USURY UPDATE

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I. CODIFICATION OF TEXAS USURY LAWS 1997 - 1999.

A. Background

1. **<u>The Texas Constitution</u>**. Texas usury laws, and the authority of the Texas Legislature to enact laws relating to interest, begin with Article XVI, Section 11 of the Texas Constitution, which provides:

> The Legislature shall have the 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 then ten per centum (10%) per annum shall be deemed usurious; . . .

Relevant to any discussion of the 1997 and 1999 changes in Texas usury law and the organization of this law within the Texas Finance Code is the Legislature's authority to "classify loans and lenders," "define interest," and "fix maximum rates of interest."

2. **<u>The Texas Credit Code</u>**. Before September 1, 1997, Texas usury laws were organized almost entirely under Article 5069, Title 79 of the Revised Civil Statutes of Texas, the Texas Credit Code, which set forth the circumstances under which Lenders could make loans providing for interest in excess of 10% per annum. The Texas Credit Code was repealed by the Texas Legislature effective September 1, 1997 and replaced with an interim Texas Credit Title and a newly-enacted Texas Finance Code. The discussion in this outline is devoted primarily to changes in law which were formerly organized under Subtitle One of the Texas Credit Code, Texas Revised Civil Statutes Annotated Article 5069-1.01 - 1.14, and interest allowable on commercial loans.

3. **<u>Codification</u>**. The Texas Legislative Council (an agency of the legislative branch of the state government created under Section 323.001 of the Texas Government Code) has, over the last several legislative sessions, undertaken the statutory revision program mandated by Section 323.007 of the Government Code in order "to clarify and simplify [Texas statutes] and to make the statutes more accessible, understandable, and usable." With respect to Texas usury laws, the effort was made to modify existing

legislation, without substantive changes, by rearranging statutes in a more logical order, employing a format and numbering system which would “facilitate citation of law and accommodate future expansion, eliminate repealed, duplicative, unconstitutional, expired, and other ineffective provisions, and restate the law in modern American English.” August 11, 1997 Memorandum from Leslie L. Pettijohn to Members of Finance Commission. The result of the Texas Legislative Council’s efforts is a relatively concise code which should provide certainty to both lenders and borrowers. After the 1995 legislative session, a House Interim Study Committee was formed to recommend revisions to the Texas Credit Code and the Texas Credit Code Revision Task Force was also formed to draft specific provisions. This Committee and Task Force included representatives with differing concerns regarding usury legislation.

4. **1997 Legislation**. The 1997 Texas legislature enacted two important pieces of legislation, House Bill 1971 ("HB1971") which (a) provided that Article 5069, Title 79 should be referred to as the Texas Credit Title, (b) repealed Chapters 1, 1A, 3, 4 and 5 of the Texas Credit Code and replaced them with Chapters 1B through 1H and 3A, and (c) included numerous substantive changes in usury laws. At the same time the Texas Legislative Council prepared and submitted to the Legislature House Bill 10 ("HB10"), providing for a new Texas Finance Code. The Finance Code is a nonsubstantive revision and codification of several statutes, including the Texas Banking Act, the Texas Savings and Loan Act, the Texas Savings Bank Act, and, for purposes of this discussion, the Texas Credit Code. Title 4 of the Texas Finance Code encompassed the Texas Credit Code without substantive revision.

a. HB1971. In addition to rearranging what was previously in Chapter 1 of the Texas Credit Code under Chapters 1B through 1H of the new Texas Credit Title, HB1971 enacted several substantive changes in Texas usury laws, defining “loan,” “obligor,” “creditor,” “legal interest” (Art. 1B.002(a)(8)), “contract interest” (Art. 1B.002(a)(1)), and “judgment interest” (Art. 1B.002(a)(7), providing for amortization and spreading of interest according to the actuarial method (Art. 1C.101 and Art. 1H.004), clarifying that late charges are covered by the federal preemption of state usury laws for first lien residential loans (Art. 1C.103), providing that charges for interest on a breach of contract which are less than the applicable rate ceiling are not subject to usury penalties (Art. 1F.001(c)), providing that forfeiture of principal is only applicable to a lender who “charges and receives” double the amount of interest allowed by law (Art. 1F.002 and Art. 1F.004), clarifying the application of the four-year statute of limitations and venue provisions (Art. 1F.006(a)) providing that the statutory penalties are the only penalties for violating the usury laws and specifically excluding common law penalties (Art. 1F.007), defining “commercial loan” (Art. 1H.001(5)), “qualified commercial loan” (Art. 1H.001(9)), and “prepayment charge or penalty” (Art. 1H.001(8)), providing that voluntary prepayment charges are not interest (Art. 1H.005), providing that an underwriter's discount or a profit or equity participation on qualified commercial loans is not interest (Art. 1H.101), and allowing agreements to compute interest on the basis of a 360-day year consisting of twelve 30-day months (Art. 1H.003).

b. HB10. The Texas Legislature in 1999 enacted HB10 as a non-substantive codification of the Texas Credit Code into the newly-created Texas Finance Code. The substantive provisions of the Texas Credit Title were not included within the Finance Code, and the Texas Finance Code utilized a different organizational format which resulted in some of the same provisions being placed under two different statutes. The Texas Legislature in its 1999 Session resolved the organization and numbering conflicts in an omnibus codification statute which moved the remaining portions of the old Texas Credit Code and the new Texas Credit Title into the new Finance Code. For the interim period from September 1, 1997 through August 31, 1999, the Texas Credit Commissioner has taken the position that the provisions of the Texas Credit Title, which remained in Article 5069, Title 79 of the Texas Revised Civil Statutes, provide the primary substantive law which was previously found in Chapters 1, 3, 4 and 5 of the Texas Credit Code. See Texas Credit Letter published by the Texas Consumer Credit Commissioner on August 26, 1997. For the law with respect to matters arising from and after September 1, 1997 and before September 1, 1999, reference should be made to Article 5069-1B.001, et seq., instead of to the (interim) Texas Finance Code.

B. 1999 Legislation

The Texas Legislature in 1999 enacted substantive changes to Texas usury laws, for example, changing the definition of a qualified commercial loan (HB2781 and SB172 modifying Section 306.001(9) of the Finance Code) (see discussion at II.B. *infra*). At the same time the Legislature completed the codification process which it began in 1997 by moving all of the provisions, including the Texas Credit Title (which were formerly contained within the Texas Credit Code at Article 5069-1B.001, *et seq.*), into the Texas Finance Code.[*]

1. SB1368. Senate Bill 1368 ("SB1368") at Article 7 contains five parts, including laws relating to credit unions and trust companies. Part 3 of SB1368 incorporates what was previously contained in Article 5069-1B through 1H, organized as follows:

Subtitle A. Interest
Chapter 301. General Provisions
Section 301.001 Short Title. ("This title may be cited as the Texas Credit Title.")
Section 301.002 Definitions
Chapter 302. Interest Rates
Subchapter A. Usurious Interest
Subchapter B. Other Rates and Provisions on Loans Secured by Real Property

[*] In this outline, a citation, for example, to Article 5069-1.03 refers to the old Texas Credit Code, a citation, for example, to Article 1H.101 refers to the interim Texas Credit Title, and a citation, for example, to Section 306.001 refers to the Texas Finance Code, as amended in 1999.

Chapter 303. Optional Rate Ceilings
Subchapter A. Rate Ceilings; Applicability, Competition, and Publication
Subchapter B. Open-End Accounts
Subchapter C. Provisions Applicable to Certain Consumer Loans and Secondary Mortgage Loans.
Chapter 304. Judgment Interest
Subchapter A. General Provisions
Subchapter B. Prejudgment Interest in Wrongful Death, Personal Injury, or Property Damage Case
Subchapter C. Other Prejudgment Interest Provisions
Subchapter D. Exceptions to Application of Chapter
Chapter 305. Penalties and Remedies
Subchapter A. Civil Liability; Criminal Penalty
Subchapter B. Exception from Liability
Chapter 306. Commercial Transactions
Subchapter A. General Provisions
Subchapter B. Provisions relating to Specific Types of Commercial Loans or Transactions.

Senate Bill 1368 replaced the Sections which were installed as Chapters 301, 302, 303, 304, 305 and 342 from the Texas Credit Code in 1997 in HB10 with the provisions which were for the interim period included under the Texas Credit Title, Article 5069-1B through 1H. Attached as Appendix I to this discussion is a conversion table which indicates how provisions from the Texas Credit Code, as it existed before September 1, 1997, were restated in the Texas Credit Title, as it came into effect on September 1, 1997, and further restated under Chapters 301 through 306, the new Texas Credit Title, of the Texas Finance Code.

II. EQUITY KICKERS AND UNDERWRITER'S DISCOUNTS

A. Background

1. A fee paid to a third party, who itself is not the lender, for arranging a loan has long been held not to constitute interest. *See, e.g. Crow v. Home Savings Ass'n of Dallas County*, 522 S.W.2d 459 (Tex. 1975). There is also case law holding that the purchase of publicly-issued securities is not the equivalent of making a loan for purposes of usury laws. *See, e.g. Lubbock Hotel Co. v. Guaranty Bank & Trust Co.*, 77 F.2d 152 (5th Cir. 1935). In form, at least in the case of a "firm underwriting", the underwriters are obligated to purchase the debt securities (which we shall refer to in this outline as bonds) utilizing their own funds and without regard to whether third party purchasers have committed to repurchase the bonds from the underwriters. In practice, underwriters rarely purchase the bonds unless they have already been pre-sold to third parties. Underwriters typically buy the bonds at a discount and resell them to third parties at par, at a premium, or at a lesser discount than the discount at which the underwriter's purchased the securities. It is rare for the underwriters to have to hold a substantial amount of bonds that have not been pre-sold. While in form the underwriter may be viewed as the initial

lender, in substance the underwriter is arranging for a large number of third parties to purchase the bonds, and the spread between the purchase price paid by the underwriters and the purchase price paid by the third parties is similar to a brokerage fee.

2. There are numerous cases that have held that a lender's participation in the revenues or profits of the borrower or the borrower's property does not constitute usury, emphasizing that the existence and amount of the participation is contingent, speculative and unascertainable. *See, e.g. Beaver v. Taylor*, 434 S.W.2d 230 (Tex. Civ. App.--Waco, 1968, writ ref'd n.r.e); *Pansy Oil Co. v. Federal Oil Co.*, 91 S.W.2d 453 (Tex. Civ. App.--Texarkana 1936, writ ref'd). There are cases holding to the contrary. *See, e.g., Thompson v. Hague*, 430 S.W.2d 293 (Tex. Civ. App.-- Ft. Worth 1968, no writ). The cases are not always easy to reconcile, and many turn on the specific facts presented. For more background on the issue, see *Weiner*, *Usury Issues in Equity Participation Loans*, State Bar Newsletter - Real Estate, Probate and Trust Law Section (January 1985).

B. Qualified Commercial Loans

1. H. B. 1971, the 1997 legislation effective September 1, 1997, introduced the concept of a "qualified commercial loan", a term that is only used in connection with the equity kicker/underwriter's discount provision.

2. The term "commercial loan" is defined in Finance Code Section 306.001(5) (interim Article 1H.001(5)) to mean:

> a loan that is made primarily for business, commercial, investment, agricultural, or similar purposes. The term does not include a loan made primarily for personal, family, or household use.

3. As originally written in 1997, Article 1H.001(9) defined a "qualified commercial loan" to mean:

> (A) a commercial loan in the original principal amount of $3,000,000 or more; or
>
> (B) a renewal or extension of a commercial loan in the original principal amount of $3,000,000 or more, whether the principal amount of the loan at the time of its renewal or extension is $3,000,000 or more.

That definition was effective from September 1, 1997 to June 18, 1999, the effective date of Section 1 of SB 172, discussed, *infra*.

4. As originally written, the definition focused on "the original principal amount" of the loan. Accordingly, if a $2,995,000 first advance was made on a $300,000,000 loan, the loan may not have been a "qualified commercial loan" because the <u>original</u> principal amount was less than $3,000,000. By way of contrast, the now repealed

Article 5069-1.07(b), using a $250,000 threshold for the higher rate available for certain loans, spoke in terms of "all sums advanced or agreed or contemplated to be advanced" pursuant to an agreement.

5. There may also have been some question regarding the applicability to syndicated loans or public offerings wherein the aggregate original principal amount was more than $3,000,000 but each individual holder's promissory note or bond was less than $3,000,000. The better reasoned view, and the more purposive interpretation, would result in syndicated loan or publicly issued bond constituting a "qualified commercial loan" if the aggregate principal amount was at least $3,000,000 even though each individual promissory note or bond may have been less than $3,000,000.

6. Many people felt that the $3,000,000 amount was too high a threshold. Others felt that focus on the <u>original</u> principal amount, as contrasted with the amount ultimately to be advanced, was inappropriate.

7. SB172 amended the definition of "qualified commercial loan" in Article 1H.001, effective June 18, 1999, to read as follows:

(9) "Qualified Commercial Loan":

(A) means:

(i) a commercial loan in which one or more persons as part of the same transaction lends, advances, borrows, or receives, or is obligated to lend or advance or entitled to borrow or receive, money or credit with an aggregate value of:

(a) $3 million or more if the commercial loan is secured by real property; or

(b) $250,000 or more if the commercial loan is not secured by real property and, if the aggregate value of the commercial loan is less than $500,000, the loan documents contain a written certification from the borrower that:

(1) the borrower has been advised by the lender to seek the advice of an attorney and an accountant in connection with the commercial loan; and

(2) the borrower has had the opportunity to seek the advice of an attorney and accountant of the borrower’s choice in connection with the commercial loan; and

(ii) a renewal or extension of a commercial loan described by Paragraph (A), regardless of the principal amount of the loan at the time of the renewal or extension; and

(B) does not include a commercial loan made for the purpose of financing a business licensed by the Motor Vehicle Board of the Texas Department of Transportation under Section 4.01(a), Texas Motor vehicle Commission Code (Article 4413 (36), Vernon's Texas Civil Statutes).

This change is effective from June 18, 1999 through August 31, 1999 at which time Article 1H.001 was repealed and is replaced by Finance Code Section 306.001(9) (which in turn was amended by SB172 to read same as the text quoted above).

8. The definition of "qualified commercial loan", as enacted in 1997, applied to all commercial loans with an original principal amount of at least $3,000,000, regardless of the type of borrower or the type of collateral. SB172 made a number of significant changes to the definition.

a. The definition now focuses on the aggregate amount to be loaned or advanced, rather than the original principal amount.

b. The definition now makes clear that all amounts to be loaned or advanced pursuant to the same transaction are aggregated in determining whether the threshold amount has been met, regardless of whether one or more persons is part of the same transaction is making the loans or advances.

c. The $3,000,000 threshold still applies if the commercial loan "is secured by real property". The statute does not state secured primarily by real property. Accordingly, any real property security results in the threshold amount of the loan being $3,000,000.

d. a commercial loan made for the purpose of financing a business licensed under Section 4.01(a) of the Texas Motor Vehicle Commission Code is excluded from the definition of "qualified commercial loan". While this may have been intended to deal with floor plan financing for automobile dealers, the scope of businesses licensed under Section 4.01(a) of the Texas Motor Vehicle Commission Code is considerably broader than merely automobile dealers and their floor plan financings.

e. The threshold, in the case of loans not secured by real property, has been reduced to $250,000. However, if the loan is for less than $500,000, the loan documents must contain a written certification from the borrower that the borrower has been advised by the lender to seek the advice of an attorney and an accountant in connection with the commercial loan and the borrower has had the opportunity to seek the advice of an attorney and accountant of the borrower's choice in connection with the commercial loan. Read literally, whether the lender has notified the borrower or the borrower has sought the advice of an attorney and accountant of its own choice appears to be irrelevant. The key is whether the loan documents contain the written certification to that effect.

f. The requirement regarding seeking the advice of an attorney and an accountant if the loan is for less than $500,000 appears to reflect some concern that smaller business owners need a larger degree of protection than larger business owners (based not on the size of the business but on the size of the loan).

9. Note that although the definition of qualified commercial loan was amended in 1999, there was no amendment in 1999 to Article 1H.101 (now codified as Finance Code Section 306.101).

C. Equity Kicker/Underwriters' Discount Statute - Article 1H.101/Finance Code Section 306.101

1. The statutory provision was enacted in 1997 as Article 1H.101, effective for transactions entered into from and after September 1, 1997. The substantive provision was codified in Finance Code Section 306.101 effective September 1, 1999.

2. The text of the statute is as follows (as codified in Finance Code Section 306.101):

Sec. 306.101. QUALIFIED COMMERCIAL LOAN. (a) The parties to a qualified commercial loan agreement may contract for a rate or amount of interest that does not exceed the applicable rate ceiling.

(b) The parties to a qualified commercial loan agreement may contract for the following charges:

(1) a discount or commission that an obligor has paid or agreed to pay to one or more underwriters of securities issued by the obligor;

(2) an option or right to exchange, redeem, or convert all or a portion of the principal amount of the loan, or interest on the principal amount, for or into capital stock or other equity securities of an obligor or of an affiliate of an obligor;

(3) an option or right to purchase capital stock or other equity securities of an obligor or of an affiliate of any obligor;

(4) an option or other right created by a contract, conveyance, or otherwise, to participate in or own a share of the income, revenues, production, or profits:

(A) of an obligor or of an affiliate of an obligor;

(B) of any segment of the business or operations of an obligor or of an affiliate of an obligor; or

(C) derived or to be derived from ownership rights of an obligor or of an affiliate of an obligor in property, including any proceeds of the sale or other disposition of ownership rights; or

(5) compensation realized as a result of the receipt, exercise, sale, or other disposition of an option or other right described by this subsection.

(c) A charge under Subsection (b) is not interest.

3. Subsection (a) merely provides that the applicable usury ceilings are no different for qualified commercial loans than for other commercial loans. See Finance Code Sections 303.001 *et seq*.

4. Subsection (b) allows the parties to a qualified commercial loan agreement to contract for certain charges and subsection (c) provides that a charge under subsection (b) "is not interest". The statement that these designated charges are not interest is a critical part of the usury analysis.

5. Subsection (b)(1) permits a discount or commission to be paid to one or more underwriters of securities issued by the obligor. This provision should make clear that underwriters' discounts and commissions do not constitute interest. As noted in Section II.A.1., *supra*, a typical underwriter's discount or commission should be viewed as analogous to a brokerage fee paid to a third party and therefore not interest under common law.

6. Subsections (b)(2) and (3) deal with conversion rights, warrants and options to acquire capital stock or other equity securities of an obligor <u>or</u> an affiliate of an obligor. These rights are particularly important in mezzanine financing and venture capital transactions where the upside potential of the issuer provides a considerable incentive to a lender or other investor to make higher risk financing available. These equity participation rights, in addition to those in Subsections (b)(4) and (5), often permit

the obligor to obtain financing at a significantly lower fixed interest rate (or spread over LIBOR or prime rate), or otherwise on terms more favorable to the borrower, than a financing without the equity incentive.

7. Subsection (b)(4) is likely to be more applicable to mortgage lending transactions. It permits the lender to participate in or own a share of the income, revenues, production or profits of an obligor, an affiliate of an obligor or any segment of the business or operations of an obligor or its affiliate or to be derived from ownership rights of an obligor or its affiliate in property, including proceeds of the sale or other disposition of ownership rights.

a. This appears to clearly cover participations in production (such as in a production payment transaction), cash flow, net income or gross revenues, and sale proceeds.

b. It should also cover items such as refinancing proceeds and appreciation in value inasmuch as they are derived from ownership rights in property, but the language is not as clear as that for sale proceeds.

8. Subsection (b)(5) covers compensation resulting from the receipt, exercise, sale or other disposition of any option or right described in subsection (b).

D. Constitutionality

1. Article XVI, section 11 of the Texas Constitution, quoted in Paragraph I.A.1., *supra*, was amended in 1960 to add the legislative authority to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest. There have been very few cases construing this constitutional provision.

2. There is a presumption that all Texas statutes, duly passed by the Texas Legislature, are constitutional. *See, e.g., Proctor v. Andrews*, 972 S.W.2d 729 (Tex. 1998).

3. *Gonzales County Savings & Loan Ass'n v. Freeman*, 534 S.W.2d 903 (Tex. 1976).

a. This case dealt in part with what was Section 5.07 of the Texas Savings and Loan Act which provided, in relevant part, that every savings association may charge

> all reasonable expenses incurred in connection with the making . . . of real estate loans" [and in addition] may charge premiums for making such loans as well as penalties for prepayments or late payments . . . the expenses, fees and charges authorized herein shall be in addition to interest authorized by law,

> and shall not be deemed to be part of the interest collected or agreed to be paid on such loans within the meaning of any law of this State which limits the rate of interest which may be extracted in any transaction.

b. In this case, the savings association charged a 2% "loan fee" on a $38,400 loan. The settlement or closing statement designated the charge as a "loan fee". The borrower sued, alleging that the combination of the loan fee and the stated interest rate caused the one year loan to be usurious. The trial court granted a summary judgment for the savings association. The Court of Appeals reversed and remanded. The Supreme Court affirmed the judgment of the Court of Appeals, thus ruling against the savings association on the motion for summary judgment.

c. The Supreme Court noted the grant of legislative authority to "define interest and fix maximum rates of interest". However, the Supreme Court was obviously concerned that a savings association could label any charge as a "premium", regardless of its amount or purpose, and have that charge excluded from the usury calculation. By contrast, the portion of Section 5.07 dealing with expenses permitted the charging of "reasonable expenses" and thus courts could consider substance over form to determine the reasonableness of the expenses in light of the amount of actual work done. Such a thorough examination would be impossible in those instances where a lender asserted that a charge levied was an open "'premium'". 534 S.W.2d at 907-908.

d. The Supreme Court stated as follows:

> The Legislature has attempted to exclude from consideration as interest <u>a charge which would otherwise plainly fit within the definition of "interest"</u> as set out in Article 5069-1.01(a). With reference to "premiums," Section 5.07 of Article 852a <u>does not purport to define interest</u> and cannot be regarded as an attempt by the Legislature to fix maximum rates of interest. [citation omitted]. In the absence of language setting a maximum rate for such charge <u>or an appropriate modification of the definition of "interest</u>", such "premium" charges will be deemed to constitute interest when seeking to determine the existence or non-existence of usury.

Id. at 908. [emphasis added]

e. Article 5069-1.01(a) in effect at the time at the time of the *Gonzales County* case, defined "interest" as "the compensation allowed by law for the use or forbearance or detention of money [but excluding time price differential arising out of a credit sale]". The definition of "interest" in Finance Code Section 301.001 has not changed materially since the definition in effect at the time of the *Gonzales County* case.

f. The *Gonzales County* case is obviously troublesome because of the language emphasized above. Section 306.101(c) states that a charge under Subsection (b) (*i.e.*,an underwriting discount or equity kicker) "is not interest". The language of Section 306.101(c) is distinguishable from the language in Section 5.07 of the Texas Savings and Loan Act in that Section 306.101 states clearly that any charge under subsection (b) "is not interest", whereas the charges authorized in Section 5.07 of the Texas Savings and Loan Act "shall be in addition to interest authorized by law, and shall not be deemed to be a part of the interest collected or agreed to be paid" on loans by savings associations for the purpose of Texas usury laws. Although this distinction is technical, it may be a significant distinction in dealing with the constitutional authority to <u>define</u> interest.

g. There are other ways to distinguish the *Gonzales County* case. First, the lender there imposed a 2% charge which was labeled a "loan fee". It was not stated in any of the documents to be a "premium" as permitted under Section 5.07. After suit was filed alleging usury, the lender argued that the loan fee was a commitment fee and, if the court did not accept that explanation, it was a "premium". Presumably parties to equity kicker transactions will attempt to document the transactions in a way that does not require later relabeling of terms in order to fit within the statute.

h. Another distinction lies in the fact that the provision allowing premiums is included within a statute permitting associations to charge "reasonable expenses", "premiums" and "penalties for prepayments or late payments". The Supreme Court was obviously concerned that the term "premium" was open-ended and did not permit any judicial scrutiny to protect borrowers from overreaching. By way of contrast, the Supreme Court thought that courts had the ability to determine the reasonableness of expenses in light of the amount of actual work done and stated that "penalties need bear some reasonable relationship to the amount of loss or inconvenience suffered by the lender due to prepayment or late payment by the borrower". *Id*. at 908. Allowing a class of lenders (savings associations) to put the label "premium" on any charge may take away from the courts the ability to protect borrowers from overreaching.

i. There is another important policy distinction between Finance Code Section 306.101 and Section 5.07 of the Texas Savings and Loan Act, albeit a distinction based on policy not discussed in the *Gonzales County* case. Section 5.07 allowed one class of lenders (savings associations) to charge any amount to any borrower for any loan of any type, purpose or amount, by merely labeling any charge as a "premium". Traditionally, most loans made by savings associations were to consumers to finance the acquisition of their primary residences. This case was decided before legislation in the late 1970s to permit rates higher than 10% per annum on single-family residential loans, and before the federal usury preemption for first lien residential loans. The loan involved in the case was for $38,400 to purchase or construct two residential properties. Thus, although Section 5.07 was not limited to single-family residential loans, the Supreme Court may have been influenced by the potential dangers created for the average family in connection with a loan for personal, family or household purposes.

j. By contrast, Section 306.101 applies only to certain commercial loans in excess of $250,000 and only certain types of consideration (*i.e.,*underwriting discounts and equity kickers). Although it is not limited to one class of lenders, it does exclude loans made primarily for personal, family or household use and loans below $250,000. Thus, the average consumer will not be subject to Section 306.101.

4. If the courts were to say, as the Supreme Court did in the *Gonzales County* case, that Section 306.101 "does not purport to define interest", then presumably the only way that the Legislature can exercise the power granted in the Constitution is to insert in the paragraph defining "interest" (formerly Article 5069-1.01(a), and now Finance Code Section 301.002(4)) every exclusion from the definition of "interest". Such an emphasis of form over substance does not appear to further any purpose of protecting borrowers. The same rationale could be applied to Finance Code Section 306.005 (discussed *infra* at Paragraph III.A.) or any other provision of the Finance Code outside of Section 301.002(a)(4) reciting that a fee or charge is not interest.

5. Another argument can be made in support of Section 306.101. There are numerous cases that have held that the equity kickers or near-equity kickers involved in those cases did not cause a loan to be usurious. In a number of cases, the court ultimately determined that the transaction did not involve a "loan" for usury purposes. In others, the

court determined that the amount to be received by the lender was contingent, speculative and of unascertainable value. Also, there were cases that held that the equity kickers or near-equity kickers did result in the loan being usurious. Accordingly, this is not a situation in which a class of consideration had clearly been held to constitute interest for usury purposes and the Legislature was attempting to overrule the common law. (See the first emphasized language quoted in Paragraph II.D.3.d., *supra*.) A strong argument can be made that Section 306.101 attempts in large part to clarify the common law, at least with respect to the types of considerations and types of loans covered by Section 306.101.

6. Another argument in support of Section 306.101 lies in competitive equality for Texas-based lenders. Whenever the parties to a transaction may lawfully choose the law of another state (such as New York) which exempts large business transactions from usury limitations, they obviate the need to be concerned with Texas usury limitations. Thus, for numerous transactions the parties choose New York law, rather than Texas law. However, the facts do not always permit the parties to choose New York law (or the law of another favorable jurisdiction). All of the contacts among the parties in the transactions may be in Texas and, accordingly, it may not be possible to effectively choose the law of another jurisdiction under either Texas Business & Commerce Code Section 35.51 or the common law. Section 306.101 does eliminate some of the competitive disadvantages of Texas-based lenders. This argument can be made as to any type of consideration or any type of transaction. However, given the limited scope (*i.e.*, certain commercial loans of $250,000 or more) of Section 306.101, this argument may have more validity.

7. HB 1971, creating Article 1H.101 (now codified as Finance Code Section 306.101), was not primarily the result of a lending institution-led statute. It arose out of a task force, appointed by Representative Marchant (Chairman of the House Financial Institutions Committee), and was comprised of representatives of the financial services industry, the small business community and consumer groups. The task force was chaired by Texas Consumer Credit Commissioner Leslie Pettijohn. The task force itself was an outgrowth of an interim study committee authorized by the House of Representatives. Section 306.101 in particular reflects the competing policy considerations of freedom of contract versus the need to protect necessitous consumers. It would be most unfortunate if a project with as much thought and debate as this is struck down on constitutional grounds.

8. In *Community Finance & Thrift Corp. v. State*, 343 S.W.2d 232 (Tex. 1961), the Texas Supreme Court held unconstitutional a statute that provided that the making of a loan by a lender, and simultaneous sale of installment investment certificates to the borrower as a condition of granting the loan, were to be considered two separate transactions so that periodic payments on the certificates were not considered periodic payments on the loan. The Supreme Court agreed with the conclusion of the Court of Civil Appeals which held that although the statute itself authorized qualified corporations to lend money and charge a lawful rate of interest, the statute was unconstitutional because application of the statute authorized the charging of usurious interest in violation

of Article XVI, Section 11 of the Texas Constitution. *Id.* at 233. See *State v. Community Finance & Thrift Corp.*, 334 S.W.2d 559, 568 (Tex. Civ. App.-Austin 1960, writ ref'd n.r.e.). The statute in question was enacted prior to the 1960 amendment to Article XVI, Section 11 of the Texas Constitution which granted the Legislature the authority to set maximum rates of interest. The lenders in *Community Finance* contended that even if the statute was unconstitutional when enacted, it was validated by the 1960 constitutional amendment. The Supreme Court stated that the statute did not purport to define interest and could not be regarded as an attempt by the Legislature to fix maximum rates of interest. Because the Legislature at that time had not enacted legislation fixing maximum rates of interest greater than 10% per annum, the Supreme Court held that the statute would be unconstitutional even under the 1960 constitutional amendment. 343 S.W.2d at 234. The scheme involved in *Community Finance* appears, at least with 1999 hindsight, to be a poorly disguised attempt to extract excessive interest from consumers. The statute made no attempt to define interest or fix any maximum rate of interest. The scheme involved in the statute clearly resulted in the consumer paying more than 10% per annum on the amount of funds outstanding from time to time when the two separate transactions are, as they logically should be, combined as periodic reductions of the principal balance.

III. PREPAYMENT CHARGES AND LATE FEES

Prepayment charges and late fees and their treatment under Texas usury law have been subjects of discussion and interpretation for years in Texas case law. Applying the definition of interest as "compensation for the use, forbearance or detention of money," (Texas Finance Code Section 301.002(4)), a prepayment charge is not interest, but rather consideration for the privilege of prepaying an obligation (and terminating the use, forbearance or detention of money). A late fee, however, may more easily be considered as "compensation" for the "detention of money" for a period in addition to the contractual payment period and therefore as interest, except to the extent to which it is characterized as a reasonable charge for the additional administrative burden of collecting the late payment. 1997 Legislation, now codified within the Texas Finance Code, provides more certainty as to whether and how a prepayment charge or a late fee should be considered in determining whether a loan is usurious.

A. Prepayment Charges

1. Before the 1997 Legislation, Texas courts typically held that a prepayment charge, as long as it did not equal or exceed the stated interest rate for the respective loan, did not constitute interest. *See, e.g., Ware v. Traveler's Indem. Co.*, 604 S.W.2d 400 (Tex. Civ. App.--San Antonio 1980, writ ref'd n.r.e.). The usual rationale employed by the courts was that a prepayment charge was not a fee imposed for the use of money, but rather a freely bargained-for consideration for the right to repay a loan at a time earlier than the loan's maturity date. *See e.g., C.C. Port, Ltd. v. Davis-Penn Mortgage Co.*, 61 F.3d 288 (5th Cir. 1995) (applying Texas law); *compare Abramoff v. Life Ins. Co. of Georgia*, 92 B.R. 698 (Bankr. W.D. Tex. 1988) (applying Texas law) (holding that acceleration penalty, which is an imposed fee, is interest for purposes of usury law).

2. Section 306.001(8) of the Texas Finance Code, which applies to "commercial loans," defines "prepayment penalty" as follows:

> "Prepayment Penalty" means compensation paid by or that is or will become due from an obligor to a creditor solely as a result or condition of the payment or maturity of all or a portion of the principal amount of a loan before its stated maturity or a regularly scheduled date of payment, as a result of an obligor's election to pay all or a portion of the principal amount before its stated maturity or a regularly scheduled date of payment.[1]

3. Section 306.005 of the Texas Finance Code (Article 1H.005 of the interim Texas Credit Title) provides with respect to a commercial loan:

> A creditor and an obligor may agree to a prepayment penalty in a loan subject to this chapter. A prepayment is not interest.

B. Late Charges and Default Interest

1. In Texas, unlike many other jurisdictions, a late charge is generally considered interest because the definition of "interest" includes the compensation for the <u>detention</u> of money. *See, e.g., Parks v. Lubbock, 92* Tex. 635, 51 S.W. 322 (1899).

2. There are numerous Texas cases that have held that interest at the maximum rate permitted by law may be lawfully charged on past due installments of principal and past due installments of interest, if the loan documents so provide. *See, e.g., Crider v. San Antonio Real Estate, Bldg. & Loan Ass'n,* 89 Tex. 597, 35 S.W. 1047 (1896); *Bothwell v. Farmers & Merchants' State Bank & Trust Co.,* 120 Tex. 1, 30 S.W.2d 289 (1930).

3. The "open account" or "legal interest" statute, formerly Article 5069-1.03 and now codified in Finance Code Section 302.002, provides, in relevant part, that in the absence of an agreement regarding payment of interest, the creditor may charge and receive legal interest at the rate of 6% per annum beginning on the 30th day after the date on which the amount is due. There has been a tremendous amount of case law dealing with issues such as whether there was an agreement specifying a rate of interest, whether interest was charged during the statutory 30 day interest-free period, whether the actions of the creditor amounted to "charging" interest for the purpose of the usury penalty provisions and whether the 6% interest rate under former Article 5069-1.03 or the prejudgment interest rate under former 5069-1.05 (now codified in Finance Code

[1] Section 301.002(a)(15) of the Texas Finance Code defines "prepayment penalty" with respect to loans other than commercial loans as the "consideration agreed on and contracted for a discharge of a loan, other than a loan governed by Chapter 306 [Qualified Commercial Loans], before its maturity or a regularly scheduled date of payment, as a result of an obligor's election to pay all of the principal amount before its stated maturity or a regularly scheduled date of payment."

Sections 304.101 *et seq*.) applies.

4. There are numerous Texas cases holding, in particular contexts, that a late charge does not constitute interest. *See, e.g., Maloney v. Andrews*, 483 S.W.2d 703 (Tex. Civ. App.--Eastland 1972, writ ref'd. n.r.e.) (*bona fide* lease agreement); *Tygrett v. University Gardens Home Owner's Ass'n.*, 687 S.W.2d 481 (Tex. App.--Dallas 1985, writ ref'd n.r.e.) (condominium association assessments); *Sunday Canyon Property Owners Ass'n v. Annett*, 978 S.W.2d 654 (Tex. App.--Amarillo, 1998, no writ) (subdivision property owners' association maintenance charges); *Bexar County Ice Cream Co. v. Swenson's Ice Cream Co.*, 859 S.W.2d 402 (Tex. App.--San Antonio 1993, writ denied), *overruled on other grounds Barruza v. Koliba*, 933 S.W.2d 164 (Tex.App.-- San Antonio 1996) (franchise agreement).

5. Section 306.006 of the Finance Code (Article 1H.006 of the interim Texas Credit Title) provides with respect to commercial loans:

> In addition to the interest authorized by this chapter, the parties to a commercial loan may agree and stipulate for:
>
> (i) a delinquency charge on the amount of any installment or other amount in default for a period of not less than 10 days in <u>a reasonable amount not to exceed five percent of the total amount of the installment</u>; . . . [Emphasis supplied.]

In contrast with Section 306.005 (interim Article 1H.005 of the Texas Credit Title) (dealing with prepayment charges) and Section 306.101 (interim Article 1H.101) (dealing with equity kickers on qualified commercial loans), Section 306.006 does not "define interest" by specifically providing that delinquency charges are "not interest." To the contrary, to resolve an uncertainty created by a 1988 Texas Supreme Court case holding that late charges are not subject to the federal usury preemption, *Seiter v. Veytia*, 756 S.W.2d 303 (Tex. 1988), Section 302.103 of the Finance Code (interim Article 1C.103) specifically provides that late charges are "interest", and therefore covered by the federal preemption for first lien residential loans that are otherwise subject to the federal preemption.

By placing Section 306.006 in the context of "commercial loans," and providing only that the parties may agree and stipulate for a delinquency charge . . . in a reasonable amount . . . ," the Legislature has not completely resolved commercial uncertainty about whether and in what amount a lender and borrower may contract for late fees. While a fair construction of Section 306.006 would seem to be that any late charge which is in "a reasonable amount not to exceed five percent" may be contracted for, charged or received "in addition to" the interest otherwise authorized by Chapter 306, Section 306.006, as written, allows for the inference that a late charge of less than five percent of an installment could be considered to be unreasonable. As such, it would seem that at least the amount of any late fee which is unreasonable or is in excess of five percent should be considered "unauthorized" additional interest for purposes of determining whether a loan is usurious. The “unauthorized” additional interest should be subject to spreading pursuant to Finance Code Section 306.004 (interim Article 1H.004 of the Texas Credit Title).

IV. SELECTED RECENT CASES.

A. General Background; Prejudgment Interest

1. Section IV will discuss selected cases reported during the period 1996 through July 1999. The overwhelming majority of the cases reported during that time period and citing Article 5069 dealt with the right to interest under old Article 5069-1.03 (interim Article 1C.101 of the Texas Credit Code, now Section 302.002 of the Finance Code) or prejudgment interest under old Article 5069-1.05(6) (interim Article 1E.101 *et seq.* of the Texas Credit Code and now Section 304.101 *et seq.* of the Finance Code).

2. Old Article 5069-1.03, often referred to as the "open account" or "legal interest" statute, provided as follows:

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

Finance Code Section 302.002 (interim Article 1C.002 of the Texas Credit Title) now provides as follows:

> 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 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.

Much of the existing case law deals with the specific language of Article 5069-1.03, and in particular the phrase "contracts ascertaining the sum payable". The outcome of some of the existing case law may have been different based on the revised statutory language.

3. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), held that equitable prejudgment interest would be awarded in personal injury and wrongful death cases and that the rate for equitable prejudgment interest would be the same as the postjudgment interest rate established under old Article 5069-1.05, with interest to be <u>compounded daily</u>. In *Cavnar*, the Court announced two major policy reasons for allowing injured victims and survivors to recover prejudgment interest at the postjudgment interest rate: to encourage settlements and to discourage delay.

4. *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929 (Tex. 1988), involved a suit for

damages caused by the improper installation of a roof. Because old Article 5069-1.03 applied only to contracts ascertaining the sum payable, and the contract involved there contained no measure by which a sum payable could be ascertained for damage resulting from failure to properly install the roof, old Article 5069-1.03 could not be the basis for awarding prejudgment interest to Olcott. The Court then stated that the policy reasons behind its holding in the *Cavnar* case also applied in cases such as *Perry Roofing* where the amount of damages is not ascertainable from the face of the contract itself. Thus, the Court allowed prejudgment interest at the postjudgment interest rate then provided in old Article 5069-1.05.

5. As part of a package of legislation generally known as "tort reform", the Legislature added Section 6 to old Article 5069-1.05 providing for judgments in wrongful death, personal injury and property damage cases to include prejudgment interest at the same rate of postjudgment interest at the time of the judgment. The interest is computed on a simple (non-compounded) interest basis and begins to accrue on the earlier of (i) 180 days after the date the defendant receives written notice of a claim or (ii) the day the suit is filed. Section 6 of old Article 5069-1.05 is now codified in Section 304.101 *et seq.* of the Finance Code (interim Section 1E.101 of the Texas Credit Code).

B. Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507 (Tex. 1998) involved a claim for economic injuries, rather than wrongful death, personal injury or property damage. The relevant issue was what amount of prejudgment interest should be permitted. The Court held that, because this did not involve wrongful death, personal injury or property damage, Section 6 of old Article 5069-1.05 did not apply by its terms. Accordingly, this case was governed by the common law. The Court adopted the Legislature's approach to prejudgment interest and held that, under the common law, prejudgment interest begins to accrue on the earlier of (i) 180 days after the date a defendant receives written notice of a claim or (ii) the date suit is filed. Prejudgment interest accrues at the rate for postjudgment interest and is computed as simple interest (rather than compound interest). The Court announced that its common law prejudgment interest would apply to all cases in which judgment is rendered on or after December 11, 1997 and to all other cases currently in the judicial process in which the issue has been preserved.

***C. Great American Ins. Co. v. North Austin Mun. Util. Dist. No. 1,* 950 S.W.2d 371 (Tex. 1997) (*per curiam*)**.

1. This case involved a suit by a utility district against a commercial surety on payment and performance bonds and against the principal contractor based on defects in the construction of a well. The utility district was awarded damages for breach of contract. The issue in this case was the calculation of prejudgment interest. Not surprisingly, the surety and the contractor asserted that the MUD was entitled to only 6% per annum prejudgment interest pursuant to old Article 5069-1.03 while the MUD claimed that it was entitled to prejudgment interest at the postjudgment rate pursuant to old Article 5069-1.05.

2. The court of appeals held that old Article 5069-1.03 did not apply inasmuch as damages for breach were not ascertainable from the face of the contract because the parties had to resort to extrinsic evidence to determine the actual amount of damages.

3. The Supreme Court held that old Article 5069-1.03

> ...applies when calculating prejudgment even if extrinsic evidence is needed to quantify contract damages so long as the contract fixes a measure by which the sum payable can be ascertained with reasonable certainty in light of the attending circumstances. We disapprove of those court of appeals opinions holding that 5069-1.03 cannot be applied when resort to extrinsic evidence to determine damages is necessary.

905 S.W.2d at 373.

D. Duzich v. Marine Office of America Corp., 980 S.W.2d 857 (Tex. App.--Corpus Christi, 1998, pet. filed), held that the Ship Mortgage Act, 46 U.S.C. Section 926(d), preempts Texas usury law in connection with a preferred ship mortgage.

E. Greathouse v. McConnell, 982 S.W.2d 165 (Tex. App.--Houston [1st Dist.] 1998, pet. denied), reaffirmed well settled law that usury is a defense personal to the debtor, one that a guarantor may not interpose. This was a "suit within a suit" legal malpractice case wherein the guarantor alleged that his attorney should have raised the affirmative defense of usury.

F. Varel Mfg. Co. v. Acetylene Oxygen Co., 990 S.W.2d 486 (Tex. App--Corpus Christi 1999, no pet.), dealt with an open account transaction. The invoice contained a printed notation that finance charge at the rate of 18% per annum would be added if the invoice was not paid by the 20th day of the month. In all but one instance, no interest was ever added to the balance. The court reiterated existing law that having the preprinted language on the invoice, where the creditor took no further action to charge or collect any interest from the debtor, did not constitute "charging" usurious interest for purposes of the usury penalty statute, and that a pleading by itself does not constitute "charging" usurious interest for purposes of the Texas usury penalty statute.

G. Advantage Group Inv., Inc. v. Pacific Southwest Bank, 972 S.W.2d 866 (Tex. App.--Corpus Christi 1998, pet. denied), held that because a party had failed to verify its usury defense pursuant to Texas Rule of Civil Procedure 93 which provides that unless a pleading that asserts that a contract is usurious is verified, "no evidence of usurious interest as a defense shall be received."

H. AU Pharm., Inc. v. Boston, 986 S.W.2d 331 (Tex. App.--Texarkana 1999, no pet.)

1. The parties entered into a settlement agreement providing for AU to pay Boston $140,000 by a date certain, and stated that the parties specifically agreed "that any interest to be charged on the Settlement Proceeds to equal zero (0) percent." *Id.* at 333. AU failed to pay the $140,000 by the date certain. The trial court awarded damages of $140,000 plus prejudgment interest at the rate of 6% per annum. AU challenged the grant of prejudgment interest.

2. The court held that old Article 5069-1.03 did not apply. By its terms, Article 5069-1.03 applied when no specified rate of interest is agreed upon by the parties. Here the

parties had specifically agreed upon zero percent interest.

3. It did not matter that the interest being sought was interest after maturity. The Texas Supreme Court had previously held in *Petroscience Corp. v. Diamond Geophysical, Inc.*, 684 S.W.2d 668 (Tex. 1984), that when a note specifies a rate of interest before maturity but is silent about any rate after maturity, old Article 5069-1.03 did not apply and the prematurity rate is implied as the post-maturity rate. The court applied the same rule to the Settlement Agreement.

4. The court also rejected the argument that recovery of prejudgment interest at the statutory rate is justified on equitable grounds. Again, the key fact was that the parties had specified interest at zero percent per annum.

5. The court also denied any postjudgment interest. Section 1 of old Article 5069-1.05 (now Finance Code Section 304.002) provides that a judgment on a contract that provides for specific rate of interest earns interest at a rate equal to the lesser of the rate specified in the contract or 18% per annum. Because the agreement here provided for a specific interest rate of zero percent, the statute mandates postjudgment interest at the rate of zero percent per annum.

6. The lesson to be learned: provide for postmaturity interest; assume that the obligor will default.

I. Concord Oil Co. v. Pennzoil Exploration and Production Co., 966 S.W.2d 451 (Tex. 1998), held that prejudgment interest could not be awarded under common law in connection with a dispute over oil and gas proceeds when that award would be contrary to statutes permitting suspension of payments, without interest, on oil and gas proceeds where there is a dispute concerning title to the oil and gas. Texas Natural Resources Code Sections 91.402(b)(1) and 91.403(b).

J. Lentino v. Cullen Center Bank & Trust, 919 S.W.2d 743 (Tex. App.--Houston [14th Dist.] 1996, writ denied).

1. Eduardo and Jorge Lentino individually executed separate promissory notes for $150,000 to the Bank. Two years later, Eduardo and Jorge Lentino and four other parties, jointly and severally, executed a new promissory note to the Bank in the principal amount of $2,252,250. Eduardo and Jorge also guaranteed payment of the $2,252,250 note.

2. Two years later, Eduardo and Jorge entered into separate compromise settlement agreements with the Bank which provided that (i) Eduardo and Jorge were released from their joint and several liability under the second note and the guaranty agreements, (ii) if Eduardo or Jorge defaulted on their new notes the defaulting party could be liable for the outstanding balance on the $2,252,250 note and (iii) Eduardo and Jorge waived all affirmative defenses and causes of action relating to the loan documents. They also executed new promissory notes in the amounts of $148,842 and $171,186.

3. Eduardo and Jorge defaulted on the new notes. The Bank filed suit against them

on the new notes. Eduardo and Jorge raised a number of defenses, including usury. The Bank filed a motion for partial summary judgment requesting the trial court to hold that the compromise settlement agreement barred all affirmative causes of action relating to the underlying loan documents. The trial court granted the Bank's motion.

4. The alleged usury problem arose out of the requirement that Eduardo and Jorge jointly and severally execute the new $2,252,250 note, making them jointly and severally liable with third parties for an amount far exceeding the amount of their existing loans, based on *Alamo Lumber Co. v. Gold,* 661 S.W.2d 926 (Tex. 1983). The court held that a fact issue existed as to whether the $2,252,250 note obligated Eduardo and Jorge to pay interest exceeding the maximum lawful rate.

5. The court went on to discuss the issue of purging a transaction of usury, which requires, at a minimum, the cancellation of the obligation tainted by the usury and the creation of a new obligation free of usury. When the original usurious obligation transcends into the subsequent agreement, the release is unenforceable.

6. The court held that there was a fact question as to whether the compromise settlement agreement carried forward the usury contained in the $2,252,250 note because if either Eduardo or Jorge defaulted on their notes the defaulting party could be liable for the entire $2,252,250.

K. Bishop v. First Interstate Bank of Texas, N.A., 1996 WL 515507 (Tex. App.--Houston [14th Dist.] 1996, writ denied) (not designated for publication). Law firm partnership had borrowed $365,000 from Bank before Bishop P.C. joined the firm. The partnership renewed and expanded the loan to $400,000, including an $80,000 additional advance. Bishop individually, together with the other partners in the Law firm, jointly and severally guaranteed payment of the loan. Bishop and Bishop P.C. alleged that the Bank required them to assume the pre-existing debt of the partnership before it would approve the advance of $80,000 in new funds, thereby creating a problem under *Alamo Lumber Co. v. Gold*, *supra*. The court found *Alamo Lumber* distinguishable. Bishop P.C., as a partner in a general partnership, was jointly and severally liable for all debts and obligations of the partnership under applicable partnership law. Because Bishop P.C.'s liability arose through operation of law, and not through a demand by a lender, Bishop P.C. had no *Alamo Lumber* claim. Bishop individually had no *Alamo Lumber* claim based on the Bank's requirement that he jointly and severally guarantee payment of the loan. The defense of usury is available only to the obligor on the note, and not the guarantor. *See, e.g., Moore v. Liddell, Sapp, Zivley, Hill & LaBoon,* 850 S.W.2d 291 (Tex. App.--Austin 1993, writ denied).

L. William C. Dear & Assocs., Inc. v. Plastronics, Inc., 913 S.W.2d 251 (Tex. App.--Amarillo 1996, writ denied), addressed the issue of compounding of interest. Dear charged Plastronics interest at 1% per month (12% per annum), compounded monthly, on an open account. Old Article 5069--1.03 allowed interest at 6% per annum. The charge at 12% per annum simple interest clearly exceeded the usury ceiling. The real issue was whether the creditor had exceeded double the usury ceiling, thereby triggering the forfeiture of principal under old Article 5069-1.06(2). Dear argued that the Texas Supreme Court had condoned the practice of compounding interest in the *Bothwell* case, *supra*, at Paragraph III.B. The court here distinguished *Bothwell* because in *Bothwell* there was an agreement in which the right to compound was extended whereas old Article 5069-1.03 is silent about compounding. By contrast, Section 3(a) of old Article 5069-1.05 (now codified in Section 304.006 of the Finance Code) provides for annual compounding of postjudgment interest. The court in *Dear* concluded that the omission of any reference in old Article 5069-1.03 reflects an intent to disallow compounding when the parties have not otherwise agreed. Old Article 5069-1.06(2) is now codified in Sections 305.002 and 305.004 of the Finance Code.

M. Teate v. The Mutual Life Ins. Co. of N. Y., 965 F.Supp. 891 (E.D. Tex. 1997), also dealt with compounding of interest. That case involved construction of Texas Insurance Code Article 21.55, Section 6, which makes the insurer that fails to make payment of certain claims, liable for interest at 18% per annum. The question was whether the 18% per annum is to be compounded annually. The statute is silent regarding compounding. Relying in part on the contrast between Article 21.55, Section 6 and Section 3(a) of old Article 5069-1.05, the court here refused to imply compounding.

N. Robert Joseph Phillips Living Trust v. Scurry, 988 S.W.2d 418 (Tex. App.--Eastland 1998, writ denied).

1. Phillips lent money to Scurry for home improvements. Scurry's note provided for interest at 12% per annum and was secured by a lien on her house. The loan documents contained a usury savings/rebate provision.

2. Because the deed of trust was a junior lien deed of trust and Phillips was not a licensed lender at the time the note and deed of trust were executed, he could not contract for, charge or receive more than 10% per annum under old Article 5069-5.01(2) (now codified in Finance Code Section 344.002). If the deed of trust had been a first lien deed of trust, the 12% per annum interest rate would not have been usurious.

3. Phillips argued that he had no actual knowledge of the existing first lien; the loan documents did not mention the first lien. The second lien documents required Scurry to discharge any prior liens. While Phillips had no actual knowledge of the first lien deed of trust, he did have constructive notice by virtue of the fact that it was recorded. The court held that Texas Property Code Section 13.002, dealing with constructive notice, is designed to preserve the order of priority among lienholders and to protect the rights of a prior lienholder against the actions of a subsequent lienholder; it does not conclusively establish an intent to charge usurious interest.

4. The court focussed on the savings clause as evidence of Phillips' intent to reduce the stated interest to a lawful rate in case the loan turned out to be usurious, even though the court recognized that he clearly intended to charge 12% per annum on the principal.

5. The trial court had granted Scurry's motion for summary judgment and awarded usury penalties against Phillips. Based on the presence of the savings clause, the absence of actual knowledge by Phillips of the existence of the first lien deed of trust, and the fact that the documents were not usurious on their face, the court held that a material question of fact existed

as to whether the parties intended to enter a lawful contract (rather than violating the usury laws). Accordingly, the summary judgment in favor of Scurry was reversed.

O. Parhms v. B&B Ventures, Inc., 938 S.W.2d 199 (Tex. App.--Houston [14th Dist.] 1997, writ denied), is another case involving a usury savings clause.

1. Ventures entered into Contract for Deed to sell residential real estate to Parhms. The contract included a late charge of $15 per day for monthly payments not received by the first day of the month. Parhms was delinquent on nearly every payment for approximately the first year. When Ventures attempted to terminate the Contract for Deed, Parhms filed suit alleging that the late charges together with the other interest were usurious. Each side moved for summary judgment. The trial court granted Ventures' motion for summary judgment.

2. The parties acknowledged that the question of whether a transaction is usurious is determined by reference to the maximum amount of interest that can be lawfully charged over the full term of the loan, citing old Article 5069-1.7(a) (now Finance Code Section 302.101) and various cases upholding the spreading doctrine.

3. The Contract for Deed contained a usury savings clause referring to amounts "charged or collected in connection hereby". After recognizing that the mere presence of a usury savings clause will not rescue a transaction that is necessarily usurious on its face, the court did give effect to the savings clause here because collection of usurious interest (through late charges) was contingent entirely on Parhms making late payments and the extent of the tardiness of those payments. Parhms argued that the savings clause by its terms referred only to interest that is "charged" or "collected", not usurious interest that is "contracted for". The court dismissed that argument.

4. The court also stated that "[B]ecause the question of whether a contract is usurious is one of contract interpretation, it is determinable as a matter of law." *Id.* at 202.

P. Sunday Canyon Property Owners Ass'n v. Annett, 978 S.W.2d 654 (Tex. App.--Amarillo 1998, no writ), involved restrictive covenants for a subdivision providing for interest at 6% per annum to accrue from the 30th day any unpaid assessments were due and payable. The association started charging interest during the 30-day interest-free period. The court held that the late charges on assessments were not interest subject to the usury laws, relying on the *Tygrett* case, *supra*, at Paragraph III.B.

Q. Southwest Livestock and Trucking Co., Inc. v. Ramon, 169 F.3d 317 (5th Cir. 1999), involved the recognition of a Mexican judgment entered on a loan.

1. Southwest Livestock entered into loan arrangements with Ramon, a citizen of the Republic of Mexico. To evidence the loan, Southwest Livestock executed a *pagare* (a Mexican promissory note) payable to Ramon with interest within 30 days. There were a series of these *pagares*. None of the *pagares* contained a stated interest rate. The interest rate actually charged was clearly above (and in some times more than twice) the applicable Texas usury ceiling.

2. After Southwest Livestock defaulted, Ramon filed a law suit in Mexico to collect on the last *pagare*. The Mexican court granted judgment in favor of him and ordered Southwest Livestock to pay its debt with interest at 48% per annum. After Ramon filed suit in Mexico, but before the Mexican judgment was entered, Southwest Livestock brought suit in U.S. District Court alleging that the loan arrangement violated Texas usury law. Ramon sought to have the Mexican judgment recognized in the U.S. District Court under the Texas Uniform Foreign Country Money-Judgment Recognition Act (the "Recognition Act"), Texas Civil Practices & Remedies Code Section 36.001 *et seq*. The magistrate recommended that the judgment not be recognized on the grounds that it violated public policy of the State of Texas and that under Texas choice of law rules, Texas internal law should be applied. The District Court agreed with the magistrate and granted substantial penalties and forfeitures to Southwest Livestock.

3. Ramon argued that the District Court should have applied Mexican law because the *pagares* designated Mexico as the place of payment and Mexico had the most significant relationship to the loan transaction. Apparently, the *pagares* did not contain an express choice of law provision. The Fifth Circuit did not appear to focus on the choice of law issue.

4. The Recognition Act permits a court not to recognize a foreign country judgment if "the cause of action on which the judgment is based is repugnant to the public policy" of Texas. Texas Civil Practices & Remedies Code Section 36.005(b)(3). The Fifth Circuit noted that the Recognition Act refers not to the judgment itself, but to the "cause of action on which the judgment is based". In this case, the Mexican judgment was based on an action for collection of a promissory note and that cause of action is not repugnant to Texas public policy. The Fifth Circuit felt that it was irrelevant that the Mexican judgment itself contravened Texas' public policy against usury.

5. Southwest Livestock argued that the law governing usury constitutes a fundamental policy in Texas and that to recognize the Mexican judgment would transgress that policy. Southwest Livestock cited *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990) in which the Texas Supreme Court refused to apply Florida law to enforce a noncompetition agreement because the law governing enforcement of noncompetition agreements is fundamental policy in Texas. The Fifth Circuit distinguished *DeSantis* because it involved enforcement of an agreement violative of Texas public policy rather than recognition of a foreign judgment. Furthermore, the Fifth Circuit felt that different considerations apply when a party (here Ramon) seeks recognition of a foreign judgment for defensive purposes as an affirmative defense.

6. The Court also distinguished *DeSantis*, as it had done in 1991, stating that "noncompetition agreements implicate an arguably stronger Texas public policy than usurious contracts." *Admiral Ins. Co. v. Brinkcraft Dev.*, 921 F.2d 591, 594 (5th Cir. 1991).

7. The Court also noted that this did not involve the victimization of a naive consumer. The Court seemed to emphasize that Southwest Livestock's management was composed of sophisticated knowledgeable people with experience in business.

8. The Court held that the public policy of Texas does not justify withholding recognition of the Mexican judgment.

R. Coker v. Cramer Fin. Group, Inc., 992 S.W.2d 586 (Tex. App.--Texarkana 1999, no pet. h.).

1. Coker executed promissory notes payable to First National Bank of Nacona ("Nacona Bank") payable on demand, but if no demand was made then on July 1, 1989. The notes provided for interest at 13% per annum and postmaturity interest at the highest rate permitted by law. Walter Overton, who was the president of Nacona Bank, handled the transactions for the loans. The notes were executed in 1988.

2. In April 1989, Nacona Bank was declared insolvent and the FDIC was appointed as a receiver. Many of its assets were taken over by First National Bank of Bowie ("Bowie Bank"), but the FDIC continued to hold Coker's notes in its capacity as receiver. Within a week after the FDIC was appointed as a receiver for the Nacona Bank, Coker received a form letter from Bowie Bank telling him that it had purchased from the FDIC all of the depository liabilities of Nacona Bank and would operate the former Nacona Bank as a branch of the Bowie Bank. The form letter stated that "Payments on loans should be made to the bank as scheduled." Coker testified that in May 1989, before the maturity of his notes, he tendered full payment of the three notes to Walter Overton at Bowie Bank. The jury found that Walter Overton was at the time of the tender an agent for the holder of the promissory notes. The court said that there was no evidence that Overton was acting as the agent for the holder of the note (FDIC) and thus there was no actual valid tender in this case.

3. The issue of tender of payment is very important because Texas Business & Commerce Code Section 3.603(c) (formerly Section 3.604) provides as follows:

> If tender of payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged. . . .

Cramer had purchased the three notes from the FDIC four years after their maturity date. Cramer filed suit for payment of the notes and post-maturity interest. Cramer did not seek any prematurity interest. Coker claimed that Cramer committed usury when it filed suit seeking <u>any</u> interest; since no interest was permissible, any interest is not only usurious but exceeds double the permissible interest (0). Inasmuch as the court found that Coker did not tender payment to the holder of the notes, his affirmative usury defense failed.

4. Cramer also alleged that Coker's claims of usury and tender were barred by the *D'Oench Duhme* doctrine, which states that no agreement that tends to diminish the interest of a financial institution in receivership is valid unless it is in writing, it was contemporaneously executed by the debtor and the financial institution, it was properly approved and it remained in the institution's records. The court held that *D'Oench Duhme* did not apply to the facts presented in this case.

S. First USA Management, Inc. v. Esmond, 960 S.W.2d 625 (Tex. 1997).

1. Esmond was an employee of First USA. He obtained a loan from First USA. His employment agreement was amended to include a default on the loan as a basis for terminating his employment for cause.

2. Esmond defaulted on the note. First USA terminated Esmond's employment for cause on account of his default. Esmond sued First USA asserting that the retained salary payments that would have been due under his employment agreement constituted interest on his loan. The trial court awarded Esmond $1,137,911.23 in usury penalties on his $18,000 loan in addition to the present value of his unpaid salary.

3. The court thought that Esmond's unpaid salary was not a charge for the use or forbearance or detention of money. Only if his services were worth less than his salary did he incur any loss or First USA incur any gain. The issue was not who actually came out ahead or behind. Rather the issue was whether a charge or receipt so uncertain in value, and probably of different value to Esmond and First USA, could be considered interest.

4. The court concluded "that as a matter of law Esmond's unpaid salary was not interest.

5. After citing cases such as *Beavers v. Taylor*, 434 S.W.2d 230 (Tex. Civ. App.--Waco 1968, writ ref'd n.r.e.), and *Catalina v. Blasdel*, 881 S.W.2d 295 (Tex. 1994), dealing with the contingent nature of the payment, the Court stated as follows:

> In the present case the amount First USA gave Esmond was clearly a loan; the issue is whether his future contractual salary was interest. However, just as uncertainty in an obligation to repay casts doubt on whether the transaction is a loan, uncertainty in the value of a contractual right that a debtor claims as interest casts doubt on whether the value can be characterized as interest. Even if USA benefitted financially from Esmond's termination, and if that value could be determined, and if it were the same as the financial detriment to Esmond, the uncertainty in the determination convinces us that the benefit to First USA cannot be called interest on the $18,000 loan.

960 S.W.2d at 628.

T. Financial Sec. Servs., Inc. v. Phase I Elecs. of West Texas, Inc., No. 07-98-0182-CV, 1999 Tex. App. LEXIS 5102 (Amarillo, July 12, 1999, no pet. h.).

1. Phase I was in the business of providing alarm services. Financial Security Services ("FSS") provided financial and other services to the security and alarm industry. In March 1994, Phase I and FSS executed a set of agreements, including a loan and security agreement, a promissory note, a contingent payment agreement and a billing and collection services agreement. FSS would make advances to Phase I against certain alarm monitoring services contracts and Phase I would assign a security interest in those contracts to FSS. For a separate fee, FSS provided billing and collection services to Phase I, and Phase I agreed not to bill or collect on the designated alarm monitoring service contracts. Payments on those accounts would be deposited into a collateral account to be applied first to the cost of monitoring the

alarms by a third party, second to FSS's own billing and collection fees; third to interest on the promissory note; and fourth toward principal owing on that note. The nominal interest rate on the notes was 13% per annum. The cash advances were subject to a 5% program fee. The parties stipulated that the program fee was interest.

2. After FSS threatened to accelerate the note and foreclose on its security interest, Phase I filed suit alleging usury and the typical lender liability claims. Phase I later paid the balance due on the note. Phase I never paid any contingent payment amount and FSS did not seek payment of that amount. The trial court rendered judgment that FSS had contracted for, charged and/or received usurious interest in excess of double the allowable amount and awarded substantial usury penalties to Phase I.

3. The first issue was whether the 5% program fee should be spread over the five-year term of the agreement. (The court did not use the word "spreading" and did not cite any of the spreading cases.) The court did not allow spreading. Because FSS did not credit or refund the advance payment (the program fee) when it accepted payment on the accelerated note after one year, the court viewed it as having received 5% interest as compensation for a one-year loan, making the rate paid by Phase I 18%, the applicable usury ceiling. Because the 5% program fee and the 13% stated interest totaled 18% per annum, any additional interest would result in usury unless the savings clause was effective.

4. Phase I alleged that the "base collateral" provision of the agreements were a frozen account on which FSS was obligated to pay interest or that the interest that it should have paid should be considered part of the interest paid by Phase I to FSS. The court distinguished *First State Bank of Bedford v. Miller*, 563 S.W.2d 572 (Tex. 1978), because in *Miller* the lender only advanced $56,000 to the borrower, leaving $14,000 in a non-interesting bearing account at the lender, while charging interest on the full $70,000 face amount of the loan. In contrast, here FSS only charged the contracted 13% interest on the amount actually involved. The court here held that "a lender has no obligation to pay, or give credit for, interest on funds not loaned as those unadvanced funds do not belong to the borrower." The court viewed the collateral provisions as not creating interest but rather as reducing the borrowing base against which Phase I could obtain funds.

5. Addressing the contingent payment provision, the court noted that the amount of the contingent payment was, indeed, contingent and could not be determined until the note was due. Phase I could cite no evidence as to the number of contracts likely to be in force at the maturity of the note and therefore the probable value of the contingency payment. Without that evidence, the amount was speculative and could not be properly characterized as interest.

U. Liberty Fin. Inc. v. Hengst, No. 03-97-00469-CV, 1999 WL 176041 (Austin Apr. 1, 1999, no pet.) (not designated for publication), is not really a usury case. It dealt with an equity participation in the net profits if the mortgaged property were sold. Hengst filed for bankruptcy. Liberty sued on the note. Hengst subsequently paid the full principal and interest claimed to be due under the loan agreement, contending that payment satisfied all of its obligations to Liberty. The issue presented was whether the equity participation was part of the loan transaction such that payment of the underlying debt discharged all obligations, thus extinguishing the equity participation, or did the equity participation represent an investment by the lender that was separate and apart from repayment of the principal and interest due on the loan. The court concluded that the trial judge had correctly declared that the equity participation was part of the lien and was extinguished upon satisfaction of the underlying debt. The key problem for the lender here was that the principal and interest were repaid before the building was sold. More careful draftsmanship may have led to a different result.

***V. Commercial Servs. of Perry, Inc. v. Wooldridge*, 968 S.W.2d 560 (Tex. App.--Ft. Worth 1998, no pet.)**, dealt with a note bearing interest at a no-longer-published prime rate of a defunct lending institution. It is not really a usury case. It reiterated the rule that, in such circumstances, the fact finder should apply a "reasonable" rate of interest, if evidence of a reasonable rate of interest is shown in the record in order to prove that a sum certain is due and owing. This rule applies when the note provides for the prime rate of a defunct bank. *Baily, Vaught, Robertson & Co. v. Remington Invs., Inc.*, 888 S.W.2d 860 (Tex. App-Dallas 1994, no writ). The court rejected the argument that Texas Business & Commerce Code Section 3.112(b) requires that interest be payable at the judgment rate in effect at the place of payment. The court found that Section 3.112 is inapplicable because the instrument was not silent as to how to calculate the interest. The court here may have confused the issue of whether the note was negotiable with whether it was totally unenforceable.

W. Pentico v. Mad-Wayler, Inc., 964 S.W.2d 708 (Tex. App.--Corpus Christi 1998, pet. denied), involved late charges erroneously imposed by the lender. The court spread the late charges and other interest over the full period of the loan so that the loan was not usurious.

X. Coastal Cement Sand Inc. v. First Interstate Credit Alliance, Inc., 956 S.W.2d 562 (Tex. App.--Houston [14th Dist.] 1997, writ denied), is another case involving pre-computed interest and a defective acceleration provision. The case is similar to *Jim Walter Holmes, Inc. v. Schuenemann, 668 S.W.2d 324 (Tex. 1984).*

APPENDIX I

Recodified Texas Credit Code Provisions as Reflected in Senate Bill 1368 of the 76th Legislative Session, effective September 1, 1999 (Selected Provisions)

ARTICLE 5069	INTERIM TEXAS CREDIT TITLE	TEXAS FINANCE CODE
Definitions Chapter 1, Art. 1.01	**Chapter 1B, Art. 1B.002**	**Title 4, Chapter 301**
(a) Interest	(a)(4) Interest	301.002(a)(4) Interest
(c) Conventional Interest	(a)(1) Contract Interest	301.002(a)(1) Contract Interest
(d) Usury	(a)(18) Usury or usurious interest	301.002(a)(17) Usurious Interest
No Analogue	(a)(7) Judgment Interest	301.002(a)(7) Judgment Interest
No Analogue	(a)(13) Obligor	301.002(a)(13) Obligor
No Analogue	(a)(16) Prepayment Penalty	301.002(a)(15) Prepayment Penalty
Maximum Rates of Interest (If No Exception) Chapter 1, Art. 1.02	**Chapter 1C, Art. 1C.001(b)**	**Chapter 302, Sec. 302.001(b)**
Legal Rate Applicable (Open Accounts) Chapter 1, Art. 1.03	**Chapter 1C, Art. 1C.002**	**Chapter 302, Sec. 302.002**
Limit on Rate With Written Contract Chapter 1, Art. 1.04	**Chapter 1D**	**Chapter 303**
(a)(1) Weekly Ceiling	1D.002, 1D.003	303.002, 303.003
(2) Quarterly or Annualized Ceiling	1D.006, 1D.007, 1D.008	303.006, 303.007, 303.008
(b)(1) Safe Harbor and	1D.009(a), (b)	303.009(a), (b)
(2) Absolute Ceiling	1D.009(c)	303.309(c)
(f) Variable Rate	1D.015(a), (b), 1D.006(b)	303.015(a), (b), 303.006(b)

ARTICLE 5069	INTERIM TEXAS CREDIT TITLE	TEXAS FINANCE CODE
(l) Renewals	1D.0013	303.013
(n)(6) Credit Unions	1D.501	303.501
(7) Insurance Code	1D.502	303.502
(o)(1) Reference to Penalties	1D.403	303.403
(2) Reference to Penalties	1D.402	303.402
(3) Enforcement	1D.404, 1D.405, 1D.406	303.404, 303.405, 303.406
(4) Enforcement	1D.407	303.407
(p) Reliance	1D.401	303.401
Judgment and Prejudgment Interest Chapter 1, Art. 1.05	**Chapter 1E**	**Chapter 304**
(1) Judgment Interest Rate	1E.002	304.002
(2) Computation	1E.003, 1E.004	304.003, 304.004
(3) Accrual	1E.005	304.005
No Analogue	1E.006 Compounding	304.006 Compounding
(5) Publication	1E.004	304.004
(6) Prejudgment Interest in Wrongful Death, Personal Injury and Property Damage Cases	1E.101-1E.008	304.101-304.108
(7) Condemnation Cases	1E.201	304.201
Penalties Chapter 1, Art. 1.06	**Chapter 1F**	**Chapter 305**
(1) General Rule	1F.001, 1F.003, 1F.005, 1F.101	305.001, 305.003, 305.005, 305.101
(2) Double Usury Ceiling	1F.002, 1F.004, 1F.008	305.002, 305.004, 305.008
(3) Statute of Limitations; Venue	1F.006(a)	305.006(a)

ARTICLE 5069	INTERIM TEXAS CREDIT TITLE	TEXAS FINANCE CODE
(4) Correction of Violation	1F.103	305.103
(5) Correction of Violation	1F.004	305.104
No Analogue	1F.001(c) Exceeding Contractual Interest	305.001(c) Exceeding Contractual Interest
No Analogue	1F.102 Legal Interest During Interest Free Period	305.102 Legal Interest During Interest Free Period
No Analogue	1F.007 Penalties Exclusive	305.007 Penalties Exclusive
Special Provisions Chapter 1, Art. 1.07	**Chapter 1C**	**Chapter 302**
(a) Spreading on Real Estate Loans	1C.101	302.101
(b) Loans Exceeding $250,000	repealed	repealed
(c) Oil and Gas Loans	repealed	repealed
(d) Prepayment Penalties	1C.102	302.102
No Analogue	1C.103 Federal Preemption and Late Charges	302.103 Federal Preemption and Late Charges
Chapter 1, Art. 1.13 Asset-Backed Securities	**1H.102**	**306.102**
Chapter 1, Art. 1.14 Purchase of Accounts Receivable	**1H.001(1), 1H.103**	**306.001(1), 306.103**
No Analogue	**Commercial Transactions Chapter 1H**	**Chapter 306**
	Definitions Chapter 1H, Art. 1H.001	**Definitions Section 306.001**
	(2) Affiliate of an obligor	306.001(2)
	(4) Business entity	306.001(4)
	(5) Commercial loan	306.001(5)

ARTICLE 5069	INTERIM TEXAS CREDIT TITLE	TEXAS FINANCE CODE
	(6) Guaranty	306.001(6)
	(7) Pass-through entity	306.001(7)
	(8) Prepayment charge or penalty	306.001(8) prepayment penalty
	(9) Qualified commercial loan	306.001(9)
	Interest **Chapter 1H, Art. 1H.002**	**Section 306.002**
	360 Day Year **Chapter 1H, Art. 1H.003**	**Section 306.003**
	Determining Rates of Interest by Spreading **Chapter 1H, Art. 1H.004**	**Section 306.004**
	Prepayment Charge **Chapter 1H, Art. 1H.005**	**Prepayment Penalty** **Section 306.005**
	Underwriter's Discounts and Equity Kickers **Chapter 1H, Art. 1H.101**	**Underwriter's Discounts and Equity Kickers** **Section 306.101**
	Late Charge **Chapter 1H, Art. 1H.006**	**Late Charge Section 306.006**
Chapter 2 General Regulatory Provision	**Chapter 3A**	**Chapters 14 and 341**
Chapter 3 Regulated Loans	**Chapter 3A**	**Chapter 342**
Chapter 4 Installment Loans	**Not Present**	**Chapter 343**
Chapter 5 Secondary Mortgage Loans	**Chapter 3A**	**Chapter 344**
Chapter 6 Retail Installment Sales	**Not Present**	**Chapter 345**
Chapter 6A Manufactured Home Credit Transactions	**Not Present**	**Chapter 347**

ARTICLE 5069	INTERIM TEXAS CREDIT TITLE	TEXAS FINANCE CODE
Chapter 7 Motor Vehicle Installment Loans	**Not Present**	**Chapter 348**
Chapter 8 Penalties	**Not Present**	**Chapter 349**
Chapter 15 Revolving Credit	**Not Present**	**Chapter 346**