract provided for interest at the then prevailing maximum rate or as the law "may be changed or amended in the future."²⁰¹ According to the Consumer Credit Commissioner, such an agreement would be subject to the Act's rate ceilings.²⁰² This is a logical result as it follows the apparent intent of the contracting parties.

The Act specifically addresses pre-H.B. 1228 open-end accounts.²⁰³ It states that if a creditor of such an open-end account decides to implement the new rates allowed under the Act, he or

195. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-30, at 2 (1981); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-12 (1982). But see CONSUMER CREDIT COMM'R LETTER INTERP. No. 82-7, at 3 (1982) (note executed before Act and containing provision that rate not to exceed "applicable law" may utilize ceilings authorized by H.B. 1228).

196. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-30, at 2 (1981).

197. See *id.* at 2.

198. See *id.* at 2.

199. See *id.* at 2.

200. See *id.* at 2.

201. See *id.* No. 82-7, at 3 (1982); see also Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-12 to Z-13 (1982).

202. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 82-7, at 3 (1982).

203. See TEX. REV. CIV. STAT. ANN. art. 5069-1A.01 (Vernon Supp. 1982-1983); see also Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-13 (1982) (art. 5069-1A.01 mandates that debtor be allowed to pay off account at previous rate).

she must give the debtor an opportunity to pay off the amount under the terms agreed to in the contract.²⁰⁴ This section of the Act is applicable only to the initial conversion of pre-Act open-end accounts to H.B. 1228 interest rates and does not affect subsequent modifications.²⁰⁵ This method of conversion does not require a new written contract to be executed by the current obligor as long as the conversion is properly implemented.²⁰⁶

4. Renewals and Extensions

The Act includes a provision dealing with renewals and extensions of contracts.²⁰⁷ An agreement to renew or extend an account may incorporate the maximum interest charge allowable under the Act at the time the parties agree to the renewal or extension.²⁰⁸ This section applies to contracts which existed before as well as those entered into after the effective date of H.B. 1228.²⁰⁹ Nevertheless, a few unanswered questions concerning this section of the Act have arisen. For example, when is a renewal or extension "agreed to" so as to determine the relevant ceiling allowed? The Consumer Credit Commissioner has not addressed this question as yet, but it would seem that, as with construing contracts, one would look to the time of agreement.²¹⁰ Thus, if the initial contract

204. See TEX. REV. CIV. STAT. ANN. art. 5069-1A.01 (Vernon Supp. 1982-1983); see also CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-12, at 2 (1981) (borrower must be permitted to pay off loan at former interest charge).

205. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-8, at 3 (1981); Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 14 (March 11-12, 1982) (available in Texas Tech University Law Library). Insofar as subsequent modifications of an account are concerned, the provisions of art. 5069-1.04, § (i) are controlling. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-8, at 4 (1981). Thus, the creditor must comply with the disclosure requirements detailed in section (i) in order to increase the rate or utilize another ceiling. See Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 14 (March 11-12, 1982) (available in Texas Tech University Law Library).

206. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-20, at 1 (1981).

207. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (i) (Vernon Supp. 1982-1983).

208. See *id.*

209. See Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-13 (1982).

210. Cf. CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981) (ceiling in force when interest rate agreed upon establishes maximum charge); Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 6 (March 11-12, 1982) (available in Texas Tech University Law Library) (Act designed to set ceiling when parties agree to terms of contract); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in

refers to a later specific rate for renewal or extension, then the ceiling applicable at the time of the initial agreement controls rather than the time the renewal or extension is implemented.²¹¹ Such an interpretation, however, seems to contradict the terms of the Act.²¹²

5. Penalties

The Act establishes a safe harbor from penalties.²¹³ As long as a transaction conforms to H.B. 1228's provisions, interpretations of the provisions of the Act by the Consumer Credit Commissioner, or judicial decisions in effect at the time the transaction was consummated, no violation will be found to have occurred.²¹⁴ Generally, the existing penalties for usurious consumer credit transactions are contained in Chapter 8²¹⁵ while penalties for usurious transactions in all other credit situations are listed in Chapter 1.²¹⁶

TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-3 (1982) (Credit Commissioner stresses loan commitment date to determine appropriate ceiling rate).

211. Cf. CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981) (statutory maximum rate at time of loan commitment and agreement on interest charge represents appropriate ceiling); Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 6 (March 11-12, 1982) (available in Texas Tech University Law Library) (ceiling in existence when contract provisions established is applicable maximum rate); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-3 (1982) (date of loan commitment determines ceiling rate).

212. Cf. TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (l) (Vernon Supp. 1982-1983) (maximum interest charge available determined when renewal or extension made).

213. See *id.*

214. See *id.* If a creditor is able to charge an 18% interest rate under a previous statute or federal law, he may be able to escape the disclosure requirements and intricacies of H.B. 1228. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-3, at 1 (1981); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-20 (1982). This "18% safe harbor" is unavailable, however, if the creditor is obligated to obtain a license because he is in the business of extending loans. See CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-3, at 1 (1981); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-20 (1982). In order to charge more than 10% interest, a person engaged in lending practices regulated by the Consumer Credit Code must obtain a license. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (m)(1) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-14, at 2 (1981).

215. See TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (o)(2) (Vernon Supp. 1982-1983); see also *id.* arts. 5069-8.01 to -8.06 (penalty provisions).

216. See *id.* art. 5069-1.06; see also Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-15 (1982) (art. 5069-1.06 sets punishments for all other transactions).

In usurious consumer credit transactions, the guilty creditor must pay the obligor twice the amount of interest and default and deferment charges agreed to, charged, or collected, plus attorneys' fees.²¹⁷ If the offending creditor exacted interest greater than double the amount of interest authorized by law, that creditor must forfeit to the obligor all principal, interest, and charges, along with the attorneys' fees.²¹⁸ The creditor may also be guilty of a misdemeanor and subject to a fine of not more than \$100.²¹⁹

Insofar as Chapter 1 transactions are concerned, creditors who contract for interest in excess of that authorized by general usury statutes must forfeit to the debtor three times the amount of usurious interest contracted for, including attorneys' fees.²²⁰ The amount forfeited, however, may not be less than the smaller of \$2,000 or twenty percent of the principal.²²¹ If the creditor has charged more than twice the legal rate of interest, the punitive penalty requires forfeiture of all of the principal, interest, and other charges, along with the debtor's attorneys' fees.²²² The creditor may also be guilty of a misdemeanor and subject to a fine not to exceed \$1,000.²²³

Section 27 provides that the Act applies to all forfeiture claims made subsequent to the enactment of H.B. 1228 except those claims then being litigated.²²⁴ The status of pre-H.B. 1228 claims which had not been brought before a court prior to the effective date of the Act is uncertain.²²⁵ In *Ciminelli v. Ford Motor Co.*,²²⁶

217. See TEX. REV. CIV. STAT. ANN. art. 5069-8.01, § (a) (Vernon Supp. 1982-1983).

218. See *id.* art. 5069-8.02.

219. See *id.*

220. See *id.* art. 5069-1.06, § (1).

221. See *id.*

222. See *id.* § (2) (Vernon 1971).

223. See *id.*

224. See 1981 Tex. Gen. Laws, ch. 111, § 27, at 286 (H.B. No. 1228) (amending TEX. REV. CIV. STAT. ANN. art. 1302-1.01 to -7.05 (Vernon 1980 & Supp. 1982-1983); arts. 2461-4.01, -7.01 (Vernon Supp. 1982-1983); arts. 5069-1.01 to -51.19 (Vernon 1971 & Supp. 1982-1983); TEX. INS. CODE ANN. art. 24.20 (Vernon 1981)).

225. Section 27 of H. B. 1228 is included in TEX. REV. CIV. STAT. ANN. arts. 1302-2.09A note, 2461-4.01 note, 2461-7.01 note, 5069-1.01 note, 5069-1.04 note, 5069-1.07 note, 5069-1.08 note, 5069-1A.01 note, 5069-2.07 note, 5069-2.08 note, 5069-3.01 note, 5069-3.15 note, 5069-3.16 note, 5069-3.21 note, 5069-4.01 note, 5069-5.02 note, 5069-6.02 note, 5069-6.03 note, 5069-6.05 note, 5069-6A.03 note, 5069-7.03 note, 5069-15.01 note, 5069-15.02 note, 5069-15.05 note, 5069-51.12A note (Vernon Supp. 1982-1983); TEX. INS. CODE ANN. art. 24.20 note (Vernon 1981).

226. 612 S.W.2d 671 (Tex. Civ. App.—Corpus Christi), *rev'd on other grounds*, 624

the Corpus Christi Court of Civil Appeals held that the repeal of Chapter 14 of the Credit Code without a savings clause effectively destroyed any claim in which final relief had not been granted by the effective date of the repeal.²²⁷ Because *Ciminelli* failed to raise this issue on appeal, the Texas Supreme Court expressed no opinion on the point.²²⁸ Section 27 of the Act, however, could be read as a savings clause for prior claims of forfeiture in that it states it affects *all* claims except those being tried when H.B. 1228 became operative.²²⁹ If not construed in this manner, all prior claims of forfeiture which were not litigated by the effective date of the Act could be lost.²³⁰ It seems more logical to hold that the Act's forfeiture provisions apply to these earlier contracts so as to preserve the debtor's cause of action, particularly since the Act was designed to protect consumers.²³¹

6. Federal Preemption

Texas did not opt out of the federal preemption laws.²³² Therefore, it would seem that a lender—to avoid the notification, disclosure, or licensing requirements imposed by Texas state law—could resort to a federal statute, such as the Depository Institutions Deregulation and Monetary Control Act of 1980.²³³ Use of this statute, however, is limited to situations in which the state ceiling is below the federal ceiling²³⁴ because the federal law is inapplicable when

S.W.2d 903 (Tex. 1981).

227. See *id.* at 672.

228. See *Ciminelli v. Ford Motor Co.*, 624 S.W.2d 903, 904 n.2 (Tex. 1981).

229. See 1981 Tex. Gen. Laws, ch. 111, § 27, at 286.

230. See *Ciminelli v. Ford Motor Co.*, 612 S.W.2d 671, 672 (Tex. Civ. App.—Corpus Christi), *rev'd on other grounds*, 624 S.W.2d 903 (Tex. 1981).

231. Cf. *Southwestern Inv. Co. v. Mannix*, 557 S.W.2d 755, 769 (Tex. 1977) (Consumer Credit Code intended to deter wrongful conduct of creditors); *O.R. Mitchell Motors, Inc. v. Bell*, 528 S.W.2d 856, 860 (Tex. Civ. App.—San Antonio 1974, writ *ref'd n.r.e.*) (Consumer Credit Code meant to discourage illegitimate credit practices).

232. See, e.g., TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (m) (Vernon Supp. 1982-1983) (contracts cannot charge rate above that allowed by Act or "any other law applicable"); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 8 (1981) (1.04, § (m) authorizes use of federal law for credit transaction); Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-16 (1982) (Texas Legislature did not opt out of federal preemption).

233. Pub. L. No. 96-221, §§ 101-902, 94 Stat. 132, 132-93 (1980) (codified in scattered sections of 12 U.S.C. and 15 U.S.C.); cf. CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 7-8 (1981) (contract may be able to employ higher ceiling allowed by federal statute).

234. See Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.

the state ceiling exceeds the federal maximum.²³⁵ Thus, the creditor cannot avoid H.B. 1228's stipulations by attempting to use the federal statute unless the federal ceiling is above the state ceiling.²³⁶ Additionally, creditors can shift back and forth between the federal law and H.B. 1228 in a single variable-rate contract depending on which statute permits the higher rate of interest as long as such a shift is authorized by the contract.²³⁷

IV. CONCLUSION

This article has pointed out some of the problems associated with H.B. 1228. To be certain, it has not presented a comprehensive list of the difficulties raised by the statute. The ambiguities, the inability to determine the effect of the statute on particular lending transactions, and the various other problems have added to the overall cost of obtaining and extending credit. Legal consulting fees, for example, must surely increase markedly as attorneys spend more time pondering their client's contracts to determine if the agreements comply with the Act's requirements.

The Texas usury law represents an ambitious and innovative response to the economic pressures of a volatile market. The needs of consumers and lenders, however, could have been met by devising a more coherent, though less flexible statute, which could adequately answer future credit questions. Both debtors and creditors would have benefitted from such a result as their agreements would have had greater certainty.

The omissions of detail in the Act may have been a result of the

L. No. 96-221, § 511(a), 94 Stat. 132, 164 (1980) (codified at 12 U.S.C. § 86(a) (Supp. IV 1980)). Section 511(a) indicates that the federal business and agricultural loan rate preemption provision applies only if the federally authorized interest rate exceeds that allowed by state law. *See id.* § 511(a), 94 Stat. at 164.

235. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 7 (1981).

236. *See id.* at 7. It must be noted that all state usury legislation affecting first mortgage loans and sales on credit of residential property has been preempted by Congress. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-3, at 1 (1981); *see also* Weiner, *Update on Texas Omnibus Usury Bill (H.B.1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-16 (1982) (federal preemption of first lien residential transactions remains in force). For a general discussion of federally preempted areas, *see* Derber, *Usury*, in TEX. BAR ASS'N 3D ANN. ADV. REAL EST. L. COURSE § U, U-17 to U-18 (1981).

237. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 8 (1981); *see also* Weiner, *Update on Texas Omnibus Usury Bill (H.B. 1228)*, in TEX. BAR ASS'N 4TH ANN. ADV. REAL EST. L. COURSE § Z, at Z-16 (1982) (switching between federal ceiling and state ceiling permissible if agreement so provides).

haste with which H.B. 1228 was drafted to meet the lending community's urgent plea for relief. Whatever the reason, the shortcomings impair the Act's capacity to deal incisively with various situations and add to the confusion of an inherently complex statute. Moreover, due to clogged court calendars, it will be years before the courts begin to hear issues involving H.B. 1228 and many areas have yet to be addressed by the Consumer Credit Commissioner. Because of these unanswered questions and the complexity of the Act, it will be difficult, if not impossible at times, for parties to agreements to be assured they are not violating the usury laws or being charged usurious rates.

APPENDIX
CEILING CHART

Consumer				
<u>Type of Contract</u>	Indicated (Weekly)*	Monthly	Quarterly	Annual
Closed-End Fixed	X		X	
Closed-End Variable	X		X	
Open-End Fixed	X		X	X
Open-End Variable	X		X	X

Business/Commercial/Investment**				
<u>Type of Contract</u>	Indicated (Weekly)	Monthly	Quarterly	Annual
Closed-End Fixed	X		X	
Closed-End Variable	X	X	X	
Open-End Fixed	X		X	X
Open-End Variable	X	X	X	X

* The indicated ceiling on all types of contracts except closed-end fixed rate is subject to weekly adjustment.

** Amount of transaction has no effect on *type* of ceiling. If amount is over \$250,000, *rate* and *ceiling* may be as high as 28% per annum; if \$250,000 or below, *rate* and *ceiling* may not exceed 24%.

This chart is a reproduction of one issued by the Consumer Credit Commissioner. See Address by Sam Kelley, Consumer Credit Comm'r, Fifth Annual Banking Law Institute, at 4 (March 11-12, 1982) (available in Texas Tech University Law Library).

An alternative chart setting forth a somewhat contrary viewpoint as to certain types of loans appears elsewhere in this issue. See St. Claire & Hogan, *The Revised Texas Usury Ceiling—A New Alice in Wonderland*, 14 ST. MARY'S L.J. 187, 296 (1983).