

USURY: A GAP OF SIGNIFICANCE (1997 - 1999)¹

Introduction

The following discussion is intended to call attention to some of the lesser known factors that can impact a claim for usury. First and foremost dates are very important. The usury statutes were amended in both 1997 and 1999. Depending when and who made a charge, there may or may not be a claim for usury. In an effort to highlight the importance of dates, please keep the following **hypothetical** in mind. Debtor and Creditor A execute an agreed judgment on April 1, 1991 (see *infra* (Agreed Judgments are Both Contracts and Judgments)). Creditor A made no collection efforts. The agreed judgment provides for an effective interest rate of almost 38% – clearly usurious if such laws apply. A cause of action premised upon the April 1, 1991, date would be governed by the repealed usury laws that were then in place (Article 5069). Creditor A sells and assigns the agreed judgment to Creditor B on October 1, 1998. As of October 1, 1998, the 1997 usury laws were in place. The 1997 usury statutes governed for a period of two years. If usurious conduct occurs during this two year window the 1997 usury laws control. On October 31, 1998, Creditor B sends a notice to Debtor monies due under the agreed judgment, including all accrued interest. Debtor files for chapter 7 bankruptcy on April 1, 2000. Subsequently, Creditor B objects to the discharge and Debtor counterclaims asserting usury.

The Usury² Statutes

“‘Usury’ means interest that exceeds the applicable maximum amount allowed by law.” Tex.Fin.C. § 301.001(4)(1997). “Interest is the compensation allowed by law for the *use or forbearance or detention of money.*” Tex.Fin.C. § 301.002(a)(1997) (emphasis added). “Except as otherwise fixed by law, the maximum rate of interest is 10 percent per year. Tex.Fin.C. § 302.001(a)(1997). “Unless otherwise authorized by law, a rate of interest greater than 10 percent per year is usurious. *A contract for usury is*

contrary to public policy and is subject to the appropriate penalties under Chapter 305. Tex.Fin.C. § 302.001(b)(1997) (emphasis added).

Usury requires an overcharge for the use, forbearance, or detention of money. *Stedman v. Georgetown Sav. and Loan Ass'n*, 595 S.W.2d 486, 489 (Tex.1979).

The use of money provision referred to is that which is contracted for when the loan is made. *Parks v. Lubbock*, 92 Tex. 635, 51 S.W. 322, 323 (1899). Forbearance, however, occurs when there is a debt due or to become due, and the parties agree to extend the time of its payment. *Meyer v. Mack Sales, Inc.*, 645 S.W.2d 493, 495 (Tex.App.-- Corpus Christi 1982, writ ref'd n.r.e.). Finally, the detention of money arises when a debt has become due and the debtor has withheld payment without a new contract giving him the right. *Parks v. Lubbock*, 51 S.W. 322, 323 (1899).

Sunwest Bank of El Paso v. Gutierrez, 819 S.W.2d 673, 675 (Tex.App.-El Paso,1991). The Texas Supreme Court further held in *Parks* that the legislature had a purpose “in adding the word ‘detention’ to the accepted definition of ‘interest’, and that this purpose was to meet the case when the debtor should detain the money owed beyond the stipulated period of forbearance, and so to provide that a promise to pay an additional sum for such detention should be deemed interest, and not merely damages by way of a penalty to secure a prompt performance of the contract.” *Parks*, 51 S.W. at 323.

The Texas Constitution and Usury

The Texas Constitution treats usury as follows:

The Legislature shall have authority to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest; provided, however, in the absence of legislation fixing maximum rates of interest ***all contracts*** for a greater rate of interest than ten per centum (10%) per annum shall be deemed usurious; provided,

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² A fairly detailed history of the usury laws in Texas can be reviewed in *Allee v. Benser*, 779 S.W.2d 61, 62-63 (1989).

further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six per centum (6%) per annum.

Tex. Const. art. XVI, § 11 (emphasis added). It is significant to note that “all contracts” are subject to usury laws. This includes the Agreed Judgments which, as discussed herein, are both contracts and judgments. Note also that section 302.001(b)(1997) which, by implication, also refers to all contracts in its use of the phrase “a contract.”

The forgoing provision of the Texas Constitution is the source for what many courts have called “common law usury.” *Allee*, 779 S.W.2d at 65. Under the Texas Constitution several courts have held that any contract which provides for usurious interest is void as to the charge for interest (but not as to the principal). *Allee*, 779 S.W.2d at 65. (“Since a constitutional provision still expressly condemns usury, if the ... contract were to collect usurious interest, that portion of the contract would be illegal and void.”); see generally, *Wall v. East Texas Teachers Credit Union*, 533 S.W.2d 918, 921 (1976) (“Unquestionably, the terms of the statute demonstrate the legislative purpose that as to interest a usurious contract is unenforceable.”). Nonetheless, effective September 1, 1999, common law usury is no longer available. Tex.Fin.C. § 305.007(1999) (“The penalties provided by this chapter are the only penalties for violation of this subtitle for contracting for, charging, or receiving interest in an amount that produces a rate in excess of the maximum rate allowed by law. *Common law penalties do not apply.*” (Emphasis added)).

Retroactive Application of Amended Usury Laws **(Which Law Applies?)**

As indicated *supra*, the usury laws have been recently amended. In fact, there were amendments in both 1997 and 1999. In both cases, the amendments became effective on September 1 of the respective year. These dates are significant.

In addressing the retroactivity of an August 27, 1979, amendment to Article 5069-1.03 Tex.Rev.Civ.Stat. Ann., the Court of Appeals Texas – El Paso held as follows:

“We hold that the general rule applies that a transaction is to be tested for usury

according to law in existence at the time of the transaction involved. *Southwestern Investment Company 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).”

Biggs v. Garrett, 651 S.W.2d 342, 344 (Tex.App. – El Paso, 1983, no writ); see also “*Thompson v. Hague*, 430 S.W.2d 293, 294 (Tex.Civ.App. -- Fort Worth, 1968) (“Where the question goes to whether the nature of the obligation is usurious it is determinable as of the time it is entered into.”)

The foregoing aside, the law concerning the retroactive application of a statute was stated by the Texas Supreme Court as follows:

It is the law of this State, and the law generally, that, in the absence of any special indication or reason, a statute will not be applied retroactively, even when there is no constitutional impediment against it. Thus statutes will not be applied retroactively unless it appears by fair implication from the language used that it was the intention of the legislature to make it applicable to both past and future transactions. *State v. Humble Oil & Refining Co.*, 141 Tex. 40, 169 S.W.2d 707 (1943); *Hockley County Seed & Delinting, Inc. v. Southwestern Investment Co.*, 476 S.W.2d 38 (Tex.Civ.App.-Amarillo 1971, n.r.e.).

Coastal Industrial Water Authority v. Trinity Portland Cement Division, General Portland Cement Company, 563 S.W.2d 916, 197-918 (Tex. 1978).

Usury

The essential elements of a usurious transaction are: (1) a loan of money, (2) an absolute obligation that the principal be repaid, and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower. *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex.1982); *Pentico v. Mad-Wayler, Inc.*, 964

S.W.2d 708, 714 (Tex.App.--Corpus Christi 1998, pet. denied). Moreover, since usury statutes are penal in nature, they must be strictly construed. *Steves Sash & Door Co., Inc. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex.1988).

As indicated above, Article 5069-1.06 (repealed) governs usurious conduct that occurred prior to September 1, 1997. Article 5069-1.06 (as of 1987) states in relevant parts as follows:

(1) 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, such usurious interest being the amount the total interest contracted for, charged, or received exceeds the amount of interest allowed by law, and reasonable attorneys fees fixed by the court except that in no event shall the amount forfeited be less than Two Thousand Dollars or twenty percent of the principal, whichever is the smaller sum; provided that there shall be no penalty for any usurious interest which results from an accidental and bona fide error.

(2) Any **person** who contracts for, charges or receives interest which is in excess of double the amount of interest allowed by this Subtitle shall forfeit as an additional penalty, all principal as well as interest and all other charges and shall pay reasonable attorney fees set by the court....

(3) All such actions brought under this Article shall be brought in any court of this State having jurisdiction thereof within four years from the date when the usurious charge was received or collected....

Tex.Rev.Civ.Stat.Ann. art. 5069-1.06 (Repealed). The remainder of this memorandum will address the 1997

and 1999 amendments to the usury laws (ie 1997 Texas Finance Code, §§ 301.001 through 305.104 and 1999 Texas Finance Code, §§ 301.001 through 305.105).

The relevant usury laws as of the 1997 amendments are as follows:

§305.001. Liability for Contracting for, Charging, or Receiving Excessive Interest.

(a) A **person** who contracts for, charges, or receives interest that is greater than the amount authorized by this subtitle is liable to the obligor for an amount that is equal to the greater of:

(1) three times the amount computed by subtracting the amount of interest allowed by law from the total amount of interest contracted for, charged, or received; or

(2) \$2,000 or 20 percent of the amount of the principal, whichever is less.

(b) This section applies only to a contract or transaction subject to this subtitle.

Tex.Fin.C. § 305.001(1997).

§ 305.002. Additional Liability for Interest Greater than twice Amount Authorized.

(a) In addition to the amount determined under Section 305.001, a **person** who contracts for, charges, or receives interest that is greater than twice the amount authorized by this subtitle is liable to the obligor for the principal amount on which the interest is contracted for, charged, or received as well as interest and all other charges.

(b) This section applies only to a contract or transaction subject to this subtitle.

Tex.Fin.C. § 305.101(1999).

The relevant usury laws as of the 1999 amendments are as follows:

Tex.Fin.C. § 305.002(1997).

§ 305.003. Attorney's Fees

A *person* who is liable under Section 305.001 or 305.002 is also liable for reasonable attorney's fees set by the court.

§ 305.001. Liability for Usurious Interest

(a) A *creditor* who contracts for, charges, or receives interest that is greater than the amount authorized by this subtitle is liable to the obligor for an amount that is equal to the greater of:

Tex.Fin.C. § 305.003(1997).

§ 305.004. Limitation on Filing Suit

An action under this chapter must be brought before the fourth anniversary of the date on which the usurious interest was received or collected. The action must be brought in the county in which:

(1) three times the amount computed by subtracting the amount of interest allowed by law from the total amount of interest contracted for, charged, or received; or

(2) \$2,000 or 20 percent of the amount of the principal, whichever is less.

(1) the defendant resides;

(2) the usurious interest was received or collected;

(3) the transaction was entered into; or

(4) the *person* who paid the usurious interest:

(A) resides; or

(B) resided when the transaction occurred.

(b) This section applies only to a contract or transaction subject to this subtitle.

(c) A *creditor* who charges or receives interest in excess of the amount contracted for, but not in excess of the maximum amount authorized by law, is not subject to penalties for usurious interest but may be liable for other remedies and relief as provided by law.

Tex.Fin.C. § 305.004(1997).

§ 305.101. Accidental and Bona Fide Error

A *person* is not subject to penalty under this chapter for any usurious interest that results from an accidental and bona fide error.

Tex.Fin.C. § 305.001(1999).

§ 305.002. Additional Liability for More Than Twice Authorized Rate of Interest

(a) In addition to the amount determined under Section 305.001, a *creditor* who charges and receives interest that is greater than twice the amount authorized by this subtitle is liable to the obligor for:

(1) the principal amount on which the interest is charged and received; and

(2) the interest and all other amounts charged and received.

(b) This section applies only to a contract or transaction subject to this subtitle.

Tex.Fin.C. § 305.002(1999).

§ 305.005. Attorney's Fees

A *creditor* who is liable under Section 305.001 or 305.003 is also liable to the obligor for reasonable attorney's fees set by the court.

Tex.Fin.C. § 305.005(1999).

§ 305.006. Limitation on Filing Suit

(a) An action under this chapter must be brought within four years after the date on which the usurious interest was contracted for, charged, or received. The action must be brought in the county in which:

(1) the transaction was entered into;

(2) the usurious interest was charged or received;

(3) the *creditor* resides at the time of the cause of action, if the *creditor* is an individual;

(4) the *creditor* maintains its principal office, if the *creditor* is not an individual; or

(5) the obligor resides at

the time of the accrual of the cause of action.

(b) Not later than the 61st day before the date an obligor files a suit seeking penalties for a transaction in which a *creditor* has contracted for or charged usurious interest, the obligor shall give the *creditor* written notice stating in reasonable detail the nature and amount of the violation.

(c) A *creditor* who receives a notice under this section may correct the violation as provided by Section 305.103 during the period beginning on the date the notice is received and ending on the 60th day after that date. A *creditor* who corrects a violation as provided by this section is not liable to an obligor for the violation.

(d) The notice requirement of Subsection (b) does not apply to a defendant filing a counterclaim action alleging usurious interest in an original action by the *creditor*.

Tex.Fin.C. § 305.006(1999).

§ 305.007. Penalties Exclusive

The penalties provided by this chapter are the only penalties for violation of this subtitle for contracting for, charging, or receiving interest in an amount that produces a rate in excess of the maximum rate allowed by law. Common law penalties do not apply.

Tex.Fin.C. § 305.007(1999).

§ 305.101. Accidental and Bona Fide Error

A *creditor* is not subject to penalty under this chapter for any usurious interest that results from an accidental and bona fide error.

Tex.Fin.C. § 305.101(1999).

§ 305.105. Amounts Payable Pursuant to Final Judgment.

A *creditor* is not liable to an obligor for a violation of this subtitle if the *creditor* receives interest that has been awarded pursuant to a final judgment that is no longer subject to modification or reversal.

Tex.Fin.C. § 305.105(1999).

The significant distinctions between the 1997 and the 1999 usury laws are as follows:

1. First, and foremost, the 1999 usury law replaces the word “person” with the word “creditor” and defines creditor as follows: **“a person who loans money or otherwise extends credit. The term does not include a judgment creditor.”** Tex.Fin.C. § 301.002(a)(3)(1999). “Judgement creditor means a person to whom a money judgment is payable.” Tex.Fin.C. § 301.002(a)(5)(1999). See highlighted versions of the respective statutes above. No such exception exists in the 1997 statutes.

2. The penalty associated with a usurious interest rate that is more than double the legal interest rate is eliminated unless the creditor charges and actually receives interest under the 1999 usury law.

3. The respective limitations statutes substantially differ. Under the 1997 usury laws an action merely needed to be brought within four years of a creditor’s receipt of usurious interest and the period did not commence running until a payment was actually made. Under the 1999 usury laws, there is the same four year time frame, however, it is now tied to the contract date, charging date, or the receipt date. Further, if the debtor commences an action, it must give sixty days notice to the creditor before filing suit to remedy the usurious nature of the transaction. However, this notice does not apply to a counterclaim or defensive use of usury.

4. The 1999 usury laws also added two entirely new provisions. First, it eliminated the common law cause of action for usury. Second, it barred usury from

applying to the receipt of usurious interest in connection with post-judgment interest. Section 305.105 was added to fill the gap that is not covered by the 1999 statute’s change of the word “person” to “creditor.”

Statute of Limitations for Usury

The statute of limitations under the 1997 Usury Laws is identical to the one under Article 5069-1.06(3) and does not begin to run until payment is made. *Schmid v. City National Bank of Wichita Falls*, 114 S.W.2d 854, 856 (Tex. 1938); *Whatley v. National Bank of Commerce*, 555 S.W.2d 500, 507 (Tex.Civ.App.--Dallas, 1977). The statute of limitations under the 1999 usury laws was changed to be four years from the date the usurious interest rate was contracted for, received or charged. Tex.Fin.C. § 305.006 (1999). Prior to that the four year statute of limitations did not begin to run until a payment of usurious interest was received. Tex.Fin.C. § 305.004 (1997).

What Constitutes a Charge Under Texas Usury Statutes?

Texas opinions addressing the issue of what constitutes a charge under the usury statute have a common thread, an express or implied demand for payment. *See, e.g., Windhorst v. Adcock Pipe and Supply*, 547 S.W.2d 260 (Tex.1977); *Woodcrest Associates v. Commonwealth Mortgage*, 775 S.W.2d 434, 437 (Tex.App.--Dallas 1989, writ denied)(letter declaring note accelerated and demanding payment); *Coppedge v. Colonial Sav. & Loan Ass’n*, 721 S.W.2d 933, 936 (Tex.App.--Dallas 1986, writ ref’d n.r.e.) (letter from attorney demanding payment); *Mecey v. Seggern*, 596 S.W.2d 924, 927 (Tex.Civ.App.--Austin 1980, writ ref’d n.r.e.) (sending statements declaring amounts due); *Moore v. Sabine Nat. Bank of Port Arthur*, 527 S.W.2d 209, 212 (Tex.Civ.App.--Austin 1975, writ ref’d n.r.e.) (notice of intent to repossess and demand for payment). Moreover, in order for there to be a “charge” for purposes of the usury statutes, the charge must actually be communicated to the debtor. *George Fuller Company of Texas, Inc., v. Carpet Services, Inc.*, 823 S.W.2d 603, 605 (1992).

Agreed Judgments are both Contracts and Judgments

Several courts in Texas, from the Texas Supreme

Court on down, have held that agreed judgments are both contracts and judgments. A string of quotes from several of those courts follows:

Schaefer, 211 S.W.2d 600, 606 (Tex.Civ.App.–San Antonio 1948).

“Ordinarily, a suit on an agreed judgment sounds in contract, not tort.... A party to a contract is free to pursue its own interests, even if it results in a breach of that contract, without incurring tort liability.... Therefore, unless an independent tort, such as fraud, can be proved, the judgment creditor must rely on a breach of contract action.” *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 71 (1997) (citations omitted).

“An agreed judgment is a contract and is enforced as a contract.” *Aetna Casualty and Surety Company v. Marshall*, 724 S.W.2d 770, 771 (1987).

“When a court enters an agreed judgment pursuant to a Rule 11 [Agreements to be in Writing] agreement, the agreed judgment becomes a contract between the parties as well as an adjudication of the court.” *Simmons v. Compania Financiera Libano, S.A.*, 14 S.W.3d 338, 342 (Tex.App.–Houston 2000).

“An agreed judgment is both a contract and a judgment and is interpreted under the rules of contract construction.” *Sanderlin v. Sanderlin*, 929 S.W.2d 121, 122 (Tex.App.–San Antonio 1996).

“Furthermore, as agreed judgments are merely contracts between the parties, and at their request given the form of a judicial ascertainment, we think the same rule of construction appertaining to contracts should be applied to agreed judgments.” *Prince v. Frost-Johnson Lumber Co.*, 250 S.W. 785, 790 (Tex.App.–Beaumont 1923).

“Agreed judgments and deeds are both contracts which may effect a transfer of property rights.” *Park v. Sweeten*, 270 S.W.2d 687, 692 (Tex.Civ.App.–San Antonio 1954).

“When an agreed judgment is pleaded a contract is likewise pleaded. We think the Colorado decree involved here is a judgment entitled to full faith and credit under the federal constitution, but if technically it be not a 'final judgment,' it is our opinion that the pleadings and evidence show that Milner, by valid contract, relinquished all claim to the Texas lands to Schaefer and Lewis, and that the judgment of the trial court may be supported upon this theory.” *Milner v.*

Conclusion

Turning to the hypothetical it appears quite plausible that the agreed judgment is a contract thereby making it subject to the usury laws. If the October 31, 1999, communication sent by Creditor B to the Debtor constitutes a charge, there may very well be a claim for usury under the 1997 statute. However note that if that letter were sent out on October 31, 2000, the 1999 statute would control and there would be no claim for usury. While it becomes more and more unlikely that any claims will arise under the 1997 statute, it is important to understand the recent history of the Texas usury statute.