Municipal Regulation of Payday & Title Loans in Texas



An Exemplary & Constitutional Good for a Necessary & Predatory Evil

By Olivia M. Peña*

Introduction

Before law school, I knew little about payday and title loans. I had heard family and friends talk about their trips to the "financiera," but I was unfamiliar with the nature of their transactions. I delved into the subject while working at the Consumer Dispute Resolution Center (CDRC) at the University of Houston Law Center. At the CDRC, I spoke with Ms. Garcia²—victim of the payday loan industry. Ms. Garcia, a 45 year-old Hispanic female, had a middle school education and did not speak English. Desperate, yet hopeful, she said, "Mija,3 I have a problem and really need someone to give me some guidance. Can you please help me?" I could not make any assurances, but I said I would try my best. In order to help her, I needed to know the facts. Ms. Garcia was a single mother of three who worked as a waitress at a Mexican restaurant. She barely made enough money to cover the monthly expenses; therefore, after her car broke down, Ms. Garcia felt compelled to get a payday loan. She knew it was easy and fast, and she needed to fix her car without missing work. Ms. Garcia got a \$625 payday loan and had already made payments totaling that amount. During our first conversation, she answered the following questions:

- 1) Did you sign a contract? "Yes."
- 2) Did you read it? "No. The lady told me where to sign."
- 3) Was it in English or Spanish? "English."
- 4) Do you speak, read, or write English? "I do not, but I can understand the basic words."
- 5) Did she tell you the total cost of the loan? "No. She just told me the monthly payment."
- 6) What numbers do you see in the contract? "I see the loan amount of \$625 and a total amount of \$1250."
- Did you see these numbers before you signed? "No. I was desperate and really needed the money."

Additionally, I learned that the business representative had demanded payment and threatened Ms. Garcia with jail time. Then, I realized that payday loans are not consumer friendly. Frustrated and in disbelief, I told Ms. Garcia I would return her call to inform her of any available legal recourse.

Ms. Garcia was the first of a long list of consumers who called the CDRC searching for help regarding payday and title loan issues. Some scholars argue that payday and title loans provide a benefit for consumers,⁴ while others argue that these loans prey on vulnerable consumers who face unfortunate situations.⁵ Due to minimal federal and state regulation, consumer advocates cry out for more appropriate consumer protection. How protected are consumers from these predatory lending practices? Do disclosures actually prevent consumers from getting payday or title loans? Apparently, disclosures did not make a difference for Ms. Garcia when she had an unexpected emergency.

A payday loan is a short-term cash loan made at a store or online.⁶ In order to get the loan, a consumer either writes a check including the principal amount and the finance charge or gives the lender access to his or her bank account.⁷ The lender cashes the check or accesses the bank account on the consumer's next payday.⁸ The consumer pays a finance charge to renew or rollover the loan if repayment is impossible; so, full payment is deferred and the principal amount owed remains the same. ⁹ To get a payday loan, lenders require a form of identification, a bank account, and, sometimes, a proof of income.¹⁰ Lenders charge extremely high interests rates even though these loans are usually for small amounts.¹¹ Industry supporters argue that payday loans are necessary to help consumers get through unexpected emergencies. Also, they argue that banning these loans will limit consumers' access to credit.¹²

A title loan is a short-term cash loan where a consumer's car title is used as collateral.¹³ In title pledging, the lender may,

but is not required to, verify a consumer's employment status or income. 14 Similar to a payday loan, a consumer renews or rollovers a title loan for additional months by paying only the interest fee. 15 If default is unavoidable, the lender may repossess the consumer's car and sell it. 16

In this article, I argue that state law does not preempt city ordinances that regulate payday and title loans, and that the ordinances are ideal to minimize the loans' predatory nature. Therefore, the Texas Legislature should adopt a similar regulatory scheme. In Part I, I briefly summarize the laws enacted by the federal and state legislatures that regulate payday and title loans. I also discuss in detail how the ordinances enacted by Austin, Dallas, El Paso, and San Antonio regulate these loans. In Part II, I engage in a legal discussion to show that state law does not preempt the ordinances, and that, therefore, they are constitutional and should be enforced. In this discussion, I incorporate the lawsuit brought by Consumer Service Alliance of Texas (CSAT) against the City of Dallas. In Part III, I talk about the benefits of these ordinances and praise the cities' attempt to police predatory short-term lending. Additionally, I incorporate two proposed but un-enacted bills matching the ordinances.

Payday and title lenders will continue their abusive practices without meaningful regulation from the Texas Legislature. The legislature should look closely at the ordinances and adopt similar laws to ensure statewide compliance. Only then will predatory lenders stop trapping disadvantaged and uneducated consumers in never-ending cycles of debt.

I. The Current Regulation of Payday and Title Loans

The popularity and demand of payday and title loans has rapidly increased.¹⁷ A greater number of consumers have easy and unlimited access to these loans. In this context, more is not merrier. In the following section, I briefly discuss the laws enacted by the federal and state legislatures. I then summarize in detail what the Austin, Dallas, El Paso, and San Antonio ordinances do to specifically control payday and title loans. Notwithstanding the ordinances' substantial similarities, I note that some cities do offer additional protections.¹⁸

A. Federal Regulations Provide Limited Consumer Protection

Among the federal laws regulating payday and title loans are the Truth In Lending Act¹⁹ (TILA), the Talent-Nelson Amendment Act²⁰ (Talent-Nelson Amendment), and the Dodd-Frank Wall Street Reform and Consumer Protection Act²¹ (Dodd-Frank Act). 22 TILA "applies to any advertisement to aid, promote, or assist directly or indirectly any consumer credit sale, loan, or other extension of credit."23 Under TILA, lenders are required to make several disclosures including the loan's repayment terms and the annual percentage rate.²⁴ At first, lenders claimed TILA was inapplicable to payday loans, but the Federal Reserve Board denied those claims.²⁵ Pursuant to TILA, consumers are not only informed, but also are able to sue lenders for noncompliance of the Act.²⁶ Under the Talent-Nelson Amendment, a lender who issues loans to service members and their dependents "may not impose an annual percentage rate of interest greater than 36 percent."27 The Department of Defense recognized the predatory nature of payday and title loans and decided that the "cycle of debt represents a more significant concern to the Department than the high cost of credit."28 Recently, the Talent-Nelson Amendment increased consumer protection, imposed civil liability on lenders for violations of the Act, and defined "dependents." 29 The Dodd-Frank Act created the Bureau of Consumer Financial Protection (CFPB) "which [regulates] the offering and provision of consumer financial products or services under the Federal consumer financial laws."30 Additionally, CFPB requires lenders to comply with "federal consumer financial law" and prevents them from engaging "in any unfair, deceptive, or abusive act or practice."³¹

B. Texas' Regulations Focus on Disclosures and Registration but Not on Loan Restriction

The Texas Constitution grants power to the Legislature "to define interest and to fix maximum rates of interest." ³² "In the absence of legislation fixing maximum rates of interest, "all contracts [with an annual interest rate greater than ten percent (10%)] shall be deemed usurious." ³³ Unfortunately, Texas' usury law does not affect payday and title lenders because they operate through the credit services organizations (CSO) model. ³⁴ There are three parties involved in the CSO model: the consumer/borrower, the lender who is subject to Texas' usury law, and the credit services organization also known as a credit access business (CAB). ³⁵A CAB "provides the storefront, interacts with the borrower, and charges a fee without a legal limit." ³⁶ CABs "are governed by Chapter 393 of the Texas Finance Code (CSO Act) ³⁷ and Chapter 74 of the Texas Administrative Code."

The CSO Act applies to CABs who "for the payment of valuable consideration" (1) [improve] a consumer's credit history or rating; (2) [obtain] an extension of consumer credit³⁹ for a consumer; or (3) [provide] advice or assistance to a consumer regarding (1) and (2).⁴⁰ In 2011, the Texas Legislature enacted two bills that amended the CSO Act—H.B. 2592 and H.B. 2594.⁴¹ H.B. 2592 places "notice and disclosure requirements." H.B. 2594 deals with "the licensing and regulation" of CABs.⁴³

C. Municipal Regulations Fill in the Gaps Left By the Federal and State Legislatures

Federal and state licensing and disclosure laws are not sufficient consumer protection.

sufficient consumer protection. Therefore, four Texas cities enacted ordinances specifically regulating payday and title loans. These ordinances build on the laws enacted by the federal and state legislatures to provide greater consumer protection. The Austin,⁴⁴ Dallas,⁴⁵ El Paso,⁴⁶ and San Antonio⁴⁷ ordinances place several requirements on CABs including registration,

recordkeeping, consumer understanding, referral services, and loan limitations. Moreover, the ordinances provide penalties for CABs in violation of the ordinances. In this section, I discuss the ordinances and their provisions in detail. The ordinances are substantially the same; however, some provide additional consumer protection.

1. CABs Must Have a Certificate of Registration

In Austin, Dallas, El Paso, and San Antonio, a person may operate or conduct a CAB only if he or she obtains a valid certificate of registration for each location.⁴⁸ Failure to obtain a certificate of registration results in a criminal offense.⁴⁹ The directors of the department assigned to enforce these ordinances provide the application form.⁵⁰ The application should include the applicant's and the business' name, street and mailing address, and contact numbers.⁵¹ Additionally, a CAB must provide the personal information of its owners and others with a financial interest in it.⁵² A CAB must give copies of a "current and valid" state license as well as a certificate of occupancy demonstrating compliance with the city's development code.⁵³ Also, a non-refundable fee must be submitted with every application.⁵⁴ A CAB must advise the department's director of any changes to the information provided in the application form within 45 days.⁵⁵

After the application is received, the director issues the certificate of registration.⁵⁶ A CAB must conspicuously display the certificate of registration and present it for examination upon request by the director or any peace officer.⁵⁷ The certificate of registration expires "on the earlier of one year after date of issuance; or the date of expiration, revocation, or other termination of the registrant's state license."⁵⁸ Finally, a CAB's certificate of registration is nontransferable.⁵⁹

2. CABs Must Have Complete Loan Records

A CAB must keep a "complete set of records" of all loans "arranged or obtained by the [CAB]." Essentially, a CAB must have a record of the consumer's personal information, the principal amount of the loan issued, and "the documentation used to establish the consumer's income." A CAB ought to keep copies of every written agreement between the CAB and the consumer that proves the issuance of a loan. Additionally, a CAB must maintain "copies of all quarterly reports" provided to the Texas Consumer Credit Commissioner (OCCC). All the records required under the ordinances "must be retained for at least three years" and "made available for inspection by the cities upon request. Moreover, Austin, El Paso, and San Antonio require a CAB to keep information regarding the amount of fees charged per loan and the duration of each loan.

3. CABs Must Ensure Consumer Understanding and Provide Referral Services

A CAB in Austin, El Paso, and San Antonio must provide to the consumer a form containing information regarding the CAB's loans.⁶⁶ The form should also refer the consumer to "non-profit agencies that provide financial education or training and agencies

with cash assistance programs."⁶⁷ The El Paso and San Antonio forms include specific information about a consumer's loan agreement and, if "the director has prescribed a form in the consumer's language of preference, the form must be provided to the consumer in the consumer's language of preference."⁶⁸ Moreover, El Paso and San Antonio mandate a CAB to make sure that the consumer

understands the loan agreement before signing it.⁶⁹ Every written agreement between a consumer and a CAB "evidencing a loan, including but not limited to refinancing and renewals, must be written in the consumer's language of preference."⁷⁰Additionally, a CAB must provide loan agreements in English and Spanish, whichever is the consumer's preferred language.⁷¹ If the consumer cannot read, the disclosures and the loan agreement must be read to the consumer, in his or her preferred language, before signing the agreement.⁷²

4. CABs' Penalties and Defenses

In Austin, Dallas, El Paso, and

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A violation of the ordinances provisions is a criminal offense. ⁷³ There is a "separate offense for each day or portion of a day" that the ordinances are violated. ⁷⁴ A violation is punishable with a fine of up to \$500, and no culpable mental state is required. ⁷⁵ The penalties are in addition to any other penalty provided by other city ordinances and state law. ⁷⁶ Furthermore, it is a "defense to prosecution under the [ordinances] if at the time of the offense the person was not required to be licensed by the state as a CAB."

5. CABs Must Comply with Loan Restrictions

Under the ordinances, a payday loan "may not exceed twenty percent (20%) of the consumer's gross monthly income." A

title loan "may not exceed the lesser of three percent (3%) of the consumer's gross annual income or seventy percent (70%) of the retail value of the motor vehicle." Additionally, a CAB must consider the consumer's ability to repay by using a "paycheck or other documentation establishing income." The City of Austin suggests the CAB use a "bank statement, an IRS Form W-2 from the previous year, a previous year's tax return, or a signed letter from an employer."

Moreover, an installment loan "may not be payable in more than four installments." The "proceeds from each installment must be used to repay at least twenty five percent (25%) of the principal amount of the loan." Installment loans "may not be refinanced or renewed." If a consumer gets a loan seven days after paying off a previous loan, such action is considered a refinance or renewal.

Furthermore, a loan "that provides for a single lump sum repayment may not be refinanced or renewed more than three times." The "proceeds from each refinancing or renewal must be used to repay at least twenty five percent (25%) of the principal amount of the original [loan]." Dallas, San Antonio, and El Paso include a savings clause stating that the terms and provisions of their ordinances are severable. Best of the same statement of the same severable.

The four ordinances provide a tailored regulatory scheme to protect their citizens from predatory lending. Soon after the cities' councils approved the ordinances, CSAT, "a trade association that represents the interests of consumers and CABs," decided to take action. CSAT sued the cities of Austin and Dallas seeking declaratory and injunctive relief to stop the regulation of CABs. CSAT's petitions are very similar in both lawsuits, but only the City of Dallas provided access to the legal documents filed. I chose to incorporate the lawsuit brought against the City of Dallas to elaborate on the arguments brought by both parties. In Part II, I refute CSAT's arguments and show that the CSO Act does not exclusively regulate CABs. Therefore, the ordinances are neither preempted nor inconsistent with state law and hence constitutional.

II. The Ordinances' Constitutionality and the Preemption of Home-Rule Cities

Under the Home-Rule Amendment of 1912, cities with a population of more than five thousand (5000) may, by a majority of votes, "adopt or amend their charters." The adoptions or amendments are "subject to such limitations [prescribed] by the Legislature, and no...ordinance passed...shall contain any provision inconsistent with the [Texas Constitution], or the general laws enacted by the [Texas Legislature]." The cities of Austin, Dallas, El Paso, and San Antonio are home-rule cities, because all of the cities adopted a charter by which the ordinances at issue were created.

Home-rule cities "possess the full power of self-government and look to acts of the legislature not for grants of power, but only for limitations on their powers." Accordingly, "legislative intent to limit the broad powers of home-rule cities must appear with unmistakable clarity." This "intent should not be implied." If the Legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home-rule city, it must do so with unmistakable clarity."

A. The ordinances are not preempted because the Texas Legislature does not limit with unmistakable clarity the cities' powers to regulate CABs

In Dallas Merchs. & Concessionaires Ass'n v. City of Dallas, 99 the court held that the Texas Alcohol and Beverage Code (TABC) preempted an ordinance that prohibited the sale of alcohol within 300 feet of a non-residential area. 100 Under the TABC,

cities may limit the sale of alcohol within residential areas, ¹⁰¹ but they may not impose stricter standards on alcohol businesses. ¹⁰² Furthermore, the Legislature stated that "it [was their] intent that [TABC] shall exclusively govern the regulation of alcoholic beverages." ¹⁰³ Because the Legislature's intent was unmistakably clear; therefore, TABC preempted the ordinance. ¹⁰⁴

Dallas Merchs. & Concessionaires Ass'n v. City of Dallas is distinguishable from the lawsuits brought by CSAT. Contrary to TABC, the CSO Act does not prevent these cities from imposing stricter standards on CABs. The Legislature does not manifest their intent to exclusively regulate CABs. On the contrary, the Act states that "a [CAB] is permitted to charge amounts allowed by other laws, as applicable." This language indicates that the regulation of CABs is not exclusively governed by the Legislature. Furthermore, "the mere fact that the legislature has enacted a law addressing a subject does not mean the complete subject matter is completely preempted." 106

Moreover, in *Houston Ass'n of Alcoholic Beverage Permit Holders v. City of Houston*,¹⁰⁷ the court held that TABC did not preempt an ordinance that banned smoking in public places.¹⁰⁸ TABC "fails to mention regulation of tobacco or smoking;¹⁰⁹ therefore, the court found "the ordinance was not preempted with "unmistakable clarity."¹¹⁰ Additionally, the court noted that the ordinance "was enacted to…protect the citizens' public health and welfare."¹¹¹ Similar to TABC, the CSO Act fails to mention caps or rollover limitations on payday and title loans, it only mentions fees; therefore, courts should find that the ordinances are not preempted with unmistakable clarity.

CSAT may argue that the Legislature had an implied intent to prohibit municipal regulation of CABs. However, the "intent to preempt home-rule cities' ordinances should not be implied."¹¹² The Austin, Dallas, El Paso, and San Antonio ordinances are not preempted unless CSAT proves that the Legislature with unmistakable clarity limited these cities' powers to regulate CABs. After all, the "purpose of the Home-rule Amendment [was] to bestow upon cities [the] full power of local self-government."¹¹³

Additionally, the Texas Finance Commission asked the Legislature to "consider amending the Texas Finance Code to more clearly articulate its intent for uniform laws and rules [governing] CABs."¹¹⁴ This request suggests that there is not an unmistakably clear intent from the Legislature to prohibit municipal regulation of CABs. The Legislature could have stated that it was their intent that the CSO Act will exclusively govern the regulation of CABs in Texas, but it did not; therefore, the ordinances are not preempted.

B. The ordinances are not inconsistent with the CSO Act because CABs can comply with both

The Texas Constitution makes it clear that "no charter or any ordinance passed...shall contain any provision *inconsistent* with the [Texas Constitution], or [with] the laws enacted by the [Texas Legislature]."¹¹⁵ In Texas, an ordinance is presumed to be valid, and courts cannot interfere unless the ordinance "clearly appears to be arbitrary, unreasonable, and an abuse of the police power."¹¹⁶ The party attacking an ordinance carries the burden of proving the ordinance's invalidity. "A home-rule city's ordinance that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute." ¹¹⁸ Essentially, "a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached."

In *City of Richardson v. Responsible Dog Owners*, ¹²⁰ the court held that an animal control ordinance was not inconsistent with Section 42.12 of the Texas Penal Code. ¹²¹ Section 42.12 applied to dogs that had previously engaged in vicious behavior, and

the ordinance applied "to any animal which [presented] a threat to the safety and welfare of the City's citizens."122 The court acknowledged the city's power to adopt a more comprehensive animal control ordinance; and also found that a "small area of overlap" was not fatal. 123 Ultimately, the court held that the ordinance was not repugnant or inconsistent with Section 42.12 and that "a reasonable construction of each can give effect to both."124

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Similarly, in *RCI Entm't* (San Antonio), Inc. v. City of San Antonio, 125 the court held that an ordinance "that [prohibited] nudity and semi-nudity in public places was not inconsistent with the Texas Penal Code. 126 The ordinance made it unlawful to "intentionally or knowingly" appear in a state of nudity at a public place. 127 The court found that "none of the [Texas Penal Code provisions explicitly expressed] the Legislature's intent [to exclusively govern] the criminalization of an intentional or knowing" appearance in a state of nudity. 128 The ordinance overlapped with one of the provisions; nevertheless, the court found the ordinance to be "comprehensive attempt to address a specific type of public conduct—appearing in a state of nudity. 129 Because the ordinance "supplemented and addressed a different subject matter," the court held the ordinance was not preempted or inconsistent with the Texas Penal Code. 130

The ordinances in the *Responsible Dog Owners* and *RCI Entm't (San Antonio), Inc.* are analogous to the Austin, Dallas, El Paso, and San Antonio lending ordinances. Just like the ordinance in *City of Richardson* regulated all animals and not just dogs, these ordinances regulate several aspects of CAB loans and not just their fees. Similarly to the ordinances in those two cases, these ordinances provide a "comprehensive attempt to address a specific type of public conduct"—acquiring payday and title loans. Like the ordinance in *RCI Entm't (San Antonio), Inc.*, these ordinances supplement and address different areas not covered by the CSO Act. The ordinances are neither repugnant nor inconsistent with the CSO Act; and despite any overlap, the courts should find that both could be given effect.

On the other hand, CSAT could argue that these lending ordinances are similar to the ordinance in Combined Am. Ins. Co. v. City of Hillsboro, 131 where the court held that an ordinance that regulated insurance companies' solicitation practices was inconsistent with Article 4.06 of the Texas Insurance Code. 132 The ordinance made it unlawful for a person to engage in any solicitation practices "without having applied for and obtained a license to do so from the City Secretary." 133 Additionally, the ordinance required individuals to post a bond, to pay several licensing fees, and to pay a fine for any violations.¹³⁴ The court found that the insurance company had complied with state law and was able to conduct business in the State of Texas. Therefore, the city had no authority to restrict their solicitation practices. 135 By analogy, CSAT may argue that CABs are only required to comply with state law and that the Legislature did not explicitly grant these cities the power to regulate CABs. Therefore, the ordinances are inconsistent with the CSO Act.

CSAT's reliance on *Combined Am. Ins. Co.* would be misplaced, however, because the ordinance was inconsistent with the Texas Insurance Code, which expressly limited the city's power to impose occupational taxes on insurance companies. ¹³⁶ Contrary to what CSAT may argue, CABs must comply with

the CSO Act and any other applicable laws, including city ordinances. Even though the restrictions placed by the ordinance in Combined Am. Ins. Co. are similar to the restrictions placed by Austin, Dallas, El Paso, and San Antonio, the CSO Act does not prevent these cities from imposing additional restrictions on CAB loans. The ordinances loans restrictions are not inconsistent with the CSO Act, because the CSO Act fails to place any loan restrictions on CABs. Thus, there is no

contradictory language. The CSO Act grants the Texas Finance Commission the power to enforce the Act, but also constraints the Commission's power to limit the fees charged by CABs. ¹³⁷ The Legislature could have used similar language to constrain the cities' powers to limit the loans provided by CABs. CSAT's argument regarding the Legislature's failure to explicitly grant these cities the power to regulate CABs will fail, because "silence on the part of the state does not give rise to an inference that the state has prohibited localities from enacting ordinances further regulating an area." ¹³⁸ Moreover, the cities of Austin, Dallas, El Paso, and San Antonio have broad powers to regulate lending practices that potentially harm the welfare their citizens. ¹³⁹

C. The constitutional analysis in the light of Consumer Service Alliance of Texas, Inc., v. City of Dallas

In the lawsuit brought against the City of Dallas, CSAT argued that the Dallas ordinance conflicted with the CSO Act. ¹⁴⁰ This argument ignores that courts consistently hold that "the mere fact that the Legislature has enacted a law addressing a subject does not mean the complete subject matter is completely preempted." ¹⁴¹ Moreover, the CSO Act does not preempt the ordinances because the ordinances' language does not contradict the language used in the CSO Act. No court has found that the Legislature intended to exclusively occupy the field of CAB regulation ¹⁴²

CSAT also argued that the "[Dallas] ordinance and [its] credit restrictions are preempted and unenforceable, because they amount to a virtual prohibition against CABs operating in the [C]ity of Dallas." In its response, the City of Dallas challenged CSAT's organizational standing to bring such claim. Consequently, CSAT dropped the virtual prohibition claim, and Title Max of Texas Inc. and ACE Cash Express Inc. intervened in order to sustain it. The interveners' virtual prohibition claim shows the ambitious and predatory nature of payday and titles lending. Ultimately, the City of Dallas' pleas to the jurisdiction were granted, and the case was dismissed with prejudice. As a result, CSAT and the intervenors appealed to the Fifth Court of Appeals in Dallas, Texas. The Fifth Circuit should affirm the district court's judgment, because the ordinances are not preempted or inconsistent with the CSO Act.

Will CABs go out of business due to loan caps and limited rollovers? Would it be impossible to restructure CABs to comply with the ordinance? In states with similar restrictions as those imposed by the ordinances, CABs continue to operate. ¹⁴⁸ Essentially, the intervenors concede that CABs are only profitable when they are able to loan unlimited amounts and allow unlimited rollovers; however, the features that ensure a CAB's profitability also ensure consumers' indebtedness. ¹⁴⁹ Unfortunately, CABs predatory lending practices will continue to harm consumers, since the Texas

Legislature refuses to enact specific regulations attacking the loans' abusive features. As a result of this inaction, Austin, Dallas, El Paso, and San Antonio realized that regulation of payday and title loans was imperative. In the following section, I discuss the cities' attempt to address these abusive features, and argue that these ordinances are beneficial.

III. How Do the Ordinances Serve a Good Purpose?

Payday and title lenders make money from consumers with little repayment leeway. 150 Lenders are aware not only of consumers' inability to repay, but also of consumers' propensity to get trapped in cycles of debt.¹⁵¹ One could argue that getting a payday or title loan is a mistake. Consumers, in turn, should learn from their mistakes. Lenders, however, should not capitalize

Unfortunately, neither bill was

similar bills in the future.

enacted into law. The Legislature,

however, should consider passing

consumers' mistakes and further exacerbate their financial distress.152 When desperate consumers face financial problems, they do not stop and consider the future consequences of their borrowing. Instead, consumers focus on the loan's present benefits,

while being optimistic about repayment. 153 Lenders promote the beneficial side of payday and title loans because they are aware of consumers' over optimism.¹⁵⁴ The framing principle—"the offsetting of small-perceived losses with the illusion of substantial gains"—could be applied to the short-term lending industry just as it applies to the mortgage industry. 155

Additionally, the loans' design is abusive and unreasonable. Consumers' indebtedness, therefore, is largely attributed to the loans' features. 156 One scholar argues that payday loans are substantively and procedurally unconscionable. 157 Substantive unconscionability relates to the abusive loan terms and the consumer's inability to repay. 158 Procedural unconscionability deals with the lender's inadequate disclosures and the consumers' financial need and lack of understanding. 159 Unfortunately, the traditional contract defense of unconscionability is not the consumers' best remedy because of the uncertainty of the unconscionability standard and the court's reluctance to apply it to consumer credit contracts. 160

The ordinances discussed in Part II are a response to the Legislature's reluctance to specifically regulate CABS. This reluctance may be attributed to the Legislature's unfamiliarity with the negative impact that payday and title loans have on consumers. Austin, Dallas, El Paso, and San Antonio are aware that payday and title loans adversely affect consumers' lives. 161 When consumers are faced with these issues, city councils are the first to hear their consumers' complains. 162 Despite federal and state regulations, these cities felt compelled to protect consumers from abusive lending practices. 163 In this section, I discuss the provisions that prevent consumers from getting caught in cycles of debt. Additionally, I incorporate two proposed bills that emulate the ordinances. Unfortunately, neither bill was enacted into law. The Legislature, however, should consider passing similar bills in the future.

A. Obligate Lenders to Consider Ability to Repay and Limit the Amount of the Loan

CABs rely on their loan recovery methods and are not compelled to consider a consumer's ability to repay. 164 Payday lenders allow consumers to rollover repeatedly and thereby recover the loan's full amount without diminishing the principal amount owed.¹⁶⁵ Payday lenders' profitably mainly derives from the consumer's inability to repay. Therefore, there is no incentive to verify the consumer's income. 166 Lenders are aware that consumers are unprotected and at a disadvantage. The ability to repay requirement balances out this inequality. By limiting the amount of a payday loan to twenty percent (20%) of the consumer's monthly gross income, the consumer will not over borrow and is likely repay the loan. 167 Also, limiting the amount of the loan could benefit lenders by ensuring fewer defaults. 168

In title lending, the consumer's ability to repay is not considered because lenders have the consumer's car title as collateral.¹⁶⁹ Most consumers are not willing to lose their car; and unlimited rollovers sound like a good option. By repeatedly rolling over the loan, the lender makes a substantial profit. 170 If the consumer defaults, the title lender is able to make additional profit from reselling the consumer's car. 171 The impact of losing

> a car compares to that of losing a home.¹⁷²t Title lenders, therefore, should be required to consider the consumers' ability to repay. 173 It has been argued that loan caps on title loans are not beneficial for poor consumers with inexpensive cars. Instead, title lenders should be encouraged to lend a higher

percentage of the consumer's equity in the vehicle. 174 Another scholar argues, however, that title loans are usually for a third of the car's retail price, which makes these loans over-secured. 175 By limiting the amount of a title loan to the "lesser of three percent (3%) of the consumer's gross annual income or seventy percent (70%) of the retail value of the car,"176 the consumer is more protected and less likely to lose his car. 177

Recently, Texas State Senator Wendy Davis introduced S.B. 1716,¹⁷⁸ and Texas House Member Joe Farias introduced H.B. 1886.¹⁷⁹ S.B. 1716 and H.B. 1886 placed the same payday and title loan caps as the ordinances. 180 Additionally, S.B. 1716 required title lenders to refund to the consumer any excess amount from the sale of his car. 181

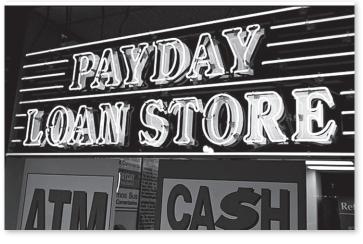
B. Eliminate Single-Lump Sum Repayment

Despite the industry's attempt to market payday and title loans as easily repaid, one study shows that a significantly low percentage of these loans are actually repaid on time. 182 The loans' structure guarantees that consumers will not be able to make ends meet at the end of the month; therefore, consumers are forced to rollover, refinance, or take out a new loan. 183 Scholars recognize the loans' faulty design and promote partial payments and amortization to ease the burden on consumers. 184 By giving consumers the opportunity to repay in more than one single lump sum consumers will not need to neglect other financial obligations such as utility bills.¹⁸⁵ Moreover, the Legislature should adopt provisions similar to those of S.B. 1716, because it mandated CABs to provide extended payment plans after consumers have rolled over three times. 186

C. Limit Rollovers and Diminish the Principal Amount

Rollovers are common and excessive, because consumers are not given enough time to repay. The Consumer Credit Research Foundation (CCRF) adamantly claims that it is unrealistic and unlikely for a consumer to rollover a loan for a year. However, the CCRF also acknowledges that the annual interest rate is higher than 300% if a consumer does rollover for a year. 187 Additionally, the CCRF claims that unlimited rollovers do not benefit consumers or lenders, because unsecured lenders will not lend money to individuals who are not likely to repay.¹⁸⁸ Despite claims that these loans are short-termed, 189 the structure of the loan and the consumers' inability to repay promote rollovers and

refinances for long terms. 190 A supporter of the industry claims that these loans help consumers cover emergencies, including monthly utilities.¹⁹¹ Consumers, however, do not see these as short-term emergency loans, and instead keep rolling them over to pay these recurring expenses.192 By limiting the amount of rollovers, the ordinances attack the most abusive feature of payday and title loans;193 therefore, consumers receive more adequate protection.



Just like the ordinances, H.B. 1886 limited repayment of installment loans to four installments, and required that proceeds from each installment be used to repay at least twenty-five percent (25%) of the principal amount.¹⁹⁴ Additionally, the bill provided that a loan that requires repayment in a single lump sum "may not be refinanced or renewed more than three times, and proceeds from each refinancing and renewal must be used to repay at least twenty-five percent (25%) of the principal amount."195 Moreover, H.B. 1886 prohibited the issuance of a new loan seven days after the consumer has paid off a previous loan. 196 This bill would have been very effective if a statewide database were created. Ultimately, CABs profitability is largely attributed to the consumer's inability to repay on time. 197 Therefore, the Legislature should try to balance out this inequality by adopting provisions such as those of H.B. 1886, which emulated the ordinances.

D. Promote Consumer Understanding and Referral Services

Disclosures have played a major role in state and federal regulations. The effectiveness of disclosures, however, is questionable. Often consumers will read disclosures without understanding them. Also, understanding loan agreements and price terms can be very difficult. By providing too much information, consumers feel overwhelmed and choose not to place enough effort in good decision-making. Lenders take advantage of this lack of knowledge, and influence consumers by promoting loans with low monthly interest rates instead of using an annual percentage rate. Despite arguments to the contrary, payday and title loans are not transparent and easily understood. These loans target "financially unsophisticated and vulnerable" consumers who often overestimate their repayment ability. Consumers

For most consumers, it might take several readings to fully grasp what disclosures or agreements say. Therefore, consumers rarely know what the transaction entails. So, what happens when a consumer cannot read English? What happens when a consumer cannot read? The San Antonio and El Paso ordinances answer these questions, and include a consumer-understanding requirement. These cities are aware that a significant amount of their population does not speak English, and do not have the appropriate education to fully understand disclosures or loan agreements.

Similar to these ordinances, S.B. 1716 required CABs to provide loan agreements and disclosures in the consumer's preferred language; and, if the consumer cannot read the documents and disclosures must be read to the consumer in the consumer's preferred language. Not only are CABs required to disclose information specific to the consumer's loan, but also are required to refer the consumer to credit counseling agencies that provide financial education and cash assistance. The Legislature should

promote statewide consumer understanding of disclosures and loan agreements, because this will "support the free market by providing consumers with informed choices without banning [payday and title loans]." ²⁰⁴

E. Require Lenders to Maintain a "Complete Set of Records"

CABs may argue that the ordinances' recordkeeping requirements negatively impact businesses from a structural

and financial standpoint. Currently, CABs require consumers to fill out an application, and to sign an agreement containing the consumers' general information and the principal amount of the loan. Arguably, CABs must maintain a filing system with client information in order to keep track of the loans issued in order to comply with the OCCC reporting requirements. Requiring CABs to keep a complete set of records should not be substantially burdensome. Moreover, the expense of maintaining these records should not be significantly higher, because most of their clients are repeat borrowers. ²⁰⁵ According to the Consumer Financial Service Association (CFSA), "payday lenders are less likely than secured lenders to make loans they believe will not be repaid from the borrower's cash flow;" ²⁰⁶ therefore, keeping a complete set of records is not only beneficial to the consumer, but also to the lenders.

Conclusion

Remember Ms. Garcia, the Hispanic lady who barely made enough to support her three children, and who called CDRC searching for help? Well, I promised I would call her back, and I did. Unfortunately, what I had to say was not what Ms. Garcia wanted to hear, and she refused to believe it. I told her that the loan agreement was binding, and that she had to pay in full unless she wanted to default. During our second conversation, I answered the following questions:

- 1) Is it legal for them to do this? "Yes."
- 2) What happens if I stop paying? "The lender may take you to court and try to get a judgment against you."
- 3) If I stop paying will they keep calling me? "Yes, and they may call the people you placed as references in an attempt to get the money."
- 4) If I go to court, can you represent me? "No, but I can refer you to organizations that may be able to provide legal assistance."

Ms. Garcia felt helpless, and I felt powerless. Nevertheless, she thanked me for calling her back and for listening to her story. That is exactly what the Legislature needs to do; it needs to listen to helpless consumers like Ms. Garcia who are not able to protect themselves.

Although any form of credit can be "abused and misused," CABs make abuse and misuse easier, and they disregard consumers' best interests.²⁰⁷ When obtaining a loan, consumers ignore future costs and get lured in by CABs' convenient locations and quick approval process.²⁰⁸ If these loans were actually well-regulated and transparent, they would serve their main purpose—helping distressed consumers in emergency situations.²⁰⁹ Unfortunately, there are minimal federal and state regulations of payday and title loans.

People in favor and against short-term loans agree that CABs provide a useful service to consumers in emergency situations;

however, consumer advocates argue that these loans are not in the consumers' best interests. ²¹⁰ Applying strict usury laws to CABs, however, is not the solution because it would do away with the business completely. ²¹¹ The Legislature should focus not only on regulating CABs with disclosures and licensing requirements, ²¹² but also on regulating the loans' abusive features. ²¹³

Municipal regulations provide "effective solutions" to predatory lending;²¹⁴ however, CABs circumvent these ordinances by advising consumers to get loans in other cities.²¹⁵ Clearly, the short-term lending industry does not want to be regulated. Their attempts to evade federal, state, and local regulations demonstrate their ambitious and vicious lending practices.

A non-profit policy and research organization argues that payday loan reform is threatened, because the industry makes large campaign contributions to lawmakers and political action committees. ²¹⁶ Are industry-financed lawmakers willing to regulate the payday loan industry? ²¹⁷ "Consumers are helpless against the combined power of lenders [which are] enhanced by their superior resources and their single-minded focus on credit-related issues." ²¹⁸ Unfortunately, consumers do not have the power and money to hire lobbyists. They cannot make hefty campaign contributions, but they can vote. How can consumers trust lawmakers who fund their campaigns with payday and title loan profits?

The Legislature can regain consumers' trust by letting them know that predatory lending practices will not be tolerated. Without specific regulations such as the ones established by the ordinances and the proposed bills, consumers like Ms. Garcia will suffer the negative consequences of payday and title lending. The ordinances serve a good purpose and are neither unconstitutional nor inconsistent with state law; therefore, instead of adopting laws limiting these cities' regulatory powers, the Legislature should adopt bills similar to the ordinances. Providing the ordinances' protection to every consumer in Texas should be one of the Legislature's main goals.

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- ¹ "Financiera" is a commonly used Spanish term for finance company.
- ² "Garcia" is a fictitious last name, but the facts are not.
- ³ "Mija" is a Spanish nickname for daughter.
- ⁴ See Todd J. Zywicki, Consumer Use and Government Regulation of Title Pledge Lending, 22 Loy. Consumer L. Rev. 425, 461 (2010) (stating that title loans help consumers avoid "utility shutoffs, eviction, and the need to forego necessary goods and services such as medical care). See also William M. Webster, IV, Payday Loan Prohibitions: Protecting Financially Challenged Consumers or Pushing Them over the Edge?, 69 Wash. & Lee L. Rev. 1051, 1055 (2012) (illustrating that payday loans help consumers "deal with unexpected or unbudgeted expenses").
- ⁵ Nathalie Martin & Ernesto Longa, *High-Interest Loans and Class: Do Payday and Title Loans Really Serve the Middle Class?*, 24 Loy. Consumer L. Rev. 524, 526 (2012).
- ⁶ Leah A. Plunkett & Ana Lucia Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 Suffolk U. L. Rev. 31, 33–34 (2011).
- 7 Id.
- ⁸ *Id.* at 34.
- 9 Id.
- ¹⁰ Karen E. Francis, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 Tex. L. Rev. 611, 611–612 (2010).
- ¹¹ *Id.*
- Webster, supra note 4, at 1051.

- ¹³ Zywicki, *supra* note 4, at 433.
- 14 Id
- ¹⁵ Jim Hawkins, Credit on Wheels: The Law and Business of Auto-Title Lending, 69 Wash. & Lee L. Rev. 535, 541 (2012).
- Plunkett & Hurtado, *supra* note 6, at 35.
- Patrick M. Aul, Federal Usury Law for Service Members: The Talent-Nelson Amendment, 12 N.C. Banking Inst. 163, 165 (2008).
- The City of Houston drafted a similar, but more lenient, ordinance that has not been enacted; therefore, it will not be discussed in detail. Hous. Tex., Consumer Protection, ch. 28, art. XIV, §§ 28-451–92 (not enacted).
- 19 15 U.S.C. § 1664 (2006).
- ²⁰ 10 U.S.C. § 987 (2006).
- ²¹ 12 U.S.C. § 5311 (2012).
- ² Hawkins, *supra* note 15, at 572.
- ²³ 15 U.S.C. § 1664 (2006).
- 24 Id. See Katherine Houren, Achieving the American Dream in Debt? Why the USA Patriot Act Puts Undocumented Immigrants at Risk for Abuse by the Payday Loan Industry, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 561, 575 (2009) (discussing the existing federal legislation of payday loans).
- Shane M. Mendenhall, Payday Loans: The Effects of Predatory Lending on Society and the Need for More State and Federal Regulation, 32 OKLA. CITY U. L. REV. 299, 315–16 (2007).
- ²⁶ *Id.* at 316.
- ²⁷ 10 U.S.C. § 987 (2006).
- Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580, 50,582 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt., 232).
- National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112–239,126 Stat. 1632.
- 30 12 U.S.C. § 5491 (2012).
- ³¹ 12 U.S.C. § 5536 (2012). *See* Hawkins, *supra* note 15, at 572 (stating that the Dodd- Frank Act prohibits title lenders from engaging in unfair, abusive, and deceptive practices).
- ³² Tex. Const. art. XVI, § 11.
- ³³ Tex. Const. art. XVI, § 11.
- ³⁴ Sealy Hutchings & Matthew J. Nance, *Credit Access Businesses: The Regulation of Payday and Title Loans in Texas*, 66 Consumer Fin. L.Q. Rep. 76, 79 (2012).
- ³⁵ *Id.*
- 36 Id.
- ³⁷ Tex. Fin. Code Ann. §§ 393.001–628 (West 2006 & Supp. 2012).
- ³⁸ 1 Tex. Admin. Code \$74.1 (West, Westlaw through March 31, 2013). *See also* Frequently Asked Questions for Credit Services Organizations, Texas Secretary of State John Steen, http://www.sos.state.tx.us/statdoc/faqs/2008.shtml (last visited Mar. 26, 2013) (informing consumers of the law regulating CABs).
- 39 Essentially, an extension of consumer credit is a loan, so I will refer to it as such throughout this article.
- ⁴⁰ Tex. Fin. Code Ann. § 393.001 (West 2006).
- Hutchings & Nance, *supra* note 34, at 84.
- ⁴² Act of June 17, 2011, 82nd Leg. R.S., ch. 1301, \$1, 2011 Tex. Sess. Law Serv., (West) (to be codified at Tex. Fin. Code Ann. §§ 393.221–24)
- ⁴³ Act of June 17, 2011, 82nd Leg. R.S., ch. 1302, \$2, 2011 Tex. Sess. Law Serv., (West) (to be codified at Tex. Fin. Code Ann. §\$ 393.601–28). .
- ⁴⁴ Austin, Tex., Bus. Regulations & Permit Requirements ch. 4-12, art. 2, § 4-12-10 (2011).
- ⁴⁵ Dall. Tex., Consumer Affairs ch.50, art. XI, §§ 50-144–151.3 (2011).
- EL Paso, Tex., Bus. License & Permit Regulations tit.5, ch. 5.17, §§ 5.17.010–130 (2013).
- San Antonio, Tex., Licenses & Bus. Regulations ch. 16, art.

- XVI, §§ 16-901-13 (2012).
- ⁴⁸ Austin, Tex., Bus. Regulations & Permit Requirements, §4-12-10.; Dall. Tex., Consumer Affairs, § 50-147.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.050.; San Antonio, Tex., Licenses & Bus. Regulations, § 16-905.
- ⁴⁹ See supra note 48 (illustrating the registration requirements for CABs).
- 50 Id.
- Austin, Tex., Bus. Regulations & Permit Requirements, § 4-12-11.; Dall. Tex., Consumer Affairs, § 50-149.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.060; San Antonio, Tex., Licenses & Bus. Regulations, § 16-906.
- ⁵² *Id.*
- ⁵³ *Id*.
- ⁵⁴ *Id.*
- ⁵⁵ Id.
- ⁵⁶ Austin, Tex., Bus. Regulations & Permit Requirements, § 4-12-12.; Dall. Tex., Consumer Affairs, § 50-150.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.070; San Antonio, Tex., Licenses & Bus. Regulations, § 16-907.
- ⁵⁷ See supra note 56 (discussing the registration requirements after certificate is issued).
- ⁵⁸ Austin, Tex., Bus. Regulations & Permit Requirements, § 4-12-13.; Dall. Tex., Consumer Affairs, § 50-151.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.080; San Antonio, Tex., Licenses & Bus. Regulations, § 16-908.
- ⁵⁹ Austin, Tex., Bus. Regulations & Permit Requirements, § 4-12-14.; Dall. Tex., Consumer Affairs, § 50-151.1.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.090; San Antonio, Tex., Licenses & Bus. Regulations, § 16-909.
- ⁶⁰ Austin, Tex., Bus. Regulations & Permit Requirements, § 4-12-20.; Dall. Tex., Consumer Affairs, § 50-151.2.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.100; San Antonio, Tex., Licenses & Bus. Regulations, § 16-910.
- 61 See supra note 60 (presenting the ordinances' recordkeeping requirements).
- 62 *Id.*
- 63 Id.
- 64 Id.
- ⁶⁵ Austin, Tex., Bus. Regulations & Permit Requirements, § 4-12-20.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.100.; San Antonio, Tex., Licenses & Bus. Regulations, § 16-910.
- ⁶⁶ Austin, Tex., Bus. Regulations & Permit Requirements, § 4-12-22.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.130.; San Antonio, Tex., Licenses & Bus. Regulations, § 16-913.
- 67 See supra note 66 (discussing the ordinances' referral requirements).
- ⁶⁸ El Paso, Tex., Bus. License & Permit Regulations, § 5.17.130.; San Antonio, Tex., Licenses & Bus. Regulations, § 16-913.
- ⁶⁹ El Paso, Tex., Bus. License & Permit Regulations, § 5.17.120.; San Antonio, Tex., Licenses & Bus. Regulations, § 16-912.
- ⁷⁰ See supra note 69 (discussing El Paso and San Antonio requirement of consumer understanding).
- ⁷¹ *Id.*
- ⁷² *Id.*
- 73 Austin, Tex., Bus. Regulations & Permit Requirements, § 4-12-23.; Dall. Tex., Consumer Affairs, § 50-146.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.030.; San Antonio, Tex., Licenses & Bus. Regulations, § 16-903.
- ⁷⁴ See supra note 73 (discussing penalties for violations of the ordinances' provisions).
- ⁷⁵ *Id.*
- ⁷⁶ Id
- Austin, Tex., Bus. Regulations & Permit Requirements, § 4-12-24.; Dall. Tex., Consumer Affairs, § 50-147.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.040.; San Antonio,

- Tex., Licenses & Bus. Regulations, § 16-904.
- ⁷⁸ Austin, Tex., Bus. Regulations & Permit Requirements, § 4-12-21.; Dall. Tex., Consumer Affairs, § 50-151.3.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.110.; San Antonio, Tex., Licenses & Bus. Regulations, § 16-906.
- ⁷⁹ See supra note 78 (illustrating the ordinances loan restrictions).
- 80 Id
- 81 *Id.*
- ⁸² *Id.*
- 83 Id.
- 84 Id.
- ⁸⁵ *Id.*
- 86 *Id.*
- Austin, Tex., Bus. Regulations & Permit Requirements, § 4-12-21.; Dall. Tex., Consumer Affairs, § 50-151.3.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.110.; San Antonio, Tex., Licenses & Bus. Regulations, § 16-906.
- 88 Dall. Tex., Consumer Affairs, § 50-151.3.; El Paso, Tex., Bus. License & Permit Regulations, § 5.17.110.; San Antonio, Tex., Licenses & Bus. Regulations, § 16-906.
- ⁸⁹ Consumer Service Alliance of Texas, http://consumerserviceal-lianceoftexas.org, (last visited Mar. 28, 2013).
- Onsumer Serv. Alliance of Texas Inc., v. City of Austin, No. D-1-GN-11-003142 (250th Jud. Dist. Ct., Travis County, Tex. June 2012) (During a telephone conversation, an employee from the Travis County District Clerks' informed that the case was closed as of June 2012.)
- Onsumer Serv. Alliance of Texas Inc., v. City of Dallas, No. 11-08739-A (14th Jud. Dist. Ct., Dallas County, Tex. Feb. 5, 2013).
- The Travis County District Clerk's Office does not have free public access to records. In order to view the legal documents filed, an individual must subscribe to idocket and pay a monthly subscription. CSAT's original petition against the City of Austin was found at the Legislative Reference Library of Texas while researching H.B. 2592 and H.B. 2594. Legal Documents, Legislative Reference Library of Texas, http://www.lrl.state.tx.us/currentissues/clips/resultsLink.cfm?clipID=202213&headline=More%20protection%20needed%20 from%20predatory%20payday-loan%20practices (last visited April 19, 2013)
- ⁹³ Tex. Const. art. XI, § 5.
- ⁹⁴ *Id.*
- 95 MJR'S Fare of Dallas, Inc. v. City of Dallas, 792 S.W.2d 569, 573 (Tex. App.—Dallas 1990, writ denied).
- ⁹⁶ City of Dallas v. Dallas Merchs. & Concessionaires Ass'n, 823 S.W.2d 347, 353 (Tex. App.—Dallas 1991) *rev'd sub nom.* Dallas Merchs. & Concessionaires Ass'n v. City of Dallas, 852 S.W.2d 489 (Tex. 1993).
- ⁹⁷ *Id.*
- ⁹⁸ Dallas Merchs. & Concessionaires Ass'n. v. City of Dallas, 852 S.W.2d 489, 491 (Tex. 1993).
- 99 Id.
- 100 *Id.* at 490.
- $^{101}\,\,$ Tex. Alco. Bev. Code Ann. § 109.31 (West 2007).
- ¹⁰² Tex. Alco. Bev. Code Ann. § 109.57 (West 2012).
- 103 Id
- ¹⁰⁴ Dallas Merchs., 852 S.W.2d at 491–92.
- ¹⁰⁵ Tex. Fin. Code Ann. §393.602 (West 2012).
- 106 Id.
- ¹⁰⁷ Houston Ass'n of Alcoholic Beverage Permit Holders v. City of Houston, 508 F. Supp. 2d 576, (S.D. Tex. 2007).
- ¹⁰⁸ *Id.*
- ¹⁰⁹ *Id.*
- ¹¹⁰ *Id.* at 583.
- ¹¹¹ *Id.* at 580–581.
- City of Dallas v. Dallas Merchs. & Concessionaires Ass'n, 823 S.W.2d 347, 353 (Tex. App.—Dallas 1991) *rev'd sub nom.* Dallas Mer-

- chs. & Concessionaires Ass'n v. City of Dallas, 852 S.W.2d 489 (Tex. 1993).
- Barnett v. City of Plainview, 848 S.W.2d 334, 338 (Tex. App.—Amarillo 1993, no writ).
- Resolution Supporting Uniformity of Laws Governing Credit Access Businesses, Finance Commission of Texas, (Dec. 2012) http://www.fc.texas.gov/resolutions/04-20-12r.html.
- ¹¹⁵ Tex. Const. art. XI, § 5.
- ¹¹⁶ City of Weslaco v. Melton, 308 S.W.2d 18, 21 (Tex. 1957).
- 117 Id
- ¹¹⁸ Dallas Merchs., 852 S.W.2d at 491.
- 119 City of Richardson v. Responsible Dog Owners of Texas, 794 S.W.2d 17, 19 (Tex. 1990).
- 120 Id.
- ¹²¹ *Id.*
- 122 Id.
- 123 Id.
- 124 Id.
- RCI Entm't (San Antonio), Inc. v. City of San Antonio, 373 S.W.3d 589 (Tex. App.—San Antonio 2012, no pet.).
- ¹²⁶ *Id.* at 593–596.
- ¹²⁷ *Id*.
- 128 Id. at 596.
- 129 Id. at 597.
- 130 Id.
- 131 Combined Am. Ins. Co. v. City of Hillsboro, 421 S.W.2d 488 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.).
- ¹³² *Id.*
- ¹³³ *Id.* at 490.
- ¹³⁴ *Id.*
- 135 *Id.* at 491.
- 136 Id. at 490.
- ¹³⁷ Tex. Fin. Code Ann. § 393.622 (West 2012).
- ¹³⁸ RCI Entm't (San Antonio), Inc., 373 S.W.3d at 597.
- 139 See Christopher L. Peterson, "Warning: Predatory Lender"-A Proposal for Candid Predatory Small Loan Ordinances, 69 WASH. & LEE L. REV. 893, 948 (2012) ("courts have consistently held that, in the absence of express or field preemption, local authority to regulate for the general welfare includes authority to regulate consumer finance").
- Plaintiff's Original Petition & Application for Temporary Injunction at 7–8, Consumer Serv. Alliance of Texas Inc., v. City of Dallas, No. 11-08739-A (14th Jud. Dist. Ct., Dallas County, Tex. Feb. 5, 2013).
- ¹⁴¹ Dallas Merchs., 852 S.W.2d at 491.
- ¹⁴² See Peterson, supra note 139 at 948 (a "state statute preempts municipal ordinances when either the language in the ordinance contradicts the language in the statute or when [the judiciary finds that] the [l]egislature has intended to thoroughly occupy the field [of regulation]").
- Plaintiff's Original Petition & Application for Temporary Injunction at 8, supra note 139.
- Defendant City of Dallas' Original Pleas to the Jurisdiction, Special Exceptions, Answer, Counterclaim, and Request for Disclosure at 6, Consumer Serv. Alliance of Texas Inc., v. City of Dallas, No. 11-08739-A (14th Jud. Dist. Ct., Dallas County, Tex. Feb. 5, 2013).
- Petition in Intervention at 6, Consumer Serv. Alliance of Texas Inc., v. City of Dallas, No. 11-08739-A (14th Jud. Dist. Ct., Dallas County, Tex. Feb. 5, 2013).
- Order Granting Defendant's Plea to the Jurisdiction at 1, Consumer Serv. Alliance of Texas Inc., v. City of Dallas, No. 11-08739-A (14th Jud. Dist. Ct., Dallas County, Tex. Feb. 5, 2013).
- Plaintiff's Notice of Appeal at 1, Consumer Serv. Alliance of Texas Inc., v. City of Dallas, No. 11-08739-A (14th Jud. Dist. Ct., Dallas County, Tex. Feb. 5, 2013).
- For example, New Mexico limits payday loans to twenty five percent (25%) of the consumer's gross monthly income, prohibits lend-

- ers from charging interest on the outstanding principal amount, and requires an extended payment plan. Additionally, a "licensee shall not charge a consumer interest on the outstanding principal owed on a payday loan product." N.M. Stat. Ann. § 58-15-5 (West, Westlaw through 2012 legislation). By the end of 2011, there were still 121 active payday locations that were registered in the statewide database, and 83,022 payday loans were issued that resulted in advance fees totaling \$4.7 million. Payday Loan Annual Report 2011, New Mexico Regulation and Licensing Department, available at http://www.rld.state.nm.us/uploads/files/FID%202011%20Payday%20Loan%20Report.pdf
- ¹⁴⁹ See discussion infra Part III.C.
- ¹⁵⁰ Charles A. Bruch, *Taking the Pay Out of Payday Loans: Putting an End to the Usurious and Unconscionable Interest Rates Charged by Payday Lenders*, 69 U. CIN. L. REV. 1257, 1288 (2001).
- ¹⁵¹ *Id.* at 1288.
- Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. Pa. L. Rev. 1, 58–59 (2008).
- ¹⁵³ Peterson, *supra* note 139, at 913–14.
- ¹⁵⁴ *Id.* at 910.
- See Patricia A. McCoy, A Behavioral Analysis of Predatory Lending, 38 Akron L. Rev. 725, 731–32 (2005) (discussing the framing principle as applied to homeownership).
- Bar-Gill & Warren, *supra* note 152, at 55–56. *See* Deena Reynolds, *A Look at Payday Loans & Current Regulation in Texas*, 8 Tex. Tech Admin. L.J. 321, 325 (2007) (discussing the balloon payment and rollover characteristics of payday loans).
- ¹⁵⁷ Bruch, *supra* note 150, at 1278–84.
- ¹⁵⁸ *Id.* at 1278–79.
- 159 *Id.* at 1282.
- Pearl Chin, *Payday Loans: The Case for Federal Legislation*, 2004 U. ILL. L. Rev. 723, 746 (2004). *See* Bar-Gill & Warren, *supra* note 152, at 71 (discussing the courts' reluctance to apply unconscionability to credit contracts).
- ¹⁶¹ Diane Hellwig, Exposing the Loansharks in Sheep's Clothing: Why Re-Regulating the Consumer Credit Market Makes Economic Sense, 80 Notre Dame L. Rev. 1567, 1577–78 (2005).
- ¹⁶² Peterson, *supra* note 139, at 942–43.
- ¹⁶³ *Id.* at 932.
- Kelly J. Noyes, Comment, Get Cash Until Payday! The Payday Loan Problem in Wisconsin, 2006 Wis. L. Rev. 1627,1635.
- ¹⁶⁵ Tiffany S. Lee, *No More Abuse: The Dodd-Frank and Consumer Financial Protection Act's "Abusive" Standard*, 14 J. Consumer & Com. L. 118, 122 (2011).
- 166 *Id.* at 124.
- ¹⁶⁷ Richard J. Thomas, *Rolling over Borrowers: Preventing Excessive Refinancing and Other Necessary Changes in the Payday Loan Industry*, 48 Wm. & Mary L. Rev. 2401, 2432 (2007).
- 168 I_{e}
- ¹⁶⁹ Nathalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 Mo. L. Rev. 41, 42 (2012).
- ¹⁷⁰ Lee, *supra* note 165, at 122.
- 171 Ia
- Martin & Adams, *supra* note 169, at 86. *See* Jean Anne Fox, Tom Feltner, Delvin Davis, & Uriah King, *Driven to Disaster: Car Title Lending and Its Impact on Consumers*, 9, Consumer Federation of America & Center for Responsible Lending (Feb. 28, 2013), http://www.responsiblelending.org/other-consumer-loans/car-title-loans/research-analysis/CRL-Car-Title-Report-FINAL.pdf (discussing asset-based lending in the mortgage industry, and it's negative effects on consumers).

 Martin & Adams, *supra* note 169, at 88. *See* Hawkins, *supra* note 15, at 602 ("the better solution is to encourage lenders to evaluate ability
- to repay through disallowing deficiencies").

 Hawkins, *supra* note 15, at 601–02.
- ⁷⁵ Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Fi-*

nancial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society, 51 S.C. L. Rev. 589, 598 (2000).

- See supra Part I.C.5.
- Fox et. al, *supra* note 172, at 10.
- ¹⁷⁸ Tex. S.B. 1716, 83rd Leg., Reg. Sess. (2013).
- ¹⁷⁹ Tex. H.B. 1886, 83rd Leg., Reg. Sess. (2013).
- ¹⁸⁰ Tex. S.B. 1716, 83rd Leg., Reg. Sess. (2013).
- 181 Id
- ¹⁸² Uriah King & Leslie Parrish, Springing the Debt Trap: Rate Caps Are Only Proven Payday Lending Reform, Center for Responsible Lending (Dec. 13, 2007). http://www.responsiblelending.org/paydaylending/research-analysis/springing-the-debt-trap.pdf.
- ¹⁸³ *Id.*
- Thomas, supra note 167, at 2412. See Alan M. White, Credit and Human Welfare: Lessons from Microcredit in Developing Nations, 69 Wash. & Lee L. Rev. 1093, 1136 (2012) ("[O]verborrowing risk may be mitigated through credit-product design (e.g., requiring amortization) and requirements for lenders to assess repayment ability properly.").
- Uriah King & Leslie Parrish, *Payday Loans, Inc.: Short on Credit, Long on Deb, Center for Responsible Lending (Mar. 2011)*, http://www.responsiblelending.org/payday-lending/research-analysis/payday-loan-inc.pdf.
- ¹⁸⁶ Tex. S.B. 1716, 83rd Leg., Reg. Sess. (2013).
- William O. Brown & David W. Findlay, *Payday Lending Factbook*, Consumer Credit Research Foundation (Dec. 2004), http://www.creditresearch.org/editor/assets/files/PaydayLendingFinal_woTitle.pdf. *Contra* Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 Minn. L. Rev. 1110, 1159 (2008) (illustrating how repeat consumers do use payday loans for years).
- Brown and Findlay, *supra* note 187, at 8. *But see* Noyes, *supra* note 164, at 1637 (stating that evidence shows rollovers and concurrent loans are abundant). *See* Houren, *supra* note 24, at 568 (stating that the industry's profitability is due to repeat borrowers).
- 189 Paige Marta Skiba, Regulation of Payday Loans: Misguided?, 69 Wash. & Lee L. Rev. 1023, 1042 (2012).
- ¹⁹⁰ Peterson, *supra* note 187 at 1126.
- ¹⁹¹ Zywicki, *supra* note 4, at 425.
- Benjamin D. Faller, *Payday Loan Solutions: Slaying the Hydra (and Keeping It Dead)*, 59 Case W. Res. L. Rev. 125, 134 (2008). *See* Plunkett & Hurtado, *supra* note 6, at 34 (describing back to back borrowing as "churning").
- ¹⁹³ Bar-Gill & Warren, supra note 152, at 55.
- ¹⁹⁴ Tex. H.B. 1886, 83rd Leg., Reg. Sess. (2013).
- ¹⁹⁵ *Id.*
- ¹⁹⁶ Id.
- ¹⁹⁷ Peterson, *supra* note 187, at 1126–27. *See also* Reynolds, *supra* note 156, at 322 (stating that "the payday loan industry's success is achieved through the enormous cost to its customers").
- ¹⁹⁸ Peterson, *supra* note 139, at 916. *See* Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. Rev. 855, 881 (2007) (discussing how normal individuals might not really understand the lending transaction).
- ¹⁹⁹ Peterson, *supra* note 139, at 916.
- ²⁰⁰ *Id.* at 917–918. *But see* Webster, *supra* note 4, at 1075 (describing payday loans as "one of the most transparent financial product[s] on the market").
- ²⁰¹ Lee, *supra* note 165, at 122.
- ²⁰² Tex. S.B. 1716, 83rd Leg., Reg. Sess. (2013).
- ²⁰³ *Id. See* Tex. H.B. 1886, 83rd Leg., Reg. Sess. (2013) (providing the same amendments to the CSO Act).
- Dee Pridgen, Putting Some Teeth in TILA: From Disclosure to Substantive Regulation in the Mortgage Reform and Anti-Predatory Lending Act of 2010, 24 Loy. Consumer L. Rev. 615, 616 (2012).

- Mann & Hawkins, supra note 198, at 865.
- Myth v. Reality, Consumer Financial Services of America, available at http://cfsaa.com/aboutthepaydayindustry/myth-vs-reality. aspx (last visited April 2013).
- ²⁰⁷ But see Webster, supra note 4, at 1052 (describing payday loans as a "sound choice" and an "effective financial tool" for consumers' short-term needs).
- Francis, *supra* note 10, at 619. *See* Michael A. Garemko III, *Texas's New Payday Lending Regulations: Effective Debiasing Entails More Than the Right Message*, 17 Tex. J. C.L. & C.R. 211, 222 (2012) (describing "unrealistic optimism" as one of consumers' cognitive problems when obtaining payday loans).
- ²⁰⁹ But see Webster, supra note 4, at 1052 (states that "our company, [Advance America], offers low-cost, transparent, and convenient credit with meaningful consumer protections).
- ²¹⁰ Bruch, *supra* note 150, at 1287.
- ²¹¹ Thomas, *supra* note 167, at 2402–03.
- ²¹² Hawkins, *supra* note 15, at 595–96.
- ²¹³ Thomas, *supra* note 167, at 2402–03.
- ²¹⁴ *Id.* at 2414.
- ²¹⁵ Credit Access Business Bulletin City Ordinances, Office of Consumer Credit Commissioner (Dec. 2012) available at http://www.occc.state.tx.us/pages/Legal/CAB_advisory/CAB%20City%20Ordinances%20Dec%2012.pdf (last visited Apr. 2013).
- ²¹⁶ Loan-Shark Financed Campaigns Threaten Payday Loan Reform, Texans for Public Justice (Mar. 2011) available at http://info.tpj.org/reports/pdf/PaydayReport.mar2011.pdf (last visited Apr. 2013).
- ²¹⁷ Bar-Gill & Warren, supra note 152, at 85.
- ²¹⁸ *Id.*