

Fall 1981

The Conflict of Laws and the Florida Usury Case

F. Townsend Hawkes

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Conflict of Laws Commons](#), and the [Other Law Commons](#)

Recommended Citation

F. T. Hawkes, *The Conflict of Laws and the Florida Usury Case*, 9 Fla. St. U. L. Rev. 543 (2017).
<http://ir.law.fsu.edu/lr/vol9/iss4/1>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

THE CONFLICT OF LAWS AND THE FLORIDA USURY CASE

F. TOWNSEND HAWKES*

"[T]wo Things are to be Reconciled: The one, that the Tooth of Usurie be grinded, that it bite not too much: The other, that there bee left open a Meanes, to invite Moneyed Men, to lend to the Merchants, for the Continuing and Quickning of Trade."

—Bacon, *Of Usurie*, in *ESSAYES* 171 (1896).

I. INTRODUCTION

With high interest rates besetting the financial market place,¹ commercially sophisticated lenders and borrowers are forced to seek ways to escape the limits imposed by usury laws upon their financing activities within a given state. Incorporation of choice-of-laws provisions into loan transactions is one method of invoking a more permissive usury ceiling.² Along with the choice-of-laws provision, parties often attempt to structure the transaction by purposely creating or manipulating as many "contacts" as possible to ensure that the chosen jurisdiction's law will be applied by any forum in which litigation may happen to arise between the parties.³ If an interstate lender were domiciled in State A, for example, and desired that the usury laws of that state control a multistate loan, he would manipulate the rules on formation of contracts to ensure

* Law clerk for Chief Justice Alan C. Sundberg, Supreme Court of Florida. A.B. 1972, magna cum laude, Harvard; M.A. 1975, Queen Mary College, University of London; J.D. 1980, Cornell.

1. When this article was written, the prime lending rate was 18% per annum. The prime rate is that rate at which large banks lend to their most creditworthy, corporate borrowers.

2. For discussion of choice-of-laws problems in contracts, see generally R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* §§ 7.1-7.9 (2d ed. 1980); H. GOODRICH & E. SCOLES, *CONFLICT OF LAWS* §§ 106-114 (4th ed. 1964); R. LEFLAR, *AMERICAN CONFLICTS LAW* §§ 144-56 (3d ed. 1977); Levin, *Party Autonomy: Choice-of-Law Clauses in Commercial Contracts*, 46 *GEO. L.J.* 260 (1958).

3. The ease with which certain contacts may be manipulated, however, is a factor considered by courts in giving such contacts less importance when making a choice-of-laws determination. See, e.g., *O'Brien v. Shearson Hayden Stone, Inc.*, 586 P.2d 830 (Wash. 1978), modified, 605 P.2d 779 (Wash. 1980). See also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 203, Comment c (1971).

that the contract was negotiated and signed in State A. He would include boilerplate provisions stipulating that the law of State A is controlling. Funds would be disbursed from State A, and payment would be due in that state. The success of this kind of choice-of-laws provision and structuring efforts obviously depends upon the recognition they will be given by a particular forum court.⁴

Practically every state has some form of general usury law,⁵ yet conflict of laws is an important consideration due to the enormous variation among these usury laws. Interest rates allowable under various laws are often quite different.⁶ The penalties extracted from a violating lender range from forfeiture of part of the excess interest⁷ to forfeiture of the entire principal and interest, plus criminal penalties.⁸ Some states exempt corporations from protection of the usury laws;⁹ others do not.¹⁰ Such variations among

4. Compare *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 626 F.2d 401 (5th Cir. 1980) (ignores structuring) [*Woods-Tucker*], *rev'd on rehearing*, 642 F.2d 744 (5th Cir. 1981) [*Woods-Tucker II*] with *Ferdie Sievers & Lake Tahoe Land Co., Inc. v. Diversified Mortgage Investors*, 603 P.2d 270 (Nev. 1979) (upholds structuring). For a discussion of the *Woods-Tucker* cases see notes 81-82 *infra*.

5. The few states that do not have a general usury law usually have some form of partial usury limitations. Massachusetts has only a criminal usury law which limits interest to 20% per annum. See MASS. ANN. LAWS ch. 271, § 49 (Michie/Law. Co-op. 1980). New Hampshire sets interest ceilings on residential second mortgages. See N.H. REV. STAT. ANN. § 398-A:2 (Cum. Supp. 1979). Maine, however, has no general usury limitations on commercial loans at all. See ME. REV. STAT. ANN. tit. 9-B, § 432 (Cum. Supp. 1980).

6. Virginia has a low interest ceiling of 8% per annum. See VA. CODE § 6.1-330.11 (1979). Maryland has this same rate on certain loans. See MD. COM. LAW CODE ANN. § 12-103(a) (Cum. Supp. 1980). Rhode Island has one of the highest rates at 21% per annum, along with Maine which has no limit on commercial loans. See R.I. GEN. LAWS § 6-26-2 (1969). Some interest ceilings are floating and are tied to the Federal Reserve discount. See, e.g., DEL. CODE ANN. tit. 6, § 2301 (Cum. Supp. 1980). One commentator has advocated this floating usury ceiling for Florida. See Long, *Trends in Usury Legislation-Current Interest Overdue*, 34 U. MIAMI L. REV. 325 (1980). Florida's rate is currently 18% per annum on loans not exceeding \$500,000, and 25% per annum on loans greater than that amount. See FLA. STAT. §§ 687.02, 687.071 (Supp. 1979 & Supp. 1980).

7. See PA. STAT. ANN. tit. 41, § 501 (Purdon Cum. Supp. 1981); TENN. CODE ANN. § 47-14-117 (1979).

8. See N.Y. GEN. OBLIG. § 5-511 (McKinney 1978); N.Y. PENAL § 190.42 (McKinney Cum. Supp. 1980). Delaware provides for a penalty of the greater of three times the interest or \$500. DEL. CODE tit. 6, § 2304 (1974). Florida provides for a penalty of twice the interest paid on loans not exceeding \$500,000. FLA. STAT., § 687.04 (1979). For usury loans in excess of that amount the loan is unenforceable and criminal sanctions are imposed. FLA. STAT. § 687.071 (1979).

9. See, e.g., N.Y. GEN. OBLIG. LAW § 5-521 (McKinney 1978); DEL. CODE ANN. tit. 6, § 2306 (1974).

10. See, e.g., CONN. GEN. STAT. ANN. §§ 37-1—37-9 (1979); FLA. STAT. § 687.01-13 (1979 & Supp. 1980). Florida repealed the allowance of a higher interest rate to corporations in 1979 Fla. Laws ch. 79-274, § 12.

usury laws make it apparent that a loan which conforms to the usury laws of one state may grossly violate the usury laws of several other states, possibly subjecting an interstate lender to serious losses under a more restrictive usury law. As interest rates climb, the interstate lender will find that his forum's permissible limits violate the law of an increasing number of jurisdictions, thereby increasing his potential for incurring usury penalties. The interstate lender must, therefore, first determine which jurisdictions are connected with the transaction. He must then determine which of these jurisdictions has the most favorable usury law. Alternatively, he could identify the states which allow application of foreign usury laws more favorable than his own.

This article examines express choice-of-laws provisions litigated in Florida usury cases.¹¹ The background of conflicts in usury is traced briefly, and the traditional or majority approach to this problem is discussed. The choice-of-laws approaches of both the *Restatement (Second) of Conflict of Laws* and the *Uniform Commercial Code* will be examined. Florida's approach to usury in conflicts will be traced historically. The remainder of the Article is devoted to the analysis of the present state of conflicts doctrine in Florida, following the important reformulation of principles in *Continental Mortgage Investors v. Sailboat Key, Inc.*¹²

II. BACKGROUND: CHOICE OF LAWS IN USURY

A. Traditional Rule

Most courts recognize that a conflicts problem in the usury case presents a special choice-of-laws problem. Such courts follow a special, traditional usury rule,¹³ rather than relying upon standard contracts-conflicts rules, such as place of execution or place of performance.¹⁴ The traditional usury rule may be stated as follows:

11. For a summary of the functioning pragmatics of Florida's usury law, see Note, *Usury: 1979 Florida Statutory Reform Partially Solves Usury Regulation Defects*, 31 U. FLA. L. REV. 756 (1979).

12. 395 So.2d 507 (Fla. 1981).

13. See, e.g., *Fahs v. Martin*, 224 F.2d 387 (5th Cir. 1955); *Cooper v. Cherokee Village Dev. Co.*, 364 S.W.2d 158 (Ark. 1963); *Ury v. Jewelers Acceptance Corp.*, 38 Cal. Rptr. 376 (1st Dist. Ct. App. 1964); *Big Four Mills, Ltd. v. Commercial Credit Co.*, 211 S.W.2d 831 (Ky. 1948).

14. Place of execution or making (*lex loci contractus*) is the most commonly used standard conflicts rule for contracts problems, and is usually the place where a contract is accepted. See *Milliken v. Pratt*, 125 Mass. 374 (1878); 2 J. BEALE, *CONFLICT OF LAWS* § 332.57 (1935). Place of performance (*lex loci solutionis*) follows the law of the place where the

The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate.¹⁵

This articulation of the traditional rule is simply a rule of validation; if either connected jurisdiction validates the loan, then it will be upheld under that validating law. This rule was first expressed in *Miller v. Tiffany*,¹⁶ in which the forum borrower sought invalidation of the loan by application of New York usury law. New York was the place of making and residence of one of the lenders. The Supreme Court upheld the loan under the higher usury rate of the place of performance, which was also the residence of the co-lender.

The Supreme Court reaffirmed and expanded the traditional rule in *Seeman v. Philadelphia Warehouse Co.*¹⁷ In this case, a Pennsylvania corporate lender was allowed to charge a New York borrower the highest rate allowed by either the place of performance, place of execution, or place with some vital and natural connection. Neither Pennsylvania nor New York law would totally validate the loan, but the penalty under the former state's laws was less severe than that of New York. The Court allowed the lender use of the limits of his home state's usury laws. The Court also

performance is carried out, and, when a loan is involved, is equated to place of payment. See *First Nat'l Life Ins. Co. v. Fidelity & Deposit Co.*, 525 F.2d 966 (5th Cir. 1976). See generally, R. WEINTRAUB, *supra* note 2, at § 7.3A; R. LEFLAR, *supra* note 2, at § 146. Party autonomy, though more a rationale than a rule, simply allows parties to choose the controlling law, but always within certain parameters. See 2 J. BEALE, *supra* at § 332.2 (1935).

15. *Miller v. Tiffany*, 68 U.S. (1 Wall.) 298, 310 (1863). (citations omitted).

16. *Id.* Three states were connected with the transaction: Indiana, residence of the borrower; New York, residence of one lender; and Ohio, residence of a second lender. Only Ohio would uphold the loan. Place of making was either New York or Indiana. Place of payment was Ohio. Notably, the borrower did not invoke the usury protections of his home state, Indiana.

17. 274 U.S. 403 (1927). Even though decided prior to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which severely limited the scope of federal conflicts rules, *Seeman* has been one of the most influential cases on later state and federal court decisions in the usury-conflicts area.

qualified a requirement of "good faith" as set out in *Miller*,¹⁸ interpreting it to mean only that the chosen law must have some vital and natural connection with the transaction.¹⁹ The traditional rule after *Seeman* would uphold an interstate loan contract against attack based upon usury rules, so long as any vitally connected jurisdiction would uphold the agreement.

After *Seeman*, the most influential case in the development of the traditional rule was *Fahs v. Martin*,²⁰ a 1955 Fifth Circuit decision which purported to determine the Florida and federal conflicts rules in usury actions as follows:

[W]ith respect to the question of usury, it may be stated as a well-established rule that a provision in a contract for the payment of interest will be held valid in most states if it is permitted by the law of the place of contracting, the place of performance, or any other place with which the contract has any substantial connection.²¹

This formulation may be seen as the final assessment of the traditional rule, a rule which by the time of *Fahs v. Martin* a majority of jurisdictions, according to that case, had already adopted.²²

18. In *Miller*, the Court had said: "These rules are subject to the qualification, that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character." 68 U.S. (1 Wall.) at 310.

19. The Supreme Court stated:

The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject.

Seeman, 274 U.S. at 408.

20. 224 F.2d 387 (5th Cir. 1955). *Fahs* was a complex bankruptcy case in which the court found it necessary to determine Florida's choice of laws in usury since a New York lender had charged interest on interest, which *might* have been illegal in New York, to a Florida railroad company borrower. The agreement was upheld under the validating Florida Law.

21. *Id.* at 397.

22. *Id.* To support its position, the court in *Fahs* quoted from Nussbaum, *Conflict Theories of Contracts: Cases versus Restatement*, 51 YALE L.J. 893, 912 (1942) (footnotes omitted), as follows:

Now the Conflict law of usury has been developed in a peculiar way by the American courts. While in general a contract is void if it is illegal under the *lex loci contractus*, courts uphold contracts if the contractual rate of interest conforms either with the *lex loci contractus* or with the *lex loci solutionis* or with any other place with which the transaction has a "normal relation" [language of Stone, J., in *Seeman v. Philadelphia Warehouse Co.*, *supra*] . . . , the policy being to give the parties a certain choice among the pertinent local maximum interest rates

[T]he usury rule . . . enjoys an undisputed existence.

Id. at 397.

The justification usually given for the rule of validation is that it effectuates the presumed intentions of the parties that their transaction, into which they have voluntarily entered, be upheld if possible under a validating law.²³ The presumed intent rationale is obviously inapplicable when both connected states would invalidate the loan, as in *Seeman*, since the parties could hardly have presumed either invalidating law would control.²⁴ Additionally, as one commentator has noted,²⁵ the borrower under normal circumstances could logically be presumed to prefer subjecting his contract to the more protective and invalidating usury laws. A second rationale for the rule of validation is that trade and commerce demand that contracts be uniformly enforced throughout the country so that predictability in interstate trade is furthered.²⁶ This second justification has a good deal of practical appeal, but total predictability could easily be achieved by absolute party autonomy in choosing a controlling law which might easily result in abdication by a forum court of all its state's interests in controlling usurious loans.²⁷

B. *Restatement (Second) Approach*

The *Restatement (Second)* has formulated a special usury rule which reads:

The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.²⁸

This is essentially a rule of validation, but with some limitation upon validation if the rates of the interested states differ too

23. See Comment, *Usury in the Conflict of Laws: The Doctrine of Lex Debitoris*, 55 CAL. L. REV. 123, 155-57 (1967) [hereinafter cited as *Lex Debitoris*]; Note, *The New York Conflicts Rule for Usury Actions: A Reappraisal*, 14 COLUM. J.L. SOC. PROB. 309, 324-28 (1979) [hereinafter cited as *Conflicts in Usury*].

24. See notes 115-123 and accompanying text *infra*.

25. *Conflicts in Usury*, *supra* note 23, at 324-25.

26. See *Lex Debitoris*, *supra* note 23, at 157-61. See also *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So.2d at 507 (Fla. 1981).

27. See R. WEINTRAUB, *supra* note 2, at 357.

28. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971) [hereinafter referred to as RESTATEMENT (SECOND)].

greatly.²⁹ The heart of the rule is, however, the notion of substantial relationship, for this is the minimum connection necessary to allow application of a jurisdiction's laws. "[A] state must have a normal and natural relationship to the contract and the parties."³⁰ The relationship is created when one significant contact (domicile, principal place of business or place of principal negotiations) and one contact of lesser importance (places of execution or performance) are located in the same state.³¹ The *Restatement (Second)* expresses distrust of "contacts" based upon traditional contacts doctrine because they are easily manipulated. It places great weight on relations which are difficult to manipulate, such as domicile and place of business, in determining the existence of a substantial relationship.³²

The rationale of the *Restatement (Second)* is stated to be protection of the justified expectations of the parties.³³ This rationale implies a further premise that interest rates do not vary significantly from state to state. But rates do vary considerably, and, more importantly, so do the penalties extracted from a violating lender.³⁴ This broad spectrum of variation indicates that some states may have differing and stronger policies against usury than other states. Nevertheless, the party expectation rationale is some-

29. For consideration of the effectiveness of the limitations under the rule of section 188 see notes 113-14 and accompanying text *infra*.

30. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203, Comment c (1971). Other relevant sections of the RESTATEMENT (SECOND) which emphasize party autonomy in contractual choice-of-laws are sections 187 and 188. Section 187 provides the general rule for determining the enforceability of express choice-of-laws clauses, which will be upheld unless (1) no substantial relation exists between the transaction and chosen jurisdiction and there is no other reasonable basis; or (2) the chosen law, if applied, would violate a fundamental public policy of the jurisdiction which has the most significant relationship. Section 188 defines the place of most significant relationship which is also the law to be chosen if no effective, express choice-of-laws provision is found. Section 188 fixes the place of most significant relationship by weighing the traditional contract contacts, including place of contracting, place of negotiation, place of performance, and parties' domiciles. The degree of party autonomy expressed in section 187, which governs express choice-of-laws clauses, is quite broad since, ultimately, only a reasonable relation need be found, so long as the policy of the state with the greatest interest in the transaction is not offended. See, e.g., *Duskin v. Pennsylvania-Central Airlines Corp.*, 167 F.2d 727 (6th Cir.), *cert. denied*, 335 U.S. 829 (1948) (limited party activities in chosen state sufficient to support choice). For utilization in a single case of sections 187, 188 and 203, see *O'Brien v. Shearson Hayden Stone, Inc.*, 586 P.2d 830 (Wash. 1978) *modified*, 605 F.2d 779 (Wash. 1980).

31. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203, Comment c (1971).

32. *Id.*

33. *Id.*, Comment b. See generally Reese, *Conflict of Laws and the Restatement Second*, 28 LAW AND CONTEMP. PROB. 679 (1963); *Lex Debitoris*, *supra* note 23, at 166-69; R. WEINTRAUB, *supra* note 2, at 355-68.

34. See notes 6-9 and accompanying text *supra*.

what more flexible than the presumed intent rationale because it recognizes that in most modern interstate loan contracts the intent of the parties need no longer be presumed. It is most usually expressed through choice-of-laws clauses. The rationale of upholding party expectations, therefore, more nearly comports with modern commercial practices.

C. Approach of the Uniform Commercial Code

Though not directly applicable to Florida usury-conflicts cases because usury laws are exempted from its scope,³⁵ the Uniform Commercial Code (U.C.C.) does provide a choice-of-laws rule which is noteworthy since it follows a course of extreme party autonomy. The conflicts rule provided in section 1-105 reads:

[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.³⁶

The Comments note that the "reasonable relation" standard is similar to the standard provided in *Seeman*. They emphasize the need to validate most contracts in order to achieve uniformity of contract enforcement among U.C.C. jurisdictions.³⁷ This party autonomy approach is comparable to the general choice-of-laws rule of the *Restatement (Second)* section 187, which allows party negotiation to determine choice-of-laws unless there is no substantial relationship or reasonable basis for the choice, or the choice would violate the policy of a state with the most significant relationship to that transaction (i.e. the state which has the greatest number of important contacts).³⁸ U.C.C. section 1-105 has no such public policy limitations; it requires only a reasonable relation to the chosen law and an agreement by the parties to choose that law.³⁹

35. See FLA. STAT. § 680.104(2)(c) (1979). Arkansas has held the U.C.C. does not govern in usury conflicts cases because of U.C.C. § 9-201, which recognizes the precedence of state usury laws over Article 9. See *Lyles v. Union Planters Nat'l Bank*, 393 S.W.2d 867 (Ark. 1965). Cf. FLA. STAT. § 679.101 (1979) (Florida's enactment of U.C.C. § 9-201).

36. U.C.C. § 1-105(1) (1972 version). Florida's enactment of this section is at FLA. STAT. § 671.105(1) (1979).

37. U.C.C. § 1-105, Comments 1, 2 (1972 version).

38. See note 30 *supra*.

39. For an excellent discussion of U.C.C. § 1-105 and its implications, see Nordstrom & Ramerman, *The Uniform Commercial Code and the Choice of Law*, 1969 DUKE L.J. 623.

The "reasonable relation" test of section 1-105 is a broad standard, and the Comments indicate that only a significant portion of either the formation or performance need be associated with a chosen jurisdiction.⁴⁰ One commentator claims that since the Code expresses such a predilection for party autonomy, the reasonable relation requirement will seldom interfere with party choice.⁴¹ The second requirement of section 1-105, that the parties agree to the chosen law, can restrict enforcement of choice-of-laws provisions if one party had no choice but to accept the provision, as in a contract of adhesion.⁴² Unfortunately, this limitation has been eroded by a few courts which will infer consent even if no express agreement is provided.⁴³

Although section 1-105 should not control usury-conflicts questions, at least two courts have so applied it. The court in *Mell v. Goodbody & Co.*⁴⁴ relied on section 1-105 when presented with a usury-conflicts question, invoking the party autonomy principle of the Code to uphold a contract against attack based upon a claim of usury. The only other decision to rely directly on section 1-105 to justify its choice-of-laws result is *Woods-Tucker Leasing Corporation v. Hutcheson-Ingram Development Company (Woods-Tucker II)*,⁴⁵ which utilized this provision in spite of the Code's warnings

See also Pedersen & Cox, *Choice of Law and Usury Limits Under Texas Law and the National Bank Act*, 34 S.W.L.J. 755, 761 (1980).

40. U.C.C. § 1-105, Comment 1 (1972 version). When parties have not chosen a law, the higher standard of "appropriate relation" determines the governing law. In spite of the liberal indications of Comment 3, "appropriate relation" has often been accorded the restrictive meaning of RESTATEMENT (SECOND) with its place of the most significant relationship. *See, e.g.,* Simmons v American Mut. Liab. Ins. Co., 433 F. Supp. 747 (S.D. Ala. 1976); *aff'd*, 560 F.2d 1022 (5th Cir. 1977); *Intraworld Indus. Inc. v. Girard Trust Bank*, 336 A.2d 316 (Pa. 1975).

41. *The Uniform Commercial Code and the Choice of Law*, *supra* note 39, at 630.

42. *Id.* at 630-33. For discussion of contracts of adhesion, *see* note 151 *infra*.

43. *See* United States Manganese Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 576 F.2d 153 (8th Cir. 1978) (court implies party intent to choice of validating law, relying on U.C.C. § 1-105); *Exchange Bank & Trust Co. v. Tamerius*, 265 N.W.2d 847 (Neb. 1978) (court implies party agreement to choice of law, citing U.C.C. § 1-105). Ordinarily, if no express choice-of-laws clause is agreed upon, the court should determine which state has the "appropriate relation" to the transaction and apply that state's law. *See, e.g.,* Bunge Corp. v. Biglane, 418 F. Supp. 1159 (S.D. Miss. 1976).

44. 295 N.E.2d 97 (Ill. App. Ct. 1973). *Mell* dealt with Illinois margin account customers who asserted usury against their New York stock broker. The broker effectively loaned money to its margin account customers, who only paid a certain portion of a stock's purchase price, the broker paying the rest and charging for this service. The Illinois appellate court found these transactions governed by Article 8, and applied U.C.C. § 1-105 to find a reasonable relation to New York, which allowed the interest rate charged by its brokers. Article 8 does not, in fact, appear to cover this type of margin account.

45. 642 F.2d 744 (5th Cir. 1981). For an analysis of why it is improper to use the Code

that usury is outside the Code's scope. But the better decisions in this area only utilize the Code's choice-of-laws provision by analogy, and do not rely on it as the controlling law, turning instead to the body of state common law to solve the usury-conflicts problem.⁴⁶

D. Florida's Historical Approach

Florida has followed a minority of state jurisdictions which fails to distinguish the usury-conflicts case from any other contracts-conflicts problem. Thus in the first Florida case to deal with this problem, *Thomson v. Kyle*,⁴⁷ the Florida Supreme Court applied the law of place of execution and place of payment as it would have done in any contracts case which involved several jurisdictions. The court merely referred to these mechanical choice-of-laws principles without explication.

The next significant Florida decision was *Atlas Subsidiaries, Inc. v. O. & O., Inc.*,⁴⁸ which involved a loan made by a Florida corporation to a Florida borrower, who was required by the lender to incorporate to attain a higher interest limit.⁴⁹ Though the note was executed in Florida and secured by Florida real estate, it was payable in Pennsylvania, residence of the lender's home office. The court refused to look to the law of the place of performance, which it claimed, without citation to authority, would be the controlling law. The court refused to apply foreign law because the lender was

under these conditions, see notes 82, 93 *infra*.

46. See *Gamer v. duPont Walston, Inc.*, 135 Cal. Rptr. 230 (4th Dist. Ct. App. 1976), which confronted the same margin accounts-usury claim as in *Mell*. The California appellate court, however, recognized that the Code did not control the usury question, and found a substantial relationship with New York, as required under RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187, 203. The court noted, however, that "substantial relationship" of RESTATEMENT (SECOND) and "reasonable relation" of U.C.C. § 1-105 were equivalent standards in this case. See also *Lyles v. Union Planters Nat'l Bank*, 393 S.W.2d 867 (Ark. 1965) which found that the Code did not control usury questions in Arkansas. *But see United States Manganese Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 576 F.2d 153 (8th Cir. 1978), which appears to undermine *Lyles* by relying heavily on U.C.C. § 1-105 when Arkansas margin accounts customers sued their New York broker for usury.

47. 23 So. 12 (Fla. 1897). *Thomson* involved a mortgage and note, secured by Florida property, where all of the parties were Alabama residents. Alabama law made the note usurious. Since the places of execution and performance were both in Alabama, the laws of that state governed. Even under the rule of validation, it is questionable whether the mere location of property securing a loan is sufficient to create a normal relation with that state. See note 102 *infra*.

48. 166 So.2d 458 (Fla. 1st Dist. Ct. App. 1964).

49. The forced incorporation was denounced as a sham by the district court. *Id.* at 461. Florida corporations no longer can obtain a higher usury ceiling. See note 10 *supra*.

essentially an in-state lender, and because the note expressly chose Florida law. In dicta, the appellate court outlined the rule of validation; this essay marked the first appearance of the rule in a court of this state.⁵⁰

Until recently,⁵¹ the final pronouncement by a Florida court on usury in conflicts was found in the 1974 opinion of *Goodman v. Olsen*.⁵² A Florida borrower there asserted the defense of usury against a New York lender. Without discussion the Florida Supreme Court found that New York law controlled since New York was the "*lex loci contractus*," or place of execution.⁵³ Once again the Florida court was not impressed by the contract's implication of usury issues, and simply viewed a contract as a contract.

Parallel to the development of choice-of-laws rules in *Goodman v. Olsen*, two Florida appellate court cases introduced a good faith factor into usury-conflicts cases. *May v. United States Leasing Corp.*,⁵⁴ decided in 1970 in the fourth district concerned an individual Florida borrower who asserted the defense of usury against a Florida corporate lender who sought payment on furniture and office equipment. The entire transaction took place in Florida, but the lender claimed California law governed, since the parties had apparently stipulated to the law of that state.⁵⁵ The lender had been granted summary judgment based on this claim. The appellate court reversed, finding that the trial court must determine, as a matter of fact, the good faith of the parties in referring to foreign law.⁵⁶ Notably, *Goodman v. Olsen* ignored this good faith standard espoused by *May*, possibly because the supreme court felt that

50. The court stated:

[The place of performance rule] is derived from the presumption that parties will be presumed to have contracted with reference to the law of the place where the transaction would be valid rather than with reference to the law of a place where it would be illegal and usurious.

Id. at 461.

51. *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So.2d 507 (Fla. 1981).

52. 305 So.2d 753 (Fla. 1974), *cert. denied*, 423 U.S. 839 (1975).

53. It was unclear whether the place of execution alone controlled, or whether the place of performance was also a factor. New York law upheld the agreement; Florida law probably would have held it usurious.

54. 239 So.2d 73 (Fla. 4th Dist. Ct. App. 1970).

55. *May* was apparently the first Florida case to deal with an express choice-of-laws clause within a usury case.

56. A few cases in other states have applied the good faith standard to determine if evasion of usury laws is taking place when foreign law is invoked. See *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 626 F.2d 401 (5th Cir. 1980) [*Woods-Tucker I*], *rev'd on rehearing*, 642 F.2d 744 (5th Cir. 1981); *Dupree v. Virgil R. Cross Mortgage Co.*, 267 S.W. 586 (Ark. 1924).

May was limited to cases involving summary judgments. This good faith standard, however, was followed seven years later by the Third District Court of Appeal in *Bella Isla Construction Corp. v. Trust Mortgage Corp.*,⁵⁷ which also required a factual finding of good faith, even though some contacts with the foreign jurisdiction existed.

The federal courts in Florida have taken a position consistent with the early case of *Fahs v. Martini*⁵⁸ and its rule of validation. Two district court decision have dealt with usury-conflicts cases, and both have validated the agreement under the foreign lender's law. In *Nicholas v. Publishers Collection Service, Inc.*,⁵⁹ the foreign law of the lender was held to control over the Florida borrower's law because the places of negotiation, making, and performance were all located in the foreign state. The court apparently found these contacts with the foreign jurisdiction to be overwhelming. The same court decided the only case in Florida, other than *May* and *Bella Isla*, to examine an express choice-of-laws provision in a usury setting. In *Your Construction Center, Inc. v. Dominion Mortgage & Realty Trust*,⁶⁰ the district court found two grounds for upholding a loan contract between a Florida corporate borrower and a New York business trust lender, by applying the validating lender's law.⁶¹ The court reasoned first, that since the weight of the contacts (place of negotiation, execution, performance, lender's domicile) were in New York, and the parties had expressly stipulated to New York law, that law should presumably govern. Second, the courts of Florida, as evidenced by *Atlas*, would follow a rule of validation, upholding the contract under the law of the connected and validating jurisdiction. While the expres-

57. 347 So.2d 649 (Fla. 3d Dist. Ct. App. 1977). *Bella Isla* involved a Puerto Rican lender with an office in Florida, and a Florida borrower, required to incorporate in Puerto Rico by the lender. The loan was executed in Puerto Rico, and payment was to be made there. The law of Puerto Rico was chosen by the agreement. The loan was to purchase land in Florida, which secured the loan. Summary judgment was held improper under these facts, and a determination of good faith or evasive intent of the parties was required. *Bella Isla* is a broadening of the good faith requirement introduced by *May* since in the latter case there were no contacts at all with the foreign jurisdiction chosen by the agreement.

58. 224 F.2d 387 (5th Cir. 1955).

59. 320 F. Supp. 1200 (S.D. Fla.), *aff'd*, 446 F.2d 891 (5th Cir. 1971). In this case a Florida trustee in bankruptcy charged an out-of-state lender with usury, seeking to avoid as preferences debts of his corporate bankrupt. The lender's foreign law was applied, which did not allow corporations to assert the defense of the usury.

60. 402 F. Supp. 757 (S.D. Fla. 1975).

61. New York, the principal place of business of the lender, did not allow corporations to assert the usury defense. The Florida borrower was a corporation.

sion of the rule of validation in *Atlas* was clearly dicta, the federal district court decision further etched the validation rule into Florida law.

Historically, Florida courts have not treated a usury-conflicts case as anything other than an ordinary contracts-conflicts problem. The only suggestion that the rule of validation was the rule Florida courts might follow came from the early federal case of *Fahs v. Martin*, and from dicta in *Atlas*, which a federal district court later repeated. The uncertainty of Florida's position in usury-conflicts cases was abruptly ended in the recent case of *Sailboat Key*,⁶² a case that radically departs from Florida's prior treatment of usury-conflicts cases.

III. *Continental Mortgage Investors v. Sailboat Key, Inc.*

A. *Factual Summary and Lower Court Holdings*

Sailboat Key concerned a \$3,500,000 commercial loan, made by a Massachusetts business trust⁶³ (Continental) to a Florida real estate development corporation (Sailboat Key). The business trust maintained its only office in Boston, the center of its multi-state lending operation and residence of a majority of the founding trustees. In 1969, Sailboat Key negotiated with the Florida management firm, Mortgage Consultants, employed by Continental to originate, recommend, and service loans in Florida. Upon recommendation of the management firm, the trust approved the loan which was executed in Massachusetts. The laws of Massachusetts were chosen by the documents⁶⁴ and the note was made payable in that state. In 1971, Sailboat Key defaulted. As a result, a settlement agreement was negotiated between the parties, modifying the original loan.⁶⁵ Under the terms of the settlement, Sailboat

62. At least when commercial loans are involved. For consideration of non-commercial loans, see notes 127-55 and accompanying text *infra*.

63. A business trust is created by a declaration of trust which transfers property to the trustees, who manage the property for the beneficiaries, who generally have no direct management control over the trustees. Such a trust may qualify for special federal tax treatment as a real estate investment trust (REIT) if several qualifications are met. Because of Internal Revenue Code requirements, a REIT must hire an independent contractor to manage its property. See I.R.C. § 856(d)3. Income derived by the REIT from usurious interest is excluded from the favorable tax treatment given REIT income generally. See I.R.C. § 856(c)(2). See generally 3 Z. CAVITCH, BUSINESS ORGANIZATION §§ 43-44 (1981); Fox, *The Maximum Scope of the Association Concept*, 25 TAX L. REV. 311 (1970).

64. See MASS. ANN. LAWS ch. 107, § 3 (1975), which allows any rate of interest if the agreement is in writing.

65. 395 So. 2d at 508. The settlement resulted in the execution by Sailboat Key of addi-

Key borrowed \$6,000,000 from a second lender, who was given a priority mortgage on the property securing Continental's loan. Three years later, the second lender foreclosed its mortgage, naming both Continental and Sailboat Key as defendants. Continental sought to foreclose its subordinated mortgage, and Sailboat Key claimed against Continental for usury.⁶⁶ At trial Sailboat Key was successful, the loan being found usurious.

The Third District Court of Appeal dismissed Continental's claim that the agreement was controlled by Massachusetts law, a law which both parties agreed had no usury statute.⁶⁷ First, the court reasoned that if an "agreement would violate the fixed, settled, or strong public policy of the state in which the action is brought, it will not be enforced by that state."⁶⁸ Finding such a public policy in Florida, the court held that application of Massachusetts law would violate Florida's public policy.⁶⁹ Second, the court looked to the good faith requirement established in *May*⁷⁰ as another reason to avoid application of foreign law. The court relied upon the trial court's finding that Massachusetts did not have a "real and vital connection with the transaction" and that the parties' choice of foreign law was a "scheme to evade Florida's usury law."⁷¹ The trial court had determined that the parties had acted

tional mortgage notes to Continental. Continental also agreed to subordinate its mortgages to a second lender which refinanced the project. In March, 1976, Continental began bankruptcy proceedings and is presently in Chapter X. *Id.*

66. *Id.* at 508. Continental as holder of a subordinated mortgage filed a cross-claim against Sailboat Key when the second lender foreclosed on the first mortgage. Sailboat Key answered and cross-claimed for usury. Upon motion, the cross-claims of Continental and Sailboat Key were severed from the main action. Continental later voluntarily dismissed its cross-claim to foreclose on its subordinated mortgage. *Id.*

67. *Continental Mortgage Investors v. Sailboat Key, Inc.*, 354 So. 2d 67 (Fla. 3d Dist. Ct. App. 1977).

68. 354 So. 2d at 71.

69. *Id.* As authority for this position, the court cited the cases of *Davis v. Ebsco Indus., Inc.* 150 So. 2d 460 (Fla. 3d Dist. Ct. App. 1963) and *Bond v. Koscot Interplanetary, Inc.*, 246 So. 2d 631 (Fla. 4th Dist. Ct. App. 1971), *on remand*, 276 So. 2d 198 (Fla. 4th Dist. Ct. App. 1973). *Davis* involved enforcement of covenants not to compete. The Third District Court of Appeal refused to enforce the covenant as being against Florida policy. In *Bond*, the Fourth District Court of Appeal stated the broad truism that an agreement against public policy is unenforceable by the parties. All of the cases cited by the district court in *Sailboat Key* were inapposite to the issue of public policy behind usury laws. *Id.*

70. 354 So. 2d at 72.

71. *Id.* As support for this conclusion, the court cited *Continental Mortgage Investors v. Village By the Sea, Inc.*, 252 So. 2d 833, 835 (Fla. 4th Dist. Ct. App. 1971), which dealt with the scope of pre-trial discovery, an obvious distinction from *Sailboat Key*. The court in *Village By The Sea* stated in dicta that the public policy of Florida might prohibit choice-of-laws provisions which circumvented this state's usury laws.

to evade Florida usury laws by finding there was no valid business purpose justifying the contacts established with Massachusetts. The appellate court thus felt constrained to affirm the trial court's application of Florida law since the issue of good faith was a question of fact and not reviewable on appeal.

B. On Appeal to the Florida Supreme Court

In a lengthy, analytical opinion⁷² the Florida Supreme Court unanimously rejected the district court's dual rationale for applying Florida law; instead, the court embarked upon an untraveled course in Florida. The court first disposed of the public policy justification as an unwarranted "shibboleth," noting that a majority of courts do not consider that conclusory slogan a sufficient ground to justify application of their own usury laws in a choice-of-laws situation.⁷³ The court reasoned that the great number of exceptions to the usury statute and the legislature's recent raising of the usury ceiling indicated a flexible approach. Florida's legislative practices thus militated against the inference of a strong public policy with regard to usury.⁷⁴

The supreme court then rejected the good faith requirement⁷⁵ which originally had been introduced into Florida law by *May*. The court also receded from the place of execution—place of performance approach it had adopted in *Goodman v. Olsen*,⁷⁶ stating that these contacts were easily manipulated, and therefore suspect. Instead, the traditional rule of validation as expressed in *Seeman*⁷⁷ and *Fahs*⁷⁸ was adopted. The rationale underlying the newly adopted rule was explained in terms of party expectation, as delineated by the *Restatement (Second)*. Quoting from section 203, Comment b,⁷⁹ the court justified upholding party expectations

72. 395 So. 2d 507 (Fla. 1981). Only six members of the court voted. Justice McDonald did not participate in the case. Certiorari was originally denied, but since *North Am. Mortgage Investors v. Cape San Blas Joint Venture*, 357 So.2d 416 (Fla. 1st Dist. Ct. App. 1977), *aff'd*, 378 So. 2d 287 (Fla. 1979), was granted certiorari, conflict was apparent because of the double penalty allowed in *Sailboat Key*, and certiorari was granted on rehearing on January 25, 1978.

73. *Id.* at 509.

74. *Id.*

75. 395 So. 2d at 513.

76. See notes 52-53 and accompanying text *supra*.

77. See notes 17-19 and accompanying text *supra*.

78. See notes 20-22 and accompanying text *supra*.

79. *Sailboat Key*, 395 So. 2d at 511. The quote reads as follows:

A prime objective of both choice of law . . . and of contract law is to protect the justified expectations of the parties. Subject only to rare exceptions, the parties

through considerations of party autonomy in a commercial setting.⁸⁰ A second justification was found in the furtherance of commercial comity and stability in interstate transactions. With particular emphasis on the federal Fifth Circuit cases, the development of the rule of validation was traced. The court, however, specifically rejected the approach of a recent fifth circuit decision, *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co. (Woods-Tucker I)*.⁸¹ This case refused to follow the long line of fifth circuit decisions upholding the traditional rule, and instead protected the forum borrower against usurious rates charged by the out-of-state lender.⁸²

will expect on entering a contract that the provisions of the contract will be binding upon them Usury is a field where this policy of validation is particularly apparent [T]he courts deem it more important to sustain the validity of a contract, and thus to protect the expectations of the parties, than to apply the usury law of any particular state.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 203, Comment b (1971).

80. See note 97 *infra*.

81. 626 F.2d 401 (5th Cir. 1980), *rev'd on rehearing*, 642 F.2d 744 (5th Cir. 1981). *Woods-Tucker I* relied on *Dugan v. Lewis*, 14 S.W. 1024 (Tex. 1891), which was not actually a usury-conflicts case since the forum law, as applied, validated the contract, and the forum borrower was quite properly not protected by the foreign lender's law. Also relied upon was *Building & Loan Ass'n v. Griffin*, 39 S.W. 656 (Tex. 1897), in which the Texas court found the out-of-state lender had carried on ten years of extensive lending in Texas, was licensed to do business there, and was therefore in reality a Texas lender subject to its laws. *Woods-Tucker I* failed to distinguish cases such as *Griffin* on the basis that *Griffin* dealt with a foreclosure of an individual's homestead and not with large commercial interests. See also *Lubbock Hotel Co. v. Guaranty Bank & Trust Co.*, 77 F.2d 152 (5th Cir. 1935). *Lubbock Hotel* refused to follow *Griffin* since the latter case assumed invocation of foreign law by the lender was a device to evade forum law, and in *Lubbock Hotel* there was no evidence of the out-of-state lender carrying on a significant in-state business.

82. On April 3, 1981, the Fifth Circuit saw the error of its way and vacated its prior decision by rendering an entirely new opinion on rehearing more consistent with *Sailboat Key. Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744 (5th Cir. 1981) [*Woods-Tucker II*]. In *Woods-Tucker II*, the federal court unfortunately relied directly on Texas' enactment of the Uniform Commercial Code § 1-105(1) (1972 version), becoming one of the first courts to do so under these circumstances. See notes 35-45 and accompanying text *supra*. The transaction was held to be one creating a secured interest within the scope of Article 9, bringing into play U.C.C. § 1-105(1). The court then found a "reasonable relation" to the state of Mississippi, home of the lender, places of execution and payment, and the state whose law was chosen by contract and which would impose lighter usury penalties. Even though the Mississippi lender was licensed to do business in the borrower's state, Texas, and maintained four Texas offices, the lender was surprisingly accorded foreign status, almost without question by the court. Reliance on U.C.C. § 1-105(1) is particularly unfortunate in a usury case because U.C.C. § 9-201 (1972 version) makes clear that usury laws are "examples of applicable laws, *outside this Code entirely*, which might invalidate the terms of a security agreement." U.C.C. § 9-201, Official Comment (1972 version) (emphasis added). U.C.C. § 9-201 reads in pertinent part: "Nothing in this article validates any charge or practice illegal under any statute or regulation thereunder governing usury. . . ." The court in *Woods-Tucker II* effectively validated part of a usurious charge

The supreme court cited two recent cases from other states which dealt with similar situations.⁸³ Both cases involved an out-of-state lender who had engaged in substantial negotiations within the borrower's forum state, even to the point of the lender's having an office in the forum state. Both cases looked to the domicile of the lender as creating a normal relationship with the foreign lender's law, which was then applied.

Finding that Continental had an established domicile and principal place of business in Boston, and adding that the places of execution and payment were also in Boston, the court determined that a "normal relation" between the loan transaction and Massachusetts existed, and that the law could be stipulated by the parties without consideration of the parties' good faith. Thus the court explicitly rejected the necessity of a finding of good faith as set out in *May* and *Bella Isla*,⁸⁴ at least in the commercial setting of *Sailboat Key*. Finally, the court noted that Massachusetts appeared to have a criminal usury law, and that therefore the case must be remanded to the trial court for a factual finding of Massachusetts law.⁸⁵ This development led the court to adopt in a footnote an extension of the rule of validation,⁸⁶ which applies the law of the more liberal jurisdiction in the event that both connected states would invalidate the loan.

IV. CONFLICTS AND USURY IN FLORIDA

A. *Status of Public Policy and Good Faith*

Without doubt the exigencies of commercial reality provide a ba-

by utilizing the Code's choice-of-laws provision, in apparent conflict with the intentions of U.C.C. § 9-201.

The principal Texas case relied upon by *Woods-Tucker II* was *Walker v. Associated Financial Services Corp.*, 588 S.W.2d 416 (Tex. Civ. App. 1979), *writ ref'd n.r.e. Walker*, in turn, had relied on U.C.C. § 1-105(1) to reach the conclusion that a Texas borrower was not protected by the Texas installment loan statute because the foreign lender's law was contractually stipulated as controlling. The decision in *Walker* is amiss on two points. First, the loan was evidently unsecured, and would therefore fall outside of the Code. Second, U.C.C. § 9-201 also excludes from the Code's coverage, at least with reference to Article 9 and secured interests, statutes governing retail installment sales or the like. The *Walker* decision is particularly egregious because the loan involved was a small (\$7,500.00) mail-order loan, and the court should have considered the increased protections required for the consumer or non-commercial borrower. See notes 127-155 and accompanying text *infra*.

83. *Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortgage Investors*, 603 P.2d 270 (Nev. 1979); *Goodwin Bros. Leasing, Inc. v. H & B Inc.*, 597 S.W.2d 303 (Tenn. 1980).

84. See notes 54-57 and accompanying text *supra*.

85. See MASS. ANN. LAWS, ch. 271, § 49 (1980).

86. *Sailboat Key*, 395 So.2d at 513 n.9.

sis for adopting the rule of validation. Implicit in many decisions in this area is the recognition that interstate commercial transactions are not in fact the targets of usury protections.⁸⁷ The numerous exceptions to the usury statute and its constantly changing interest limit suggest that the statute does not set an absolute ban on usurious loans. *Sailboat Key* recognizes that an essential element to the just operation of a usury statute is flexibility in the face of ever changing commercial demands. By acknowledging through choice-of-laws principles the need for flexibility in the application of usury laws, the court has simply kept abreast of the more modern conflicts theory in usury cases.

Florida now follows the majority of jurisdictions in its restrictive attitude towards the public policy behind usury laws.⁸⁸ Two for-

87. *Lex Debitoris*, *supra* note 23, at 135. The explanation for not protecting a consumer under usury laws is that he theoretically voluntarily purchases the commodity, and hence cannot be a necessitous borrower. For a criticism of the soundness of this belief, see Benfield, *Money, Mortgages and Migraine—The Usury Headache*, 19 CASE W. RES. L. REV. 819, 846-47 (1968) [hereinafter cited as *The Usury Headache*].

88. The most recent Florida case in the usury-conflicts area is *Morgan Walton Properties, Inc. v. International City Bank & Trust Co.*, No. 58,879 (Fla. Oct. 8, 1981), which was before the court on a certified question from the federal Fifth Circuit. The question read as follows:

Are notes executed and payable in a state other than Florida, secured by a mortgage on Florida real estate, providing for interest legal where made, but usurious under Florida law, unenforceable in Florida courts due to Florida's usury statute, public policy or otherwise, where (a) the interest charged or paid exceeds 25 percent and (b) where the interest charged does not exceed 25 percent, but exceeds the maximum interest rate allowed by law?

International City Bank & Trust Co. v. Morgan Walton Properties, Inc., 612 F. 2d 227, 229 (5th Cir. 1980).

Walton Properties involved two cases, the first with a corporate Florida borrower and the second with an individual Florida borrower. Louisiana, home of the lender, had no usury limit for corporate borrowers. The lenders apparently had no contacts with Florida. In the case of the corporate borrower, the court had no trouble in simply following *Sailboat Key* to uphold the loan under validating Louisiana law, reiterating much of what had been stated in *Sailboat Key*. Louisiana law was found to have a "normal and reasonable relation" to the agreement because that state was the domicile of the lender, the parties stipulated to the law of Louisiana, and that state was the place of making and performance. Slip op. at 6.

The second case, involving the individual borrower, presented a more interesting problem, both because there was no choice-of-laws provision in the agreement, and the laws of both states invalidated the agreement. Under Louisiana law, the interest alone was forfeited. Under Florida law, depending on the amount of interest, either the interest was forfeited or the entire loan was unenforceable. In the former case, in which both laws extracted the same penalty, there was of course no conflict-of-laws problem, though the court seemed unaware of this. If the entire loan, however, were unenforceable due to Florida's criminal usury provision, Fla. Stat. § 687.071 (1973), Louisiana's law would be more lenient as only interest would be forfeited. *Walton Properties* again correctly followed the holding of *Sailboat Key* by allowing the more favorable law to control. See *Sailboat Key*, 395 So. 2d at 513 n.9. Because no interest had apparently been collected the double interest penalty did not apply.

eign cases are representative of this position. First, *Ury v. Jewelers Acceptance Corp.*⁸⁹ dealt with an out-of-state New York lender who had solicited a forum borrower in his home state, California. The lender required the borrower to incorporate in order to avoid New York's usury laws, which denied the usury defense to corporations. Observing that the loan was a retail commercial business loan, the appellate court found that California had no public policy against enforcement of this loan because of the large number of exceptions carved from the general usury statute.⁹⁰ The California court also considered as significant the contractual choice-of-laws provision which stipulated New York law. Second, *Big Four Mills, Ltd. v. Commercial Credit Corp.*⁹¹ involved an out-of-state lender who was not qualified to do business in the forum. The court determined that so long as a vital element of the transaction such as execution, performance, or party intent was connected to the foreign state, the enforcement of the loan according to the law of the lender's state would not be against public policy. This position was maintained in spite of the lender's substantial activities in the forum (lender was a subsidiary of a forum corporation.)⁹² *Ury* and *Big Four Mills* both stand for the general proposition that public policy will seldom be invoked by the forum state to preserve its usury laws in an interstate loan situation, provided that the dealings are commercial in character and involve parties possessing the necessary business acumen.⁹³

The loans involved were large and evidently commercial. The first case involved over six and one-half million dollars. Notably, the lack of an express choice-of-laws provision was not determinative. Because the lender had no evident contacts with Florida and the loan was commercial, the result in *Walton Properties* was properly and easily reached.

89. 38 Cal. Rptr. 376 (1st Dist. Ct. App. 1964). The court also found that the parties' bargaining power was not overly disparate, the borrower being fairly sophisticated.

90. *Solevo v. Aldens, Inc.*, 395 F. Supp. 861 (D. Conn. 1975) provided another way to circumvent public policy. Once the court found foreign law applicable, it reasoned that forum policy could not be offended by a foreign transaction, unless the agreement were also usurious under foreign law.

91. 211 S.W.2d 831 (Ky. 1948). Maryland, the lender's state, prohibited corporations from asserting the usury defense. The contract also stipulated to Maryland law as the place of execution. Because the loan agreement was between two corporations, the court seemed determined to uphold it.

92. There was, however, no proof that the lender was doing business in the forum state. *Id.* at 835.

93. *Sailboat Key* did not rely on FLA. STAT. § 671.105(1) (1979) or the *Uniform Commercial Code* which provides:

[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this code applies to transactions bearing an appropriate relation to this state.

The adoption of the rule of validation is perhaps a recognition that a subjective test⁹⁴ of good faith in the choice-of-laws area is inherently unworkable because of its lack of predictability. The line between avoiding a forum's usury law for legitimate reasons and circumventing the laws in bad faith was difficult if not impossible to ascertain. *Seeman* was the first case to point out the dangers of a literal good faith standard since choice-of-laws provisions will normally be used only to "avoid" the usury laws of the forum.⁹⁵ This untenable subjective standard is replaced by a more objective standard of "normal relation," with its emphasis on the domicile and place of business, the contacts which are the most difficult to manipulate.

V. NEW STANDARD: NORMAL RELATION

A. Basis

Under Florida law, a critical question in determining the validity of a multistate loan is whether there exists a "normal relation" between the loan transaction and jurisdiction whose law is purportedly controlling. *Sailboat Key* pointed to two important contacts under this test: domicile and place of business.⁹⁶ Because of the difficulty that contracting parties will normally encounter in manipulating domicile and place of business, these contacts are essential in defining a "normal relation." From the emphasis placed upon these contacts, it would appear that a "normal relation" could not exist unless domicile and principal place of business were both present. These critical contacts are the foundation upon which the reasonable expectations of the parties are laid.⁹⁷

Usury laws are specifically exempted from the *Commercial Code* and take precedence over any *Commercial Code* provisions. See FLA. STAT. §§ 680.104(2)(c), 679.201 (1979). Utilization of the *Commercial Code* is also inappropriate because the loan involved in *Sailboat Key* is outside of the scope of the Code. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 22-6 (2d ed. 1980). See notes 35-43 and accompanying text *supra*.

94. See Nussbaum, *Conflict Theories of Contracts: Cases versus Restatement*, 51 YALE L.J. 893, 897-900 (1942), for development of the subjective-objective distinction in conflicts.

95. *Seeman*, 274 U.S. at 408.

96. "In addition to the domicile-place of business contacts, which we consider most significant, the loan agreement was executed in Massachusetts, the loan was made payable in that state, and the funds were originally disbursed from that state." 395 So. 2d at 513.

97. For discussion of RESTATEMENT (SECOND) and its predilection for upholding party expectation, see notes 109-14 and accompanying text *infra*. See also notes 28-34 and accompanying text *supra*. See generally, R. WEINTRAUB, *supra* note 2, at 335-380.

B. Normal Relation in Other Courts

Having adopted the traditional rule of validation, Florida has tapped into a wealth of foreign case law. A large body of doctrine deals with the scope of a "normal relation" to the chosen state's law within the rule of validation. Numerous cases find that a "normal relation" exists when the out-of-state lender is domiciled and has its principal place of business in the foreign state.⁹⁸ Though these cases usually identify the lender's state as the place of performance and place of execution, this is not always the case.⁹⁹ These easily manipulated contacts seldom seem to be the deciding factor, although place of performance (payment) most often coincides with the lender's state. Thus, in *Fahs v. Martin*¹⁰⁰ Florida law was applied to uphold an agreement even though its place of execution and performance was New York because the borrower and the mortgaged property were both in Florida, giving the validating laws of that state a substantial interest or normal relation. The deciding factor in *Fahs* was therefore not the place of performance or the place of execution; the critical factor was which state with a "normal relation" to the transaction would validate the agreement.

A few cases have held that merely being incorporated in a state is an insufficient basis for creating a "normal relation." In *United Divers Supply Co. v. Commercial Credit Co.*,¹⁰¹ incorporation in

98. See, e.g., *Sarlot-Kantarjian v. First Pa. Mortgage Trust*, 599 F.2d 915 (9th Cir. 1979); *Consolidated Jewelers, Inc. v. Standard Financial Corp.*, 325 F.2d 31 (6th Cir. 1963); *Blackford v. Commercial Credit Corp.*, 263 F.2d 97 (5th Cir.), cert. denied, 361 U.S. 825 (1959); *Exchange Bank & Trust Co. v. Tamerius*, 265 N.W.2d 847 (Neb. 1978).

99. See *Merchants' & Mfr.s' Sec. Co. v. Johnson*, 69 F.2d 940 (8th Cir.), cert. denied, 293 U.S. 569 (1934); *Wilkins v. M & H Financial, Inc.*, 476 F. Supp. 212 (E.D. Ark. 1979), aff'd, 621 F.2d 311 (8th Cir. 1980). *Merchants'* involved an interstate business loan contract that was performed in both the state of the lender and that of the borrower. 69 F.2d at 943. The case followed *Seeman* upholding the contract under the lender's law because his principal place of business in the foreign state gave the lender a legitimate interest in seeking the benefit of foreign laws. See also *Goodwin Bros. Leasing, Inc. v. H & B, Inc.*, 597 S.W.2d 303 (Tenn. 1980) (place of execution in forum state but loan upheld under foreign law since lender had "normal relation" with foreign state).

100. 224 F.2d 387 (5th Cir. 1955). It is ironic to note that in spite of the heavy reliance on *Fahs* by the court in *Sailboat Key*, *Fahs* was not a true usury-conflicts case because only the law of the lender's state, New York, could have invalidated the loan. The federal court would further the interests of neither state by using a New York law to invalidate an agreement to protect a Florida borrower. For a discussion of false or avoidable conflicts see Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Comment, *False Conflicts*, 55 CALIF. L. REV. 74 (1967).

101. 289 F. 316 (5th Cir. 1923). See also *Brierley v. Commercial Credit Co.*, 43 F.2d 730

Delaware was not sufficient to create a "normal relation" with that state. Instead, the state in which the lender's principal office was located, which was also the place of performance and execution, was determined to have a "normal relation."¹⁰²

The most difficult problem occurs not in defining "normal relation," but in determining the point at which a foreign lender becomes a domestic lender. The public interest in the regulation of such lenders dictates that they simply will not be allowed unfettered use of choice-of-laws principles.¹⁰³ The court in *Sailboat Key* was careful not to adopt the position enunciated in *Goodwin Brothers Leasing, Inc. v. H & B Inc.*¹⁰⁴ which allowed an out-of-state lender with an in-state office to maintain its foreign posture and thereby invoke foreign law. Although in *Sailboat Key* negotiations were carried on in Florida, the only office of Continental and the residence of a majority of the founding trustees were in Massachusetts.¹⁰⁵ Continental's relationship with the Florida management firm was close, but the entities were legally separate. The supreme court's reticence in adopting the position in *Goodwin Brothers* may indicate that given more in-state activity by a borrower, the court would be unwilling to preserve a lender's status as an out-of-state lender.¹⁰⁶ This rationale underlies such cases as *Woods-Tucker I*¹⁰⁷ and *Mirgon v. Sherk*,¹⁰⁸ which found that the

(3d Cir. 1930), *cert. denied*, 282 U.S. 897 (1931).

102. One case has extended the concept of "normal relation" to include a state where the security for the loan is located and the borrower conducted his business, although neither party was domiciled in that state. *Armstrong v. Alliance Trust Co.*, 88 F.2d 449 (5th Cir. 1937). But this case is not a true conflicts case because the laws of all connected jurisdictions upheld the agreement. In contrast, North Carolina has made the place of security the exclusive, controlling factor, and will not look to foreign law even though a "normal relation" exists with the foreign state, so long as North Carolina property secures the loan. *Equilease Corp. v. Belk Hotel Corp.*, 256 S.E.2d 836, *cert. denied*, 261 S.E.2d 121 (N.C. 1979).

103. In the usury-conflicts area, courts often seem to give great weight to the lack of forum business by an out-of-state lender, to justify invocation of foreign law. *See, e.g.*, *Whitman v. Green*, 289 F.2d 566 (9th Cir. 1961); *Smith v. Western & S. Life Ins. Co.*, 87 F.2d 839 (5th Cir. 1937).

104. 597 S.W.2d 303 (Tenn. 1980).

105. For purposes of determining federal diversity of citizenship, a federal court will look to the citizenship of the trustees of a business trust, and not that of the beneficiary shareholders. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980).

106. The Supreme Court of Idaho has held that a foreign lender who is qualified to do business in the state may not invoke foreign law by merely making the note payable in its foreign state since the lender is no longer foreign. *United States Bldg. & Loan Ass'n v. Lanzarotti*, 274 P. 630 (Idaho 1929).

107. *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 626 F.2d 401 (5th Cir. 1980) [*Woods-Tucker I*], *rev'd on rehearing*, 642 F.2d 744 (5th Cir. 1981). In *Woods-Tucker*

lender had so much in-state activity that it functioned as a domestic business, subject to the forum's laws.

C. *Focus of Normal Relation in Terms of Restatement (Second) of Conflict of Laws (1971)*

The rationale of the *Restatement (Second)* § 203, Comment b,¹⁰⁹ supports adoption of the rule of validation, with its emphasis on "normal relation." The rationale underlying section 203,¹¹⁰ the special conflicts usury rule, which is based on the same premise as the traditional usury rule, is one which points to the pragmatics of upholding party expectations through party autonomy since parties ordinarily anticipate that the contracts which they have entered will be binding.¹¹¹ The *Restatement (Second)* requires the state upholding the contract to have only a "substantial relationship" to the contract. Comment c defines this as a "normal and natural relationship," and discounts places of execution and performance as being, in themselves, significant contacts due to their easy manipulation. This position is echoed in *Sailboat Key* where the court refused to follow *Goodman v. Olsen* because places of execution and performance are "today of little practical value since these contacts are so easily manipulated in our mobile society."¹¹² Contacts which are critical for a substantial relationship to exist are ultimately the parties' domicile and principal place of business.

A second requirement of the *Restatement (Second)* § 203 is that the usury rate of the state with only a "normal relation" not greatly exceed the rate of the state with the most significant relationship, as defined by section 188.¹¹³ Of the five contacts listed as

I the foreign lender was licensed to do business and had four offices in the forum. The court would therefore not look to the foreign law to validate the loan. See notes 81-82 *supra*.

108. 84 P.2d 362 (Wash. 1938). In *Mirgon* the foreign lender had seven branch offices in the forum state. The court would not allow the foreign lender to invoke its state's laws since the lender was carrying on extensive in-state business and was violating forum public policy against usury.

109. See notes 28-34 and accompanying text *supra*.

110. For the text of RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971), see note 28 and accompanying text *supra*.

111. See R. WEINTRAUB, *supra* note 2, at 355-63.

112. *Sailboat Key*, 395 So. 2d at 510.

113. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971) reads:

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the

controlling in section 188, places of contracting, negotiation, and performance are subject to relatively easy manipulation. The location of the subject matter of the contract is often inscrutable in an interstate loan agreement. The only remaining contacts—domiciles and principal places of business of the parties—merely duplicate the factors applied in the Restatement usury rule. Thus, this second requirement that both interested states have similar usury rates does not appear to add any significant limitation to the straightforward rule validating a contract under the law of a state with a “normal relation.” It is perhaps noteworthy that *Sailboat Key* chose to adopt the traditional usury rule as developed in case law.¹¹⁴

D. Both States Invalidate the Contract

The problem of choosing the law to apply when neither state would entirely uphold the agreement has been addressed only peripherally in Florida.¹¹⁵ Because the court in *Sailboat Key* determined that Massachusetts, the lender's state, might itself have an applicable usury limit, it faced at least tangentially this problem of dual invalidation. In a footnote, the court adopted an extension of the traditional rule which applies the law of the more lenient state if both invalidate the agreement.¹¹⁶ This is also the position taken by the *Restatement (Second)* § 203, which would apply the law of

contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

114. One case, however, has relied on the differences in usury rates between the state with a substantial relationship and that with the most significant relationship (the forum) to avoid application of the usury section of *RESTATEMENT (SECOND)*. See *O'Brien v. Shearson Hayden Stone, Inc.*, 586 P.2d 830 (Wash. 1978), *modified*, 605 P.2d 779 (Wash. 1980).

115. For cases choosing the more lenient law when neither connected state would uphold the contract, see *Wiltsek v. Anglo-Am. Properties, Inc.*, 277 F. Supp. 78 (S.D.N.Y. 1967); *Deaton v. Vise*, 210 S.W.2d 665 (Tenn. 1948). *Deaton* did not present a true conflict since all parties were from the forum state, although the security and payment were in a foreign state. For discussion of false conflicts, see note 100 *supra*.

116. *Sailboat Key*, 395 So. 2d at 513 n.9.

the state with the lightest penalty.¹¹⁷ The second circuit, when faced with this problem in *Speare v. Consolidated Assets Corp.*¹¹⁸, observed that a rule of validation based upon the presumed intent of the parties was untenable, since that intent must have contemplated application of a law invalidating the transaction.¹¹⁹ *Seeman* itself dealt with a situation involving two jurisdictions which would both invalidate the loan, though applying different penalties.¹²⁰ The Supreme Court chose the more lenient law in *Seeman*.

A more justifiable rationale under these conditions is that of party expectations. Even though a court cannot presume an intention of the parties to have an invalidating law apply, the parties may nevertheless have expected that the law of one of the connected jurisdictions govern the transaction. More realistically, there is a tendency by the courts to apply the more lenient law since the courts are reticent to extract too great a penalty from a violating lender for fear of providing the borrower with a wind-fall.¹²¹ The cases are divided,¹²² however, and the "more lenient" rule does not appear to have as widespread acceptance as the traditional rule of validation under which one state upholds the transaction.¹²³

VI. UNRESOLVED ISSUES IN FLORIDA'S USURY LAWS

A. Degree of Certainty of Normal Relation

Although the adoption of the rule of validation and its linchpin of "normal relation" may be seen as an effort by the supreme court at removing some of the subjectivity inherent in previous Florida usury-conflicts decisions predicated on the standard of good faith, the boundaries of the "normal relation" standard remain unknown. A question still remains whether domicile and principal place of business are alone sufficient to create a "normal relation." The factors of place of execution, performance, and disbursement continue to be ones that will be considered by courts in Florida. Just what weight these factors will be given is difficult to ascertain, though they apparently are of less significance than the domicile-principal

117. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203, Comment d (1971).

118. 367 F.2d 208 (2d Cir. 1966).

119. *Id.* at 211.

120. *Seeman*, 274 U.S. at 405-06.

121. *Lex Debitoris*, *supra* note 23, at 195-97, 242.

122. *Id.* at 199-200.

123. See H. GOODRICH, *supra* note 2, at 217.

place of business contacts.

Also uncertain is the test which determines when an out-of-state lender will be characterized as an in-state lender, losing any advantage of a more liberal foreign law. In *Sailboat Key*, Continental had been established in Massachusetts for nine years for the legitimate business reason of utilizing that state's developed law for business trusts.¹²⁴ Continental's center of business activities as a lender was also located in Massachusetts where it maintained its only office and carried out significant lending activities. The court apparently considered the quality of the domicile-principal place of business contacts, giving weight to the substance of these contacts, as well as to the fact of their existence.¹²⁵ Ultimately, some element of subjectivity must color any court's assessment of these essential contacts. The point at which the domicile contacts will be ignored due to lack of substance and a corresponding abundance of pure formality is unpredictable.¹²⁶

B. Commercial v. Consumer: Characterization Problem

By its terms, *Sailboat Key* is limited to commercial loans, implying that there is a class of individual, consumer loans which is not within the scope of the opinion and which may be treated differently.¹²⁷ An examination of usury cases involving small or consumer loans is therefore warranted.¹²⁸

124. *Sailboat Key*, 395 So. 2d at 513.

125. *Id.* The court noted the extensive activities of Continental in Massachusetts.

126. Compare *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 626 F.2d 401 (5th Cir. 1980) [*Woods-Tucker I*], *rev'd on rehearing*, 642 F.2d 744 (5th Cir. 1981) (in-state offices overcame form that lender is out-of-state) with *Goodwin Bros. Leasing, Inc. v. H & B Inc.*, 597 S.W.2d 303 (Tenn. 1980) (in-state office does not affect out-of-state lender's foreign status).

127. Although *Sailboat Key* did not rely on a commercial-consumer distinction, perhaps because of the difficulty inherent in such a characterization, other courts have looked to the relative sophistication of the parties in a large commercial loan as a reason for holding the parties to the contract. See, e.g., *Sarlot-Kantarjian v. First Pa. Mortgage Trust*, 599 F.2d 915 (9th Cir. 1979) (borrower knowledgeable and experienced in real estate ventures); *Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortgage Investors*, 603 P.2d 270 (Nev. 1979) (borrower experienced in such business transactions); *Goodwin Bros. Leasing, Inc. v. H & B Inc.*, 597 S.W.2d 303 (Tenn. 1980) (borrower sophisticated, knowledgeable, businessmen). The Florida Legislature has tacitly recognized this distinction by allowing a higher usury ceiling (25% per annum) on loans exceeding \$500,000. See FLA. STAT. §§ 687.02, 687.071 (1979 & Supp. 1980).

128. UNIFORM CONSUMER CREDIT CODE § 1.301(15)(a) (1974 Act) defines a consumer loan as follows:

Except as provided in paragraph (b), "consumer loan" means a loan made by a creditor regularly engaged in the business of making loans in which:

(i) the debtor is a person other than an organization;

When the loan involves a consumer or individual, courts have evinced strong protectionist attitudes, and have effectively adopted a rule of *lex debitoris*,¹²⁹ which applies the law of the borrower's domicile under most conditions.¹³⁰ *Lex debitoris* is based on the presumption that the law of the debtor-borrower's state must control an interstate loan contract. The lender's law will be applied only as an exception to this premise under the following circumstances: the borrower is sophisticated and has sufficient bargaining power so as not to require protection; the borrower's law provides unduly harsh penalties; or the lender would be unfairly surprised by application of the borrower's law.¹³¹ The first exception in effect recognizes a "commercial" exception to the doctrine of *lex debitoris*, since it allows the lender's law to apply if the parties involved are sophisticated, as is typical in a large, commercial loan setting. This rule has the advantage of furthering legislative aims in passing usury laws,¹³² which include the protection of a forum borrower both from his own inexperience in the lending market place and the rapacity of the lender, aided by the lender's superior legal and economic expertise.¹³³ For this reason, *lex debitoris* is the preferable rule when the consumer borrower is involved.¹³⁴

Cases which seek to protect the small borrower often are couched in terms of public policy, rather than consumer protection

(ii) the debt is incurred primarily for a personal, family, household, or agricultural purpose;

(iii) the debt is payable in installments or a finance charge is made; and

(iv) the amount financed does not exceed \$25,000 or the debt, other than one incurred primarily for an agricultural purpose, is secured by an interest in land.

Loans secured by real estate are outside this definition if the finance charge does not exceed 12% per annum.

129. See generally *Lex Debitoris*, *supra* note 23, at 181-88.

130. See, e.g., *In re Wakefield*, 460 F. Supp. 1224 (E.D. Ark. 1978); *Lyles v. Union Planters Nat'l Bank*, 393 S.W.2d 867 (Ark. 1965). See also Note, *Incorporation to Avoid the Usury Laws*, 68 COLUM. L. REV. 1390, 1397 (1968), which takes the position that *lex debitoris* is the better rule in cases of individual borrowers, but the traditional rule of validation is the preferred rule in a commercial situation.

131. *Lex Debitoris*, *supra* note 23, at 182-83.

132. See H. GOODRICH, *supra* note 2, at 217.

133. One difference between general commercial loans and small loans is that the former may, or may not, be contracts of adhesion, depending on the circumstances of the parties, but the latter, the small loan to the necessitous consumer-borrower, is almost surely one whose terms are dictated by the lender to one who has not the social or economic power to demur.

R. WEINTRAUB, *supra* note 2, at 376.

134. See generally *Lex Debitoris*, *supra* note 23, at 200-24; *The Usury Headache*, *supra* note 87, at 838-40, 881; *Conflicts in Usury*, *supra* note 23, at 338-342.

or disparate bargaining power. The Supreme Court of Washington in *Mirgon v. Sherk*¹³⁵ invoked public policy to shield a forum borrower, owing \$280 secured by a chattel mortgage, from an out-of-state lender who carried on significant forum business.¹³⁶ Other cases have invoked the same protectionist stance to prevent the collection of 26% interest on a \$650 loan to a boilermaker¹³⁷ or 42% interest on \$300 owed by a school teacher,¹³⁸ thereby depriving an out-of-state lender of the liberal laws of his own state.¹³⁹ This attitude has become prevalent in decisions from Arkansas. At one time Arkansas adopted a liberal rule of validation in a commercial case,¹⁴⁰ only to shift to choice of forum law when dealing with a consumer transaction. This distinction, though, was never articulated in terms other than public policy.¹⁴¹ Courts which do invoke public policy in the consumer borrower area are undoubtedly aware that the application of forum usury law will only work a small forfeiture on the lender since consumer loans are usually for small amounts.¹⁴² This awareness makes borrower protection easier to attain since the consequences of enforcing forum usury laws ordinarily will not be devastating to violating lenders.

The boundary implied by the distinction between commercial and consumer loans is not always apparent.¹⁴³ The *Uniform Consumer Credit Code* has defined a consumer loan as one made by a professional lender to an individual for personal, family, household or agricultural purposes.¹⁴⁴ The loan must be less than \$25,000 or be secured by real estate and the interest must exceed 12 percent

135. 84 P.2d 362 (Wash. 1938).

136. See also *O'Brien v. Shearson Hayden Stone, Inc.*, 586 P.2d 830 (Wash. 1978), *modified*, 605 P.2d 779 (Wash. 1980). In that case, the court sought to protect the individual investor-borrower who bought stocks in New York on margin accounts, invoking public policy to protect forum borrowers.

137. *Fidelity Sav. Ass'n v. Shea*, 55 P. 1022 (Idaho 1899).

138. *Continental Adjustment Corp. v. Klause*, 174 A. 246 (Dist. Ct. N.J. 1934).

139. Another court has protected an individual borrower on mortgaged land by holding a 50% per annum rate so shocking that choice of laws was not even a consideration. *Trinidad Indus. Bank v. Romero*, 466 P.2d 568 (N.M. 1970).

140. *Cooper v. Cherokee Village Dev. Co.*, 364 S.W.2d 158 (Ark. 1963).

141. *In re Wakefield*, 460 F. Supp. 1224 (E.D. Ark. 1978); *Lyles v. Union Planters Nat'l Bank*, 393 S.W.2d 867 (Ark. 1965); *Huchingson v. Republic Fin. Co.*, 370 S.W.2d 185 (Ark. 1963). *But see* *Bridgeman v. Gateway Ford Truck Sales*, 296 F. Supp. 233 (E.D. Ark. 1969), *modified*, 311 F. Supp. 695 (E.D. Ark. 1970) (individual borrower, but for business purposes; follow lender's law as more lenient and on modification to uphold based on time-price doctrine).

142. *Lex Debitoris*, *supra* note 23, at 171, 232-43.

143. See R. WEINTRAUB, *supra* note 2, at 378.

144. See note 127 *supra*.

per annum. The *Consumer Code* is an effort at consolidating and simplifying regulation of consumer and business loans of less than \$25,000, setting out disclosure and interest requirements under one comprehensive law. The *Consumer Code* focuses its definition of consumer, therefore, on the amount and purpose of the loan.

For usury-conflict of laws purposes, a precise definition of commercial and consumer loan becomes less important where only general usury laws are concerned because usury laws have little application in the consumer area due to the time-price doctrine.¹⁴⁵ The time-price doctrine exempts most consumer sales from usury laws by allowing the seller to fix one price for cash and another for credit, and by not considering this difference as interest. The massive consumer financing protections in Florida law demonstrate that the time-price doctrine had left consumers largely unprotected, and exemplify both the legislature's desire to protect consumer borrowers and the awareness that the interest ceilings on various consumer loan areas must be higher than the general usury level.¹⁴⁶ However, choice-of-laws problems under the consumer protection statutes are less often encountered since most consumer lenders are presumably located in-state, near the resident borrower.¹⁴⁷ Also, the finance charge structure for consumer loans is

145. See generally, *The Usury Headache*, *supra* note 87, at 843-47. Florida has long recognized this doctrine. See *Davidson v. Davis*, 52 So. 139 (Fla. 1910).

146. See, e.g., Florida Consumer Finance Act, FLA. STAT. §§ 516.001 et seq. (1979 & Supp. 1980); Retail Installment Sales Act, FLA. STAT. §§ 520.30-42 (1979 & Supp. 1980); Motor Vehicle Sales Finance Act, FLA. STAT. §§ 520.01-.13 (1979 & Supp. 1980). These various consumer protection statutes set interest rates and disclosure requirements on transactions which are outside of the usury laws because of the time-price doctrine. These statutes are therefore equivalent to affirmative usury laws for the consumer.

147. The issue as to whether a state may constitutionally apply its consumer protection statutes to an out-of-state lender who has only minimal advertising and mail order contacts with the consumer's state has been decided. Four federal circuits have decided that there are neither due process nor commerce clause problems when a state chooses to protect its consumers from the higher interest charged by an Illinois mail order house in its credit agreements. See *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980); *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977); *Aldens, Inc. v. Packer*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). A state court has also reached the same conclusion. *Meirhenry v. Spiegel, Inc.*, 277 N.W.2d 298 (S.D.), *appeal dismissed*, 444 U.S. 804 (1979). One would think that *Aldens, Inc.* would begin to see the handwriting on the wall.

Although Florida's consumer protection statutes do not specifically apply to out-of-state transactions, even traditional choice-of-laws rules should allow a state to pursue such a strong policy interest as protection of its consumers. At least one statute, however, would apparently apply its protections to mail order transactions, reaching out-of-state businesses such as *Aldens, Inc.* See FLA. STAT. § 520.36 (1979).

relatively liberal.¹⁴⁸

An example of a loan which may pose problems of characterization is the small business loan, which prior to 1980 escaped regulation under the Florida Consumer Finance Act if it exceeded \$2,500.¹⁴⁹ In 1980 the legislature raised the amount which a licensee under the act could lend to \$25,000, enlarging the scope of certain consumer borrower protections previously afforded only to borrowers of less than \$2,500.¹⁵⁰ This action would indicate that the legislature, as suggested in the *Consumer Code*, considers the small business borrower of \$25,000 or less in need of consumer-oriented protections. Assuming Florida chooses to follow those states which apply their own law in a consumer case, this would militate against a rule of validation should a choice-of-laws problem arise. The problem of characterization remains unclear for small business loans over \$25,000.

The commercial-consumer distinction becomes critical, however, when one realizes that the focus of *Sailboat Key* was on commercial loans. Notably, the good faith requirements espoused in *May* and *Bella Isla* still exist in Florida law, although inapplicable in commercial cases. The implication remains that a different standard than normal relation may be required in a case characterized as consumer, and that for these cases a good faith requirement may survive.

A second and more viable manner of approaching the commercial-consumer distinction is to give the greater protection of forum usury and consumer finance laws to those borrowers who are victims of unequal borrowing power, adhesion contracts¹⁵¹ and their own lack of expertise.¹⁵² This borrower will often be the consumer

148. Under FLA. STAT. § 516.031 (Supp. 1980), dealing with consumer finance, the interest rate is 30% per annum on the first \$500, 24% per annum on the next \$500, and 18% per annum on anything above \$1,000. Under FLA. STAT. § 520.34(5)(a) (Supp. 1980), dealing with retail installment sales, the interest allowed is \$12 per \$100 per year, or about 21.6% per annum.

149. See FLA. STAT. §§ 516.02, 516.031 (1979).

150. See Florida Consumer Finance Act, ch. 80-412, § 1, 1980 Fla. Laws 1733 (codified as FLA. STAT. 516.031 (1980 Supp.)).

151. Contracts of adhesion are those drafted by one party, usually a corporation with expert legal advice, and are carefully formulated to resolve as many legal issues as possible in favor of the dominant drafting party. The disparity of bargaining power between the drafting party and the acquiescing party results in the second party submitting to, rather than bargaining for, the contract terms. See generally, Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). For a discussion of adhesion contracts in a usury-conflicts case, see *Ury v. Jewelers Acceptance Corp.*, 38 Cal. Rptr. 376 (1st Dist. Ct. App. 1964).

152. A worthwhile comparison can be made between the sophistication required of the

borrower, but rather than focusing on the amount of a transaction and the use to which the borrowed funds are applied by defining a consumer loan, this approach emphasizes the actual disparity between bargaining parties and the resulting one-sided agreement.¹⁵³

Outlining the "unconscionability" approach, a federal district court has suggested the factors to be considered in determining whether a borrower warrants protection by the court. These factors include (1) the bargaining position of the parties; (2) the degree of custom reflected in the agreement; (3) the degree of risk reflected in higher rates; (4) the availability of other funds to the borrower; (5) the benefit to commerce by increasing access to funds; and (6) the impact of invalidation on the financing community.¹⁵⁴ This manner of determining which borrowers will receive increased forum usury protection is inherently subjective. But such flexibility in the law is necessary for a court to shape its relief to assist those individual and non-commercial borrowers who are truly at the mercy of the overreaching lender who seeks the protection of his higher foreign usury limitations.¹⁵⁵

parties for fair contractual bargaining and the sophistication and ability to absorb loss required by Rule 146 of the Regulations of the Securities and Exchange Commission, 17 C.F.R. § 230.146 (1981). Rule 146 outlines conditions for private offerings in which the S.E.C. feels certain investors do not need disclosure protections provided under the Securities Act of 1933. Offerees who are either sophisticated in business matters or are able to bear the economic risk of the investment are considered outside the disclosure requirements of the S.E.C. if certain other conditions of Rule 146 are also met. 17 C.F.R. § 230.146(d)(1) (1981). Both usury laws and securities regulations seek to protect the unwary from the overreaching lender or issuer, and an exception from these protections is reasonable if the borrower or offeree-purchaser is capable of dealing with his nemesis on an equal footing.

153. One commentator has claimed that the rule of validation is not the appropriate choice-of-laws rule in a usury case, and then cites examples of overreaching in consumer loans. A. EHRENZWEIG, *CONFLICT OF LAWS*, 483, 484 & n.10 (1962). Three of the four cases Ehrenzweig cites for the nonapplication of the rule of validation are clearly consumer cases. *Fidelity Sav. Ass'n v. Shea*, 55 P. 1022 (Idaho 1899) (boilermaker borrowed \$650); *Personal Fin. Co. v. Gilinsky Fruit Co.*, 255 N.W. 558 (Neb. 1934), *cert. denied*, 293 U.S. 627 (1935) (assignment of employee's wages to secure small loan); *Continental Adjustment Corp. v. Klaus*, 174 A. 246 (Dist. Ct. N.J. 1934) (school teacher borrowed \$300). The fourth case, *Bundy v. Commercial Credit Co.*, 157 S.E. 860 (N.C. 1931), did not decide the issue of whether the rule of validation applied, but sent the case back to the trial level for a factual finding on good faith.

Ehrenzweig fails to recognize that courts effectively create an exception to the rule of validation when they encounter the consumer borrower who has been exploited by a sophisticated lender.

154. *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864, 874 (E.D. Pa. 1966). See generally *The Usury Headache*, *supra* note 87, at 883-84.

155. Another unsettled issue in Florida usury law is the degree of federal preemption wrought by the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221 § 501, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 161 (codified at 12 U.S.C. § 1735f-7 note (1980)) as amended by Act of Oct. 8, 1980, Pub. L. No. 96-399 §§

VII. CONCLUSION

Historically, Florida has followed a minority of jurisdictions which utilize ordinary choice-of-laws principles even when dealing with an interstate loan contract involving usury. The classical choice-of-laws rules look to place of execution and performance to determine which law should be applied to a multistate loan contract. Florida courts have also examined the subjective factor of good faith of the parties in seeking to invoke the law of a foreign jurisdiction.

Choice of laws in a usury setting, therefore, has been a confused area in Florida, with decisions ignoring the rule of validation, a special choice-of-laws rule followed by a majority of courts in usury cases. This rule would choose the law of a state with a "normal relation" to an interstate loan agreement which upholds the contract. *Sailboat Key* adopted the rule of validation for Florida, at least for commercial contracts. Under the rule of validation a "normal relation" will usually depend on the domicile and principal place of business of the parties, thus adding a degree of predictability to conflict problems in interstate loan contracts implicating usury.

Choice of laws when individual, consumer loans are involved remains an open question. The courts in this state may follow other jurisdictions in adopting a more protectionist attitude towards consumer borrowers, and apply Florida laws even if a "normal relation" exists with the state of the foreign lender. This could be done either by defining consumer loans as exempted from the rule of validation, or developing unconscionability standards to protect a vulnerable borrower.

308(c)(6), 324(a), (e), 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 1641, 1647, 1648; Act of Aug. 13, 1981, Pub. L. No. 97-35 § 384, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 432. Another part of the Act (§ 511) is codified at 12 U.S.C. § 86(a)(Supp. 1981). The Act preempts state usury law for certain federally related residential loans and business or agricultural loans of \$1,000 or more.