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The Revised Texas Usury Ceilings - A New Alice in Wonderland.

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THE REVISED TEXAS USURY CEILINGS—A NEW ALICE IN WONDERLAND

FRANK A. ST. CLAIRE*

SARA GREENWOOD HOGAN**

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Texas House Bill 1228, effective 1981, established usury ceilings governing all credit transactions in Texas. This article discusses these basic usury ceilings, concentrating primarily on the commerical loan provisions. Additionally, this article discusses the applicability of the ceilings, selected interpretational problems, and certain procedural and constitutional questions suggested by the Act. The Act is still largely "unchartered waters" and, therefore, many of the questions raised by the authors of this article are and will remain unanswered for sometime. Because of the extreme complexity of the new Act, this article is not intended to be an exhaustive treatise of all of the provisions of House Bill 1228 and the problems which the provisions raise; rather, it is merely intended to take the reader on a journey with Alice "Through the Looking Glass."

I. Introduction And Overview

On May 8, 1981, House Bill 1228[1] was signed into law.[2] The Act constitutes an omnibus bill totally revising interest limitations in Texas. The overall framework of the Act increases the basic usury

1. 1981 Tex. Gen. Laws, ch. 111, §§ 1-29, at 271-87. House Bill 1228 will often be referred to in this article simply as the "Act."

2. *See* 1981 Tex. Gen. Laws, ch. 111, § 29, at 287. The Act was emergency legislation and became effective immediately upon signature by the Governor. *See id.*

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ceiling for any written contract[3] from the ten percent basic usury ceiling established by prior law,[4] to a floating "indicated rate ceiling" equal to the "auction average rate quoted on a bank discount basis for 26-week treasury bills issued by the United States government, as published by the Federal Reserve Board, for the week preceding the week in which the rate is contracted for, multiplied by two, and rounded to the nearest one-quarter of one percent."[5] The Act creates as alternative ceilings monthly, quarterly, and annualized ceilings computed by using the same basic formula as the indicated rate ceiling. In addition, the Act establishes a minimum floating ceiling of eighteen percent per annum and a maximum floating ceiling of twenty-four percent except in the case of credit in excess of $250,000 extended for business, commercial, investment, or other similar purposes in which event the maximum ceiling is twenty-eight percent.

The Act was designed to solve problems in the Mastercard, Visa, and revolving charge account areas by allowing creditors a procedure to unilaterally increase interest rates on future advances of open-end credit and further amend them periodically on a quarterly or annual basis.[6] Two other principal goals of the Act were to allow factoring institutions to make monthly adjustments and to allow all loans to be tied to some type of variable index such as the federal discount rate or the prime rate of a particlar lending institution.[7] The Act, however, affects other aspects of commerical lending some of which, apparently, were not adequately considered by the draftsmen. As a result, the Act raises many unanswered questions which continue to cause confusion and uncertainty in commercial lending.

In order to fully understand the new statute, especially the application of the chapter provisions and the penalty provision, it is

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3. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a) (Vernon Supp. 1982-1983). The Act also increases the ceiling on any rate or amount of time price differential producing a rate for any agreements described in Chapters 6, 6A, or 7 of Title 79. *See id.*

4. *See* TEX. CONST. art. XVI, § 11; TEX. REV. CIV. STAT. ANN. art. 5069-1.02 (Vernon 1971).

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

6. *See id.* § (h)(1) (ceilings available for open-end accounts). If provided for in the agreement, the creditor, upon complying with the Act, may unilaterally increase the interest rate. *See id.* § (i).

7. *See* TEX. REV. CIV. STAT. ANN. arts. 5069-1.01 to -51.19 (Vernon 1971 & Vernon Supp. 1982-1983) (Title 79 concerns interest).

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helpful to understand the organization of Title 79 of the Texas Revised Civil Statutes. Title 79 is entitled simply "Interest" and consists of three subtitles. Subtitle One, entitled "Interest," comprises two chapters, "Interest" and "Alternative Credit Provisions." Subtitle Two, entitled "Consumer Credit," comprises eight chapters; included therein are the "General Provisions" and "Penalties." Subtitle Three, entitled "Consumer Protection," is composed of seven chapters including Chapter 15 entitled "Revolving Loan Triparty Accounts." House Bill 1228 comprises twenty-nine sections; the most important is section five which establishes new permissible ceilings for interest rates.[8]

II. The Consumer Credit Commissioner

> "Who are *you*?" said the Caterpillar.
> . . . Alice replied, rather shyly, "I-I hardly know, Sir, just at present — at least I know who I *was* when I got up this morning, but I think I must have been changed several times since then."
> "What do you mean by that?" said the Caterpillar sternly. "Explain yourself!"
> "I can't explain *myself*, I'm afraid, sir," said Alice, "because I'm not myself, you see."
> "I don't see," said the Caterpillar.[9]

The Act authorizes the "consumer credit commissioner" to enforce Chapters 2, 3, 4, 5, 6, 6A, 8, 15, and 51 of Title 79;[10] to compute[11] and publish the monthly, quarterly, and annualized ceilings

8. *See id.* art. 5069-1.04 (Vernon Supp. 1982-1983). This statute and all others beginning with the prefix "5069-" will at times be referred to without reference to the "5069-" prefix. For example, "article 5069-1.04" will often be simply referred to as "article 1.04." Many of the other sections of the Act expand the applicability of article 1.04 to other areas of law. For example, Section 1 of the Act creates a new article 1302-2.09A, which allows corporations to contract at rates not in excess of those permitted under article 1.04. *See id.* art. 1302-2.09A (alternate rate provision). Section 2 amends article 2461-4.01 and Section 3 amends article 2461-7.01 to allow credit unions to make loans at rates not in excess of those permitted under article 1.04. *See id.* arts. 2461-4.01, 2461-7.01. Section 6 creates a new article 5069-1.07, § (f), which authorizes article 1.04 rates to be used in loans secured by real estate. *See id.* art. 5069-1.07, § (f) (Vernon Supp. 1982-1983). Section 7 amends article 5069-1.08 to allow registered brokers and dealers to charge article 1.04 rates. *See id.* art. 5069-1.08.

9. L. Carroll, Alice's Adventures in Wonderland 24 (1982).

10. *See* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (o)(3) (Vernon Supp. 1982-1983).

11. *See id.* § (d).

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in the Texas Register;[12] and, possibly, to issue interpretations.[13] The Act fails to define exactly who is the "consumer credit commissioner."[14] Article 2.01 states that, for purposes of Subtitle Two, the terms, "Consumer Credit Commissioner" and "Commissioner" ". . . when used in general application shall mean the Consumer Credit Commissioner."[15] In relation to state chartered banks, savings and loan associations, and credit unions operating under Subtitle Two, the term means respectively the State Banking Commissioner, the State Savings and Loan Commissioner, and the Credit Union Supervisor of the State Banking Department.[16] With regard to the federally chartered counterparts of these entities, the term means the "official exercising authority or equivalent to that exercised by the appropriate state official."[17]

Since the enforcement authorization provision of the Act specifically refers to article 2.01(*l*), no ambiguity exists in the Act as to the identity of the Consumer Credit Commissioner for purposes of enforcement.[18] The other H.B. 1228 sections referring to the Consumer Credit Commissioner, however, do not contain this reference.[19] It is arguable that the "other" commissioners[20] have no au-

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12. *See id.* § (k)(1).

13. *See id.* § (p). This section may create that authority by implication. *See id.* § (p). For a further discussion, see text accompanying notes, 28-36 *infra.*

14. For purposes of this article, a reference to the "Consumer Credit Commissioner" will mean the Consumer Credit Commissioner created under article 5069-2.02. *See* TEX. REV. CIV. STAT. ANN. art. 5069-2.02, § (1) (Vernon Supp. 1982-1983). A reference to "consumer credit commissioner" will be a reference to the term as used in the Act. This distinction also applies to the word "commissioner."

15. *Id.* art. 5069-2.01, § (*l*) (Vernon 1971). This definition applies only in Subtitle Two.

16. *See id.* The "Consumer Credit Commissioner" is that individual appointed by the Finance Commission pursuant to article 2.02. *See id.* art. 5069-2.02, § (1) (Vernon Supp. 1982-1983). Article 2.02 outlines the duties and powers of the Consumer Credit Commissioner. *See id.* §§ (2)-(7).

17. *Id.* art. 5069-2.01, § (*l*) (Vernon 1971).

18. *See id.* art. 5069-1.04, § (o)(3) (Vernon Supp. 1982-1983). Note, however, that the term "consumer credit commissioner" is capitalized in Subtitle Two and not in the Act. *Compare id.* § (o)(3) (enforcement provision of Act refers to consumer credit commissioner) *with id.* art. 5069-2.01, § (*l*) (Vernon 1971) (Subtitle Two refers to Consumer Credit Commissioner). Additionally, the technical provisions of article 2.01(*l*) appear to be established for purposes of Subtitle Two rather than all of Title 79. *See* TEX. REV. CIV. STAT. ANN. art. 5069-2.01 (Vernon 1971).

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

20. *See id.* art. 5069-2.01, § (*l*) (Vernon 1971). "Other commissioners" refers to the alternative commissioners created in Subtitle Two. *See id.* § (*l*).

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thority outside Subtitle Two, therefore, the "Consumer Credit Commissioner" as established by article 2.02 would have sole authority to implement the usury laws established in article 1.04.[21] On the other hand, it seems unlikely that the various "other" commissioners would feel bound by interpretations promulgated by the Consumer Credit Commissioner which are contrary to their own views concerning Title 79 provisions. The uncertainty created by these definitions becomes more apparent when considering the "safe-harbor" provision contained in Subtitle One.[22] According to article 1.04(p), a person does not violate Title 79 if he relies upon an interpretation of Title 79 by the "consumer credit commissioner."[23] Since this provision is contained in Subtitle One and the "other" commissioners relate to institutions operating under the authority of Subtitle Two, it might be assumed that the reference in article 1.04(p) is solely to the article 2.02 Consumer Credit Commissioner. Conversely, reliance on the "other" commissioners' interpretations may be protected by the "safe-harbor" provision contained in Subtitle Two, which provides in part:

> A person may not be held liable in any action brought under this Article for a violation of this Subtitle or of Chapter 14 of this Title if such person shows by a preponderance of evidence that . . . (2) the violation was an act done or omitted in good faith in conformity with any rule, regulation, or interpretation of this Title by any state agency, board, or commission . . . .[24]

Presumably, "any state agency, board, or commission" would include the "other" commissioners. Further, this "safe-harbor" provision raises an additional problem of conflicting interpretations by the Consumer Credit Commissioner and the "other"

21. With respect to publication of the various computed ceilings, this creates no serious conflict as the same ceilings should result regardless of who performs the calculations. *See id.* § (k)(1) (Vernon Supp. 1982-1983) (commissioner shall publish ceilings).

22. *See id.* § (p). A "safe harbor" provision is a provision in a statute that sets forth certain rules or criteria, which if complied with, will excuse a violation of the statute committed in reliance upon the rules or criteria set forth. *See id.*

23. *See id.* § (p). For a full discussion of article 1.04(p), see text accompanying notes 413-58 *infra.*

24. TEX. REV. CIV. STAT. ANN. art. 5069-8.01, § (f) (Vernon Supp. 1982-1983). The effective date of this provision was August 31, 1977. *Query,* does the requirement of "good faith" imply reliance? *Compare id.* art. 5069-1.04, § (p) (no requirement of good faith) *with id.* art. 5069-8.01, § (f) (good faith required).

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commissioners.[25]

Another question raised by the language of the Act concerns the authority of the Consumer Credit Commissioner to issue interpretations of the Act at all. The legislature has the authority to delegate certain of its functions to a subordinate administrative body; however, the statute granting such powers must contain definite guidelines for the administrative exercise of its delegated duties.[26] An administrative agency possesses only those powers which are expressly given by the statute and those which may be necessarily implied from the authority given and responsibilites imposed.[27] The Act contains no express grant of authority to issue interpretations of Title 79.[28] Since the authority to *issue* interpretations was not expressly granted, the question becomes whether this power may be necessarily implied from the authority conferred and the duties imposed upon the Consumer Credit Commissioner. The Consumer Credit Commissioner is charged with the duty to enforce chapters 2, 3, 4, 5, 6, 6A, 7, 8, 15, and 51 and article 5069-1.04 as it is applied to contracts governed by those chapters.[29] Gener-

25. In the event of conflicting interpretations, several questions arise. Must the institutions referred to in article 2.01(*l*) rely only upon interpretations issued by their respective commissioners or may they rely on an alternative statement issued by the Consumer Credit Commissioner? Additionally, does the conflict exist only for those persons who may be held liable for a violation of Subtitle Two and what are the rights of the various borrowers in the event of such a conflict?

26. *See In re* Johnson, 554 S.W.2d 775, 780-81 (Tex. Civ. App.—Corpus Christi 1977), *writ ref'd n.r.e. per curiam*, 569 S.W.2d 882 (Tex. 1978). The delegation of power will be constitutional "if the legislature has prescribed sufficient and adequate standards to guide the discretion conferred." *Id.* at 781. As a general principle, the delegating law must be so complete in its terms that the recipient need not exercise his judgment to determine the extent of the delegated power. The rights, obligations, or powers granted or imposed must be fixed precisely. The only discretion allowed must relate to the execution of the prescribed rights and duties. *See id.* at 781.

27. *See* Stauffer v. City of San Antonio, 162 Tex. 13, 16, 344 S.W.2d 158, 160 (1961); Railroad Comm'n v. Atchison, T. & S.F.R.R., 609 S.W.2d 641, 643 (Tex. Civ. App.—Austin 1980, no writ).

28. The Act does provide that an individual who conforms to an interpretation of Title 79 by the Consumer Credit Commissioner does not violate the statute. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (p) (Vernon Supp. 1982-1983).

29. *See id.* § (o)(3). Additionally, he is directed to compute and publish the monthly, quarterly, and annualized ceilings for the next applicable period. *See id.* §§ (c), (d), (k)(1). Other articles prescribe additional duties. *See, e.g.,* TEX. REV. CIV. STAT. ANN. arts. 5069-2.02 (Vernon Supp. 1982-1983) (authority and duties with respect to internal procedure and consumer education); -2.03 (Vernon 1971 & Vernon Supp. 1982-1983) (authority with respect to investigation and enforcement of Subtitles Two and Three); -3.08 (Vernon Supp. 1982-1983) (examination of licensees and access to records in connection therewith).

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ally, an individual or agency charged with the enforcement of a statute may be expected to interpret the statute in order to define or clarify its duties.[30] In addition to the above premise, the reference in article 1.04(p) to Commissioner interpretations may lead to the conclusion that the authority to issue interpretations is a power necessarily implied from the duties of enforcement expressly conferred.[31]

Conversely, the legislature may not have intended for the Consumer Credit Commissioner to issue interpretations to be relied upon by the general public. Like the Credit Union Commissioner, the Consumer Credit Commissioner was given no substantive authority to promulgate rules and regulations pursuant to his duties of enforcement.[32] Additionally, it is unclear whether the legislature intended that statutory interpretations given by the Consumer Credit Commissioner be subject to the procedural requirements of the Administrative Procedure and Texas Register Act (APTRA) as are interpretive rules promulgated by state agencies.[33] The inter-

30. *See* First Fed. Sav. & Loan Ass'n v. Vandygriff, 639 S.W.2d 492, 498-99 (Tex. Ct. App.—Austin 1982, no writ) (interpretive rules interpret and apply provisions of applicable statute). The court quoted the following example from Cooper's treatise on state administrative law:

> [An] agency given broad discretionary powers in respect to the granting of licenses may formulate a statement of the conditions which must be met in order to obtain a license. In many cases, agencies have thus worked out standards and policies which in effect control the administrative decision in a wide variety of cases.

Id. at 498-99; *cf.* State v. United Bonding Ins. Co., 450 S.W.2d 689, 692 (Tex. Civ. App.—Austin 1970, no writ) (construction of statute by those with duty to carry it into effect entitled to great respect in courts).

31. *Cf.* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (p) (Vernon Supp. 1982-1983) (no liability for acts in conformity with commissioner interpretations).

32. *See* TEX. ATT'Y GEN. OP. No. H-598, at 2 (1975) (Consumer Credit Commissioner does not have rulemaking authority). *Compare* TEX. REV. CIV. STAT. ANN. art. 5069-2.01, § (*l*) (Vernon 1971) (Consumer Credit Commissioner shall promulgate rules and regulations adopted by Finance Commission) *with id.* art. 2461-11.10, § (e) (Vernon Supp. 1982-1983) (Credit Union Commissioner shall enforce rules and regulations promulgated by Credit Union Commission). Although the Savings and Loan Commissioner appears to have statutory rule-making power, the Austin Court of Appeals has recently held that substantive rule-making authority resides exclusively in the Savings and Loan Section of the Finance Commission. *Compare* TEX. REV. CIV. STAT. ANN. art. 342-205, § (e) (Vernon 1973) *with* First Fed. Sav. & Loan Ass'n v. Vandygriff, 639 S.W.2d 492, 498 (Tex. Ct. App.—Austin 1982, no writ) (Savings and Loan Commissioner has no rule-making power).

33. *Compare* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (p) (Vernon Supp. 1982-1983) (no reference to APTRA) *with id.* art. 6252-13a, § 5 (Vernon Supp. 1982-1983) (requirements to meet before adoption of rules). For a discussion of the APTRA requirements and the extent of the Consumer Credit Commissioner's compliance, see text accompanying notes

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pretations envisioned by the legislature in article 1.04(p) may well have been those generated on a case-by-case basis in the course of enforcement and licensing proceedings rather than general interpretations of the Act. If the Consumer Credit Commissioner has exceeded his statutory authority in promulgating published interpretations of the Act and substantial individual rights have been prejudiced as a result, this may provide grounds for reversal upon judicial review of a contested case.[34]

The Consumer Credit Commissioner has taken the view that he is authorized to issue interpretations of the entire Act,[35] and has done so in a diligent and prodigious fashion.[36] As a result of his voluntary undertaking and the understandable reluctance of the various other agencies to issue voluminous interpretations of the Act, it appears that most, if not all, interpretations of the Act will come from the Consumer Credit Commissioner. Because of the many ambiguities contained in the Act, these letter interpretations will continue to generate debate and discussion.

III. Ceilings

The Act establishes a number of alternative interest rate ceilings varying as a function of a determinable index. The Act further provides, however, that regardless of the result of the computation of the various ceilings, in no event shall the ceiling be less than a set

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376-412 *infra*. It is interesting to note that the Credit Union Commission's rule-making power is expressly subject to the APTRA. *See* Tex. Rev. Civ. Stat. Ann. art. 2461-11.07, § (b) (Vernon Supp. 1982-1983).

34. *See* Tex. Rev. Civ. Stat. Ann. art. 6252-13a, § 19(e)(2) (Vernon Supp. 1982-1983) (court will reverse or remand if appellant's substantial rights prejudiced because administrative decision exceeded statutory authority of agency); *see also* First Fed. Sav. & Loan Ass'n v. Vandygriff, 639 S.W.2d 492, 498-500 (Tex. Ct. App.—Austin 1982, no writ) (Savings and Loan Commissioner exceeded statutory authority causing reversal and remand); United Sav. Ass'n of Texas v. Vandygriff, 594 S.W.2d 163, 171-72 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (even if agency exceeded statutory authority in delaying entry of order, no reversal or remand where substantial rights unharmed).

35. *See* 7 Tex. Reg. 3040, 3041 (1982). As authority for the issuance of interpretations, the Commissioner cited articles 5069-1.04, § (p) and -8.01, § (f). *See id.* at 3041.

36. The Consumer Credit Commissioner issued thirty-six Letter Interpretations during 1981 and twenty-nine Letter Interpretations in 1982. Several of the Letter Interpretations contain case law analysis and review of legislative history. References to the Letter Interpretations in this article shall be by number and date. The current Consumer Credit Commissioner is Sam Kelley, whose office also publishes "The Credit Code Letter" containing summaries of certain Letter Interpretations as well as the computed ceilings each week.

minimum rate or greater than one of two set maximum rates.

A. *Minimum Ceiling*

If the computation of the applicable ceiling[37] yields a result less than eighteen percent, then that applicable ceiling is eighteen percent.[38] Consistent with the language of the Act, the Consumer Credit Commissioner has stated that regardless of the resulting computation of the indicated rate, monthly, quarterly, or annualized ceiling, an eighteen percent usury ceiling is always available on a written contract[39] unless the loan is made under a usury statute other than article 1.04.[40] A person engaged in lending practices regulated by the Consumer Credit Code, however, may have to obtain a license if the interest charged thereunder exceeds ten percent per annum.[41]

B. *Maximum Ceiling*

As a general rule, if the computation of the applicable ceiling yields a result greater than twenty-four percent, then that applicable ceiling is twenty-four percent.[42] The Act increases the maximum ceiling from twenty-four to twenty-eight percent "on any contract under which credit in an amount in excess of $250,000 is or is to be extended, or any extension or renewal of such a contract," provided the credit is extended for business, commercial, investment, or other similar purpose.[43] Finally, references to the various alternative ceilings contained in the Act mean the ceilings as modified by these minimum and maximum ceilings.[44]

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37. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (a), (c) (Vernon Supp. 1982-1983) (computations of indicated rate, annualized, quarterly, and monthly ceilings).

38. *See id.* § (b)(1).

39. *See* CONSUMER CREDIT COMM'R LETTER INTERP. NOS., 81-19, at 3 (1981); 81-3, at 1 (1981).

40. *See id.* No. 81-4, at 1-2 (1981). An oral loan or a loan made pursuant to the ten percent ceiling of article 1.02 by an unregulated lender are examples of such a loan. *See id.* No. 81-14, at 1-2 (1981).

41. *See id.* 81-14, at 1-2 (1981).

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

43. *See id.* § (b)(2). Note that loans for agricultural purposes are subject only to the twenty-four percent ceiling. *See id.* § (b)(2).

44. *See id.* § (b)(3).

C. *Indicated Rate Ceiling*

The basic ceiling created by the Act is the "indicated rate ceiling" which is defined as:

> [T]he auction average rate quoted on a bank discount basis for 26-week treasury bills issued by the United States government, as published by the Federal Reserve Board, for the week preceding the week in which the rate is contracted for, multiplied by two, and rounded to the nearest one-quarter of one percent . . . .[45]

Auctions of treasury bills generally occur on Monday, unless the Monday is a holiday, in which case they occur the preceding Friday.[46] In the event the Federal Reserve Board fails to publish its auction rate, the consumer credit commissioner can obtain the rate from what he believes to be the best source.[47] If the information necessary to compute a ceiling is not available, the ceiling is "frozen" at the last calculable level until the information again becomes available.[48] Additionally, the Consumer Credit Commissioner is required to compute and publish the monthly, quarterly, and annualized ceilings in the Texas Register within eleven days after the day on which they are computed; the Commissioner must publish the indicated rate ceiling from time to time.[49] Courts are permitted to take judicial notice of the published rate.[50]

The definition of indicated rate ceiling fails to specify which week is meant by the "week preceding the week in which the rate

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45. *Id.* § (a)(1).

46. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 2 (1981). The auction average rate is generally available through information sources about 4:30 p.m. Central Standard Time. By that time, banks which have bid on bonds know what that rate is. The Federal Reserve Board has provided a telephone number recording, (214)651-6177, available twenty-four hours a day, seven days a week, which contains the twenty-six week treasury bill rate for bonds to be issued on a Thursday. On Tuesday, the recording gives the rate for bonds to be issued the following Thursday. The recorded information does not track the language of the Act. There is first an announcement of the rate of the treasury bills issued on a Thursday, after which there will be an announcement of the rates for three and six month (instead of twenty-six week) treasury bills. The twenty-six week treasury bill rate is published in the Tuesday Wall Street Journal under the heading "Money Rates." As a practical matter, it is likely that people will rely on the Wall Street Journal, even though it is not an official source, and upon the Credit Code Letter which is now published weekly by the Consumer Credit Commissioner.

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

48. *See id.* § (k)(2).

49. *See id.* § (k)(2).

50. *See id.* § (k)(3).

is contracted for."[51] There are three possible interpretations: (i) the week of the auction, (ii) the week of publication of the auction rate, or (iii) the week in which the bills are issued. The least likely choice from both a grammatical and practical standpoint is the week of publication by the Federal Reserve Board.[52] The week in which the auction occurs creates a problem when there are two auctions in one week and no auctions in the following week.[53] The Consumer Credit Commissioner has taken the position that he will look to the week of the auction to determine the twenty-six week treasury bill rate.[54]

D. *Quarterly Ceiling*

Available as an alternative to the indicated rate ceiling is the quarterly ceiling, which is the average of the computations for the indicated rate ceilings for auctions occuring during the three calendar months preceding the computation dates of December 1, March 1, June 1, and September 1.[55] A quarterly ceiling becomes effective on the next succeeding January 1, April 1, July 1, and October 1, respectively.[56] The maximum and minimum ceilings set forth in article 1.04(b) are applied to the final average obtained and not to each of the indicated rate ceiling computations.[57]

E. *Annualized Ceiling*

The annualized ceiling is an average ceiling of computations of

51. *See id.* § (a)(1).

52. The Federal Reserve publishes a "Federal Reserve Statistical Release" on Monday which has the rate in effect for the preceding week. Under a column for Thursday, it lists the issue rate for bonds issued on Thursday. Unfortunately, that publication normally is not available until Thursday or Friday of each week. The "Federal Reserve Bulletin," published monthly by the Federal Reserve, has a monthly computation of rates which would be too late to use for the weekly indicated rate ceiling.

53. For example, this would occur when Monday is a holiday.

54. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 2, 3 (1981).

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

56. *See id.* § (d).

57. *See id.* § (b)(1)-(3). Article 1.04(a)(2) and article 1.04(d) both reference the average of the "computations" in article 1.04(a)(1) and not simply the indicated rate ceiling. *See id.* §§ (a)(2), (d). The Consumer Credit Commissioner has also interpreted the Act in this manner. *See* CONSUMMER CREDIT COMM'R LETTER INTERP. No. 82-14, at 1-3 (1982). Thus, since section (b) refers to these computations, the ceilings apply to the final average obtained. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (b)(1) (Vernon Supp. 1982-1983).

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the indicated rate ceilings under article 1.04(a)(1) for auctions held in the twelve calendar months immediately preceding the four dates used for computing the quarterly ceiling.[58] This computed annual ceiling will remain effective until the next quarterly calculation.[59] As with the quarterly ceiling, the maximum and minimum ceilings are to be applied to the resulting average of the computations rather than to the individual indicated rate ceilings.[60] Thus, there are four annualized ceilings in effect during each year, although only one of them would be applicable to any given contract.

F. *Monthly Ceiling*

Finally, the Act provides for a monthly ceiling composed of the average of the indicated rate ceiling computations obtained for auctions in the calendar month immediately preceding the calendar month in question.[61] The maximum and minimum ceilings apply to the monthly ceilings in the same manner as they do to the quarterly ceilings and annualized ceilings.[62] For purposes of determining the monthly ceiling, it appears fairly clear that the applicable week for each indicated rate ceiling computation is the week in which the auction occurs.[63] The Act directs the Consumer Credit Commissioner to compute the rate "on the first business day of the calendar month in which the rate applies."[64] This language creates a gap between the date of applicability of the monthly ceiling (the first day of the month) and the actual computation of the monthly ceiling by the Consumer Credit Commissioner when the first day of the month is not a business day. The Consumer Credit Commissioner takes the position that, because the Act refers to an adjust-

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

59. *See id.* § (d).

60. *See id.* §§ (a)(2), (d); CONSUMER CREDIT COMM'R LETTER INTERP. No. 82-14, at 1-3 (1982).

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

62. *See id.* § (b)(1)-(3) (set minimum and maximum ceilings apply to quarterly, annual, monthly ceilings); CONSUMER CREDIT COMM'R LETTER INTERP. No. 82-14, at 1-2 (1982) (minimum and maximum ceilings apply to monthly ceiling).

63. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983). "[T]he monthly ceiling is the average of all the computations under Section (a)(1) of this Article for *auctions* occuring during the preceding calendar month . . . ." *Id.* (emphasis added).

64. *See id.*.

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ment of the monthly ceiling on a monthly basis,[65] he will compute the monthly ceiling as of the first day of each month regardless of whether the first day of the month is a business day.[66] This interpretation would seem consistent with the purpose of the Act.

Since the monthly ceiling appears to be useful primarily in situations involving a contract rate which floats only monthly,[67] most banks will probably not use it. Banks will desire the flexibility to float the contract rate daily in accordance with their prime rate fluctuations. Other lenders, however, may not mind such limitation. The monthly ceiling was designed for factoring institutions which normally compute a rate for each month's billings. The monthly ceiling may be attractive for the non-commercial lender who makes occasional loans involving a floating rate or who does not want to keep track of daily changes in prime and is willing to change contract interest rates only on a monthly basis.

IV. DEFINITIONS

> "When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master — that's all."[68]

A. *Open-End Account*

To fully comprehend the new usury provision it is necessary to understand certain definitions contained in the Act. Probably the most important definition is that of "open-end account" contained

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65. *See id.*

66. CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 3 (1981) (will calculate after last auction of each month). In reality, there is no practical prohibition against any lender doing his own calculation on the first day of the month, at which time he will have available all of the auction rates for the preceding month. If he correctly applies the formula, he will arrive at the same computed ceiling as the Consumer Credit Commissioner.

67. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983) (rate adjusted on monthly basis). In this situation, the ceiling and the rate would float together.

68. Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 502 (Tex. 1979) (Pope, J., dissenting) (quoting L. CARROLL, THROUGH THE LOOKING GLASS text found at page 184 of 1982 edition).

in section four of the Act[69] because the Act divides loans into two categories. Any account that falls within the term "open-end account" is treated in one manner. Any account that does not is treated in another.

> "Open-end Account" means any account, under a written contract under which the creditor may permit the obligor to make purchases or borrow money from time to time, and under which interest or time price differential may from time to time be computed on an outstanding unpaid balance. The term includes, but is not limited to, accounts under agreements described by Section (4), Article 3.15; Section (4), Article 4.01; and Chapters 6 and 15 of this Title.[70]

The Act contains no definition of the term "account." Webster's Dictionary defines an account as "a business relationship."[71] Additionally, an "account" has been defined to be a "detailed statement of the mutual demands in the nature of the debt and credit between parties, arising out of contracts or some fiduciary relation."[72]

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

70. *Id.*.

71. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 12 (G. & C. Merriam Co. 1963).

72. McCamant v. Batsell, 59 Tex. 363, 367 (1883); Call of Houston, Inc. v. Mulvey, 343 S.W.2d 522, 525 (Tex. Civ. App.—Houston 1961, no writ); Dodson v. Kemper Military School, 42 S.W.2d 288, 290 (Tex. Civ. App.—Amarillo 1931, writ dism'd). Article 15.01 also contains the following definitions:

> (a) "Account" means a revolving loan account or a revolving triparty account.
>
> . . . .
>
> (k) "Revolving loan account" means an arrangement between a creditor and a customer establishing an open-end line of credit under which
>
> (1) the customer may obtain loans from the creditor;
>
> (2) the unpaid balance of the loans and any interest thereon are debited to an account;
>
> (3) interest is not precomputed but may be computed on the balances of the customer's account outstanding from time to time; and
>
> (4) the customer may defer payment of any part of the balance.
>
> (*l*) "Revolving triparty account" means an arrangement between a creditor and a customer establishing an open-end line of credit under which
>
> (1) by means of a credit card, the customer may obtain loans from the creditor, which may be advanced by other participating persons, and lease goods or purchase goods or services from participating lessors or sellers, and the creditor will pay the other participating persons, lessors, or sellers and the customer is obligated to pay the creditor the amount of such loans or the cost of such leases or purchases;
>
> (2) the unpaid balance of such loans, leases, and purchases and any interest thereon are debited to an account;
>
> (3) interest is not precomputed but may be computed on the balances of the customer's account outstanding from time to time; and
>
> (4) the customer may defer payment of any part of the balance.

An account is apparently distinguishable from a contract.[73]

The term "open-end account" would literally apply to any multi-advance loan, such as: (i) a commercial revolving line of credit agreement,[74] (ii) an "advancing note" (such as an interim construction loan,[75] or a permanent loan under which there are one or more sums retained by the lender at closing),[76] or (iii) a "readvancing note."[77]

TEX. REV. CIV. STAT. ANN. art. 5069-15.01, §§ (a), (k), (*l*) (Vernon Supp. 1982-1983).

73. *See* Humble Oil & Refining Co. v. Southwestern Bell Tel. Co., 2 S.W.2d 488, 489 (Tex. Civ. App.—Waco 1927, no writ). "An account between parties contemplates and presupposes a contract, express or implied . . . ." *Id.* at 490. This distinction is made throughout the Act. The Act repeatedly uses the terms "open-end account" and "variable rate contract." *Compare* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983) (use of variable rate contract) *with id.* § (i)(1) (use of open-end account). A "closed-end account," while not defined in the Act, would seem to be the complement of an "open-end account"—single purchases or advances and not made "from time to time." *Cf.* TEX. REV. CIV. STAT. ANN. art. 5069-1.01, § (f) (Vernon Supp. 1982-1983) (definition of open-end account).

74. The Consumer Credit Commissioner has taken the position that a written agreement, between a business and its customer wherein the customer agrees to pay an annual interest rate of 18% on account balances which are 30 days past due, is an "open-end account" and that an 18% interest rate could be charged on any past due accounts. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-10, at 1, 2 (1981).

75. *See id.* No. 81-24, at 1 (1981). An "advancing" note as used in the Letter Interpretations is:

> [O]ne for credit not to exceed a specified face amount, to be advanced in whole or in increments upon request of the borrower at times (which may be specified or unspecified in the note) on or after the date of execution thereof but prior to maturity, with interest being borne only on the balance outstanding from time to time, but containing a single fixed maturity date for full repayment of all principal and interest remaining unpaid at maturity.

Id. at 1 (quoting a letter from Jewett E. Huff dated June 16, 1981). An example would be an interim construction note having a stated principal amount with advances "to be made in increments (but not to exceed in the aggregate the face amount of the note) at times to be determined in the future (often, but not always, determinable with reference to the progress of the construction)," and providing that all advances made shall be fully repaid, with interest, at some specified maturity date, and usually containing a prepayment privilege without penalty. *Id.* at 1.

76. The typical situation is where the loan closes with funding at a certain level to be increased when certain rental levels are achieved by the borrower.

77. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 1, 2 (1981).

> [A readvancing] note, like the 'advancing' note, provides for a stated principal amount, to be advanced in whole or in increments at the request of the borrower from time to time prior to the stated maturity date, upon which date all outstanding principal, with interest, is to be repaid in full, but providing not only the privilege of prepayment in whole or in part without penalty, but also providing a 'revolving' feature which is its principal distinction from the 'advancing' note, [permitting] the borrower, after having borrowed the full face amount of the note and prepaid all or some

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The Consumer Credit Commissioner has taken a much more restrictive view of the term "open-end account." For example, the Consumer Credit Commissioner has stated that an "advancing note" is not an open-end account;[78] that a commercial construction loan, arising from a loan commitment and evidenced by a note with a fixed principal amount and providing for multiple advances, is not an open-end account;[79] and that a permanent commercial loan arising from a loan commitment, evidenced by a note in a fixed amount, which provides for two or more stages of funding[80] is not an open-end account.[81]

It is the opinion of the authors of this article that such a restrictive view is unjustified in view of the wording of the Act. The term "borrow" as used in the Act[82] is a transitive verb, meaning to "borrow money." Webster's Dictionary defines "borrow" as "to receive temporarily from another, implying or expressing the intention either of returning the thing received or of giving its equivalent value to the lender."[83] "Receive" means "to take possession [of something] . . . ."[84] Upon substitution of these definitions into the overall definition of open-end account, an open-end account becomes "any account, under a written contract under which the creditor may permit the obligor to make purchases or [receive or take possession of money] from time to time [with the intent of returning the equivalent to the lender] . . . ."[85] The characterization of a contract involving an open-end account should be determined by whether funds are given to the borrower "from time to

portion thereof, to request a readvancement of funds prior to maturity, so long as the aggregate amount outstanding at any one time does not exceed the face amount of the note. A typical example of such a contract would be a short-term note (frequently with a maturity date of 6 months, and seldom if ever more than one year) for the financing of a merchant's inventory, which provides for future advances (often, but not always, limited to some stated percentage of his invoice price of inventory being purchased), with the unpaid balance of such advances being at all times limited to the face amount of the note.

Id. at 1, 2 (quoting a letter from Jewett E. Huff dated June 16, 1981).

78. *See id.* at 4.

79. *Id.* Nos. 81-24 at 1, 4 (1981); 81-28 at 1, 2 (1981).

80. This refers to the rental achievement funding referenced in footnote 76.

81. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-28, at 2 (1981).

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

83. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 256 (G. & C. Merriam Co. 1963).

84. *Id.* at 1894.

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

St. Claire and Hogan: The Revised Texas Usury Ceilings - A New Alice in Wonderland.

time" under the terms of the contract. Thus, an interim construction loan containing multiple draws during the course of construction involves the receipt of funds by the borrower "from time to time" and thus fits the definition of an open-end account under the Act. Similarly, a permanent loan with staged funding also fits the definition of an open-end account. It appears that the Consumer Credit Commissioner's distinctions have been based on four criteria for an open-end account,[86] three of which are obtained from the definition of "open-end account" contained in article 1.01(f).[87] There must be:

> (1) a written agreement where,
> (2) the creditor allows the debtor to purchase or borrow money from time to time, and
> (3) the interest or time price differential charge may periodically be calculated.[88]

The fourth criterion set out by the Consumer Credit Commissioner is not to be found in the Act: "[T]he parties generally do not know the total amount of credit which will be extended pursuant to the agreement nor do they usually know when or in precise amounts what the various loans or purchases will be."[89] While it may be true that the parties generally do not know the total amount of credit actually utilized in an open-end account, every revolving credit agreement has a maximum credit or charge limit which is available to the borrower.[90] Similarly, the amounts and times of draws on interim construction loans normally are not known as to either precise time or amount.[91] All that is really known is the ceiling on the loan amount. Finally, article 1.01(f) makes it clear that

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

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

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

89. *Id.*, at 4.

90. An example is one's credit limit on a bank card such as Master Card.

91. While not articulated in the Letter Interpretations, one additional distinction which may be intrinsic to the "revolving" concept is the idea of no maturity date. *Cf.* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-24, at 1, 2 (1981) (borrow from time to time). Every line of credit, however, either has a maturity date or is terminable by the creditor upon notice to the debtor. Also, implied in the Consumer Credit Commissioner's interpretation, but not in the Act, is that an open-end account requires the credit to "revolve" or increase, decrease, and increase again over time. *See id.* No. 81-24 at 1, 2, 4. Nothing in the Act creates such an implication. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.01, § (f) (Vernon Supp. 1982-1983).

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the term "open-end account" is not limited to what would traditionally be thought of as "open-end credit accounts."[92]

The Consumer Credit Commissioner has expressed the view that a closed-end credit agreement does not become converted into an "open-end account" because it has a provision that upon a payment default, the loan will accrue interest "at the highest lawful rate" or because it contains a requirement that funds advanced by the creditor to satisfy debts of the creditor or protect its collateral will accrue interest "at the highest lawful rate."[93] This interpretation appears to the authors of this article to be correct since default provisions are not contemplated to occur in the normal operation of the contract but, rather, are remedial provisions available after default by the borrower.[94]

B. *Variable-Rate Contracts*

The Act further distinguishes between variable-rate contracts and contracts which are not variable-rate contracts,[95] and, apparently, between contracts that provide for a rate and contracts that provide for an "index, formula, or provision of law" to be used in computing the rate.[96] There is no definition of a variable-rate contract in the Act. Article 1.04(f), however, contains the phrase "variable contract rates as described in this Section (f)," which provides that parties may agree to rates determined by "any index, formula, or provision of law, by or under which the numerical rate or amount can from time to time be determined."[97] The initial determination to be made is whether the phrase "variable contract rates as described in this Section (f)" refers to the definition of a variable contract rate or simply refers to a type of variable contract rate

92. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.01, § (f) (Vernon Supp. 1982-1983). "The term [open-end account] includes, but is not limited to, accounts under agreements described by Section (4), Article 3.15; Section (4), Article 4.01; and Chapters 6 and 15 of this Title." *Id.*

93. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 1 (1981).

94. It is arguable, however, that if the default rate of interest is different than the fixed contract rate, the parties have "contracted for" a variable rate.

95. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983) (monthly ceiling available only for variable-rate contracts).

96. *See id.* § (i)(1)(A). The creditor, when changing the terms of the contract, must disclose, if applicable, "the new rate, *or* the new index, formula, or provision to be used in computing the rate . . . ." *Id.* § (i)(1)(A) (emphasis added).

97. *Id.* § (f).

and is not all-inclusive. The authors of this article are of the opinion that the phrase should not be interpreted as a definition of variable contract rate; rather, it should be interpreted as a certain type of variable contract rate—calculated by an index or formula or provision of law[98] or, in other words, "a floating" variable rate.[99] The obvious question is what type of loan is a "non-floating" variable rate? The Consumer Credit Commissioner has stated that a variable-rate contract "does not include contracts for repayment of interest at more than one fixed rate of interest."[100] This interpretation appears incorrect. The term "vary" means "to exhibit or undergo change."[101] By definition, a loan which provides for one rate of interest in the first year and another rate of interest in the second year contains an interest rate which changes and, therefore, "varies."[102] The method of rate change in such a non-floating variable-rate contract also fits the traditional definition of a "formula" used in the mathematical sense.[103] Such a loan will be designated

98. The phrase "rates as described" is interpreted by the authors to be limiting language. *See id.* § (f). If the phrase read "rates, as described" it would be more likely that the phrase was merely descriptive. Without the comma, however, it would appear that the draftsmen meant to refer to a certain type of variable rate. Prior to the date of this article such a distinction has not been advanced, and it has been widely assumed, whether correctly or not, that the phrase is definitional in nature. This distinction has been adopted by the authors of this article for purposes of clarification. Because of other definitional problems, it is hoped that this distinction will be adopted by others in the near future.

99. The term "floating" indicates an amount of uncertainty or erraticism not necessarily conveyed by the term "variable."

100. *See* CONSUMER CREDIT COMM'R LETTER INTERP. NO. 81-27, at 1 (1981). No rationale is given for this statement in the Letter Interpretation. *Id.*

101. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2535 (G. & C. Merriam Co. 1963).

102. One of the authors of this article expressed such a view several years prior to the Act. *See* St. Claire, *The "Spreading of Interest" Under the Actuarial Method,* 10 ST. MARY'S L.J. 753, 756 n.15 (1979). The author cites, as an example of a variable rate loan, a three year loan at nine percent per annum during the first two years, and twelve percent during the third year. *Id.* The Consumer Credit Commissioner's interpretation is apparently aimed at loans "floating" with an index. If the legislature had intended such an interpretation, it could have used the term "floating with an index" rather than the broader term "variable."

103. Such a formula is known as a "step function" equation and is well recognized in mathematics, finance, and economics. *See* G. THOMAS, CALCULUS AND ANALYTIC GEOMETRY 25 (3d ed. 1965). Probably the most common step function is the greatest integer function. *See* I. NIVEN & H. ZUNDERMAN, AN INTRODUCTION TO THE THEORY OF NUMBERS 85 (2d ed. 1966). In fact, without the concept of the greatest integer function, the indicated rate, quarterly, monthly, and annualized ceilings could not be calculated, since rounding to the nearest one quarter percent is in itself a step function and can be expressed in terms of the greatest

throughout the remainder of this article as a "non-floating variable-rate account."

The answer to this dilemma concerning loans which provide for different fixed rates of interest in different years appears to be that the existence of this type of loan was either overlooked by the draftsmen of the Act or not intended to be covered.[104] The draftsmen appear merely to have thought in terms of two types of loans, one being a "floating" variable-rate loan and the other being a single, fixed-rate loan containing the possibility of an interest rate change by the lender from time to time on open-end accounts.[105]

The Consumer Credit Commissioner has stated that a commercial permanent loan secured by a mortgage on real property evidenced by a promissory note with a fixed interest rate and payments, but providing for the lender to receive a specified percentage of future rental increases derived from the property (if any) or a percentage of the equity on sale (if any) as contingent additional interest, is not a variable-rate contract.[106] This view appears incorrect. It is important to note that article 1.04(f) speaks in

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integer function. Thus, if:

A = the auction rate in percent,

I = the indicated rate ceiling, and

B = [(8 x A) + .5]

then

I = [B]/4

where [B] stands for the "greatest integer not greater than B."

Thus, if auction rate A were 9.87%, then 8 x 9.87% equals 78.96. 78.96 plus .5 equals 79.46. The greatest integer not greater than 79.46 is 79. 79% divided by 4 equals 19.75%. This is the same result as multiplying 9.87% by 2 (which equals 19.74) and rounding to the nearest quarter percent.

104. It is important to remember that the one main concern of the draftsmen was the fixed-rate open-end account which would periodically be amended under the Act to change the rate. With the availability of such a loan, an open-end account with predesignated interest rates for future years did not seem a very likely possibility. The loan with multiple fixed interest rates is most commonly closed-end credit and is generally seen in real estate transactions. In such a loan, there seems little reason to require the ceiling to float if all interest rates are legal on the date of contracting on a single fixed-rate closed-end loan if the highest of those multiple rates would have been legal at that time.

105. While not defined in the Act, it is useful to define a "fixed-rate contract" as the complement of a variable-rate contract: the rate never varies.

106. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-31, at 1, 2 (1981). For discussions of equity participations, see Barton & Morrison, *Equity Participation Arrangements Between Institutional Lenders and Real Estate Developers*, 12 ST. MARY'S L.J. 929 (1981); Comment, *Equity Participation in Texas: A Lender's Dream or A Usurious Nightmare?*, 34 SW. L.J. 877 (1980).

terms of a "rate or amount" determined "from time to time" under an index or formula.[107] A permanent loan which provides for contingent interest equal to a percentage of future rental increases or a percentage of the equity on sale does contain the requisite formula from which the interest amount can be determined "from time to time."[108] It is a "floating variable" rate that is tied to some event ascertainable only at a future date. The amount of interest is no more determinable in these situations than it is in any "floating with prime" contract.[109] All such loans should be considered as floating variable-rate contracts.

Additionally, the Consumer Credit Commissioner has stated that a permanent commercial contract secured by a mortgage on real property evidenced by a promissory note with a fixed rate of interest and payments, but providing for optional rate review(s) prior to contract maturity is not a variable-rate contract.[110] The rate is not tied to any index or other formula which would lead to a mathematically determinable rate; rather, the rate review is exercisable solely at the lender's discretion. Should the option not be exercised, the rate and payment amount would remain unchanged. Such an interpretation is correct until the interest rate changes, at which time the new rate is determinable and the loan appears to have assumed the characteristics of a non-floating variable-rate loan because the rate has varied. Conversely, the loan could be cast as a fixed-rate contract renewed on that date.[111]

The Consumer Credit Commissioner has also stated that where a contract bears interest at a rate set at the "prime rate" in effect from time to time, the term "prime rate," without further elaboration, does not satisfy article 1.04(f) as an "index, formula, or provision of law by or under which the numerical rate can from time to

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

108. The interest would be measured at the time of rental increases or time of sale. Note that a formula must exist; otherwise, the lender would be unable to determine the amount of interest due.

109. The contingency, in a "floating with prime" contract, is the establishment of a certain prime rate at a point in time. Then, the amount of interest due is calculable.

110. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-31, at 1, 2 (1981). An example would be a 15 year note with optional rate reviews in the fifth and tenth years.

111. The applicable ceiling would be the ceiling in effect "at the time the renewal or extension is made or agreed to." TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (*l*) (Vernon Supp. 1982-1983).

time be determined."[112] The Commissioner did note that the term may be amplified so as to be part of a variable-rate index or formula such as "the 'prime' rate as established by a particular bank not to exceed a particular ceiling from time to time in effect."[113] The term "prime rate," if not tied to a particular bank, is an ambiguous term.[114] In addition to "prime rate" not being determinable under article 1.04(f), such a provision might also be unenforceable in a contract because of such ambiguity. Conversely, if the contract ties the interest rate to the prime rate of a particular bank or the contract implies the prime rate of a particular lender, such rate becomes determinable as the interest rate of a particular lender, and for purposes of article 1.04(f), should be considered a variable-rate account. The Commissioner's limitation—"not to exceed a particular ceiling from time to time in effect"—is merely an addition to the formula of the "prime rate" of a particular bank and does not change the result.[115]

For the same reason that an account should not be construed as an open-end account simply because of the remedy provisions, a fixed-rate contract should not be construed as a variable rate contract simply because it contains a provision that in the event of default in payment the loan will bear interest at "the highest lawful rate," or because of a provision stating that monies advanced by the lender to satisfy obligations of the borrower or otherwise to protect its collateral will bear interest "at the highest lawful rate."[116]

V. Applicability Of Ceilings

In order to determine the applicability of the various sections of article 1.04, it is helpful to put aside for the moment consideration of the non-floating variable-rate contract and to discuss the applicability of the Act to the single fixed-rate contract and the floating variable-rate contract. After completion of this analysis, applica-

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112. *See* Consumer Credit Comm'r Letter Interp. No. 81-31, at 1, 2 (1981).

113. *Id.*

114. There is no one "prime lending rate" since each institution typically sets its own prime rate. The prime rate is the actual base rate at which the particular institution will lend money to its largest and most creditworthy corporate clients.

115. *See* Consumer Credit Comm'r Letter Interp. No. 81-31, at 2 (1981).

116. *See id.* No. 81-27, at 1 (1981).

tion of the ceilings to a non-floating variable-rate contract will be considered.

Article 1.04(a), which authorizes the use of an indicated rate ceiling,[117] a quarterly ceiling,[118] or an annualized ceiling,[119] applies to the single fixed-rate contract and does not appear to apply to the floating variable-rate contract.[120] Conversely, article 1.04(b), which establishes the maximum and minimum ceilings under article 1.04, is applicable to both the single fixed-rate contract and the floating variable-rate contract since article 1.04(b)(3) redefines the indicated rate, annualized, quarterly, and monthly ceilings used in article 1.04 as those ceilings are modified by article 1.04(b).[121]

The application of the monthly ceiling is probably the most difficult to determine from the wording of the statute. The monthly ceiling is not available in a single fixed-rate contract.[122] It would thus appear that the draftsmen of the Act intended it to apply to floating variable-rate contracts.[123] Additionally, the contract rate is allowed to float only once each month on a floating variable-rate contract.[124]

To understand article 1.04(e), it is necessary to review the language of the statute. Article 1.04(e)[125] provides:

> In a contract that does not involve an open-end account,[[126]] as an alternative to the indicated rate ceiling, the parties may contract for a rate not exceeding the quarterly ceiling in effect at the time the rate is contracted for,[[127]] but the creditor may not rely on the annu-

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

118. *See id.* § (a)(2).

119. *See id.* § (a)(2).

120. *See id.* § (a). "The parties to any written contract may agree to and stipulate for any *rate* of interest . . . that does not exceed: (1) an indicated rate ceiling . . . or, as an alternative, (2) an annualized or quarterly ceiling . . . ." *Id.* § (a) (emphasis added). Note that article 1.04(a) is written in terms of a rate rather than an "index or formula" producing the rate which seems to be required if the provision were to apply to a floating variable-rate contract. *See id.* § (f) (index or formula required for variable-rate contract).

121. *See id.* § (b)(3).

122. *See id.* § (c) (monthly ceiling only available in variable-rate contracts).

123. Whether article 1.04(c) applies to non-floating variable-rate contracts remains unanswered. For a discussion of the distinction between floating variable-rate contracts and non-floating variable-rate contracts, see text accompanying notes 95-116 *supra*.

124. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983) (if rate subject to adjustment on monthly basis, rate may not exceed monthly ceiling in effect).

125. *Id.* § (e).

126. This clause will be referred to in the text as clause 1.

127. This clause will be referred to in the text as clause 2.

alized ceiling in such a contract,[[128]] and in a contract subject to Section (f) of this Article may not rely on both the indicated rate ceiling and the quarterly ceiling in any given contract.[129]

Article 1.04(e) applies to all closed-end contracts. Different results occur depending on how the various clauses of this section are interpreted to apply to one another. Probably, clause one limits the entire section.[130] Clause two initially appears applicable only to single fixed-rate contracts[131] but most likely applies to both fixed rate and floating variable-rate contracts.[132] Clause three appears to refer back to clause one and, therefore, is probably applicable to all closed-end accounts.[133] Finally, clause four probably applies only to floating variable-rate closed-end loans.[134] Combining all of these constructions, the most likely interpretation of section (e) is as follows:

(1) On all closed-end loans, the quarterly ceiling is available as an alternative to the indicated rate ceiling.

(2) An annualized ceiling is not available for a closed-end account.

(3) In a floating variable-rate closed-end account, the indicated rate ceiling and quarterly ceiling cannot both be made applicable to the same contract.

Article 1.04(f) authorizes floating variable-rate open-end contracts.[135] Article 1.04(g) applies to both single fixed rate and float-

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128. This clause will be referred to in the text as clause 3.

129. TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983). This clause will be referred to in the text as clause 4.

130. At the very least, clause 1 modifies clause 4; to interpret the statute otherwise would prevent the use of an indicated rate ceiling and quarterly ceiling on *any* floating variable-rate contract. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (a)(1) (indicated rate ceiling available on any written contract), (a)(2) (quarterly ceiling available on any written contract) (Vernon Supp. 1982-1983).

131. *Compare id.* § (e) (may contract for rate) *with id.* § (f) (may contract for index or formula). Note, however, that article 1.04(f) seems to modify all of article 1.04, thereby applying to section (e). *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (f) (Vernon Supp. 1982-1983) ("parties to any contract" may use section (f)).

132. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (f) (Vernon Supp. 1982-1983) (section (f) available to all parties of any contract).

133. "Such a contract" in clause 3 should relate back to "contract" in clause 1. *See id.* § (e).

134. *Compare id.* § (e) (last clause applies to section (f) contract) *with id.* § (f) (section (f) applies to contracts using index or formula to compute interest).

135. *See id.* § (f). "The parties . . . may agree to and stipulate for a rate or amount by

ing variable-rate accounts.[136]

Article 1.04(h)(1) allows the creditor, "from time to time," to implement any rate authorized by the quarterly or annualized ceilings as an alternative to the indicated rate ceiling on a single fixed-rate open-end account,[137] provided the contract allows such adjustment.[138] Article 1.04(h)(2) authorizes the use of the indicated rate ceiling, the quarterly ceiling, and the annualized ceiling on a floating variable-rate open-end account.[139] Article 1.04(i), which provides for amendment of all open-end accounts, applies both to single fixed-rate open-end contracts and to floating variable-rate contracts.[140]

The foregoing text reviewed article 1.04 provisions in terms of single fixed-rate contracts and floating variable-rate contracts to determine the applicability of each provision to these two types of contracts. Purposely left undetermined was the applicability of these provisions to the non-floating variable-rate contract. For the reasons stated earlier, the authors believe that such a contract should be deemed a variable-rate contract.[141] Regardless of whether it is deemed a non-floating variable-rate account or a fixed-rate account, problems exist in attempting to apply the provisions of article 1.04. Under either characterization, the provision which seems to authorize article 1.04 rates for the non-floating variable rate account is article 1.04(a).[142] It is arguable that this sec-

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contracting for any index, formula, or provision of law, by or under which the numerical rate or amount can from time to time be determined." *Id.* § (f). Section (f) also implies a distinction between a variable contract and "variable contract rates as described in this Section (f)." *Cf. id.* § (f). Article 1.04(f)-(1) also refers to variable rates or amounts. *See id.* § (f)-(1).

136. *See id.* § (g). Section (g) stipulates that when parties agree to a rate, they are deemed "to have agreed to any lesser rate that the creditor may elect, or is required under Section (h) of this Article to implement." *Id.* § (g).

137. Note that article 1.04(h)(1) speaks exclusively in terms of the "rate" rather than an "index or formula." *See id.* § (h)(1) (open-end contract may implement any rate). Note, however, that open-end contracts may compute interest pursuant to an index or formula. *See id.* § (f).

138. *See id.* § (h)(1). The agreement may allow a quarterly or annualized ceiling, or it may be amended to allow such ceilings. *See id.* § (h)(1).

139. *See id.* § (h)(2).

140. *See id.* § (i)(1), (2).

141. For a discussion of the distinction between floating variable-rate contracts and non-floating variable-rate contracts, see text accompanying notes 95-116 *supra*.

142. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a) (Vernon Supp. 1982-1983). It is arguable that article 1.04(h)(1) might be construed as authorizing the implementation of other ceilings on a non-floating variable rate open-end contract; however, the basic authori-

tion allows the subsequent rates for future years to be authorized under the ceiling available at the time the contract is signed.[143] The first sentence of article 1.04(c) restricts the use of the monthly ceiling to variable-rate contracts not made for personal, family, or household use.[144] Thus, at least as far as the first sentence of 1.04(c) is concerned, the monthly ceiling may be arguably available on certain non-floating variable-rate contracts. An interesting aspect of the monthly ceiling is the third sentence of 1.04(c) stating, as to contracts for which the monthly ceiling is available,

> *if* the parties agree that the rate is subject to being adjusted on a monthly basis *in accordance with Section (f)* . . . they *may* further contract that the rate from time to time in effect may not exceed the monthly ceiling from time to time in effect under this section and the monthly ceiling from time to time in effect is the ceiling on those contracts, instead of any ceiling under Article 1.04(a) . . . .[145]

Because of the reference to section (f), the third sentence of article 1.04(c) is apparently concerned with something less than all variable-rate contracts not for personal, family, or household purposes — namely, *floating* variable-rate accounts. If such an analysis is correct, then the third sentence of article 1.04(c) applies only to floating variable-rate accounts while the first sentence is applicable to all variable-rate accounts. If such analysis is correct, the

zation of the rate would be under 1.04(a). *Compare id.* § (h)(1) (parties to open-end account may contract under indicated rate, quarterly, or annualized ceilings) *with id.* § (a) (parties to any contract may implement indicated rate, quarterly, or annualized ceilings).

143. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a) (Vernon Supp. 1982-1983). Article 1.04(a) allows the parties to contract for any rate of interest. Does this allow multiple rates for future periods to be contracted for under the present ceiling? It would seem so, especially since the Commissioner states that a fixed-rate closed-end loan at the highest rate under the ceiling would be lawful. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981) (ceiling does not float on fixed-rate closed-end loan); *see also* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a) (Vernon Supp. (1982-1983)) (parties may contract for any rate under ceilings).

144. TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983).

145. *Id.* Note the reference to section (f) rather than a reference to the contracts as variable rate accounts. *See id.* This seems to conflict with the Commissioner's position that non-floating "variable rate" contracts are not variable-rate contracts within article 1.04; otherwise, why would the draftsmen draw a distinction between variable-rate contracts and section (f) contracts (a type of variable-rate contract)? *Compare id.* § (c) (section (c) references variable-rate contracts and contract rates that adjust pursuant to section (f)) *and id.* § (f) (parties may contract for index or formula under which rate can be computed) *with* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 1 (1981) (variable-rate contract does not include contract containing more than one fixed rate of interest).

monthly ceiling would be available for all non-floating variable-rate accounts not used for personal, family, or household use.[146]

Article 1.04(e) allows parties to a non-floating variable-rate closed-end account to "contract for a rate not exceeding the quarterly ceiling in effect *at the time the rate is contracted for*."[147] If each of the specified rates is below the quarterly ceiling, it is arguable that the ceiling should not float for a non-floating variable-rate closed-end account.[148]

Article 1.04(f) appears inapplicable to a non-floating variable-rate open-end account;[149] however, the disclosure requirements of article 1.04(f)-(1) appear applicable to a non-floating variable-rate open-end account primarily for personal, family, or household use.[150] In all probability, article 1.04(h) was not designed to apply to a non-floating variable-rate open-end contract.[151] With this overview of the applicability of the various provisions, it is possible to identify the applicability of the ceilings to each loan type.

A. *Fixed-Rate Closed-End Accounts*

Under a fixed rate closed-end account, the indicated rate ceiling is available.[152] The quarterly ceiling is available as an alternative to

146. This result is apparently contrary to the Commissioner's view. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 1, 4 (1981) ("variable-rate contract" does not include contracts with multiple fixed interest rates; monthly ceiling available only in variable-rate contracts).

147. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983). This language, like the language in 1.04(a), would seem to allow a contracting for multiple rates for future periods. *Compare id.* § (a) (parties may contract for interest rates not exceeding indicated rate ceiling for week preceding week when rate is contracted for) *with id.* § (e) (parties can contract for rate allowable under quarterly ceiling in effect at time rate contracted for).

148. *Cf. id.* § (e) (may contract for rate allowable under quarterly ceiling in effect at time of contracting).

149. *See id.* § (f). The article refers to an "index or formula," which would yield a *floating* variable rate, rather than a variable rate account. *See id.* § (f).

150. *See id.* § (f)-(1). Note that article 1.04(f)-(1) uses the term "variable rate" instead of refering to a rate determined by an "index or formula." *See id.* § (f)-(1).

151. A provision authorizing the implementation of new ceilings would not be logically applied to a non-floating variable-rate contract since the rates for future years are authorized at the time of contracting. *Compare id.* § (h)(1) (rate governed by ceilings in effect at time new rate becomes effective) *with id.* § (a)(1) (parties may contract for rate allowable under indicated rate ceiling in effect at time of contract).

152. *See id.* § (a)(1) (any contract may use indicated rate ceiling); *see also* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (indicated rate ceiling available for

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the indicated rate ceiling.[153] The monthly ceiling is unavailable since it is applicable only to variable-rate accounts.[154] The annualized ceiling is unavailable because it does not apply to a closed-end account.[155]

B. *Fixed-Rate Open-End Accounts*

Under a fixed-rate open-end account, the indicated rate ceiling is available.[156] The quarterly and annualized ceilings are also available.[157] The monthly ceiling is not available since it applies only to variable-rate accounts.[158]

C. *Floating Variable-Rate Closed-End Accounts*

Under a floating variable-rate closed-end account, the indicated rate ceiling is available[159] if the quarterly ceiling is not relied upon in the same contract.[160] The monthly ceiling is available if the account does not involve a contract made for personal, family, or household use and the variable interest *rate* changes only monthly.[161] The quarterly ceiling would appear to be available if

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fixed-rate closed-end accounts).

153. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (a)(2), (e) (Vernon Supp. 1982-1983) (quarterly ceiling available for any contract); *see also* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (quarterly ceiling available for fixed-rate closed-end accounts).

154. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983) (available only in variable-rate contracts); *see also* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (monthly ceiling available only in variable rate transactions).

155. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983) (no annualized ceiling in contracts not involving open-end accounts); *see also* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (no annualized ceiling in fixed-rate closed-end transactions).

156. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a)(1) (Vernon Supp. 1982-1983) (ceiling available on any contract); *see also* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (ceiling available in fixed-rate open-end contracts).

157. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983) (quarterly and annualized ceilings available in open-end accounts); *see also* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) (quarterly and annualized ceilings apply to fixed-rate open-end accounts).

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

159. *See id.* § (a)(1) (available for any contract).

160. *See id.* § (e). In a variable-rate contract the parties may not use both the indicated rate ceiling and the quarterly ceiling. *See id.* § (e).

161. *See id.* § (c). Apparently, the monthly ceiling must be "contracted for." *See id.* (may contract that rate "may not exceed the monthly ceiling from time to time in effect"); *see also* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2 (1981) ("monthly ceiling

the indicated rate ceiling is not relied upon in the same contract.[162] The annualized ceiling appears unavailable since it may not be applicable to a variable-rate closed-end account.[163]

D. *Floating Variable-Rate Open-End Accounts*

Under a floating variable-rate open-end account, the indicated rate ceiling is available.[164] The monthly ceiling is available if the account does not involve a contract made for personal, family, or household use and the variable *rate* changes only monthly.[165] The quarterly and annualized ceilings are also available.[166]

E. *Non-Floating Variable-Rate Closed-End Accounts*

Under a non-floating variable-rate closed-end account, the indicated rate ceiling is available.[167] The monthly ceiling appears available if the account does not involve a contract made for personal, family, or household use.[168] The quarterly ceiling appears applicable.[169] The annualized ceiling is unavailable for any contract involving closed-end credit.[170]

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may be *contracted for* only in variable rate transactions") (emphasis added).

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

163. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983) (annualized ceiling available in open-end accounts); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2, 3 (annualized ceiling available only in open-end accounts).

164. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a)(1) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981).

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

166. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981).

167. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a)(1) (Vernon Supp. 1982-1983) (indicated rate ceiling available for all contracts). The Commissioner believes this type of contract is a fixed-rate account. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 1 (1981). For a discussion of these conflicting interpretations, see text accompanying notes 95-116 *supra*.

168. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983). *But see* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 1, 2 (1981) (monthly ceiling not available because not variable rate account).

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

170. *See id.* § (e).

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F. *Non-Floating Variable-Rate Open-End Accounts*

Under a non-floating variable-rate open-end account, the indicated rate ceiling is available.[171] The monthly ceiling appears available if the account does not involve a contract made for personal, family, or household use.[172] The quarterly ceiling and the annualized ceilings are available.[173]

A summary of the foregoing discussion is located in Table 1 at the end of this article.

G. *Post Maturity or Default Interest*

The Consumer Credit Commissioner has stated that on a fixed-rate closed-end account, the contract may provide for interest after maturity at the same rate contracted for during the stated term of the agreement, provided the interest rate does not exceed the ceiling applicable at the time the contract was consummated.[174] Additionally, if the ceiling applicable to the contract is higher than the contract rate charged during the term of the contract, the contract may provide for a post-maturity interest rate equal to that ceiling.[175] On a closed-end variable-rate account, the Consumer Credit Commissioner further states that the parties may contract for post-maturity interest not to exceed the ceiling applicable from time to time prior to maturity; this ceiling is imposed by article 1.04(f) which states that the interest rate in variable-rate contracts may never exceed the applicable ceiling from time to time in effect for as long as the debt is outstanding.[176] The Consumer Credit Commissioner has also stated that in open-end contracts, the appropriate ceiling for interest after maturity would be the ceiling

171. *See id.* § (a)(1). The Commissioner classifies a contract having multiple fixed rates as a fixed-rate contract instead of a variable-rate contract. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 1 (1981). For a discussion of these two views, see text accompanying notes 95-116 *supra*.

172. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983). *But see* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 1, 2 (1981) (not variable-rate contract, therefore, monthly ceiling inapplicable).

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

174. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-19, at 3 (1981). The Consumer Credit Commissioner has also stated that in any written contract entered into pursuant to the provisions of article 1.04, the parties may always agree to interest after maturity at the rate of 18% per annum, since the minimum ceiling is always available. *See id.*

175. *See id.* at 3, 4.

176. *See id.* at 4.

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applicable to the contract before maturity.[177]

H. *Selection of Applicable Period*

Since the Act refers to the rate in effect at the time the rate (meaning the contract rate) is "contracted for,"[178] one must determine exactly when the rate is contracted for in a particular situation. For a fixed-rate closed-end loan, three dates are critical to this determination—each of which may occur in different weeks: the date of commitment, the date of execution of the loan documents, and the date of funding. At least one jurisdiction has held that in a declining rate environment, where a seller entered into a contract providing for credit at a fixed rate below the maximum floating usury ceiling allowed at the time of the contract, but funded the loan after the ceiling fell below the fixed contract rate, the loan was not usurious.[179] There are no Texas decisions on this point.

The Consumer Credit Commissioner's viewpoint can be summarized as follows: (i) if the commitment for a fixed-rate closed-end account provides an interest rate for a loan which is to be subsequently funded and that rate is lawful at the time of the commitment, the rate will be lawful when the loan is funded;[180] (ii) if the commitment does not specify the rate of interest, but, provides for the rate to be agreed to at the time of funding or a date subsequent to the commitment, the applicable ceiling is the one in existence when the parties agree to an interest rate;[181] (iii) if the commitment specifies a particular rate, but, at a future date, the parties change the interest rate, the ceiling at the time of the subsequent agreement applies;[182] (iv) if the commitment provides for a lawful rate and that rate is not changed by mutual agreement prior to the closing of the loan, the original ceiling applies to the con-

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177. *See id.* at 4. Presumably, the ceiling floats after maturity as well.

178. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (a)(1), (e) (Vernon Supp. 1982-1983).

179. *See* Slaymaker v. Peterkin, 518 P.2d 763, 766 (Alaska 1974). *Slaymaker,* however, did not involve a unilateral loan commitment. For the distinction between a unilateral and bilateral commitment, see note 185 *infra.*

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

181. *See id.*

182. *See id.*

tract when closed despite a new ceiling in effect at closing.[183]

There appears to be little in the Act or in case law to support the Consumer Credit Commissioner's position that the commitment date of a fixed-rate closed-end loan is the effective date of the "contracting for interest." A more likely interpretation for the "contracting for" date to which the Act refers should be the date of execution of the loan documents—that is, the date on which there exists a binding obligation on the borrower to repay the loan with interest.[184] A typical loan commitment is unilateral in nature and allows the borrower to simply decline actual consummation of the loan.[185] If the date of the commitment determines the applicable ceiling, then, logically, this date would also be the applicable

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183. *See id.*

184. *See* Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982) (one essential element of usurious transaction is absolute obligation to repay principal); Redman Indus. v. Couch, 613 S.W.2d 787, 789 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (absolute obligation to repay principal required); Rinyu v. Teal, 593 S.W.2d 759, 761 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e) (obligation to repay principal required).

185. A unilateral commitment, which is an option to borrow funds, is the traditional form of commitment. The borrower pays a certain fee to the lender in order to have funds reserved for its use if it so elects. A bilateral commitment is one in which the lender has the right to compel specific performance of the loan commitment, i.e., the right to force the borrower to accept the loan. One danger of the bilateral commitment from a lender's perspective is the possibility that a court would indeed hold the commitment to be a "contracting for" interest, view the commitment and loan as an integrated transaction, and treat all consideration for the commitment as interest. In Stedman v. Georgetown Savings & Loan Ass'n, 595 S.W.2d 486 (Tex. 1979), the Texas Supreme Court held that despite the fact that the charges for a "commitment" were called "interest" and were figured monthly at the highest level that could have been charged had the loan already been funded, the charge assessed prior to funding did not constitute interest (for a contrary view, see the dissent of Justice Pope). The court stated that the charges had no principal to which to attach and that since the commitment was unilateral, the borrower was not required to consummate the loan. *Id.* at 488. *Query,* would the court have reached the same result if the commitment had been bilateral? Even in a situation in which the commitment is not legally bilateral, could a court find a commitment to be economically bilateral based upon the unreasonableness of the commitment fee? *See id.* (Spears, J., dissenting). The authors of this article contend that in *Stedman* The commitment fee was not reasonable since the fee was equal to the maximum amount that the lender could collect *had he already made* the loan. *Cf.* Gonzalez County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976). "Whether or not a charge labeled a 'commitment fee' is merely a cloak to conceal usury may depend on whether or not the fee is unreasonable in light of the risk to be borne by the lender." *Id.* at 906; *see* Gulf Atl. Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (commitment fee bona fide since reasonable in light of risk borne for having future loan available). For a discussion of *Stedman,* see Note, *Commitment Fees—Consideration Paid for Loan Option Is Bona Fide Commitment Fee, Not Interest Despite Attached and Amount Charged,* 12 ST. MARY'S L.J. 259 (1980).

date to determine the existence of usury.[186] If usury can be found at the inception of the commitment, then a court could find a transaction to be usurious even though the loan is never closed.[187]

I. *Existing Loans*

The Consumer Credit Commissioner has stated that no evidence exists of any legislative intent that the interest rates authorized by the Act have retroactive applicability; thus, existing law limiting the interest rate on the transaction at the time it was agreed to remains applicable.[188] Consequently, the holder of a floating-rate closed-end loan in existence on the effective date of the Act (May 8, 1981) cannot utilize the interest rates authorized by the Act.[189] The same result occurs if the note provides for interest after default at the "highest lawful rate."[190]

J. *Plan or Arrangement*

In open-end consumer credit transactions, if a majority of the creditor's open-end accounts are tied to an annualized or quarterly ceiling "under a particular plan or arrangement" and the debtors on those accounts are Texas residents, the creditor must give the

186. Note, however, that Texas courts have held that usury is to be judged as of the inception of the loan. *See* Pinemont Bank v. DuCroz, 528 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (usury determined at inception of loan); Southwestern Inv. Co. v. Hockley County Seed & Delinting, Inc., 511 S.W.2d 724, 731 (Tex. Civ. App.—Amarillo) (usury determined at time of contract inception), *writ ref'd n.r.e. per curiam*, 516 S.W.2d 136 (Tex. 1974), *rev'd on other grounds sub nom.* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 787 (Tex. 1977).

187. Note that this result conflicts with one of the essential elements of a usurious transaction—a loan of money must be made. *See* Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982).

188. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-30, at 2 (1981). For a discussion of the possibility of the Act being given retroactive effect see text accompanying notes 459-578 *infra*.

189. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-30, at 1, 2 (1981) (floating prime plus two rate loan in existence at time H.B. 1228 enacted cannot utilize new ceilings).

190. *See id.* (interest after default at highest lawful rate subject to law applicable at time contract entered into). Note, however, the Consumer Credit Commissioner has taken the position that his statement in Letter Interpretation 81-30 would not apply if the note provides that the floating rate shall not exceed the maximum interest rate allowed by "applicable law" defined as the "laws of the State of Texas or the laws of the United States, whichever laws allow the greater rate of interest, as such laws now exist or may be changed or amended in the future." *See id.* No. 82-7, at 1, 3 (1982).

same terms to subsequent obligors who are also Texas residents.[191] This provision, article 1.04(j), was designed to handle credit card operations.[192] By implication, this provision permits dissimilar treatment of citizens of Texas and citizens of other states.[193] It may permit Texas creditors to provide less favorable terms on open-end accounts for citizens of other states. The privileges and immunities clause of the United States Constitution places certain limitations on a state discriminating against citizens of another state.[194] The clause guarantees that a citizen of one state doing business in another state be provided substantially equal terms as are provided the citizens of the latter state.[195] The clause, however, does not prohibit dissimilar treatment when a valid reason, other than the fact that an individual is a citizen of another state, exists for such treatment.[196] The state is allowed considerable latitude to identify local evils created by non-citizens and adopt appropriate remedies.[197] Further, if a valid reason exists for differentiation between citizens and non-citizens, the degree of discrimination must bear a close relationship to such reason.[198] One basis for such discrimination would be the contention that loans to out-of-state bor-

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191. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (j) (Vernon Supp. 1982-1983). Article 1.04(j) provides as follows:

> If a creditor implements an annualized or quarterly ceiling as to a majority of its open-end accounts that are under a particular plan or arrangement and are for obligors in this state, that ceiling is also the ceiling for all open-end accounts that are opened or activated under plan for obligors in this state during the period that the election is in effect.

Id. § (j). *Query,* what constitutes a "particular plan or arrangement?" The provision was apparently aimed at the credit card industry as the Consumer Credit Commissioner has stated that the term does not apply to "all commercial loans, or all construction loans . . . or all 90-day commercial loans" on the basis that the loans "are separate and individual transactions, separately negotiated and agreed upon . . . ." CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 7 (1981).

192. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (j) (Vernon Supp. 1982-1983) (particular plan or arrangement).

193. *See id.* (same ceiling for all accounts activated under plan for obligors of Texas).

194. *See* U.S. CONST. art. IV, § 2, cl. 1. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." *Id.; see also* Toomer v. Witsell, 334 U.S. 385, 395 (1948) (designed to give citizens of different states same privileges); White v. Thomas, 660 F.2d 680, 685 (5th Cir. 1981) (prevents state from discriminating to favor own citizens).

195. *See* Toomer v. Witsell, 334 U.S. 385, 396 (1948).

196. *See id.* at 396.

197. *See id.* at 396.

198. *See id.* at 396.

rowers involve a greater risk than do loans to in-state borrowers. Such a rationale, together with the apparent reluctance of the courts to find a violation of the privileges and immunities clause,[199] makes it highly unlikely that a constitutional challenge to this provision would succeed.

VI. FLOTATION OF CEILINGS

"Curiouser and curiouser!" cried Alice . . .[200]

One important question regarding the Act is whether an applicable usury ceiling "floats"[201] over time as treasury bill rates vary or whether the applicable usury ceiling remains at a constant level over the life of the loan.

A. *Fixed-Rate Closed-End Accounts*

A reading of the Act in its entirety indicates that, on a fixed-rate closed-end contract, the ceiling can be fixed at the indicated rate ceiling existing on the date of the loan and that ceiling will not fluctuate during the term of the loan.[202] The Act does not specifically provide that the use of the indicated rate ceiling refers only to that ceiling in effect at the time the rate is contracted for.[203] The concept of a floating ceiling, however, is logically inconsistent with a fixed-rate closed-end contract since there are no further advances and no changes in the rate.[204]

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199. *See* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978) (must treat all citizens equally only in regard to " 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity."). *See generally* Note, *Constitutional Law—The Privileges and Immunities Clause of Article IV: Fundamental Rights Revived,* 55 WASH. L. REV. 461, 463 (1980) (clause protects only fundamental rights and only if inadequate reason for discrimination).

200. L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 24 (1982).

201. In connection with the ceilings, the term "float" is used to mean increases and decreases in the usury ceiling over a period of time.

202. *Compare* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a) (Vernon Supp. 1982-1983) (any rate may not exceed indicated rate ceiling computed with discount rate for week preceding week during which parties contracted for rate) *and id.* § (e) (in fixed-rate closed-end accounts, may use quarterly ceiling instead of indicated rate ceiling) *with id.* § (c) (monthly ceiling in effect from time to time applicable to variable-rate contracts) *and id.* § (h)(1), (2) (open-end accounts may be subject to ceilings that can be periodically altered).

203. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (a)(1) (Vernon 1982-1983).

204. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981) (indicated rate and quarterly ceilings do not float in fixed-rate closed-end accounts). This logical incon-

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B. *Fixed-Rate Open-End Accounts*

Whether the ceilings float on a fixed-rate open-end account is not clear. From a simplistic point of view, one can argue that the ceiling should be set on the date of the loan and since the contract rate of interest is fixed on that date, the contract would be subject only to the ceiling in effect at that time. To some extent, it is inconsistent to have a fixed-rate contract with a floating ceiling since a contract rate lawful at the time the loan is closed could subsequently become usurious solely because the ceiling floated down below the fixed contract rate.[205] The only remedy would be to say the fixed rate is not truly fixed and must float down to the applicable ceiling. The same argument can be made as to the optional quarterly and annualized ceilings available on a fixed-rate open-end account under article 1.04(h)(1).[206]

Article 1.04(h)(1) provides that if the agreement of the parties on a fixed-rate account so provides or is amended to so provide, a creditor may, as an alternative to the indicated rate ceiling, from time to time implement any rate permitted under the quarterly or annualized ceilings as to any current and future balances on any of its open-end accounts by giving notice of the rate at any time or times after the computation date for the quarterly or annualized ceiling and before the last date of the next succeeding calendar quarter.[207] Article 1.04(h)(1) applies only to contracts in which the creditor has the right to alter the rate from time to time.[208] To carry out the intent of 1.04(h)(1), the quarterly and annualized ceilings on every fixed-rate open-end account must float from time to time.[209] Arguably, since article 1.04(a) allows the parties to agree to the indicated rate ceiling and does not specifically address the

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sistency is discussed in detail regarding fixed-rate open-end accounts in text accompanying notes 205-14 *infra*. The inconsistency is most compelling in a fixed-rate closed-end account since there would appear to be no policy reason or justification for requiring the usury ceiling to decrease over a period of time during which no further advances are made and the interest rate is fixed. Logic also dictates that if the ceiling cannot float down, in the absence of clear legislative intent, neither should it float up.

205. This idea is very similar to the concept of "spreading" of interest. For a discussion of the possible application of "spreading," see text accompanying notes 348-68 *infra*.

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

207. *See id.*

208. *See id.* (if agreement provides or is amended to provide that creditor may from time to time implement rate allowed under quarterly or annualized ceiling).

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

question of how long that indicated rate ceiling applies, it should be permissible for the parties to an open-end account to agree that the indicated rate ceiling applicable at the time the account is opened will be applicable to all transactions made subsequent to that date. In essence, this would be "locking in" the indicated rate ceiling in effect on the date of the contract. Nevertheless, the quarterly and annualized ceilings were made applicable to open-end accounts to provide a manageable alternative to fluctuating weekly ceilings for retailers, bank credit card issuers, and their customers.[210]

As the Consumer Credit Commissioner has noted, nothing in article 1.04 authorizes the extension of the indicated rate ceiling beyond one week.[211] According to the Consumer Credit Commissioner, each transaction on an open-end account is a separate "loan."[212] Assuming that each transaction under an open-end agreement is a new loan and that the party does not become obligated for this new loan within the meaning of article 1.04(a)(1) until each new transaction is made, then the Commissioner's position that the indicated rate ceiling for the week during which each new loan is made will be applicable to that loan appears correct.[213] It

210. *See id.* at 2. This Letter Interpretation cited the following sources as support for this rationale: Transcript of House Financial Institutions Committee on H.B. 1228, March 3, 1981, Statements made by Rep. Bill Messer, House Sponsor of H.B. 1228, pages 6 and 7 of the transcript; Transcript of House Floor Debate on H.B. 1228, March 23, 1981, pages 72-76, debate involving Rep. Bill Messer and Rep. Frank Collazo; Transcript of House Floor Debate on H.B. 1228, March 23, 1981, pages 92-93, debate involving Rep. Bill Messer and Rep. Craig Washington; Transcript of Senate Economic Development Hearing on H.B. 1228, April 13, 1981, page 6, Statements made by Senator Grant Jones, Senate sponsor of H.B. 1228; Transcript of Senate Floor Debate on H.B. 1228, April 15, 1981, pages 5, 9, 10, and 11, Statements made by Senator Grant Jones. *See id.* at 2.

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

212. *See id.* at 2-3. The Commissioner made the following statement:

> This office has always viewed various transactions made pursuant to, for example, a Chapter 15 revolving loan account as separate loans. For example, Art. 15.01(k) defines a "Revolving loan account" as an arrangement between a creditor and a customer establishing an open-end line of credit under which (1) the customer *may obtain loans* from the creditor. The same type language also is used in Art. 15.01(*l*) in the definition of "Revolving triparty account." We have always felt until the transaction was entered into (use of card) on a Chapter 15 agreement that no loan had been made. Since no loan is made on a typical bank credit card agreement until the card is used, it is at that time that the parties become obligated for the rate of interest applicable to the transaction.

Id.

213. *Compare id.* No. 81-22, at 3 (1981) (each transaction is new loan and until transac-

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would be illogical for article 1.04(h)(1) to require the quarterly and annualized ceilings be adjusted periodically but allow a creditor to fix a rate forever on an open-end account based on the indicated rate ceiling in one particular week.

If the ceilings do not float, a creditor, in times of high ceilings, could "lock in" the high ceilings by characterizing or converting every variable-rate open-end account to a fixed-rate open-end account subject to the high ceiling and thereafter avoid the floating ceilings applicable to variable-rate accounts for all existing accounts.[214] Thus, the Consumer Credit Commissioner's position appears correct in concluding that all ceilings on a fixed-rate open-end account must float; however, it may be awkward to implement such a rule in certain instances.

C. *Floating Variable-Rate Accounts*

The legislature apparently intended for the monthly ceiling to vary on all floating variable-rate accounts.[215] Article 1.04(c) states that if the parties agree to a rate adjustable monthly, calculated under article 1.04(f),[216] "they may further contract that the rate

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tion made, no obligation under article 1.04(a)(1)) *with* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983) (quarterly and annualized ceilings adjusted periodically). The Consumer Credit Commissioner has buttressed his view by the language of article 1.04(j) which provides: "If a creditor implements an annualized or quarterly ceiling as to a majority of its open-end accounts that are under a particular plan . . ., that ceiling is also the ceiling for all open-end accounts . . . opened . . . under that plan . . . during the period [elected]." TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (j) (Vernon Supp. 1982-1983). As the Commissioner noted, article 1.04(j) does not provide for what happens to new customers if the creditor elects the indicated rate ceiling. This apparently evidences a legislative intent that the indicated rate ceiling need not be mentioned because ceilings covering all customers under the plan would be adjusted weekly. *See id.* § (j); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22, at 3 (1981). The Commissioner noted:

> [T]his omission, coupled with the fact that under an "open-end account" program such as a bank credit card arrangement a loan is not made until such time as the offered credit is actually extended, seems to solidify the view that the Legislature did not intend that a creditor could choose to implement the indicated rate ceiling on an "open-end account" subject to Art. 1.04(h)(1) and "lock in" the highest possible rate forever.

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

214. To remain competitive, the lender could periodically "waive" or "forgive" the interest in excess of what he would otherwise have charged on a variable-rate open-end account, or if loan demand were high, he could continue the rate at the higher ceiling.

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

216. Article 1.04(f) provides that the parties can contract for a floating variable rate, "[h]owever, the rate or amount so produced may not exceed the ceiling that may from time

from time to time in effect may not exceed the monthly ceiling from time to time in effect."[217] In such an instance, the ceiling and the "rate" would vary. The Consumer Credit Commissioner has stated that in all variable-rate accounts, except those involving personal, household, or family uses, under which is used a monthly rate, the ceiling also floats on a monthly basis.[218] Arguably, since the parties to a closed-end account may contract for a rate "not exceeding the quarterly ceiling in effect at the time the rate is contracted for"[219] and the quarterly ceiling is available for such contracts,[220] it is unnecessary to float the quarterly ceiling on a floating variable-rate closed-end account. Nevertheless, the ceiling has been interpreted by the Commissioner so as to float on floating variable-rate closed-end contracts.[221] Further, since nothing within the Act authorizes the indicated rate ceiling to remain in effect for longer than one week, the indicated rate ceiling should float.[222] Thus, in all floating variable-rate closed-end accounts, the applicable ceiling "floats."[223] A similar analysis yields the conclusion that all ceilings should float on a floating variable-rate open-end account.[224]

D. *Non-Floating Variable-Rate Open-End Accounts*

Because the third sentence of article 1.04(c) may concern only floating variable-rate accounts,[225] it is possible that the monthly

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to time be in effect and applicable to the contract, for so long as debt is outstanding under the contract." *Id.* § (f).

217. *Id.* § (c).

218. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 2, 3 (1981). *But see* discussion in text accompanying notes 95-116 *supra*, regarding non-floating variable-rate closed-end accounts.

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

220. *See id.* § (a)(2).

221. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-21, at 1, 2 (1981). The Commissioner has stated that all ceilings on a variable-rate account float. *See id.* Nos. 81-21, at 1, 2 (1981); 81-27, at 3 (1981).

222. *See id.* No. 81-21, at 1, 2 (1981). Logically, it would be inconsistent to allow the indicated rate ceiling to remain fixed when the other ceilings are required to float.

223. *See id.* Nos. 81-21, at 1, 2 (1981); 81-27, at 2 (1981).

224. *See id.* No. 81-27, at 3 (1981).

225. This would be because the third sentence references a section (f) contract which is a floating variable-rate contract. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (c), (f) (Vernon Supp. 1982-1983). For a discussion of this issue, see text accompanying notes 95-116 *supra*.

ceiling on a non-floating variable-rate open-end account other than for personal, family, or household use (if such a contract exists)[226] might not float.[227] In certain instances, article 1.04(h)(1) arguably applies to a non-floating variable-rate open-end account[228] and, therefore, the indicated rate ceiling, the quarterly ceiling, and the annualized ceiling would all be available and would float.[229]

E. *Non-Floating Variable-Rate Closed-End Accounts*

For the same reason that the monthly ceiling on a non-floating variable-rate open-end account might not float, it should arguably not float on a non-floating variable-rate closed-end account.[230] The Act does not appear to require the indicated rate ceiling and the

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226. In previous discussions, the authors expressed the view that a loan providing for different fixed interest rates in different years is a non-floating variable-rate contract. The Commissioner has stated that in his opinion, such a contract is a fixed-rate contract. For a full discussion of this issue, see text accompanying notes 95-116 *supra*.

227. Nevertheless, it would be logically inconsistent for the legislature to single out the monthly ceiling as the only ceiling which does not float on a non-floating variable-rate open-end account.

228. Article 1.04(h)(1) is normally thought of as applying to fixed-rate open-end accounts. *See* Address by Sam Kelley, Consumer Credit Commissioner, Fifth Annual Banking Law Institute (March 11-12, 1982) (available at Texas Tech Law Library) ((h)(1) applies to fixed-rate open-end contracts). Clearly, article 1.04(h)(2) applies only to floating variable-rate open-end accounts. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(2) (Vernon Supp. 1982-1983) (rates amended pursuant to index or formula). Therefore, if non-floating variable-rate open-end accounts are adjustable periodically pursuant to article 1.04(i) and article 1A.01, then presumably this adjustment would be done under authority of article 1.04(h)(1). *See id.* § (h)(1) (if agreement amended under section (i) or article 1A.01, then rates adjustable under alternative ceilings). The same result occurs if the non-floating variable-rate open-end account is construed to be a fixed-rate open-end account. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-22, at 2-4 (1981).

229. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983). Article 1.04(h)(1) allows the implementation of the quarterly and annualized ceilings "from time to time" as an alternative to the indicated rate ceiling. The language "from time to time" indicates that all three ceilings should float. *Compare* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-21, at 2 (1981) (section (f) contains "from time to time" language indicating ceiling floats) *with* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983) ("may from time to time implement any rate").

230. The third sentence of section (c) references a section (f) contract which is a floating variable-rate contract. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (c), (f) (Vernon Supp. 1982-1983). According to the Consumer Credit Commissioner, this issue would not arise because he believes a loan characterized by the authors of this article as a non-floating variable-rate contract is a fixed-rate contract. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 1 (1981) ("variable-rate contract" does not include contracts with multiple fixed rates); *see also* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983) ("monthly ceiling available only in variable-rate contracts").

St. Claire and Hogan: The Revised Texas Usury Ceilings - A New Alice in Wonderland.

quarterly ceiling to float on a non-floating variable-rate closed-end account[231] any more than they would be required to float on a fixed-rate closed-end account.[232]

A summary of the flotation ceilings is contained in Table 2 at the end of this article.

F. *Ceiling Adjustment Dates*

In a floating variable-rate account or a fixed-rate open-end account where it is mandatory that the usury ceiling float, one must determine when adjustments to the ceiling are to be made. Article 1.04(h)(1) states that in a fixed-rate open-end account, under the annualized ceiling, "[t]he creditor may implement a rate, not exceeding the annualized ceiling, for a 12-month period from the date it becomes effective *as to an account*."[233] Apparently, in a fixed-rate open-end account, the Act provides for an adjustment of the annualized ceiling of a particular account every twelve months rather than on the actual change date of the annualized ceiling.[234] Similarly, on a fixed-rate open-end account, the quarterly ceiling is adjusted every three months rather than on the actual change date of the quarterly ceiling.[235] While not clearly addressed by the Act, the Consumer Credit Commissioner states that the indicated rate ceiling on a fixed-rate open-end account is adjusted on Monday of each week.[236]

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231. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1), (2) (Vernon Supp. 1982-1983) (section (h) applies only to open-end accounts). The Commissioner, who classifies this type of loan as a fixed rate loan, states that ceilings do not float on "fixed-rate closed-end loans." *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981).

232. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 3 (1981). For a full discussion of fixed-rate closed-end account ceilings, see text accompanying notes 95-116 *supra*.

233. TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983) (emphasis added).

234. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-18, at 2 (1981).

235. *See id.* at 2. As to "new" customers whose accounts are put into the creditor program between the ceiling change times, their ceilings will be in effect less than the full ceiling period. On the ceiling change date, the new customers' ceilings will change also. This applies both to quarterly and annual ceiling programs. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (j) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-18, at 3 (1981).

236. *See* CONSUMER CREDIT COMM'R LETTER INTERP. Nos. 81-7, at 2 (1981) (Monday is day new weekly ceiling is effective); 81-22, at 1-3 (1981) (fixed-rate open-end account uses indicated rate ceiling subject to weekly adjustment).

The Act authorizes an annualized, a quarterly, or an indicated rate ceiling for a floating variable-rate open-end account.[237] Additionally, the Act provides that the annualized ceiling shall be adjusted every twelve months, the quarterly ceiling every three months, and the indicated rate ceiling every week.[238] Consistent with the difference in wording between article 1.04(h)(1) and (h)(2), the Consumer Credit Commissioner has mandated that on a floating variable-rate open-end account, the annualized ceiling is adjusted twelve months after the annualized ceiling came into effect (rather than twelve months after the loan came into effect).[239] The same rationale holds true for an adjustment of the quarterly ceiling.[240] The Act mandates that the indicated rate ceiling must be adjusted "*weekly*";[241] further, the Consumer Credit Commissioner has stated that these weekly ceilings applicable to all floating variable-rate contracts should be adjusted each Monday.[242] This view is based on the rationale that the treasury bill auctions are customarily held on Monday and Monday is the first business day of the week.[243] It is unclear whether this is correct. Logically, article 1.04 (h)(2) could mandate that if the loan closes on a Monday, the usury ceiling on the loan changes each Monday; but, if the loan closes on Tuesday, the applicable indicated rate ceiling changes each Tuesday and likewise throughout the week.[244] The monthly ceiling is adjusted on the first day of each month.[245] It is

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

238. *See id.* § (h)(2).

239. *Compare* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 3 (1981) (section (h)(2) requires adjustment 12 months after annualized ceiling came into effect) *with id.* No. 81-18, at 2 (1981) (section (h)(1) requires adjustment 12 months after it became effective to particular account).

240. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 3 (1981) (quarterly ceiling adjusted on floating variable-rate open-end account pursuant to set adjustment dates under section (d)).

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

242. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 1, 2 (1981).

243. *See id.*

244. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(2) (Vernon Supp. 1982-1983) ("indicated rate ceiling shall be adjusted weekly"). *But see* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 1, 2 (1981) (weekly ceiling applicable to variable-rate contracts changes each Monday).

245. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-7, at 2, 3 (1981). The monthly ceiling is limited to commercial transactions. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983).

immaterial that the initial period of the contract term prior to adjustment may be less than one week, one month, one quarter, or one year, respectively.[246]

On a non-floating variable-rate open-end account, the monthly ceiling would be adjusted on the first day of each month.[247] If article 1.04(h)(1) is applicable to such an account,[248] the quarterly and annualized ceilings would be adjusted every three and twelve months respectively from the contract or election date.[249] Presumably, the indicated rate ceiling would be adjusted on Monday of each week.[250]

A summary of the ceiling adjustment dates is contained in Table 3 at the end of this article.

VII. Changing Ceilings and Federal Preemption

Article 1.04(m) of the Act provides as follows:

> The ceilings provided by this Article for a contract, including a contract for an open-end account, are optional and any person may, notwithstanding any other law, *contract for, charge, and receive* the rates or amounts allowed by this Article for that contract, or the rates or amounts allowed by any other applicable provision of this Title or any other law applicable to such a contract, except as restricted under Section (q) of this Article.[251]

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246. *See* Consumer Credit Comm'r Letter Interp. No. 81-7, at 2, 3 (1981).

247. *See* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983). Note, however, that the Consumer Credit Commissioner classifies these types of accounts as fixed-rate accounts. *See* Consumer Credit Comm'r Letter Interp. No. 81-27, at 1 (1981). Consequently, the monthly ceiling would not be applicable. *See* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983). The authors contend these accounts are variable-rate contracts. See text accompanying notes 95-116 *supra*.

248. For a discussion of this issue, see text accompanying notes 205-14 *supra*.

249. *See* Consumer Credit Comm'r Letter Interp. No. 81-18, at 2 (1981) ((h)(1) applies to fixed-rate open-end accounts and ceilings apply for full period from date of applicability to each account).

250. *See id.* No. 81-7, at 2 (1981) (in variable-rate contract, weekly ceiling adjusted weekly). The Commissioner, of course, holds the monthly ceiling as inapplicable to these accounts. *Compare* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983) (monthly ceiling applies only to variable-rate contracts) *with* Consumer Credit Comm'r Letter Interp. No. 81-27, at 1 (1981) (multiple fixed-rate accounts not variable-rate contracts).

251. Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (m) (Vernon Supp. 1982-1983) (emphasis added). Article 1.04(q) renders inapplicable the alternative 1.04 ceilings in home solicitation transactions defined in Chapter 13 if secured by the homestead and credit is extended by the seller in the transaction. *Id.* § (q); *see also* Consumer Credit Comm'r Letter Interp.

An initial question presented by this section is whether the language "may . . . contract for, charge, *and* receive" requires all three events to occur before other authorized rates are permitted or whether the phrase should be interpreted to mean "may . . . contract for, charge, *or* receive." The courts have repeatedly stated the general rule in interpreting "and" to mean "or":

> This construction . . . is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion; as where it must be done in order to effectuate the manifest intention of the user; and where not to do so would render the meaning ambiguous, or result in an absurdity; or would be tantamount to a refusal to correct a mistake.[252]

Most reported cases have refused to interpret "and" to mean "or."[253] Because the clause in question is permissive rather than restrictive in nature, however, a court would probably hold that the legislature, in using the restricted conjunctive "and," really meant the liberal disjunctive "or."[254] Thus, it would appear that the creditor is free to take advantage of any other ceiling provided by law which is more permissive.

Article 1.04(h)(1) provides that in a fixed-rate open-end account, as an alternative to the indicated rate ceiling, a creditor may *from time to time* utilize the quarterly or annualized ceilings.[255] Thus, for loans subject to article 1.04(h)(1),[256] the parties may switch repeatedly between the indicated rate ceiling, the quarterly ceiling, and the annualized ceiling over the life of such an open-end ac-

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No. 81-4, at 1, 2 (1981).

252. *See* Robinson v. Reliable Life Ins. Co., 569 S.W.2d 28, 30 (Tex. 1978); Bayou Pipeline Corp. v. Railroad Comm'n, 568 S.W.2d 122, 125 (Tex. 1978); Board of Ins. Comm'rs v. Guardian Life Ins. Co., 142 Tex. 630, 635, 180 S.W.2d 906, 908 (1944).

253. *See* Robinson v. Reliable Life Ins. Co., 569 S.W.2d 28, 30 (Tex. 1978); Bayou Pipeline Corp. v. Railroad Comm'n, 568 S.W.2d 122, 125 (Tex. 1978); Board of Ins. Comm'rs v. Guardian Life Ins. Co., 142 Tex. 630, 635, 180 S.W.2d 906, 908 (1944); *see also* American Nat'l Ins. Co. v. Wilson State Bank, 480 S.W.2d 296, 300 (Tex. Civ. App.—Amarillo 1972, no writ).

254. *See* Rio Grande Valley Sugar Growers, Inc. v. Campesi, 592 S.W.2d 340, 342 (Tex. 1979) (reversing court of civil appeals in its construction of phrase "the bylaws *and* marketing contract *may* fix" in former article 5753).

255. Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983).

256. As discussed in the text accompanying notes 205-14 *supra*, it is unclear whether article 1.04(h)(1) is applicable only to fixed-rate open-end accounts or whether non-floating variable-rate open-end accounts would also be subject to its provisions.

count.[257] The election to switch ceilings cannot be made at anytime, since the adjustment dates on the ceilings mandate when the change is allowed.[258] For example, once the annualized ceiling is elected, the creditor must remain with that annualized ceiling for twelve months from the contract or election date on a fixed-rate contract.[259]

Article 1.04(h)(2) requires the election of the annualized ceiling to remain in effect for twelve months *after the ceiling comes into effect* on a floating variable-rate open-end account and the quarterly ceiling elected three months after the ceiling comes into effect on a floating variable-rate open-end account.[260] Apparently, the Act does not specifically authorize or prohibit switching ceilings on a floating variable-rate open-end account.[261]

A. *Effect of Act on the Federal Usury Preemption Statute*

Texas usury law is no longer simply confined to the Texas statutes. With the passage of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA),[262] as amended by the Housing and Community Development Act of 1980,[263] certain areas of state law have been preempted by federal law.[264] A complete review of DIDMCA is beyond the scope of this article.[265] In general, DIDMCA preempts state law in five areas: (i) first lien loans on residential property;[266] (ii) limitations on interest rates

257. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983) (may use, from time to time, quarterly, or annualized ceilings as alternatives to indicated rate ceiling).

258. *See id.* § (h)(1) (implement rate on date it becomes effective).

259. *Id.* § (h)(1); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-18, at 2 (1981).

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

261. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(2) (Vernon Supp. 1982-1983) ("ceiling as disclosed to the obligor"). Article 1.04(h)(2) conspicuously lacks the language "from time to time implement" contained in article 1.04(h)(1). *See id.* §§ (h)(1), (2). The fact that the ceiling is adjusted periodically does not necessarily imply that switching is permitted.

262. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified in scattered sections of 12 U.S.C. and 15 U.S.C.).

263. Housing and Community Development Act of 1980, Pub. L. No. 96-399, 94 Stat. 1614 (1980) (codified in scattered sections of 12 U.S.C. and 42 U.S.C.).

264. Both federal acts will hereafter be referred to simply as "DIDMCA."

265. For an excellent analysis of DIDMCA, see David P. Derber, *Usury*, Mortgage Lending Inst., University of Texas School of Law (September 1982).

266. *See* 12 U.S.C. § 1735f-7 note (Supp. IV 1980) (§ 501(a)(1) of DIDMCA).

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paid on obligations of financial institutions;[267] (iii) business and agricultural loans;[268] (iv) loans by certain federally related lenders;[269] and (v) loans by small business investment companies.[270] DIDMCA permits a state to repeal certain portions of DIDMCA by passing legislation which states explicitly that the state does not want DIDMCA to apply.[271] There is no express repeal of DIDMCA in the Act. H.B. 1228 states that the ceilings provided in article 1.04 are optional, and any person may contract for, charge, or receive rates in amounts allowed by article 1.04, or any other applicable law, except as restricted by article 1.04(q).[272] The reference to "other applicable law" should include DIDMCA.

B. *First Lien Residential Loans*

DIDMCA preempts state provisions limiting the rate or amount of interest, discount points, finance charges, or other charges with respect to any loan, mortgage, credit sale, or advance made after March 31, 1980, which is secured by a first lien on residential real property and meets certain other criteria.[273] On such a loan there is no longer a usury ceiling.[274] A state may override the federal preemption at any time prior to April 1, 1983,[275] but the preemption will continue to apply to any loan, mortgage, credit sale, or advance made after the effective date of the state's election to override the preemption if the transaction is made pursuant to a commitment entered into between April 1, 1980, and the effective date of the state's election.[276] Regardless of whether a state overrides the preemption, DIDMCA permits a state, at any time in the future, to adopt laws limiting discount points or other such charges

267. *See id.* § 1735f-7 note (§ 501(a)(2)(A) of DIDMCA).

268. *See id.* § 86a.

269. *See id.* §§ 1730g, 1785(g), 1831d.

270. *See id.* § 687. This exemption will not be discussed in this article.

271. *See id.* § 1735f-7 note (§ 501(a)(2)(B) of DIDMCA).

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

273. *See* 12 U.S.C. § 1735f-7 note (Supp. IV 1980) (§ 501(a)(1) of DIDMCA).

274. *Compare* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (m) (Vernon Supp. 1982-1983) (may use ceilings allowed by other law) *with* 12 U.S.C. § 1735f-7 note (Supp. IV 1980) (§ 501(a)(1)(B) of DIDMCA) (no ceiling on first lien residential property made after March 31, 1980).

275. *See* 12 U.S.C. § 1735f-7 note (Supp. IV 1980) (§ 501(b)(2) of DIDMCA).

276. *See id.* § 1735f-7 note (§ 501(b)(3)(A) of DIDMCA).

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on any loan, mortgage, credit sale, or advance covered by section 501(a)(1).[277]

C. *Business and Agricultural Loans*

DIDMCA allows a rate not in excess of five percent over the Federal Reserve discount rate, including surcharge, on ninety-day commercial paper for business and agricultural loans of $25,000 or more made after the effective date of DIDMCA and prior to the earlier of April 1, 1983 or the date of the state's election to override the preemption.[278] This section was amended by the Housing and Community Development Act of 1980 by changing the loan amount to $1,000.[279] When the state ceilings allow a greater rate of interest, it would appear that this provision is inoperative.[280] This particular preemption expires on April 1, 1983.[281]

D. *Loans by Certain Federally Related Lenders*

DIDMCA allows state-chartered federally-insured banks, insured branches of foreign banks, insured savings and loan associations, and insured credit unions to charge on any loan the greater of the rate permitted by state law or one percent in excess of the Federal Reserve discount rate on ninety-day commercial paper.[282] The federal preemption of state chartered lending institutions is applicable only with respect to loans made during the period beginning on April 1, 1980, and ending on the date on which a state explicitly overrules the preemption.[283]

277. *See id.* § 1735f-7 note (§ 501(b)(4) of DIDMCA).

278. *See* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, §§ 511, 512, 94 Stat. 132, 164 (1980) (sections later amended by Pub. L. No. 96-399, § 324(c)(1), 94 Stat. 1614, 1648 (1980)).

279. *See* 12 U.S.C. § 86a(a) (Supp. IV 1980) (codification of Pub. L. No. 96-399, § 324(c)(1), 94 Stat. 1614, 1648 (1980)).

280. *Id.* § 86a(a) (this section applies if this ceiling exceeds state ceiling).

281. *See id.* § 86a note (§ 512 of DIDMCA).

282. *See id.* §§ 1730g, 1785(g), 1831d.

283. *See id.* §§ 1730g note, 1785(g) note, 1831d note. This provision allows the state to overrule these preemptions at anytime in the future. Federal law will continue to govern a loan made after the state overrules the preemption if it is made pursuant to a commitment entered into after April 1, 1980 and prior to the passage of the state law. *See id.* §§ 1730g note, 1785(g) note, 1831d note.

E. *Interest Rates Paid on Obligations of Financial Institutions*

DIDMCA preempts state law limiting the rate or amount of interest which may be charged, taken, received, or reserved on any deposit held by or obligation of a depository institution.[284] There is no express date of expiration for this provision and no express authorization for a state to override this preemption.[285]

Apparently, DIDMCA is still applicable in Texas. If the rates authorized by DIDMCA are in excess of those permitted under state law, a borrower may pay the rate authorized by DIDMCA.[286] DIDMCA provides that its provisions will not be applicable as long as state ceilings remain higher.[287] One unanswered question is, in a loan made under the state ceilings which later fall below the federal ceilings, whether it is possible to switch to the federal ceilings and vice versa.[288] Prior to the passage of the Act, article 1.07(b) provided an eighteen percent interest rate for loans of $250,000 or more.[289] Following the enactment of DIDMCA, a number of creditors utilizing the eighteen percent ceiling of article 1.07(b) switched to the federal ceiling when it exceeded eighteen percent. Apparently, lenders will continue to switch between state and federal ceilings interchangeably under the Act.[290]

VIII. Renewals and Extensions

The maximum rate applicable to a renewal or extension[291] is the

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284. *See id.* § 1735f-7 note (§ 501(a)(2) of DIDMCA).

285. *See id.* § 1735f-7 note. A depository institution includes insured banks, mutual savings banks, savings banks, insured credit unions, savings associations, and other insured institutions defined in the National Housing Act. *See id.* § 1735f-7 note (§ 502(a)(2) of DIDMCA).

286. *See* Consumer Credit Comm'r Letter Interp. No. 81-27, at 7, 8 (1981).

287. *See* 12 U.S.C. §§ 1730g, 1785(g), 1831d (Supp. IV 1980).

288. The Consumer Credit Commissioner believes that if the contract authorizes such possible "dual ceilings," one state and one federal, then those ceilings may be interchangeably applicable to one contract. *See* Consumer Credit Comm'r Letter Interp. No. 81-27, at 7, 8 (1981).

289. Tex. Rev. Civ. Stat. Ann. art. 5069-1.07, § (b) (Vernon Supp. 1982-1983).

290. *See* Consumer Credit Comm'r Letter Interp. No. 81-27, at 7, 8 (1981) (Commissioner believes dual ceilings possible).

291. The meanings of the terms "renewal" and "extension" were recently considered in Braugh v. Corpus Christi Bank & Trust, 605 S.W.2d 691, 696 n.1 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

> An extension agreement generally provides for a further extension in the length of time for performance of an agreement. . . . [T]he term "extension" imparts "[a]n

rate in effect at the time the renewal or extension is made or agreed to.[292] In some cases, the renewal or extension is agreed to at a time different from the time that it is made. In such a case, it may be difficult to ascertain what is the appropriate date to determine the applicable ceiling. Renewals and extensions are addressed in two places in the Act: article 1.04(*l*) and article 1.04(b)(2). Under article 1.04(*l*), the ceiling for any contract to renew or extend the terms of payment of any indebtedness at any time incurred is the applicable ceiling for a contract entered into at the time the renewal or extension is made or agreed to; therefore, on a renewal or extension after the effective date of the Act of a loan made prior to the effective date of the Act, the creditor should be able to charge the new interest rates authorized by the new ceilings.[293]

The Act is silent as to whether the renewal or extension must be made at maturity.[294] A literal interpretation of the Act would apply the alternative ceilings provided in article 1.04 to any contract to renew or extend regardless of whether the renewal or extension occurs prior to maturity. Nevertheless, since a renewal or extension can be agreed to at maturity, prior to maturity, or even after maturity, the Act is unclear as to which date is determinative. A con-

> allowance of additional time for the payment of debts. An agreement between a debtor and his creditors by which they allow him further time for the payment of his liabilities. A creditor's indulgence by giving a debtor further time to pay an existing debt." . . . A "renewal" as that term is commonly used with reference to notes imparts a postponement of the maturity of an obligation. An obligation is "renewed" when the same obligation is carried forward by the new paper or undertaking.

Id. at 696 n.1. As to the requirements of an oral extension of a promissory note, see Tsesmelis v. Sinton State Bank, 53 S.W.2d 461, 465 (Tex. Comm'n. App. 1932, judgm't adopted); Voelker v. Hera, 616 S.W.2d 647, 648 (Tex. Civ. App.—Texarkana 1981, no writ); Maceo v. Doig, 558 S.W.2d 117, 119 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); Pace v. Wells, 458 S.W.2d 474, 476-77 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.); Mizell Constr. Co. & Truck Line, Inc. v. Mack Trucks, Inc., 345 S.W.2d 835, 837-38 (Tex. Civ. App.—Houston 1961, no writ); Crispi v. Emmott, 337 S.W.2d 314, 318 (Tex. Civ. App.—Houston 1960, no writ); Tolbert v. McSwain, 137 S.W.2d 1051, 1058 (Tex. Civ. App.—El Paso 1939, no writ).

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

293. *See id.* § (*l*).

294. *See id.* § (*l*) (ceiling is one in effect at time renewal or extension made or agreed to). One example of a renewal or extension prior to maturity is a situation involving a borrower who prefers never to have short term debt which would have to be disclosed as such on a financial statement. Each loan agreement is structured to be due and payable several more years hence. Prior to the year of maturity the loan is renewed and extended for several years hence. The loan may never reach maturity in this manner.

servative approach would apply the ceilings contained in article 1.04 only to renewals or extensions at maturity.[295] A prudent approach might apply the ceilings in effect at the time the renewal and extension becomes binding upon both parties, normally upon formal execution of renewal or extension documents.[296]

Article 1.04(b)(2) provides that on any contract for business, commercial, investment, or similar purposes under which credit in excess of $250,000 is or is to be extended, or on any extension or renewal of such a contract, the maximum ceiling is twenty-eight percent.[297] Consequently, on a loan exceeding $250,000 made after the effective date of the Act but renewed at a balance of less than $250,000, the applicable maximum ceiling should still be twenty-eight percent.[298] Conversely, on a loan in excess of $250,000 made prior to the effective date of the Act for business, commercial, investment, or similar purposes, but renewed after the effective date of the Act for an amount less than $250,000, the applicable maximum ceiling may only be twenty-four percent since article 1.04(*l*) refers to the rate applicable to the contract at the time the renewal or extension is made.[299]

IX. CEILING DISCLOSURE REQUIREMENTS

The Act requires certain disclosures to be made in connection with the use of the alternative ceilings provided by article 1.04. Probably the most important of these is the disclosure of the applicable ceiling and a change in the rate or the index or formula used to calculate the rate.[300]

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295. *Cf.* Braugh v. Corpus Christi Bank & Trust, 605 S.W.2d 691, 697 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) ("evidence of a debt" would include renewal and extension entered into after default).

296. *Query,* what if the renewal and extension is "agreed to" at the time the loan is originally made? One argument against the loan origination date being the applicable date is that it, in all probability, is no more than an option at that time. The borrower would be required to exercise the option in order for it to become legally binding.

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

298. *See id.* § (b)(2).

299. *See id.* § (b)(2) (maximum ceiling of 28% on loans of $250,000 for business purposes and renewals and extensions thereof).

300. The Act also requires other disclosures to be made in certain instances. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (f)—(1), (i) (Vernon Supp. 1982-1983). Loans primarily for personal, family, or household use require disclosure, in at least ten point type, that the borrower has the right to terminate the agreement if he does not wish to pay the new rate. *See id.* § (i)(1)(F). Further, consumers who give consent to this agreement may be

A. *Fixed-Rate Closed-End Accounts*

The Consumer Credit Commissioner has noted that no requirement exists mandating the parties to designate a specific ceiling in a fixed-rate closed-end account.[301]

B. *Fixed-Rate Open-End Accounts*

The Act does not specifically require the applicable ceiling be designated in a fixed-rate open-end account. The first sentence of 1.04(h)(1) provides, in part: "If the agreement of the parties *so provides* . . . a creditor of an open-end account may, *as an alternative to the indicated rate ceiling*, from time to time implement any rate permitted under the quarterly or annualized ceiling, ..."[302] This language apparently indicates that without a specification of the particular ceiling used for a fixed-rate open-end account, the applicable ceiling will be the indicated rate ceiling.[303] In referring to the notice requirements applicable to open-end accounts, the Act requires that the obligor be advised of the period

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subject to a future rate as high as 24%. *See id.* § (f)—(1). This disclosure need not be made if Regulation Z provides for a disclosure as to variable-rate accounts. *See id.* § (f)—(1). This is consistent with article 1.04(r) which provides that in the event of conflicts with federal disclosure requirements, federal disclosure requirements control and that the disclosures required by the Act may be varied to comply with the federal disclosures. *See id.* § (r). The Consumer Credit Commissioner has stated that section (i)(1) requires that a notice be sent by the creditor to the obligor when the creditor is changing a rate, formula, or index used to calculate the rate under a floating variable-rate open-end contract. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 6 (1981) (notice required when creditor wants to alter formula used to set rate on variable-rate open-end contract). Compliance with the requirement of section (i)(1) is not necessary, however, when the rate of interest on a floating variable-rate open-end account automatically adjusts pursuant to the formula set forth in the contract provided the new rate does not exceed any contractually agreed upon maximum rate. *See id.*

301. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 6 (1981). This interpretation is probably correct. There seems to be no reason to require designation of a ceiling on a fixed-rate closed-end account. Article 1.04(e) provides that "as an alternative to the indicated rate ceiling, the parties *may contract for a rate* not exceeding the quarterly ceiling . . . ." TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983) (emphasis added). The reference is to the contracting for a *rate* rather than a ceiling. Compare this to a floating variable-rate open-end account discussed at note 315 *infra*.

302. TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (h)(1) (Vernon Supp. 1982-1983) (emphasis added).

303. *See id; cf.* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 6 (1981) (variable-rate, closed-end account, if no designation otherwise, ceiling is indicated rate ceiling because basic ceiling of statute).

for which the rate has been elected, or at which time the ceiling adjustment will be made.[304] The Consumer Credit Commissioner has stated that, in a fixed-rate open-end account, if the obligors are advised of the rate implementation dates and periods for which the rates are implemented or the time at which the ceiling will be adjusted, the agreement (or notice of amendment) need not specifically state that a particular ceiling is applicable to the contract.[305] Article 1.04(h)(1) appears to require a disclosure of a provision allowing the lender to switch from one ceiling to another and that if the lender does elect an alternative ceiling, the election may be renewed.[306]

C. *Floating Variable-Rate Closed-End Accounts*

Article 1.04(c) allows the parties to a floating variable-rate contract not made for personal, family, or household use to agree to a variable rate subject to a monthly adjustment and to "further [agree] that the rate from time to time in effect may not exceed the monthly ceiling from time to time in effect . . . ."[307] Based upon that language, the Consumer Credit Commissioner has stated that in both open-end and closed-end floating variable-rate contracts in which the monthly provision is available and contracted for, the contract must state that the monthly ceiling applies to the contract.[308]

Unlike article 1.04(c) and the monthly ceiling, there is no language in section (e) of article 1.04 dealing with floating variable-rate closed-end accounts subject to the indicated rate or quarterly ceilings.[309] Likewise, there is no provision similar to section (h)(2), requiring a ceiling disclosure in a variable-rate open-end account.[310] Also, article 1.04 has no express ceiling designation re-

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

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

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

307. *See id.* § (c).

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

309. *Compare* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983) (third sentence notes that parties may contract for monthly variable rate subject to monthly variable ceiling) *with id.* § (e) (no language referencing quarterly or weekly ceilings).

310. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983) (no language referencing contract for floating quarterly or weekly ceiling and rates).

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quirement for a floating variable-rate closed-end account.[311] Nevertheless, since the Act prohibits reliance on both the indicated rate ceiling and the quarterly ceiling in any one contract, one is impliedly required to designate a ceiling in a floating variable-rate closed-end account.[312] The Consumer Credit Commissioner has stated that the indicated rate ceiling applies to the contract unless the parties designate the quarterly ceiling to be applicable.[313] This conclusion is based on the rationale that the indicated rate ceiling appears to be the "basic rate" established by the Act and all other ceilings are merely alternatives.[314]

D. *Floating Variable-Rate Open-End Accounts*

Apparently, the lender must disclose the applicable method of calculating the usury ceiling in a variable-rate open-end account.[315] The ceiling agreed upon should be disclosed to the borrower somewhere in the documents, preferably in the note.[316] With respect to loans other than for personal, family, or household use, the lender does not have to disclose a rate caused by the previously disclosed rate formula or index.[317]

A summary of the disclosure requirements is contained in Table 4 at the end of this article.

X. Prepayment Provisions

Under new article 1.07(f), if a loan for property that is to be a residential homestead is made at an interest rate greater than the rate prescribed in article 1.07(d), a prepayment charge or penalty

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311. *See* Consumer Credit Comm'r Letter Interp. No. 81-27, 4 (1981) (no express designation requirement).

312. *See* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (e) (Vernon Supp. 1982-1983).

313. *See* Consumer Credit Comm'r Letter Interp. No. 81-27, at 5 (1981).

314. *See id.; see also* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (a) (Vernon Supp. 1982-1983) ("parties . . . may agree to . . . any rate . . . that does not exceed: (1) indicated rate ceiling . . . or, *as an alternative*, (2) an annualized or quarterly ceiling . . . .") (emphasis added).

315. Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (h)(2) (Vernon Supp. 1982-1983) (disclosed to obligor).

316. An example of suitable language is "unless changed in accordance with law, the applicable method of calculating the usury ceiling under Texas law shall be the indicated rate, quarterly, monthly, or annualized ceiling from time to time in effect as provided in Texas Revised Civil Statutes Annotated art. 5069-1.04, as amended."

317. *See* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (h)(2) (Vernon Supp. 1982-1983).

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may not be collected on the loan unless the charge or penalty is required by an agency created by federal law.[318] The ceiling prescribed by 1.07(d) is a floating ceiling above ten percent with an upper limit of twelve percent.[319] Consequently, on residential loans, a prepayment charge or penalty may not be collected on loans bearing interest above the lesser of (i) twelve percent or (ii) the floating ceiling under article 1.07(d). Since article 1.07(d) ceased to be effective on September 1, 1981,[320] there was some thought that the restrictions on prepayment penalties and charges contained in that statute would also become inapplicable. These restrictions, however, have been carried forward by article 1.07(f).[321] There remains a question whether the restrictions apply to loans made after September 1, 1981, which used article 1.07(d) interest rates since article 1.07(d) was no longer effective.

Article 1.04(m) implicitly authorizes the use of interest rates provided by DIDMCA, and on first lien residential real property loans, DIDMCA permits an unlimited rate.[322] Obviously, an unlimited rate is higher than the maximum ceiling set by the Act.[323] Because of this provision, the conservative approach has been not to charge a prepayment penalty if the rate charged was in excess of ten percent. This approach is based on the reasoning that although article 1.07(d) is no longer effective,[324] 1.07(f) continues to remain in effect. Thus, if a ceiling exceeds the limits set by 1.07(f) (and, therefore, the limits of 1.07(d)), no prepayment penalty can be charged.[325]

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318. *See id.* art. 5069-1.07, § (f).

319. *See id.* § (d)(1).

320. *See id.* § (d)(3).

321. *See id.* § (f) (no prepayment penalties if first lien residential loan rate is greater than article 1.07(d) rates).

322. *Compare* 12 U.S.C. § 1735f-7 note (Supp. IV 1980) (§ 501(a)(1) of DIDMCA) (no ceiling on first lien residential loans) *with* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (m) (Vernon Supp. 1982-1983) (1.04 ceilings optional and may use rates allowed by other applicable law).

323. Note, however, article 1.07(d), which authorizes a floating usury ceiling for certain one-to-four-family dwelling real property loans, prohibits the charging of a prepayment penalty if the creditor charges rates in excess of the ceiling authorized in article 1.04. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.07, § (d)(1)-(4) (Vernon Supp. 1982-1983).

324. *See id.* § (d)(3).

325. *Compare id.* § (d)(4) (no prepayment penalty allowed on loans bearing interest at rates greater than article 1.04) *with id.* § (f) (residential homestead loans with rates greater than article 1.07(d) rates may not have prepayment penalties).

XI. PENALTIES

The penalty provisions of Subtitle One of Title 79 are contained in article 1.06.[326] These penalties were amended in 1979 to provide that when the excess interest does not exceed double the amount permitted by law, the penalty is three times the amount of the usurious portion (but not all) of the interest contracted for, charged or received, plus reasonable attorneys' fees.[327] Penalties relating to Subtitle Two violations are found in article 8.01.[328] These penalties provide, with respect to usurious interest, that the penalty shall be "twice the amount of interest or time price differential and default and deferment charges contracted for, charged or received, and reasonable attorneys' fees fixed by the court."[329] Section (b) of article 8.01 provides certain penalties for the commission of any act or practice prohibited by Subtitle Two.[330] Although article 1.04 amends many areas of the Consumer Credit Code, it is in Subtitle One but not in Subtitle Two. One must determine whether the penalties in article 1.06 or those in article 8.01 will apply in a particular context. The Act provides that if the contract is subject to Chapters 4, 5, 6, 6A, 7, or 15,[331] and the rate of interest exceeds that allowed by the particular chapter and article 1.04, then the provisions of articles 8.01 through 8.06 apply to that contract to determine the penalties for overcharge and apply to article 1.04 as if it were a part of Subtitle Two.[332] On the other hand, under article 1.04(o)(1), it must be assumed that when the contract is entered into under Subtitle One and, thus, is not a Consumer Credit Code transaction,[333] the penalty will be that provided in article 1.06.

The Act does not change the basic article 1.06 and article 8.01 penalties, but instead cross-references the penalties to various

326. *Id.* art. 5069-1.06, § (1).

327. *Id.* § (1). Usurious interest in excess of double the amount of allowable interest causes forfeiture of all interest and principal in addition to the section (1) penalties. *See id.* § (1).

328. *See id.* art. 5069-8.01.

329. *See id.* § (a).

330. *See id.* § (b) (penalty "twice the time price differential or interest contracted for, charged, or received" subject to set monetary limits).

331. These chapters make up the Consumer Credit Code.

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

333. This would be a transaction under Chapters 4, 5, 6, 6A, 7, or 15.

types of loans.[334] Before the effective date of the Act, a consumer loan at a rate in excess of ten percent fell under the Consumer Credit Code, and there were various consumer protection provisions built into that code. With the new Act permitting rates in excess of those authorized by the Consumer Credit Code, the legislature did not want to eliminate the previously existing consumer protection provisions. Therefore, article 1.04(o) contains cross-references to other penalties depending upon the type of loan involved.[335] Article 1.04(o)(1) subjects "[a]ll other written contracts whatsoever, except those otherwise authorized by law" to the penalties of Subtitle One.[336] These contracts are typically commercial transactions. The first sentence of 1.04(o)(2) contains penalties for transactions that would otherwise be subject to the Consumer Credit Code; it refers to the applicable Consumer Credit section providing penalties for that type transaction.[337] The second sentence of 1.04(o)(2), added by a Senate amendment, causes some confusion. It appears that the intent of that sentence was to subject the creditor to the penalties of the Consumer Credit Code on all loans if the creditor violated the duties imposed by the Act.[338] For example, in a floating variable-rate open-end account, the creditor has a duty to disclose the method of calculating the applicable usury ceiling.[339] If the contract does not disclose that method to the obligor, the creditor has violated that duty and is subject to the penalties prescribed in article 8.01(b).[340] The penalty is "twice the time price differential or interest contracted for, charged or received" up to $2,000 if the financed amount is $5,000 or less; the penalty is limited to $4,000 if the financed amount is $5,000 or

334. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (o)(2) (Vernon Supp. 1982-1983) (loan under applicable chapter violating ceiling will be subject to Chapter 8 penalties).

335. *See id.* § (o)(2), (3).

336. *See id.* § (o)(1).

337. *See id.* § (o)(2).

338. *See id.* § (o)(2). The pertinent sentence reads:

> The failure to perform any duty or comply with the prohibition required by Article 1.04, in a contract entered under authority of Article 1.04, shall be subject to the penalties set out in Article 8.01(b) and shall be subject to such of the other provisions of Articles 8.01 through 8.06 which apply to failures to perform duties or comply with prohibitions to the same extent as if the duties and prohibitions in Article 1.04 were contained in Subtitle 2.

Id. § (o)(2).

339. *See id.* § (h)(2).

340. *See id.* § (o)(2).

more, together with reasonable attorneys' fees as fixed by the court.[341] Thus every single contract that does not comply with the disclosure requirements of the Act may subject the creditor to a penalty of up to $4,000 if the proper language is not found in the contract. Unfortunately, the language of article 1.04(o)(2) is ambiguous enough to be interpreted as meaning that all penalties, including rate penalties, are now subject to Chapter Eight.[342] The rate penalties of Chapter Eight differ from the rate penalties of Subtitle One. Article 1.06(1) provides a rate penalty of triple the usurious portion of the interest contracted for, charged, or received.[343] Chapter Eight provides a rate penalty of double the amount of time-price differential or interest contracted for, received, or charged, subject to set maximum amounts.[344] Further, Chapter Eight penalties do not provide for the additional penalty assessed by article 1.06(2) requiring forfeiture of principal if the interest charged exceeds twice the amount permitted by law.[345] If "spreading"[346] is not permitted under the Act and if Chapter Eight rate penalties apply to all loans, then upon the slightest overcharge, a creditor would no longer be liable merely for triple the usurious portion of interest, but rather double the total finance charge or interest for which he contracted.[347]

XII. Spreading Of Interest

"Then you should say what you mean," the March Hare went on. "I do," Alice hastily replied; "at least—at least I mean what I say—that's the same thing, you know."

341. *See id.* art. 5069-8.01, § (b).

342. *See id.* art. 5069-1.04, § (o)(2) ("failure to perform any duty or comply with the prohibition required by article 1.04 . . . shall be subject to the penalties set out in article 8.01(b) . . . .").

343. *See id.* art. 5069-1.06, § (1) (forfeit three times amount of usurious interest).

344. *See id.* art. 5069-8.01, § (b).

345. *See id.* art. 5069-1.06, § (2) (Vernon 1971).

346. "Spreading" is a method of allocating interest over the life of the loan. For discussions of this concept, see generally, St. Claire, *The Spreading of Interest Under the Actuarial Method*, 10 St. Mary's L.J. 753 (1979); Comment, *Usury in Texas: Spreading Interest Over the Entire Period of the Loan*, 12 Hous. L. Rev. 159 (1974).

347. *See* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (o)(2) (violation of article 1.04 subjects one to penalties of article 8.01(b)); art. 5069-1.06, § (1) (usurious loan under subtitle one forfeits three times the usurious interest); art. 5069-8.01, § (b) (violation subjects one to penalty of twice amount of interest charged) (Vernon Supp. 1982-1983).

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> "Not the same thing a bit!" said the Hatter. "Why, you might just as well say that 'I see what I eat' is the same thing as 'I eat what I see!' "[348]

"Spreading" can be defined as a method of allocating over the life of a loan (or a portion of the loan, in the event the loan maturity is accelerated or the loan is prepaid) charges that the parties themselves have called interest or that a court would deem interest regardless of the label given the charge by the parties. Actually, the term "spreading" is misleading since interest is not "spread"; instead, a payment is characterized as a payment of either principal or interest (or both) and then treated accordingly by the courts.[349]

The application of spreading in its simplest form is perhaps best illustrated by *Nevels v. Harris,*[350] where the borrower had executed a note in the principal sum of $6,400 due in five years with interest payable annually in the amount of $512 (eight percent of the face amount of the note). Because the lender deducted $320 for making the loan, the court held that the true principal actually received by the borrower was $6,080.[351] The court then computed the maximum lawful interest that could be collected on $6,080 at ten percent for five years—$3,040—which, when added to the principal of

348. L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 67 (1982).

349. *See* St. Claire, *The Spreading of Interest Under the Actuarial Method,* 10 ST. MARY'S L.J. 753, 755, n.10 (1979); *see also* First State Bank v. Miller, 563 S.W.2d 572, 575 (Tex. 1978); Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 783 (Tex. 1977); Nevels v. Harris, 129 Tex. 190, 198, 102 S.W.2d 1046, 1050 (1937); TEX. REV. CIV. STAT. ANN. art. 5069-1.07, § (a) (Vernon Supp. 1982-1983). The first use of the term "spreading" in an appellate decision appears to have been in Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1343 (5th Cir. 1972). For an excellent analysis of the judicial development of the concept of spreading, see Comment, *Usury in Texas: Spreading Interest Over the Entire Period of the Loan,* 12 HOUS. L. REV. 159 (1974). Additional analysis can be found in Comment, *Usury Implications of Front-End Interest and Interest in Advance,* 29 SW. L.J. 748 (1975).

350. 129 Tex. 190, 102 S.W.2d 1046 (1937); *see* Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1343 (5th Cir. 1972) (Fifth Circuit held $67,500 "commitment fee" was interest and should be deducted from stated amount of principal to arrive at true principal received).

351. Nevels v. Harris, 129 Tex. 190, 196, 102 S.W.2d 1046, 1049 (1937). In its reformulation of the loan as a loan for $6,080 the court characterized the $320 front-end charge as a reduction of principal rather than as additional interest. *See id.* at 196, 102 S.W.2d at 1049. *But cf.* First State Bank v. Miller, 563 S.W.2d 572, 575 (Tex. 1978) (supreme court erroneously treated front-end charge as both reduction of principal and interest).

$6,080, would call for a total repayment of $9,120.[352] The court then compared this amount to the amount required to be paid by the borrower[353] and concluded that the loan was not usurious.[354] Subsequent cases have applied this concept of spreading.[355]

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352. *See* Nevels v. Harris, 129 Tex. 190, 196, 102 S.W.2d 1046, 1049 (1937).

353. The amount actually required to be paid by the borrower was $8,960, composed of the $2,560 interest actually charged (5 x $512) and the $6,400 repayment of the principal face amount. *See id.* at 197, 102 S.W.2d at 1049. Although the $320 front-end charge was not an additional payment but merely a reduction of the amount advanced, the amount was nevertheless repaid at the end of the loan term as part of the $6,400 repayment. *See id.* at 196, 102 S.W.2d at 1049.

354. *See id.* at 190, 102 S.W.2d at 1049.

355. *See* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 786-87 (Tex. 1977). Relying on *Nevels*, the court emphasized that to impose the penalties for usury merely on proof that interest payments for one year were in excess of the statutory limit, while over the term of the loan the interest received did not exceed the statutory limit, would be manifestly unjust and beyond the obvious legislative intent of article 1.06 and its 1967 amendment, which extended usury penalties to interest "contracted for" over the entire contract term. *See id.* at 786-87. "[I]t seems only reasonable that the [legislature] intended for the contract to be tested for usury on the basis of the compensation charged for the entire term during which the borrower had the use, detention or forebearance of the principal debt." *Id.* at 786. Nevertheless, in the last paragraphs of the opinion, the court appears to have limited its decision to contracts "wherein the stated rate of interest on the principal debt does not exceed 10% per annum and wherein all consideration (contracted for and judicially determined) for use, detention or forebearance of the principal debt is a sum no greater than such principal debt would produce at 10% per annum during the full time that the payor has use of the principal debt or the consideration (such as land) represented by the principal debt." *Id.* at 787. It is at least arguable that *Tanner* might permit fluctuating interest rates which at times exceed the maximum permitted rate to be "spread" over the entire term of the loan. *See id.* at 784. See the favorable quote from Mills v. Johnston, 23 Tex. 308, 330 (1859):

> The law, in deciding whether a settlement involves usury or not, will look at the whole amount of interest reserved . . . and to the whole period of the forebearance extended; and if the charges, properly imputable to interest, do not exceed the highest interest allowed by law, for the whole period of the forebearance extended; then the settlement cannot be held to be usurious.

Id. at 329-30. This interpretation would require that the phrase "during the full time that the payor has the use of the principal debt or the consideration (such as land) which is represented by the principal debt," modifies not only the immediately preceding clause, but also the clause "wherein the stated rate of interest on the principal debt does not exceed 10% per annum." *See* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 787 (Tex. 1977). In *First State Bank v. Miller*, the court again approved *Nevels* but then proceeded to misapply its holding. In *Miller*, the borrower signed a three-year note for $70,000 bearing interest at the rate of ten percent per annum. Interest for the first two years ($14,000) was frozen in a non-interest-bearing account with the lender, resulting in the borrower receiving effectively only $56,000. The court then computed the maximum amount chargeable on $56,000 for three years to be $16,800, then compared this with the interest called for on the face of the note ($21,000) and held the contract to be usurious. The court's error in applying *Nevels* was in treating the frozen interest as both a reduction of principal and as interest. *See* First State Bank v. Miller, 563 S.W.2d 572, 575 (Tex. 1978); *see also* Spanish Village, Ltd. v.

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Following the passage of the Act, it is necessary to determine what effect, if any, the Act has on spreading. The Consumer Credit Commissioner has indicated that the Act was not intended to change existing concepts of "spreading" of interest.[356]

Article 1.07(a), the spreading statute, provides in part:

> On any loan or agreement to loan secured or to be secured, in whole or in part, by a lien, mortgage, security interest, or other interest in or with respect to any interest in real property, determination of the rate of interest for the purpose of determining whether the loan is usurious under all applicable Texas laws shall be made by amortizing, prorating, allocating, and spreading, in equal parts during the period of the full stated term of the loan, all interest at any time contracted for, charged, or received from the borrower in connection with the loan.[357]

The language of article 1.07(a) does not appear to fit into a floating rate context[358] unless interpreted in accordance with the actuarial method.[359]

American Mortgage Co., 586 S.W.2d 195, 200 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (example of spreading).

356. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-27, at 6 (1981). The Commissioner stated:

> It is our opinion that no section of H.B. 1228 was intended to change existing concepts of the "spreading" of interest although I should mention I have never been quite certain of what those concepts are. (There is an excellent discussion of the "spreading" problem by Mr. Frank A. St. Claire in ST. MARY'S LAW JOURNAL, Vol. 10, page 753). Insofar as loans are concerned, we follow the concept as set out by the Supreme Court in Nevels v. Harris, 102 S.W.2d 1046 (Sup. Ct. Tex., 1937), and what we perceive to be the "actuarial method" of computation. Apparently, the holding of the Supreme Court in Tanner Development Co. v. Ferguson, 561 S.W.2d 777 (Sup. Ct. Tex., 1977) will be the applicable spreading concept in transactions involving the credit sales of real estate. I would point out, however, that article 1.04(f) provides that in variable-rate contracts the rate or amount produced by the variable rate formula may not exceed the ceiling from time to time in effect and applicable to the contract.

Id.

357. TEX. REV. CIV. STAT. ANN. art. 5069-1.07, § (a) (Vernon Supp. 1982-1983).

358. The present spreading statute says that one literally spreads by "amortizing in equal parts" all interest charges. It is unclear exactly what "in equal parts" means, but one interpretation is that it means "at equal rates." Under such an interpretation, if one amortizes interest in equal parts with a floating usury ceiling on a contract rate at that floating ceiling, a higher than permissible amount of interest will be charged at any time the ceiling declines.

359. *See* St. Claire, *The Spreading of Interest Under the Actuarial Method,* 10 ST. MARY'S L.J. 753, 802-21 (1979) (discussion of actuarial method).

St. Claire and Hogan: The Revised Texas Usury Ceilings - A New Alice in Wonderland.

Article 1.04(c) provides that in

> [C]ontracts for which the monthly ceiling is available under this section, if the parties agree that the [contract] rate is subject to being adjusted on a monthly basis in accordance with Section (f) of this Article they may further contract that the [contract] rate from time to time in effect may not exceed the monthly ceiling from time to time in effect under this section and the monthly ceiling from time to time in effect is the ceiling on those contracts.[360]

Article 1.04(c) does not contain the language of article 1.04(f) "for so long as debt is outstanding under the contract."[361] Thus, the use of the monthly ceiling appears to preclude the use of spreading.

Article 1.04(f) provides "[h]owever, the rate or amount so produced may not exceed the ceiling that may from time to time be in effect and applicable to the contract, for so long as debt is outstanding under the contract."[362] Because the phrase "for so long as debt is outstanding under the contract" is not present in article 1.04(c), one can argue that the legislature was in fact expressing a desire to authorize spreading in variable-rate open-end accounts in which the monthly ceiling was not utilized. Another factor lending credence to such an argument is the absence of any express language prohibiting spreading and the similarity of the language to earlier spreading cases.[363] One weakness of the argument, however, is the absence of any credible reason to single out the monthly ceiling as the only situation not permitting spreading on a variable-rate open-end account.

Several more plausible interpretations of the phrase may be sug-

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360. TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (c) (Vernon Supp. 1982-1983).

361. *See id.* §§ (c), (f).

362. *Id.* § (f).

363. *See* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 786 (Tex. 1977). "It seems only reasonable that [the legislature] intended for the contract to be tested for usury on the basis of the compensation charged for the entire term during which the borrower had the use, detention or forebearance of the principal debt." *Id.* at 786; *see* Nevels v. Harris, 129 Tex. 190, 196, 102 S.W.2d 1046, 1049 (1937). "If the contract for the use and detention of the principal debt is not a sum greater than such debt would produce at 10 percent per annum from the time the borrower had the use of the money until it is repaid, it is not usurious." Nevels v. Harris, 129 Tex. 190, 196, 102 S.W.2d 1046, 1049 (1937) (quoting Adleson v. Dittmar Co., 124 Tex. 564, 80 S.W.2d 939 (1935)); *see also* Mills v. Johnston, 23 Tex. 308, 329-30 (1859). "[A]nd if the charges, properly imputable to interest, do not exceed the highest interest allowed by law, for the whole period of forebearance, then the settlement cannot be held to be usurious." Mills v. Johnson, 23 Tex. 308, 329-30 (1859).

gested. One might interpret the phrase such that it simply means that the rate may never exceed the ceiling from time to time in effect.[364] Under such an interpretation, spreading would not be permissible. One could also interpret the phrase "for so long as debt is outstanding" as clarifying that the fluctuating ceiling can be applied after maturity of the contract as well (i.e., when the contract is in default or matured). This would seem to be a plausible interpretation of the phrase, especially when it is remembered that all of the ceilings in article 1.04 are alternative ceilings to other usury ceilings and are not mandatory.[365] It is therefore possible to interpret all of article 1.04 as a statement by the legislature that, while spreading is generally permissible, if a lender seeks to use the alternative ceilings of article 1.04 for a variable-rate account, the lender cannot at the same time spread interest so as to allow the lender to circumvent a requirement that the floating rate never exceed the floating ceiling in effect from time to time. Obviously such an interpretation could have an adverse effect on a lender who seeks to take advantage of every permissible device to charge more interest. For example, this interpretation could cause a number of "equity participation" loans[366] to be usurious if the Consumer Credit Commissioner's opinion that such loans are not variable-rate accounts is incorrect.[367]

Whether spreading is permitted under the Act is still an unanswered question.[368]

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364. Because of the punctuation of article 1.04(f) it could be interpreted to read: however, for so long as debt is outstanding, the rate may not exceed the ceiling from time to time in effect. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (f) (Vernon Supp. 1982-1983).

365. *See id.* § (m).

366. An equity participation loan is a means by which the lender receives additional interest in the form of an ownership interest or share in profits at the time of sale. Barton & Morrison, *Equity Participation Arrangements Between Institutional Lenders and Real Estate Developers*, 12 ST. MARY'S L.J. 929, 934-36 (1981); *see* Comment, *Equity Participation in Texas: A Lender's Dream or a Usurious Nightmare?* 34 SW. L.J. 877, 879 (1980).

367. A discussion of the Commissioner's view on "equity participation" loans is found in text and accompanying notes, 106-09 *supra*. For example, a lender using an indicated rate ceiling may suddenly find himself collecting usurious interest in the last week of the loan when the property is sold and he receives his equity share. The same situation could arise in a "percentage-rents-contingent-interest" loan.

368. *See* Address by Sam Kelley, Consumer Credit Commissioner, Fifth Annual Banking Law Institute at 20 (March 11-12, 1981) (available at Texas Tech University Law Library). The Commissioner stated in part:

> There is no particular difficulty as long as the contract is a standard closed-end fixed-rate transaction. The more difficult problems arise if the note has a feature such as an

XIII. CONVERSION OF EXISTING OPEN-END ACCOUNTS

Section 26 of the Act creates a new Chapter 1A composed of article 1A.01.[369] The purpose of Article 1A.01 is to allow a creditor on an open-end account existing prior to the effective date of the Act to take advantage of the higher ceilings authorized by article 1.04 on future balances by utilizing the amendment procedures set forth in article 1.04(i).[370] To do so, however, the creditor must give the obligor the option to terminate the agreement and pay the existing balance at the rate and minimum payment terms to which he previously agreed.[371] The creditor may apply payments on the account first to reduce the balance outstanding on the date of the Act and then to credit extended after such date.[372] Article 1.04(i)(1) provides that in an open-end account,

> the creditor may provide in the agreement . . ., or, pursuant to Article 1A.01 . . ., amend the agreement to provide that the terms, including the rate, or index, formula, or provision of law used to compute the rate on the open-end account will be subject to revision as to current and future balances, from time to time, by notice from the creditor to the obligor.[373]

> equity participation in a building financed by the loan or a percent of the profit from a sale of the financed building or if the loan is a variable rate transaction. I do not have any good answers to some of these questions. I am of the opinion that equity participations and percentages of profit from sale of financed buildings should be considered interest. [*See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-31, at 1, 2 (1981)]. However, I do not know how they should be viewed as pertains to the "spreading" concept. As far as variable-rate contracts are concerned, 1.04(f) requires that the rate produced may not exceed the ceiling that may from time to time be in effect. This can be read in more than one way when considering the spreading concept, but *I am inclined to think it means that at no time during the life of the variable-rate contract may the rate produced exceed the ceiling applicable to the contract.* I realize some very good lawyers take a different view. We will have to deal with some of these questions in the very near future but, as of this writing, I still am not able to express a definite viewpoint.

Id. (emphasis added).

369. TEX. REV. CIV. STAT. ANN. art. 5069-1A.01 (Vernon Supp. 1982-1983).

370. *See id.; see also id.* art. 5069-1.04, § (i)(1), (2) (procedure to amend agreement). Article 1A.01 is not applicable to closed-end accounts. Note, however, that it may be possible that some pre-Act variable-rate closed-end accounts will be able to utilize the new ceilings in article 1.04 if the account provides that the interest rate may not exceed "the legal maximums as they existed at the time of the making of the contract or as they might be changed or amended." CONSUMER CREDIT COMM'R LETTER INTERP. No. 82-7, at 3 (1982).

371. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1A.01 (Vernon Supp. 1982-1983).

372. *See id.*

373. *See id.* art. 5069-1.04, § (i)(1), (2).

This provision implies that by complying with the required notice procedures,[374] a lender can bring existing open-end accounts under the provisions of article 1.04, as amended, provided the contract formula allows the lender to charge rates up to the applicable ceilings authorized by article 1.04. The language of article 1.04(i)(1) literally says the lender can change the rate—for example, "prime" to "prime plus five"—a result on commercial transactions not anticipated by the legislature. Nevertheless, commercial lenders on open-end accounts may wish to change from the former applicable ceiling to the new ceilings authorized by the Act. They may not necessarily want to change the contract rate of "prime" or "prime plus two" but they may want to utilize the usury ceilings provided in the Act rather than any other previously existing usury ceiling since this might allow the formula rate to float higher than the old ceiling. The contract may limit the parties to a usury ceiling or applicable law in effect at the date of the contract. In such a case, it would be a breach of the contract to attempt to change the usury ceiling. If the contract provides, however, that the maximum rate of non-usurious interest shall be "the maximum rate allowed from time to time by applicable law as presently in effect, or as may from time to time hereafter be," the lender may contend that he can now take advantage of the ceilings created by the Act because the contract explicitly says that he can utilize the maximum rate established by law after the contract is executed.[375]

374. The Act allows amendment of an open-end account in situations in which the lender has reserved the right to change the index (*e.g.*, prime plus 2 or 4). *See id.* § (i)(1). The lender must give notice of the new rate index or formula used, the effective date, the period in which the new formula will be in effect, and whether current balances are affected. *See id.* § (i)(1). The lender must also advise the borrower that he has the right either to accept or reject the new rate. *See id.* § (i)(1)(D) (notify obligor of rights). If rejected, the borrower can make no further use of the line of credit, but can pay off the existing balance in accordance with the existing terms of the contract. *See id.* § (i)(2). The Act specifically prohibits the creditor from accelerating the loan because the borrower rejects the new rate. *See id.* § (i)(2). The borrower is deemed to have agreed to the amendment five days after it is delivered unless he objects to the amendment, however, the borrower is deemed to have agreed to the new rate if he uses the line of credit after that period. *See id.* § (i)(2). If the borrower does nothing, the new rate becomes effective 21 days after the notice is sent. *See id.* § (i)(2). The notice must provide a means by which the borrower can return a portion of the notice to the lender specifying he refused the rates used. *See id.* § (i)(2). These provisions appear to have credit cards in mind. Nonetheless, if a commercial loan is drafted in such a manner that the lender is given the right to make these types of amendments, he will need to comply with these disclosure provisions.

375. The creditor will probably be able to implement the change. *Cf.* CONSUMER CREDIT

XIV. The Administrative Procedure And Texas Register Act

According to Article 1.04(o)(3), the Consumer Credit Commissioner must enforce Chapters 2, 3, 4, 5, 6, 6A, 7, 8, 15, and 51 of Title 79; additionally, he must enforce 1.04 as it applies to contracts under those chapters.[376] Article 1.04(p) provides that no violation occurs under Title 79 when a person commits acts or omissions, "that conform to the provisions of [article 1.04], or to the provisions determined by the consumer credit commissioner, or that conform to an interpretation of this Title by the consumer credit commissioner . . . ."[377]

Since the effective date of the Act, the Consumer Credit Commissioner has issued "Letter Interpretations" in response to inquiries from various members of the legal and business communities.[378] The majority of these interpretations have been addressed to questions about article 1.04. The Consumer Credit Commissioner believes that the interpretations will benefit the public by stating the administrative position of his office on various questions relating to credit transactions thereby allowing the public to rely on them.[379] Excerpts from twenty-seven previously issued letter interpretations were published in the Texas Register on August 7, 1982.[380] Their date of issue was given as August 10, 1982, although the individual interpretations dated back to May 27, 1981.[381]

The Office of the Consumer Credit Commissioner of the State of

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Comm'r Letter Interp. No. 81-11, at 2, 3 (1981) (commercial lender of open-end account able to utilize article 1.04(i) and article 1A.01 to unilaterally change fixed rate). In fact, in the absence of a provision permitting the maximum rate allowed by law, the commercial lender on an open-end account will probably still be able to utilize these articles to unilaterally change the rate. In Letter Interpretation No. 81-11, the Commissioner held that a commercial lender of an open-end account could unilaterally change the rate on the account from 10% to 18% upon compliance with articles 1.04(i) and 1A.01. *See id.* at 3. The contract did not reference the "maximum rate allowed by law" nor did it have a provision allowing unilateral modification of the contract. *See id.*

376. *See* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (o)(3) (Vernon Supp. 1982-1983).

377. *Id.* § (p).

378. In 1981, the Commissioner issued thirty-six numbered letter interpretations. In 1982, twenty-nine numbered letter interpretations were issued.

379. *See* 7 Tex. Reg. 3040, 3041 (1982).

380. *See id.* at 3041-44. To date, there have been no additional interpretations published in the Texas Register.

381. *See id.*

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Texas is established by article 2.02.[382] The Administrative Procedure and Texas Register Act[383] defines "agency" as "any state board, commission, department, or officer having statewide jurisdiction . . . that makes rules or determines contested cases."[384] "Rule" is defined as "any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency."[385] Based upon the definitions given above, the office of the Consumer Credit Commissioner is an agency under the APTRA since it has statewide jurisdiction[386] and issues statements of general applicability interpreting Title 79.[387]

The APTRA mandates a procedure for the adoption of rules by state agencies and provides specifically that "no rule hereafter adopted is valid unless adopted in substantial compliance with this section."[388] Before adopting any rule, each agency is directed by the APTRA to comply with the following procedure for the adoption of rules:

> [A]n agency shall give at least 30 days' notice of its intended action . . . [by filing a notice of the proposed rule] with the secretary of

382. *See* TEX. REV. CIV. STAT. ANN. art. 5069-2.02, § (1) (Vernon Supp. 1982-1983).

383. *See id.* art. 6252-13a. The Administrative Procedure and Texas Register Act will hereinafter be referred to simply as the "APTRA." For an analysis of various aspects of the APTRA, see Shannon & Ewbank, *The Texas Administrative Procedure and Texas Register Act Since 1976—Selected Problems*, 33 BAYLOR L. REV. 393 (1981); Spears & Sanford, *Standing to Appeal Administrative Decisions in Texas*, 33 BAYLOR L. REV. 215 (1981); Watkins & Beck, *Judicial Review of Rulemaking Under the Texas Administrative Procedure and Texas Register Act*, 34 BAYLOR L. REV. 1 (1982).

384. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 3(1) (Vernon Supp. 1982-1983).

385. *See id.* § 3(7).

386. *See id.* art. 5069-2.02, § (1) (office is for State of Texas).

387. *See id.* art. 6252-13a, § 3(1), (7) (state officer issuing statement of general applicability interpreting law). Interpretive rules have been described as "those which interpret and apply the provisions of an applicable statute." First Fed. Sav. & Loan Ass'n v. Vandygriff, 639 S.W.2d 492, 498 (Tex. Ct. App.—Austin 1982, no writ). No sanction is imposed for the violation of an interpretive rule, but only for the violation of the underlying statute. *See id.* at 498; *see also* General Elec. Credit Corp. v. Smail, 584 S.W.2d 690, 694 n.7 (Tex. 1979). The Texas Supreme Court notes, in reference to federal agencies, that some administrative bodies issue rules without legislative sanctions; these "interpretive rules" are not law, but courts give them great deference. *See* General Elec. Credit Corp. v. Smail, 584 S.W.2d 690, 694 n.7 (Tex. 1979). There is some question as to whether the Consumer Credit Commissioner has the authority to issue these interpretations. For a discussion of this issue, see the chapter entitled "Consumer Credit Commissioner," accompanying notes 28-36 *supra*.

388. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(e) (Vernon Supp. 1982-1983).

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> state [who shall in turn publish it] in the Texas Register. [Among other requirements], [t]he notice must include:
> (1) a brief explanation of the proposed rule;
> (2) the text of the proposed rule . . .
> (3) a statement of the statutory or other authority under which the rule is proposed to be promulgated . . . and
> a certification that the proposed rule has been reviewed by legal counsel and found to be within the agency's authority to adopt;
> (4) . . . (A) [certain financial information, including] the additional estimated cost . . .
> (B) estimated reductions in costs to the state and to local governments [expected] as a result of enforcing or administering the rule;
>
> . . . .
>
> (5) a public benefit-cost note . . .
>
> . . . .
>
> (6) a request for comments on the proposed rule from any interested person . . . .[389]

Before adopting the rule, the agency must give all interested parties a reasonable chance to submit oral or written data or arguments concerning the adoption of the proposed rule.[390] The agency must consider all submissions and, if requested, issue a statement of the reasons for its decision.[391] Once the rule is adopted, the agency order promulgating such rule must contain:

> (1) a reasoned justification of the rule, including a summary of comments received from [interested] parties . . . and whether they were for or against its adoption, and also including a restatement of the rule's factual bases and why the agency disagrees with party submissions and proposals;
> (2) a concise restatement of the particular statutory provisions under which the rule is adopted and of how the agency interprets these provisions as authorizing or requiring the rule; and
> (3) a certification that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.[392]

The APTRA also requires that all rules, statements of policy, and interpretations promulgated or otherwise used in the exercise

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389. *Id.* § 5(a).
390. *See id.* § 5(c).
391. *See id.* § 5(c).
392. *Id.* § 5(c-1).

of its duties be indexed and made available for public inspection.[393] Further, no agency promulgation is valid against anyone, nor may it be used by the agency for any reason, until such promulgation is indexed and rendered available for public inspection.[394]

In view of the mandatory requirements of the APTRA, the letter interpretations issued by the Consumer Credit Commissioner may be invalid in several respects. It is apparent that the office of the Consumer Credit Commissioner has not complied with the APTRA's procedure for the adoption of rules. To date, no advance notice of any intended rulemaking has been published; further, the Texas Register has only recently begun to publish summaries of previously adopted interpretations.[395] The August 17, 1982 edition of the Texas Register prefaced a listing of selected interpretations with a statement that they were authorized by the provisions of article 1.04(p) and 8.01(f) generally referred to as the "safe-harbor" provisions of Title 79.[396] Nevertheless, there was no statement of how these provisions were interpreted to authorize the rule adopted, nor was there a certification that the rule as adopted had been reviewed by legal counsel and found to be a valid exercise of the commissioner's legal authority.[397] Interested persons were invited to comment on any or all of the interpretations published, although this invitation does not satisfy the APTRA's direction to provide notice and an opportunity for comment prior to the adoption of any rule.[398]

The Texas Register of August 17, 1982 stated that the interpretations published therein were available for public inspection at the office of the Consumer Credit Commissioner.[399] It is not clear

393. *See id.* § 4(a)(2).

394. *See id.* § 4(b). This mandate is not available to any party who has actual knowledge of the promulgation. *See id.* § 4(b).

395. *See* 7 Tex. Reg. 3040, 3041 (1982).

396. *See id.* The "safe harbor" provisions insulate the creditor from penalties for usury if his actions conform to certain situations described in the statute. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (p) (no violation of statute if act committed based on commissioner or appellate court interpretation); *id.* art. 5069-8.01, § (f) (Vernon Supp. 1982-1983) (no violation if unintentional resulting from bona fide error or act committed in good faith conforming to agency interpretation).

397. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(c—1)(2), (3) (Vernon Supp. 1982-1983).

398. *Id.* art. 6252-13a, § 5(c); 7 Tex. Reg. 3040, 3041 (1982).

399. *See* 7 Tex. Reg. 3040, 3041 (1982). Upon request and receipt of postage to cover

from this statement whether previously written letter interpretations not published in the Texas Register are also available for public inspection. Additionally, since not all of the letter interpretations written have been published in the Texas Register, the reliability of these unpublished interpretations for purposes of the safe-harbor provisions of articles 1.04(p) and 8.01(f) may be questioned,[400] because the APTRA provides that no rule is valid against any person nor may it be invoked for any purpose until it is indexed and available for public inspection.[401]

No rule adopted by an administrative agency is valid unless it has been adopted in substantial compliance with APTRA procedures.[402] From the foregoing discussion, it appears that the Consumer Credit Commissioner has not met the requirement of substantial compliance with APTRA procedures. Any rule may be contested and set aside on the ground of noncompliance with the APTRA provided that the proceeding is commenced within two years after the rule's effective date.[403] The first letter interpretation of the Act issued was dated May 27, 1981, although it was not summarized in the Texas Register until August 17, 1982.[404] Although there may be some debate as to which of the above dates is the effective date of the rule, the two year statute of limitations for contesting this and subsequent interpretations has not expired under either interpretation of the effective date.[405]

Additionally, APTRA provides that a declaratory judgment action may be instituted to test the validity or that applicability of any rule that is alleged to interfere with, impair, or threatens to

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the cost of mailing, the Consumer Credit Commissioner will mail copies of all letter interpretations issued by him relative to the Act. *See id.*

400. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (p) (no violation if relied on commissioner interpretation); *id.* art. 5069-8.01, § (f) (no violation if good faith act based on rule, regulation, or interpretation of agency); *id.* art. 6252-13a, §§ 3(1) (agency includes officer of state), (5)(e) (no rule adopted valid without APTRA compliance) (Vernon Supp. 1982-1983).

401. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 4(b) (Vernon Supp. 1982-1983). This rule does not apply to a person with actual knowledge of the rule. *See id.* § 4(b).

402. *See id.* § 5(e).

403. *See id.* § 5(e). *See generally,* Shannon & Ewbank, *The Texas Administrative Procedure and Texas Register Act Since 1976—Selected Problems,* 33 BAYLOR L. REV. 393, 429 (1981).

404. *See* 7 Tex. Reg. 3040, 3041 (1982); CONSUMER CREDIT COMM'R LETTER INTERP. NO. 81-1 (1981).

405. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(e) (Vernon Supp. 1982-1983).

interfere with or impair the plaintiff's legal rights or privileges.[406] Such an action would permit a substantive challenge to any one or more of the Consumer Credit Commissioner's letter interpretations of the Act.[407] The construction of a statute is inherently a judicial determination.[408] Nevertheless, a "contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect is entitled to great respect in the [Texas] courts."[409] An administrative agency has discretion to interpret an applicable statute, but the courts may review the agency's interpretation and may overturn the construction given if found to be legally incorrect.[410] An interpretation contrary to the words of the statute will be invalidated.[411] For those who have relied upon an invalid interpreta-

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406. *See id.* § 12; *see also* State Bd. of Ins. v. Deffebach, 631 S.W.2d 794, 797 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.). The place of venue for such an action is fixed in any district court of Travis County. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 12 (Vernon Supp. 1982-1983).

407. A declaratory judgment action, however, may not be brought if an administrative proceeding to suspend, revoke, or cancel a license given by the agency is before the agency. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 12 (Vernon Supp. 1982-1983). Further, a declaratory judgment action will not be maintained if there is a pending action or proceeding in another court between the same parties which might resolve the declaratory judgment issue. *See* Texas Liquor Control Bd. v. Canyon Creek Land Corp., 456 S.W.2d 891, 895 (Tex. 1970). *See generally,* Shannon & Ewbank, *The Texas Administrative Procedure and Texas Register Act Since 1976—Selected Problems,* 33 BAYLOR L. REV. 393, 426-36 (1981). The rationale behind this restriction is that a declaratory judgment may not be rendered unless the court can settle the entire controversy between the parties. If proceedings are pending before another court, complete relief cannot be granted and a declaratory judgment would be nothing more than an advisory opinion. *See* Powell v. Estelle, 580 S.W.2d 169, 171 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.); Wilson v. Grievance Comm., 565 S.W.2d 361, 362-63 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

408. *See* Public Util. Bd. v. Central Power & Light Co., 587 S.W.2d 782, 788 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e) (inherent judicial determination); Teacher Retirement Sys. v. Cottrell, 583 S.W.2d 928, 930 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (Board decision reviewed by district court and civil appeals court).

409. Neubert v. Chicago, R.I. & G. Ry., 116 Tex. 644, 651, 296 S.W. 1090, 1094 (1927); *see* State v. United Bonding Ins. Co., 450 S.W.2d 689, 692 (Tex. Civ. App.—Austin 1970, no writ) (quoting *Nuebert*); *see also* First Fed. Sav. & Loan Ass'n v. Vandygriff, 639 S.W.2d 492, 499 (Tex. Ct. App.—Austin 1982, no writ) (interpretive rules given great deference by judicial department).

410. *See, e.g.,* Teacher Retirement Sys. v. Cottrell, 583 S.W.2d 928, 929-31 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (court held agency construction did not follow law); State v. United Bonding Ins. Co., 450 S.W.2d 689, 692 (Tex. Civ. App.—Austin 1970, no writ) (although agency has discretion, decision overturned if legally wrong); Board of Adjustment v. Underwood, 332 S.W.2d 583, 585 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.) (may review Board of Adjustment decision when alleged to be illegal).

411. *See* Citizens Nat'l Bank v. Calvert, 527 S.W.2d 175, 180 (Tex. 1975); Rudman v.

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tion, however, articles 1.04(p) and 8.01(f) of the Act may provide a safe harbor from liability.[412]

XV. Safe Harbor Provisions

> Alice was too much puzzled to say anything . . . .[413]

Article 1.04(p), which contains the "safe harbor"[414] provisions of the Act, provides:

> A person does not violate this Title by contracting for, charging, or receiving any rate or dollar amount, or by any acts done or omitted, that conform to the provisions of this Article, or to the provisions determined by the consumer credit commissioner, or that conform to an interpretation of this Title by the consumer credit commissioner or by a decision of an appellate court of this state or of the United States in effect at the time that the acts were done or omitted.[415]

The provision can therefore be divided into four operative clauses:

1. Acts done or omitted conforming to the provisions of article 1.04;
2. acts done or omitted conforming to provisions determined by the Consumer Credit Commissioner;
3. acts done or omitted conforming to an interpretation of Title 79 by the Consumer Credit Commissioner;
4. acts done or omitted conforming to an interpretation of Title 79 by a federal or state appellate court.

The phrase "in effect at the time that the acts were done or omitted" appears to refer to all four situations and not just to interpretations by the Consumer Credit Commissioner and decisions by appellate courts in effect at the time the acts were done or omitted. For example, to construe the phrase as allowing acts done prior to the effective date of the Act to be characterized suddenly as non-usurious simply because the loan if now made would be non-usuri-

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Railroad Comm'n, 162 Tex. 579, 584, 349 S.W.2d 717, 721 (1961).

412. *See* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (p); *id.* art. 5069-8.01, § (f) (Vernon Supp. 1982-1983).

413. L. Carroll, Through the Looking Glass 184 (1982).

414. A safe harbor provision is a provision upon which a person can rely in order to be excused from liability for an unintentional violation of the law.

415. Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (p) (Vernon Supp. 1982-1983).

ous would necessarily imply that this provision is not only a safe harbor provision to apply prospectively, but is also a retroactive law.[416] It is important to note that article 1.04(p) is triggered by the act or omission being in conformity with any one of the four situations.[417] The Act is silent as to whether reliance upon the provision, interpretation, or decision must be shown.

A. *Acts Done or Omitted Conforming to the Provisions of Article 1.04*

No problems exist with this provision provided, however, that it is not interpreted to mean that if a provision of the Act is held invalid, the court is powerless to grant relief because the act was done in conformity with an invalid provision. Clearly, the legislature cannot merely relegislate unconstitutional laws.[418] For the same reason, it would be inconsistent to allow the legislature to prohibit a court from granting relief which would otherwise be available upon a court's determination that the statute or provision was unconstitutional or otherwise invalid.[419]

B. *Acts Done or Omitted Conforming to the Provisions Determined by the Consumer Credit Commissioner*

This clause apparently refers to the obligations of the Consumer Credit Commissioner under the Act, one of which is the calculation

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416. For a discussion of the constitutionality of retroactive laws, see text accompanying notes 459-578 *infra*. Because of the presence of section 27 of the Act which addressed the applicability of the Act to "claims of forfeiture in litigation," such a construction seems highly improbable. *See* 1981 Tex. Gen. Laws. ch. 111, § 27, at 286 (claims of forfeiture determined by prior law). Section 27 is found in the notes of each statute that was revised by H.B. 1228. *See* TEX. REV. CIV. STAT. ANN. arts. 1302-2.09A note, 2461-4.01 note, 2461-7.01 note, 5069-1.01 note, 5069-1.04 note, 5069-1.07 note, 5069-1.08 note, 5069-1A.01 note, 5069-2.07 note, 5069-2.08 note, 5069-3.01 note, 5069-3.15 note, 5069-3.16 note, 5069-3.21 note, 5069-4.01 note, 5069-5.02 note, 5069-6.02 note, 5069-6.03 note, 5069-6.05 note, 5069-6A.03 note, 5069-7.03 note, 5069-15.01 note, 5069-15.02 note, 5069-15.05 note, 5069-51.12A note, (Vernon Supp. 1982-1983); TEX. INS. CODE ANN. art. 24.20 note (Vernon 1981).

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

418. *See* Corder v. State Water Pollution Control Bd., 391 S.W.2d 83, 87 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.); *cf.* Cramer v. Sheppard, 140 Tex. 271, 286, 167 S.W.2d 147, 155 (1942) (statute cannot override constitution).

419. *Compare* Cramer v. Sheppard, 140 Tex. 271, 286, 167 S.W.2d 147, 155 (1942) (statute cannot override constitution) *with* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (p) (Vernon Supp. 1982-1983) (no violation of usury if relied on statute).

of the various usury ceilings.[420] In the event the Consumer Credit Commissioner miscalculated the applicable ceiling, this provision would prohibit enforcement of the penalty provisions if the loan rate was in conformity with the miscalculated rate.[421]

C. *Acts Done or Omitted Conforming to An Interpretation of Title 79 by the Consumer Credit Commissioner*

Since the Consumer Credit Commissioner in issuing such interpretations has not followed the Texas Administrative Procedure Act,[422] such interpretations might not be considered valid.[423]

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420. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (k)(1) (Vernon Supp. 1982-1983) (Commissioner shall cause ceilings to be published). In this article, the term "Commissioner" refers to the Consumer Credit Commissioner appointed by the Finance Commission. *See id.* art. 5069-2.02, § (1). The term "commissioner" refers to the "consumer credit commissioner" as used in H.B. 1228. These terms may not, in all instances, refer to the same person. For a discussion of this issue, see text accompanying notes 9-36 *supra*.

421. *See id.* § (p) (no violation if relied on provisions determined by commissioner). This provision would appear more appropriate if there were a requirement of a showing of reliance upon the miscalculation. In the absence of reliance such a safe harbor seems unnecessary.

422. TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1982-1983) (APTRA). The Consumer Credit Commissioner is currently in the process of publishing these interpretations in the Texas Register. *See* 7 Tex. Reg. 3040-44 (1982). This Act requires in part that prior to the adoption of any rule, an agency shall give at least 30 days' notice of its intended action and notice of the proposed rule must be filed with the Secretary of State and published by the Secretary of State in the Texas Register. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(a), (b) (Vernon Supp. 1982-1983). This has not yet been done with respect to interpretations issued under article 1.04(p). For a full discussion of the APTRA, see text accompanying notes 372-412 *supra*.

423. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(a), (b) (Vernon Supp. 1982-1983) (notice requirements of APTRA). Even if valid, consider the effect of interpretations by the Consumer Credit Commissioner which benefit a lender in one context but act to the detriment of lenders in another context. For example, the Consumer Credit Commissioner has said that for purposes of Chapter 5 loans, seller's points are interest. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 82-14, at 1-3 (1982) (benefitting lender under Chapter 5, since seller's points, if not interest, could not be charged). Even though the Consumer Credit Commissioner's interpretation did not include seller's points paid in other transactions, the article 1.01(a) definition of interest as "compensation allowed by law for the use, forebearance, or detention of money" is broad enough to include seller's points. TEX. REV. CIV. STAT. ANN. art. 5069-1.01, § (a) (Vernon 1971). *Query:* If the Consumer Credit Commissioner rules that seller's points are interest, will that destroy the ability of a lender to rely on the alternative ceilings of article 1.04 and at the same time to claim that seller's points are not interest? As to whether seller's points constitute interest, see St. Claire, *The "Spreading of Interest" Under the Actuarial Method*, 10 ST. MARY'S L.J. 753, 756 n.19 (1979) (noting that Texas usury laws probably would consider "points" to be interest even though only indirectly paid by borrower). Many residential sellers, cognizant of the fact that

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D. *Acts Done or Omitted Conforming to An Interpretation of Title 79 by a Federal or State Appellate Court Decision*

Article 1.04(p) provides that a person does not violate Title 79 by engaging in conduct which conforms to "a decision of an appellate court of this state or of the United States in effect at the time that the acts were done or omitted."[424] The wording of this clause of article 1.04(p) may create some perplexing procedural and possibly constitutional problems which ultimately may have to be resolved by the courts. These problems are best illustrated by way of example.

Example 1. A decision is rendered under diversity jurisdiction by a federal district court in California relating to a dispute between a California resident and a New York resident that involves an interpretation of Title 79. After rendition of the judgment, the case is appealed to the Ninth Circuit and a decision is rendered by the Ninth Circuit holding that the lending party did not violate Title 79.[425] Subsequent to the judgment by the Ninth Circuit, *L* lends money to *B* in a situation identical to the Ninth Circuit case. *B* sues for usury alleging violation of Title 79. At least two situations can be constructed to show the awkwardness of this provision. First, a state district court renders judgment for *B*, but is powerless to grant a remedy because of the contrary Ninth Circuit decision.[426] Alternatively, a state district court renders judgment for *L*, but *B* ultimately appeals to the Texas Supreme Court which renders judgment for *B* but is powerless to grant a remedy to *B* because of the contrary Ninth Circuit decision.[427]

Example 2. The same cases set forth in Example 1 have been decided. An additional case occurs identical to *B v. L*, involving a loan from *C* to *D* executed after the Texas Supreme Court decision

they may have to pay points in connection with the sale of the house, increase their sale prices. *Query:* Who *really* pays the points in that situation?

424. TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (p) (Vernon Supp. 1982-1983).

425. The federal appellate court is without authority to require a Texas court to render an opinion on a matter of Texas law, even if initiated by a declaratory judgment action in state court. *See* United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 856, 863 (Tex. 1965). The Texas Supreme Court has ruled that such an opinion would be advisory and outside the constitutional authority of the court. *See id.* at 863.

426. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (p) (Vernon Supp. 1982-1983) (no violation if act conforms to decision of United States appellate court).

427. *See id.* § (p) (no violation if act follows appellate court decision).

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referred to in Example 1. *D* sues in a Texas district court which renders judgment for *C*, based upon the Texas Supreme Court decision, but is without power to grant relief to *D* because the Ninth Circuit appellate decision cannot be overturned by the Texas court.[428]

Example 3. A loan is held to be non-usurious in a Texas district court and the case is appealed to the court of appeals which also holds it non-usurious. A new case with the same facts is then decided in a federal district court which holds that had the Texas Supreme Court decided the case, the loan would be usurious and grants judgment for the borrower. Since the federal district court is obligated to determine what the Texas Supreme Court would hold, it grants relief to the borrower.[429] Finally, *B* borrows from *L* under the exact same facts as these prior two loans. The case is ultimately appealed to the Texas Supreme Court which finds the loan usurious but denies relief because of the prior Texas appellate decision in effect at the time the loan was made.

Example 4. A loan is held to be usurious in a Texas district court and judgment is affirmed upon appeal to the court of appeals. A new case with the same facts is then decided in a federal district court in the Ninth Circuit and is held to be non-usurious. Judgment is affirmed upon appeal to the Ninth Circuit on the rationale that the first case would have been reversed by the Texas Supreme Court. Finally, *B* borrows from *L* on the same facts. *B* sues for usury and the case is ultimately appealed to the Texas Supreme Court which holds the loan to be usurious but is unable to grant relief because of the Ninth Circuit decision.[430]

Example 5. All of the cases in Example 4 have occurred and now

428. *See id.* § (p). It can be argued that the effect of the Texas Supreme Court ruling is to overrule the Ninth Circuit on this particular point of law, since the technical wording of the statute says no violation occurs as long as the act or omission conforms to an appellate decision *in effect* at the time of the act or omission. *See id.* § (p) (emphasis added).

429. Federal courts are bound by the construction of a state statute made by the highest court of a state. *See* United States v. Yates, 204 S.W.2d 399, 405 (Tex. Civ. App.—Beaumont 1947, writ ref'd n.r.e); Hollingsworth v. Cities Serv. Oil Co., 199 S.W.2d 266, 268 (Tex. Civ. App.—Beaumont 1946, writ ref'd), *cert. denied*, 332 U.S. 774 (1947); *cf.* Rice v. Continental Casualty Co., 153 F.2d 964, 965 (5th Cir. 1946) (federal court bound by construction of state statute by intermediate appellate court in absence of decision by state supreme court).

430. *See* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, § (p) (Vernon Supp. 1982-1983) (no violation if act conforms to decision by appellate court of United States).

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D borrows from *C* on the same facts. The case is ultimately appealed to the Texas Supreme Court, which holds the loan usurious but again is unable to grant relief to *D* because, despite the fact that the loan is clearly usurious under Texas law, there still exists the Ninth Circuit decision which, in effect, prevents the Texas Supreme Court from granting relief.[431]

In addition to the procedural quagmire which may result from this provision of the safe harbor clause, the provision might possibly be viewed by a court as constituting an impermissible legislative intrusion into the power of the judiciary. Article II, section 1 of the Texas Constitution provides:

> Section 1. The power of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.[432]

Article V, section 1 of the Texas Constitution provides in part:

> Section 1. The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.[433]

Once a principle, rule, or proposition has been determined by the Supreme Court of Texas, or the highest court of the state exercising jurisdiction over the issue, the decision is binding precedent upon the same court and other lower courts when the identical point is raised in a later suit involving different parties.[434] The courts of appeals are courts of co-ordinate jurisdiction within their respective districts and none has the power to review causes assigned to another.[435] A decision rendered by a court of appeals in

431. *See id.* § (p).

432. TEX. CONST. art. II, § 1.

433. *Id.* art. V, § 1.

434. *See* Swilley v. McCain, 374 S.W.2d 871, 875 (Tex. 1964); Jones v. Hutchinson County, 615 S.W.2d 927, 933 (Tex. Civ. App.—Amarillo 1981, no writ).

435. *See* Parr v. Hamilton, 437 S.W.2d 29, 32 (Tex. Civ. App.—Corpus Christi 1968, no

one district is not binding upon the court of appeals in any other district[436] unless the Texas Supreme Court has refused outright an application for writ of error.[437] Decisions of the federal district and circuit courts have persuasive value only and are not controlling upon any Texas court in their interpretation of Texas law.[438]

Arguably, the net result of the Act's provision, providing that a person does not violate Title 79 if his actions are in conformity with an existing state or federal appellate decision, is to interfere with the courts' ability to exercise original jurisdiction. Such an argument is based upon a contention that a court deprived of the right to grant any remedy has in fact been deprived of jurisdiction. For example, once a single appellate court rules that a particular practice is not violative of Title 79, and the decision is not reversed or overruled, no trial court in the state would be permitted to grant relief even upon a contrary determination.[439] " 'Judicial power' is the power of a court to decide and pronounce a judgment *and carry it into effect* between persons and parties who bring a case before it for a decision."[440] Further, " 'jurisdiction is power to hear and determine the matter in controversy according to established rules of law, *and to carry the sentence or judgment of the court into execution.*' "[441] It might, therefore, be argued that the

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writ); Hogan v. G., C. & S. F. Ry., 411 S.W.2d 815, 816 (Tex. Civ. App.—Beaumont 1966, writ ref'd).

436. *See, e.g.*, Shook v. State, 244 S.W.2d 220, 221 (Tex. Crim. App. 1951) (courts not bound by decisions of courts with equal jurisdiction); Dousson v. Disch, 629 S.W.2d 111, 112 (Tex. Ct. App.— Dallas 1981, no writ) (court declined to follow civil appeals court decision); Calvary Temple v. Taylor, 288 S.W.2d 868, 871 (Tex. Civ. App.—Galveston 1956, no writ) (civil appeals court not bound by another civil appeals court decision).

447. *See, e.g.*, Muldoon v. Musgrave, 545 S.W.2d 539, 541 (Tex. Civ. App.—Fort Worth 1976, no writ); Landig Serv. Ins. Co. v. Williams, 324 S.W.2d 597, 599 (Tex. Civ. App.—Waco 1959, no writ); Case-Pomeroy Oil Corp. v. Pure Oil Co., 279 S.W.2d 886, 888 (Tex. Civ. App.—Waco 1955, writ ref'd). In such case, the opinion of the court of appeals becomes an "authority of substantially equal dignity as an opinion of the Supreme Court." Muldoon v. Musgrave, 545 S.W.2d 539, 541 (Tex. Civ. App.—Fort Worth 1976, no writ).

438. *See* Woodward v. Texas Dep't of Human Resources, 573 S.W.2d 596, 598 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.); Nance Exploration Co. v. Texas Employer's Ins. Ass'n, 305 S.W.2d 621, 625-26 (Tex. Civ. App.—El Paso 1957, writ ref'd n.r.e.), *cert. denied*, 358 U.S. 908.

439. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, § (p) (Vernon Supp. 1982-1983) (no violation if act conforms to decision of appellate court).

440. Morrow v. Corbin, 122 Tex. 553, 558, 62 S.W.2d 641, 644 (1933) (emphasis added); *see* Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 74 (1927); Muskrat v. United States, 219 U.S. 346, 356 (1911).

441. Morrow v. Corbin, 122 Tex. 553, 559, 62 S.W.2d 641, 644 (1933) (quoting Cleve-

frustration of the trial court's ability to grant relief has effectively deprived it of jurisdiction.[442] In *Morrow v. Corbin,*[443] the Texas Supreme Court held a statute authorizing a trial court to certify a question of law to the court of civil appeals during the pendency of a case unconstitutional.[444] The *Morrow* court stated that "it was never the purpose of the Organic Law to permit one tribunal to interfere with the lawful exercise by another of the judicial power allocated to it,"[445] and that "[o]ne Court of Civil Appeals or district court will not be permitted to interfere with the previously attached jurisdiction of another court of co-ordinate power, nor can an appellate court interfere with the jurisdiction of a district court, except upon appeal in the usual way."[446]

Of course, *Morrow* can be distinguished from the situations arising under the Act since nothing in the Act prevents the trial court from rendering a judgment; it simply prevents the court from being able to grant relief. Ultimately, the Texas Supreme Court can resolve any conflicts among the state courts of appeals.[447] While every lender consummating a usurious loan during the existence of an appellate court decision upholding a similar transaction would escape the sanctions of Title 79, every borrower bringing suit after the Texas Supreme Court had resolved the issue would be entitled

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land v. Ward, 116 Tex. 1, 16, 285 S.W. 1063, 1069 (1926)) (emphasis added by *Morrow* court).

442. *See, e.g.,* Morrow v. Corbin, 122 Tex. 553, 559, 62 S.W.2d 641, 644 (1933) (jurisdiction is power to hear case and carry judgment into execution); Cleveland v. Ward, 116 Tex. 1, 16, 285 S.W. 1063, 1069 (1926) (jurisdiction is power to hear controversy and carry sentence into effect); Allied Fin. Co. v. Shaw, 373 S.W.2d 100, 104 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.) (jurisdiction is power to hear case and carry judgment into execution).

443. 122 Tex. 553, 62 S.W.2d 641 (1933).

444. *See id.* at 574, 62 S.W.2d at 651.

445. *Id.* at 558, 62 S.W.2d at 644.

446. *Id.* at 560, 62 S.W.2d at 645. In *Morrow,* the court elaborated:

> [T]he jurisdiction of trial courts, under the Constitution, once it attaches, embraces every element of judicial power allocated to those tribunals, and includes . . . the power to execute the judgment or sentence . . . . That with the right of the trial court to exercise the powers thus confided to it, no appellate court can interfere, except in accordance with the authority given in the Constitution or valid statutes thereunder.

Id. at 560-61, 62 S.W.2d at 645 (quoting *Cleveland v. Ward*) (emphasis by *Morrow* court); *see also* Allied Fin. Co. v. Shaw, 373 S.W.2d 100, 105 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.) ("no court of co-ordinate authority is at liberty to interfere with [a court's] action").

447. *See* TEX. CONST. art. V, § 3 (appellate jurisdiction over all matters except criminal law).

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to relief since that supreme court decision would effectively reverse or disapprove contrary state appellate court decisions. Undetermined is the result if the contrary appellate decision were a federal appellate court decision. Does the Texas Supreme Court decision reverse or nullify the federal appellate decision to an extent sufficient to prevent its assertion as a defense under article 1.04(p)?

Another possible reaction by a court would be to hold the controversy "moot" rather than render a judgment that it would be powerless to enforce. Texas courts have consistently held that a "case becomes moot when it appears that one seeks to obtain a judgment . . . upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy."[448] Such a rule applies even in a declaratory judgment action.[449] Thus, arguably, a court realizing its inability to grant any relief might dismiss the case as moot.

Conversely, one might argue that the legislature is authorized to provide penalties;[450] therefore, the legislature would be free to determine how the remedies will be applied and it would be beyond the power of the courts to pass upon the wisdom of such a law.[451] Still another rebuttal is that the courts are not deprived of either jurisdiction or the ability to fashion a remedy despite article 1.04(p) and a contrary appellate court decision. The Texas Consti-

448. Kolsti v. Guest, 576 S.W.2d 892, 893 (Tex. Civ. App.—Tyler 1979, no writ); Stephenson v. State, 515 S.W.2d 362, 363 (Tex. Civ. App.—Dallas 1974, writ dism'd).

455. *See* Kolsti v. Guest, 576 S.W.2d 892, 893-94 (Tex. Civ. App.—Tyler 1979, no writ). The Uniform Declaratory Judgments Act specifies that a declaratory judgment is available regardless of whether further relief could be claimed. *See* TEX. REV. CIV. STAT. ANN. art. 2524-1, § 1 (Vernon 1965). Nevertheless, the Declaratory Judgments Act has been construed to apply only to "existing justiciable controversies" due to the constitutional prohibition against advisory opinions. *See* Stop 'N Go Mkts. of Tex., Inc. v. Executive Sec. Sys., Inc., 556 S.W.2d 836, 837 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); *cf.* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-40 (1937) (federal Declaratory Judgments Act requires justiciable controversy).

450. The usury statutes have been called penal in nature. *See, e.g.,* Childs v. Taylor Cotton Oil Co., 612 S.W.2d 245, 251 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.); Pinemont Bank v. DuCroz, 528 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); Home Sav. Ass'n v. Crow, 514 S.W.2d 160, 165 (Tex. Civ. App.—Dallas 1974), *aff'd,* 522 S.W.2d 457 (Tex. 1975).

451. *See, e.g.,* Jones v. Del Andersen & Assoc., 539 S.W.2d 348, 351 (Tex. 1976) (not court function to question wisdom of statute); Texas State Bd. of Barber Examiners v. Beaumont Barber College, Inc., 454 S.W.2d 729, 732 (Tex. 1970) (courts are not to judge wisdom of statute); Filley Enters. v. Youngstown Sheet & Tube Co., 441 S.W.2d 509, 513 (Tex. 1969) (supreme court is not to pass on wisdom of leglislative policy).

tution provides that in the absence of the statutory establishment of usury ceilings, all contracts charging greater than ten percent interest annually are usurious.[452] Although article 1.04(p) may render inapplicable the penalty provisions of article 1.06, it may not prevent the court from exercising the power to formulate an appropriate remedy because the prohibition against usury is not merely statutory but constitutional.[453] For example, in *State v. Southwestern Bell Telephone Co.*,[454] the Texas Supreme Court held that the failure of the legislature to regulate intrastate rates did not prevent the court from determining the reasonableness of the charges because of the effect of the business on the public interest.[455] Article 1.02 provides that "[a]ll contracts for usury are contrary to public policy."[456] Arguably then, the court should, at the very least, be free to hold that all usurious interest can be cancelled in a loan and possibly that any usurious interest previously paid be returned or credited to the remainder of the contract.[457]

Of course, it is possible that a court may never be called upon to interpret this provision in a constitutional context. Nevertheless, the legislature has created a potential procedural nightmare and added only uncertainty to the law with this provision.[458]

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452. TEX. CONST. art. XVI, § 11.

453. *See id.*

454. 526 S.W.2d 526 (Tex. 1975).

455. *Id.* at 529.

456. TEX. REV. CIV. STAT. ANN. art. 5069-1.02 (Vernon 1971).

457. Note that this interpretation would appear to be consistent with the first sentence of section 28 of the Act which also provides that:

> If any provision of this Act is held to be unconstitutional, *no liability or forfeiture shall attach under Title 79*, Revised Civil Statutes of Texas, 1925, as amended (Article 5069-1.01 et seq., Vernon's Texas Civil Statutes), *or any other law of this state* to any person conforming his conduct to the applicable provisions of this Act.

TEX. REV. CIV. STAT. ANN. art. 5069-1.04 note (Vernon Supp. 1982-1983) (§ 28 of Act) (emphasis added). While the constitution is a law of the state, it is not subject to amendment at the whim of the legislature. Thus the constitution permits the legislature to fix maximum rates of interest but does not allow the legislature to override the constitutional sanctions against usurious contracts in the absence of legislation fixing maximum rates.

458. For example, the Beaumont Court of Civil Appeals appears to be the first court recognizing the applicability of a time-price differential to a real estate mortgage. Mid States Homes, Inc. v. Sullivan, 592 S.W.2d 29, 31 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) The court held that since a "time-price" differential was involved, no "interest" was charged and, therefore, even though the annual percentage rate charged exceeded the applicable usury ceiling the lender did not violate the usury laws. *Id.* at 31. At least one author has cautioned against relying on the decision. Heath, *New Developments in Real Estate Financing*, 12 ST. MARY'S L.J. 811, 843 (1981). It is the opinion of the authors of this

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XVI. RETROACTIVE APPLICATION OF H.B. 1228

"What sort of things do *you* remember best?" Alice ventured to ask.
"Oh, things that happen week after next," the Queen replied in a careless tone.[459]

Section 27 of H.B. 1228 provides as follows:

> This Act shall be applicable to all claims of forfeiture made after the effective date of this Act, but with respect to claims of forfeiture in litigation pending at such effective date, the amount forfeited shall be determined under the provisions of the law as it existed prior to the effective date of this Act.[460]

Under the Texas Constitution, the enactment of ex post facto laws, retroactive laws, and laws impairing the obligation of contracts is prohibited.[461] The constitutional prohibition against retroactive laws, however, applies only to those laws which destroy or impair vested rights acquired under existing laws.[462] As a general rule, it is presumed that an act is intended to operate prospectively and not retroactively.[463] Retrospective intent will not be found unless required by "explicit language or necessary implication."[464]

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article that the case is an incorrect application of a time-price differential. *Query:* Does article 1.04(p) now allow every seller in a lending transaction to avoid any usury limitation simply by characterizing the transaction as a time-price differential and "papering" the transaction accordingly?

459. L. CARROLL, THROUGH THE LOOKING GLASS 171 (1982).

460. 1981 Tex. Gen. Laws, ch. 111, § 27, at 286. Section 27 is found in the notes of each article in the Texas statutes that was revised by H.B. 1228. *See, e.g.,* TEX. REV. CIV. STAT. ANN. arts. 5069-1.01 note, 5069-1.04 note, 5069-1.07 note (Vernon Supp. 1982-1983).

461. *See* TEX. CONST. art. I, § 16. The United States Constitution does not prohibit the enactment of retroactive laws, but does forbid ex post facto laws and laws impairing the obligation of contracts. *See* U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

462. *See, e.g.,* Deacon v. City of Euless, 405 S.W.2d 59, 61 (Tex. 1966); Southwestern Bell Tel. Co. v. Public Util. Comm'n, 615 S.W.2d 947, 956 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.); Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280, 284 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

463. *See Ex parte* Abell, 613 S.W.2d 255, 258 (Tex. 1981).

464. *See* National Carloading Corp. v. Phoenix-El Paso Express Inc., 142 Tex. 141, 148, 176 S.W.2d 564, 568 (1943); Hockley County Seed and Delinting, Inc. v. Southwestern Inv. Co., 476 S.W.2d 38, 39 (Tex. Civ. App.—Amarillo 1971), *opinion after remand,* 511 S.W.2d 724 (Tex. Civ. App.—Amarillo 1974), *writ ref'd n.r.e. per curiam,* 516 S.W.2d 136 (Tex. 1974), *rev'd on other grounds sub nom.* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 787 (Tex. 1977); *see also Ex parte* Abell, 613 S.W.2d 255, 258 (Tex. 1981). In United States Fidelity & Guar. Co. v. United States *ex rel.* Struthers Wells Co., 209 U.S. 306, 314 (1908),

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Given these precepts, the first question to be considered is whether the legislature intended for the provisions of the Act to be retroactive. The determination of legislative intent depends upon the meaning of "claims of forfeiture" in section 27.[465] "Forfeiture" appears to refer to the forfeiture of usurious interest required under the penalty provisions of Title 79.[466] At least two interpretations of the term are possible, one being a formal claim asserted and the other being the establishment of the right to assert a claim. Under the first interpretation, the language of section 27 would indicate that the Act was intended to operate retrospectively. Under the second interpretation, the intent is unclear and, therefore, the Act should apply prospectively only.

According to the first interpretation, a "claim of forfeiture" is made when a claim for usury is formally asserted against a creditor; the most typical example would be a petition to recover the usury penalties or an assertion of usury as a defense to the creditor's suit on a note.[467] The Act applies to all "claims of forfeiture made" after its effective date.[468] A cause of action for usury predating the Act but not yet in litigation on its effective date would be included in this category.[469] Moreover, under the Act, only a "claim of forfeiture in litigation pending" on the effective date of the Act is governed by prior law.[470] Apparently, all other claims of forfeiture made after the effective date of the Act—even those based on acts prior to the Act—are governed by the Act. Thus, in this instance, the Act would have retrospective application.[471] If

the United States Supreme Court made the following statement:

> The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied.

Id. at 314.

465. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04 note (Vernon Supp. 1982-1983) (§ 27 of Act) (Act applies to claims of forfeiture made after Act's effective date).

466. *See id.* arts. 5069-1.06, 5069-8.02.

467. *See* Wall v. East Tex. Teachers Credit Union, 533 S.W.2d 918, 921-22 (Tex. 1976).

468. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04 note (Vernon Supp. 1982-1983) (§ 27 of Act).

469. *See id.* art. 5069-1.04 note (§ 27 of Act) (Act applies to all forfeiture claims made after Act's effective date).

470. *Id.* art. 5069-1.04 note (§ 27 of Act).

471. *See* Purser v. Pool, 145 S.W.2d 942, 944 (Tex. Civ. App.—Eastland 1940, no writ)

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this interpretation of "claim of forfeiture" is correct, the statute may violate the equal protection clause of the Texas Constitution.[472] Legislative classifications are permissible as long as there is a reasonable basis for such classifications and the law operates equally on all members within a class or persons similarly situated.[473] It is questionable whether there is a rational basis for differentiating between a person who files a lawsuit for usury penalties the day prior to the effective date of the Act and one who has not yet filed on the effective date of the Act.[474] Both individuals are members of the class of obligors who entered into contracts providing for interest rates that were usurious under prior law. Neither has a superior right[475] under the law.[476] If section 27 saves a cause of action only for those who have at least filed a complaint on the effective date of the Act, it does not operate equally on all members of the class of persons with existing claims for usury.[477]

(construing similar language). In *Purser*, a retroactive construction of the statute would have cut off pre-existing causes of action not in litigation on the effective date of the statute. Surmising that the legislature did not intend this result, the court held that the statute was not intended to operate retrospectively. *See id.* at 944.

472. *See* Tex. Const. art. I, § 3. "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." *Id.*

473. *See* Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 650 (Tex. 1971) (state may distinguish between classes as long as there is reasonable basis for distinction); Prudential Health Care Plan, Inc. v. Commissioner of Ins., 626 S.W.2d 822, 830 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.) (all persons within particular class or similarly situated must be affected alike or different treatment justified on reasonable basis); Anguiano v. Jim Walter Homes, Inc., 561 S.W.2d 249, 254 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.) (test is whether classification made by legislature is essentially arbitrary, unreasonable, not based on reality).

474. *Cf.* Purser v. Pool, 145 S.W.2d 942, 944 (Tex. Civ. App.—Eastland 1940, no writ) (retroactive application of statute denied where would have cut off pre-existing claims not in litigation on effective date of statute).

475. As to whether such a right is "vested" or merely a change of a remedy accorded by statute, see text accompanying notes 490-531 *infra*.

476. As an example of a classification that might withstand a reasonable basis scrutiny, consider a provision that differentiated between prejudgment and postjudgment claims. Arguably, the claim of the post judgment litigant is more substantial than that of the prejudgment litigant. The claim of a prejudgment litigant is no more substantial than a claim asserted by a demand letter.

477. *Cf.* Tex. Rev. Civ. Stat. Ann. art. 5069-1.07 note (Vernon Supp. 1982-1983) (§ 3 of S.B. 305 amending article 1.07 in 1979). This statement of applicability says: "This Act applies from and after its effective date prospectively and does not have any application to any right or duty, contract, obligation, cause of action, or claim or defense arising prior to its effective date." *Id.* The principal difficulty with the language of section 27 is the fact that it

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Statutes are to be construed, whenever possible, to preserve the constitutionality of the statute.[478] Assuming this construction would render the Act unconstitutional, one must ascertain whether section 27 is susceptible to another construction which would uphold the validity of the Act.[479]

According to the second interpretation, a "claim" may mean a basis for demanding something or a cause of action.[480] Since usury is determined at the inception of a contract, this definition of claim could only refer to all contracts entered into after the effective date of the Act.[481] Based upon this interpretation of "claim of forfeiture," all claims for usury may be divided into three categories: (i) claims arising after the effective date of the Act; (ii) claims in litigation as of the effective date of the Act; and (iii) claims existing but not in litigation as of the effective date of the Act. Section 27 specifically provides that the Act applies to the first category of claims.[482] Additionally, it specifically provides that the Act does not apply to the second category of claims.[483] As to the dispo-

was taken almost verbatim from article 5069-1.06 note wherein the penalties for usury are set forth. *See id.* 5069-1.06 note. In that context, a distinction between claims in litigation and claims not in litigation is reasonable as to the calculation of penalties—" the amount forfeited." *See id.* art. 5069-1.06 note (applies to all claims of forfeiture made after effective date of Act, but original provisions apply to litigation pending).

478. *See* State v. City of Austin, 160 Tex. 348, 356, 361, 331 S.W.2d 737, 746-47 (Tex. 1960); County of Cameron v. Wilson, 160 Tex. 25, 31, 326 S.W.2d 162, 166 (Tex. 1959); McKinney v. Blankenship, 154 Tex. 632, 640, 282 S.W.2d 691, 697 (Tex. 1955).

479. *See* State v. Shoppers World, Inc., 380 S.W.2d 107, 111 (Tex. 1964) (statute should not be given one of two reasonable interpretations which would render it unconstitutional); Vick v. Pioneer Oil Co., 569 S.W.2d 631, 634 (Tex. Civ. App.—Amarillo 1978, no writ) (if possible, statute must be construed to avoid repugnancy to constitution).

480. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 414 (G. & C. Merriam Co. 1963) (demand of right or supposed right . . . privilege to something).

481. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.06, § (1) (Vernon Supp. 1982-1983). "Any person who *contracts for,* charges or receives interest which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor three times the amount of usurious interest *contracted for,* charged or received . . . . " *Id.* (emphasis added); *see also* Pinemont Bank v. DuCroz, 528 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); Southwestern Inv. Co. v. Hockley County Seed & Delinting, Inc., 511 S.W.2d 724, 731 (Tex. Civ. App.—Amarillo 1974), *writ ref'd n.r.e. per curiam,* 516 S.W.2d 136 (Tex. 1974), *rev'd on other grounds sub nom.* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 787 (Tex. 1977).

482. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04 note (Vernon Supp. 1982-1983) (§ 27 of Act). "This Act shall be applicable to all claims of forfeiture made after the effective date of this Act . . . ." *Id.*

483. *See id.* "[W]ith respect to claims of forfeiture in litigation pending at such effective date, the amount forfeited shall be determined under the provisions of the law as it

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sition of the third category, however, the Act is silent.[484]

In determining whether retroactivity was intended, the rules of statutory construction do not permit the inference of retrospective application. As previously stated, to infer retroactiveness, the language of the statute must be explicit, clear, strong, and imperative.[485] Since section 27 does not specifically address the effect of the Act upon existing unlitigated claims for usury and does not create a necessary implication that the Act is to apply retroactively to these claims, all doubts should be resolved against such a construction.[486]

The Consumer Credit Commissioner follows this construction that the Act was not intended to operate retroactively.[487] In Letter Interpretation No. 81-30, the Commissioner responded to the question whether the interest ceilings established by the Act could be applied to a note executed prior to the effective date of the Act and, more particularly, to a note providing for interest after default at the "highest lawful rate."[488] The Commissioner stated the following: "[B]ased upon the legislative record and the many conversations I have had with the people involved with the enactment of H.B. 1228, I believe it accurate to state that there is no evidence of any legislative intent that the interest rates authorized by H.B. 1228 have retrospective applicability."[489]

Even if the language of section 27 indicated a clear legislative

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existed prior to the effective date of this Act." *Id.*

484. *See id.*

485. *See* United States Fidelity & Guar. Co. v. United States *ex rel.* Struthers Wells Co., 209 U.S. 306, 314 (1908); National Carloading Corp. v. Phoenix-El Paso Express, Inc. 142 Tex. 141, 148, 176 S.W.2d 564, 568 (1943); Hockley County Seed & Delinting, Inc. v. Southwestern Inv. Co., 476 S.W.2d 38, 39 (Tex. Civ. App.—Amarillo 1971), *opinion after remand,* 511 S.W.2d 724 (Tex. Civ. App.—Amarillo 1974), *writ ref'd n.r.e. per curiam,* 516 S.W.2d 136 (Tex. 1974), *rev'd on other grounds sub nom.* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 787 (Tex. 1977).

486. *See Ex parte* Abell, 613 S.W.2d 255, 258 (Tex. 1981) (if any doubt, intention resolved against retrospective operation of statute).

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

488. *See id.*

489. *See id.* Additionally, the Consumer Credit Commissioner cited the case of Frank v. State Bank & Trust Co., 263 S.W. 255, 258 (Tex. Comm'n App. 1924), *holding modified,* 10 S.W.2d 704 (Tex. Comm'n App. 1928), for the proposition that when a contract contains an express or implied promise for the payment of interest, the obligation to pay interest is protected by the constitution and any subsequent statutory attempt to change the rate at which the interest is computed is void. *See* CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-30, at 2 (1981).

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intent that the Act be retroactive, it is unclear whether the legislature could make the Act retroactive to validate a previously usurious contract. In order to protect rights not otherwise guaranteed by the constitution, article I, section 16 of the Texas Constitution prohibits retroactive laws.[490] A retroactive law is one that destroys or impairs vested rights acquired under existing laws, creates new obligations, imposes new duties, or adopts new disabilities with regard to past transactions or considerations.[491] A vested right is one which is more than an expectation; it is a legal or equitable title to the present or future ability to enforce a demand or be exempted from the demand of another.[492] There can be no vested right to a particular remedy provided by common law or statute.[493] As a general rule, the repeal of a statute providing a special remedy will terminate any cause of action thereunder unless the legislature includes a savings clause in favor of pending suits.[494] Several usury cases imply that usury claims are only a particular remedy afforded by statute and not a vested right.[495]

In *Ewell v. Daggs*,[496] the United States Supreme Court considered whether the defense of usury could be interposed by an obligor under a pre-existing contract following the constitutional re-

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490. *See* Mellinger v. City of Houston, 68 Tex. 37, 43, 3 S.W. 249, 252 (1887); Tex. Const. art. I, § 16 comment.

491. *See Ex parte* Abell, 613 S.W.2d 255, 260 (Tex. 1981); Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280, 284 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

492. *See* Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280, 284 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); Du Pre v. Du Pre, 271 S.W.2d 829, 832 (Tex. Civ. App.—Dallas 1954, no writ).

493. *See Ex parte* Abell, 613 S.W.2d 255, 261 (Tex. 1981); Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280, 284 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); Du Pre v. Du Pre, 271 S.W.2d 829, 831 (Tex. Civ. App.—Dallas 1954, no writ).

494. *See* Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 384 (Tex. 1982). In *Knight*, the supreme court held that chapter 14 of the Consumer Credit Act was a special remedy provided by statute and that its repeal without a savings clause in favor of pending suits immediately terminated Knight's cause of action thereunder. Knight's suit was pending at the time of the repeal. *Id.* at 384; *accord* Dickson v. Navarro County Levee Improvement Dist. No. 3, 135 Tex. 95, 99-100, 139 S.W.2d 257, 259 (1940); *see also* National Carloading Corp. v. Phoenix-El Paso Express, Inc., 142 Tex. 141, 152, 176 S.W.2d 564, 568 (1943); Ciminelli v. Ford Motor Credit Co., 612 S.W.2d 671, 672 (Tex. Civ. App.—Corpus Christi), *rev'd on other grounds*, 624 S.W.2d 903 (Tex. 1981).

495. *See* Ewell v. Daggs, 108 U.S. 143, 151 (1883) (usury protection was remedy afforded by statute and not vested right); Stewart v. Lattimer, 116 S.W. 860, 861 (Tex. Civ. App. 1909, no writ) (usury penalties not vested right).

496. 108 U.S. 143 (1883). The case was appealed from the United States Circuit Court for the Western District of Texas. *Id.* at 143.

peal of all Texas usury laws.[497] The Texas statute in effect at the time provided for a maximum rate of interest of twelve percent; the promissory note at issue provided for interest at the rate of twenty percent.[498] Following the execution of the note but prior to the institution of suit on the note, the state usury laws were abolished by an amendment to the Texas Constitution.[499] Although the usury statute upon which the obligor relied declared that a usurious contract was "void and of no effect" as to the interest, the court held that the contract was voidable only.[500] Additionally, the court distinguished between a vested right and a remedy afforded solely by statute and construed the former Texas usury statute as providing a remedy only.[501] The court stated:

> [T]he right of a defendant to avoid his contract is given him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri,* and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur . . . . The right which the curative or repealing act takes

497. *Id.* at 144. The Texas statute in effect at the time the note was signed provided as follows:

> That 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 12 per cent per annum for the loan, payment, or delivery of any money, goods, wares, or 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. at 144.

498. *See id.* at 144.

499. *See id.* at 148. The amendment read as follows:

> 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 the rate of interest in contracts where the rate is not specified.

Id. at 148.

500. *See id.* at 150.

501. *See id.* at 151.

away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect.[502]

Accordingly, the United States Supreme Court held that the constitutional repeal of the usury statute cut off the obligor's defense based upon the former statute in effect when the contract was made; however, the decision was based in part upon a determination that the statute allowed the interest to be voidable rather than void.[503]

In *Stewart v. Lattner*,[504] a Texas court of civil appeals case, suit was brought to recover penalties for usury. At the time the contract was made, the existing statute assessed a penalty for usury of twice the entire interest *paid*.[505] The statute did not provide a penalty for contracting for usurious interest as do the present statutes.[506] Prior to the time suit was brought, the statute was amended to reduce the usury penalty to twice the interest paid in excess of the amount permitted by law.[507] The evidence showed that usurious interest was not paid until after the amendment was passed but before it took effect.[508] In dicta, the court stated that a claim for usury penalties was not considered to be a vested right and, consequently, an amendment of the usury penalties would not be in violation of the constitutional prohibition against retroactive laws.[509] Nevertheless, the court held that the amendment was intended to have prospective effect and since the usurious interest was paid prior to the effective date of the amendment, penalties were determinable under the pre-amended statute.[510]

The Texas Supreme Court has never addressed the question

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502. *Id.* at 151; *see also* American Sav. Life Ins. Co. v. Financial Affairs Management Co., 513 P.2d 1362, 1365 (Ariz. Ct. App. 1973); First Fed. Sav. & Loan Ass'n v. Guildner, 295 N.W.2d 501, 503 (Minn. 1980).

503. *See* Ewell v. Daggs, 108 U.S. 143, 151 (1883). The effect of the court's decision was to validate a contract usurious when made. *Cf.* Cappaert v. Bierman, 339 So. 2d 1355, 1357 (Miss. 1976) (whether contract usurious determined by maximum statutory interest rate in effect when suit filed, not lower rate in effect when contract made).

504. 116 S.W. 860 (Tex. Civ. App. 1909, no writ).

505. *See id.* at 860.

506. *See id.* at 860.

507. *See id.* at 860.

508. *See id.* at 860-61.

509. *See id.* at 861.

510. *See id.* at 861.

whether an increase in maximum interest rates by virtue of a statutory amendment could operate retroactively to validate a contract usurious when made. *Ewell v. Daggs*[511] would at first seem to support such a holding, but is clearly distinguishable. First, *Ewell* involved a constitutional repeal of all usury laws, thereby eliminating the public policy against usurious contracts.[512] Secondly, the United States Supreme Court held that the contract was voidable only and Ewell made no election to void the contract until *after* the constitutional repeal of the usury laws.[513] Third, the court determined that Ewell's defense of usury was not a vested right but a mere statutory right to avoid his contract.[514] Since the re-enactment of the constitutional provision concerning usury, however, the right to assert a claim of usury is not solely grounded in statute.[515] Further, the statutory right to avoid a contract has been held in subsequent Texas case law to be a vested right not destroyed by subsequent changes in the law.[516] Similarly, *Stewart v. Lattner*[517] is distinguishable. The court's statement that a claim for usury is not considered to be a vested right but a special remedy given by statute which may be taken away at any time, is merely dicta since the court's holding was based on the fact that the amended statute was intended to be prospective.[518] Finally, it is important to note that in *Stewart*, the remedy was changed but not extinguished as would be the case should the Act be interpreted as retroactive in application.[519]

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511. 108 U.S. 143 (1883).

512. *See id.* at 148; *cf.* TEX. REV. CIV. STAT. ANN. art. 5069-1.02 (Vernon Supp. 1971) (all contracts for usury contrary to public policy and subject to penalties).

513. *See* Ewell v. Daggs, 108 U.S. 143, 148-49 (1883).

514. *See id.* at 151 (1883) (right given by statute may be taken away as long as final judgment not obtained).

515. *See* TEX. CONST. art. XVI, § 11

516. *See* Click v. Seale, 519 S.W.2d 913, 920 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), *rev'd on other grounds*, 556 S.W.2d 95 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.). In *Click*, the court held that the legislature, by subsequent repeal of the coverture statutes, could not destroy the vested right of a married woman to disavow an option contract executed at a time the statutes were in force. *See id.* at 920.

517. 116 S.W. 860 (Tex. Civ. App. 1909, no writ).

518. *See id.* at 861.

519. *Compare id.* at 860 (remedy enlarged) *with* TEX. REV. CIV. STAT. ANN. art. 5069-1.04 note (Vernon Supp. 1982-1983) (§ 27 of Act) (if retroactive interpretation given to section 27, usurious contracts entered into but not yet in litigation as of Act's effective date would lose remedy if not usurious under new ceilings).

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Arguably, a claim for usury penalties is a right which becomes vested at the moment of contracting for usurious interest. Texas case law holds that usury is determined at the inception of a contract.[520] The statute supports this view by providing that any person who "*contracts for*, charges or receives" interest in excess of the amount authorized thereunder is subject to the penalties for usury.[521] Since usury is determined at the inception of the contract and the obligor is then entitled to bring an affirmative action for usury penalties, the legal right to be exempted from the demand for illegal interest is arguably vested at this point.[522] If vested, then the legislature could not validate a usurious contract by means of a retroactive statute raising the maximum permissible interest ceilings. Supporting this hypothesis is the case of *Click v. Seale*.[523] In *Click*, the Austin Court of Civil Appeals considered the effect of the repeal of the coverture statutes on contracts executed prior thereto.[524] While married, Mrs. Click signed option agreements for the sale of two tracts of her separate property.[525] After the repeal of the statute, she was sued for specific performance of the contracts; she answered by disaffirming the agreements in accordance with the right given by the coverture statutes existing when the

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520. *See* Pinemont Bank v. DuCroz, 528 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); Southwestern Inv. Co. v. Hockley County Seed & Delinting, Inc., 511 S.W.2d 724, 731 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam*, 516 S.W.2d 136 (Tex. 1974), *rev'd on other grounds sub nom.*, Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 787 (Tex. 1977).

521. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.06, § (1) (Vernon Supp. 1982-1983) (emphasis added); Smart v. Tower Land & Inv. Co., 597 S.W.2d 333, 340 (Tex. 1980).

522. *Cf. Ex parte* Abell, 613 S.W.2d 255, 261 (Tex. 1981) (vested right exists when in consequence of certain facts, person entitled to resist enforcement of claim urged by another); Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280, 284 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (vested right includes legal exemption from demand of another); Click v. Seale, 519 S.W.2d 913, 920 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (right of married woman under disability of coverture to disavow voidable contract vested at time of contracting and could not be destroyed by subsequent legislation), *rev'd on other grounds*, 556 S.W.2d 95 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

523. 519 S.W.2d 913 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), *rev'd on other grounds*, 556 S.W.2d 95 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

524. *See id.* at 916-21. The statute required, in conveyances of the wife's separate real property, that both the husband and wife join in the conveyance. *See id.* at 917. The statute further required that the wife acknowledge the conveyance before an officer authorized to receive such and that such acknowledgment be out of the husband's presence. *See id.* at 917. The option contract was executed in 1962; the statute was repealed in 1963. *See id.* at 916-17.

525. *See id.* at 915.

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contracts were signed.[526] The plaintiff argued that Click's right to disaffirm was terminated by the repeal of the statute.[527] The court rejected this argument, holding that Mrs. Click's right under the coverture statutes to retract and refuse to perform the option contracts was a vested right which could not be affected by subsequent changes in the law.[528] Similarly, the penalty provisons of the usury statute give an individual the right to avoid the payment of usurious interest[529] and the additional right to avoid payment of the entire principal and interest on a note if a lender has contracted for, charged, or received more than twice the amount of interest permitted by law.[530] Under the rationale of *Click*, the right conferred to the debtor by the usury statute constitutes a legal exemption from the demand of another which may not be abridged by subsequent changes in the law.[531]

Additionally, an argument may be advanced that a retroactive statute of this nature may violate the constitutional prohibition against laws impairing the obligation of contracts.[532] Laws existing at the time and place of contracting become a part of the contract as if expressly referenced or incorporated therein.[533] The laws incorporated include those affecting the validity, construction, discharge, and enforcement of the contract.[534] Although existing remedies for the enforcement of the obligation of the contract may be modified by subsequent legislation, they may not be destroyed entirely nor may they be so altered as to take away or impair any of

526. *See id.* at 915-16.

527. *See id.* at 919.

528. *See id.* at 920; *cf.* Ewell v. Daggs, 108 U.S. 143, 151 (1883) (right to avoid contract is naked legal right afforded by statute which may be repealed at any time).

529. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.06, § (1) (Vernon Supp. 1982-1983) (current penalty provision does not require repayment of usurious interest; requires creditor pay penalty based on usurious interest contracted for, charged or received).

530. *See id.* § 2 (Vernon 1971).

531. *Cf.* Click v. Seale, 519 S.W.2d 913, 920 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), *rev'd on other grounds*, 556 S.W.2d 95 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

532. *See* U.S. CONST. art. I, § 10, cl. 1; TEX. CONST. art. I, § 16.

533. *See* Langever v. Miller, 124 Tex. 80, 83, 76 S.W.2d 1025, 1031 (1934); Estate of Griffin v. Sumner, 604 S.W.2d 221, 230 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.); Purser v. Pool, 145 S.W.2d 942, 943 (Tex. Civ. App.—Eastland 1940, no writ); CONSUMER CREDIT COMM'R LETTER INTERP. No. 81-30, at 2 (1981).

534. *See* Langever v. Miller, 124 Tex. 80, 91, 76 S.W.2d 1025, 1031 (1934) (stating also that the ideas of validity and remedy are inseparable).

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the rights given by the contract.[535] Two Depression-era cases are noteworthy for their extensive discussions of the constitutional prohibition against laws impairing the obligation of contracts. In *Travelers' Insurance Co. v. Marshall*,[536] the Texas Supreme Court held unconstitutional a moratorium law authorizing state district judges to grant continuances and stays of execution in all suits instituted for the purpose of foreclosing liens upon real estate.[537] The court noted that the law deprived the creditor of the rights and remedies for which he had contracted, thereby impairing the value of the contract.[538] In the companion case of *Langever v. Miller*,[539] the Texas Supreme Court addressed the constitutionality of the Anti-Deficiency Judgment Act.[540] Under this Act, the debtor was accorded a defense or partial defense to a suit for a deficiency judgment if he could plead and prove that the actual value of the property was greater than the sale price received at the foreclosure.[541] If the debtor was successful in his pleading and proof, he was entitled to a credit upon the deficiency judgment for the difference between the foreclosure price and the actual value.[542] The court noted that the legal effect of the statute was to cancel existing deficiency judgments and, in the case of non-judicial foreclosures, to deny recovery of a deficiency except when the value of the property was less than the debt.[543] Regardless of whether the Anti-Deficiency Judgment Act was interpreted as impairing the obligation of the contract or denying the remedies for its enforcement, the statute was held unconstitutional.[544]

535. *See id.* at 92, 76 S.W.2d at 1031. The case also criticizes as "superfine" the distinction between the "obligation" of the contract and "remedies" for its enforcement. *See id.* at 87-88, 76 S.W.2d at 1029.

536. 124 Tex. 45, 76 S.W.2d 1007 (1934).

537. *See* Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 79, 76 S.W.2d 1007, 1025 (1934).

538. *See id.* at 79, 76 S.W.2d at 1025. The rights for which the creditor contracted included the right to accelerate the maturity of the contract, foreclose his lien, and receive payment of the debt, or to bid in and become the owner of the property at the foreclosure sale and obtain a deficiency judgment. *Id.* at 50, 76 S.W.2d at 1009.

539. 124 Tex. 80, 76 S.W.2d 1025 (1934).

540. *See id.* at 81-86, 76 S.W.2d at 1026-28.

541. *See id.* at 84, 76 S.W.2d at 1027.

542. *See id.* at 84-85, 76 S.W.2d at 1027.

543. *See id.* at 85-86, 76 S.W.2d at 1028.

544. *See id.* at 104, 76 S.W.2d at 1038. Under the authority of the law existing at the time the contract was executed, Miller obtained a valid deficiency judgment which was as yet unsatisfied when the Anti-Deficiency Judgment Act was enacted. *See id.* at 82, 76

Although the two cases discussed above involved legislative impairment of creditor's rights and remedies, the *Marshall* court cited with approval cases from other jurisdictions in which legislation impairing debtors' rights and remedies was similarly struck down.[545] In *Moody v. Hoskins*,[546] the Mississippi Supreme Court considered a statute which permitted the state to sell land for taxes, subject to the right of the owner, if an infant, to redeem the land within one year after attaining his majority.[547] After Moody's land was sold in accordance with the statute, the law was repealed and the state was given the right to convey an absolute title.[548] The purchaser of Moody's land refused to allow Moody's right of redemption and Moody brought suit.[549] The court held that the repeal of the original statute destroyed a valuable right, the right of redemption, and that the purchaser in the instant case took the land subject to this right.[550]

A statutory right of redemption was also the subject of the appeal in *Turk v. Mayberry*.[551] Prior to attaining statehood, Oklahoma law granted a judgment debtor a period of time in which to redeem his property before title would pass to the pur-

S.W.2d at 1026.

545. *See* Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 78, 76 S.W.2d 1007, 1024 (1934).

546. 1 So. 622 (Miss. 1887).

547. *See id.* at 623.

548. *See id.* at 623.

549. *See id.* at 623. There are two types of redemption: redemption from the mortgage (the "equity of redemption") and statutory redemption. An equity of redemption permits a mortgagor who has defaulted in the payment of his mortgage to redeem his interest in the land by paying the amount due and owing prior to the date set for foreclosure. *See* N. PENNEY & R. BROUDE, LAND FINANCING 328 (2d ed. 1977). The mortgagor's right of redemption has been described as an estate in land. *See* Reisenberg v. Hankins, 258 S.W. 904, 909 (Tex. Civ. App.—Amarillo 1924, writ dism'd). It is cut off, however, by foreclosure of a lien by sale in accordance with the terms of the deed of trust and applicable statutes. *See* Rogers v. Fielder, 392 S.W.2d 797, 798 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.). A statutory right of redemption is established by legislation and allows the mortgagor a certain period of time to redeem the property by paying the purchaser at the foreclosure sale the price he paid at the sale. *See* United States v. Stadium Apartments, Inc., 425 F.2d 358, 368 (9th Cir. 1970) (Ely, C.J., dissenting). As an example of a statutory right of redemption in Texas, see TEX. TAX CODE ANN. § 34.21 (Vernon 1982) (right to redeem property sold at tax sale).

550. *See* Moody v. Hoskins, 1 So. 622, 623 (Miss. 1887). The court stated, "To admit such a right is to concede the power to transfer valuable rights from one to another by the easy process of legislative declaration . . . . This is not legislation, but confiscation . . . ." *See id.* at 623.

551. 121 P. 665 (Okla. 1912).

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chaser.[552] The question for the court was whether the right of redemption was preserved to the judgment debtor by the subsequently adopted state constitution.[553] Noting that the parties are presumed to contract in reference to existing law, the court stated that "any legislation which deprives a party of a remedy substantially as efficient as that which existed at the making of the contract does impair its obligatory force."[554] In the opinion of the court, a debtor's statutory right to redeem his lands from a mortage or execution sale was as sacred as the creditor's right to foreclose his mortgage under the laws existing at the time it was made.[555] Consequently, the court concluded that the right of redemption was not destroyed by the adoption of the state constitution.[556]

These cases suggest that the parties to a loan transaction should be presumed to contract with reference to the existing usury laws.[557] The right to avoid the payment of usurious interest and to exact penalties for its charge is a valuable remedy given to the debtor.[558] The remedy existing in the state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is prohibited by the federal and state constitutions.[559] If by retroactive legislation, the debtor is deprived of his existing remedy for the exaction of usurious interest, the value of his contract is undoubtedly lessened.[560] Just as an existing statutory right of redemption became part of the contract between the parties at the time of contracting, so should an existing statutory right to require a lender to

552. *See id.* at 667.

553. *See id.* at 667.

554. *See id.* at 668.

555. *See id.* at 668-69.

556. *See id.* at 669.

557. *See* Langever v. Miller, 124 Tex. 80, 83, 76 S.W.2d 1025, 1031 (1934); Estate of Griffin v. Sumner, 604 S.W.2d 221, 230 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).

558. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.06, § (1) (Vernon Supp. 1982-1983) (penalties available to borrower if loan usurious).

559. *See* Edwards v. Kearzey, 96 U.S. 595, 601 (1877); Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 68, 76 S.W.2d 1007, 1018-19 (1934); McLane v. Paschal, 62 Tex. 102, 107 (1884).

560. *Cf.* Langever v. Miller, 124 Tex. 80, 88, 76 S.W.2d 1025, 1029 (1934) (statute which denies party lawful remedies existing when instrument executed impairs obligation of contract by rendering contract less valuable).

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forfeit usurious interest and penalties.[561] Each of these debtor remedies constitutes a substantial right inherent in the contract at the time it is made. It may be argued that any legislative attempt to completely destroy a debtor's remedy for usury would violate the constitutional prohibition against laws impairing the obligation of contracts.[562]

A retroactive law validating a previously usurious contract may also be susceptible to attack under the due process clause of the Texas Constitution. Article I, section 19 provides as follows: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."[563] The due process clause of the constitution protects vested rights, including matured causes of action or defense.[564] If an amendment to, or repeal of, a statute alters the remedy or procedure for enforcing the right, due process is not denied, provided a "substantial and efficient" remedy remains.[565] Since the debtor's right to assert a claim for usury penalties or to interpose usury as a defense occurs at the time of contracting,[566] any subsequent amendment or repeal of usury prohibitions in effect at the time of contracting would violate the due process clause unless a "substantial and efficient" remedy remained.[567] No "substantial and efficient" remedy would exist if the right to extract penalties for usurious interest was removed by a

561. *Cf.* Moody v. Hoskins, 1 So. 622, 623 (Miss. 1887) (statutory right of redemption existing at time of contract unaffected by subsequent legislation).

562. *Cf. id.* at 623 (repeal of infant's statutory right of redemption existing when land sold for taxes destroyed valuable right of owner); Turk v. Mayberry, 121 P. 665, 668 (Okla. 1912) (statutory right of redemption was valuable right inherent in contract when made and could not be repealed as to past transactions without impairing obligation of contract).

563. TEX. CONST. art. I, § 19.

564. *See* Middleton v. Texas Power & Light Co., 108 Tex. 96, 107, 185 S.W. 556, 560 (1916); Coulter v. Melady, 489 S.W.2d 156, 159 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.), *cert. denied,* 414 U.S. 823 (1973).

565. *See* Luse v. City of Dallas, 131 S.W.2d 1079, 1083 (Tex. Civ. App.—Dallas 1939, writ ref'd); Atwood v. Kelley, 127 S.W.2d 555, 556-57 (Tex. Civ. App.—Dallas 1939, no writ).

566. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.06, § (1) (Vernon Supp. 1982-1983) (person who contracts for usury subject to penalties); *see also* Pinemont Bank v. DuCroz, 528 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (usury determined at inception of contract).

567. *Cf.* Atwood v. Kelley, 127 S.W.2d 555, 558 (Tex. Civ. App.—Dallas 1939, no writ) (repealed statute violated due process because bondholders left without equally valuable remedy).

statute retroactively validating usurious contracts.[568]

Additionally, a retroactive amendment which completely cuts off existing causes of action might be objectionable for want of prior notice to affected parties. In *Purser v. Pool*,[569] plaintiff brought suit on a parol contract for a real estate broker's commission.[570] At the time the contract was executed and at the time the commission was earned, existing law permitted a suit to recover the commission whether or not the contract was in writing and the plaintiff was a licensed real estate dealer.[571] Subsequently, a bill was enacted which permitted such a suit to be brought only if the two aforementioned conditions were satisfied.[572] The trial court construed the statute to be retroactive and dismissed plaintiff's suit.[573] On appeal the court noted that a retroactive construction of the statute had the effect of permanently depriving the plaintiff of his vested cause of action without legal notice advising him of the necessity of instituting suit prior to the effective date of the statute.[574] Passage of the act did not operate as legal notice;[575] consequently, the plaintiff had no notice of the provisions of the statute until it became law.[576] Holding that the legislature did not intend for the statute to be retroactive, the court of civil appeals reversed

568. *See* TEX. CONST. art. I, § 19. *Compare* Luse v. City of Dallas, 131 S.W.2d 1079, 1083 (Tex. Civ. App.—Dallas 1939, writ ref'd) (no violation of due process when defendant failed to establish Board of Appeals as provided by statute to review zoning matters when Board of Adjustment performed substantially similar functions) *with* Atwood v. Kelley, 127 S.W.2d 555, 558 (Tex. Civ. App.—Dallas 1939, no writ) (repeal of statute affording bondholders right to institute suit and employ counsel to collect delinquent taxes violated due process since bondholders deprived of substantial right without leaving equally valuable remedy).

569. 145 S.W.2d 942 (Tex. Civ. App.—Eastland 1940, no writ).

570. *See id.* at 943.

571. *See id.* at 943.

572. *See id.* at 943.

573. *See id.* at 943.

574. *See id.* at 944. The court stated, "This act would not have the effect of giving plaintiff notice that if he did not file his suit before September 19, 1939, it could not thereafter be filed, or would be subject to a plea of limitation." *Id.* at 944.

575. An act of the legislature is not operative as notice of its provisions and performs no function until it becomes effective as law. *See* Regal Properties v. Donovitz, 479 S.W.2d 748, 750 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.); Calvert v. General Asphalt Co., 409 S.W.2d 935, 938 (Tex. Civ. App.—Austin 1966, no writ).

576. *See* Purser v. Pool, 145 S.W.2d 942, 944 (Tex. Civ. App.—Eastland 1940, no writ); *cf.* 1981 Tex. Gen. Laws, ch. 111, § 29 at 287 (effective immediately upon passage as emergency legislation).

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the trial court.[577] If intended to be retroactive as to all existing claims for usury save those in litigation as of the effective date of the Act, a statute such as the Act would be subject to the same criticism as that discussed in *Purser v. Pool.* The due process clause prohibits the destruction of a vested right without prior notice and opportunity for affected persons to institute suit before their claims are barred by statutory repeal or amendment.[578]

XVII. LEGISLATURE'S DUTY TO "FIX" INTEREST RATES

> "That's a great deal to make one word mean," Alice said in a thoughtful tone.
> "When I make a word do a lot of work like that," said Humpty Dumpty, "I always pay it extra."[579]

The authority of the legislature to enact usury legislation is controlled by article XVI, section 11 of the Texas Constitution:

> 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 percentum (10%) per annum shall be deemed usurious . . . .[580]

"Fix" is not a defined term under article 5069-1.01.[581] Pursuant to the grant of authority contained in section 11 above, the legislature, in passing the Act, revised article 1.04 to provide for the following usury ceilings:

> (b)(1) If a computation under Section (a)(1), (a)(2), or (c) of this Article is less than 18 percent a year, the ceiling under that provision is 18 percent a year. If a computation under Section (a)(1), (a)(2), or (c) of this Article is more than 24 percent a year, the ceiling under that provision is 24 percent a year.[582]

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577. *See* Purser v. Pool, 145 S.W.2d 942, 944 (Tex. Civ. App.—Eastland 1940, no writ).

578. *See* Coulter v. Melady, 489 S.W.2d 156, 159 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.) (due process clause protects vested rights, including matured causes of action), *cert. denied*, 414 U.S. 823 (1973).

579. L. CARROLL, THROUGH THE LOOKING GLASS 184 (1982).

580. TEX. CONST. art. XVI, § 11 (emphasis added).

581. The basic definitions of Title 79 are contained in TEX. REV. CIV. STAT. ANN. art. 5069-1.01 (Vernon 1971 & Supp. 1982-1983).

582. *Id.* art. 5069-1.04, § (b)(1) (Vernon Supp. 1982-1983).

The effect of this provision is to establish a *range* within which the maximum usury ceiling will float rather than to fix a numerical rate as the ceiling. Arguably, by establishing a variable "floating" usury ceiling, the legislature did not *fix* a maximum rate as directed by the Texas Constitution.[583]

Whether such an interpretation is valid depends on the definition of "fix." Two recent opinions of the Attorney General of Texas have construed the term "fix" as used in the constitutional provision to mean "to set or place definitely; to establish; . . . to determine, to assign precisely."[584] Both opinions continue by stating:

> We note that Texas courts have assumed "fix" in this provision to be interchangeable with "establish." *See Freeman v. Gonzales County Savings & Loan Ass'n,* 526 S.W.2d 774, 777 (Tex. Civ. App.—Corpus Christi 1975) [*aff'd,* 534 S.W.2d 903 (Tex. 1976)]; *Home Savings Ass'n of Dallas County v. Crow,* 514 S.W.2d 160, 165 (Tex. Civ. App.—Dallas 1974), *aff'd,* 522 S.W.2d 457 (Tex. 1975). We believe the Constitution authorizes the Legislature to enact statutes establishing a precise figure as the maximum interest rate. If it does not enact such statutes, or if for other reasons there is no legislation fixing maximum interest rates for any class of transactions, the Constitution itself fixes a ten percent maximum.[585]

One of these two opinions was in response to a request concerning the constitutionality of an amendment to article 3.15 which would have authorized the Finance Commission to establish maximum interest rates for small loans.[586] The Attorney General stated that "the Legislature may not delegate its power to establish maximum interest rates," and that upon its failure "to exercise its power to state the maximum by attempting to delegate it to an administrative agency, the constitutional maximum will come into effect."[587] It would appear that if delegation to the Finance Commission of the authority to set maximum rates of interest is imper-

583. *See* TEX. CONST. art. XVI, § 11.

584. TEX. ATT'Y GEN. OP. No. MW-319, at 1024-25 (1981); TEX. ATT'Y GEN. LA-146, at 513 (1977); (both opinions quoting WEBSTER'S SECOND INTERNATIONAL DICTIONARY).

585. TEX. ATT'Y GEN. OP. No. MW-319, at 1024 (1981); TEX. ATT'Y GEN. LA-146, at 513 (1977).

586. TEX. ATT'Y GEN. LA-146, at 512 (1977); *see* TEX. REV. CIV. STAT. ANN. art. 5069-3.15 (Vernon Supp. 1982-1983).

587. TEX. ATT'Y GEN. LA-146, at 512 (1977).

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missible, delegation of the same authority to the Consumer Credit Commissioner[588] or to some index outside the control of the legislature would also be impermissible.[589]

The final form of the Act was shaped in part by two subsequent opinions issued by the Attorney General. In a 1979 opinion,[590] the Attorney General was called upon to interpret the constitutionality of H.B. 1212, a provision establishing interest rates.[591] H.B. 1212 was proposed as an amendment to article 1.02 and provided for a maximum interest rate of one percent over the discount rate on 90-day commercial paper in effect on the day the loan was made with an upper limit of twelve percent and a lower limit of ten percent per year.[592] The Attorney General opined that the bill did not exceed the legislature's authority under the constitution since it "fixed" an absolute maximum rate of interest which could in no event exceed twelve percent a year.[593] Despite its positive nature, the concluding language of the opinion discloses some reservations about the constitutionality of the bill by stating that "if the legislature wants to insure that it has set a maximum rate of interest under any construction by the courts, it can draft a severability clause to clarify that the absolute maximum of twelve percent is applicable regardless of the validity of other provisions."[594]

This form of "legislative insurance" suggested by the Attorney General was utilized in the enactment of article 1.07(d) in 1979.[595] Article 1.07(d) provided that until September 1, 1981,[596] on certain

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588. The Consumer Credit Commissioner is an employee of the Finance Commission. TEX. REV. CIV. STAT. ANN. art. 5069-2.02, § (1) (Vernon Supp. 1982-1983).

589. TEX. ATT'Y GEN. LA-146, at 513 (1977).

590. TEX. ATT'Y GEN. OP. No. MW-17, at 49 (1979).

591. *See id.* at 49.

592. *See id.* at 49.

593. *See id.* at 50.

594. *See id.* at 50; *cf.* TEX. REV. CIV. STAT. ANN. art. 5069-1.07, § (d)(1) (Vernon Supp. 1982-1983) (alternative provision setting maximum interest rate at twelve percent in event existing provision held unconstitutional). A severability clause in the traditional sense is not utilized for providing alternative provisions but rather to save the remainder of a legislative act from being struck down if one portion is declared unconstitutional. Under Texas law such a clause is unnecessary because of TEX. REV. CIV. STAT. ANN. art. 11a (Vernon Supp. 1982-1983) which provides that all statutes are severable. *See* TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 3.12 (Vernon Supp. 1982-1983) (applicable to codified laws).

595. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.07, § (d) (Vernon Supp. 1982-1983). The amendment can be found in 1979 Tex. Gen. Laws, ch. 715, § 1, at 1766.

596. Ironically, article 1.07(d) was effective only during the period from August 27, 1979, until April 1, 1980, at which time it was preempted by the Depository Institutions

residential loans, the interest rate could not exceed the lesser of (i) twelve percent per annum; or (ii) a rate equivalent to the average per annum market yield rate adjusted to constant maturities on ten-year United States Treasury notes and bonds as published by the Board of Governors of the Federal Reserve System for the second calendar month preceding the month in which the lender becomes legally bound to make the loan, plus an additional two percent per annum rounded off to the nearest quarter of one percent per annum.[597] The bill further provided that if the floating ceiling was held to be unconstitutional, a new 1.07(d)(1) would be substituted, the language of which provided basically that the ceiling would be twelve percent.[598] It should be noted that the bill set out the precise language of the alternative article 1.07(d).[599]

In a 1981 opinion, the Attorney General was presented with the question whether the Texas Constitution requires that legislation tying the interest rate to a moving index fix an absolute maximum rate.[600] In all probability, the question arose in connection with the Act. In response, the Attorney General stated that the legislature would not be fixing a maximum interest rate if it enacted a formula permitting the computation of maximum interest from economic indicators.[601] The constitution dictates that the legislature

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Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 U.S.C.). For a brief discussion of the preemption provisions of this law, see text at notes 262-90 *supra*.

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

598. *See id.* art. 5069-1.07, § (d)(1) (§ 3 of 1979 amendment). For a discussion of the wisdom of such flip-flop provisions, see text accompanying notes 614-41 *supra*.

599. *Compare* TEX. REV. CIV. STAT. ANN. art. 5069-1.07, § (d)(1) (Vernon Supp. 1982-1983) (alternative provision of article 1.07(d)) *with id.* art. 5069-1.04 note (§ 28 of Act) (alternate provision of H.B. 1228). Section 28 of the Act does not set out the specific language of the alternate provision, but merely provides:

> If any provision of this Act under which a rate or amount is determined or made available is determined by a court of competent jurisdiction to be unconstitutional, the maximum rate of interest or time price differential on contracts, including those for open-end accounts that would be subject to such a provision if it were constitutional is 24 percent a year except that in the case of contracts subject to Section (b)(2), Article 1.04, Title 79, Revised Civil Statutes of Texas, 1925, as amended (Article 5069-1.04, Vernon's Texas Civil Statutes), as amended by this Act, the maximum rate of interest or time price differential is 28 percent a year.

TEX. REV. CIV. STAT. ANN. art. 5069-1.04 note (Vernon Supp. 1982-1983) (§ 28 of Act). *Query*: Is such a general provision specific enough to constitute a statute? See text accompanying notes 606-13 *infra*.

600. *See* TEX. ATT'Y GEN. OP. No. MW-319, at 1024 (1981).

601. *See id.* at 1025; *cf.* TEX. ATT'Y GEN. LA-146, at 513 (1977) (constitution prohibits

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fix a numerical maximum interest rate.[602]

In considering the effect of these opinions upon the Act, it is apparent that the mechanical operation of new article 1.04 is similar to the proposed H.B. 1212 discussed in Opinion MW-17. The maximum usury ceiling floats between eighteen and twenty-four percent as determined by various calculations based upon the auction average rate quoted on a bank discount basis for twenty-six week treasury bills issued by the United States government.[603] At any one point in time, there may be a different maximum floating ceiling for each of the four ceilings established under article 1.04(a). Although the computations under article 1.04(a) are tied to economic indicators, based upon Opinion MW-17, the upper ceiling of twenty-four percent would most likely be considered by the Attorney General to "fix" the maximum interest rates.[604] Nevertheless, an opinion of the Attorney General, while persuasive, would not be binding upon the courts in the event the constitutionality of article 1.04 were challenged.[605]

Acting with regard to the Attorney General opinions, the legislature in drafting the Act apparently attempted to include a constitutional "flip-flop" provision to ensure that maximum interest rates were validly fixed.[606] Section 28 of the Act provides that the maximum rate of interest shall be twenty-four percent a year if the article 1.04 rate provisions are found to be unconstitutional.[607] The

delegation of legislative power to establish maximum interest rates).

602. *See* TEX. ATT'Y GEN. OP. No. MW-319, at 1025 (1981).

603. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04, §§ (a)(1)-(2), (b)(1) (Vernon Supp. 1982-1983). There is an exception to the above for business loans over $250,000; they have a maximum ceiling of 28 percent. *See id.* § (a)(2).

604. *See* TEX. ATT'Y GEN. OP. No. MW-17, at 49-50 (1979).

605. *See* Jones v. Williams, 121 Tex. 94, 98, 45 S.W.2d 130, 131 (1931); Commissioners' Court v. El Paso County Sheriff's Deputies Ass'n, 620 S.W.2d 900, 902 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.).

606. *Compare* TEX. REV. CIV. STAT. ANN. art. 5069-1.04 note (Vernon Supp. 1982-1983) (§ 28 of Act) (alternate provision to H.B. 1228 rates) *with* TEX. ATT'Y GEN. OP. No. MW-319, at 1024-25 (1981) (general comments on requirements for fixing interest rates) *and* TEX. ATT'Y GEN. OP. No. MW-17, at 49-50 (1979) (general comments on requirements for fixing interest rates). The term "flip-flop" is used because the purported effect of the provision is to cause the usury ceiling to flip-flop to a fixed numerical rate if the floating ceilings are held to be usurious. Such a provision is not truly a severability clause but rather an alternative statutory provision. See text accompanying notes 614-41 *infra*.

607. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04 note (Vernon Supp. 1982-1983) (§ 28 of Act). There is an exception to the above for business loans over $250,000; they have a maximum ceiling of 28% . *See id.*

very inclusion of section 28 as an amendment to the Act suggests a concern on the part of the legislature that the provisions of article 1.04 might not be construed by the courts as "fixing" maximum interest rates as required by the constitution.

Assuming that a clause of this type could achieve its desired purpose, it is questionable whether section 28 is properly drafted. The amendment is set forth in section 28 of the Act but is not contained within the text of any article.[608] As previously discussed, article 1.07 contains a similar contingency clause provision but specifically sets forth the text of the alternative article.[609] If article 1.04(a) and (b) were found to be unconstitutional, section 28 may not be self-enacting as it stands since it fails to contain the actual text to substitute for the existing article 1.04.[610] An act may be made effective upon the occurrence of a specific contingency or future event[611] provided it is complete in and of itself.[612] Additionally, a law must be sufficiently definite so that its terms and provisions may be known, understood, and applied.[613] It can be argued that since section 28 fails to provide the text of the alternative statute and thus is not complete in itself, the provision may fail as an attempted enactment of a contingent statute because it is uncertain how its terms are to be applied.

XVIII. The Constitutional "Flip-Flop" Provision

> Courts should keep their eyes fixed on the past and follow precedent. Legislatures should look to the future and disregard it.[614]

A "constitutional flip-flop" provision as used in this article refers

608. *See, e.g., id.* arts. 5069-1.04 note, 5069-1.07 note & 5069-1.08 note. Section 28 is appended to each article in 5069 that was amended by the Act, including 1.04, 1.07, 1.08, 1A.01, 2.07, 2.08, 3.01, 3.15, 3.16, 3.21, 4.01, 5.02, 6.02, 6.03, 6.05, and 6A.03.

609. *Compare* Tex. Rev. Civ. Stat. Ann. art. 5069-1.04 note (Vernon Supp. 1982-1983) (§ 28 following text of article) *with id.* art. 5069-1.07, § (d)(1) (similar provision incorporated into text of article).

610. *See* Tex. Const. art. III, § 36; Humble Oil & Ref. Co. v. State, 104 S.W.2d 174, 185 (Tex. Civ. App.—Austin 1936, writ ref'd).

611. *See* City of San Antonio v. Brady, 315 S.W.2d 597, 598 (Tex. 1958); State Highway Dep't. v. Gorham, 139 Tex. 361, 366, 162 S.W.2d 934, 937 (1942).

612. *See* State Highway Dep't. v. Gorham, 139 Tex. 361, 366, 162 S.W.2d 934, 937 (1962).

613. *See Ex parte* Granviel, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978) (en banc).

614. T. Arnold, The Symbols of Government 184 (1935).

to alternative legislative provisions which become operative upon a statute or portion thereof being held unconstitutional.[615] Section 28 of the Act provides in part:

> If any provision of this Act under which a rate or amount is determined or made available is determined by a court of competent jurisdiction to be unconstitutional, the maximum rate of interest or time price differential on contracts, including those for open-end accounts that would be subject to such a provision if it were constitutional is 24 percent a year except that in the case of contracts subject to Section (b)(2), Article 1.04, Title 79, Revised Civil Statutes of Texas, 1925, as amended (Article 5069-1.04, Vernon's Texas Civil Statutes), as amended by this Act, the maximum rate of interest or time price differential is 28 percent a year.[616]

The possible inadequacies of section 28 of the Act from a draftsmanship point of view have been discussed previously.[617]

Appellate courts have no power under the Texas Constitution to render advisory opinions.[618] In *Morrow v. Corbin*,[619] the court noted that the only jurisdiction given the Texas Supreme Court was appellate jurisdiction on questions of law or matters arising in cases of which the courts of civil appeals have appellate jurisdiction.[620] Because its jurisdiction was appellate only, the rendering of an advisory opinion to a lower court on a matter before the lower court would constitute an exercise of original jurisdiction, for

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615. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04 note (§ 28 of Act); *id.* art. 5069-1.07 note (§ 5 of chapter 715, the 1979 amendment to article 1.07) (Vernon Supp. 1982-1983).

616. *Id.* art. 5069-1.04 note (§ 28 of Act). Section 28 is found in the notes following each article H.B. 1228 amended.

617. See text accompanying notes 606-13 *supra*.

618. Firemen's Ins. Co. v. Burch, 442 S.W.2d 331, 333 (Tex. 1968); United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 859 (Tex. 1965); California Prods., Inc. v. Puretex Lemon Juice, Inc., 160 Tex. 586, 590, 334 S.W.2d 780, 782 (1960).

619. 122 Tex. 553, 62 S.W.2d 641 (1933).

620. *See id.* at 562, 62 S.W.2d at 645-46. The court noted original jurisdiction in very limited instances. *See id.* at 562, 62 S.W.2d at 646. The court stated:

> When the Constitution declares that our appellate courts shall have and exercise *original* and *appellate* jurisdiction, it means those types of *original* and *appellate* jurisdiction which from time immemorial the common law courts have exercised. Beyond the limits of original and appellate power as comprehended by the common law the Legislature is without constitutional authority to confer jurisdiction, except in so far as the common law has been abrogated or modified directly or by necessary implication by the Constitution itself.

Id. at 564, 62 S.W.2d at 647 (emphasis original).

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which the constitution did not provide.[621]

If a constitutional flip-flop provision is construed as a request for an advisory opinion, it might be deemed to constitute an attempt on the part of the legislature to authorize the judiciary to render advisory opinions, which has been held to be unconstitutional.[622] A flip-flop provision such as that contained in the Act can be envisioned to provide one or more alternative laws in anticipation of a judicial declaration of the unconstitutionality of a statute, with each alternative only slightly more probable of passing constitutional muster than the last. Such a practice, if found to be permissible, could result in multiple alternatives for each questionable statute being drafted and available for the court's consideration and interpretation. Upon declaring the existing statute unconstitutional, the court would be called upon either to review each of these "alternative statutes" one by one in a particular suit until it found one constitutionally acceptable or to strike down one alternative each time it was presented in a case. The court might be unable to grant relief until each of the alternative provisions had been struck down on a case-by-case basis.[623] Validation of such a practice would encourage neither legislative nor judicial efficiency. The only difference between this situation and a request for an advisory opinion[624] would be the existence of a justiciable controversy.[625] Moreover, section 28 of the Act provides that "[I]f any

621. *See id.* at 574, 62 S.W.2d at 651.

622. *See* Firemen's Ins. Co. v. Burch, 442 S.W.2d 331, 333 (Tex. 1968).

623. Whether the court would feel constrained to review all or only one alternative might be governed by whether the alternative was drafted to apply to the instant case or only to subsequent controversies, *i.e.*, whether it contained a sentence similar to the first sentence of section 28 which provides that even if declared unconstitutional, no one violates Title 79 by complying with the Act. The former situation might compel the court to strike down each provision as a retroactive law, while the latter situation might require it to determine only one alternative per case.

624. An advisory opinion is one rendered by a court on a matter of law without a justiciable controversy before it. *In re* Workman's Compensation Funds, 119 N.E. 1027, 1028, 224 N.Y. 13, 15 (1918). The courts have stated that the rendition of advisory opinions is to be regarded as the exercise of executive rather than judicial power. Morrow v. Corbin, 122 Tex. 553, 557, 62 S.W.2d 641, 643 (1933). The rendition of advisory opinions by the courts on constitutional matters has been authorized by the constitutions of several states: Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado, and South Dakota. *See generally* Field, *The Advisory Opinion—An Analysis*, 24 IND. L.J. 203 (1949); Note, *Judicial Determinations in Nonadversary Proceedings*, 72 HARV. L. REV. 723 (1959).

625. *See* Davis v. Dairyland County Mut. Ins. Co. of Tex., 582 S.W.2d 591, 593 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). "To constitute a justiciable controversy . . . there

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provision of this Act is held to be unconstitutional, no liability or forfeiture shall attach under Title 79 . . . or any other law of this state to any person conforming his conduct to the applicable provisions of this Act."[626] This language is very similar to that contained in the "safe harbor" provision of article 1.04.[627] As discussed previously in this article, the inclusion of such a provision in a statute has the effect of depriving the court of the power to carry out its judgment and therefore may render the whole proceeding moot due to the absence of a justiciable controversy.[628] In other words, the court may only be able to render the functional equivalent of an advisory opinion on the first alternative since it is without power to grant relief to the borrower in this instance upon finding the statute unconstitutional and the contract usurious.[629]

Section 28 is vulnerable to at least one other constitutional assault. In *Jenckes v. Mercantile National Bank*,[630] the Dallas Court of Civil Appeals was presented with a challenge to the constitutionality of a statute, which created a presumption of ownership of a stock certificate.[631] The statute was passed after two court decisions holding that proof of ownership of the certificate had not been established.[632] After the passage of the statute, the parties who were unable to establish their claim of ownership in the two prior cases brought a third lawsuit based upon the presumption of ownership created by the statute.[633] The court held that as to the

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must be a real and substantial controversy involving a genuine conflict of tangible interest rather than a theoretical one." *Id.* at 593; Sub-Surface Constr. Co. v. Bryant-Curington, Inc., 533 S.W.2d 452, 456 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); *see also* Anderson v. McRae, 495 S.W.2d 351, 357 (Tex. Civ. App.—Texarkana 1973, no writ).

626. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04 note (Vernon Supp. 1982-1983) (§ 28 of Act).

627. *See id.* art. 5069-1.04 note (§ 28 of Act).

628. See text accompanying note 448 *supra*, for a discussion of mootness in this type of situation. Also see text accompanying note 625 *supra*, for a discussion of justiciable controversy.

629. *See* Firemen's Ins. Co. v. Burch, 442 S.W.2d 331, 332 (Tex. 1968) (advisory opinion is one rendered without justiciable controversy); Davis v. Dairyland Mut. Ins. Co. of Tex., 582 S.W.2d 591, 593 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) ("justiciable controversy . . . [requires] a real and substantial controversy involving genuine conflict of tangible interest rather than a theoretical one").

630. 407 S.W.2d 260 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).

631. *See id.* at 261-62.

632. *See id.* at 262. The two decisions were Davis v. Fraser, 121 N.E.2d 406, 413 (1957) and Davis v. Fraser, 319 S.W.2d 799, 810 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.).

633. *See* Jenckes v. Mercantile Nat'l Bank, 407 S.W.2d 260, 262 (Tex. Civ.

parties to the prior litigation,[634] (i) the statute constituted an invasion by the legislature of the judicial powers vested in the judiciary contrary to article II, section 1 of the Texas Constitution since it had as its purpose the reversal or frustration of the prior court decisions and (ii) it was a retroactive law in violation of article I, section 16 of the Texas Constitution.[635] The court held that the unknown owners of the certificate had obtained a valuable vested right in the decision of the prior litigation holding that the appellants had not proved that they were entitled to ownership of the certificate.[636] This vested right was described as a "legal exemption from the demand of another"[637] and could not under the Texas Constitution be taken away by the legislature.[638]

Reviewing the operation of section 28 of the Act in light of *Jenckes* discloses the possibility that it suffers from the same constitutional infirmity as did the statue in *Jenckes*. Both provisions of section 28 become operative only upon some provision of the Act being held unconstitutional.[639] The first provision prevents a court, having found in favor of a borrower that a contract is usurious, from granting the relief which became a vested right upon the

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App.—Dallas 1966, writ ref'd n.r.e.).

634. The court was not called upon to and did not decide the constitutionality of the statute in general but only as to the parties to the litigation. *See id.* at 264. *Query*: If a statute is repugnant to the constitution as to the rights of any person is it not per se unconstitutional? In other words, does not the fact that a statute infringes upon the rights of a class in a constitutionally impermissible manner render the statute per se unconstitutional? Perhaps the answer lies in the unique fact situation of the case. The court might be saying that the only person or persons in the world whose rights could be adversely affected by the retroactivity of the statute and by the intrusion upon the power of the judiciary were the parties to the litigation. If the protected class had been larger perhaps the opinion would have been made applicable to the larger class as a whole.

635. *See id.* at 264.

636. *Id.* at 265.

637. *Id.* at 265 (quoting from National Carloading Corp. v. Phoenix-El Paso Express, Inc., 142 Tex. 141, 151, 176 S.W.2d 564, 570 (1943), *cert. denied*, 322 U.S. 747 (1944)).

638. *See id.* at 265; *see also* Ferguson v. Wilcox, 119 Tex. 280, 297, 28 S.W.2d 526, 534 (1930); International & G.N.R. v. Edmundson, 222 S.W. 181, 186 (Tex. Comm'n App. 1920, judgm't approved); Mellinger v. Mayor & Alderman of the City of Houston, 68 Tex. 37, 45-46, 3 S.W. 249, 253 (1887); Milam County v. Bateman, 54 Tex. 153, 167 (1880); Heights Hosp., Inc. v. Patterson, 269 S.W.2d 810, 812 (Tex. Civ. App.—Waco 1954, writ ref'd); Arnold v. City of Sherman, 244 S.W.2d 880, 883 (Tex. Civ. App.—Dallas 1951, writ ref'd) (on rehearing).

639. "If any provision of this Act . . . is determined by a court of competent jurisdiction to be unconstitutional [then the alternate ceilings will apply]." TEX. REV. CIV. STAT. ANN. art. 5069-1.04 note (Vernon Supp. 1982-1983) (§ 28 of Act).

rendition of judgment for the borrower.[640] The second provision of section 28 similarly seeks to frustrate the decision of the court by "legislating over" the court's decision immediately and, in conjunction with the first provision, renders the court without power to carry its own judgment into effect.[641]

Even if the flip-flop provision is not unconstitutional, it is the opinion of the authors of this article that this form of legislation is at least unwise. It opens the door to the mischief of multiple flip-flop provisions which could be used to frustrate future judicial decisions.

XIX. Conclusion

> "It seems very pretty," she said when she had finished it, "but it's rather hard to understand!" (You see she didn't like to confess, even to herself, that she couldn't make it out at all.) "Somehow it seems to fill my head with ideas—only I don't exactly know what they are!"[642]

House Bill 1228 was originally created to allow the credit card industry to charge higher rates on loans. Before the Act was passed, it became a piece of legislation providing "something for everyone" by allowing higher interest ceilings on almost every type of loan. Probably the greatest benefit of the Act to the lending community was the creation of the eighteen percent minimum ceiling for all written loans. Nevertheless, the Act has also generated many unanswered questions because of its new terminology, the extent of its applicability, and the difficulty of reconciling some of its provisions. Perhaps because the legislature undertook such an expansive revision of the Texas usury laws, certain aspects of the Act were not adequately developed and are in need of clarification. It is hoped that the legislature will take the initiative to refine the Act in the near future.

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640. *See* Jenckes v. Mercantile Nat'l Bank, 407 S.W.2d 260, 265 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.); *see also* Click v. Seale, 519 S.W.2d 913, 920 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), *rev'd on other grounds*, 556 S.W.2d 95 (Tex. Civ. App.-Eastland 1977, writ ref'd n.r.e.) and text at note 477 regarding "vested rights."

641. *See* Jenckes v. Mercantile Nat'l Bank, 407 S.W.2d 260, 265 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).

642. L. Carroll, Through the Looking Glass 134 (1982).

APPENDIX

TABLE 1[1]

Available Ceilings[2]

	Indicated Rate Ceiling	Monthly Ceiling	Quarterly Ceiling	Annualized Ceiling
Fixed-rate Closed-end	Yes — 1.04, § (a)(1) LI 81-27	No — 1.04, § (c) LI 81-27	Yes — 1.04, §§ (a)(2), (e) LI 81-27	No — 1.04, § (e) LI 81-27
Fixed-rate Open-end	Yes — 1.04, §§ (a)(1), (h)(1) LI 81-27	No — 1.04, § (c) LI 81-27	Yes — 1.04, §§ (a)(2), (h)(1)	Yes — 1.04, §§ (a)(2), (h)(1) LI 81-27
Floating Variable-rate Closed-end	Yes, but only if quarterly ceiling is not used 1.04, §§ (a)(1), (e) LI 81-27	Yes, but only if rate adjusted monthly, and loan is not for personal, family or household use 1.04, § (c) LI 81-27	Yes, but only if indicated rate ceiling is not used 1.04, §§ (a)(2), (e) LI 81-27	No — 1.04, § (e) LI 81-27
Floating Variable-rate Open-end	Yes — 1.04, §§ (a)(1), (h)(2) LI 81-27	Yes, but only if rate adjusted monthly, and loan is not for personal, family or household use 1.04, § (c) LI 81-27	Yes — 1.04, §§ (a)(2), (h)(2)	Yes — 1.04, §§ (a)(2), (h)(2) LI 81-27
Non-Floating Variable-rate Closed-end	Yes — 1.04, § (a)(1)	Yes, but only if loan is not for personal, family or household use 1.04, § (c)	Yes — 1.04, § (a)(2)	No — 1.04, § (e), LI 81-27
Non-Floating Variable-rate Open-end	Yes — 1.04, §§ (a)(1), (h)(1) LI 81-27	Yes, but only if loan is not for personal, family or household use 1.04, § (c)	Yes — 1.04, §§ (a)(2), (h)(1) LI 81-27	Yes — 1.04, §§ (a), (h)(1) LI 81-27

1. The loans categorized by the authors as non-floating variable-rate accounts have been categorized by the Commissioner as fixed-rate accounts. This table reflects the authors' interpretations. For a discussion of the distinction between these views, see text accompanying notes 95-116, *supra*. For an explanation of the commissioner's view, see Hightower, ***The Current Status of Usury Laws in Texas***, 14 ST. MARY'S L.J. 149 (1983).

2. "LI" as used in these Tables is an abbreviation for Letter Interpretation. The Tables in this article are provided as a convenient reference to the reader. In interpreting any particular situation, the reader should carefully read the Act in context and not simply rely on the Tables.

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TABLE 2[1]
Flotation of Ceilings

	Indicated Rate Ceiling	Monthly Ceiling	Quarterly Ceiling	Annualized Ceiling
Fixed-rate Closed-end	Does not float LI 81-27	N/A	Does not float LI 81-27	N/A
Fixed-rate Open-end	Floats LI 81-27	N/A	Floats 1.04, § (h)(1) LI 81-27 LI 81-22	Floats 1.04, § (h)(1) LI 81-27 LI 81-22
Floating Variable-rate Closed-end	Floats 1.04, § (h)(2) LI 81-21 LI 81-27	Floats 1.04, § (c) LI 81-21 LI 81-27	Floats 1.04, § (h)(2) LI 81-21 LI 81-27	N/A
Floating Variable-rate Open-end	Floats 1.04, § (h)(2) LI 81-27 LI 81-21	Floats 1.04, § (c) LI 81-27 LI 81-21	Floats 1.04, § (h)(2) LI 81-27 LI 81-21	Floats 1.04, § (h)(2) LI 81-27 LI 81-21
Non-Floating Variable-rate Closed-end	Does not float LI 81-21 LI 81-27	Should not float	Does not float LI 81-21 LI 81-27	N/A
Non-Floating Variable-rate Open-end	Floats 1.04, § (h)(1)	Might not float 1.04, § (c)	Floats 1.04, § (h)(1)	Floats 1.04, § (h)(1)

1. The loans categorized by the authors as non-floating variable-rate accounts have been categorized by the Commissioner as fixed-rate accounts. This table reflects the authors' interpretation. For a discussion of the distinction between these views, see text accompanying notes 95-116 *supra*.

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TABLE 3[1]

Ceiling Adjustment Dates

	Indicated Rate Ceiling	Monthly Ceiling	Quarterly Ceiling	Annualized Ceiling
Fixed-rate Closed-end	N/A	N/A	N/A	N/A
Fixed-rate Open-end	Monday of each week LI 81-7	N/A	Every 3 months from contract or election date 1.04, § (h)(1), LI 81-18	Every 12 months from contract or election date 1.04, § (h)(1), LI 81-18
Floating Variable-rate Closed-end	Monday of each week LI 81-7	1st calendar day of each month LI 81-7, but see 1.04, § (c)	Every quarterly adjustment date to ceiling 1.04, § (h)(2), LI 81-7	N/A
Floating Variable-rate Open-end	Monday of each week LI 81-7	1st calendar day of each month LI 81-7, but see 1.04, § (c)	Every quarterly adjustment date to ceiling 1.04, § (h)(2), LI 81-7	Every 12 months after ceiling comes into effect (*i.e.* on ceiling adjustment date) 1.04, § (h)(2), LI 81-7
Non-Floating Variable-rate Closed-end	N/A	N/A	N/A	N/A
Non-Floating Variable-rate Open-end	Monday of each week LI 81-7	1st calendar day of each month LI 81-7, but see 1.04, § (c)	Every 3 months from contract or election date 1.04, § (h)(1)	Every 12 months from contract or election date 1.04, § (h)(1)

1. The loans categorized by the authors as non-floating variable-rate accounts have been categorized by the Commissioner as fixed-rate accounts. This table reflects the authors' interpretation. For a discussion of the distinction between these views, see text accompanying notes 95-116 *supra*.

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TABLE 4[1]

Disclosure Of Applicable Ceiling[2]

	Indicated Rate Ceiling	Monthly Ceiling	Quarterly Ceiling	Annualized Ceiling
Fixed-rate Closed-end	Not required LI 81-27	N/A	Not required LI 81-27	N/A
Fixed-rate Open-end	None LI 81-27	N/A	None, except notification to obligor when used 1.04, § (h)(1), LI 81-27	None, except notification to obligor when used 1.04, § (h)(1), LI 81-27
Floating Variable-rate Closed-end	None, but indicated rate ceiling presumed unless otherwise specified LI 81-27	Must be specified in contract and disclosed 1.04, § (c), LI 81-27	None, but indicated rate ceiling presumed unless otherwise specified LI 81-27	N/A
Floating Variable-rate Open-end	Must be specified and disclosed 1.04, § (h)(2) LI 81-27	Must be specified in contract and disclosed 1.04, § (c), LI 81-27	Must be specified and disclosed 1.04, § (h)(2) LI 81-27	Must be specified and disclosed 1.04, § (h)(2) LI 81-27
Non-Floating Variable-rate Closed-end	None	None (?)	None	N/A
Non-Floating Variable-rate Open-end	None LI 81-27	Must be specified in contract and disclosed 1.04, § (c)	None except notification to obligor when used(?) 1.04, § (h)(1)	None except notification to obligor when used(?) 1.04, § (h)(1)

1. The loans categorized by the authors as non-floating variable-rate accounts have been categorized by the Commissioner as fixed-rate accounts. This table reflects the authors interpretation. For a discussion of the distinction between these views, see text accompanying notes 95-116 *supra*.

2. This table lists only the necessity for disclosure of the applicable ceiling. As discussed in the text accompanying notes 300-317 *supra* there may be additional disclosure requirements.