USURY AND HOW TO AVOID IT:

IMPACT OF NEW LEGISLATION ON COLLECTION PRACTICES

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INTRODUCTION

In order to guard against usury, a practitioner needs to know what it is. The primary Texas usury statute was recently amended by the Texas Legislature with the passage of H.B. No. 1971, which amends Title 79 of the TEXAS REVISED CIVIL STATUTES ANNOTATED (previously, Tex. Rev. Civ. Stat. Ann. Art. 5069-1.01 *et seq.* [Vernon 1987]) by deleting Chapters 1, 1A, 3, 4 and 5, and adding new Chapters 1B through 1H. These statutes have now been codified in Chapters 301 *et seq.* of the TEXAS FINANCIAL CODE. These changes to the usury statute, the first in over 20 years, are as significant as any in the last 100 years. One goal of the legislature was to re-cast the usury laws in "Plain English." The new statute applies only to acts committed or transactions that occur on or after September 1, 1997. This paper seeks to impart a basic understanding of what constitutes usury as clarified by the new statute and by case law. This paper also examines the various ways that people most commonly run afoul of the usury laws and some practical tips on avoiding usury. Usury penalties and defenses to usury actions are also discussed.

I. SCOPE

This paper focuses on Chapters 301-339 of the TEXAS FINANCE CODE which used to be, generally, Art. 5069-1. This paper does not purport to address the other sections of the article which contain the Consumer Credit Code, (FINANCE CODE Chapters 341-94, formerly Art. 5069-2.01 *et seq.*, except in passing. This outline does not discuss in detail all of the cases on each topic. Nothing in this outline or the accompanying speech should be considered to be the rendering of a legal opinion by the author or his firm.

II. WHAT CONSTITUTES USURY

A. History. Early Chinese, Hindu, Mosaic law and the Koran all prohibited the exacting of interest for the use of money. 45 Am. Jur. 2d Interest and Usury § 3 (1969). Since the time of the Code of Hamurabi (around 1800 B.C.), legislatures have imposed exceedingly harsh penalties for

usury. *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988). Collecting interest for the use of money was unlawful under the English Common Law until 1545. *Phillips Petroleum_Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 485-86 (Tex. 1978). Usury has been governed by statute ever since that time and, in Texas, by a Constitutional Amendment.

Texas had usury laws in place as early as 1840. In 1869, the Texas Constitution was amended to abolish usury laws and made it unlawful for the legislature to pass any laws limiting the amount of interest that could be charged for the use of money. *Allee v. Benser*, 779 S.W.2d 61, 62 (Tex. 1988). The gross credit abuses that arose from the absence of usury laws after 1869 prompted the people of Texas to adopt a specific usury prohibition in the Constitution of 1876. *Allee*, *supra*, 779 S.W.2d at 62. As amended, that provision reads:

> **Section 11. Usury; rate of interest in absence of legislation**
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> Section 11. The Legislature shall have authority to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest; provided, however, in the absence of legislation fixing maximum rates of interest all contracts for a greater rate of interest than ten per (10%) per annum shall be deemed usurious; provided, further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six per (6%) per annum. Should any regulatory agency, acting under the provisions of this Section, cancel or refuse to grant any permit under any law passed by the Legislature; then such applicant or holder shall have the right to appeal to the courts and granted a trial de novo as that term is used in appealing from the justice of peace court to the county court.

TEX. CONST. art. XVI, § 11 (1992) (amended 1960). This provision is self-executing and makes usury a quasi offense. *Watts v. Mann*, 187 S.W.2d 917, 925 (Tex. Civ. App.—Austin 1945, writ ref'd). Usury previously was not properly classified as either a crime or a tort. *Harned v. E-Z Fin.*

Co., 151 Tex. 641, 648-49, 254 S.W.2d 81, 86 (1953). By statute, it is now considered a civil liability except in those cases where a lender commits double usury with respect to a transaction for personal, family, or household use. 305.008.[1] Most actions for usury are brought not under the constitutional provision, but under the enacting legislation, currently found in Chapters 301 *et seq*. of the TEXAS FINANCE CODE Sections 1302-2.09 and 2.09A of the TEXAS CIVIL STATUTES. The policy of the legislature in enacting usury statutes is to protect borrowers against oppressive exactions by lenders. *Autocredit of Fort Worth v. Pritchett*, 223 S.W.2d 951, 954 (Tex. Civ. App.—Ft. Worth 1949, writ dism'd).

B. Elements.

1. Generally. Usury was previously defined under common law as (1) a loan of money, (2) an absolute obligation that the principal be repaid, and (3) the exaction of greater compensation than allowed by law for use of the money by the borrower. *Holley v. Watts*, 629 S.W.2d 694 (Tex. 1982). Usury is now defined by statute as "interest that exceeds the applicable maximum amount allowed by law." 301.002(a)(17). "Interest" means compensation for the use, forbearance, or detention of money. 301.002(a)(4). There must be a loan of money; transactions not involving a loan contract are not governed by the usury laws. *Sage Street Associates v. Northdale Constr. Co.*, 863 S.W.2d 438, 440 (Tex. 1993); *Bexar County Ice Cream Co. v. Swenson's Ice Cream Co.*, 859 S.W.2d 402, 406-07 (Tex. App.—San Antonio 1993, writ denied). A "loan" is "an advance of money that is made to or on behalf of an obligor, the principal amount of which the obligor has an obligation to pay the creditor." 301.002(a)(10).[2] There must be an overcharge by a lender for the

[1]All statutory references are to Chapters and Sections of The Texas Finance Code, unless otherwise indicated, so only the Chapter, and Section references will be given hereafter.

[2]Note that the requirement that the obligation to repay be absolute has been left out of the statute. This could have a significant impact on case law. See Justin T. Toth, Texas Usury Law: When is a Borrower's Promise to Repay Absolute?, The Houston Lawyer (Sept/Oct 1994).

use, forbearance, or detention of the lender's money. *First USA Mgmt., Inc. v. Esmond*, 960 S.W.2d 625, 627 (Tex. 1997); *Stedman v. Georgetown Sav. & Loan Ass'n*, 595 S.W.2d 486 (Tex. 1979). There must be a contract. Acceptance of payments made voluntarily, rather than as required by contract, is not sufficient for usury. *Ashley v. Edwards*, 626 S.W.2d. 107 (Tex. App.—Houston [14th Dist.] 1981, no writ).

2. Intent. Intent is not an element of usury. *Commercial Credit Equip. Corp. v. West*, 677 S.W.2d 669, 676 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.). There need not be an intent to charge usurious interest, just intent to make the bargain made. *Cochran v. American Sav. & Loan Ass'n*, 586 S.W.2d 849, 850 (Tex. 1979); *Jim Walters Homes, Inc. v. Schuenemann*, 668 S.W.2d 324, 328 (Tex. 1984). The intent of the lender is presumed to be reflected in the document he signs, regardless of which party drafted it. *Dunnam v. Burns*, 901 S.W.2d 628 (Tex. App.—El Paso 1995, no writ).

3. Triggers Are Disjunctive. One is guilty of usury if he does any of the following three things: (1) contracts for, (2) charges, or (3) receives usurious interest. 305.001; *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333 (Tex. 1980). A mere contract for usurious interest violates the usury statute even though no interest is actually collected. *Martinez v. Corpus Christi Area Teachers Credit Union*, 758 S.W. 2d 946, 949 (Tex. App.—Corpus Christi 1988, writ denied). Likewise, a charging of interest can result in usury even if the underlying contract is not usurious. *Pentico v. Mad-Wayler*, 964 S.W.2d 708, 713 (Tex. App.—Corpus Christi, 1998, no writ). A "charging" means unilaterally placing on an account an amount due as interest. *Butler v. Wright Way Spraying Serv.*, 683 S.W.2d 823 (Tex. App.—San Antonio 1984), *aff'd in relevant part, rev'd in part*, 690 S.W.2d 897 (Tex. 1985); *see also Concrete Constr. Supply, Inc., v. M.F.C., Inc.*, 636 S.W.2d 475 (Tex. App.—Dallas 1982, no writ). Under prior law, there did not have to be an actual communication of the usurious charge to the debtor in order for the debtor to have a statutory cause

of action for usury. *Williams v. Back*, 624 S.W.2d 272 (Tex. App.—Austin 1981, no writ). As indicated above, this continues to be the general rule. 305.001. In order for a creditor to be liable for the penalties for double usury under the new statute, however, the creditor must actually (1) charge and (2) receive interest that is more than twice the amount authorized under the statute. 305.002.

4. Use, Forbearance Or Detention. There must be an overcharge for the "use, forbearance or detention" of the lender's money. 301.002(4); *Tygrett v. University Gardens Homeowners' Ass'n*, 687 S.W.2d 481, 483 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). The "use" is that which is contracted for when the loan is made. *Tygrett*, 687 S.W.2d at 483. There is a "forbearance" within the meaning of the usury statute when there is a debt due or to become due and the parties agree to extend the time of its payment. Id. The "detention" of money arises when a debt has become due and the debtor has withheld payment without a new contract giving him the right. Id. The party charging for the use, forbearance or detention of money must be the lender himself. Id. The true principal amount upon which the transaction is tested for usury is the actual amount of which the borrower had use, detention or forbearance. *Jordan v. Aston*, 798 S.W.2d 17 (Tex. App.—Houston [1st Dist.] 1990, no writ). Where a charge is admittedly for the use, forbearance, or detention of money, it is, by definition, interest regardless of the label placed on it or the artfulness with which it is concealed. *ECE Technologies, Inc. v. Cherrington Corp.*, 168 F.3d 201, 204 (5th Cir. 1999).

5. Transaction Requested By Borrower. It does not matter whether the borrower solicited the lender's money or structured the transaction and voluntarily paid the rate of interest contracted for; there is still no estoppel on the borrower from asserting usury. *Najarro v. SASI Int'l*, 904 F.2d 1002 (5th Cir. 1990); *Hardwick v. Austin Gallery of Oriental Rugs*, 779 S.W.2d 438 (Tex. App.—Austin 1989, writ denied). Courts are not concerned with which party originated the

allegedly usurious transaction. *El Paso Dev. Co. v. Berryman*, 769 S.W.2d 584 (Tex. App.—Corpus Christi 1989, writ ref'd). The only time there could be an estoppel is if the borrower deceived the lender. *Arguelles v. Kaplan*, 736 S.W.2d 782 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.); *see also Miro v. Allied Fin. Co.*, 650 S.W.2d 938 (Tex. App.—Houston [14th Dist.] 1983, no writ) (borrower/drafter was corporate general counsel and breached fiduciary duty by failing to bring potentially usurious transaction to corporation's attention). Penalties can be recovered by a borrower even if he knowingly pays usurious interest. *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.). The lender's subjective intent is likewise irrelevant. *Cook v. Frazier*, 765 S.W.2d 546 (Tex. App.—Fort. Worth 1989, no writ).

6. Oral And Written Contracts. The statutory and constitutional usury provisions apply to "all contracts," both oral and written. *Mecey v. Seggern*, 596 S.W.2d 924 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.); *Moody v. Main Bank*, 667 S.W.2d 613 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

C. Examining Transactions For Usury

1. Substance Over Form. Courts will look beyond the form of a transaction to its substance in determining the existence or non-existence of usury. *First USA Mgmt., Inc. v. Esmond*, 960 S.W.2d 625, 627 (Tex. 1997); *Gonzales County Sav. & Loan Ass'n v. Freeman*, 534 S.W.2d 903 (Tex. 1976); *Dryden v. City Nat'l Bank*, 666 S.W.2d 213, 216 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). Whether an amount of money is interest depends not on what the parties call it but on the substance of the transaction. *Gonzalez*, *supra*.

2. Transaction As A Whole. Whether there is usury must be determined by construing all of the documents in the transaction taken as a whole. *Ballin v. Poston Home Care Ctr. Co.*, 749 S.W.2d 164, 169 (Tex. App.—San Antonio 1988, writ denied); *In the matter of CPDC, Inc.*, 337 F.3d 436, 443-44 (5th Cir. 2003).

3. Determination At Time Of Transaction. Usury must be determined as of the time of the inception of a contract, not at the time of performance. *Pinemont Bank v. DuCroz*, 528 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.). Likewise, determination of whether obligation is usurious must be made under the law in effect on the date the obligation was entered into. Arguelles v. Kaplan, 736 S.W.2d 782 (Tex. App.--Corpus Christi 1987, writ ref'd n.r.e.). The new statute applies only to acts committed or transactions that occur on or after September 1, 1997. H.B. No. 1971, Chapters 49 and 51. The determination whether an allegedly usurious provision is ambiguous is a question of law for the court to decide. *Strasburger Enterprises*, 110 S.W.3d 566, 578-79 (Tex.App.-Austin 2003, no pet.) ("interest at 10%" may or may not mean annualized and may or may not mean it is being charged during the 30-day interest free period so court properly held a trial to determine the intent).

4. How To Apply Partial Payments. Where there is a running account with various items of charges and credits occurring at different times, and no direction of payment has been made by the debtor, payments on the account as a whole are applied by law to the oldest unpaid portion of the account. *Watson v. Cargill, Inc., Nutrena Div.*, 573 S.W.2d 35, 39 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.). Where parties do not agree otherwise, partial payments on an interest-bearing obligation are ordinarily applied first to accrued interest and then to principal. *Community Sav. & Loan Ass'n v. Fisher*, 409 S.W.2d 546 (Tex. 1966).

IV. STATUTORY MAXIMUM INTEREST RATES

A. 6% A Year; Legal Interest. "Legal Interest" means interest charged or received in the absence of any agreement by an obligor to pay contract interest. As stated in 302.002:

> ACCRUAL OF INTEREST WHEN NO RATE SPECIFIED. If a creditor has not agreed with an obligor to charge the obligor any interest, the creditor may charge and receive from the obligor legal interest at the rate of six percent a year on the principal amount of the credit extended by the creditor to the obligor beginning on the 30th day after the date on which the amount is due. If an obligor has agreed to pay to a creditor any compensation that constitutes interest, the obligor is considered to have

agreed on the rate produced by the amount of that interest, regardless of whether that rate is stated in the agreement.

There was considerable litigation over whether the amount due was ascertainable from the face of the contract. *See e.g.*, *Great Am. Ins. Co. v. N. Austin M.U.D.*, 950 S.W.2d 371 (Tex. 1997). A 1999 amendment to 302.002 has taken the "ascertaining the amount payable" language out of the statute, which should eliminate such disputes. Instead, 302.002 is applicable, whether the damages are liquidated or not. Where the contract does not specify a rate of interest, charging 10% interest is usurious because 6% starting after 30 days is the statutory maximum. *Strasburger Enterprises*, 110 S.W.3d 566, 574-76 (Tex.App.-Austin 2003, no pet.). The term "legal interest" does not include judgment interest. 301.002(8). The 6% interest rate is simple, not compound. *Wm. C. Dear & Associates, Inc. v. Plastronics, Inc.*, 913 S.W.2d 251, 254 (Tex. App.—Amarillo 1996, n.w.h.). The phrase "shall bear interest at the highest legal rate" was a specification of a definite rate of interest sufficient to make the predecessor to 302.002 inapplicable. *Dodson v. Citizens State Bank*, 701 S.W.2d 89 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.). This same rule should apply under the new statute to permit interest at a rate up to the applicable interest rate ceiling (except as provided by 303.101 *et seq.*). 303.001(a).

B. 10% A Year. "The maximum rate or amount of interest is 10 percent a year except as otherwise provided by law." 302.001(b); TEX. CONST. Art. XVI, § 11.

C. 12% Per Month. By previous statute, corporations were permitted to contract for interest up to 12% per month if the principal obligation was $5,000 or more. Art. 1302-2.09. Now, corporations, including charitable or religious corporations, can agree to pay any rate of interest that does not exceed a rate authorized by Chapter 303 of the Finance Code. Art. 1302-2.09A.

D. 18% A Year. If the rate computed by the Consumer Credit Commissioner for the weekly, monthly, quarterly, or annualized ceiling is less than 18% a year, then the ceiling is 18% a

year. 303.009. All of the rate ceilings are tied to the rates quoted on a bank discount basis for 26-week treasury bills issued by the United States and published by The Federal Reserve Board. 303.003-007. The rate ceilings are published in the Texas Register. 303.011. If an insurance company delays payment of a claim more than 60 days, the insurer shall pay, in addition to the amount of the claim, 18% per annum (simple interest) of the amount of such claim as damages, together with reasonable attorneys fees. TEX. INS. CODE Art. 21.55(b); *Teate v. Mutual Life Ins. Co. New York*, 965 F. Supp. 891 (E.D. Tex. 1997).

E. 21% A Year. For open-end account credit card transactions on which a merchant discount is not taken, if any of the rate ceilings exceeds 21% a year, the ceiling is 21% a year. 303.009(d).

F. 24% A Year. Except for those debts that are subject to the 21% ceiling above, and the 28% ceiling, below, if any of the rate ceilings exceeds 24% a year, the ceiling is 24% a year. 303.009(b).

G. 28% A Year. For a contract under which credit is extended for a business, commercial, investment, or similar purpose, and the amount of the credit extension is $250,000 or more, the 24% ceiling set forth above is increased to 28% a year. 303.009(c).

H. Variable Rates. Parties to a contract, including a contract for an open-end account, can agree on an index formula providing for a variable rate of interest so long as the rate does not exceed the rate ceiling applicable to the contract. 303.015(a). A variable rate agreement for credit extended primarily for personal, family, or household use must have the disclosures required by the regulations issued pursuant to the federal Truth In Lending Act (15 U.S.C. § 1601 *et seq.*) unless that Act is not applicable to such a transaction due to the amount of the transaction, the following disclosure must be provided in 10-point type in a manner so as to be conspicuous:

> NOTICE TO CONSUMER: UNDER TEXAS LAW, IF YOU CONSENT TO THIS AGREEMENT, YOU MAY BE SUBJECT TO A FUTURE RATE AS HIGH AS 24 PERCENT PER YEAR.

303.015(c).

I. Open-End Accounts. An open-end account agreement may provide that the lender may change the terms of the agreement for current or future balances. 303.103(a). Notice of intent to make a change must be given by the lender and, if the rate of interest under the agreement is increased, the notice must be accompanied by a check-the-box return form, postage prepaid, with the following express notice in 10-point type:

> YOU MAY TERMINATE THIS AGREEMENT IF YOU DO NOT WISH TO PAY THE NEW RATE.

303.103(b, c). Notice does not have to be given for changes in rates that are merely the result of the agreed index or formula unless the credit is extended for personal, family, or household use, in which case notice must be given before the beginning of the cycle in which the rate changes; or, with the regular billing statement. 303.105. If given with the regular billing statement, the notice must be made with a statement for a billing cycle that precedes the cycle for which the change becomes effective 303.105.

J. Consumer Loans. The interest rate ceilings for non-real property consumer loans governed by the CONSUMER CREDIT CODE (formerly, TEX. REV. CIV. STAT. ANN. ANN. Art. 5069-2.01 et seq. [Vernon 1987]) are calculated differently than for other loans. Under the new statute, these ceilings are set forth in 342.201-342.258.

K. Judgment Interest. The new statute treats judgment interest separately from other interest. "Judgment Interest" means interest on a money judgment, whether the interest accrues before, on, or after the date the judgment is rendered. 301.002(a)(7). The new statute makes it clear that a judgment is not a "loan" to which the usury statutes apply. 301.002(a)(10), (13). A creditor who receives interest pursuant to a final judgment, no longer appealable, cannot be liable for usury.

305.105. The definitions of "creditor" and "obligor" expressly exclude judgment creditors and debtors. 301.002(a)(3)(13).

1. Prejudgment Interest.

a. Specified Cases. Except as specified in the next paragraph, prejudgment interest accrues in wrongful death, personal injury, or property damage cases, from the earlier of (1) the 180th day after the defendant receives written notice of a claim or (2) the date suit is filed. 304.104. The prejudgment interest rate for such cases is equal to the post-judgment rate applicable at the time of judgment. 304.103. Similarly, in condemnation cases, the prejudgment interest rate is equal to the post-judgment interest rate at the time of judgment. 304.201. The pre-judgment rate also equals the post-judgment rate in medical malpractice cases, but pre-judgment interest begins accruing on the date of injury, not the 180th day after injury. TEX. REV. CIV. STAT. ANN. Art. 4590i, § 16.02(c) (Vernon 1997). The pre-judgment interest rate provisions of this statute do not apply in delinquent tax and child support cases. 304.301, 304.302.

If a judgment in a wrongful death, personal injury, or property damage case turns out to be for an amount less than a previous written settlement offer, then no pre-judgment interest accrues during the time period that the settlement offer could have been accepted. 304.105, 304.106. Even if the judgment is for more than the settlement offer, pre-judgment interest does not accrue on the amount of the settlement offer during the time it was outstanding. 304.105(b). If the settlement offer contains non-cash consideration, it is valued at fair market value for purposes of applying this statute. 304.107. A court may order that pre-judgment interest does not accrue during periods of trial delay. 304.108. The court may consider which party caused the delay. Id.

b. On Contracts With No Agreed Rate And Other Cases. The 6% interest rate can apply where there is no agreed rate of interest. 302.002. Unlike Art. 5069-1.03, FINANCE CODE § 302.002 is not a pre-judgment interest statute and it does not require a 6% rate of interest on

contracts which do not specify a rate of interest. Rather, it merely permits a creditor to charge and collect up to 6% interest beginning 30 days after payment was due when no other rate was agreed upon. If the creditor actually charges interest under 302.002 then presumably that would become the pre-judgment rate of interest.[3] In cases not covered by the specific pre-judgment interest provisions of 304.103, 304.104, and 304.201, including contract cases where the creditor has not invoked 302.002, where there is no other statute specifying a rate of pre-judgment interest, presumably the 10% common law rate of interest will apply. The common law 10% rate commences on the earlier of (1) 180 days after the defendant receives written notice of the claim or (2) the date lawsuit is filed. *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507 (Tex. 1998). An agreed rate of zero interest takes an agreement out of 302.002 and precludes any recovery of pre-judgment or post-judgment interest. *All Pharmaceutical, Inc. v. Boston*, 986 S.W.2d 331, 335-36 (Tex. App.—Texarkana 1999, n.w.h.). Pre-judgment interest under 302.002 is simple, whereas post-judgment interest is compounded annually. 304.006; *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 125 (Tex. App.—Corpus Christi 1999, writ denied).

2. Post-judgment Interest. If the judgment is on a contract containing an interest rate or a time price differential, then post-judgment interest will be the lesser of:

(1) the rate specified in the contract, which may be a variable rate; or

(2) 18% a year.

304.002. If the judgment is on a contract which does not specify a rate, or is not on a contract, then the post-judgment rate is:

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[3]This is actually an interesting question. 302.002, which allows for the recovery of interest at the rate of 6% when no rate is specified, specifically refers to "legal interest." 301.002(8) expressly states that "legal interest" does not include "judgment interest." 301.002(7) defines "judgment interest" as interest on a money judgment, regardless of whether the interest accrues before, on, or after the date of the judgment is rendered.

(1) 10%; or

(2) the auction rate for 52-week U. S. treasury bills if that is higher than 10%; or

(3) 20% if the auction rate is higher than 20%. 304.003.

304.003. The Consumer Credit Commissioner sends the auction rate information to the Secretary of State, who publishes it in the Texas Register. 304.004. If a judgment creditor files a motion for extension of time to file a brief in the court of appeals, then post-judgment interest does not accrue for the period of extension. 304.005. Post-judgment interest is compounded annually. 304.006.[4]

Money judgments must specify the post-judgment interest rate that is applicable. 304.001. If the judgment is on a contract which does not specify an interest rate or a time price differential, it is clear that post-judgment interest accrues on pre-judgment interest and court costs awarded in the judgment. 304.003(a). More troublesome is post-judgment interest where the judgment is on a contract which does specify an interest rate or time price differential. Chapter 304.002, which covers this, does not include the express language contained in 304.003(a) (see the preceding sentence). However, 304.002 specifies that post-judgment interest accrues on a "money judgment," and 304.002(a)(12) provides that the term "money judgment" includes legal interest or contract interest that is payable to a judgment creditor under a judgment. There is no mention of court costs. Where a note specifies a rate of interest before maturity, but is silent about any rate after maturity, the prematurity rate is implied as the post maturity rate and 302.002 does not apply. *Petroscience Corp. v. Diamond Geophysical, Inc.*, 684 S.W.2d 668, 668-69 (Tex. 1984). Where a note specifies that interest is to be paid but the rate cannot be ascertained from the description in the note, the post-judgment interest rate is substituted as the note rate. TEX. BUS. COM. CODE § 3.112(b); *Commercial*

[4]Note that, at least in wrongful death, personal injury, property damage, and condemnation cases, pre-judgment interest is not compounded. 304.104, 304.201.

Services of Perry, Inc. v. Wooldridge, 968 S.W.2d 560, 565 (Tex. App.—Fort Worth 1998, writ denied).

V. LICENSING OF LENDERS MAKING CONSUMER OR SECONDARY MORTGAGE LOANS

Persons in the business of making consumer or secondary mortgage loans must be licensed to do so unless they are (1) banks, (2) savings banks, (3) savings and loans, or (4) insurance agents licensed under Article 21.14 of the INSURANCE CODE who negotiate or arrange such loans on behalf of a bank or savings and loan association. 303.201, 342.051(c).[5] The Consumer Credit Commissioner is required to enforce the licensing provisions (303.404) and has the power to inspect a licensee's business and records (303.405). The lender must have a license for each one of its offices at which loans are made, negotiated, or collected (342.052) and may be required to post a bond (342.102). The license may be suspended or revoked if: (1) the lender failed to pay license fees or other fees, (2) the lender knowingly or negligently violated the usury statute or an order or rule issued by the Credit Commissioner, or (3) facts are discovered that, had they been known to the Commissioner at the time, the license would not have been granted. 342.156. A license holder who violates the usury statute is also subject to forfeiture of its corporate charter. 342.157. Any person who engages in consumer lending without a license is guilty of a misdemeanor with a fine of up to $1,000. 349.502. Each loan is a separate violation. 349.502. A lender may not take an instrument in which a borrower waives any right accruing to the borrower under the usury statute. 342.507. A lender also may not take an instrument in which a blank is left to be filled in after the loan is made. 342.506. An authorized lender must maintain on file with the Consumer Credit Commissioner a

[5]With respect to insurance agents, 342.051(c) includes savings banks while 303.201 does not. However, note that with the exception of secondary mortgage loans, loans covered by 303.201 are generally covered by Chapter 342 as well. 303.202

registered agent for service of process. 342.556. If the lender has no statutory registered agent, service of process may be made on the Commissioner. 342.556.

VI. COMMON WAYS OF COMMITTING USURY

A. Loans.

1. In General. Where a note can be construed two different ways, the courts will construe it as non-usurious. *See Cecil v. Zivley*, 683 S.W.2d 853 (Tex. App.—Houston [14th Dist.] 1984, no writ). This is partly because the usury statute is penal in nature and must be construed against a finding of usury where possible. *Meyer v. Mack Sales, Inc.*, 645 S.W.2d 493 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.). It has been held that a note will be held to be usurious if there is any contingency by which the lender may exact usurious interest under the note. *Fisher v. Westinghouse Credit Corp.*, 760 S.W.2d 802 (Tex. App.—Dallas 1988, no writ); *Najarro v. SASI International, Ltd.*, 904 F.2d 1002 (5th Cir. 1990). On the other hand, the *Najarro* case and similar cases have been forcefully distinguished in *FSS v. Phase I Electronics of West Texas, Inc.*, 998 S.W.2d 674, 681-82 (Tex. App.—Amarillo 1999, writ denied) where it was held that Apayments which are contingent, uncertain, or speculative are not interest for the purpose of determining usury. *Id.* at 681.

2. Acceleration Clauses. The danger in acceleration clauses is that they may be read to include acceleration of the entire indebtedness, which would be usurious if it includes unearned interest. The question then becomes one of intent. *See Ballin v. Poston Home Care Ctr. Co.*, 749 S.W.2d 164 (Tex. App.—San Antonio 1988, writ denied) (where nothing in documents showed that lender intended to collect unearned interest in the event of acceleration of debt and lender expressly disavowed any such interest, no usury was found). There is authority that a provision in a note making "all sums" immediately due if maker is in default refers only to sums due at the time of acceleration and not unearned interest so as to render the note usurious. *Myles v.*

Resolution Trust Corp, 787 S.W.2d 616 (Tex. App.—San Antonio 1990, no writ). Better practice would be to make explicit what sums are due upon acceleration. A demand for the full amount of the note may result in usury. *See Dryden v. City Nat'l Bank*, 666 S.W.2d 213 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); *Brookshire v. Longhorn Chevrolet Co.*, 788 S.W.2d 209 (Tex. App.—Ft. Worth 1990, no writ). If the acceleration provision is defective, the lender may be found liable for contracting for usurious interest even though the loan is never accelerated. *Jim Walters Homes, Inc. v. Schuenemann*, 668 S.W.2d 324 (Tex. 1984). There is authority that additional interest charged by a lender on a borrower's account after acceleration is not usurious (so long as it is within statutory limits). The rationale is that the interest due on the accelerated balance of a note after default is not interest under the note, and is viewed as a separate transaction. *Fisher v. Westinghouse Credit Corp.*, 760 S.W.2d 802 (Tex. App.—Dallas 1988, no writ).

3. Front-End Charges. Only the amount of money the borrower actually receives is considered the principal amount of the loan against which all interest charges will be analyzed for purposes of usury. *First State Bank v. Miller*, 563 S.W.2d 572, 575 (Tex. 1978) (lender escrowed portion of loan for payment of first 2 years of interest); *Jordan v. Ashton*, 798 S.W.2d 17, 20 (Tex. App.—Houston [1st Dist.] 1990, no writ) (interest applied to all eleven invoices, not just the two picked by the borrower). Thus, one may be required to deduct interest, fees, commissions, and other front-end charges in order to determine the actual amount of money of which the borrower had use, detention or forbearance. One cannot rely on the amount stated to be principal on the face of the loan. *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777 (Tex. 1977); *but see Loomis v. Blacklands Prod. Credit Ass'n*, 579 S.W.2d 560 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (requirement that loan proceeds be used to purchase stock in the association held not to be deductible front-end charges). Amounts charged or received in connection with a loan are not interest if they are not for the use, forbearance, or detention of money. *See First USA Mgmt., Inc. v. Esmond*, 960 S.W.2d 625

(Tex. 1997). Several types of front-end fees have been held not to constitute interest. *See Texas Commerce Bank-Arlington v. Goldring*, 665 S.W.2d 103 (Tex. 1984) (concurring opinion) (lender's attorney's fees not interest), *First USA Mgmt., Inc. v. Esmond*, 960 S.W.2d 625, 627 (Tex. 1997). For instance, bona fide commitment fees are not interest. *Stedman v. Georgetown Sav. & Loan Ass'n*, 595 S.W.2d 486 (Tex. 1979).

4. Commissions. There is authority that commissions payable to the lender for making a loan will be considered as interest for purposes of the usury statutes. *Najarro v. SASI Int'l. Ltd.*, 904 F.2d 1002, 1008 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 755 (1991). However, a bona fide third-party agent or broker may lawfully charge a commission or fee for such services and such fees will not be taken into consideration when determining whether a loan is usurious. *O'Conner v. Lamb*, 593 S.W.2d 385, 387 (Tex. Civ. App.—Dallas 1979, no writ).

5. Late Charges. The new statute provides that a delinquency charge on the amount of any installment or other amount in default for not less than 10 days under a commercial loan can be charged in addition to interest as long as the charge is reasonable and does not exceed 5% of the amount of the late installment. 306.006(1). For loans other than commercial loans, the common law governs. Late charges are often considered to be interest and will be added to whatever interest is specified in the agreement. *Pentico v. Mad-Wayler, Inc.*, 964 S.W.2d 708, 715-716 (Tex. App.—Corpus Christi 1998, no petition); *Hardwick v. Austin Gallery of Oriental Rugs*, 779 S.W.2d 438 (Tex. App.—Austin 1989, writ denied); *Veytia v. Seiter*, 740 S.W.2d 64 (Tex. App.—San Antonio 1987), *aff'd*, 756 S.W.2d 303 (Tex. 1988). Late charges are considered to be fees charged for the detention of money. *Id*. Only if the specified interest plus the late charge aggregate to less than the rate allowed by law will usury be avoided. *Dixon v. Brooks*, 678 S.W.2d 728 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) *Bona fide* payments to third parties for servicing past-due amounts will not be considered interest. *Perry v. Stewart Tile Co.*, 756 F.2d 1197 (5th Cir),

reh'g granted in non-relevant part, 761 F.2d 237 (1985). Late charges are not interest if the underlying transaction is not a loan of money with an absolute obligation to pay. *Bexar County Ice Cream Co. v. Swenson's Ice Cream Co.*, 859 S.W.2d 402, 406-07 (Tex. App.—San Antonio 1993, writ denied). For cases holding that late charges are not interest *see Tygrett v. University Gardens Homeowners' Ass'n*, 687 S.W.2d 481 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Rimco Enters., Inc. v. Texas Elec. Serv. Co.*, 599 S.W.2d 362 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); *Apparel Mfg. Co. v. Vantage Properties, Inc.*, 597 S.W.2d 447 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.); *Southwest Park Outpatient Surgery, Ltd. v. Chandler Leasing Div.*, 572 S.W.2d 53 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); and *Maloney v. Andrews*, 483 S.W.2d 703 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

6. Prepayment Charges Or Penalties. Lenders are prohibited from charging a prepayment penalty on loans secured by the borrower's residential homestead if the interest on the loan is greater than 12% a year. 302.102. The only exception is if the charge or penalty is required by an agency created by federal law. 302.102. Prepayment charges are permitted in commercial loan agreements and are not considered to be interest, 306.005; however, the charges must be agreed to and not involuntary. 306.005. Prepayment penalties or non-sufficient funds charges for overdrawn checks are not considered to be interest. *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285 (Tex. 1994). Non-sufficient funds charges of $25 per item are now expressly permitted in connection with commercial loans. 305.006(2).

7. Assuming Other Debt. A borrower's agreement to pay his own undisputed prior obligations to the lender, as part of the consideration for a new loan, does not render the loan usurious. *Stephens v. First Bank & Trust*, 540 S.W.2d 572, 574 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.). If a lender requires as a condition of making a loan that a borrower assume a debt owed by a third party to the lender, the amount of the third party debt will be included in the interest

computation, despite the lender's contention that it did not intend to charge or contract for usurious interest. *Alamo Lumber Co. v. Gold*, 661 S.W.2d 926 (Tex. 1983); *Laid Rite, Inc. v. Texas Indus., Inc.*, 512 S.W.2d 384 (Tex. Civ. App.—Worth 1974, no writ). On the other hand, if the lender requires as a condition of making a loan that a borrower assume debt of a third party to a different unaffiliated lender, that will be considered as a bona fide charge or fee and will not be calculated as interest. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 936 (Tex. 1991). A lender's requirement that two borrowers guaranty each other's loans as a condition for renewal of the loans does not come within the *Alamo Lumber* rule. *Sterling Property Mgmt., Inc. v. Tex. Commerce Bank, N.A.*, 32 F.3d 964 (5th Cir. 1994).

8. Attorney's Fees. Many promissory notes provide for an additional 10% of interest and principal as attorney's fees if the borrower is in default and as a penalty for late payment. At least one case has held that seeking to charge this extra 10% resulted in usury. *Hardwick v. Austin Gallery of Oriental Rugs*, 779 S.W.2d 438 (Tex. App.—Austin 1989, writ denied). The *Hardwick* case may be distinguishable, however, because the lender in that case testified that he charged the 10% under the attorney's fees provision "as a penalty for what [he] considered to be late payments on the note.'" Id. at 443. The court held this to be a charge for the detention of money. Other cases hold that attorney's fees provisions are not usurious. *Texas Commerce Bank-Arlington v. Goldring*, 665 S.W.2d 103, 104 (Tex. 1984); *Rollingbrook Inv. Co. v. Texas Nat'l Bank*, 790 S.W.2d 375 (Tex. App.—Amarillo 1990, writ denied).

9. 360-Day Year. Commercial loans (for business, commercial, investment, agricultural or similar purposes) can be amortized using a 360-day year. 306.003. Computing interest on the basis of a 360-day year on other loans may result in usury. *Lawler v. Lomas & Nettleton Mortgage Investors*, 691 S.W.2d 593 (Tex. 1985).

10. Floating Rate. There is authority that using a floating rate, such as prime plus 2, does not result in usury. The reasoning of the cases is that such an instrument is not usurious on its face. *See Allied Supplier & Erection v. A. Baldwin & Co.*, 688 S.W.2d 156 (Tex. App.—Beaumont 1985, no writ). For safety's sake, any such document should contain an upper-limit and/or usury savings clause in case prime plus 2 ends up greater than the rate allowed by statute for transactions of the type in question.

B. Invoices. A high percentage of commercial and consumer transactions are conducted on the basis of verbal or written purchase orders which are then followed by an invoice. Persons can run afoul of the usury laws by including an interest provision in the invoice which was never discussed by the parties at the time of the purchase order. *E.g.*, *Preston Farm & Ranch Supply v. Bio-Zyme Enters.*, 625 S.W.2d 295 (Tex. 1981); *Triton Oil & Gas Corp. v. Marine Contractors & Supply Inc.*, 644 S.W.2d 443 (Tex. 1982); *Windhorst v. Adcock Pipe & Supply*, 547 S.W.2d 260 (Tex. 1977); *Butler v. Holt Mach. Co.*, 741 S.W.2d 169 (Tex. App.—San Antonio 1987, writ denied), *opinion corrected on denial of reh'g*, 739 S.W.2d 958 (Tex. 1987); *Parr v. Tagco Indus.*, 600 S.W.2d 200 (Tex. App.—Amarillo 1981, no writ); *Watson v. Cargill, Inc., Nutrena Div.*, 573 S.W.2d 35, 42 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.). For cases to the contrary, *see Varel Mfg. Co. v. Acetylene Oxygen Co.*, 990 S.W.2d 486, 492-93 (Tex. App.—Corpus Christi; 1999, no pet.); *Thomas Conveyor Co. v. Portec, Inc.*, 572 S.W.2d 361 (Tex. Civ. App.—Waco 1978, no writ), and *Killebrew v. Bartlett*, 568 S.W.2d 915 (Tex. Civ. App.—Amarillo 1978, no writ). In *Varel* the Court held that Anot every mention of interest or a service charge amounts to a charge or demand...[o]nly when, and to the extent that, the threatened interest is actually charged or assessed against the debtor has the usury statute been violated. *Varel*, 990 S.W.2d at 492. In the absence of an agreement, any interest above 6% is usurious as a matter of law. *Wright Way Spraying Serv. v. Butler*, 690 S.W.2d 897 (Tex. 1985), *appeal after remand*, 743 S.W.2d 304 (Tex. App.—San

Antonio 1987, writ denied); *Hagar v. Williams*, 593 S.W.2d 783 (Tex. Civ. App.—Amarillo 1979, no writ). A demand for usurious interest contained in an invoice, letter, ledger sheet or other book or document violates the usury statute prohibition against "charging" interest even though there is no agreement between the parties for a usurious amount of interest. *Augusta Dev. Co. v. Fish Oil Well Servicing Co.*, 761 S.W.2d 538 (Tex. App.—Corpus Christi 1988, no writ). Calling the charge a "service charge" will not prevent a finding of usury. *Flato Elec. Supply Co. v. Grant*, 620 S.W.2d 915 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

C. Failing To Wait 30 Days. For invoices providing for interest at the highest lawful rate if overdue 30 days, do not make the mistake of computing interest on the 30 day period. *Ceco Corp. v. Steves Sash & Door Co.*, 714 S.W.2d 322 (Tex. App.—San Antonio 1986), *aff'd in relevant part*, 751 S.W.2d 473 (Tex. 1988). Where no interest rate has been agreed upon, it used to be the law that charging interest on an open account during the interest-free period prescribed by art. 5069-1.03 is double usury and results in a forfeiture of principal, because any interest charged during the 30 days is considered to exceed two times the rate allowed by law (2 x 0 = 0) and therefore subjects the creditor to the statutory penalties for double usury. *Commerce, Crowdus & Canton, Ltd. v. DKS Constr., Inc.*, 776 S.W.2d 615 (Tex. App.—Dallas 1989, no writ); *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217 (Tex. 1979). In recognition of the harshness of this rule, the new statute provides that a person is not liable to an obligor solely because the person charges or receives legal interest before the 30th day after the date on which the debt is due. 305.102.

D. Debits Can Constitute Charges. Business ledger card records of an open account showing debits of amounts for interest in excess of 6% per annum can constitute a "charging" of interest to the customer. *See Duke v. Power Elec. & Hardware Co.*, 674 S.W.2d 400 (Tex. App.—Corpus Christi 1984, no writ); *see also Augusta Dev. Co. v. Fish Oil Well Servicing Co.*, 761 S.W.2d 538 (Tex. App.—Corpus Christi 1988, no writ).

E. Demand Letters and Pleadings. A pleading filed in court containing a claim for usurious interest is not a document charging interest for the purpose of imposing usury or double usury penalties. *George A. Fuller Co., Inc. v. Carpet Services, Inc.*, 823 S.W.2d 603 (Tex. 1992). Merchants, debt collectors, and others sometimes run afoul of the usury statutes by sending out demand letters or similar documents itemizing the amounts then claimed to be due. Any errors in such calculations can be costly because a pay-off quote constitutes a "charging" of interest under the usury statutes. *Danziger v. San Jacinto Sav. Ass'n*, 732 S.W.2d 300 (Tex. 1987); *Dryden v. City Nat'l Bank*, 666 S.W.2d 213 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). A demand letter sent by an attorney can be a "charging" within the meaning of the usury statute. *Woodcrest Assocs., Ltd. v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434 (Tex. App.—Dallas 1989, writ denied); *Coppedge v. Colonial Sav. & Loan Ass'n*, 721 S.W.2d 933 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). The Fifth Circuit has held that a demand letter sent to a guarantor, though erroneous, cannot constitute a charging of usurious interest because it is not a demand for the **guarantor's** use, forbearance, or detention of money and the guaranty agreement is not a loan or forbearance of money. *First S. Sav. Ass'n v. First S. Partners, II, Ltd.*, 957 F.2d 174, 177 (5th Cir. 1992). The court further held that an erroneous demand will not be construed to constitute a usurious charging of interest where the underlying loan or guaranty agreement contains a usury savings clause. *Id.* at 178 (citing *Woodcrest Assocs., Ltd. v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434, 437-39 (Tex. App.—Dallas 1989, writ denied). It has been held that post-judgment demand letters sent by an attorney do not violate the usury laws even if they contain an overcharge of post-judgment interest. *Solomon v. Briones*, 805 S.W.2d 916 (Tex. App.—San Antonio 1991, writ denied). Note that the Supreme Court granted writ in the *Solomon* case, issued an opinion reversing the Court of Appeals, but then withdrew that opinion and denied the writ. The Supreme Court affirmed only that a demand for post-judgment interest is not a charging of usurious interest. *Briones v. Solomon*, 842 S.W.2d

278 (Tex. 1992). The new statute makes it clear that the usury statutes do not apply to judgments. 301.002(a)(10),(13).

F. Time-Price Differential. If certain requirements are met and a transaction is not designed to circumvent the usury laws, a merchant may sell merchandise at a higher price for credit than for cash and the price difference is not usurious. *Kinerd v. Colonial Leasing Co.*, 800 S.W.2d 187 (Tex. 1990). The new statute codifies the common law time-price doctrine. In order to apply the time-price doctrine, it must be shown that the seller clearly offered to sell goods for both a cash price and a credit or time price, that the purchaser was aware of the two offers, and that the purchaser knowingly chose the higher time or credit price. *Id.*; 301.002(a)(4); 301.002(a)(16); 302.001(a); 303.001(b); *see also Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324 (Tex. 1984); *Rotello v. International Harvester Co.*, 624 S.W.2d 249 (Tex. App.—Dallas 1981, writ ref'd n.r.e.); *Briercroft Serv. Corp. v. De Los Santos*, 776 S.W.2d 198 (Tex. App.—San Antonio 1989, writ denied) (good discussion of difference between time-price differential contracts and loans). If an agreement fails to qualify as a time-price differential contract, then the finance charges may be found to constitute usurious interest. *See El Paso v. Berryman*, 769 S.W.2d 584 (Tex. App.—Corpus Christi 1989, writ ref'd).

G. Leases. A true lease is not a credit transaction and the usury statutes therefore do not apply to it. *Potomac Leasing Co. v. Housing Auth.*, 743 S.W.2d 712 (Tex. App.—El Paso 1987, writ denied); *Apparel Mfg. Co. v. Vantage Properties, Inc.*, 597 S.W.2d 447 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.). Thus, a lease with late charges assessed on overdue rentals is not a lending transaction and the usury statutes do not apply. *Varel Mfg. Co. v. Acetylene Oxygen Co.*, 990 S.W.2d 486, 491 (Tex. App.—Corpus Christi 1999, no writ). A lease with an option to purchase, on the other hand, can be considered to be a purchase on credit to which the usury statutes apply. *Kinerd v. Colonial Leasing Co.*, 800 S.W.2d 187 (Tex. 1990); *Transamerican Leasing Co. v. Three*

Bears, Inc., 586 S.W.2d 472 (Tex. 1979). The court will determine the intent of the parties as manifested by their agreement or the surrounding circumstances. *Rinyu v. Teal*, 593 S.W.2d 759 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). A list of the factors often used by the courts to distinguish a *bona fide* sale and lease from a loan is contained in the case of *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 626 F.2d 401 (5th Cir. 1980), *rev'd on other issues*, 642 F.2d 744 (5th Cir. 1981). The *Woods-Tucker* case held that if the price of the option to purchase at the end of a lease is for a nominal amount, then the lease is conclusively presumed to be a loan for purposes of the usury statutes. 626 F.2d at 412.

H. Purchase Of Loans Or Accounts Receivable At Discount. Seemingly valid sales of loans or accounts receivable at a discount may nevertheless be construed as loans to which the usury statutes apply. *A.B. Lewis Co. v. National Inv. Corp.*, 421 S.W.2d 723 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.); *Glenn v. McCarty*, 137 Tex. 608, 155 S.W.2d 912 (Tex. 1941); *A.B. Lewis Co. v. National Inv. Corp.*, 421 S.W.2d 723 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.); *Griffith v. Gadberry*, 182 S.W.2d 739 (Tex. Civ. App.—El Paso 1944, no writ) (transaction held not to be *bona fide* "factoring" of accounts, but a device to conceal usurious lending). Under the new statute, a person engaged in a commercial enterprise who sells accounts, instruments, chattel paper or other documents at a discount does not commit usury and neither does the buyer. 306.103, 306.001(1). The parties' characterization of an account purchase transaction as a purchase is conclusive that the account purchase transaction is not a transaction for the use, forbearance, or detention of money. 306.103(b); *Korrody and Unicorn Construction, Inc. v. Miller*, 126 S.W.3d 224, 226 (Tex.App.-San Antonio 2003, no pet.). In the absence of a written agreement expressing an intent to enter into a factoring arrangement, the intent of the parties becomes a question to be decided by the fact finder at trial. *Korrody*, 126 S.W.3d 226-28. Also, under the new statute, amounts paid or passed through to the holders of asset-backed securities by a pass-through

entity are not interest. 306.102. A pass-through entity is a business entity that does not have significant assets other than assets held for the benefit of the holders of asset-backed securities. 306.001(7).

I. Higher Rates Not Allowed Even If Based On A Contingency. A contract is usurious as a matter of law if there is any contingency by which the lender may receive more than the lawful rate of interest. *Najarro v. SASI Int'l, Ltd.*, 904 F.2d 1002 (5th Cir. 1990), *reh'g denied*, *cert. denied*, 111 S. Ct. 755 (1991). Even if, by agreement, a payment of interest will not exceed the rates allowed by law unless a certain condition or contingency is satisfied, the contract will be considered usurious. *Id.* On the other hand, a contract may not be usurious just because it contains a contingent obligation, such as a repurchase option. *Bray v. McNeely*, 682 S.W.2d 615 (Tex. App.—Houston [1st Dist.] 1984, no writ) (option to repurchase was not an absolute obligation to repay); *but see Bantuelle v. Williams*, 667 S.W.2d 810 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (contract for sale of land for $1,342.52 with right to repurchase in 60 days for $2,342.52 was found to be usurious). Contingent obligations of uncertain value at the time of contracting are not likely to be found to be interest. *See*, *First USA Mgmt, Inc. v. Esmond*, 960 S.W.2d 625, 627-28 (Tex. 1997).

J. Settlement Agreements. There is authority that settlement agreements are not subject to the usury statutes because they do no involve a lending or credit transaction or debtor-creditor relationship. *Rahmani v. Banet*, 2015 Tex. App. LEXIS 4676 *7-8 (Tex. App. – Ft. Worth 2015, pet. denied), citing *Villanova v. Fed. Deposit Ins. Corp.*, No. 08-11-00361-CV, 2014 Tex. App. LEXIS 6906, 2014 WL 2881540, at *6, *8 (Tex. App.—El Paso June 25, 2014, no pet.) (holding that breach of settlement agreement that resulted in foreclosure was not the type of agreement governed by the usury statutes); *Starr v. Dart*, No. 14-07-00673-CV, 2008 Tex. App. LEXIS 5513, 2008 WL 2841685, at *1, *3-4 (Tex. App.—Houston [14th Dist.] July 24, 2008, pet. denied) (holding that settlement agreement in which Dart agreed to dismiss lawsuit and transfer his stock to Starr in

consideration for $424,000, paid in three installments, with an additional $1,000 per day for any late payments, was not the type of contract to which the usury laws applied despite $1,000 per day late fee).

VII. PENALTIES FOR USURY

A. Biblical. The Bible suggests that the penalty for usury is exclusion from heaven or death. *See* Psalm 15:1-5; Ezekiel 18:13.

B. Statutory.

1. For Usury. Any person who contracts for, charges or receives interest which is greater than allowed by law is liable to the obligor for the greater of: (1) three times the amount of interest contracted for, charged or received less the amount allowed by law, or (2) $2,000 or 20% of the principal, whichever is less. 305.001(a); 305.003(a). Such a creditor is also liable to the obligor for attorney fees fixed by the court. 305.005. Note that a creditor who charges or receives interest in excess of the amount contracted for but not in excess of the maximum amount authorized by law, is not subject to penalties for usury but may be liable for other remedies and relief provided by law. 305.001(c); *Fisher v. Westinghouse Credit Corp*,760 S.W.2d 802, 808 (Dallas 1988, no writ); prior law to the contrary included *Hardwick v. Austin Gallery of Oriental Rugs, Inc.*, 779 S.W.2d 438 (Tex. App.—Austin 1989, writ denied).

2. For Double Usury. Any person who charges **and** receives interest in excess of double the amount allowed by law shall incur the penalties for usury and shall additionally be liable to the obligor for the principal on which the interest was charged and received as well as the interest and all other amounts charged and received. 305.002; 305.004. Prior case law held that interest charged at any rate for a period contracted by the parties to be free of interest is not only usurious, but is in excess of double the amount of interest allowed because any interest at all is more than double zero interest. *See PJM, Inc. v. Walter Clark Advertising, Inc.*, 624 S.W.2d 282 (Tex. App.—

Dallas 1981, writ ref'd n.r.e.). Under the new statute, a person is not liable to the obligor solely because the person charges or receives legal interest before the 30th day after the date on which the debt is due. 305.102. A person who commits double usury in connection with a transaction for personal, family, or household use shall be guilty of a misdemeanor punishable by a fine of not more than $1,000. 305.008. While there are no longer any criminal penalties associated with commercial loans, there can be liability under the federal extortionate credit statute. See 18 U.S.C.A. § 891.

3. Application. For cases showing how the penalty provisions are applied under various fact situations *see Risica & Sons, Inc. v. Tubelite, a Div. of Indal, Inc.*, 794 S.W.2d 468 (Tex. App.—Corpus Christi 1990, writ granted); *Petroscience Corp. v. Diamond Geophysical, Inc.*, 663 S.W.2d 68 (Tex. App.Houston [14th Dist.] 1983), writ ref'd n.r.e., 684 S.W.2d 668 (Tex. 1984); and *Kinerd v. Colonial Leasing Co.*, 800 S.W.2d 187 (Tex. 1990); *Strasburger Enterprises, Inc. v. TDGT Limted Partnership*, 110 S.W.3d 566, 576 (Tex.App.-Austin 2003, no pet.). Forfeiture of principal means all principal, paid or unpaid. *Lafferty v. A.E.M. Developers & Builders Co.*, 483 S.W.2d 279 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.). However, the principal to be forfeited is only that amount upon which the usurious interest was charged. Steves Sash & Door v. Ceco Corp., 751 S.W.2d 473, 475 (Tex. 1988).

4. Affirmative Defense or Counterclaim. Penalties may be recovered whether usury is raised as an affirmative defense or as a counterclaim. *Butler v. Wright Way Spraying Serv.,* 683 S.W.2d 823, 825 (Tex. App.--San Antonio 1984), *aff'd in relevant part, rev'd in part*, 690 S.W.2d 897 (Tex. 1985). The borrower under a usurious transaction has a choice of either pursuing the usury penalties as an offset to an action on the note or pursuing an affirmative action to recover the penalty amount. *Wall v. East Tex. Teachers Credit Union*, 533 S.W.2d 918 (Tex. 1976).

5. Legal Rate Is Subtracted. Penalties are calculated based on the difference between the legal rate of interest and the amount of interest charged. *Baker v. Howard*, 799 S.W.2d 450 (Tex. App.—Waco 1990, no writ).

6. No Prejudgment Interest On Penalties. Prejudgment interest is not recoverable on penalty damages for usury. *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 474 (Tex. 1988); *Standard Sav. Ass'n v. Greater New Canaan Missionary Baptist Church*, 786 S.W.2d 744 (Tex. App.—Houston [14th Dist.] 1990, no writ). This is consistent with the general principal that prejudgment interest may not be awarded on punitive damages. *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129 (Tex. 1988).

7. Penalties Not Exclusive Of Other Statutory Penalties. Recovery under the Federal Consumer Credit Protection Act does not bar recovery under the usury statute. *San Juan Pools, Inc. v. Krohn*, 594 S.W.2d 492 (Tex. Civ. App.—San Antonio 1979, no writ). Likewise, a plaintiff may recover under both the DTPA and the usury statute. *Kinerd v. Colonial Leasing Co.*, 800 S.W.2d 187, 191 (Tex. 1990); *Kish v. Van Note*, 692 S.W.2d 463 (Tex. 1985).

C. No More Common Law Penalties. Under the common law, the debtor under a usurious contract was entitled to recover all usurious interest paid and to a cancellation of all interest not yet paid because a usurious contract is unenforceable as to interest. *Danziger v. San Jacinto Sav. Ass'n*, 732 S.W.2d 300, 304 (Tex. 1987). These common law remedies used to be recoverable in addition to all statutory remedies available. *Id.* at 305; *Commercial Credit Equip. Corp. v. West*, 677 S.W.2d 669, 678-80 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.); *El Paso Dev. Co. v. Berryman*, 769 S.W.2d 584, 591 (Tex. App.—Corpus Christi 1989, writ ref'd). The new statute provides that it is exclusive and no common law penalties apply. 305.007; *Bair Chase Prop. Co., LLC v. S&K Dev. Co.*, 260 S.W.3d 133, 140-141 (Tex. App.--Austin 2008, pet. denied).

VIII. TIPS FOR AVOIDING USURY

A. Refund Provision. At least 61 days before filing a suit seeking usury penalties from a creditor who has contracted for, charged or received usurious interest, an obligor must give written notice to the creditor advising the creditor in reasonable detail of the nature and amount of the violation. 305.006(b). If the creditor then, within 60 days, corrects the violation and gives the obligor written notice of the corrective action, the creditor is not liable for the violation. 305.006(c), 305.103. The 60-day written notice requirements do not apply to an obligor filing a counterclaim for usury in an action filed against him by the creditor. 305.006(d). A creditor who would otherwise be liable under the usury statute can also escape liability if it finds and corrects a usurious transaction on its own not later than the 60th day after a violation is actually discovered by the creditor and before the obligor gives written notice of the violation or files an action alleging the violation. 305.103(a); *Strasburger Enterprises, Inc. v. TDGT Limted Partnership*, 110 S.W.3d 566, 576 (Tex.App.-Austin 2003, no pet.). Actual discovery means discovery in fact, not when a reasonable person should have discovered the violation. 305.103(b). *In the matter of CPDC, Inc*., 337 F.3d 436, 442 (5th Cir. 2003). This is true even if a party or its lawyers were concerned that the transaction might be usurious; only when the party becomes actually and subjectively aware that the transaction was illegal and usurious does the 60-day trigger commence. *In the Matter of CPDC, Inc*., 337 F.3d at 443. Correcting the violation means "taking any necessary action and making any necessary adjustment, including the payment of interest on a refund, if any, at the applicable rate provided for in the contract of the parties." 305.103(a)(1); *In re Kemper*, 263 B.R. 773, 783 (Bankr. E.D. Tex. 2001) ("a correction of a usury violation under § 305.103 must be just that—an acknowledgment of the existence of a usury violation accompanied by the adjustment or correction required in order to bring the transaction into compliance with the applicable usury standard."). The cure must occur and must actually be received by the usury victim prior to the victim's notice of a violation to the usurer.

Strasburger Enterprises, 110 S.W.3d at 577. Just as a pleading alone is insufficient to constitute a demand for usurious interest, a pleading alone is insufficient to serve as a notice to correct a usurious violation. *Strasburger Enterprises*, 110 S.W.3d at 577; *but see* Pagel v. Whatley, 82 S.W.3d 571, 577 (Tex.App.-Corpus Christi 2002, pet. denied) (any usury was cured where creditor's petition acknowledged that the creditor was informed of the "consequences and possibility of a usury violation" and creditor deleted the usurious interest charges on the unpaid account and sued only for lawful interest). Upon receipt of a written usury notice, the creditor should request the obligor to state all damages that have occurred so that the creditor can be sure to correct all violations within the 60-day grace period. On loans secured by real estate and commercial loans, if the loan is paid before the end of its term and the amount of interest received exceeds the maximum rate authorized by law for that period, the lender shall (1) refund the amount of excess to the borrower, or (2) credit the excess against amounts owing under the loan. 302.101(b), 306.004(b). A creditor who complies with this provision is not subject to any of the penalties for usury. 302.101(c), 306.004(c). There is authority that the over-receipt of interest must be solely as a result of a creditor inadvertently receiving usurious interest as a result of the obligor=s actions in prepaying an otherwise non-usurious loan. *Coppedge v. Colonial Sav. & Loan Ass'n*, 721 S.W.2d 933, 938 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *but see Mayfield v. San Jacinto Sav. Ass'n*, 788 S.W.2d 119, 122 (Tex. App.—Houston [14th Dist.] 1990, writ denied). See also section VI.6. above.

B. Usury Savings Clauses.

1. Will Be Given Effect. Texas courts give effect to usury savings clauses. *Woodcrest Assocs., Ltd. v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434 (Tex. App.—Dallas 1989, writ denied); *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777 (Tex. 1977); *Mack v. Newton*, 737 F.2d 1343 (5th Cir. 1984), *reh'g denied, en banc*, 750 F.2d 69 (5th Cir. 1986). *In re Casbeer*, 739 F2d 1496 (5th Cir. 1986); *Pentico v. Mad-Wayler, Inc.*, 964 S.W.2d 708, 714-17 (Tex. App.—

Corpus Christi 1998, no petition). The foregoing cases contain examples of successful usury savings clauses.

2. May Be Simple. A savings clause may be as simple as "but not at any time to exceed the highest rate of interest lawfully chargeable to borrower under the Indicated Rate ceiling of ART. 5069-1.04.'" *Rent Am., Inc. v. Amarillo Nat'l Bank*, 785 S.W.2d 190, 192 (Tex. App.—Amarillo 1990, writ denied).

3. Should Provide For Spreading. Absent a savings clause in a loan agreement, or a clause requiring what would have otherwise been usurious interest charged in any one year to be spread over the term of the loan, the prepayment of interest in excess of 10% per annum in any one year may be a violation of the usury statute. *Miller v. First State Bank*, 551 S.W.2d 89 (Tex. Civ. App.—Fort Worth 1977), *modified and aff'd*, 563 S.W.2d 572 (Tex. 1978); *but see Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777, 782-87 (Tex. 1977). The new statute requires spreading in real estate loans and commercial loans to determine whether the loans are usurious. 302.101; 306.004.

4. Will Not Save All Transactions. Beware, however, that a usury savings clause may not save a transaction that is necessarily usurious by its terms. *Woodcrest Assocs., Ltd. v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434 (Tex. App.—Dallas 1989, writ denied); *Riverdrive Mall, Inc. v. Larwin Mortgage Investors*, 515 S.W.2d 5 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.). The savings clause will not save a transaction if usurious interest has already been received. *ECE Technologies, Inc. v. Cherrington Corp*, 168 F.3d 201, 205 (5th Cir. 1999).

5. May Not Prevent A Charging. A savings clause may not prevent a "charging" of usurious interest from being actionable because the fact that an instrument expressly negates any intent to contract for or receive usurious interest is immaterial to whether the lender "charged" usurious interest outside of the contacts terms. *Hardwick v. Austin Gallery of Oriental Rugs*, 779 S.W.2d 438, 443 (Tex. App.—Austin 1989, writ denied); *but see First S. Sav. Ass'n v. First S.*

Partners, II, Ltd., 957 F.2d 174, 178 (5th Cir. 1992) (savings clause negates any "charging" of usurious interest).

6. Disgorgement Of Excess Interest May Still be Required. A savings clause may prevent a finding of usury, but it may also require the lender to disgorge any interest exceeding of the legal rate. *In re Casbeer*, 793 F.2d 1436, 1447 (5th Cir. 1986).

C. Attempt to Retract the Charging. If a demand has accidentally been sent charging excess interest, then follow-up as soon as possible with a correction letter. In at least one case, this was held to have raised a fact issue on the lender's affirmative defense of *bona fide* error which had to be submitted to the jury. *Lovell v. Western Nat'l Life Ins. Co.*, 754 S.W.2d 298 (Tex. App.—Amarillo 1988, writ denied). One case held that when a usurious loan was voided shortly after it was executed and the loan was never funded, then there was no usury. *Miro v. Allied Fin. Co.*, 650 S.W.2d 938 (Tex. App.—Houston [14th Dist.] 1983, no writ). (See also, 305.103(a), discussed in section VIII.A above.)

D. Invoice Purports to Allow Charging of Interest but None has been Charged. If goods or services are purchased on the basis of a work order or purchase order that is silent on interest, but the subsequent invoice contains a notation that interest at a specified rate will be charged, such interest was probably not agreed to. If your client has not attempted to "charge" that interest, do not include it in your demand letter and do not seek more than 6% interest in your petition. *See White v. Groco Corp.*, 783 S.W.2d 24 (Tex. App.—Eastland 1990, writ denied); *Industrial Disposal Supply Co. v. Perryman Bros. Trash Service*, 664 S.W.2d 756 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); *Watson v. Cargill, Inc., Nutrena Div.*, 573 S.W.2d 35 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.); *Thomas Conveyor Co. v. Porter, Inc.*, 572 S.W.2d 361 (Tex. Civ. App.—Waco 1978, no writ). Note that where parties agree to a specific payment schedule, that schedule determines

whether the rate of interest is usurious or not, regardless of the percentage stated on the face of the instrument.

E. Signed or Paid Invoices. When signed by the debtor, invoices containing stipulations as to interest can evidence a written contract allowing for interest in excess of that allowed where there is no contract. *Augusta Dev. Co. v. Fish Oil Well Servicing Co.*, 761 S.W.2d 538 (Tex. App.—Corpus Christi 1988, no writ); *Bendele v. Tri-County Farmer's Co-op*, 635 S.W.2d 459 (Tex. App.—San Antonio 1982); *aff'd in part, vacated in part*, 641 S.W.2d 208 (Tex. 1982). Likewise, a history of paying invoices containing late charges can constitute an agreement to pay interest. *Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enters*, 625 S.W.2d 295 (Tex. 1981); *Industrial Disposal Supply Co. v. Perryman Bros. Trash Serv.*, 664 S.W.2d 756 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (hundreds of invoices over 8-10 year period evidenced agreement re interest); *Motor 9, Inc. v. World Tire Corp.*, 651 S.W.2d 296 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.). However, partial payment of invoices and a failure to object to unilateral charging of interest constitutes no evidence of an agreement to pay interest. *Tubelite v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex. 1991).

F. Let Borrower Do the Calculating. A lender might be able to avoid "charging" usurious interest by requesting that the borrower compute and pay the principal and interest due under an obligation. A borrower who voluntarily pays usurious interest and principal cannot thereafter recover as overpayment of principal the interest he voluntarily paid. *Cherry v. Berg*, 508 S.W.2d 869 (Tex. Civ. App.—Corpus Christi 1974, no writ). However, there is authority that a lender will be liable if it "receives" usurious interest even though someone else does the calculating. *Perez v. Hernandez*, 658 S.W.2d 697 (Tex. App.—Corpus Christi 1983, no writ). Any excess received should be promptly refunded. Another reason to let the borrower do the calculation is that the lender's calculation, even if done by an attorney and not disclosed to the borrower, may be discoverable. *Oyster Creek Financial Corp. v. Richwood Investments II, Inc.*, 957 S.W.2d 640, 647-

48 (Tex. App.—Amarillo 1997, writ denied) (the court also pointed out that the lender may be forced to do the calculation if the note contains a notice-and-opportunity-to-cure clause).

G. Qualified Commercial Loans. For "qualified commercial loans," the parties may contract for the following additional charges, which will not be considered interest: (1) discounts or commissions to securities underwriters; (2) an option to exchange, redeem or convert loan principal into equity of the obligor or any of its affiliates; (3) an option to purchase equity of the obligor or an affiliate; or (4) a profit participation interest. 306.101(b),(c). A qualified commercial loan is a commercial loan of $3,000,000 or more, if secured by real property, and just $250,000 or more if not secured by real property, and any renewal or extension thereof, even if the renewal is for a smaller amount. 306.001(9). For loans between $250,000 and $500,000 not secured by real property, the loan documents must contain written certification from the borrower that the borrower has been advised to seek, and has had the opportunity to seek, the advice of an attorney and an accountant of the borrower's choice in connection with the commercial loan. 306.001(9)(a). One can aggregate several borrowers or lenders to reach the minimum monetary limits so long as they are part of the "same transaction." 306.001(9).

H. Secondary Mortgage Loans. For secondary mortgage loans, such as home improvement loans, the lender may include the following charges in the loan contract: (1) fees payable to the trustee under a deed of trust, including enforcement fees, (2) attorney's fees for collection if the attorney is not an employee of the lender, (3) court costs for collection, and (4) a fee of $15 for each dishonored check. 342.307. The lender may also collect at closing, or include in the loan principal, fees for the following: (1) title examination and an abstract of title, (2) premiums for title insurance, (3) loan document preparation fees by an attorney who is not an employee of the lender, (4) charges paid by law to public officials to verify whether there are any liens, (5) appraisal

fees, (6) survey fees, (7) premiums for mortgage protection life insurance, and (8) premiums for property insurance. 342.308.

I. Enter Separate Settlement Agreement Regarding Prior Debt. When documenting a settlement of a prior debt, it is best to explicitly extinguish and supersede the prior debt so that no claim can be made that payments under the settlement debt should be regarded as additional interest on the original note. *Scalise v. McCallum*, 700 S.W.2d 682 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Southwestern Inv. Co. v. Hockley County Seed & Delinting, Inc.*, 516 S.W.2d 136 (Tex. 1974). This doctrine can apply to notes that are mere renewals of prior notes. *See Lawler v. Lomas & Nettleton Mortgage Investors*, 691 S.W.2d 593, 595 (Tex. 1985); *see also Robinson v. Rudy*, 666 S.W.2d 507 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (non-suit of action on prior debt was consideration for new note); *but see El Paso Dev. Co. v. Berryman*, 769 S.W.2d 584 (Tex. App.—Corpus Christi 1989, writ ref'd); *Skeen v. Slavik*, 555 S.W.2d 516 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

J. Settlement of Usury Claim. Parties to a usurious transaction may release and settle a claim of usury, but only if the compromise is made in good faith and the instrument evidencing the compromise is not executed to cloak the real transaction. *Southwestern Inv. Co. v. Hockley County Seed & Delinting*, 516 S.W.2d 136 (Tex. 1974); *Finn v. Alexander*, 139 Tex. 461, 163 S.W.2d 714 (1942). However, such releases will receive strict scrutiny and may be invalidated for lack of consideration or as devices to cloak a usurious transaction. *Finn*, *supra* (only consideration for release was another usurious loan); *Skeen v. Slavik*, 555 S.W.2d 516 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (settlement merely carried forward usury from original transaction).

K. Oral Demands. There is authority that oral demands for payment of a debt cannot form the basis for a usury claim if the parties thereafter enter into an integrated non-usurious writing

covering the same debt. *Lesbrookton, Inc. v. Jackson*, 796 S.W.2d 276, 283 (Tex. App.—Amarillo 1990, writ denied).

L. Pleadings. A prayer for interest in a pleading is not a "charging" within the purview of the usury statute. *George A. Fuller Co. of Tex., Inc. v. Carpet Serv., Inc.*, 823 S.W.2d 603, 603 (Tex. 1992). A demand for judgment, containing a prayer for interest, is not a part of the underlying claim between the parties and is not subject to the usury statutes. *Fibergate Corp. v. Research-Cottrell, Inc.*, 481 F. Supp. 570 (N.D. Tex. 1979).

M. Return on Investment. A promise of a certain rate of return on an investment does not constitute "interest" within the meaning of the usury statutes. *Cure v. Sussman*, 795 S.W.2d 804 (Tex. App.--Houston [14th Dist.] 1990, writ denied); *see also Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 19940; *Morgan v. Healy*, 614 S.W.2d 186 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.). However, when the amount invested is not subject to the risk of the enterprise because there is an absolute obligation to repay, then any profits agreed to be paid to the investor must be considered compensation for the use of money and "interest" for purposes of the usury statute. *Johns v. Jaeb*, 518 S.W.2d 857 (Tex. Civ. App.—Dallas 1974, no writ).

N. Highest Rate Allowed by Law. Where a contract expressly provides that past-due payments shall accrue interest at the highest legal rate, the creditor may use the interest rate ceilings and assess both prejudgment and post-judgment interest at the rate of 18%. *Cavalcade Oil Corp. v. Samuel*, 746 S.W.2d 842, 844-45 (Tex. App.—El Paso 1988, writ denied); *Whitehead Utils., Inc. v. Emery Fin. Corp.*, 697 S.W.2d 460 (Tex. App.—Beaumont 1985, no writ) ("highest rate allowed by law" held to mean 18%). The 6% legal interest rate does not apply because the parties are deemed to have specified a rate of interest. *Id.*

O. Move Lending Operation Out of State. The Fifth Circuit recently hold that a Texas obligor who signed promissory notes payable in Mexico with rates of interest exceeding 52% could

not complain on public policy grounds when the Mexican lender took a default judgment against the obligor in Mexico and then domesticated and enforced that judgment under TEXAS UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT. *Southwest Livestock & Trucking Co., Inc. v. Ramon*, 169 F.3d 317, 320-23 (5th Cir. 1999). The court cited with approval its prior decision that a Mississippi choice of law clause in a loan agreement precluded a Texas borrower from asserting Texas' usury statute, which was more stringent than Mississippi's. *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co.*, 642 F.2d 744,745 (5th Cir. 1981). The parties to a contract can choose out-of-state law to govern their transaction under certain circumstances. TEX. BUS. & COM. CODE § 35.51.

VI. DEFENSES

A. Usury Must Be Pled

1. Affirmative Defense or Counterclaim. Usury must be pled or it is waived. *First State Bank v. Miller*, 563 S.W.2d 572 (Tex. 1978). Usury is ordinarily an affirmative defense and cannot be raised unless supported by verified pleading. TEX. R. CIV. P. 93(11) and 94; *Midgett v. J. Edelstein Furniture Co.*, 700 S.W.2d 332 (Tex. App.—Corpus Christi 1985, no writ). However, when raised in a petition, as opposed to an answer, there is authority that the plea need not be verified. *Fears v. Mechanical & Indus. Technicians, Inc.*, 654 S.W.2d 524 (Tex. App.—Tyler 1983, writ ref'd n.r.e.). A counterclaim for usury is a compulsory counterclaim within the meaning of TEX. R. CIV. P. 97(a) and must be brought in the action on the debt or it will be barred. *Madden v. Harlandale Bank*, 574 S.W.2d 590, 591 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

2. Must Plead Damages Specifically. A borrower must specifically pray for recovery of usurious interest paid or it cannot be recovered. *First State Bank v. Miller*, 563 S.W.2d 572 (Tex. 1978); *Smart v. Tower Land & Inv. Co.*, 635 S.W.2d 615 (Tex. App.—Dallas 1982, writ ref'd n.r.e.). There is authority that the pleader must specify whether damages are sought under the

usury or double usury provisions because where a pleading is based entirely on recovery for double usury, no recovery may be had for ordinary usury, and *vice versa*. *Stacks v. East Dallas Clinic*, 409 S.W.2d 842 (Tex. 1966); *Smart v. Tower Land & Inv. Co.*, 635 S.W.2d 615 (Tex. App.—Dallas 1982, writ ref'd n.r.e.); *Carr Well Serv., Inc. v. Skytop Rig Co.*, 582 S.W.2d 500 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

3. Defenses to Usury Must Also Be Pled. Affirmative defenses to a usury claim, like other affirmative defenses, must be pled. *Tri-County Farmer's Co-op v. Bendele*, 641 S.W.2d 208, 210 (Tex. 1982).

B. Accidental and Bona Fide Error.

1. Must Be Pled. In order to avoid liability for usury because of a mistake, the lender must plead, prove and obtain a finding that there was an accidental and bona fide error on his part. *Cochran v. American Sav. & Loan Ass'n*, 586 S.W.2d 849 (Tex. 1979); *Perez v. Hernandez*, 658 S.W.2d 697 (Tex. App.—Corpus Christi 1983, no writ).

2. Elements. The bona fide error defense is only available when the evidence shows that the charge of usury results from ignorance of a material fact or from other unintentional mishaps in office practice or routine which may be fairly characterized as clerical errors. *Commerce, Crowdus & Canton, Ltd. v. DKS Constr., Inc.*, 776 S.W.2d 615 (Tex. App.—Dallas 1989, no writ); *Martinez v. Corpus Christi Area Teachers Credit Union*, 758 S.W.2d 946 (Tex. App.—Corpus Christi 1988, writ denied); *Mayfield v. San Jacinto Sav. Ass'n*, 788 S.W.2d 119 (Tex. App.—Houston [14th Dist.] 1990, writ denied); 305.101; 349.101 (note the burden of proof is higher than 349.101, which governs consumer loans). There must also be a showing that the error was made notwithstanding the maintenance of procedures adopted to avoid error. *Esparza v. Nolan Wells Communications, Inc.*, 653 S.W.2d 532 (Tex. App.—Austin 1983, no writ); *Seitz v. Lamar Sav. Ass'n*, 618 S.W.2d 142 (Tex. App.—Austin 1981, no writ).

3. Must Check Figures. Failure to check over one's calculations can result in a loss of the bona fide error defense. *Miller v. Soliz*, 648 S.W.2d 734,738 (Tex. App.—Corpus Christi 1983, no writ).

4. Intent Is Relevant. If one intends to charge a certain sum, albeit under a mistaken assumption that the sum does not constitute interest or usurious interest, one cannot avail himself of the bona fide error defense. *Commerce, Crowdus & Canton, Ltd. v. DKS Constr., Inc.*, 776 S.W.2d 615 (Tex. App.—Dallas 1989, no writ); *Hardwick v. Austin Gallery of Oriental Rugs*, 779 S.W.2d 438 (Tex. App.—Austin 1989, writ denied).

5. Ignorance of the Law. Ignorance of the usury laws is not a bona fide error and is not a defense. *Wm. C. Dear & Associates, Inc. v. Plastronics, Inc.*, 913 S.W.2d 251, 254 (Tex. App.—Amarillo 1996, n.w.h.); *Johns v. Jaeb*, 518 S.W.2d 857 (Tex. Civ. App.—Dallas 1974, no writ).

6. Applied to Both Usury and Double Usury. There is a split of authority as to whether the bona fide error defense applies to both usury and double usury, but the new statute seems to be clear that the defense applies to both. *See* 305.101.

C. De Minimis Non Curat Lex. The doctrine of *de minimis non curat lex* applies in usury cases. *Hardwick v. Austin Gallery of Oriental Rugs*, 779 S.W.2d 438 (Tex. App.—Austin 1989, writ denied); *Starness v. Guaranty Bank*, 634 S.W.2d 325 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) ($.21 per month held de minimis); *HSAM Inc. v. Gatter*, 814 S.W.2d 887, 890-92 (Tex. App.—San Antonio 1991, writ dism'd by agr.).

D. Other Equitable Defenses. Estoppel and other equitable defenses are not ordinarily applicable in usury cases because usury is a statutory cause of action. *Miller v. First State Bank*, 551 S.W.2d 89 (Tex. Civ. App.—Fort Worth 1977), modified in another respect, 563 S.W.2d 572 (Tex. 1978); *Greever v. Persky*, 156 S.W.2d 566 (Tex. Civ. App.—Fort Worth 1941), *aff'd*, 140 Tex. 64,

165 S.W.2d 709 (1942) (lender cannot invoke unclean hands defense); *but see General Elec. Credit Corp. v. Smail*, 584 S.W.2d 690 (Tex. 1979) (court found parties *in pari delicto* and damages an unjustifiable windfall). However, a party seeking equitable relief, such as an injunction or a foreclosure or the return of property pledged for a debt, must offer to do equity by showing a readiness and willingness to pay the underlying debt on which usurious interest has allegedly been charged. *Poulter v. Jones*, 112 S.W.2d 297, 298 (Tex. Civ. App.—Austin 1937, no writ); *Poff v. Rollinsford Sav. Bank*, 105 S.W.2d 782, 783-84 (Tex. Civ. App.—Amarillo 1937, no writ). But this rule does not apply where a party is claiming double usury because, in that case, the principal debt has been forfeited. *El Paso Dev. Corp. v. Berryman*, 729 S.W.2d 883, 885 (Tex. App.—Corpus Christi 1987, no writ).

E. Only Obligor Has Standing.

1. Usury Claims Are Not Assignable. Penalties under the usury statute are restricted to the immediate parties to the usurious transaction. *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217 (Tex. 1979). Usury claims are not assignable and are limited to the obligor. *South E. Xpress, Inc. v. Bank of Crowley*, 612 S.W.2d 85 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.); *but see Richards v. Moody*, 422 S.W.2d 200 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.). Assignees therefore do not have standing to assert usury. *Allee v. Benser*, 779 S.W.2d 61 (Tex. 1988).

2. Effect of Death. A claim of usury does not survive the death of the obligor. *Orr v. International Bank of Commerce*, 649 S.W.2d 769 (Tex. App.—San Antonio 1983, no writ); *Childs v. Taylor Cotton Oil Co.*, 612 S.W.2d 245 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.). It has been held that claims for common law usury do survive death, *Duggan v. Marshall*, 7 S.W.3d 888, 892 (Tex. App.—Houston [1st Dist.] 1999, n.w.h.), but common law usury claims have now been abolished by statute. 305.007.

3. Guarantors Have No Standing. Guarantors and sureties do not have standing to assert usury. 301.002(a)(13)(B); *RepublicBank Dallas, N.A. v. Shook*, 653 S.W.2d 278 (Tex. 1983); *Greenway Bank & Trust v. Smith* 679 S.W.2d 592 (Tex. App.—Houston [1st Dist] 1984, writ ref'd n.r.e.); *El Paso Refining, Inc. v. Scurlock Permian Corp*., 77 S.W.3d 374, 384 (Tex.App.-El Paso 2002, pet. denied). Likewise, junior lienholders have no standing to assert the penalty provisions of the usury statutes against the senior lienholder. *Allee v. Benser*, 779 S.W.2d 61, 65 (Tex. 1988). Even though a borrower successfully invokes the penalties for double usury and causes the forfeiture of the lender's principal, the lender can still collect the full principal from a guarantor because the guarantor lacks standing to assert usury. *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 222 (Tex. 1979); *Bank of El Paso v. T.O. Stanley Boot Co.*, 809 S.W.2d 279, 290 (Tex. App.—El Paso 1991), *aff'd in part, rev'd in part on other grounds*, 847 S.W.2d 218 (Tex. 1992). Note that guarantors do have standing to challenge the commercial reasonableness of a lender's disposition of collateral under UCC 9.501 and 9.504. *Rabinowitz v. Cadle Co. II, Inc.*, 993 S.W.2d 796, 799-800 (Tex. App.—Dallas 1999, writ requested).

4. Lender Has No Standing. The lender also does not have standing. The policy of the usury law will not permit the usurer to set up his own usury as a defense to avoid his agreement, and the borrower has the privilege of waiving the usury. *Vordenbaum v. Rubin*, 611 S.W.2d 463 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

F. No Usury if Debt is Void. A void debt may not be the subject of a usury claim. *In re T.E. Mercer Trucking Co.*, 16 B.R. 176 (Bankr. N.D. Tex. 1981). Conversely, that a contract is usurious does not cause the contract to be void; rather, the lender recovers the principal without interest and the borrower recovers its costs. *Lockwood Corp. v. Black*, 501 F. Supp. 261 (N.D. Tex. 1980), *aff'd*, 669 F.2d. 324 (5th Cir. 1982); *Vordenbaum v. Rubin*, 611 S.W.2d 463 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

G. Venue. An action for usury may be brought in the county: (1) where the obligor resides at the time the cause of action accrued, (2) where the usurious interest has been charged or received, (3) where the transaction was entered into, or (4) where the creditor resides at the time of the cause of action if the creditor is a natural person, or (5) where the creditor has its principal place of business if the creditor is not a natural person. 305.006.

H. Limitations. The general statute of limitations for a usury claim is four years from the date on which the usurious interest was contracted for, charged, or received. 305.006. For violations of the Consumer Credit Code, limitations are four years from the date of the loan or retail installment transaction **or** two years from the date of the occurrence of the violation, whichever is later. However, in the case of open-end credit transactions, limitations are two years from the date of the occurrence of the violation. *Mayfield v. San Jacinto Sav. Ass'n*, 778 S.W.2d 119 (Tex. App.—Houston [14th Dist.] 1990, writ denied). Payment of interest under a usurious contract triggers the limitations period, regardless of the amount of the interest payment. *Cook v. Frazier*, 765 S.W.2d 546 (Tex. App.—Fort Worth 1989, no writ); *see also Cherry v. Berg*, 508 S.W.2d 869 (Tex. Civ. App.—Corpus Christi 1974, no writ); *Whatley v. National Bank of Commerce*, 555 S.W.2d 500 (Tex. Civ. App.—Dallas 1977, no writ). An answer asserting usury within four years is sufficient to raise usury for limitations purposes and a counterclaim is not required. *Commerce Sav. Ass'n v. GGE Management Co.*, 539 S.W.2d 71 (Tex. Civ. App.—Houston [1st Dist.] 1976), *modified in non-pertinent respects*, 543 S.W.2d 862 (Tex. 1976). Note that the usury limitations provisions may not apply to an action requesting the release of a deed of trust securing an allegedly usurious note. *Cherry v. Berg*, 508 S.W.2d 869 (Tex. Civ. App.—Corpus Christi 1974, no writ).

I. Burden of Proof. The party asserting usury has the burden of proof. *Mays v. Pierce*, 154 Tex. 487, 281 S.W.2d 79 (Tex. 1955). The preponderance of the evidence standard (not clear and convincing) should be used in a usury jury question. *El Paso Refining, Inc. v. Scurlock Permian Corp.*, 77 S.W.3d 374, 381 (Tex.App.-El Paso 2002, pet. denied). Where a loan on its face is not usurious, the borrower has the burden of proving some agreement, device or subterfuge to charge usury and that both parties contemplated that purpose. *Moss v. Metropolitan Nat'l Bank*, 533 S.W.2d 397 (Tex. Civ. App.—Houston [1st Dist] 1976, no writ). Where a loan is usurious on its face, the lender has the burden to prove that the terms of the loan resulted from accidental or bona fide error. *Najarro v. SASI Int'l, Ltd.*, 904 F.2d 1002, 1006 (5th Cir. 1990). If a contract is unambiguously usurious, the court cannot depart from the terms of the contract to make legal what the parties made unlawful. *Ashley v. Edwards*, 626 S.W.2d 107, 111 (Tex. App.—Houston [14th Dist.] 1981, no writ).

J. Non-Assignability. A cause of action for usury is not assignable. *South E. Xpress, Inc. v. Bank of Crowley*, 612 S.W.2d 85 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.); *Smart v. Crawford Bldg. Material Co.*, 638 S.W.2d 228 (Tex. App.—Tyler 1982, no writ) (husband could not assign to wife).

K. Time-Price Differential. The claim that a charge is not interest, but is a higher price based on a credit purchase (i.e., that there is a time-price differential) is an affirmative defense to an action for usury and must be pled. *Commercial Credit Equip. Corp. v. West*, 677 S.W.2d 669 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.). A "time-price differential" is the higher of the two prices a consumer knowingly pays over a period of time as opposed to immediately paying the full, but lesser cash price. *Id.* The seller has the burden of proving that there were two offers and that the purchaser knowingly chose the higher "time" price. *El Paso Dev. Co. v. Berryman*, 769 S.W.2d 584 (Tex. App.—Corpus Christi 1989, writ ref'd).

L. Spreading. Under the common law *Nevels* doctrine, courts were required to analyze a transaction for usury by "spreading" the entire amount of interest, even advance or prepaid interest, over the entire term of the contract. *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937); *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777, 782-87 (Tex. 1977); *Esparza v. Nolan Wells Communications, Inc.*, 653 S.W.2d 532, 538 (Tex. App.—Austin 1983, no writ) (defines "amount of interest allowed" as the amount of interest derived from applying the maximum lawful percentage rate allowed by the usury statute to the principal sums which were unpaid and owing on the date of the charge of which the debtor complains for the period of time that each component principal sum was due and owing). The new statute makes spreading mandatory and extends the doctrine to all commercial loans, not just real estate loans. 302.001(c), 302.101. A good case illustrating how the spreading doctrine applies is *Pentico v. Mad-Wayler, Inc.*, 964 S.W.2d 708, 716-17 (Tex. App.—Corpus Christi 1998, no petition).

M. Rate of Interest, Not Amount. There is authority that one does not commit usury by attempting to charge interest on the wrong amount of principal as long as the proper rate of interest was charged. *McPherson Enters., Inc. v. Producers Co-op. Mktg. Ass'n*, 827 S.W.2d 94, 96 (Tex. App.—Austin 1992, no writ). In that case, the creditor mistakenly charged interest on a principal amount of $41,470 instead of the true principal amount owing, which was $9,816. *Id.* The borrower argued that the amount of interest charged as compared to the amount of interest truly owed was usurious. *Id.* The court held that the lender had charged too much principal (not covered by the statute), but had not charged too high a **rate** of interest; therefore, there was no usury. *Id.* Perhaps the court would have reached a different result if in addition to the charging, the lender had actually received the full amount of the interest charged. *Id.*

N. Payment of Principal. Where the parties had no agreement regarding interest and where, before trial, the debtor pays the creditor the principal alleged to be due, the creditor is barred

from recovering any interest. *Johnson-Walker Moving & Storage, Inc. v. Lane Container Co.*, 548 S.W.2d 500 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.). There is also authority that the tender of the amount due prevents a recovery of prejudgment interest. *Denta Rama, Inc. v. Lavastone Indus. of Cent. Tex., Inc.*, 597 S.W.2d 507 (Tex. Civ. App.—Dallas 1980, no writ); 304.105(b).

O. Opinion of Credit Commissioner Or Court. A person does not violate the usury statute by any acts done or omitted, that conform to: (1) an interpretation of the statute by the Consumer Credit Commissioner, or (2) a decision of an appellate court of this state or of the United States in effect at the time that the acts were done or omitted. 1D.401. The Consumer Credit Commissioner may issue interpretations of the usury statutes from time-to-time. The Commissioner's practice is to publish the Credit Code Letter weekly setting forth his calculation of the various rate ceilings and a synopsis of the interpretive letters that were issued during the previous week. A subscription to the Credit Code Letter can be obtained from the Texas Office of Consumer Credit Commissioner, P.O. Box 2107, Austin, Texas 78768. Their website is http://www.occc.state.tx.us. Go to the Public Documents section. Requests for an interpretation must be published in the Texas Register no later than 10 days after receipt. Interpretations likewise must be published in the Texas Register no later than 10 days after approval by the Commissioner.

P. Fact Issue. Usury is ordinarily a question of law for the court, but where it is not apparent from the face of an instrument, it is a question of fact for the jury. *Dryden v. City Nat'l Bank*, 666 S.W.2d 213 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); *Stedman v. Georgetown Sav. & Loan Ass'n*, 595 S.W.2d 486 (Tex. 1979) (whether a charge is merely a device to conceal usury is a question of fact). Where there is a dispute in the evidence a fact question exists. *See First Bank v. Tony's Tortilla Factory*, 877 S.W.2d 285 (Tex. 1994).

Q. Plead Agreement. Any agreement, oral, written, or implied by course of conduct, is sufficient to make the limits of legal interest inapplicable. *Preston Farm & Ranch Supply v. Bio-*

Zyme Enters., 625 S.W.2d 295 (Tex. 1981). The *Bio-Zyme* case suggests that where there is evidence of a course of dealing between the parties concerning interest, the creditor facing a claim of usury should plead and attempt to prove an implied agreement pursuant to TEX. BUS. & COM. CODE § 2.204. *Id.*; *S.W. Indus. Import & Export, Inc. v. Borneo Sumatra Trading Co.*, 666 S.W.2d 625, 629 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (citing TEX. BUS. & COM. Code § 2.208); *Industrial Disposal Supply Co. v. Perryman Bros. Trash Serv.*, 664 S.W.2d 756 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). However, no agreement will be implied where invoices have not been paid. *Triton Oil & Gas Corp. v. Marine Contractors & Supply*, 664 S.W.2d 443 (Tex. 1982); *Amarillo Equity Investors v. Claycroft Lacy Partners*, 654 S.W.2d 28, 31 (Tex. App.—Fort Worth 1983, no writ); *see also Tubelite v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex. 1991) (partial payment of less than full amount of principal is no evidence of an agreement to pay interest and mere failure to object to a unilateral charging of interest, without more, does not establish an agreement to pay interest between the parties).

R. Subterfuge. A borrower cannot assert a subterfuge of its own making to establish usury without proof that the lender participated in or had actual knowledge of the subterfuge. *American Century Mortgage Investors v. Regional Ctr., Ltd.*,529 S.W.2d 578 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

S. Mental Incompetence. There is authority that where a borrower has successfully avoided all obligations under a note on the grounds of mental incompetence, the borrower loses the right to recover two times the usurious interest paid as a penalty. *O'Quinn v. Beanland*, 540 S.W.2d 526 (Tex. Civ. App.—San Antonio 1976, no writ).

T. FDIC and RTC Not Liable. Claims against the FDIC and RTC for usury cannot be asserted because "such application could have no deterrent effect and would only serve to punish innocent creditors of the failed institution by diminishing available assets.'" *First S. Sav. Ass'n v.*

First S. Partners II, Ltd., 957 F2d 174,178 (5th Cir. 1992); *but see Bradford v. American Fed. Bank*, F.S.B., 783 F. Supp. 283 (N.D. Tex. 1991) (FDIC as receiver subject to usury claims).

U. Federal Preemption for Residential Mortgages. The Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") allows the charging of an unlimited legal rate of interest on loans made on or after April 1, 1980 by qualified financial institutions where such a loan is secured by a first lien on: residential real property; stock in residential cooperative housing corporations; or, residential manufactured homes. 12 U.S.C. § 1735f-7a. *Moore v. United National Bank*, 821 S.W.2d 409, 410-11 (Tex. App.—Ft. Worth 1991, writ denied). This preemption also applies to a loan made by an individual financing the sale of his principal residence. States had the right to opt out of DIDMCA by taking certain specific actions within a specified time period. The State of Texas never undertook such measures and hence the foregoing preemption applies to loans governed by Texas law. *Seiter v. Veytia*, 756 S.W.2d 303 (Tex. 1988); *Pineda v. PMI Mortgage Insurance Co.*, 843 S.W.2d 660 (Tex. App.--Corpus Christi 1992); *writ denied per curiam* 851 S.W.2d 191 (Tex. 1993). The new state statute makes it clear that on loans subject to the federal statute, late charges are considered to be interest and, therefore, covered by the federal preemption of state interest rate limitations. 302.103.

V. Other Helpful Law. Because the usury statutes are penal in nature, the courts have adopted several rules of construction which may be of help to a practitioner seeking to collect debts or judgments. *See Meyer v. Mack Sales, Inc.*, 645 S.W.2d 493 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.). When an allegedly usurious contract, construed as a whole, is doubtful or is susceptible of more than one reasonable construction, a court should adopt the construction which comports with legality. *Heine v. Schendel*, 797 S.W.2d 278 (Tex. App.—Corpus Christi 1990, writ denied); *Missouri-Kansas R.R. v. Fiberglass Insulators*, 707 S.W.2d 943 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). Unless an allegedly usurious contract, by its express and positive

terms, evidences an intent that unearned interest is to be collected in any event, the courts will construe the contract to mean that the parties intended that unearned interest should not be collected. *Gonzalez v. Gainan's Chevrolet City*, 690 S.W.2d 885 (Tex. 1985); *Ballin v. Poston Home Care Ctr Co.*, 749 S.W.2d 164 (Tex. App.—San Antonio 1988, writ denied). Courts will presume that the parties intended a non-usurious contract. *FSS v. Phase I. Electronics of West Texas, Inc.*, 998 S.W.2d 674, 677 (Tex. App.—Amarillo 1999, writ denied). *Asmussen v. Wilson*, 775 S.W.2d 676 (Tex. App.—San Antonio 1989, no writ); *Goode v. Davis*, 135 S.W.2d 285 (Tex. Civ. App.—Fort Worth 1939, writ dism'd judgm't cor.). When interest stated on a note appears to be usurious it must be spread over the term of the loan. *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777 (Tex. 1977); *Standard Sav. Ass'n v. Greater New Canaan Missionary Baptist Church*, 786 S.W.2d 774 (Tex. App.—Houston [14th Dist.] 1990, no writ); *Griffin v. B & W Fin. Co.*, 389 S.W.2d 350 (Tex. Civ. App.—Tyler 1965, no writ); *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937). Payments on an open account, if not earmarked for a specific invoice, will by law be applied to the oldest part of the account even if that part of the account is barred by limitations, *Watson v. Cargill, Inc., Nutrena Div.*, 573 S.W.2d 35, 39 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.). If there is any doubt about the legislative intent behind the usury statutes, the doubt must be construed in favor of the lender. *Pentico v. Mad-Wayler, Inc.*, 964 S.W.2d 708, 714 (Tex. App.—Corpus Christi; 1998, no petition).

X. ATTORNEY'S FEES

A. Attorney's Fees Recoverable. The usury statute expressly allows the recovery of attorney's fees. 305.005. The purpose is to deter usury. *Esparza v. Nolan Wells Communications, Inc.*, 653 S.W.2d 532 (Tex. App.--Austin 1983, no writ).

B. Question for the Court. Formerly, the amount of attorney's fees was an issue for the trier of fact. *Grandview Farm Ctr., Inc. v. First State Bank*, 596 S.W.2d 190 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.). Now, attorney's fees are to be set by the Court. 305.005.

C. Appellate Fees. Appellate attorney's fees are contemplated by the statute. *Mecey v. Seggern*, 596 S.W.2d 924 (Tex. Civ. App—-Austin 1980, writ ref'd n.r.e.); *Commercial Credit Corp. v. Chasteen*, 565 S.W.2d 342 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.) (award of attorney's fees through Supreme Court).

D. Contingency Fees. It has been held that contingency fee awards are not contemplated by the predecessor to 1F.005, *Mecey*, *supra*, but contingency fees have been awarded under the predecessor to 8.01 and 8.02 for violations of the Consumer Credit Code. *Jim Walters Homes, Inc. v. Shuenemann*, 655 S.W.2d 264 (Tex. App.—Corpus Christi 1983), aff'd, 668 S.W.2d 324 (Tex. 1984) (40% contingency for trial, 50% if appealed).

E. No Double Recovery. Just because a party recovers under both usury and double usury claims does not mean the party may recover attorney's fees twice (or the penalty amounts of interest twice). *Smart v. Tower Land & Inv. Co.*, 635 S.W.2d 615 (Tex. App.—Dallas 1982, writ ref'd n.r.e.).

F. Not Limited to Amount in Note. A borrower is entitled to reasonable attorney's fees and is not limited to an amount specified in the usurious note. *Southwestern Inv. Co. v. Hockley County Seed & Delinting, Inc.*, 511 S.W.2d 724 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e.*, 516 S.W.2d 136 (Tex. 1974).

G. Recovery by Creditor. Attorney's fees are recoverable even if the creditor recovers more from the obligor than the obligor's judgment against the creditor for usury. *Esparza v. Nolan Wells Communications, Inc.*, 653 S.W.2d 532 (Tex. App.—Austin 1983, no writ); *see also Dean Vivian Homes, Inc. v. Sebera's Plumbing & Appliances, Inc.*, 615 S.W.2d 921, 927 (Tex. Civ. App.—Waco 1981, no writ). Forfeiture of principal requires forfeiture of attorney's fees as well. *Broady v. Johnson*, 763 S.W.2d 832 (Tex. App.—Texarkana 1988, no writ). Successful creditors

may be able to recover attorney's fees spent defending against a claim of usury. *RepublicBank Dallas, N.A. v. Shook*, 653 S.W.2d 278, 282 (Tex. 1983).