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Robert H. Hughes

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# A RE-EXAMINATION OF THE TEXAS CREDIT INSURANCE ACT<sup>†</sup>

by

Robert H. Hughes\*

A LOAN shark is one who lends comparatively small sums of money as a business, at high and almost always illegal rates of charge under conditions which defraud and oppress the borrower. The anti-thesis of the loan shark is one who supplies credit in small amounts at reasonable and legal rates of charge under conditions of fair dealing. Socially, the legitimate lender is the positive pole and the loan shark the negative one. What promotes one destroys the other.<sup>1</sup>

Assuring the destruction of the "loan shark" is a problem which has plagued lawmakers for centuries.

The demand for loans of \$1,000 or less is tremendous and constant. Prior to World War II, demand for small loans came from the lower income bracket groups, especially from wage-earners. Since that time, the attitude of many toward debt has changed. Borrowers wish to enjoy today the benefits of tomorrow's earnings. Then too, the substantial increase in Texas' industrialization and population has undoubtedly increased demand in this area more than elsewhere. Furthermore, the boom since World War II rendered the demand effective because small loans are made primarily on the basis of the margin between wage-earners' incomes and minimum subsistence costs.<sup>2</sup>

Such a basis for loans obviously involves a risk to the lender which neither the borrower nor the lender can control, *i.e.*, the loss of income resulting from physical disability or death. This risk is also of concern to the borrower, because either he or his representative must pay the debt, and he does not want to burden his family with debts not payable out of income. The use of credit insurance has found increasing acceptance as a means of limiting the borrower's liability.<sup>3</sup>

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<sup>†</sup> For further reference in this field, see Davis, Does the Texas Certificate Plan Act "Legalize" Usury?, 12 Sw. L.J. 196 (1958); Davis, Does the Hatridge Case "Legalize" Usury?, 11 Sw. L.J. 433 (1957); Davis, Does the Texas Credit Insurance Act "Legalize" Usury?, 11 Sw. L.J. 139 (1957).

\* Attorney at Law, Dallas, Texas; Representative, District 51, Texas Legislature.

<sup>1</sup> Hubachek, The Development of Regulatory Small Loan Laws, 8 Law & Contemp. Prob. 108 (1941).

<sup>2</sup> "So long as salaries and wages remained close to the subsistence level, the prospect of such incomes had no collateral value. When, however, wage-earners' real income rose to the point where they covered the minimum necessities of life and, at the same time, provided a surplus for meeting payments of principal and interest on debts, prospective salaries and wages became assets, however inchoate, against which loans could be made." Nugent, The Loan Shark Problem, 8 Law & Contemp. Prob. 3, 4 (1941).

<sup>3</sup> ". . . [A]t the end of 1945, there was approximately \$365,000,000 of credit life in-

Judicial decisions have declared that, in addition to the maximum interest rate, lenders may charge borrowers for bona fide expenses incurred on behalf of borrowers<sup>4</sup> and that reasonable insurance may be required as security for a loan.<sup>5</sup> Recognizing a legitimate business opportunity, some lenders, through their duly licensed agents, made insurance available to their borrowers at prevailing rates in amounts approximating the loan liability, giving the borrowers evidence of their protection by the delivery of policies; and in return for services to the insurance company, the lenders received reasonable commissions.

The cause for complaint lies not in this, but in the methods used by illegitimate lenders. These lenders attempted to use insurance sales as a device to increase the interest on their loans. The borrowers were *required* to purchase insurance through the lenders and could not secure insurance from other sources. In most instances premium rates were exorbitant, policies were not delivered to the borrowers, and the amount of coverage required was unreasonable. Such frequent practices were cause for legislative concern.

Freedom of the borrower to offer a policy of credit insurance as security for a loan or to purchase such a policy from the lender himself, if he wishes, enables a borrower to obtain loans from ethical lenders at a reasonable interest rate. A regulation which would prevent giving such security might force the borrower to transact business with the illegal loan shark who flourishes wherever the borrower is deprived of the means of obtaining a legal loan. Money lending involves questions of ethics which render almost impossible the formulation of permanent and definite criteria of what constitutes a usurious transaction. As long as freedom of contract remains a cornerstone of economic organization,<sup>6</sup> the state must de-

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insurance in force in the United States. In eleven short years, that volume of insurance in force had increased to over \$17,000,000,000. At the end of 1945 there were just slightly over 2,000,000 individuals covered by credit life insurance. At the end of 1956, over 32,000,000 persons were protected . . . [and] in 1956, companies writing credit insurance paid death claims of nearly \$77,000,000." Peterson, *Credit Life Insurance*, Vol. 58, No. 9 *Best's Insurance News* 18 (Life Ed. Jan. 1958).

<sup>4</sup> *Greever v. Persky*, 140 Tex. 64, 165 S.W.2d 709 (1942); *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937); *Stuart v. Tenison Bros.*, 53 S.W. 83 (Tex. Civ. App. 1899) error ref.

<sup>5</sup> *Rodriguez v. R.P. Youngberg Finance, Ltd.*, 241 S.W.2d 815 (Tex. Civ. App. 1951); *Texas Finance & Thrift Ass'n v. State*, 224 S.W.2d 522 (Tex. Civ. App. 1949); *Restatement, Contracts* § 528 (1932).

<sup>6</sup> One must bear in mind that lenders are not engaged in a common calling in the sense that they are obligated to lend their money to whomever applies for a loan. They are free to examine into the integrity, character, financial worth, and security offered by each applicant for a loan. A lender may refuse to make a loan, or he may require such security as he deems necessary for his protection. When business judgment demands that the

termine when a voluntary economic transaction is tainted with an element of usury.<sup>7</sup> Texas citizens have long felt that the interest rate in lending transactions must be regulated to promote the general welfare.<sup>8</sup> Recent legislation reflects the conviction that the establishment of a maximum interest rate alone is not enough, that it is necessary to regulate expenses which may be charged and premiums for credit insurance required as security for loans.<sup>9</sup> In 1949 the 51st Legislature of the State of Texas passed the "Credit Insurance Act" regulating the writing and use of credit life insurance and credit health and accident insurance in connection with loans not exceeding \$1,000. This paper is concerned with the validity of that legislation, now codified in article 3.53 of the Texas Insurance Code. This statute will hereinafter be referred to as the "Credit Insurance Act."

### I. THE PROVISIONS OF THE CREDIT INSURANCE ACT— WHAT IS PERMITTED

The Credit Insurance Act is a detailed, comprehensive regulation of the sale and use of "credit life insurance" and "credit accident and health insurance" in which the insured(s) are borrowers of sums not exceeding \$1,000.<sup>10</sup> The Board of Insurance Commissioners is instructed to make and file a schedule of rates "just and reasonable" to the insuring public and "adequate" to credit insurers.<sup>11</sup> The terms and amount of credit insurance may be regulated to limit the insurance permitted by the act to "true credit insurance."<sup>12</sup> Section 5 prohibits more than one policy on one loan.

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collateral securing a loan be insured against loss by casualty, or that a policy of credit life or accident and health insurance is necessary, there is nothing which prevents a lender from requiring such security. A lender is not prohibited from refusing to loan money if the insurance is not obtained and he may make a loan if the borrower obtains, or agrees to obtain, the required insurance.

<sup>7</sup> Interpretive Commentary, Vernon's Ann. Tex. Const. art. 16, § 11 (1955).

<sup>8</sup> The Constitution of the Republic of Texas (1836) had no provision governing interest. In 1840 the Legislature enacted a usury law setting the maximum conventional interest rate at 12% per annum and 8% in the absence of agreement on the rate. 8 Gammel's Laws of Texas 155 (1898). The 1845 Constitution under which Texas was admitted to the Union contained no interest provision. The Constitution of 1869 in art. XII, § 44, provided for the abolishment of all usury laws, except those relating to interest rates in the absence of contract, and prohibited legislation on the subject. The present Constitution (1876) in art. 16, § 11, formerly set a maximum conventional rate of 12% per annum and 8% per annum in the absence of contract, making excessive rates usurious. An 1891 amendment lowered these rates to 10% per annum and 6% per annum respectively. The period between effective dates of the 1869 and the 1876 Constitutions is the only time when interest rates were not regulated either by constitutional or statutory provisions.

<sup>9</sup> Tex. Banking Code arts. 342-508 (1947).

<sup>10</sup> Tex. Ins. Code art. 3.53, § 6 (Supp. 1956).

<sup>11</sup> Id. at § 2B.

<sup>12</sup> Id. at § 7. That term is specifically limited. The amount of credit accident and health is limited to such "proportion to the unpaid balance of the loan as shall be ap-

Section 7 requires a written application and section 13 provides civil and criminal penalties for the collection of excessive premiums—a penalty more severe than the penalty for usury.

Section 6 has been specifically singled out for attack as permitting “legalized usury”; however, sections 4 and 10 are equally important to a discussion of that question. Sections 4, 6, and 10 are worded as follows:

**Section 4. BORROWER TO HAVE CHOICE OF INSURER AND AGENT.**—No lender or lender agent shall hereafter require as a condition for the making of a loan that the borrower purchase either credit life or credit health and accident insurance from such lender, lender agent or any insurer represented by them. It shall be permissible for such lender or lender agent to require of a borrower such credit life or credit health and accident insurance or both as a condition for making the loan, if, and only if, the borrower is given the option to purchase such insurance from any insurer or insurance agent of his own choice. It is the intent of this section to prohibit coercion of insurance and to preserve to each citizen the right to choose his own insurer and insurance agent.<sup>13</sup>

**Section 6. COMMISSIONS NOT DEEMED INTEREST; CONTINGENT COMMISSIONS.**—Commissions received by lenders, lender agents and insurance agents from insurers for the writing of credit insurance complying with the terms of this article, the maximum rates promulgated by the Board, and rules and regulations of the Board of Insurance Commissioners, shall be considered for all purposes as compensation for services rendered to such insurer and shall not be taken to be an interest charge on the money borrowed; provided, however, should such commissions be in excess of any maximum filed hereunder, then such commissions shall be deemed to be an interest charge on the money borrowed. No agreements by insurers with any of its agents shall permit contingent commissions based on loss experience.<sup>14</sup>

**Section 10. EXCESSIVE RATES DEEMED INTEREST; REPORT AND LEGAL PROCEEDINGS.**—Any rate, premium, or assessment charged and collected by an insurer, insurance agent, or lender agent in excess of the rate, premium, or assessment set out in said insurer's

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proved by the Board.” In addition, the Board must approve all policies as to form and has general regulatory power “to carry out the spirit and purposes of this article.” *Id.* at § 9. Section 2 of the regulations dated April 23, 1956, permitted credit insurance in excess of the amount of loan obligation it was protecting. This was contrary to the spirit and purpose of the act and the concept and definition of credit insurance and has been changed in the regulations since February 24, 1958. The underlying principle of credit life insurance is to provide automatic liquidation of indebtedness in the event of death; credit accident and health provides periodic installment payments on the debt in the event that the debtor is disabled through accident or illness. Thus, lenders and insurers who sold excessive credit insurance also seized the opportunity to sell credit disability insurance in excess of the amount of the installment payment. See Cade, *The Fundamental Issues of Consumer Credit Insurance*, No. 385 *Ins. L.J.* 76 (1955).

<sup>13</sup> *Id.* at § 4.

<sup>14</sup> *Id.* at § 6.

rate schedule on file with the Board, and in force at the time, is declared to be an exaction of interest on the money borrowed. It shall be the duty of the Board to report forthwith to the Attorney General of Texas any facts coming to its attention indicating that such excess rate, premium, or assessment has been charged and collected, and he in turn shall deliver such evidence to the proper District or County Attorney for proper legal proceedings under the usury laws, or himself bring such proceedings.<sup>15</sup>

Thus, section 6 does not stand alone even though the tacit assumption of the argument against its validity is that it does. Such an assumption is required for that argument. However, it is submitted that the *remainder* of the act and regulations, properly administered, render it impossible for section 6 to permit usury. Constitutionality of the act must be judged by what it permits. Pursuing this analysis, the Credit Insurance Act permits the following:

- (1) The lender agent can require as security only such credit insurance as the act permits (Section 4);
- (2) The compulsory purchase of such insurance from the lender agent or any other agent may not be made a condition precedent to the loan (Section 4);
- (3) The consideration or premium for such insurance if purchased must be "reasonable and just" (Section 2);
- (4) The only insurance permitted is that which is limited in term and in an amount reasonably related to the debtor's obligation.

Section 6 merely states that the commissions to the lender agent for writing such insurance shall not be deemed interest and shall be considered for all purposes as compensation for services rendered to the insurer, provided such commissions are not in excess of any maximum fixed by the Board. Inasmuch as the commissions are paid by the insurance company to the lender, it is somewhat difficult to see how a borrower, who has not paid the commissions, could allege that the payment of the commission in any way involved the exaction of interest from him.

The premiums, however, assume a different status since they are paid by the borrower. The courts are primarily interested in sums actually expended by the borrower and in whether or not such sums involve compensation for the borrowed money. The constitutional provision against usury does not contemplate that all ancillary contracts made between borrower and lender must be considered when determining interest. Accepting the definition

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<sup>15</sup>Id. at § 10.

of interest as being compensation for the loan, use or forbearance of money, a bona fide insurance premium paid for credit insurance would not be interest. It is significant that insurance premiums are not mentioned in section 6. However, the regulations do limit the amount of the commission that may be paid to a lender out of premiums. In a sense, this offers greater protection to the borrower than did the common law, *i.e.*, reasonable insurance premiums are not interest, but commissions paid to the lender agent in excess of the maximum allowed by the Board are interest, whether compulsory or not. They would not have been at common law.<sup>16</sup>

Section 6 does not foreclose inquiry as to the compulsory nature of the insurance, nor as to compliance with sections 4 and 10. The lender can require such credit insurance "of a borrower," but he cannot compel the purchase of such insurance *from himself or any other agent* without violating the act.

## II. THE CONSTITUTIONAL ISSUE

Consideration must be given the constitutional limitation on the Legislature with respect to interest, the Legislature's power and duty to provide appropriate penalties for the same, and its police power which includes the power to regulate the insurance business. Section 11 of article 16 of the Constitution of Texas provides:

All contracts for a greater rate of interest than ten per centum per annum, shall be deemed usurious, and the first Legislature after this amendment is adopted, shall provide appropriate pains and penalties to prevent the same; but when no rate of interest is agreed upon, the rate shall not exceed six per centum per annum.<sup>17</sup>

It is settled beyond question that the Legislature has the general power to regulate the insurance business.<sup>18</sup> This includes establishing the premium rate and the compensation or commission paid to agents. Indeed, the agents' compensation bears a direct relation to the rate of premium fixed by the state, which is the only rate for which the parties may contract.<sup>19</sup> To allow the parties to an

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<sup>16</sup> Cases cited note 8 supra.

<sup>17</sup> Tex. Const. art. 16, § 11 (1955).

<sup>18</sup> Associated Employers Lloyds v. Dillingham, 262 S.W.2d 544 (Tex. Civ. App. 1953) error ref.; Alamo Express, Inc. v. American Fidelity & Cas. Co., 250 S.W.2d 602 (Tex. Civ. App. 1952); Red Arrow Freight Lines, Inc. v. American Fidelity & Cas. Co., 225 S.W.2d 240 (Tex. Civ. App. 1949); Brown & Root, Inc. v. Traders and Gen. Ins. Co., 133 S.W.2d 534 (Tex. Civ. App. 1939) error disp.

<sup>19</sup> See note 22 supra. See also Osborn v. Ozlin, 310 U.S. 53 (1940) (which states that the power to regulate the insurance business is affected by due process); O'Gorman & Young v. Hartford Ins. Co., 282 U.S. 251 (1936).

insurance contract to fix any other rate would impair or destroy the state's regulatory system, which assures a policy of uniform and non-discriminatory insurance rates and in which the public has a paramount interest.<sup>20</sup> To retain the state's regulatory system and insure that only one rate is offered by the insurer to members of the public in the same class, section 6 was not restricted merely to creating a prima facie presumption that a commission charged is reasonable. Such a system would permit juries to fix commission rates merely by finding the same to be interest; thus, the presumption was made conclusive.

Close analysis reveals that insurance premiums are fundamentally different from the charges and expenses incurred in connection with a loan. This distinction justifies different treatment by the Legislature which provided a conclusive presumption of reasonableness of the former, while there is only a prima facie presumption of reasonableness as to the latter. The distinction arises in the definiteness in ascertaining a reasonable cost. The insurance rate is based upon actuarial computations and a reasonable return to the lender. This contrasts with the charges for expenses and services rendered to a borrower which cannot be accurately calculated. The cost of a security appraisal can vary with the type of security offered, the amount of the loan, the location of the lender with respect to the borrower, the lender's policy, and knowledge of the borrower derived from prior transactions. Obviously, all the Legislature could do consistent with its policy that such charges for services should be both compensatory and reasonable was to limit these charges and create a prima facie presumption of reasonableness.

### III. WHAT IS INTEREST AND WHAT IS NOT INTEREST

As the only objection to the validity of the Credit Insurance Act has been the contention that it violates the constitutional limitation on interest, it follows that if the act does not permit usury, the entire basis for the objection fails. Indeed, the burden of proof is upon the opponents of constitutionality in view of the presumption of constitutionality of any act of the Legislature.<sup>21</sup> The problem, therefore, is to determine what is interest, what is usury, and what is compensation which falls within neither class.

The Constitution does not define "interest." The Legislature, however, has defined interest as being "a compensation allowed by

<sup>20</sup> See note 23 *supra*.

<sup>21</sup> 9 Tex. Jur., Constitutional Law § 59 (1930).



law or fixed by the parties to a contract for the use or forbearance, or detention of money."<sup>23</sup>

Usury is defined as "interest in excess of the amount allowed by law."<sup>24</sup> There are four elements of usury: (1) there must be a loan or forbearance; (2) the loan must be of money or something circulating as money; (3) it must be repayable absolutely; and (4) something must be exacted for the use or forbearance of money in excess of, and in addition to, the interest allowed by law.<sup>24</sup> There are decisions implying that a fifth element must be added, namely, the intent of the parties, or at least of the lender, that illegal interest shall be paid and received. The courts often speak of such an intent as being controlling in controversies respecting alleged usury. However, a study of the cases indicates that when the courts speak of intent, they mean that when the transaction is innocent in form, evidence may be received to show its real nature and to permit a jury finding that the parties intended a transaction usurious in substance.<sup>25</sup> But, when the transaction is usurious in substance, whether so in form or not, the penalties imposed by law cannot be evaded by proving that the party had no evil design, unless it be further shown that the lender acting innocently and by some mistake of fact, as by an incorrect computation, contracted to receive an excess of the legal interest.<sup>26</sup> Mere intention, except in the case of a mistake of fact, cannot change the character of a transaction necessarily usurious; neither can it taint with usury a transaction necessarily innocent. Therefore, where a transaction is simply a purchase and where there is no actual violation of the usury laws, the presence or absence of an intent to violate them is immaterial, and evidence of such intent will not be admitted.<sup>27</sup>

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<sup>23</sup> Tex. Rev. Civ. Stat. Ann. art. 5069 (1947).

<sup>24</sup> Id. at art. 5071. Such definitions are merely reiterations of the common-law definition.

<sup>25</sup> Annot., 46 Am. St. Rep. 178, 182 (1895). See also note 28 *supra*.

<sup>26</sup> *Glover v. Buchman*, 104 S.W.2d 66 (Tex. Civ. App. 1937) error dismissed.

<sup>27</sup> Legally, one cannot say he intended to charge an amount for interest which later proved to be excessive, although he did not intend to violate the usury law. *Van Biel v. Fordney*, 79 Ala. 76 (1885); *Manchester Realty Co. v. Kanehl*, 130 Conn. 552, 36 A.2d 114 (1944); *Jones v. Hernando Bank*, 194 Miss. 474, 13 So. 2d 31 (1943); *Jefferson Standard Life Ins. Co. v. Davis*, 173 Miss. 854, 163 So. 506 (1935); *Burdon v. Unrath*, 47 R.I. 226, 132 Atl. 728 (1926). This is a mistake of law; however, the decided cases distinguish between a mistake of law and a mistake of fact, holding that an excessive interest charge made as a result of a mistake of fact will not constitute usury because the requisite intent to make more than permitted by statute is not present. *Jefferson Standard Life Ins. Co. v. Davis*, *supra*.

<sup>28</sup> *Smith v. Paton*, 31 N.Y. 66 (1865). This would appear to be a continuation of the general rule that the law does not concern itself with mere guilty intentions unconnected with outward manifestation. 14 Am. Jur., Criminal Law § 25 (1938). *Wood v. Continental Sav. & Bldg. Ass'n*, 56 S.W.2d 641, 643 (Tex. Comm. App. 1933): "They [the plaintiffs] merely alleged that the scheme by which the defendant in error was enabled to collect that amount of money it did collect from them was a device to charge usurious

#### IV. REASONABLE INSURANCE PREMIUMS ARE NOT INTEREST AS A MATTER OF LAW

As stated above, interest and usury must be distinguished from forms of compensation of a fundamentally different nature. At common law, the fact that the lender may refuse to make a loan unless the borrower consents to enter into another transaction is a factor independent of the loan and does not render it usurious, if the lender receives only a fair equivalent of the consideration which he gives.<sup>28</sup> But if the collateral bargain is merely a colorable device by which the lender is to receive interest in addition to the highest permitted rate of consideration for the loan, it does render the loan usurious.<sup>29</sup> Nor does the mere fact that the lender makes profit out of the collateral transaction render the loan usurious. Whether a collateral bargain is a mere colorable device is a question of fact which must be submitted to a jury if there is any doubt. The provisions of section 6 are thus merely a reiteration of the common-law rule in Texas. Naturally if there were fraud, accident, or mistake of fact, it might convert the collateral transaction from one within the statute and deemed not to be usurious to one which is not sanctioned by the statute. In that event, the protection of the statute to the lender against being declared guilty of usury would be lost in the same manner that a violation of the statute governing the collateral transaction would put the transaction itself outside the statute.<sup>30</sup> A study of cases reveals that the insurance permitted under the Credit Insurance Act is somewhat more restricted than that permitted by the common law in a collateral transaction. In the states where the lender is permitted to profit from a collateral transaction, it is well established that life insurance companies as a condition precedent to making the loan can legally require the purchase of a life insurance policy from themselves as security for the loan. Such a requirement does not violate the usury law, even though the total interest charged, plus the insurance premium, exceeds the statutory maximum in-

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interest. But the testimony shows that this scheme was one expressly authorized by the statutes of the state, and therefore could not legally have been a usurious one . . ." See also *Abilene Christian College v. Wright*, 1 S.W.2d 720 (Tex. Civ. App. 1927) error ref. <sup>28</sup> 42 Tex. Jur., Usury § 40 (1936). See also *Greever v. Persky*, 140 Tex. 64, 165 S.W.2d 709 (1942); *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937); *Shattuck v. Clark*, 34 S.W. 404 (Tex. Civ. App. 1896) error ref.; *Huddleston v. Kempner*, 21 S.W. 946 (Tex. Civ. App. 1892); accord, *Restatement, Contracts* § 528 (1932); 6 *Williston, Contracts* § 1687 (rev. ed. 1938).

<sup>29</sup> *Glover v. Buchman*, 104 S.W.2d 66 (Tex. Civ. App. 1937) error dism.

<sup>30</sup> *Wood v. Continental Sav. & Bldg. Ass'n*, 56 S.W.2d 641 (Tex. Comm. App. 1933).

terest rate.<sup>31</sup> Two standards are set: (1) that the premium charged for the insurance must be the normal charge which would be made in a transaction where no loan was involved; and (2) that the amount of the insurance coverage be reasonably related to the loan transaction.<sup>32</sup>

The Texas common-law rules are the same. The earliest and most frequently cited Texas case involving the sale of credit insurance in connection with a loan is *Rodriguez v. R. P. Youngberg Finance, Ltd.*<sup>33</sup> The loan exceeded \$1,000 and would therefore be outside the Credit Insurance Act. The court said:

Admittedly a lender may without violating the usury law make an extra charge for any distinctly separate and additional consideration other than the simple lending of money. *Greever v. Persky*, 140 Tex. 64, 165 S.W.2d 709 (Sup. Ct.). There can be little doubt that appellant did receive material and substantial benefits from the "credit" insurance. . . . Therefore it seems obvious that there was a distinctly separate and additional consideration other than the loaning of money for these premiums which were collected. . . . There is no evidence that the premiums charged were in any respect excessive for this kind of insurance, or that appellant was in any way coerced into acquiring this insurance. . . . Nor can it be assumed that appellee acted in bad faith in requiring this type of insurance—in other words, that it was unnecessary as additional protection for the loan. . . . In the absence of statutory prohibition we approve the following language of the Court of General Sessions of Delaware, in *State v. Bankers Finance Corporation*, 2 Terry 566, 26 A. 2d 220, loc. cit. 225, as applicable to the facts of this case: "If a lender compel a borrower to insure in a company where the lender will get additional commissions, we think such conduct constitutes an unlawful exaction. If, on the other hand, no compulsion whatever is used, but the selection results in an agent's commission to the lender, whether the premium be paid by the borrower himself or by the lender at request of the borrower, we see no reason that these commissions should be credited to the borrower. He has no expense in maintaining the agency and has paid but the normal manual rate. There being in this case no evidence of any compulsion in the selection

<sup>31</sup> *Sledd v. Pilot Life Ins. Co.*, 52 Ga. App. 326, 183 S.E. 199 (1935); *Morris v. Georgia Loan, Sav. & Banking Co.*, 109 Ga. 12, 34 S.E. 378 (1899); *Washington Life Ins. Co. v. Paterson Silk Mfg. Co.*, 25 N.J. Eq. 160 (1874); *Homeopathic Mut. Life Ins. Co. v. Crane*, 25 N.J. Eq. 418 (1874); *John Hancock Mut. Life Ins. Co. v. Nichols*, 55 How. Pr. 393 (N.Y. 1874); *Philbrick v. Puritan Corp.*, 178 Okla. 489, 63 P.2d 38 (1936); *Heaberlin v. Jefferson Standard Life Ins. Co.*, 114 W. Va. 198, 171 S.E. 419 (1933); *Friedman v. Wisconsin Acceptance Corp.*, 192 Wis. 58, 210 N.W. 831 (1926); *Downes v. Green*, 12 M. & W. 481, 52 Eng. Rep. 1287 (Ex. 1844). The English case of *Downes v. Green*, supra, is particularly interesting in view of the first article of the Texas statutes, which provides that: "The common law of England so far as it is not inconsistent with the constitution and laws of this state, shall together with such constitution and laws be the rule of decision, and shall continue in force until altered or repealed by the Legislature." *Tex. Rev. Civ. Stat. Ann. art. 1* (1947).

<sup>32</sup> Cases cited note 35 supra.

<sup>33</sup> 241 S.W.2d 815 (Tex. Civ. App. 1951).

of the company, we do not think the failure to apply the commission to the account of the borrower constitutes any unlawful charge against the borrower." That the question of good faith on the part of appellee was a question of fact which was decided by the trial court adversely to appellant is clearly demonstrated by the opinion of the Supreme Court of Wisconsin in *Friedman v. Wisconsin Acceptance Corp.*, 192 Wis. 58, 210 N.W. 831, 53 A.L.R. 758, a case decided on facts in no material respect distinguishable from the facts here except that no part of the commissions was received by the lender, in which it was held that such charges were not a subterfuge and were not usurious. See also Annotation 21 A.L.R. 876. It is unnecessary to hold that the transaction here was made in good faith as a matter of law. The trial court has in effect found that it was made in good faith and our holding is that it does not appear otherwise as a matter of law.<sup>34</sup>

Certainly the validity of a statute cannot be made to depend upon its administration. In this respect and in considering the effect of section 6, it is to be noted that section 6 does not require the Board to set maximum commissions which may be charged. It merely gives the Board the power to fix such maximum rates upon its determination of the necessity for such regulation. As previously pointed out, the power to regulate commissions is essential, but it does not follow that the power must be exercised. In brief, the power is granted and the Board can use it if it finds it necessary to do so. Until recently it did not find it necessary, but under the revised regulations of February 24, 1958, the Insurance Commission has set a maximum on these commissions and placed them under strict regulation.<sup>35</sup> Although the commission is in addition to the ten per cent interest which the lender charges to the borrower, such commission, when not in excess of the maximum, is not under section 6 interest charged on the money borrowed.

Section 6 provides that "Commissions . . . complying with the terms of this article, the maximum rates promulgated by the Board, and rules and regulations of the Board of Insurance Commissioners . . . shall not be taken to be an interest charge . . ." Therefore, unless the commissions conform to the maximum rate promulgated by the Board, they do not come under the protection of section 6. The contention that such commissions would be protected in the absence of Board action is without merit. This could not be the effect of legislative action under the legislative power to fix the rate of commissions and premiums on insurance policies.

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<sup>34</sup>Id. at 820.

<sup>35</sup>Order of the State Board of Insurance, Regulations for Issuance of Credit Life Insurance and Credit Health and Accident Insurance Policies (Feb. 24, 1958).

The rate-making function of the Insurance Department is legislative in character.<sup>36</sup>

There are many factors which must be considered in the fair and reasonable administration of laws requiring rate fixing. Under such administrative laws, all questions of fact are primarily for the commission or board to determine.<sup>37</sup> Therefore, when a rate has been prescribed under the state's regulatory authority, it is the rate which the state has found reasonable and has established under its legislative power. The destruction of the state's regulatory authority could come about through judicial determinations as to the reasonableness of insurance rates in individual cases. The courts will not permit such collateral attacks on legislative action regulating prices.<sup>38</sup> Indeed, a statute which provides that the court should substitute its judgment for that of a commission and try matters anew as an administrative body, substituting its findings for those of the commission would be an unconstitutional delegation of non-judicial powers to the judiciary.<sup>39</sup> Where the parties contract for credit insurance, a question of fact naturally arises as to the reasonableness of the premium charged. The only manner in which the legitimate lender can be protected from the accusation of taking usury because the premium for credit insurance is unreasonable is to have the reasonableness of the premium established by the Legislature under its rule-making authority. This is especially true since the lender may have no control over the premium.

Inasmuch as the Texas Credit Insurance Act does not permit usury or interest in excess of that permitted by law, the intent of a lender or a borrower or any other private person that it should do so has no bearing on the constitutionality of the act of the Legislature. Without permitting interest in excess of that allowed by the Constitution, the Texas Credit Insurance Act cannot be an attempt to "legalize usury." This act is a working tool, which, if properly used, will enable the state to remove abuses and create a wholesome atmosphere in the small-loan field.

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<sup>36</sup> *Brown & Root, Inc. v. Traders and Gen. Ins. Co.*, 153 S.W.2d 534 (Tex. Civ. App. 1939) error dismissed; 42 Am. Jur., Pub. Administrative Law § 38 (1942).

<sup>37</sup> *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 87 S.W.2d 1069 (1935).

<sup>38</sup> *Associated Employers Lloyds v. Dillingham*, 262 S.W.2d 544 (Tex. Civ. App. 1953) error reversed; *Red Arrow Freight Lines v. American Fidelity & Cas. Co.*, 225 S.W.2d 240 (Tex. Civ. App. 1949); *Falvey v. Simms Oil Co.*, 92 S.W.2d 292 (Tex. Civ. App. 1936); *Minney v. Furman, Lawrence & Parker*, 286 S.W. 287 (Tex. Civ. App. 1926).

<sup>39</sup> *Suppee v. Railroad Comm.*, 123 Tex. 521, 73 S.W.2d 505 (1934).

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