If There Is No Rate, You Must Rebate: Small Loan Laws in Oklahoma

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Driving down old Route 66 in Tulsa, Oklahoma one is likely to see several businesses offering “Cash Loans!” or “Fast Cash - Approved Immediately!” This is not false advertising. A $660.00 loan can be obtained from such small loan companies in less than an hour. However, the simplicity of obtaining this type of loan is deceptive. While the borrower may be relieved upon receiving such fast cash, it
is doubtful she realizes the actual cost of her loan. Although there is no specific rate of interest set by the Oklahoma statute governing such loans, acquisition and handling charges permissible on small loans allow for calculation of an annual percentage rate ("APR") that often equals over 100% on the original loan, and possibly over 300% in the event of refinancing.2

The small loan industry caters to an estimated one-third of America's adult population who typically have no access to traditional sources of credit.3 Alternative financial services, such as the small loan industry, provide non-depository access to credit.4 Typically, the industry extends credit at high rates to low-income, high-risk borrowers who cannot afford, or do not qualify for credit from depository institutions or banks.5 Specifically, small loan lenders provide access to fast cash loans at rates three times as high as traditional banks.6

The small loan industry in Oklahoma is governed by § 3-508B of the Oklahoma Consumer Credit Code ("OCCC").7 Loans made under this provision are typically referred to as "B" loans. Such "B" loans authorize account-specific charges8 in lieu of finance charges or rate ceilings applicable in other loan statutes9 and thereby do not set a specific rate of interest for this type of loan. Although § 3-508B charges may be converted to an APR to satisfy Federal Truth in Lending Law ("TILA") disclosures,10 there is no maximum rate of interest fixed as required by the Oklahoma Constitution.11 The statutory discrepancy makes the "B" loan provision constitutionally suspect because the Oklahoma Constitution authorizes the legislature to set a maximum rate of interest for loans, not a maximum charge on loans.12 That the charges can be converted to an APR to satisfy TILA requirements simply does not fulfill the constitutional mandate. In addition to the absence of a maximum rate of interest, the fees authorized by the provision may also be suspect. When the Oklahoma courts rule on the constitutionality of § 3-508B, they may also be forced to decide whether the fees authorized by the statute constitute interest calculable for

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2. See Joe Robertson, Consumers Needing Quick Cash Easy Target, TULSA WORLD, Jan. 13, 1997, at A1 [hereinafter Robertson, Consumers]. See also infra Part IV.
4. See John P. Caskey, FILENE RESEARCH INSTITUTE CENTER FOR CREDIT UNION RESEARCH, LOWER INCOME AMERICANS, HIGHER COST FINANCIAL SERVICES 1 (1997) (defining alternative financial services generally as non-depository suppliers of credit such as check-cashing outlets, small loan companies, pawnshops, and rent-to-own companies).
5. See id. at 27.
6. Compare Robertson, Consumers, supra note 2, at A1, and OKLA. STAT. ANN. tit. 14A, §§ 3-508A(2)(a) (West 1996) (stating depository institutions making loans for $660 or less are limited to charging a maximum 30% interest rate).
8. See id. § 3-508B(1).
9. See, e.g., OKLA. STAT. ANN. tit. 14A, §§ 3-201, 3-508A, 3-605 (West 1996) (setting a maximum rate of interest for each type of loan).
12. See id.
usury purposes. 13

This comment discusses the small loan laws in Oklahoma with specific focus on § 3-508B of the Oklahoma Consumer Credit Code. After overviewing the small loan market and its borrowers, the comment outlines the genus and statutory construction of the "B" loan provision including recent amendments to the provision. The author argues rates authorized by § 3-508B are unjustifiable either on a risk or competitive theory basis and more importantly, from a public policy standpoint. Further, small loans could be governed more equitably by § 3-508A. Next, a strict interpretation of Article XIV § 2 of the Oklahoma Constitution renders the "B" loan provision unconstitutional because § 3-508B does not provide for a maximum rate of interest, and thereby authorizes usurious rates prohibited by the state constitution. Finally, should the courts fail to find the relevant statute unconstitutional, the legislature must consider further reforms to § 3-508B.

II. THE SMALL LOAN INDUSTRY AND ITS LOW-INCOME CUSTOMERS

Logically, there is a high correlation between low-income borrowers and borrowers qualifying as high credit risks. A study of small loan borrowers in Oklahoma reveals that over 70% of high credit risk borrowers earn under $20,000 per year and have less than twelfth grade education. 14 The poor 15 and less educated are representative of the population seeking the type of small loans governed by § 3-508B. 16 High-risk borrowers are not only those with negative credit history or a poor credit rating, but also those with no savings, little collateral, or unstable employment histories.17 Accordingly, these are all typical characteristics of the low-income population as well. The economic and social status of the low-income portion of the population render it more vulnerable to the predatory lending measures engaged in by small loan lenders and authorized by the "B" loan provision.

Due to the increasing lower income population and public administration deregulation, the small loan industry has considerably expanded both in profit margin

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14. See Willis J. Wheat, A Study On the Status of the Class 'B' Lending Industry in the State of Oklahoma, 50 CONSUMER FIN. L.Q. REP. 452, 454 (1996). For purposes of this comment, small loan borrowers are assumed to earn less than $20,000 per year and have less than a twelfth grade education.

15. The Department of Health and Humans Services ("DHS") lists the greater United States poverty level at $16,050.00 for a family of four. See Annual Update of the HHS Poverty Guidelines, 62 Fed. Reg. 10,856 (1997). This figure is based upon the net income of the family, and used by the federal government in determining when a family is eligible for federal assistance or services. See id. Extrapolating to Oklahoma, the DHS poverty guidelines accurately reflect Oklahoma's poor.

16. See CASKEY, supra note 4, at 14-15. Caskey's study targeted three geographic areas: Atlanta, GA, Oklahoma City, OK, and eastern Pennsylvania. For purposes of this comment, Caskey's conclusions are representative of Oklahoma's small loan borrowers.

17. See id.
and size during the last fifteen years. In Oklahoma there are approximately 710 small loan companies as compared to some 230 banks.

A. Why People Borrow at High Costs

There are several explanations why people borrow from the small loan industry despite the high cost. The most common theory is the risk factor. This theory simply asserts that the risk-screening procedures of traditional banks eliminate credit access for most lower income households by identifying them as high-risk borrowers who either have a poor credit report or no collateral to secure the loan. Denial from the traditional banking sector forces borrowers to look for alternative means of credit.

Additionally, there is evidence to support the claim that small loan borrowers do not fully understand the higher cost of alternative financial services, despite the fact that federal truth in lending laws require lenders to make certain disclosures. Borrowers may be confused by the many required disclosures, or simply incapable of interpreting the information. "They'll be told sign here, sign here, sign here... . . . It's embarrassing for people to realize they don't understand the terms of the transaction... . . . They'll tend to believe what's told to them orally by the sales person." Since the average borrowers in Oklahoma have a limited education, their lack of knowledge will likely impede effective use of the required disclosure information. If borrowers are forced to take out a loan out of sheer need and have no credit alternative, the cost of the loan will be of little concern. One small loan company employee says, "Few customer's blink over the rate... . They need a car to get to work to pay the bills, so they do whatever they have to do... . The higher the interest we charge, the more money the company makes and the faster we grow." Consumer advocates also argue that today's over-abundance of credit access may induce borrowers to believe they can afford the loan. "Borrowers often fail to

18. See id. at 1.
20. See Wheat, supra note 14, at 458.
21. See CASKEY, supra note 4, at 19.
23. See CASKEY, supra note 4, at 19; see also Emery v. American General Finance, 71 F.3d 1343 (7th Cir. 1996) (ruling that allegations in borrower's complaint were sufficient to state a claim under state civil Racketeering Influenced and Corrupt Organizations Act ("RICO") statute for alleged predatory lending practices).
24. See 15 U.S.C. §§ 1601-1667(f) (1994). The Federal Truth In Lending Act ("TILA") was enacted to allow consumers to better understand the actual cost of credit and to provide mandatory disclosures by lenders of the amount financed, the finance charge, and the APR calculated by the actuarial method or a method substantially similar. See 12 C.F.R. § 226 (1996).
27. See Wheat, supra note 14, at 454.
consider important credit characteristics such as term and rates, assuming that if they can obtain credit in the judgment of the lender, they must be able to afford the repayments.\textsuperscript{29}

There are also persuasive pragmatic arguments why borrowers use alternative financial sources to access credit. Small loan offices often strategically locate in low-income areas and offer longer hours of operation.\textsuperscript{30} These tactics allow borrowers greater physical access to the small loan offices than to more traditional lenders.\textsuperscript{31} Additionally, small loan lenders’ quick approval processes make their services more attractive to borrowers.\textsuperscript{32} Typically, those seeking a small loan need an immediate source of cash. Even if borrowers were able to qualify for a loan from a traditional lender, it is unlikely their time and mobility constraints would allow for the traditional lender’s lengthier approval process.

The most compelling reason for obtaining a small loan is that given by the borrowers themselves. In a survey conducted among households with non-deposit accounts, 53\% of borrowers said they did not use a deposit account because they did not have any savings.\textsuperscript{33} Borrowers apparently believe a deposit account is not necessary since their paycheck-to-paycheck budget will not allow for any savings.\textsuperscript{34} Additionally, these households cannot maintain the minimum balance that many banks require, nor can they afford the monthly charges on the account or possible returned check charges.\textsuperscript{35} Therefore, low-income borrowers are often forced to seek alternative means of obtaining loans.

Because of a combination of the foregoing theories, small loan lenders have taken advantage of, albeit legally, the majority of low-income borrowers in Oklahoma. Seemingly, the mantra of the small loan industry has become: “If a customer can be taken advantage of due to lack of education, sophistication, or any real alternative in the market place, carpe diem is the operating principle of . . . lenders.”\textsuperscript{36} That unscrupulous lenders would seek to charge extremely high interest is no surprise—that a statute would endorse such rates is shocking.

B. How Borrowers Spend Small Loans

While there is little documentation illustrating how small loan borrowers spend their loan money, the socioeconomic status of the borrowers allows a reasonable inference that a majority of the loans are used for necessities.\textsuperscript{37} To better envision

\begin{itemize}
  \item \textsuperscript{29} Morris, \textit{supra} note 25, at 169.
  \item \textsuperscript{30} See CASKEY, \textit{supra} note 4, at 4, 19.
  \item \textsuperscript{31} See \textit{id.} at 19.
  \item \textsuperscript{32} See \textit{id.}
  \item \textsuperscript{33} See \textit{id.} at 21.
  \item \textsuperscript{34} See \textit{id.}
  \item \textsuperscript{35} See \textit{id.}
  \item \textsuperscript{36} Keest, \textit{supra} note 22, at 365.
  \item \textsuperscript{37} See Paul Testo, \textit{Lawmakers Scrutinize Practices}, \textit{THE STATE}, Jan. 15, 1995, at G1 (reporting one woman’s situation when Medicaid could not cover her medical expenses she sought loans to pay for her medications); \textit{see also} John P. CASKEY, \textit{FRINGE BANKING CHECK CASHING OUTLETS, PAWNSHOPS, AND THE POOR} 78-83 (1994) (discussing why
\end{itemize}
what the monies are used for, consider this hypothetical. Bill and Eleanor Baines have two young children and the family resides in Tulsa, Oklahoma. Both Bill and Eleanor are wage earners with a combined gross income of $20,000.00 per year. (For a family of four, a $20,000.00 per year before tax income is realistically, a paycheck-to-paycheck existence, allowing for little or no savings. \textsuperscript{38}) Assume Bill and Eleanor have one car which serves as their sole mode of transportation to and from work. The car breaks down, and the cost of repair is $500.00. Because the family has no discretionary income, they cannot afford the repair. Without the car it will be difficult for either wage earner to get to work. If they do not go to work, they will lose their jobs. If they lose their jobs, they will not be able to provide food and shelter for themselves and their children. In order to survive, they must repair the car. Thus, the family is forced to take out a loan. The urgency of their situation and their lack of access to a traditional bank requires the family to seek out alternative financial services to meet their needs. A small loan lender offers them a loan at an effective 121% APR, as compared to a traditional bank’s maximum 30% APR.\textsuperscript{39} Due to the long-term consequences of not borrowing the money, Bill and Eleanor are not likely to refrain from borrowing solely on the basis of its high cost. For all intents and purposes, the loan is a necessary.

The family’s predicament is reminiscent of the old circus acts in which a performer would progressively spin poles with plates atop with the object of keeping all the poles and plates spinning at once, and thereby preventing the plates from breaking. The performer would begin by spinning the first pole and plate, and progress down the line spinning each successive pole and plate. Upon spinning the last pole, the performer rushes back to the beginning of the line and re-spins the first pole. If she fails to re-spin the first pole, the lack of momentum will cause the plate to fall from the pole and break. If the family does not fix the car (or re-spin the first pole), they will lose their jobs (the second plate breaks) which in turn will cause them to lack the funds to buy food and pay bills (the third and fourth plates break), pay for shelter (the fifth plate breaks), and so on and so forth. To keep the theoretical poles spinning, Bill and Eleanor must borrow from the small loan lender, no matter what the cost.

This hypothetical is just one explanation for the rapidly expanding alternative financial services market, but most importantly it demonstrates the vulnerability of

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typical low-income borrowers. At the very least, the increasing number of
low-income households with no access to credit serves to increase market demand.\(^40\) However, Oklahoma in particular has seen a relatively marked expansion\(^41\) due not only to demand, but also to the state’s lender-friendly consumer credit laws.\(^42\) Whether borrowers are using the loan for necessities is arguably irrelevant.\(^43\) The important fact is that the majority of borrowers classify as poor.\(^44\) Consumer credit
laws that tip the scales in favor of lenders further disadvantage an already suffering
class. Ironically, the Oklahoma legislature’s endorsement of the “B” loan practices
are at the expense of the class needing their protection the most.

### III. The Genus of § 3-508B

#### A. Adoption of Uniform Consumer Credit Code

The Uniform Consumer Credit Code (“UCCC”) was designed “‘to protect consumers against unfair practices by some suppliers of consumer credit, having due regard for the interest of legitimate and scrupulous creditors,’ and instructs that the
Act ‘be liberally construed and applied to promote its underlying purposes and
policies.’”\(^45\) The UCCC was prompted by a patchwork of small loan laws throughout
the United States, and the many different and often inconspicuous methods lenders
used to inform the consumer of the cost of credit.\(^46\) The UCCC sought to institute a
uniform system of laws for governing small loans which would better protect the
consumer without eliminating competition in the market.\(^47\) Indeed it has successfully
done so in every state where implemented—save Oklahoma.\(^48\)

Prior to Oklahoma’s adoption of the UCCC in 1969,\(^49\) the small loan industry

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40. See Timmons, supra note 3.  
41. See Robertson, Consumers, supra note 2, at A1.  
42. See id.; see also Marie Price, Senators Ponder Deregulating Short Term Loan Rates, The Journal Record, Apr. 29, 1997; World Acceptance Corp., Prospectus, May 25, 1993, at 11 (discussing the company’s plan to further
target the Oklahoma market due to the favorable lender laws allowing for higher interest rates, fees, and charges).  
43. See Tosto, supra note 37 and accompanying text.  
44. See Annual Update of HHS Poverty Guidelines, supra note 38.  
46. See id. at 53.  
47. See U.C.C.C §§ 1.101-9.103 (1968) (Prefatory Note to 1968 Revised Final Draft) (West 1997). In addition to
protecting consumer rights, the UCCC sought to impose a uniform system for consumer credit, overcome outdated
usury laws, and promote market competition. See id.  
48. See OKLA. STAT. ANN. tit. 14A, §§ 1-101 to 1-110 (West 1969). The UCCC has been enacted in eight
other states. See COL. REV. STAT. ANN. § 3-508 (West 1997); IOWA CODE ANN. § 535.2 (West 1997); KAN. STAT. ANN. § 16a-2-401 (Furse 1995); ME. REV. STAT. ANN. tit. 9-A, § 2-401 (West 1997); WIS. STAT. ANN. § 138.09 (West 1997); WYO. STAT. ANN. § 40-14-310 (Michie 1997); UTAH CODE ANN. § 70C-2-101(1998). The majority of
Oklahoma states adopting some form of UCCC section 3.508 have interest rates not exceeding 36%. See id. In the one
UCCC state not adopting some form of section 3.508, the small loan statute is
was sparsely regulated.\footnote{Although the first Oklahoma Constitution provided for a 10% maximum interest rate\footnote{intending to compel small loan lenders to charge low rates, Oklahoma common law provided for a number of exceptions allowing a greater yield than 10% maximum interest.} in 1963, the Oklahoma Supreme Court decided Hollamon v. First State Bank of Stroud\footnote{indicating that courts would no longer liberally apply the exceptions to the 10% maximum rate of interest.} in Hollamon, the court established that for the purposes of determining usury, “the ten percent per annum interest maximum was to be computed on the declining balance of installment obligations.”} The consumer credit industry believed the Hollamon decision would jeopardize business by causing lenders to deny credit to high-risk borrowers at the lower rates the decision required.\footnote{In addition to the Hollamon decision, the consumer credit industry feared the impending Truth in Lending Act (“TILA”) of 1968\footnote{because the proposed federal legislation required lenders to disclose rates in terms that would reveal their violation of the maximum 10% per annum interest rates.} because the proposed Federal Consumer Credit Protection Act\footnote{would exempt states from TILA regulations that implemented substantially the same requirements as the federal law.} Since the UCCC met the TILA requirements, adoption of the Code seemed a particularly suitable remedy for Oklahoma.\footnote{Still, the 10% maximum rate per}

\footnote{See Baggett & Miller, supra note 50, at 7. Declining balance allows for the more traditional interest-bearing calculation. See NCLC, supra note 45, at 123.

With an “interest-bearing” note, the lender sets up the loan on a “declining balances” basis. Every time a periodic payment is made, a periodic interest rate (the annual rate divided by the number of periods) is applied to the outstanding balance. The interest that is produced (plus late charges, if any) is subtracted from the payment; the remainder of the payment is applied to the outstanding balance, thereby reducing it. Each time a payment is made, the same process is repeated, until the outstanding balance is reduced to zero.

\textit{Id.}}

\footnote{\textit{Id.}}

\footnote{15 U.S.C. §§ 1601-1667(f) (1994). By enacting the UCCC, Oklahoma effectively complies with the TILA requirements. See OKLA. STAT. ANN. tit. 14A, § 3-302 (West 1996).}

\footnote{Id.}}
annum did not coincide with the UCCC interest rate provisions. To allow for adoption of the UCCC, the Oklahoma legislature proposed a referendum to amend the state constitution. By popular vote, the Oklahoma Constitution was amended to read:

The Legislature shall have the 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 percent (10%) per annum shall be deemed usurious; provided, further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six percent (6%) per annum.

The constitutional amendment allowed the Oklahoma legislature to adopt the UCCC in 1969 and thereby qualify for the FCCPA exemption. In so doing, the legislature also added and amended several provisions of the UCCC to form the Oklahoma Consumer Credit Code ("OCCC").

A particularly interesting addition which significantly departed from the Uniform Consumer Credit Code was § 3-508B governing small supervised loans. While § 3-508A of the OCCC was largely based upon the corresponding provision in the UCCC and provides for a maximum rate of interest of 30% on supervised loans, § 3-508B was modeled after a unique Texas (a non-UCCC state) statute governing small loans authorizing charges that equate to interest rates as high as 300%, but failing to specify a maximum rate of interest for this type of loan. There is no corresponding provision in the UCCC to the Texas statute that ultimately became Oklahoma’s small loan statute. The Uniform Code proposed that state small loan statutes all be governed by what became § 3-508A of the OCCC. Importantly, adopting § 3-508B was not proposed until after the 1968 constitutional amendment was in place.

Thus, at the time the legislature drafted the amendment to the Okla. Const. Article XIV, § 2 and at the time the people of Oklahoma overwhelmingly voted to amend

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64. See Baggett & Miller, supra note 50, at 7.
65. See id.
69. See U.C.C.C. § 3.508 (West 1997).
70. See TEX. REV. CIV. CODE ANN. § 5069-3.16 (West 1996).
71. Robertson, Consumers, supra note 2, at A1. Technically, it is impossible to determine how high the rates could go since nothing in the statute prohibits repeated refinancing which significantly increases the APR. See OKLA. STAT. ANN. tit. 14A, § 3-508B (West Supp. 1999); see also Plaintiffs' Combined Response, Aug. 3, 1998, supra note 13, at 5-10 (detailing one plaintiff’s repeated loan refiannancings).
74. See id., § 3.508 (setting the maximum interest rate at 36%); see also OKLA. STAT. ANN. tit. 14A, § 3-508A (West 1996) (setting the maximum interest rate at 30%).
that section of the Oklahoma Constitution, the provisions of the Oklahoma UCCC Section 3-508B[sic]—which are found nowhere in the model Code—were nothing more than a twinkle in the eye of Oklahoma’s small loan industry.76

In adopting § 3-508B, the Oklahoma legislature effectively skirted the UCCC’s attempt to protect borrowers’ rights and provide uniformity in state loan laws.77 Even worse, it disregarded the trusting will of its constituents. The Oklahoma legislature was apparently more interested in promoting the interest of the lender rather than protecting the vulnerable borrower.

B. The Oklahoma Consumer Credit Code

The OCCC defines “consumer loans” as those loans which are for purposes of personal, family, or household uses, and the debt is either payable in installments or a loan finance charge is made.78 “Supervised loans” are those consumer loans in which the interest rate exceeds 10% per year.79 In order to make supervised loans, a lender must either be a supervised financial organization80 or licensed by the Administrator of the Oklahoma Department of Consumer Credit.81 “B” loan lenders are authorized to make supervised loans by license82 since they are not deposit institutions.83 Licensed lenders are subject to oversight by the Administrator of the Oklahoma Consumer Credit Department who has the power to suspend and revoke licenses if the lender is not in compliance with the applicable OCCC provisions.84 In order to discover other abuses, an agent of the Administrator typically inspects “B” loan lenders annually.85 Creditors may also file complaints with the Oklahoma Department of Consumer Credit.

The Oklahoma legislature amended the UCCC provision for supervised loans by dividing it into two distinct sections. The “A” loan provision is comparable to section 3.508 of the UCCC,86 and the “B” loan provision mirrors Texas statute § 3.16.87 Because § 3-508B was modeled after Texas law and not the Uniform Code, terms such as “acquisition charge” and “installment account handling charges” are not defined in the relevant chapter.88 The discrepancy in terms has caused confusion

76. Id.
79. See id.
80. See id. § 1-301(17)(a)-(b) (defining a supervised financial organization as “organized, chartered, or holding an authorization certificate under the laws of this state or of the United States which authorizes the person to make loans and to receive deposits, including a savings, share, certificate, or deposit account.”).
81. See id. §§ 3-503, 3-504.
82. See id. § 3-501(2).
85. See Wheat, supra note 14, at 454.
86. See U.C.C.C. § 3.508 (West 1997).
87. See TEX. REV. CIV. CODE ANN. § 5069-3.16 (West 1997).
and strife among lenders, the administrative oversight agency, and state judges. Despite the inequity and confusion surrounding the “B” loan provision, the Oklahoma legislature has repeatedly refused to repeal § 3-508B and thereby comply with the intention of the UCCC by allowing § 3-508A to regulate small loans.

C. The Statutory Construction of § 3-508B

Section 3-508B authorizes a loan acquisition charge and an installment account handling fee in lieu of a loan finance charge. While the APR can be easily calculated for each specific “B” loan, there is no maximum rate of interest for this type of loan. By contrast § 3-508A authorizes loan finance charges between 15% and 30% depending on the amount of the loan. However, it is clear that the legislature set the maximum rate of interest for “A” loans at 30%.

Currently “B” loans are defined as loans which are $660 or less, and in addition to acquisition charges (equaling 1/10 of the principal), also provides for monthly installment charges ranging from $9.90 to $16.50 depending on the amount of the loan. The maximum amount allowable under § 3-508B is periodically adjusted for inflation according to the Consumer Price Index (“CPI”). Instead of the loan finance charges specified in § 3-508A, the OCCC allows “B” loan charges in the following amounts:

(1) On loans having a principal of One Hundred Dollars ($100.00) or less, a supervised lender may charge in lieu of the loan finance charges specified in Section 3-508A, the following amounts:

(a) on any amount up to and including Twenty-nine Dollars and ninety-nine cents ($29.99), a charge may be added at the ratio of One Dollar ($1.00) for each Five Dollars ($5.00) of principal;

(b) on any loan in an amount in excess of Twenty-nine Dollars and ninety-nine cents ($29.99) up to and including the amount of Thirty-five Dollars ($35.00), there shall be allowed an acquisition charge for making the loan not in excess of 1/10 of the amount of the principal. In addition thereto, an installment account handling charge shall be

89. See Memorandum from Charles E. Jones, Administrator, Oklahoma Department of Consumer Credit to Supervised Lenders (Feb. 21, 1997) (Preface to 96-84 Op. Att’y Gen.) (Oklahoma 1997); see also infra Part IV.
90. See H.R. 2467, 145th Leg., 2d Session (Okla. 1995) (proposing the repeal of § 3-508B).
92. For a further discussion of § 3-508B’s failure to set a maximum rate of interest, see infra Part VIII.
94. See id. § 3-508A(2)(a)(i) (“The loan finance charge, calculated according to the actuarial method may not exceed the equivalent of the greater of either of the following: (a) the total of (i) thirty percent (30%) per year on that part of the unpaid balances of the principal which is three hundred dollars ($300.00) or less”; twenty-one percent (21%) for balances between $300 and $1000; and fifteen percent (15%) for balances greater than $1,000.).
allowed not to exceed Three Dollars ($3.00) per month; 

(c) on any loan of an amount in excess of Thirty-five Dollars ($35.00) but not more than Seventy Dollars ($70.00), there shall be allowed an acquisition charge for making the loan not in excess of 1/10 of the amount of the principal. In addition thereto, an installment account handling charge shall be allowed not to exceed Three Dollars and fifty cents ($3.50) per month; 

(d) on any loan of an amount in excess of Seventy Dollars ($70.00) but not in excess of One Hundred Dollars ($100.00), there shall be allowed an acquisition charge for making the loan not in excess of 1/10 of the amount of the principal. In addition thereto, an installment account handling charge shall be allowed not to exceed Four Dollars ($4.00) per month; 

(e) on any loan in an amount in excess of One Hundred Dollars ($100.00) up to and including the amount of One Hundred Fifty Dollars ($150.00), there shall be allowed an acquisition charge for making the loan not in excess of 1/10 of the amount of the principal. In addition thereto, an installment account handling charge shall be allowed not to exceed Four Dollars and fifty cents ($4.50) per month; 

(f) on any loan of an amount in excess of One Hundred Fifty Dollars ($150.00) but not more than Two Hundred Dollars ($200.00), there shall be allowed an acquisition charge for making the loan not in excess of 1/10 of the amount of the principal. In addition thereto, an installment account handling charge shall be allowed not to exceed Five Dollars ($5.00) per month . . . . 97

The maximum term of any loan under this finance schedule is one month for each $10 of the principal up to ten months, or one month for each $20 of the principal up to ten months on loans of $100 or more. 98 The minimum term of any loan under this finance schedule for loans more than $29.99 is no less than sixty days, to be payable in equal installments in not less than thirty days from the date the loan is made. 99 Importantly, the finance charge authorized is deemed earned after the first sixty days of the loan term. 100 Under either the minimum or maximum term, borrowers are crippled by exorbitant fees and charges permitted by § 3-508B.

To illustrate, if the Baines borrow $500.00 on January 1, for the minimum term,

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97. Id. § 3-508B(1)(a)-(f) (emphasis added).
98. See id. § 3-508B(2).
99. See id. § 3-508B(3).
100. See id. § 3-508B(6). This recent amendment to the “B” loan provision prevents the lender from charging additional acquisition fees in the first sixty days. See id.
they pay $291.50 on February 1 and again on March 1, for a total payback of $583.00. The Baines’ annual percentage rate is 132%. Given the payday-to-payday lifestyle of most small loan borrowers it is hard to imagine that even the most desperate borrower would agree to these terms. However, consumer advocates believe that lenders will push this short-term loan plan because of its high rate of return. If the borrower has no feasible alternative nor the requisite knowledge to understand the loan, she may easily be manipulated into this exorbitant rate. The Baines’ choice is based on their interest in solving their immediate financial problem. The long-term problem—although still relatively short—of making the large payments does not concern them at the time they make the loan. Nothing in Oklahoma law prevents lenders from seizing on borrowers’ inability to analyze the overall cost of the loan. Critics refer to this scheme as “sucker-pricing.”

Under the maximum term, if the Baines borrow $500.00 on January 1, they pay $71.50 on the first of every month for ten months, for a total payback of $715.00. The Baines’ APR under the maximum term is 84%. While the total payback is higher for the Baines, they may be more likely to prefer this plan since they may only be able to accommodate the smaller monthly payments, if any payments at all. Small lenders are quite amenable to the longer term plan as well, since it offers them multiple chances to refinance the loan and drive up the APR, and of course, a higher profit margin. Under either term, the lender clearly has the advantage.

D. Why Not § 3-508A?

A key point in understanding the injustice of § 3-508B is recognizing that § 3-508A could govern the loans presently extended under § 3-508B. Indeed, the UCCC suggested a provision similar to § 3-508A for governing small loans and to that end, consumer advocates have attempted to repeal § 3-508B. Repealing the “B” loan provision would force finance companies to comply with § 3-508A which mandates rates no higher than 30%. This would be a relatively easy solution to eliminate the extremely high loan finance charges and bring Oklahoma law in line

101. These figures include a $50.00 acquisition fee and two $16.50 monthly installment account handling charges plus the $500.00 principal, for total of $583.00, or two equal payments of $291.50.
102. This figure was calculated by the actuarial method, using an actuarial calculation program.
103. See CASKEY, supra note 4, at 42.
104. See NCLC, supra note 45, at 56.
106. See NCLC, supra note 45, at 56.
107. These figures include a $50.00 acquisition fee and ten $16.50 monthly installment account handling charges plus the $500.00 principal, for total of $715.00 with ten equal payments of $71.50.
108. This figure was calculated by the actuarial method, using an actuarial calculating program.
109. Although the amended version of § 3-508B effects a sixty-day waiting period before lenders may refinance the loan, it is not foreseeable refinancing practices will decrease any substantive amount. Refinancing is how small loan companies make the majority of their profit. See Robertson, Consumers, supra note 2, at A1; infra Part IV.
110. See OKLA. ADMIN. CODE tit. 20, § 20-18 (1997) (setting $3,300.00 as the maximum amount for “A” loans).
with the majority of other UCCC states’ small lender laws. While a repeal of § 3-508B would decrease the industry’s considerable profit margin, small loan companies operate profitably in many other states with substantially lower rates. Nevertheless, the small loan industry has effectively combated this solution by persuading the Oklahoma legislature to blatantly disregard and exploit their most vulnerable constituents.

The fees authorized by § 3-508B make it difficult for even a relatively sophisticated consumer to realize the actual cost of credit. In light of the fact that small loans are available under the “A” loan provision at a 30% interest rate, it is clear that the “B” loan provision is strictly for purposes of enabling lenders to disguise the fees and take advantage of customers. If the Baines escape refinancing the loan before paying it off, they incur well over the “A” loan 30% maximum interest rate under either term. In the nine states enacting some form of the UCCC, only two allow for interest rates over 36%. Most other UCCC states provide interest ceilings closer to a 30% maximum rate of interest in § 3-508A. Oklahoma is the only state that has corrupted one of the central purposes of implementing the UCCC—protecting the consumer.

E. Obtaining a “B” Loan

“B” loans are relatively easy to obtain. Lenders require that the borrower be at least eighteen years of age, have verifiable current employment for at least one year (in the absence of year-long employment, any current employment and a co-signer


115. See Michael Hudson, Casting In On Poverty, THE NATION, May 10, 1996, at 13 (stating that national consumer-finance companies typically “earn double or triple the return on assets that banks do.”); see also GREENVILLE NEWS, Apr. 25, 1998, at A6 (citing World Acceptance Corporation’s operation in five other states and its 29% net income increase from 1996 to 1997); Timmons, supra note 3 (citing World Acceptance Corporation’s 22.5% net income increase from 1995 to 1996).

116. See David Averill, Editorial, Oklahoma’s Sorry Small-Loan Law Unconscionable, TULSA WORLD, May 21, 1995 (“That’s when the loan operators went on the offensive. Loan compani[es]... who make their livings dunning... late payers for money turned their finely honed telephone skills on the Legislature. No issue, not even the concealed weapons bill, generated more phone calls...”).

117. See Robertson, Consumers, supra note 2, at A1.

118. Refinancing is typical on small loans. In fact the small loan industry reports that 89% of their customers refinance. See American Financial Services Association Education Foundation, Members in the Spotlight: World Acceptance Corporation (visited Oct. 12, 1997) <http://www.americanfinsvcs.com/credit/sep96/15.html>. The industry focuses on “flipping” or refinancing the loan. See Robertson, Consumers, supra note 1, at A1. Flipping is one of the best ways for lenders to make money. See id.


will suffice), a verifiable place of residence, and three forms of collateral. \(^\text{122}\) To approve the loan, the lender does not perform a credit check but simply verifies the loan application information. \(^\text{123}\) "In assessing the risk of loan applicants, . . . small-loan companies generally do not obtain a loan applicant’s credit report." \(^\text{124}\) After making a few calls to verify employment and residence, \(^\text{125}\) the "B" lender will typically loan the borrower the lower range of the principal category governing the fee schedule. \(^\text{126}\) Because the lender can charge a monthly account handling fee of $16.50 for loans between $495.00 and $660.00, \(^\text{127}\) the rate of return is higher for a $495.00 loan than a $660.00 loan. \(^\text{128}\) "B" loan laws then, create an incentive for lenders to make loans at the lower range of the principal category. \(^\text{129}\)

An indicator of how easy it is to qualify for a loan is the plethora of collateral lenders accept. The following articles are acceptable collateral: automobiles with clear title (for loans over $300.00), \(^\text{130}\) televisions, video cameras, video tapes, computers, software, adding machines, musical equipment, exercise equipment, electronic games (i.e., Sega or Nintendo), fishing and camping equipment, guns, power tools, lawn mowers, VCRs, sports equipment, bikes, furniture, and complete luggage sets. \(^\text{131}\) Household appliances are not acceptable. \(^\text{132}\) In other words, collateral for the small lender is everything but the kitchen sink.

**F. Lender Management of the "B" Loan**

Small loan lenders incur very little risk even when lending to the highest risk borrower. \(^\text{133}\) This is largely due to the fact that borrowers tend to re-pay their loans in order to preserve their sole source of credit. \(^\text{134}\) One of the nation’s largest small loan lenders, World Acceptance Corporation, "finds that most customers tend to pay up, apparently to protect their only source of credit." \(^\text{135}\) Lending companies also maintain close communication with their customers often contacting them as soon as a payment is missed. \(^\text{136}\) "Local office staff promptly contact delinquent customers

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\(^\text{122}\) See Interview with Consumer Credit Company employee, in Tulsa, Oklahoma (Oct. 16, 1997) (notes on file with author).

\(^\text{123}\) See id.

\(^\text{124}\) CASKEY, supra note 4, at 32.

\(^\text{125}\) See Interview, supra note 122.

\(^\text{126}\) See CASKEY, supra note 4, at 42.


\(^\text{128}\) See CASKEY, supra note 4, at 42. In studying Oklahoma’s small loan law Caskey’s study found that when some borrowers "requested a loan greater than the lower bound in the relevant loan size category, lenders refused to make the loan. However, the lenders offered to make a cash advance equal to the lower bound of that category or the one above it." Id.

\(^\text{129}\) See id.


\(^\text{131}\) See Interview, supra note 122.

\(^\text{132}\) See id.

\(^\text{133}\) See Kenneth Cline, Mining the Low End, AMERICAN BANKER, May 16, 1994, at 4.

\(^\text{134}\) See id.

\(^\text{135}\) Id. (emphasis added).

\(^\text{136}\) See World Acceptance Corp., supra note 42, at 23.
following any payment due date and thereafter remain in close contact with such
customers through placing phone calls, letters, or personal visits to the customer’s
residence or place of employment until payment is received. 137 (A common method
of obtaining payment is actually refinancing the loan in order to advance the borrower
cash to make a loan payment.) 138 In the rare case of default, the lender may enforce
her security interest on the collateral or garnish the borrower’s wages. 139 Tellingly,
in over thirty years of business, World Acceptance Corporation has yet to report a
loss. 140 This fact is indicative of borrowers’ tendency to repay and lenders’
successful collection efforts.

IV. REFINANCING UNDER § 3-508B

The plight of small loan borrowers increases when considering the frequency
of refinancing. The industry often refers to refinancing as “rolling” or “flipping” the
loan. 141 World Acceptance Corporation reported that it refinanced an astounding
89% of its loans in 1996. 142 Thus, small loan lenders’ major source of profit comes
from keeping borrowers in perpetual debt. 143 As one former Oklahoma lender said,
“You keep rolling them and rolling them till you bleed them dry.” 144 “If we never
renewed the loan, we’d make very little money.” 145

The profitability of refinancing is primarily due to two factors, non-refundable
acquisition fees and the Rule of 78. The original acquisition fee is non-refundable to
the consumer after sixty days. 146 The legality of the second acquisition fee and the
rates at which “B” loans are refinanced was in dispute until the recent reforms to §
3-508B. 147 Section 3-205 of the OCCC requires that the refinancing interest rate not
exceed the rate of the original loan and accordingly refers supervised lenders to § 3-
508. 148 Since there is no § 3-508 in the OCCC (only § 3-508A and § 3-508B), a
1969 West Publishing Company footnote indicated the “B” loans were to be
refinanced under the § 3-508A 30% maximum rate. 149 While the legislature adopted
the footnote in recodifying the statutes in 1971, 1981, and 1991 and Oklahoma
Attorney General Drew Edmonson issued an opinion interpreting the statute as indeed
requiring the “B” loan lenders to refinance at the “A” loan 30% maximum rate. 150

137. Id.
138. See NCLC, supra note 45, at 190.
140. See Cline, supra note 133, at 4; GREENVILLE NEWS, supra note 115, at A6.
141. See Robertson, Consumers, supra note 2, at A1.
142. See American Financial Services Association Education Foundation, supra note 118.
143. See id.
144. Robertson, Consumers, supra note 2, at A1.
145. Tosto, supra note 37, at G5 (quoting Charles Walters, Chief Executive Officer, World Acceptance Corp.).
147. See id.
148. See id., § 3-205(1).
150. See id. at 6.
regulatory officials and lenders ignored the footnote for nearly thirty years.\textsuperscript{151} Agreeing with lenders, an Oklahoma district court judge found the codified footnote inconsequential and held lenders may continue to assess charges and refinance loans causing rates well exceeding § 3-508A's 30% maximum rate of interest.\textsuperscript{152} Also siding with lenders, the 1997 legislature clarified § 3-210 by specifying the language to state that "B" loans are to be refinanced under the provisions of § 3-508B.\textsuperscript{153} Refinancing "B" loans at the "A" loan rate would have eliminated much of the inequity that accompanies § 3-508B loans since lenders would no longer have been able to charge the acquisition charges or installment account handling fees upon refinancing.\textsuperscript{154}

Refinancing is also profitable to lenders because Oklahoma law uses the Rule of 78 for rebate calculation. The Rule of 78 rebates borrowers less than actuarially due.\textsuperscript{155} As required by law, when an existing consumer loan is refinanced, the lender rebates to the debtor the unearned portion of the loan finance charge.\textsuperscript{156} Rebates are typically calculated either by the actuarial method or the Rule of 78.\textsuperscript{157} Although the most accurate method of rebate calculation is the actuarial method, it is the most difficult mathematically.\textsuperscript{158} However, the increasing use of computers and modern technology allows for quick and easy actuarial calculation.\textsuperscript{159} While the Rule of 78 is a relatively simple calculation, the Rule is far more advantageous to lenders than the alternative methods because there will always be a smaller rebate for consumers when the Rule of 78 is used.\textsuperscript{160}

The Rule of 78 calculates the fraction of the finance charge earned at any point in the loan.\textsuperscript{161} Rather than assuming the amount of interest earned during each interval of the loan is equal, the Rule of 78 places greater weight on the earliest intervals of the loan term, and attributes progressively less interest to later months.\textsuperscript{162} As a result, when a loan is repaid through refinancing, or any other method, the Rule of 78 credits a lender with more earned interest than is actuarially due.\textsuperscript{163}

To fully understand the detrimental effects of these financial rules consider the impact on the hypothetical Baines family. If the Baines refinance their loan under the maximum term scenario after five months, they incur an additional acquisition charge which is one-tenth of the new principal and lose the non-refundable acquisition charge

\textsuperscript{151} See Price, \textit{supra} note 42, at 11.
\textsuperscript{152} See id.
\textsuperscript{154} See 96-84 Op. Att'y Gen. 4 (1997); \textit{see also infra} Part IX and accompanying text regarding whether the courts will in fact find these charges can be calculated for interest purposes.
\textsuperscript{156} See id. § 3-210(1).
\textsuperscript{157} See \textit{NCLC, supra} note 45, at 165.
\textsuperscript{158} See id. at 100-01 ("Actuarial interest is calculated by applying a periodic interest rate to the outstanding balance of the unpaid principal every repayment period for the term of the loan. The reduction over time of the outstanding balance, to produce 'declining balances,' is known as 'amortization.'").
\textsuperscript{159} See id. at 101.
\textsuperscript{160} See id. at 167.
\textsuperscript{161} See \textit{NCLC, supra} note 45, at 170 for a detailed mathematic discussion of the Rule of 78.
\textsuperscript{162} See id.
\textsuperscript{163} See id.
of $50.00 on the former loan. The new principal is calculated by adding the unpaid portion of the balance and the new money advanced. Hence if the Baines refinance after the fifth month for the same $500.00, they pay an additional $50.00 acquisition fee with a rebate calculated by the Rule of 78 equaling $9.00. Thus the balance due with the rebate would be $348.50. (If the rebate were calculated by the actuarial method the balance due would be $336.14.) At the time of refinance the Baines will receive not $500.00, but $151.50 since the $348.50 balance due must be subtracted from the new $500.00 loan. The total amount now owed by the Baines is $916.50, due in ten equal payments of $91.65. The new APR is 120%, which is a 36% increase from the original APR. If the Baines refinance under the same terms, yet again, their APR will be close to 200%.

Consumer advocates claim that the Rule of 78 is an anachronism that is no longer necessary due to increasingly advanced technology. True to its apparently evasive purposes, the OCCC specifically authorizes the Rule of 78 to calculate the rebate formula for “B” loans. Not surprisingly, many states have outlawed the Rule of 78 by statute. Section 3-508B’s authorization of repeated acquisition charges and rebates calculated by the Rule of 78 make the refinancing terms some of the most harmful provisions of the “B” loan law.

Adding insult to injury, the lack of knowledge of average borrowers often causes them to misunderstand the concept of refinancing and more detrimentally, borrowers fail to realize their greatly increased cost. Because refinancing is so advantageous to lenders, rarely will lenders inform borrowers that they will not receive the full amount of the refinanced loan. Only after the borrowers agree to refinance will they find out that the actual cash advanced is much less than what they anticipated, and only after the amount and number of the borrowers’ payments increase, will they realize their extended debt. Extended and misunderstood debt may ultimately lead to yet additional refinancings.

Many people in need of quick cash are easy targets, said Elsie Ellsworth of Tulsa, who . . . discovered the plight of her sister who had [refinanced] while caring for a husband who had been undergoing dialysis for kidney failure.

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164. See id.
165. See id.
166. According to the Rule of 78 calculation method, the number of scheduled installments remaining after the date of refinance (5) plus 1 is divided by the number of originally scheduled installments (10) plus 1, and then multiplied by the finance charge ($16.50). This formula equals the $9.00 rebate owed to the borrower. If the rebate were calculated by the actuarial method, the borrower would receive a $13.86 rebate.
167. If the Baines made five monthly payments of $71.50 for a total of $357.50, the remaining balance of the original loan is $357.50. To obtain the balance due at the time of refinance, the rebate ($9.00) is subtracted from the remaining balance of the original loan ($357.50). Thus the balance due with the rebate is $348.50.
168. See NCLC, supra note 45, at 100-01.
169. The total amount of the loan ($916.50) is calculated by adding the new money advanced ($151.50) to the principal with the fees ($715.00) and the additional $50 non-refundable acquisition charge.
170. See id. at 167.
172. See NCLC, supra note 45, at 167-68.
When Ellsworth . . . searched through the mountain of receipts, [she] found that [her] sister had loans . . . that had been refinanced five, six, and seven times, with new fees and higher rates every time.\textsuperscript{173}

Not surprisingly, small loan lenders focus on refinancing the loan. "We want them to max out . . . We want customers to stay in debt."\textsuperscript{174} In addition to offering to refinance the loan to pay on the original loan, small lenders use other tactics to encourage refinancing. Often small loan lenders award bonuses to salespersons who encourage borrowers to refinance their loans.\textsuperscript{175} Companies also keep in close contact with their customers in order to offer continuous refinancing, frequently mailing notices to borrowers informing them that extra cash is "available."\textsuperscript{176} Such predatory practices persuade large numbers of borrowers to refinance.\textsuperscript{177} Refinancing the loan extends the term of the loan, while also increasing the already high APR. Specifically because there is no maximum rate of interest, refinancing is one of the most dangerous aspects of small loan borrowing, and the most profitable for lenders. If the Oklahoma legislature continues to resist the repeal of § 3-508B, and if the state courts find the statute constitutional, the legislature should at the very least prohibit the use of the Rule of 78 for rebate calculation and eliminate repeated acquisition charges.

V. RECENT REFORMS TO § 3-508B

The Oklahoma legislature recently amended the "B" loan provision recognizing a few of its unfair provisions.\textsuperscript{178} The major reforms include amended language in the

\textsuperscript{173} See Robertson, Consumers, supra note 2, at A1 (emphasis added).


\textsuperscript{175} See Robertson, Consumers, supra note 2, at A1.

\textsuperscript{176} See Caskey, supra note 4, at 34. In Emery v. American General Finance, Inc., 71 F.3d 1343 (7th Cir. 1996), the court held that allegations in the borrower's complaint were sufficient to state a civil RICO claim against lender. See id. at 1395. Emery filed suit against American General Finance under RICO based on the lender's predicate acts of mail fraud in connection with loans. See id. Chief Justice Posner wrote:

ASSUME . . . that these employees, desiring to exploit the financial naivete of working-class borrowers, realizing that these borrowers do not read Truth in Lending Act disclosure forms intelligently, and hoping to trick them into overpaying disastrously for credit, drafted a letter that they believed would be effective in concealing the costs of refinancing. Read against this background of nefarious purpose, the letter is seen to be replete with falsehoods and half truths.

"Dear Verna . . . You're a good customer. To thank you for your business, I've set aside $750.00* in your name." She is no "Dear Verna" to them; she has not been selected to receive the letter because she is a good customer, but because she belongs to a class of probably gullible customers for credit; the purpose of offering her more money is not to thank her for her business but to rip her off . . . .

\textit{Id.} at 1347.

\textsuperscript{177} See American Financial Services Association Education Foundation, supra note 118.

prohibition of loan splitting,\textsuperscript{179} enactment of the “brick wall” provision,\textsuperscript{180} prohibition of bi-weekly and semi-weekly payments,\textsuperscript{181} and a prohibition of a second acquisition charge for the first sixty days of the loan term.\textsuperscript{182}

A. Loan Splitting and the “Brick Wall” Provision

A loan split can occur in two ways. First the lender may attempt to split a loan amount in order to actually make two loans which effects a higher rate of return for the lender. This practice was specifically prohibited by § 3-509 of the OCCC.\textsuperscript{183} The amendments to this section add that a lender may also not loan split by acting in concert with other lenders.\textsuperscript{184} This provision attempts to prohibit lenders from loaning or refinancing only a portion of the amount requested by the borrower and sending the borrower to another lender (owned by the same parent company) to borrow or refinance the remaining amount. This type of loan splitting obviously increases the rate of return for lenders. Prohibiting lenders to act in concert, only theoretically eliminates loan splitting since many small lenders are owned by the same parent company and often housed nearby one another.

The “brick wall” provision and the amended language in the loan splitting provision are intended to work in conjunction to prohibit “in concert” loan splitting. Prior to the “brick wall” provision, many small lenders shared offices. Thus if the lender refused to lend the borrower the amount desired, possibly intending to split the loan,\textsuperscript{185} the borrower could simply walk down the counter from Office A to Office B and borrow the additional amount. Regardless of the lender’s intention, this seems an obvious solution for the borrower without any suggestion by the lender.\textsuperscript{186} The “brick wall” provision mandates that two offices now be separated not by a “brick wall” technically, but by at least something requiring the borrower to walk out of one office to enter the next.\textsuperscript{187} Small loan companies have effectively skirted the new law

\begin{itemize}
\item \textsuperscript{179} See id. § 3-509.
\item \textsuperscript{180} See id. § 3-504(9)(a).
\item \textsuperscript{181} See id. § 3-508B(3).
\item \textsuperscript{182} See id. § 3-508B(6).
\item \textsuperscript{183} See id. § 3-509.
\item \textsuperscript{185} The lender may loan the lesser amount of the principal category to gain a higher rate of return. See supra notes 128-29 and text accompanying notes.
\item \textsuperscript{186} The lender would technically be in compliance with § 3-509. See Okla. Stat. Ann. tit. 14A, § 3-509 (West Supp. 1999).
\item \textsuperscript{187} See Okla. Stat. Ann. tit. 14A, § 3-504(9)(a)(i) - (iv) (West Supp. 1999). The statute states in pertinent part: [T]he term office shall mean a location occupied by a licensee with the following characteristics:
  \begin{itemize}
  \item (i) a manager for the office who is not common to any other supervised lender’s offices,
  \item (ii) a street and mailing address separate from any other supervised lender’s office,
  \item (iii) an entrance through which the public may access only one supervised lender’s office, and
  \item (iv) separation from any other supervised lender’s office by walls or otherwise and through which neither employees nor the public may pass . . . .
  \end{itemize}
  \textit{Id.}
\end{itemize}
by housing lending offices next door to each other or in the same strip shopping center. In effect, this provision means that the borrower must now walk out of Office A, and enter Office B from the street. Because the Department of Consumer Credit only performs annual inspections, it will be difficult for the Department to discover whether lenders are continuing to split loans.188 "The law could have—and should have—been stronger . . . .The fact that business continues as usual shows that more reforms could be passed and . . . [lenders] could still do business profitably."189 The practical effect of these minimal revisions will accomplish little, if any, increased protection for the borrower.

B. Prohibitions of Bi-Weekly and Semi-Monthly Payments and Refinancing Within the First Sixty Days

The prohibition of bi-weekly and semi-monthly payments decreases the opportunities lenders have to offer refinancing to borrowers. It also allows borrowers a lengthier amount of time both for use of the loan, and to save for loan repayment. Prohibiting lenders from refinancing during the first sixty days of the loan term decreases costs to borrowers in the event of refinancing. But because loan terms can be up to ten months,190 lenders still have several additional opportunities to refinance—costing borrowers additional acquisition fees. Although this reform may ease the cost of refinancing, it will certainly not eliminate the profitable practice.

Since the enactment of the OCCC, the industry has remained a powerful lobbying force in the legislature and has effectively guarded the henhouse.191 Most consumer advocates believe that even the most recent reforms do not go far enough.192 Consumer advocates would ideally like to see § 3-508B repealed, thereby allowing small loans to fall under § 3-508A.193 Oklahoma small loan lenders could still operate profitably at the maximum 30% interest rate authorized under § 3-508A.194

188. See Wheat, supra note 14, at 460.
191. The only definitive study on the Oklahoma "B" loan industry was conducted by Dr. Willis J. Wheat, who besides being both the former Dean of the Business School and President of Oklahoma City University, held a position on the board of Paceco, a Duncan, Oklahoma small lending company. See Joe Robertson, Lenders, Regulators, Relationship Termed Cozy, (visited Oct. 12, 1997) <http://www.tulsaworld.com>. Wheat’s study reported:

Those individuals who are critical of the Class "B" lending industry typically claim annual percentage rates are exorbitant while failing to take into consideration the business risk and legitimate service that is being provided to consumers. The cost in providing this important service must be measured in dollars and cents and not solely in annual percentage rates. The Oklahoma Legislature has established the Oklahoma Department of Consumer Credit and the department in turn has created a system in which Class "B" lenders are highly regulated and the rates that are permitted are well defined, controlled, and disclosed to the borrower. This system of law and regulation is serving well the State of Oklahoma and its citizens.

Wheat, supra note 14, at 457 (emphasis added). Clearly, Wheat’s previous board position calls into question the objectivity of his report.
193. See supra Part III.D.
Indeed offices that operate outside the state currently do so now.\textsuperscript{195}

VI. WHY § 3-508B?

When Oklahoma adopted the UCCC in 1969, small loan lenders lobbied heavily to protect their interests.\textsuperscript{196} The industry recognized that if the UCCC were adopted in its pure form, it would not allow for the rates then charged.\textsuperscript{197} Compromise obviously came in the form of § 3-508B which arguably did nothing more than legalize loan sharking.

A. Risk Theory Analysis

The "B" loan industry typically justifies the high APRs generated by its loans in several ways. Primarily, the industry maintains that because its borrowers are typically high credit risks, interest rates must reflect that risk.\textsuperscript{198} This argument assumes that high-risk borrowers will not pay off the loan. The industry contends that if the rates are lowered, it will be forced out of business due to the costs of unrecovered debt.\textsuperscript{199} Yet, lenders themselves admit that their customers do in fact pay off their loans.\textsuperscript{200} The loans "are a customer's credit card . . . his source of liquidity . . . from payday to payday."\textsuperscript{201}

Additionally, while chargeoff rates for small lenders are high by bank standards, lenders are able to compensate with the profit gained by charging extremely high interest rates.\textsuperscript{202} In fact, World Acceptance Corporation specifically notes that the rates allowable in Oklahoma help to minimize any losses incurred not only in Oklahoma, but also in the five other states where it maintains offices.\textsuperscript{203} The argument that lower rates will result in a detrimental loss of profits is exceedingly tenuous, remembering that small lenders operate profitably in other states with much lower interest rates.\textsuperscript{204}

B. Marketplace Competition Analysis

Proponents of § 3-508B contend that repealing the provision and governing small loans under § 3-508A will eliminate competition from the market.\textsuperscript{205} However,

\textsuperscript{195} See id. (reporting profitable operation in a total of six states).
\textsuperscript{196} See Robertson, Consumers, supra note 2, at A1.
\textsuperscript{197} See id.
\textsuperscript{198} See World Acceptance Corp., supra note 42, at 19; see also Price, supra note 42, at 3.
\textsuperscript{199} See Averill, supra note 116.
\textsuperscript{200} See Cline, supra note 133, at 4.
\textsuperscript{201} Id.
\textsuperscript{202} See id.
\textsuperscript{203} See World Acceptance Corp., supra note 42, at 12.
\textsuperscript{204} See Price, supra note 42, at 3 (noting that the alternative financial services industry operates profitably in Arkansas where the interest rates are some of the lowest in the nation).
\textsuperscript{205} See id.
the World Acceptance Corporation itself claimed:

The Company believes that pricing is not an important competitive factor in the industry, because most small loan consumer finance companies charge the maximum rate of interest allowable under applicable state laws. The Company believes that competition between small loan consumer finance companies occurs primarily on the basis of the strength of consumer relationships, customer service, and reputation in the local community.206

Because small loan companies generally charge the maximum charges allowable, imposing a maximum rate of interest such as that authorized under § 3-508A will not eliminate competition from the small loan market.

C. Lack of Access to Credit Analysis

"B" lenders also claim that if their services are not available, high-risk borrowers will have no access to credit. Proponents of the existing statute allege this cut off will prompt borrowers to seek illegal means of obtaining loans.207 There is no empirical evidence to support such a claim. "Consumer credit legislation, when originally proposed, virtually always has evoked dire predictions that consumers will be shut out of the credit market."208 "These predictions almost invariably lack credible empirical evidence and fail to materialize once the legislation is adopted."209 In fact, every other UCCC state adopting the recommended small loan statute210 has a maximum interest ceiling, and no evidence suggests that these states' consumers are suffering from lack of access to credit.

Colorado, a UCCC state, imposes a 36% maximum interest rate for loans of $630.00 dollars or less211 and has yet to report that high-risk borrowers have no access to credit or increased rates of loan sharking.212 Further, a study in Arkansas revealed that despite a then state-imposed 10% usury ceiling,213 credit was much more available to low-income borrowers than in states allowing a much higher interest

207. See Fred H. Miller & James A. McCaffrey, Oklahoma's Adventitious Amendments to the UCC: The Experience One Year Later, 42 OKLA. BAR J. QUAR. 50, 42 (1971).
208. NCLC, supra note 45, at 55 n.127 (citing G. Wallace, The Logic of Consumer Credit Reform, 82 YALE L.J. 461 (1971)).
209. Id.
210. See COL. REV. STAT. ANN. § 3-508 (West 1997); IND. CODE ANN. § 24-4.5-3-508 (West 1995); IOWA CODE ANN. § 535.2 (West 1997); KAN. STAT. ANN. § 16a-2-401 (Furse 1995); ME. REV. STAT. ANN. tit. 9-A, § 2-401 (West 1997); WIS. STAT. ANN. § 138.09 (West 1997); WYO. STAT. ANN. § 40-14-310 (Michie 1997).
211. See COL. REV. STAT. ANN. § 5-3-508 (West 1997).
212. See Telephone Interview with employee of the Colorado Department of Consumer Credit (Nov. 4, 1997) (notes on file with author).
213. See ARK. CONST. art. 19 § 13(6) (amended 1987) (changing the 10% maximum interest rate to a 17% maximum interest rate per year). Even at 17%, the Arkansas maximum interest rate is still one of the most restrictive rates in the nation.
rate.214 "In general, so long as credit restrictions do not make consumer lending unprofitable as an over-all business, concerns that these restrictions will shut individuals out of the credit market seem greatly exaggerated."215

Finally, an increasing number of alternative sources of credit, other than consumer finance companies, specifically seek to offer lower rates of interest to high-risk borrowers. Credit unions have begun to focus on expanding their membership by extending credit to low-income borrowers.216 Through education and counseling, some credit unions manage credit extension to high-risk borrowers.217 A growing number of community-based finance companies successfully extend credit at rates as low as 10% to lower income households.218 Although these alternative services require specialized services to educate the borrower in management and maintenance of credit, the long-term effect of their ability to prevent borrowers from perpetual debt logically has a positive impact on the economy and society as a whole.219

D. Lender Collection Options Analysis

Lender arguments are further weakened by the broad collection remedies allowed by Oklahoma law. In fact, Oklahoma offers broader collection methods than almost any other state in the nation.220 Pursuant to state law, Oklahoma small lenders can garnish wages and repossess collateral to force payment.221 Because such measures are costly, lenders usually attempt to collect through aggressive methods such as repeated calling and threats to ensure that little debt goes bad.222 Nevertheless, garnishment and repossession are legally available remedies to lenders and the mere threat of their use would seemingly serve them well. Obviously, the most advantageous method of collection for the lender is to refinance the loan and simply extend the debt.223 World Acceptance Corporation "allows refinancing of delinquent loans on a case by case basis for those customers who otherwise satisfy . . . credit standards."224

A range of effective collection methods, combined with high interest rates, offers the "B" lender a double remedy. Justification of high interest rates based on high credit risk borrowers is incidental, since lenders have a range of remedies to

215. NCLC, supra note 45, at 56 n.127.
216. See CASKEY, supra note 4, at 59-61.
217. See id. at 5.
218. See Mike Hudson, Community Credit, 21 SOUTH. EXP. J. POL. & CUL. 37, 39 (1993).
222. See GREENVILLE NEWS, supra note 115, at A6 ("In 1996, World Acceptance Corporation began tightening its policies regarding collection . . . ."); see also CASKEY, supra note 4, at 35-36.
223. For a full discussion of lender benefits concerning refinancing, see supra Part IV.
ensure that the debt will not go bad in the event the borrower defaults. If Oklahoma continues to sanction such unfriendly consumer laws like the "B" loan provision, the legislature should consider either fixing a low maximum interest rate akin to other UCCC states or limit the lender's collection remedies. The Oklahoma legislature could further serve the state's consumers by making § 3-508B subject to a usury ceiling.\textsuperscript{225}

\section*{VII. The Purpose of Usury Laws}

Usury law pre-dates written history and was common throughout the United States prior to deregulation.\textsuperscript{226} The long-standing theory behind usury law is that it "protect[s] the community, as well as its individual members from the destabilizing effects of indebtedness such as debt servitude and debt oppression."\textsuperscript{227} Appropriately then, the first Oklahoma Constitution placed a 10\% cap on all loans made by contract in an attempt to protect the independent farmer in the growing industrial economy.\textsuperscript{228} Any contractual loans with an interest rate higher than 10\% were intended usurious.\textsuperscript{229} The waning strength of usury laws, both in Oklahoma and the rest of the United States, is largely due to America's free market ideals and the resulting deregulation of public administration.\textsuperscript{230} Early economist Jeremy Bentham articulated the argument against usury laws:

No man of ripe years and sound mind, acting freely, and with his eyes open, ought to be hindered, with a view to his advantage, from making such a bargain, in the way of obtaining money, as he thinks fit: nor (what is a necessary consequence) anybody hindered from supplying him, upon any terms he thinks proper to accede to.\textsuperscript{231}

Like most free market theories, Bentham's argument "presumes equal aptitude, intelligence, information, and vigor on the parts of both borrower and lender."\textsuperscript{232} However, current studies report that "nearly 40\% of the population is estimated to be functionally illiterate."\textsuperscript{233} To measure "quantitative literacy," one "recent literacy study used a typical advertisement for a home equity loan."\textsuperscript{234} More than half of the

\begin{itemize}
\item \textsuperscript{225} See Okla. Stat. Ann. tit. 14A, §§ 5-107(2), 3-605 (West 1996) (capping interest rates on all loans, other than consumer loans and those governed by § 3-508B, at 45\%).
\item \textsuperscript{226} See Morris, supra note 25, at 152, 154-56.
\item \textsuperscript{227} Id. at 152.
\item \textsuperscript{229} See id.; see also supra Part III.A.; Baggett & Miller, supra note 50 and accompanying text regarding the common law exceptions to the 10\% maximum interest rate.
\item \textsuperscript{230} See Morris, supra note 25, at 154-55.
\item \textsuperscript{231} Id. at 155 (quoting Jeremy Bentham, Defense of Usury, in Works of Jeremy Bentham 3-29 (J. Bowring, ed. 1962)).
\item \textsuperscript{232} Morris, supra note 25, at 156.
\item \textsuperscript{233} NCLC, supra note 45, at 400 (citations omitted).
\item \textsuperscript{234} Id.
\end{itemize}
adults sampled knew the meaning of the acronym APR, 235 37% understood that the APR is the primary indicator of the cost of credit, 236 and "only 4% of the adults could calculate how much interest would be charged." 237 The lack of knowledge of the average borrower renders the presumption that borrowers and lenders are on equal footing implausible.

Additionally, assuming that high-risk, low-income borrowers have no credit alternative, the assertion that the two are on equal bargaining planes is illogical since in effect, borrowers are left with a Hobson’s choice. Either the borrower borrows at the rates offered by the lender or she does not borrow at all.

Thus, usury laws are a necessary in protecting low-income borrowers. The drafters of the Oklahoma Constitution apparently believed this to be true as evidenced by the earlier 10% interest cap, as did the legislature evidenced by its later enactment of the 45% usury ceiling for all loans other than consumer loans. 238 “B” loans are the only consumer loans with effective rates which exceed that ceiling. 239 While America has largely moved away from the paternalistic argument for usury laws, the fact remains that low-income borrowers remain vulnerable to the predatory practices of small loan lenders, especially “B” loan lenders. The existing constitutional usury ceiling is basically dormant; however in questioning the constitutionality of § 3-508B, the courts have an opportunity to put its honest purposes to use.

VIII. THE CONSTITUTIONAL ISSUE

Oklahoma’s first constitution was drafted under a populist spirit which sought to protect the small independent farmer and the industrial economy. 240 Thus the first constitution incorporated a strict usury provision, forbidding interest rates above 10% in contractual agreements and 6% in non-contractual agreements. 241 In fact, the language of the constitutional provision strongly suggests the framers never intended for the interest rate to exceed the 10% maximum interest rate. 242 Nevertheless, the Oklahoma Constitution was amended effectively overriding the usury ceiling, and affording the state legislature the power to define interest and fix maximum rates of interest. 243 While the amended constitution paved the way for the adoption of the UCCC, voters did not anticipate non-UCCC provisions such as § 3-508B. 244

235. See id. at 401 n.8 (citations omitted).
236. See id.
237. Id. at 400-01.
238. OKLA. STAT. ANN. tit. 14A, § 3-605 (West 1996) (excluding § 3-508B by referring to § 5-107(2) which states: “unless such rate was lawful under any provision or provisions of this Act.” Id. § 5-107(2)).
240. See MURRAY, supra note 228.
242. See id. ("The legal rate of interest shall not exceed six per centum per annum in the absence of any contract as to the rate of interest, and by contract, parties may agree upon any rate not to exceed ten per centum per annum, and, until reduced by the Legislature, said rates of six and ten per centum shall be, respectively, the legal and the maximum contract rates of interest.") (emphasis added).
passing the constitutional amendment, "[t]here is little doubt that the people of Oklahoma were demanding honest credit laws with realistic rates of interest." Section 3-508B is well short of their demands, but more importantly it violates Article XIV § 2 of the Oklahoma Constitution.

Because the “B” loan provision does not fix a maximum rate of interest, § 3-508B of the OCCC is constitutionally suspect. Section 3-508B merely attaches charges to the loan which are then required to be translated into the interest rate on each loan. This simply does not meet the mandates of the Article XIV § 2 of the Oklahoma Constitution which requires the legislature to do two things: (1) define interest, and (2) set a maximum rate of interest. Since the amended constitution requires that in the absence of a maximum rate of interest, loans may not exceed a 10% interest rate loans made under § 3-508B are arguably subject to the seemingly dead letter usury provision. In short if there is no rate, the courts must rebate. To that end, courts must determine this issue based upon an interpretation of the constitutional language and whether the fees authorized under § 3-508B may be calculated for purposes of interest.

In fulfilling the first requirement of Article XIV § 2, the legislature defined interest as a loan finance charge for supervised loans and in § 3-508A fulfilled the second requirement by setting the maximum rate of interest at 30%. Thus for § 3-508A, the legislature fulfilled both of Article XIV’s requirements. For § 3-508B however, the legislature merely substituted the terms “acquisition fees” and “handling charges” for “finance charge” in defining interest, but failed to set a maximum rate of interest. Whether these costs constitute interest is a question for the courts. Whatever the determination, it is indisputably clear that in failing to set a maximum rate of interest for “B” loans the Oklahoma legislature violated the second requirement of Article XIV § 2.

Proponents of the existing “B” loan statute argue that the constitutional language does not impose any limits on how the rates are determined. Further, proponents contend by setting a method for calculation rather than fixing a maximum rate of interest, the Oklahoma legislature is indirectly setting rates. Section 3-508B advocates also claim that in order for its challengers to succeed on damage claims for rebates of moneys charged beyond the 10% usury cap, plaintiffs must concede that

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245. Baggett & Miller, supra note 50, at 8 (emphasis added).
248. See id.
250. See id. § 3-508A(2)(a)(i).
251. See id. § 3-508B(1).
253. See id.
the fees accompanying § 3-508B are interest. This argument is based on the fact that without the fees, the loans are virtually interest-free. This grossly misses the point, since critics of § 3-508B simply argue that the constitutional violation lies in that there is no maximum rate of interest at all, not whether the charges allow for the calculation of interest on each loan. To simplify, the dispute is not over whether interest can be calculated, but rather whether the Oklahoma legislature set a maximum rate of interest for the “B” loan category.

A. Why §3-508B Does Not Comply with the Oklahoma Constitution

When the constitutionality of “B” loans reaches the courts it will be a case of first impression. The key question for the courts asking whether the “B” loan provision fixes a maximum rate of interest will be largely a definitional question involving a statutory interpretation of the terms “interest” and “rate of interest.” Further, because the constitution directs the legislature to both “define interest and fix maximum rates of interest,” a related question is whether the charges authorized under § 3-508B meet the Oklahoma legislature’s definition of interest. Ironically, courts considering similar issues have held that charges attached to a loan do not constitute interest. Webster’s dictionary defines the term “fix” as “to give a permanent or final form to.” While the interest rate for each individual loan may be calculated, the Oklahoma legislature failed to fix a maximum rate of interest for the “B” loan class as required by the constitutional amendment. The ability to merely calculate the interest on each individual loan and make the required disclosures to the consumer is simply not enough to satisfy the Oklahoma Constitution. This is true because “interest” and “rate of interest” are two separate concepts. “[T]he plain, ordinary, and common meaning of the phrase ‘rate of interest’ is the rate of money paid for the use of money ‘expressed as a percentage per unit of time.’” Although the flat charges of each loan are easily converted to a percentage charge constituting “interest,” there is no maximum rate of interest for the loans. The Oklahoma Constitution expressly mandates the legislature to fix a maximum rate of interest for each type of loan; it does not, as the Oklahoma legislature has done, allow for setting a maximum charge which in turn can be

256. OKLA. CONST. art. XIV, § 2 (amended 1968) (emphasis added).
258. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 441 (10th ed. 1995).
262. Id. (emphasis added) (citations omitted).
calculated as interest on each individual loan. Buttressing this argument, is the fact that every other supervised consumer loan provision in the OCCC fixes a maximum rate of interest in the form of a percentage rate for each loan category. In short, the "B" loan provision's allowance of flat charges rather than fixing a maximum rate of interest violates the Oklahoma Constitution.

B. Projected Analysis of the Constitutional Issue

Since the Oklahoma courts have yet to address this issue, what will factor into the decision on the constitutionality of §3-508B is speculative. Presumably, the courts will consider the issue against the background of the Oklahoma Constitution, its specific language, the UCCC, and relevant case law from other jurisdictions. The 1907 constitution afforded a 10% maximum interest rate by contract and provided that it only change if the Oklahoma legislature sought to reduce it. The 1968 constitutional amendment to Article XIV §2 disregarded the populist intentions of the 1907 constitution to pave the way for the adoption of the UCCC. However, the amendment did not contemplate the adoption of anomalies to the Code such as §3-508B. Clearly the people of Oklahoma did not intend for the legislature to authorize charges allowing interest rates over 300% or to nullify usury laws capable of protecting consumers from such exorbitant rates when voting for the referendum to allow for the constitutional amendment. The foundation of the Oklahoma Constitution, the purpose of the amendment, and much less, the plain language of the amendment can hardly be held to support the exploitive rates allowable under §3-508B.

If the Oklahoma courts consider other states adopting some form of the UCCC, they will find no statute more exploitative of small loan borrowers than Oklahoma's. The UCCC was drafted to strike a compromise between efficiency and equity in the market with UCCC drafters recognizing the need for a profitable rate of return while also acknowledging the vulnerability of borrowers. While courts are not bound by the intention of the UCCC, loans made under §3-508B are not in concert with its consumer protective spirit.

A strict interpretation of the Oklahoma Constitution clearly invalidates §3-
508B. Article XIV § 2 mandates that the legislature fix a maximum rate of interest.\textsuperscript{271} In the absence of such maximum rate, any interest rate above 10% is usurious.\textsuperscript{272} In adopting § 3-508B, the Oklahoma legislature chose not to fix a maximum rate of interest for the "B" loan category, but instead to authorize specific charges which cannot constitutionally take the place of setting a maximum rate of interest for "B" loans. Although the threshold question is whether a maximum rate of interest was established, courts must also determine whether charges authorized by the "B" loan provision are calculable for interest purposes. By default, the charges serve as a basis for calculating interest to comply with TILA disclosure,\textsuperscript{273} however this is not definitive of whether they constitute interest. For courts to determine that "B" loan charges are not calculable for interest purposes borders on the absurd, since without the charges the loan would be interest-free. That said, considering the stronghold of small loan lobby, courts may refuse to consider "B" loan charges as interest, thereby negating the concern over the lack of a maximum rate of interest and resulting in a continual circumvention of the Oklahoma Constitution.

\section*{IX. Finance Charge as Interest}

It is likely that in determining the constitutionality of § 3-508B, the Oklahoma courts will address whether some or any of the fees authorized by the "B" loan provision are the equivalent of interest on the loan. If the statute is found unconstitutional, the analysis of fees as interest will be particularly necessary since it will determine the rebate to any plaintiffs basing their claim on the absence of a maximum rate of interest and thus beneficiaries of the 10% constitutional usury ceiling.\textsuperscript{274} Presumably, the courts will consider how Texas courts have ruled on this issue, since §3-508B was modeled after the Texas statute.

The OCCC and Texas law define interest as "the compensation allowed for the use or forbearance or detention of money or its equivalent."\textsuperscript{275} Texas courts have generally held that charges such as those authorized under § 3-508B do not constitute interest and have thus refused to deem loans usurious.\textsuperscript{276} Apparently, for charges to be considered interest and thus calculable for usury purposes, they must be solely consideration for the lending of money. In \textit{Texas Commerce Bank-Arlington v. Goldring},\textsuperscript{277} one judge reluctantly concurred:

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\textsuperscript{271} See \textit{Okla. Const.} of 1907, art. XIV, § 2 (amended 1968).
\textsuperscript{272} See id.
\textsuperscript{274} See \textit{Okla. Const.} of 1907, art. XIV, § 3 (amended 1968).
\textsuperscript{276} See Steedman v. Georgetown Savings & Loan Association, 592 S.W.2d 486 (Tex. 1979) (holding commitment fees equal to 10% per annum of the loan does not constitute interest); Greer v. Persky, 165 S.W.2d 709 (Tex. 1942) (holding extra charges given for separate consideration other than the lending of money is not interest); Ross v. Walker, 554 S.W.2d 189 (Tex. 1977) (holding loan service charges for additional consideration given previously does not constitute interest).
\textsuperscript{277} 665 S.W.2d 103 (Tex. 1984).
Those business expenses of a lending institution that may be added to the debt without being called ‘interest’ are now without limitation. This court has held a plethora of charges can be added to the interest charged on indebtedness without being charges for the ‘use, or forbearance or detention’ of money.

Fees for obtaining a loan are not interest.

So long as charges are for ‘distinctly separate and additional consideration other than the simple lending of money’ they are not interest. The rule has now been stretched to the point that if another label can be applied to the charge, it isn’t interest in the eyes of the law. This is so even though the nexus of the transaction is the making of the loan, and without a loan, there would be no occasion to make any charges at all.278

The Texas judge’s concerns that “business expenses . . . may be added to the debt without being called ‘interest’ are now without limitation,”279 are alleviated by the same court’s earlier holding in Gonzales County Savings and Loan Assoc. v. Freeman.280 In Freeman, the court held that a 2% “loan fee” was not proven reasonable by the lender and thus constituted usury.281 The lender argued the “loan fee” was consideration for having a permanent loan available for the borrower’s benefit, and for the purposes of covering the expenses of negotiating the loan.282 The Freeman court rejected the lender’s argument and considered the substance of the transaction rather than its form in determining whether the contract was usurious.283 “Labels put on particular charges are not controlling. A charge which is in fact compensation for the use, forbearance or detention of money is, by definition, interest, regardless of the label placed on it by the lender.”284 Such relevant precedent is an applicable rationale for the determination of whether or not the fees charged under § 3-508B can be calculated for interest purposes.

Accordingly, the court in Goldring found the attorney fees for the purposes of collection was consideration in addition to the simple lending of money, and therefore not interest.285 By contrast, the Freeman court held that a loan fee not attributable to any specific cost in addition to the simple lending of money was interest.286 The Texas Supreme Court’s holdings on whether fees can be calculated as interest suggests a distinction between fees which cover specific expenses related to a

278. Id. at 105 (Spears, J. concurring).
279. Id.
280. 534 S.W.2d 903 (Tex. 1976).
281. See id. at 908.
282. See id. at 905.
283. See id. at 906 (citing Schmid v. City Nat’l. Bank of Wichita Falls, 114 S.W.2d 854 (Tex. 1938)).
284. Id.
286. See Gonzales County Savings and Loan Assoc. v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976).
borrower’s individual loan and expenses which cover general overhead or profit.

If the Oklahoma courts evaluate the fees allowable under § 3-508B, lenders should be required to prove that the “acquisition fees” and “installment account handling charges” are for the specific purpose of maintaining a particular loan. “Fees covering only overhead or profit can be challenged as hidden interest.” Assuming lenders can demonstrate that the charges are specific to the borrower’s contract, Oklahoma courts should question and assess whether the fee amount is reasonably related to the cost of the services provided. “Excessive charges for otherwise valid services are not actually attributable to those services to the extent they are excessive, and should be considered interest to that extent.”

In addition to requiring lenders to justify rates and determining the reasonableness of the rates, Oklahoma courts should weigh heavily the rationale asserted by the Goldring concurrence. “[T]he nexus of the transaction is the making of the loan, and without a loan, there would be no occasion to make any charges at all.”

If the acquisition fees and account handling charges cannot be calculated for interest purposes, § 3-508B undercuts the maximum interest usury ceilings set out in the constitutional usury provision applicable when the legislature fails to set a maximum rate of interest. Moreover if these acquisition fees and account handling charges cannot be calculated for interest purposes, the courts in practice are refusing to enforce the Oklahoma Constitution which requires the legislature to fix a maximum rate of interest for every type of loan. To that end, courts must decide whether they will uphold legislation that purposely skirts the Oklahoma Constitution and is clearly violative of public policy.

X. CONCLUSION

Beyond the constitutional reasons for invalidating § 3-508B, there is a strong public policy argument to do so. Declaring the “B” loan provision unconstitutional and recognizing the charges as interest would offer consumer protection to those who need it most without eliminating access to credit. Additionally, by enforcing the dormant usury provision of the Oklahoma Constitution, courts will acknowledge the unequal bargaining power that exists between small loan lenders and borrowers, while demonstrating an intolerance for preying on the disadvantaged. Oklahoma courts have the opportunity to send a clear message to the legislature that it will no longer tolerate its cozy relationship with the small loan industry. In turn, their decision would likely prompt the legislature to reassess small loan provisions as it did after the Hollamon decision. After seeing the proverbial writing on the wall, the legislature may decide to govern small loans by § 3-508A similar to the more equitable provision recommended by the UCCC.

287. NCLC, supra note 45, at 206 (citations omitted).
288. Id.
290. See OKLA. CONST. of 1907, art. XIV, § 2 (amended 1968).
291. See U.C.C.C. § 3.508 (West 1997).
If Oklahoma courts do not find “B” loans unconstitutional, the legislature must repeal the statute. Thus far, the “B” loan industry has not made an effective argument to justify its exorbitant rates under § 3-508B. The lenders’ risk argument is significantly diminished by industry profitability in other states with lower rates and fewer collection alternatives. Additionally, there is no empirical evidence to suggest that decreasing the rate would eliminate low-income access to credit or eliminate competition in the industry. Specifically targeting disadvantaged and unsuspecting consumers is doubly difficult to justify when § 3-508A is already in existence and would allow for lenders to make loans at a 30% maximum rate of interest while still operating profitably. In the absence of at least some substantial justification, it is unconscionable for the Oklahoma legislature to condone such a law. The most obvious and equitable solution is for the Oklahoma legislature to repeal § 3-508B.

If the legislature again refuses to do so, the Oklahoma legislature must amend the statute by enacting specific reforms to achieve some consumer protection and more specifically, better protect disadvantaged borrowers. The legislature should first address the problem of refinancing since it is the most dangerous practice to borrowers. Simply by eliminating the use of the Rule of 78 for rebate calculation and allowing for a one-time acquisition charge, the legislature will reduce the small loan companies’ incentive to refinance while simultaneously reducing the number of small loan borrowers drawn into perpetual debt.

Additionally, the Oklahoma legislature can equalize the bargaining power between lenders and borrowers by reforming the “brick wall” provision. Because the “brick wall” provision will have little practical effect on the deterrent of loan splitting, legislators should impose a geographic distance requirement between small loan offices and subject lenders to three annual Department of Consumer Credit inspections. Legislation should also be enacted to eliminate the lenders’ double remedies, by prohibiting the use of security interests and/or wage garnishment. Finally, the Oklahoma legislature might also do well to consider investigating what particular expenses the loan charges are applied to and subsequently reduce the allowable charges under § 3-508B.

At the very least legislators should make § 3-508B subject to the 45% interest ceiling provided by § 3-605. In so doing, the legislature may still yet give the courts an opportunity to decided whether or not the fees authorized by the “B” loan provision are directly related to the maintenance of a specific loan, and thereby, whether the fees are reasonable. Making the “B” loan charges subject to a 45% usury ceiling, and forcing lenders to justify the charges, would afford the vulnerable low-income borrower some needed protection.

Suzanne E. Schreiber

293. See id. § 3-603.