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3-1-1997

## Recent Changes in the Texas Usury Statutes - Do They Affect Common Law Usury Claims?

Cindy T. Beal

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### Recommended Citation

Cindy T. Beal, *Recent Changes in the Texas Usury Statutes - Do They Affect Common Law Usury Claims?*, 3 Tex. Wesleyan L. Rev. 421 (1997).

Available at: <https://doi.org/10.37419/TWLR.V3.I2.5>

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## RECENT CHANGES IN THE TEXAS USURY STATUTES—DO THEY AFFECT COMMON LAW USURY CLAIMS?

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### INTRODUCTION

Harry the Handyman (“Harry”) enters into a verbal contract with Roofs Are Us (“Roofs”) for the purchase of roofing materials. At no point are interest charges discussed, and the purchase agreement is never reduced to writing. Harry merely agrees to pay pursuant to the terms provided on the outstanding invoices. More importantly, Harry never agrees to pay interest, and the invoices do not address the payment of interest. However, after Harry becomes delinquent in his payments, Roofs charges Harry eighteen percent per annum interest on his outstanding balance. If Harry makes interest payments to Roofs, is Roofs liable to Harry for statutory usury, for common law usury, or both statutory *and* common law usury? Moreover, if Roofs is liable to Harry for usury, can Roofs take any remedial action to prevent any or all of its liability, or will any remedial action alert Harry that other possible claims exist?<sup>1</sup> Until recently, Roofs could be held liable for either statutory usury or common law usury. However, the Texas Legislature recently amended the general usury stat-

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1. Other claims may include fraud, misrepresentation, Deceptive Trade Practices Act violations, and the like.

ute<sup>2</sup> by enacting a cure provision.<sup>3</sup> The cure provision allows creditors to escape *statutory* liability penalties for charging usurious interest.<sup>4</sup>

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2. In a brief background prepared for a house bill analysis, the Texas House of Representative's Committee on Investments & Banking states, "The [Texas] Legislature is authorized by the [Texas] Constitution to regulate loans, define interest, and fix maximum rate [sic] of interest. Pursuant to this authority, the Legislature enacted the [Texas Consumer Credit] Code, which is the principal usury statute in Texas. . . ." HOUSE COMM. ON INVEST. & BANKING, BILL ANALYSIS, TEX. H.B. 2005, 73d Leg., R.S., 2 (1993). The bill analysis explains that

The Texas [Consumer] Credit Code is complex and extremely difficult to understand. The Code is amended by the Legislature virtually every time it meets, whether in regular or special session. Amendments typically utilize odd numbering systems and inconsistent terminology. Unlike the law in most state [sic] where usury is strictly a statutory creature, Texas law addresses usury ceilings both by statute and by the Texas Constitution.

*Id.* at 1.

3. See TEX. REV. CIV. STAT. ANN. art. 5069-1.06(4) (Vernon Supp. 1997).

4. See *id.* Following is the text of article 5069-1.06(4):

(4)(A) A person has no liability to an obligor for a violation of this Subtitle if:

(i) within 60 days after the date the person actually discovered the violation the person corrects the violation as to the obligor by taking whatever actions and by making whatever adjustments are necessary to correct the violation, including the payment of interest on a refund, if any, at the applicable rate provided for in the contract of the parties; and

(ii) the person gives written notice to the obligor of the violation before the obligor has given written notice of or has filed an action alleging the violation of this Subtitle.

(B) For the purposes of this section, the term "actually discovered" may not be construed, interpreted, or applied in a manner that refers to the time or date when, through reasonable diligence, an ordinarily prudent person could or should have discovered or known as a matter of law or fact of the violation in question, but the term shall be construed, interpreted, and applied to refer to the time of the discovery of the violation in fact. However, the actual discovery of a violation in one transaction may constitute actual discovery of the same violation in other transactions if the violation actually discovered is of such a nature that it would necessarily be repeated and would be clearly apparent in the other transactions without the necessity of examining all the other transactions. For purposes of this Section the giving of written notice shall be accomplished by and on the delivery of the notice to the person to whom the notice is directed or to the person's duly authorized agent or attorney of record. The delivery shall be made in person or by United States mail to the address shown on the most recent documents in the transaction. Deposit of the notice as registered or certified mail in a postage paid, properly addressed wrapper in a post office or official depository under the care and custody of the United States Postal Service constitutes prima facie evidence of the delivery of the notice to the person.

(C) A person has no liability to an obligor for a violation of this Subtitle if:

(i) before March 1, 1994, the person corrects the violation as to the obligor by taking whatever actions and by making whatever adjustments are necessary to correct the violation, including the payment of interest on a refund, if any, at the applicable rate provided for in the contract of the parties; and

(ii) the person gives written notice to the obligor of the correction before the obligor has given written notice of or has filed an action alleging the violation of this Subtitle.

Usury is defined as “interest in excess of the amount allowed by law.”<sup>5</sup> Therefore, usurious interest is interest exceeding the allowable legal amount. Charging usurious interest gives a debtor a statutory cause of action against a creditor. However, the new cure provision may affect what was once a debtor’s guaranteed recovery against a creditor charging usurious interest.

Roofs may thus avoid statutory usury liability by utilizing the new cure provision.<sup>6</sup> But, the question remains whether the cure provision will likewise absolve Roofs of liability for common law usury. Furthermore, if the statutory cure does not eliminate Roofs’ common law liability, Roofs’ remedial action of notifying and correcting the excessive interest charges may alert Harry of his potential common law usury claim against Roofs. Thus, a dilemma is created for creditors. A creditor, attempting to absolve himself of statutory usury, must notify a debtor to correct the overcharge. Yet, the cure provision’s statutory notification requirement may alert the debtor that the creditor is liable for common law usury.

While the new statutory cure provision was intended to encourage creditors to voluntarily cure interest overcharges, it may actually have the unintended effect of encouraging creditors *not* to cure interest overcharges. The problem arises because Texas recognizes common law usury and statutory usury as independent causes of action.<sup>7</sup> The newly-appended usury cure provision, however, applies only to *statutory* usury.<sup>8</sup> Given the fact that the Texas Supreme Court holds common law usury and statutory usury are independent causes of actions,<sup>9</sup> it appears that a debtor may still bring a common law usury action against a creditor even if the creditor has cured pursuant to the statu-

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(D) A person has no civil liability to an obligor and no criminal liability for a violation of this Subtitle resulting solely from contracting for, charging, or receiving the interest provided in Article 1.03 of this Subtitle prior to the 30th day after the debt is due and payable.

(5) The action of a person who corrects a violation of this Subtitle as provided by Section (4) of this Article is effective as to all persons in the same transaction, and those persons are entitled to the same protection as that provided in Section (4) of this Article to the person who makes the correction.

*Id.*

5. See TEX. REV. CIV. STAT. ANN. art. 5069-1.01(d) (Vernon 1987).

6. See TEX. REV. CIV. STAT. ANN. art. 5069-1.06(4) (Vernon Supp. 1996).

7. See *Danziger v. San Jacinto Sav. Ass’n*, 732 S.W.2d 300, 304 (Tex. 1987); see also *infra* Part II.

8. See TEX. REV. CIV. STAT. ANN. art. 5069-1.06(4) (Vernon Supp. 1996). The statute specifically states, “A person has no liability to an obligor for a violation of this subtitle” and lists the steps a creditor must take to absolve himself from liability. *Id.* (emphasis added).

9. See *Danziger*, 732 S.W.2d at 304.

tory provision. If so, is the debtor limited to the traditional common law recovery?<sup>10</sup>

This comment examines the cure provision of the Texas usury statute and discusses its effect on a plaintiff's recovery for common law usury. Part I discusses the historical background of usury laws and Texas usury statutes. Part II explains that the Texas Supreme Court has adjudicated common law and statutory usury actions and has concluded that Texas courts may allow both actions independently. Part III examines the new statutory cure provision. Part IV analyzes the questions that arise in applying the statutory usury cure remedy. Finally, the author concludes the statutory cure provision should not apply to a common law usury cause of action.

### I. THE HISTORICAL BACKGROUND OF USURY

Usury law is not a recent advent arising from modern consumer protection concerns enacted in derogation of the traditional principal of *caveat emptor*.<sup>11</sup> Rather, usury laws date back to the Code of Hammurabi<sup>12</sup> in 3000 B.C. and to the Old and New Testaments.<sup>13</sup>

While modern usury law regulates the charging of excessive interest rates, early usury law, as established in Leviticus, prohibited charging any interest on debts.<sup>14</sup> While contemplating and allowing the charging of interest, the Code of Hammurabi imposed a stringent penalty for usury law violations.<sup>15</sup> If a creditor used fraud or deception to collect an illegal rate of interest, he was stripped of all rights to repayment and the debtor's entire debt was voided.<sup>16</sup>

In 1545, England became the first European country to establish usury laws, which legalized and regulated the taking of interest.<sup>17</sup> Although "England repealed its usury laws in 1854, the English experience had already set the standard of interest regulation followed by

10. In *Bexar Building & Loan Ass'n v. Robinson*, 145 S.W. 227 (Tex. 1890), the Texas Supreme Court first allowed a debtor to merely recover interest paid in excess of the permitted rate as an equitable recovery and quoted various early treatises in fashioning its common law remedy.

11. *Caveat emptor* means "Let the buyer beware. This maxim summarizes the rule that a purchaser must examine, judge, and test for himself." BLACK'S LAW DICTIONARY 222 (6th ed. 1990).

12. The Code of Hammurabi fixed the maximum rate of interest on loans and required the presence of an official and one witness in executing all loans. See S. HOMER, A HISTORY OF INTEREST RATES 17-31 (1963).

13. See *Exodus* 22:25; *Deuteronomy* 23:19-20; *Nehemiah* 5:7; *Proverbs* 28:3; *Leviticus* 25:36; *Matthew* 25:14-30; *Luke* 19:11-27.

14. See *Leviticus* 25:36 (The Law of Moses was, "Do not take interest of any kind from [your countryman] . . . so that your countryman may continue to live among you.").

15. See HOMER, *supra* note 12, at 15-33.

16. See *id.*

17. See generally Jerret C. Oeltjen, *Usury: Utilitarian or Useless?*, 3 FLA. ST. U. L. REV. 167, 171-80 (1975).

the American colonies . . . .”<sup>18</sup> With England’s usury laws providing a foundation, the American colonies adopted laws defining and restricting the amount of allowable interest<sup>19</sup> and began molding the current usury laws.<sup>20</sup>

## II. COMMON LAW USURY AND STATUTORY USURY ARE INDEPENDENT CAUSES OF ACTION IN TEXAS

### A. Statutory Usury

Texas defines usury as interest exceeding the legal allowable amount.<sup>21</sup> Texas’s first usury statute was enacted in 1840 and authorized a twelve percent per annum maximum conventional rate of interest.<sup>22</sup> Contracts with interest rates exceeding twelve percent were void, although a creditor was permitted to recover the value of the goods sold to the debtor or the principal amount of the loan.<sup>23</sup> Thus, the first Texas usury statute guaranteed a debtor could recover interest paid to a creditor, while the creditor could retain the principal.

However, in the mid-19th century, restrictions on interest rates were the topic of increased debate in business and political circles.<sup>24</sup> Proponents of free enterprise argued against governmental intervention in the money market.<sup>25</sup> They contended that although interest rate restrictions were intended to aid the poor in obtaining loans,<sup>26</sup> the restrictions effectively created a shortage of capital.<sup>27</sup> Furthermore, they argued, because the source of credit was diminishing, the interest rate restrictions actually operated to exclude the poor from obtaining loans.<sup>28</sup> These Texas free-enterprise proponents thus convinced Texas

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18. Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates Under the Unconscionability Standard*, 31 HOUS. L. REV. 721, 726 (1994) (footnote omitted).

19. *See id.*

20. For a brief description of American usury laws and a history of its development *see* Bender, *supra* note 18, at 726-28.

21. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.01(d) (Vernon 1987).

22. *See* Paschal’s Dig. arts. 3941, 3942; Hart. Dig. art. 1609.

23. Paschal’s Dig. art. 3942. The statute stated:

All contracts or instruments of writing whatsoever, which may, in any way, directly or indirectly, violate the foregoing provisions of this act, by stipulating for allowing or receiving a greater premium or rate of interest than twelve per centum per annum, for the loan, payment, or delivery of any money, goods, wares, merchandise, bonds, notes of hand, or any commodity, shall be void and of no effect for the whole premium or rate of interest only; but the principal sum of money, or the value of the goods, wares, merchandise, bonds, notes of hand or commodity, may be received and recovered.

*Id.*

24. *See* TEX. CONST. art. XVI, § 11 interp. commentary (Vernon 1993).

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.*

lawmakers to abolish all existing usury laws and to forbid any future usury law enactment.<sup>29</sup>

The sweeping repeal of usury laws, however, resulted in massive credit abuses that within less than a decade compelled Texas to become, once again, usury-conscious.<sup>30</sup> Thus, in 1876, the people of Texas adopted a constitutional amendment deeming any interest charged above the rate of twelve percent per annum usurious and, furthermore, interest charged in excess of eight percent per annum “in the absence of any contract as to the rate of interest” was illegal.<sup>31</sup> But, the constitutional amendment did not provide a remedy for debtors who had paid usurious interest. Therefore, Texas courts fashioned remedies for debtors injured by the payment of excessive interest.<sup>32</sup>

Almost immediately after passage of the 1876 constitutional amendment, the Texas Legislature began enacting statutes implementing the constitutional mandate fixing maximum rates of interest.<sup>33</sup> While various subsequent constitutional amendments and usury statutes changed the permissible interest rate ceilings, the substance of the

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29. See TEX. CONST. of 1869, art. XII, § 44. Section 44 provided:

All usury laws are abolished in this State, and the Legislature is forbidden from making laws limiting the parties to contracts in the amount of interest they may agree upon for loans of money or other property: Provided, this section is not intended to change the provisions of law fixing rate of interest in contracts, where the rate of interest is not specified.

*Id.*

30. TEX. CONST. art. XVI, § 11 interp. commentary (Vernon 1993).

31. *Id.* In particular, section 11 of the 1876 Texas Constitution provided:

“The legal rate of interest shall not exceed eight per cent. per annum, in the absence of any contract as to the rate of interest; and by contract parties may agree upon any rate not to exceed twelve per cent. per annum. All interest charged above this last named rate, shall be deemed usurious, and the Legislature shall, at its first session, provide appropriate pains and penalties to prevent and punish usury.”

*Id.*

32. See *Bexar Bldg. & Loan Ass'n v. Robinson*, 145 S.W. 227 (Tex. 1890) (holding the creditor should be entitled to recover the loan amount and twelve percent per annum interest, the allowable rate, and the debtor should receive credit for amounts she actually paid, although the contract required interest from her at “about 14 1/2 per cent”).

33. Act approved Aug. 21, 1876, 15th Leg., R.S., ch. 45, §§ 2, 3, 1876 TEX. GEN. LAWS 228, reprinted in 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1873-1879, at 1064 (Austin, Gammel Book Co. 1898) and Tex. Rev. Civ. Stat. arts. 2978, 2979 (1879) (interest on written contracts not to exceed 12% per annum; written contracts agreeing to a greater rate of interest void and of no effect for the whole rate of interest only); Act approved April 11, 1892, 22d Leg., 1st C.S., ch. 6, § 21, 1892 TEX. GEN. LAWS 4, reprinted in 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1889-1897, at 368 (Austin, Gammel Book Co. 1898); Usury-Prescribing Pains and Penalties for Collection of Act approved April 18, 1907, 30th Leg., R.S., ch. 143, § 3, 1907 TEX. GEN. LAWS 277-78, reprinted in 13 H.P.N. GAMMEL, THE LAWS OF TEXAS 1906-1907, at 277 (Austin, Gammel Book Co. 1898) (allowing double recovery of the amount of usurious interest received or collected pursuant to a written contract). See generally *Allee v. Benser*, 799 S.W.2d 61 (Tex. 1988) (providing a succinct history of Texas statutory and constitutional usury provisions).

constitutional and statutory provisions “remained substantially the same, ultimately being codified as articles 5071 and 5073 of the Revised Statutes of 1925.”<sup>34</sup> Then, in 1967, the Sixtieth Texas Legislature enacted the genesis of Texas’s current general usury statute: Title 79, Chapter One of the Texas Credit Code.<sup>35</sup> Texas lawmakers followed the rationale that: (1) credit lending is essential and vital to Texas’s economy, (2) credit lending should be regulated, (3) no effective regulation existed, and (4) lack of regulation leads to creditors victimizing debtors.<sup>36</sup> Consequently, the legislature, in article 5069 of the Texas Revised Civil Statutes (“article 5069”), set a maximum legal interest rate of ten percent per annum, unless otherwise authorized by law,<sup>37</sup> and established a legal rate of six percent per annum for all accounts and contracts that contained no agreed upon rate of interest.<sup>38</sup> Furthermore, to protect debtors and to curtail abusive credit practices, the Sixtieth Legislature expanded the definition of a creditor, and article 5069 first codified a penalty provision for usury<sup>39</sup> thereby subjecting creditors to statutory penalties.<sup>40</sup> The legislature defined a creditor as anyone that “contracts for, charges or receives interest . . . authorized by this Subtitle.”<sup>41</sup> Thus, for the first time, Texas usurious creditors faced severe penalties, especially for egregious violations.<sup>42</sup> For instance, pursuant to section 1.06(1) of article 5069, a usury violation subjected a creditor to forfeiture of twice the total interest contemplated, not merely twice the interest overcharge, plus reasonable attorneys’ fees.<sup>43</sup> An egregious violation, such as, when total contemplated interest doubled the legal rate, subjected the creditor not only to all penalties contained in section 1.06(1), but also to forfeiture of all principal, interest, and other charges.<sup>44</sup>

In 1979, the Sixty-sixth Texas Legislature modified the penalty portion of section 1.06, by increasing the penalty from two times the total

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34. *Allee*, 779 S.W.2d at 63 (synopsizing the constitutional and statutory framework of Texas usury laws) (citing TEX. REV. CIV. STAT. ANN. arts. 5071, 5073 (1925) (repealed 1967)).

35. See TEX. REV. CIV. STAT. ANN. art. 5069-1.01-.07 (Vernon 1987 & Supp. 1997). Title 79, Interest, art. 5069-1.01-.14 Declaration of Legislative Intent, § 1 (Vernon 1987).

36. See Chapter 274, H.B. No. 452, § 1. Additional protection became available for consumers with the creation of the Texas Deceptive Trade Practices Act in 1977.

37. See TEX. REV. CIV. STAT. ANN. art. 5069-1.02 (Vernon 1987).

38. *Id.* § 1.03.

39. See *id.*

40. See *id.* 1.06(1)-(2).

41. *Id.*

42. See *id.*

43. Acts 1967, 60th Leg., R.S., ch. 274, 1967 Tex. Gen. Laws 608, 610 (amended 1979) (current version at TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon 1987)).

44. See TEX. REV. CIV. STAT. ANN. art. 5069-1.06(2). In addition to the civil penalties, 1.06(2) makes the charging of usurious interest in excess of double the maximum rate a misdemeanor. See *id.*



contemplated amount of interest to three times the amount exceeding the usury limit,<sup>45</sup> plus reasonable attorneys' fees.<sup>46</sup> Furthermore, in cases where this new calculation would bring a debtor only a small recovery, the legislature provided a minimum recovery of \$2,000 or twenty percent of the principal, whichever was less.<sup>47</sup> This provision was specifically intended to deter small loan creditors from charging high interest rates.<sup>48</sup> The legislature also made the six percent default rate, utilized in the absence of a specified interest rate, applicable to all open accounts, and the interest was to "commenc[e] on the thirtieth (30th) day from and after the time when the sum [was] due and payable."<sup>49</sup> However, creditors committing accidental and bona fide errors are relieved from usury liability.<sup>50</sup> Thus, creditors committing clerical errors use section 1.06(1) as a defense to a usury charge.<sup>51</sup>

Whether a creditor is subject to a statutory penalty depends on whether a debtor can prove all the elements of a cause of action for usury, which include proving the creditor charged him "an exaction of a greater compensation than allowed by law for use of the money by

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45. COMMITTEE ON FINANCIAL INSTITUTIONS, BILL ANALYSIS, TEX. H.B. 616, 66th Leg., R.S. 2 (1979). The Legislative history for this amendment has disappeared from the Archives Division of the State Library in Austin. In a telephone interview with Gene Carefoot of the Archives Division, the legislative history for House Bill No. 616, which was enacted as art. 5069-1.06(1)-(3), was last requested in 1985, and despite an extensive search performed by Ms. Carefoot and her associates, the legislative history information was not found. Ms. Carefoot's conclusion was that the documents were either missing or misfiled. Thus, it is difficult to surmise the true legislative intent regarding this amendment. Telephone Interview with Gene Carefoot, Coordinator, Access and Outreach Projects, Archives Division of the State Library (June 12, 1996). See also James A. Pikel, *Usury Law and Guarantor: A Texas-Sized Loophole*, 13 REV. LITIG. 31, n.17 (1993) (verifying the missing legislative history of this amendment by a professional research firm).

46. See Acts 1967, 60th Leg., R.S., ch. 274, 1967 Tex. Gen. Laws 608, 610 (amended 1979) (current version at TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon 1987)).

47. See *id.* (providing further that "in no event shall the amount forfeited be less than two thousand dollars or twenty percent of the principal, whichever is the smaller sum").

48. See COMMITTEE ON FINANCIAL INSTITUTIONS, BILL ANALYSIS, TEX. H.B. 616, 66th Leg., R.S., 2 (1979).

49. TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1987). See Manuel H. Newburger, *Acceleration Notices and Demand Letters*, 47 CONSUMER FIN. L.Q. REP. 338, 341 (1993). Newburger states that:

On open accounts for which there is no written agreement to pay interest, it cannot be charged until thirty days after the date the invoice is due. Any attempt to charge interest during the thirty days from the date of the invoice to the invoice's due date will be an act of usury and, because no interest could be charged during that time period, will in fact be an act of double usury.

*Id.* at 341 (citations omitted).

50. See TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon 1987).

51. See *Mayfield v. San Jacinto Sav. Ass'n*, 788 S.W.2d 119 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (finding that lender's transposition of numbers between the note and a disbursement check was a clerical type error absolving the lender of liability).

the debtor.”<sup>52</sup> The statute defines usurious interest as interest that is greater than that allowed by statute<sup>53</sup> or interest “which is in excess of double the amount of interest allowed by this Subtitle[.]”<sup>54</sup> Additionally, a debtor must bring a statutory action for usury within four years from when the creditor “received or collected”<sup>55</sup> the usurious interest.

### B. Common Law Usury

Article 16, section 11 of the current Texas Constitution grants authority to the Texas Legislature to fix the maximum legal rates of interest.<sup>56</sup> Absent such legislation, however, the Constitution mandates that a maximum default rate of ten percent per annum applies to contracts with agreed upon interest rates.<sup>57</sup> Furthermore, section 11 provides that a maximum default rate of six percent per annum applies to contracts containing no agreed upon interest rate.<sup>58</sup>

Nonetheless, when legislators amended the Texas Constitution in 1876, they included no provision allowing debtors to recover damages in the event they paid usurious interest.<sup>59</sup> The amendment only made it unlawful for a creditor to charge interest above twelve percent per annum.<sup>60</sup> Thus, in 1890, the Texas Supreme Court, in *Bexar Building & Loan Ass'n v. Robinson*,<sup>61</sup> created a common law remedy for debtors voluntarily paying usurious interest.<sup>62</sup> In *Bexar Building*, the court

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52. *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982) (“The essential elements of a usurious transaction are: (1) a loan of money; (2) an absolute obligation that the principle be repaid; and (3) the exaction of a greater compensation than allowed by law for the use of money by the debtor.”).

53. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon 1987).

54. *Id.* § 1.06(2). In addition to the penalty set forth in article 5069-1.06(1), article 5069-1.06(2) penalizes a violator through forfeiture of all principal “as well as interest and all other charges [the violator] and shall pay reasonable attorney fees set by the court.” *Id.* Article 5069-1.06(2) also sets forth a criminal penalty for such violation: a misdemeanor with assessment of a fine of not more than \$1,000. *See id.*

55. *Id.* § 1.06(3).

56. *See* TEX. CONST. art. XVI, § 11. The constitutional provision provides:

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

*Id.*

57. *See id.*

58. *See* TEX. REV. CIV. STAT. ANN. art. 1.06(1)-(2).

59. *See* *Bexar Bldg. & Loan Ass'n v. Robinson*, 14 S.W. 227, 227-28 (Tex. 1890).

60. *See* TEX. CONST. art. XVI, § 11.

61. 14 S.W. 227 (Tex. 1890).

62. *See id.* at 228.

declared that it would function as a court of equity and “interfere” in the transaction between the complaining debtor and the creditor but only to the extent that it allowed the debtor to recover usurious interest<sup>63</sup> but required the debtor to pay the principal. The court held that even though Texas’s usury statute simply maintained a usurious contract void and did not specifically provide a remedy for an injured debtor to recover excessive amounts paid, the debtor was not foreclosed from a “common-law or equitable right to recover, by affirmative action, such interest.”<sup>64</sup>

In *Commercial Credit Equipment Corp. v. West*,<sup>65</sup> the Amarillo Court of Appeals revisited the issue of whether a usury statute preempted all common law causes of action for usury. The *Commercial Credit* court held that both statutory and common law causes of action are actionable if pleaded.<sup>66</sup> In *Commercial Credit*, a debtor sued a creditor, alleging the creditor violated the usury statute.<sup>67</sup> In addition, the debtor asserted a common law usury cause of action.<sup>68</sup> The *Commercial Credit* court relied on *Bexar Building* for the proposition that both the statutory and the common law actions were independently valid.<sup>69</sup> Specifically, the *Commercial Credit* court stated, “We find nothing in . . . article 5069-1.06 that expresses a clear intent by the legislature to overturn the long-established common law action pronounced in [*Bexar Building*] for the recovery of usurious interest paid.”<sup>70</sup> The court further stated,

Courts, do not, however, favor repeals of settled principles by implication, and the legislature in the enactment of a statute will not be presumed to intend to overturn long-established legal principles, unless such intention is made clearly to appear by express declarations or by necessary implication. *To the contrary, the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed, unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits of no other reasonable construction.*<sup>71</sup>

Similarly, the Texas Supreme Court in *Danziger v. San Jacinto Savings Ass’n*,<sup>72</sup> held that common law usury and statutory usury are in-

63. *See id.*

64. *Id.*

65. 677 S.W.2d 669, 679 (Tex. App.—Amarillo 1984, writ ref’d n.r.e.).

66. *See id.* at 679 (holding the usury statute did not overturn or repeal the common law action for recovery of usurious interest).

67. *See id.*

68. *See id.*

69. *See id.*

70. *Id.*

71. *Id.* (quoting *Flannery v. Bishop*, 504 P.2d 778, 781 (Wash. 1972)) (emphasis added).

72. 732 S.W.2d 300 (Tex. 1987). In *Danziger*, the creditor placed the principal amount of a home improvement loan in an escrow account to be disbursed by the

dependent causes of action.<sup>73</sup> The *Danziger* court expressly held a debtor could sue for both common law usury and statutory usury.<sup>74</sup> The court specifically referred to *Commercial Credit* and other lower court decisions stating that the plaintiffs had “properly pleaded their common law claim and preserved it on appeal; therefore, they are entitled to recover all interest paid.”<sup>75</sup> In sum, the *Danziger* court held that if both actions are initially pleaded in a case, then both actions are valid.<sup>76</sup> The Texas Supreme Court has emphasized, however, that a common law cause of action not properly pleaded will not be sustained, and the injured debtor may not recover common law damages.<sup>77</sup> For instance, in *Allee v. Benser*,<sup>78</sup> the Texas Supreme Court held that a common law cause of action for usury could not be sustained because it had not been properly pleaded.<sup>79</sup> However, the *Allee* court expressly stated that it was not precluding the plaintiff from asserting a common law cause of action for usury on remand.<sup>80</sup>

### C. Common Law Remedy for Statutory Usury

*Bexar Building* established a remedy for debtors voluntarily paying usurious interest rates.<sup>81</sup> Under the rule established in *Bexar Building*, a debtor’s damages are calculated as the difference between the actual payments of interest made to the creditor and the interest that would have been due had the maximum *legal* amount been paid.<sup>82</sup> The *Bexar Building* decision made Texas one of the first states to al-

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creditor directly to the contractor as work progressed on the improvements. *See id.* at 302. The debtor was charged interest on the total loan amount during the time the construction was in progress. *See id.* “At the end of the disbursements, when [the creditor] could calculate how much money had been retained in the escrow account during each payment period, [the creditor] provided a “manual” (handwritten) credit to the account to *return interest charged* on the money prior to its being disbursed.” *Id.* (emphasis added). The Texas Supreme Court held it was illegal for a lender to charge interest on the total principal amount of the note when the loan is disbursed intermittently and then credit back the overcharge once the entire principal amount is disbursed. *See id.*

73. *See id.* at 305.

74. *See id.*

75. *See id.* at 304.

76. *See id.*

77. 779 S.W.2d 61 (Tex. 1988).

78. *See id.* In *Allee*, the assignees of a subordinate lienholder brought a cause of action against the superior lienholder for a declaration that the senior transaction was usurious as a matter of law and that the subordinate lienholder had standing to assert the usury claim. *See id.* The Texas Supreme Court concluded that the subordinate lienholder lacked “standing to assert the penalty provisions of the *usury statutes* against the senior lienholder,” but would not decide whether the subordinate lienholder had standing to assert a *common law* cause of action against the superior lienholder because “[t]he present state of the [subordinate lienholder’s] pleadings would not allow such a remedy . . . .” *Id.* at 65 (emphasis added).

79. *See id.*

80. *See id.*

81. *See Bexar Bldg. & Loan Ass’n v. Robinson*, 14 S.W. 227, 228 (Tex. 1890).

82. *See id.*

low a debtor to institute an action for restitution to recover usurious interest paid to a creditor.<sup>83</sup> The *Bexar Building* court surveyed other states' usury statutes, including those of Missouri, Iowa, Maryland, and Georgia, and found that none permitted a debtor to sue for damages due to "some peculiar policy or language of the statute."<sup>84</sup> The *Bexar Building* court distinguished these state decisions as not in accord with equitable doctrines and fashioned an *equitable* remedy.<sup>85</sup> The court, quoting several early treatises, stated:

Equity . . . will never assist a party to carry into effect his own intentional violation of the law. It is well settled that courts of equity will go further, and give all the affirmative relief which is just to the debtor. . . . If the contract is executed, he may recover back the usurious amount paid in excess of the sum actually borrowed, and legal interest thereon. . . . Such contracts being declared void by the statute against usury, equity will follow the law in the construction of the statute.<sup>86</sup>

At the date of the *Bexar Building* decision, the Texas usury statute provided that a contract with an interest rate greater than twelve percent per annum would be void.<sup>87</sup> In its analysis, the *Bexar Building* court could find nothing in the Texas statute to indicate that the legislature intended to destroy a debtor's right to file a common law cause of action to recover interest overcharges.<sup>88</sup> Thus, the court allowed the debtor to receive restitution of the interest paid above the legal limit.<sup>89</sup>

Thus, as long as both the common law usury action and the statutory usury action are properly pleaded,<sup>90</sup> Texas will recognize both causes of action. However, Texas law also prohibits a debtor from receiving a double recovery.<sup>91</sup> In attempting to harmonize these concepts, Texas appellate courts have fashioned confusing and conflicting remedies.

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83. *See id.* at 227-28.

84. *See id.*

85. *See id.* at 228.

86. *Id.* (referring to the disclaimed notion that if an individual contracted to pay usurious interest he should not be granted equity if no compulsion was used by the creditor) (footnotes omitted).

87. *See id.*

88. *See id.*

89. *See id.*

90. *See generally* Allee v. Benser, 779 S.W.2d 61 (Tex. 1988) (disallowing a common law remedy for usury when not properly pleaded, but not precluding the plaintiff from asserting on remand a common law cause of action); First State Bank of Bedford v. Miller, 563 S.W.2d 572 (Tex. 1978) (holding a properly pleaded common law claim for usury is the fundamental requirement for recovery).

91. *See* Coppedge v. Colonial Sav. & Loan Ass'n, 721 S.W.2d 933, 939 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (citing Vick v. George, 671 S.W.2d 541, 551 (Tex. App.—San Antonio 1983), *rev'd on other grounds*, 686 S.W.2d 99 (Tex. 1984)).

For example, the *Commercial Credit* court, while holding common law usury actions are independent from statutory usury actions, treated the remedies as cumulative, allowing the debtors to recover for common law usury but also exacting the statutory penalty.<sup>92</sup> In fact, the court supplemented the statutory penalties of “forfeiture of three times the amount of usurious interest *contracted for, charged or received*”<sup>93</sup> with the common law remedy of restitution of the amount of interest paid above the authorized legal rate.<sup>94</sup> In assessing the statutory penalties, the court reasoned that allowing Commercial Credit to retain interest up to the maximum legal amount allowed the creditor to benefit “from its unlawful action and effectively escape[] from the triple damages provision of the statute.”<sup>95</sup> Thus, the court ruled that the common law remedy should not be limited solely to restitution of excess interest paid beyond the legal rate.<sup>96</sup>

In *Coppedge v. Colonial Savings & Loan Ass’n*,<sup>97</sup> the court agreed that the common law and statutory causes of action are independent, noting “that when the legislature creates a cause of action and a remedy for its enforcement, that legislation is regarded as *cumulative* of the common-law cause of action and remedy, unless the statute expressly or by implication negatives the latter.”<sup>98</sup> However, the court ruled a debtor was entitled to recovery under either the common law or the statute but not both.<sup>99</sup> Thus, although the debtors pleaded both statutory and common law actions, the court reasoned the debtors were only entitled to the common law remedy because the debtor’s damages were the “result of one loss, viz., the usurious interest charged and received by [the creditor].”<sup>100</sup> Therefore, the court held that the debtors were not entitled to recover under the alternative statutory cause of action.<sup>101</sup> The *Coppedge* court, affirming the trial court’s judgment of recovery under a common law usury cause of action, held that where alternative remedies exist, the aggrieved party is entitled to only a single recovery.<sup>102</sup>

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92. *Commercial Credit Equip. Corp. v. West*, 677 S.W.2d 669, 680 (Tex. App.—Amarillo 1984, writ ref’d n.r.e.).

93. *See id.*

94. *See id.* at 679.

95. *Id.* at 680.

96. *See id.*

97. 721 S.W.2d 933 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).

98. *Id.* at 938 (citing *Juneman v. Franklin*, 3 S.W. 562, 563 (Tex. 1887) (emphasis added)).

99. *See id.* at 939.

100. *See id.*

101. *Id.* at 939 (citing *Vick v. George*, 671 S.W.2d 541, 551 (Tex. App.—San Antonio 1983), *rev’d on other grounds*, 686 S.W.2d 99 (Tex. 1984)) (“It is well established that an aggrieved party is entitled to only one recovery for the same loss, even when alternative remedies exist.”).

102. *See Coppedge*, 721 S.W.2d at 939.

Finally, in *Danziger v. San Jacinto Savings Ass'n*,<sup>103</sup> the Texas Supreme Court ruled that a debtor pleading a common law action is entitled to recover all interest *as well as* statutory penalties.<sup>104</sup> In *Danziger*, the court also extinguished the requirement that a debtor must pay usurious interest in order to proceed with a common law cause of action against a creditor charging usurious interest. The court found the unilateral act of charging excessive interest occurs when a creditor enters a usurious amount on a statement, an invoice, a letter, a ledger sheet or other document.<sup>105</sup> The court found it unnecessary and immaterial whether the debtor actually pays the usurious amount before he may proceed with an action,<sup>106</sup> stating, “The mere charging of excessive interest constitutes usury.”<sup>107</sup> Using this framework, the court ruled the plaintiffs were entitled to *all* interest paid and were “entitled to cancellation of all interest not yet paid because ‘. . . as to interest a usurious contract is unenforceable.’”<sup>108</sup> The court allowed this recovery in addition to statutory penalties since the plaintiffs had properly pleaded and preserved both causes of action.<sup>109</sup> Thus, the court expanded the traditional recovery for usury beyond that which previously had been allowed. Pursuant to the *Danziger* decision, Texas courts now recognize independent causes of action *and* recoveries for common law and statutory usury, provided each is pleaded and properly preserved for appeal.<sup>110</sup>

### III. THE STATUTORY CURE PROVISION

According to the House Committee on Investments and Banking, the Texas usury statute is poorly organized and of such length and complexity as to create “nightmares” for creditors and debtors.<sup>111</sup> To escape the harsh nature of Texas usury laws, large corporations have either sought out-of-state financing for in-state projects or have avoided undertaking major projects in Texas altogether.<sup>112</sup> For this and perhaps other reasons, the Seventy-third Legislature in 1993 amended article 1.06, adding a cure provision to grant relief to credi-

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103. 732 S.W.2d 300 (Tex. 1987).

104. *See id.*

105. *See id.* at 304 (citing *Windhorst v. Adcock Pipe & Supply*, 547 S.W.2d 260, 261 (Tex. 1977); *Wright Way Spraying Serv. v. Butler*, 690 S.W.2d 897 (Tex. 1985); *Moore v. Sabine Nat'l Bank of Port Arthur*, 527 S.W.2d 209 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (demand letters); *Dryden v. City Nat'l Bank of Laredo*, 666 S.W.2d 213 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (monthly statements).

106. *See id.*

107. *Id.*

108. *Id.* (quoting *Wall v. East Tex. Teachers' Credit Union*, 533 S.W.2d 918, 921 (Tex. 1976)) (omission in original).

109. *See id.*

110. *See id.*

111. *See* HOUSE COMM. ON INVEST. & BANKING, BILL ANALYSIS, TEX. H.B. 2005, 73d Leg., R.S. (1993).

112. *See id.*

tors charging usurious interest.<sup>113</sup> In enacting House Bill No. 2005, legislators added subsection (4) to article 5069-1.06.<sup>114</sup> On its face, the amendment clearly allows a creditor to cure a statutory usury violation by “taking whatever actions . . . necessary to correct the violation,” provided the remedial action is taken within sixty days from the creditor’s actual discovery of the violation.<sup>115</sup> Thus, the cure provision permits a creditor to escape statutory liability.<sup>116</sup> Remedial actions may include either refunding the interest, or correcting the charged interest rate, or both.<sup>117</sup> Moreover, a creditor must give written notice to the debtor that he violated the usury statute before the debtor informs the creditor of the violation or before the debtor has filed a usury action against the creditor.<sup>118</sup>

IV. THE TEXAS LEGISLATURE FAILED TO RESOLVE WHETHER  
THE STATUTORY CURE PROVISION APPLICABLE TO  
STATUTORY USURY CLAIMS ALSO APPLIES TO  
COMMON LAW USURY CLAIMS

In spite of the legislative intention to allow creditors to cure usurious violations by utilizing the statutory cure provision, a major question remains unanswered. The cure provision addresses only the statutory usury claims. The cure provision, however, is silent as to whether the provision may be applied to *common law* usury claims. Since the Texas Supreme Court specifically allows both common law and statutory claims, the unresolved issue is whether, or how, the new statutory cure provision affects the common law usury cause of action. Specifically, may a debtor recover on a common law usury claim after the creditor has used the cure provision to foreclose the debtor’s statutory usury claim?

In the initial hypothetical, it is undisputed that Roofs committed usury. Roofs violated the usury statute by charging excessive interest. By charging Harry eighteen percent per annum interest, Roofs is not only liable to Harry for the smallest statutory penalty—three times the usurious interest charged—but Roofs is also liable for an egregious violation and thus must forfeit all of the principal, interest, incidental charges, and required payment of attorneys’ fees. Since the parties never agreed on the amount of interest to be charged, Roofs is limited to charging Harry a maximum interest rate of six percent interest per annum.<sup>119</sup> However, if Roofs discovers its usury violation

113. See TEX. REV. CIV. STAT. ANN. art. 5069-1.06(4) (Vernon Supp. 1997).

114. See *id.*

115. *Id.* 5069-1.06(4)(A)(i).

116. See *id.*

117. See *id.*

118. See *id.* § 1.06(4)(A)(ii). The statute also defines the meaning of “actually discovered,” being the time of the violation discovery “in fact” and the procedure for giving written notice and delivery. See *id.* § 1.06(B).

119. See *id.* § 1.06(4)(A)(ii).



and acts within sixty days to cure, Roofs may correct its mistake as prescribed by the statutory cure provision. To do so, Roofs must take whatever means necessary and send written notice to Harry. Yet, such written notice may alert Harry to a common law usury claim against Roofs.

Texas courts have not addressed whether or how the statutory cure provision applies to common law usury claims. In fact, Texas courts have yet to interpret the statutory cure provision. Thus, the question remains whether the statutory cure provision, if followed, will be applied to both statutory and common law usury claims. In resolving the issue, Texas courts may literally interpret the statutory cure provision, ascertain legislative intent from the provision's legislative history, interpret the cure provision as Texas courts have interpreted the usury statute, or consult other states' decisions interpreting similar usury cure provisions.

#### A. *Texas Legislative History, Construction, and Interpretation*

Although no Texas court has interpreted the usury cure provision, many courts have interpreted the usury statute.<sup>120</sup> Thus, judicial treatment of the usury statute may shed some light on how Texas courts will construe the cure provision. For instance, the Texas Supreme Court's opinion in *Bexar Building* is evidence of how the new cure provision might be interpreted. In construing early Texas usury statutes, the *Bexar Building* court held a common law cause of action for usury was not pre-empted by the statutory usury cause of action.<sup>121</sup> The court reached this conclusion after noting the statutory usury provision lacked any eliminating language.<sup>122</sup> Hence, the *Bexar Building* court strictly construed the language of the usury statute in its analysis.<sup>123</sup> This strict construction of the usury statute was also followed in *First State Bank of Bedford v. Miller*,<sup>124</sup> *Commercial Credit Equipment Corp. v. West*,<sup>125</sup> and *Danziger v. San Jacinto Savings Ass'n*,<sup>126</sup> leading to the arguably obvious conclusion that Texas courts narrowly construe usury statutes.

In fact, since *Bexar Building*, Texas courts have specifically stated that the Texas usury statute “*must be narrowly construed*[.]”<sup>127</sup> The Austin appellate court in *Hardwick v. Austin Gallery of Oriental Rugs*,

120. See *infra* text accompanying notes 121-132.

121. See *Bexar Bldg. & Loan Ass'n v. Robinson*, 14 S.W. 227, 228 (Tex. 1890).

122. See *id.*

123. See *id.*

124. 563 S.W.2d 572, 576-77 (Tex. 1978).

125. 677 S.W.2d 669 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

126. 732 S.W.2d 300 (Tex. 1987).

127. *Hatzenbuehler v. Call*, 894 S.W.2d 68, 69 (Tex. App.—San Antonio 1995, writ denied) (citing *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988)).

*Inc.*,<sup>128</sup> states that “nothing in Section 1.06(1) evidences a legislative intention to supplant the common law remedy.”<sup>129</sup> Furthermore, the Dallas Court of Appeals in *Cadle Co. v. Castle* stated, “In determining the meaning of statutory language, we read the statute as a whole and give consideration to the entire act, its nature and object, and the consequences that would follow from a particular construction.”<sup>130</sup> Thus, these Texas courts, using a strict, plain-meaning construction,<sup>131</sup> focus on the language, or lack thereof, in the usury statute and infer the legislative intent from the language to determine the meaning, scope, and purpose of the usury statute.

As previously stated, in enacting the statutory cure provision, the Texas Legislature failed to state whether the cure provision affects common law usury. Rules of statutory construction dictate that if the Texas Legislature intended the cure provision to include common law usury, it would have expressed its intention in the statute.<sup>132</sup> Therefore, because the plain language of the statute does not include liability for common law usury, then by its exclusion, the Texas Legislature must have intended the cure provision to affect only statutory usury causes of action.<sup>133</sup>

However, recent proposed amendments to the usury statutes in Texas expressly include and negate a creditor’s liability for common law usury.<sup>134</sup> Companion bills in the Texas House of Representatives and the Texas Senate were introduced in the Seventy-fourth Legislature in 1995.<sup>135</sup> The companion bills stated:

The liability provided by . . . this section is inclusive of any other liabilities of creditors provided by common law for contracting for, charging, or receiving conventional interest in an amount that produces a rate in excess of the maximum rate of conventional interest fixed by this Subtitle, including any other liabilities imposed by the

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128. 779 S.W.2d 438 (Tex. App.—Austin 1989, writ denied) (emphasis added).

129. *Id.* at 448.

130. *Cadle Co. v. Castle*, 913 S.W.2d 627, 631 (Tex. App.—Dallas 1995, writ denied) (citing *Sayer v. Mullins*, 681 S.W.2d 25, 27 (Tex. 1984)).

131. See 2A NORMAN J. SINGER, SUTHERLAND’S STATUTORY CONSTRUCTION § 46.01 at 81 (5th ed. 1992).

132. See *Commercial Credit*, 677 S.W.2d at 679 (quoting *Flannery v. Bishop*, 504 P.2d 778, 781 (Wash. 1972)).

133. *Expressio unis est exclusio alterius* is an often quoted legal maxim meaning the expression of one is the exclusion of others. BLACK’S LAW DICTIONARY 299 (5th ed. 1983).

134. See Tex. S.B. 1473, 74th Leg., R.S. (1995); Tex. H.B. 3071, 74th Leg., R.S. (1995). In a telephone conversation, Nancy Hayes of the Legislative Reference Library indicated the committee passed neither bill. Therefore, neither bill was introduced in the Senate or the House. Hence, no bill analysis is available—nor any additional information. Telephone Interview with Nancy Hayes, Legislative Reference Library (July 12, 1996).

135. See Tex. S.B. 1473, 74th Leg., R.S. (1995); Tex. H.B. 3071, 74th Leg., R.S. (1995).

courts of this state to enforce Section 11, Article XVI, Texas Constitution, and a creditor is not subject to those other liabilities.<sup>136</sup>

The Texas Legislature's refusal to expressly enact these bills may arguably demonstrate a legislative intent to leave common law usury outside the scope of the statutory cure provision.

As discussed in Part II, the Texas Supreme Court has allowed recovery for common law usury in addition to recovery for statutory usury, provided the common law claim is properly pleaded and error is preserved for appeal.<sup>137</sup> Furthermore, since the Texas Legislature did not specifically include liabilities for common law usury claims within the general usury statutes, and since courts continue to recognize common law usury claims, it may be inferred that common law usury is not affected by the new cure provision. Therefore, creditors who choose to implement the cure provision to avoid statutory liability may still be liable for common law usury.

The cure provision's requirement that a creditor notify a debtor to avoid liability for statutory usury may actually serve to alert the debtor that he has another potential cause of action against the creditor. Therefore, the creditor is placed in a "Catch-22" situation. In order to escape statutory liability, the creditor must notify the debtor that creditor violated the statutory usury provision. Yet, such notification may alert the debtor that the creditor may also be liable for common law usury.

The cure provision does not specify a particular format that a creditor must follow to notify the debtor. Rather, the cure provision requires the creditor to correct his violation by *whatever means necessary* within sixty days of actually discovering the violation and to give the debtor written notification of the violation.<sup>138</sup> Thus, a creditor could conceivably draft the notice so that it does not state or imply that a legal violation has occurred. Practically speaking, presently it is impossible to notify a debtor of the interest rate correction without seeming to send a telegram saying, "SUE ME!"

An examination of the legislative history of the cure provision and rules governing statutory construction shows the Texas Legislature intended to allow usurious creditors to absolve themselves of, at least, statutory liability.<sup>139</sup> For instance, in 1993, the Seventy-third Legislature eliminated the nearly automatic usury penalty provision of the usury statute by including the cure provision.<sup>140</sup> The cure provision was intended to put the usurious creditor in a better position by allowing him to avoid suit by an injured debtor if the creditor proac-

136. Tex. S.B. 1473, 74th Leg., R.S. (1995).

137. See *supra* Part II.

138. See *supra* note 4, § 4(A)(i).

139. See HOUSE COMM. ON INVEST. & BANKING, BILL ANALYSIS, TEX. H.B. 2005, 73d Leg., R.S. (1993).

140. See *supra* note 4, § 4.

tively remedies the debtor's injury.<sup>141</sup> The newly enacted cure provision was modeled after the then existing cure provision found in article 5069 of the Texas Revised Civil Statutes that only applied to specified consumer loans.<sup>142</sup> The new cure provision, however, applies to consumer loans in general and effectively treats all usurious creditors equally.<sup>143</sup> However, the provision does not apply to all consumer loans. Specifically excluded are transactions falling outside the delineated sections, which include sections governing consumer loans that are regulated by the Consumer Credit Commissioner.<sup>144</sup>

In the House Committee Reports, the Legislature stated, "The purposes of this legislation are to allow persons who have violated Chapter One of the Credit Code to use procedures similar to those found in Chapter Eight of the Credit Code to cure the violation and avoid liability."<sup>145</sup> Furthermore, the Legislature found that the cure provision was the proper remedy because creditors were confused and unsure regarding statutory liability for charging usurious interest.<sup>146</sup> In fact, in bill hearings, proponents emphasized that the banking industry requested such an amendment.<sup>147</sup>

The proponents of the bill also sought enactment of the cure provision to effectuate certain policy goals. First, they hoped that by affording usurious creditors the ability to cure, debtors' usury lawsuits would no longer "clog [ ] the courts."<sup>148</sup> Further, the House Committee on Investments and Banking alleged that without the bill's enactment, creditors would be discouraged from acting in good faith by notifying debtors of a mistake.<sup>149</sup> Additionally, the House Committee contended that without the cure provision the usury statute discouraged creditors from disclosing their mistakes and decreased the incen-

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141. See HOUSE COMM. ON INVEST. & BANKING, BILL ANALYSIS, TEX. H.B. 2005, 73d Leg., R.S. (1993).

142. See *id.* The newly enacted cure provision was modeled after the existing cure provision in Chapter Eight of article 5069. See TEX. REV. CIV. STAT. ANN. art. 5069-8.01(C) (Vernon 1987).

143. See TEX. REV. CIV. STAT. ANN. art. 5069-1.01 (Vernon 1987). Subtitle One governs written contracts and consumer loans in general. Subtitle Two, containing chapters two through eight, governs loans under the jurisdiction of the Consumer Credit Commission.

144. See *id.* 5069-2.01. Specifically, Subtitle Two deals with Regulated Loans (chapter three), Installment Loans (chapter four), Secondary Mortgage Loans (chapter five), Retail Installment Loans (chapter six), and Motor Vehicle Installment Sales (chapter seven). The cure provision that governs Subtitle 2 (Sections 2.01 to 8.01) is in Chapter Eight. See TEX. REV. CIV. STAT. ANN. art. 5069-8.01(C) (Vernon 1987).

145. HOUSE COMM. ON INVEST. & BANKING, BILL ANALYSIS, TEX. H.B. 2005, 73rd Leg., R.S. (1993).

146. See *id.*

147. See *id.*; *Hearing on Tex. H.B. 2005 Before the House Comm. on Inv. & Banking*, 73d Leg., R.S. (March 23, 1993) (copy on file with the author).

148. HOUSE COMM. ON INVEST. & BANKING, BILL ANALYSIS, TEX. H.B. 2005, 73d Leg., R.S. (1993).

149. See *id.*

tive to correct overcharges.<sup>150</sup> Thus, the Committee intended to decrease litigation and promote creditors' good faith actions to correct mistakes when it encouraged enactment of the cure provision. Whether the Legislature clearly effectuated its purpose, however, remains to be seen. In fact, passage of the cure provision coupled with the legislators' specific exclusion of common law usury causes of action,<sup>151</sup> may actually produce a contrary result.

Regardless of the legislature's attempts to clarify the scope of the statutory cure provision, Texas courts must ultimately determine the issue. It appears clear that if the cure statute is interpreted strictly, as courts construed the usury statutes in *Bexar Building* and *Miller*, then the common law usury cause of action will still be allowed in spite of the statutory cure provision.

### B. Survey of Other States

Since no Texas case law exists regarding the scope of Texas's statutory cure provision and/or its effect on a creditor's liability for common law usury, usury statutes and cure provisions of other states may be helpful in interpreting and applying Texas law.<sup>152</sup> Three other states' statutes expressly provide a statutory cure provision for a credi-

150. *See id.*

151. *See supra* Part II.

152. *See generally* ALA. CODE § 8-8-12 (1996); ALASKA STAT. § 45.45.030 (Michie 1995); ARIZ. REV. STAT. ANN. § 44-1202 (West 1996); CAL. CIV. CODE § 1916-1 (West 1996); *Heald v. Friis-Hansen*, 345 P.2d 457 (Cal. 1959); COLO. REV. STAT. ANN. § 5-12-103 (West 1996); CONN. GEN. STAT. ANN. § 36A-573 (West 1996); D.C. CODE ANN. §§ 26-705, 26-707, 28-3303, 28-3304 (1996); GA. CODE ANN. §§ 7-4-1, 7-4-2, 7-4-10, 7-4-18 (1996); HAW. REV. STAT. ANN. §§ 478-4, 478-5, 478-7, 478-8 (Michie 1995); IDAHO CODE § 28-42-201 (1996); 17 ILL. COMP. STAT. ANN. 6413 (West 1981); 815 ILL. COMP. STAT. ANN. 205/1-205/6 (West 1993); IND. CODE ANN. § 24-4.5-1-102 (Michie 1996); IOWA CODE ANN. § 535.5 (West 1996); KAN. STAT. ANN. § 17-7105 (1995); KY. REV. STAT. ANN. § 360.020 (Michie 1995); LA. CIV. CODE ANN. art. 2924 (West 1996); LA. REV. STAT. ANN. § 3501 (West Supp. 1996); *Thrift Funds of Baton Rouge, Inc. v. Jones*, 274 So. 2d 150 (La. 1973); ME. REV. STAT. ANN. tit. 9-B, § 432 (West 1980); MINN. STAT. ANN. §§ 47.20, 48.196, 334.03 (West 1996); MISS. CODE ANN. §§ 75-17-17, 75-67-119 (1995); MO. ANN. STAT. §§ 408.060, 408.070 (West 1996); *Hecker v. Patney*, 196 S.W.2d 442 (Mo. Ct. App. 1946); MONT. CODE ANN. § 31-1-108 (1995); NEB. REV. STAT. § 45-105 (1995); NEV. REV. STAT. § 99.050 (1995); N.H. REV. STAT. ANN. § 336:1 (1995); N.J. STAT. ANN. § 31:1-3 (West 1990); N.M. STAT. ANN. § 56-8-13 (Michie 1996); N.Y. GEN. OBLIG. LAW § 5-513 (McKinney 1989); N.C. GEN. STAT. §§ 1-53, 6-25, 24-2 (1995); N.D. CENT. CODE §§ 47-14-09 to 47-14-11 (1995); OHIO REV. CODE ANN. §§ 1321.02, 1321.13, 1321.04 (Banks-Baldwin 1996); OKLA. STAT. ANN. tit. 14A, § 3-201 (West 1996); OR. REV. STAT. § 82.010 (1995); 41 PA. CONS. STAT. ANN. § 502 (West 1992); R.I. GEN. LAWS § 6-26-4 (1995); S.D. CODIFIED LAWS §§ 54-3-7, 54-3-9, 54-11-7, 54-3-9 (Michie 1996); TENN. CODE ANN. §§ 47-14-114, 47-14-117 (1996); UTAH CODE ANN. § 70B (1996), (repealed); UTAH CODE ANN. §§ 70C-1-101 to -106, -201 to -203, -301 to -302 (1996); VT. STAT. ANN. tit. 9, § 50 (1993); VA. CODE ANN. §§ 6.1-330.56, 6.1-330.57 (Michie 1996); WASH. REV. CODE ANN. § 19.52.030 (West 1996); WIS. STAT. ANN. § 138.057 (West 1996); WYO. STAT. ANN. §§ 40-14-101, 40-14-140, 40-14-142, 40-14-522, 40-14-523, 40-14-702 (Michie 1996) (illustrating the incongruous treatment of usury among individual states).

tor.<sup>153</sup> However, these provisions differ significantly from the Texas provision.

In Florida, for example, a penalty provision is inapplicable if a creditor notifies a debtor of a usurious charge and refunds the overcharge, plus interest, or if the creditor is “a bona fide endorsee or transferee of negotiable paper purchased before maturity” limited to certain exceptions.<sup>154</sup> In Maryland, usury cannot be pleaded or claimed if a creditor notifies the debtor and modifies the contract rate to the legal rate within thirty days of the execution of the loan.<sup>155</sup> A West Virginia creditor is not in violation of its state’s statute if an innocent, bona fide error is made and if the error is rectified within fifteen days after the creditor’s receipt of notice of a usurious contract.<sup>156</sup>

Therefore, Texas is the only state which contains a corrective measure which is based on the creditor’s discovery of the violation.<sup>157</sup> Thus, interpreting Texas’s cure provision by examining other states’ corrective measures remains difficult due to the lack of similarity among statutes. Nonetheless, these other states’ statutory cure provisions are clearly intended to provide creditors with incentives to cure by absolving them of all liability.

#### CONCLUSION

Texas holds statutory usury claims are independent of common law usury claims. Courts further hold that each usury cause of action neither relies on nor requires the other. Hence, Texas courts allow a debtor to recover under the Texas usury statute regardless of whether the debtor makes a claim for or receives a recovery from a common law usury cause of action, provided he does not receive double recovery.

Section 1.06(4) of article 5069 was intended to reduce creditor liability for statutory usury by allowing creditors to voluntarily correct overcharges. The Texas Legislature, however, did not specifically include common law usury claims within the scope of the cure provision. Strictly construed, the cure provision may only apply to statutory usury causes of action. Thus, the legislature has left creditors in a very precarious position because the very notification required to cure a statutory usury claim may trigger knowledge of a common law usury claim and could subject the creditor to severe penalties. This result leaves creditors that rely on the statutory cure provision vulnerable to liability if a debtor asserts a claim for common law usury. Therefore,

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153. See FLA. STAT. ANN. § 687.04 (West 1990); MD. CODE ANN., Com. Law I § 12-114 (1983); W. VA. CODE. § 47-6-6 (1995).

154. FLA. STAT. ANN. § 687.04 (West 1990).

155. See MD. CODE ANN., Com. Law I § 12-114 (1983).

156. See W. VA. CODE § 47-6-6 (1995).

157. See TEX. REV. CIV. STAT. ANN. art. 5069-1.06(4)(A)(i) (Vernon Supp. 1996).

creditors who choose to follow the cure provision may still be held liable under a common law usury cause of action.

Additionally, a debtor may even use the current status of usury laws either defensively or offensively. From a defensive posture, if a creditor charging usurious interest were to sue a debtor for recovery of a past-due balance without availing itself of the statutory cure provision, a debtor could countersue for statutory and common law usury. Offensively, if this same creditor failed to avail itself of the cure provision, the debtor may be entitled to bring a usury cause of action against the creditor at any time prior to the expiration of the four year limitations period.<sup>158</sup> Thus, the creditor is left merely with a hope that the debtor will fail to realize he may pursue a common law usury cause of action.

In sum, the statutory usury cure provision, intended to reduce creditor liability for usury, is of questionable value because it may actually function as notice to a debtor that his creditor broke the law. Thus, the cure provision for the creditor is not really a cure at all, but rather is an ailment, offering a creditor incomplete protection from lawsuits and actually placing the creditor in a vulnerable position.

*Cindy T. Beal*

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158. See TEX. REV. CIV. STAT. ANN. art. 5069-1.06(3) (Vernon 1987).