IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9120

ABC ASPHALT, INC., ET AL.,

Plaintiffs-Appellants,

v.

CREDIT ALLIANCE CORPORATION, ET AL.,

Defendants-Appellees.

C/W

No. 94-10118

IN THE MATTER OF: ABC UTILITIES SERVICES, INC., ET AL.,

Debtors.

JOSEPH COLVIN, Trustee of the Estate
of ABC Asphalt, Inc., Utilities Equipment
Leasing and ABC Utilities Services, Inc., ET AL.,

Appellants,

v.

ORIX CREDIT ALLIANCE, INC.,

Appellee.

Appeals from the United States District Court
For the Northern District of Texas
(Nos. 4:89-CV-720-A, 4:93-CV-639-A)

(May 15, 1995)

Before JOLLY and WIENER, Circuit Judges.[*]

WIENER, Circuit Judge:[**]

In this consolidated appeal of two related cases, Plaintiffs-Appellants, all corporations (collectively, "ABC"), argue that the district court erred in granting summary judgment in favor of Defendant-Appellee ORIX Credit Alliance, Inc. (ORIX),[1] concluding that the substantive law of New York, not Texas, governed ABC's claims, which were founded primarily on Texas usury law. In the other case, Appellant Joseph Colvin (Trustee), contends that the district court erred in holding that the doctrine of res judicata barred the claims brought by the Trustee. Finding no reversible error, we affirm.

I

FACTS AND PROCEDURE

ABC Utilities Services, Inc. (ABC Utilities), a Texas corporation with its home office in Fort Worth, installed municipal

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[*]When this case was argued in December 1994, Judge Goldberg was a member of the panel. Due to his death On February 11, 1995, however, Judge Goldberg did not participate in this decision, and the case is being decided by a quorum. 28 U.S.C. § 46(d).

[**]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]ORIX has had several corporate predecessors. Leasing Services Corporation was merged into Credit Alliance Corporation, which, in turn, was merged into First Interstate Credit Alliance, which then changed its name to ORIX Credit Alliance, Inc. For the purposes of this opinion, all of these entities are referred to as ORIX.

utilities for cities and towns in the Dallas/Fort Worth area. Utilities Equipment Leasing Company, Inc. (UELCO), and ABC Asphalt, Inc. (Asphalt) were wholly owned subsidiaries of ABC Utilities. UELCO acquired construction equipment and leased it to ABC Utilities, while Asphalt provided asphalt to ABC Utilities for use in its various construction projects. Frank Wolfe was the president and sole director of ABC Utilities, UELCO, and Asphalt.

Between 1984 and 1989, ORIX, a New York corporation that specializes in the financing of equipment purchases, loaned money to both UELCO and Asphalt to finance their acquisition of heavy equipment for use in construction projects.[2] As collateral for those loans, ORIX obtained security interests in the equipment leased or purchased with those loans.

In 1988, ORIX combined all of ABC's then-outstanding promissory notes into one note, the "Consolidation Note," and the parties executed a comprehensive security agreement, the "Consolidated Security Agreement," in which ORIX was granted a security interest in the equipment acquired by its loans. Later that year, ORIX and ABC replaced the Consolidation Note with another promissory note, the "Replacement Note," which included another transaction and refinanced the terms of the Consolidation Note, but no new security agreement was executed.

In April 1989, ABC, represented by St. Clair Newbern, filed for bankruptcy under Chapter 11, and the companies were named

[2]ORIX maintains branch offices in Houston and Dallas, Texas, but its principal office and place of business is in New York.

debtors-in-possession. In October 1989, ABC filed a complaint against ORIX, primarily alleging violations of Texas usury law (ABC I).[3] ABC, with the approval of the bankruptcy court, retained Brian Powers to handle the litigation as he had experience litigating usury claims against ORIX. When ABC retained Powers, he was actively representing another Texas corporation, Paisano Construction Company (Paisano), in other litigation against ORIX.

In April 1990, ORIX and Paisano (represented by Powers) entered into a confidential settlement agreement. As part of that accord, Powers received a $100,000 "consulting fee" from ORIX in consideration of which Powers agreed, among other things, that neither he nor his law firm would represent anyone in usury suits against ORIX, except for the pending representation of ABC in ABC I. ABC maintains that it did not learn of the terms of Powers' "secret consulting agreement" until June 1993. ORIX claims that ABC knew of the existence of the agreement as early as 1990.

In July 1991, after roughly two years of discovery, ABC and ORIX filed cross motions for summary judgment in ABC I. In June 1992, the district court denied both parties' motions without opinion and scheduled trial for the summer of 1993. In the spring of 1993, ABC obtained a copy of a deposition taken pursuant to other litigation in which Clifton B. Bolstad, formerly an ORIX regional vice president in Texas, stated that ORIX intentionally engaged in certain fraudulent business practices (Bolstad

[3]ABC Asphalt, Inc. v. Credit Alliance Corp., No. 4:89-CV-720-A.

Deposition). Based on that information, ABC filed a motion for leave to amend its complaint so that it could raise additional claims. About that same time, ORIX sought reconsideration of the district court's decision denying its motion for summary judgment. In May 1993, the court denied ABC's motion to amend its complaint, but granted ORIX's request for reconsideration and rendered summary judgment in favor of ORIX. A month later, ABC made a motion to set aside that judgment, which the court denied.

In July 1993, after the district court had entered summary judgment in favor of ORIX in ABC I, the bankruptcy court withdrew Powers as counsel for ABC and retained new counsel, Hill, Heard, Gilstrap, Goetz & Moorhead (Hill). Six days later, the new attorneys commenced an adversary proceeding in bankruptcy court against ORIX on behalf of the Trustee (ABC II).[4] In that proceeding, the Trustee raised numerous legal theories, some of which had not been advanced by Powers in ABC I. The district court withdrew its reference to the bankruptcy court, and the case was transferred to district court. ORIX filed a motion for summary judgment, arguing that ABC I barred ABC II under the doctrine of res judicata. The district court agreed and granted summary judgment in favor of ORIX in ABC II. This appeal followed, with ABC and the Trustee assigning four points of error. With regard to ABC I, ABC contends that the district court erred in (1) failing to set aside the judgment under Federal Rules of Civil Procedure Rule

[4] In re ABC Utilities Servs., Inc., No. 4:93-CV-639-A. The Trustee was appointed in April 1991.

60(b); (2) granting summary judgment in favor of ORIX; and (3) not allowing ABC to amend its complaint. The Trustee asserts that the district court improperly found that res judicata barred ABC II.

II

DISCUSSION

A. Motion to Set Aside Summary Judgment

ABC's primary complaint is that the district court erred in denying its motion under Rule 60(b) to set aside summary judgment in favor of ORIX in ABC I after ABC alerted the court to Powers' dual representation. ABC contends that such extraordinary relief is warranted as the district court "did not have all of the facts," i.e., that Powers had also been retained by ORIX, when it entered summary judgment against ABC. ORIX responds that ABC is not entitled to relief under Rule 60(b) and that, even if it were, it waived any remedy to which it may have otherwise be entitled by choosing voluntarily to wait until after the district court rendered summary judgment before raising the issue of Power's purported conflict of interest.

The district court denied ABC's Rule 60(b) motion, concluding that "there is no reason to believe that the judgment [in favor of ORIX] was obtained by fraud on any party or on the court, no matter how reprehensible the conduct of plaintiffs' counsel [Powers]." The court found, in particular, that ABC (1) "had knowledge of the facts giving rise to [its] request long before judgment was granted," (2) "make[s] no assertion that [its] counsel [Powers] failed to allege any fact that could have been urged to raise a

genuine issue for trial," and (3) does not "argue that [its] counsel failed to take any legal position that would have affected the outcome of the motion for summary judgment." We review for abuse of discretion a denial of a Rule 60(b) motion.[5] "Under this standard, the court's decision need only be reasonable."[6]

"Several factors shape the framework of the court's consideration of a 60(b) motion:

> (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to do substantial justice; (4) whether the motion was made within a reasonable time; (5) whether))if the judgment was a default or a dismissal in which there was no consideration of the merits))the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether there are any intervening equities that would make it inequitable to grant relief; and (7) any other factors relevant to the justice of the judgment under attack."[7]

Although in its brief ABC does not make clear under which provision of Rule 60(b) its motion is based, we surmise from the tenor of its argument that its motion is founded either on Rule 60(b)(3) or on Rule 60(b)(6). We consider the district court's ruling under both of those standards.

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[5]Edward H. Bohlin Co. v. Banning Co., 6 F.3d 350, 353 (5th Cir. 1993).

[6]Id.

[7]Id. at 356 (quoting Seven Elves v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981)).

1. Rule 60(b)(3)

Rule 60(b)(3) provides that, "[o]n motion . . . the court may relieve a party . . . from a final judgment . . . for . . . fraud . . ., misrepresentation, or other misconduct of an adverse party." "One who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence."[8] "The conduct complained of must be such as prevented the losing party from fully and fairly litigating his case or defense."[9] "This subsection of the Rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect."[10]

We cannot disagree with the district court's characterization of Powers' conduct; but neither can we conclude that the district court abused its discretion in denying ABC's requested relief under Rule 60(b)(3). As the district court found, the record does not support ABC's contention that Powers' misconduct prevented the company from fully and fairly litigating its case: The district court did not clearly err in finding that Powers neither failed to allege facts that could have been urged to raise a genuine issue for trial nor eschewed legal positions that could have affected the outcome of ABC's motion for summary judgment. ABC, with the benefit of hindsight, speculates that Powers, at a minimum, should

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[8]Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978).

[9]Id.

[10]Id.

have (1) "investigate[d] whether ABC had claims beyond simply contracting for usury," (2) "deposed Clifton Bolstad and learned of [ORIX'] corporate policy to defraud its customers," and (3) asked Pat Miller, an ORIX employee, more questions during his deposition.[11] But the mere existence of those alternatives does not establish that Powers' professional misdeeds foreclosed the possibility of a full and fair airing of ABC's claims))a necessary finding for relief under Rule 60(b)(3).[12]

2. Rule 60(b)(6)

Neither did the district court abuse its discretion in denying ABC relief under the catch-all provision, Rule 60(b)(6), which permits a court to set aside a judgment for "any other reason justifying relief from the operation of the judgment." To obtain relief under subsection (6), ABC "`must show the initial judgment to have been manifestly injust.'"[13] This ABC cannot do.

We agree with the district court, which essentially found that ABC's Rule 60(b)(6) conflict claim was untimely.[14] The record makes

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[11]We note that after Powers obtained a copy of the Bolstad Deposition, he filed a motion to amend ABC's complaint to include almost all of the claims later brought by new counsel in ABC II, but that his motion for leave to amend was denied by the district court.

[12]Diaz v. Methodist Hosp., 46 F.3d 492, 497 (5th Cir. 1995); see Rozier, 573 F.2d at 1346.

[13]Edward H. Bohlin Co., 6 F.3d at 357; see Rozier, 573 F.2d at 1338 (stating that under the "fraud upon the court" standard, the movant must "`show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" (quoting England v. Doyle, 281 F.2d 304, 309 (9th Cir. 1960))).

[14]See Travelers Ins. Co. v. Liljeberg Enters., Inc., 38 F.3d 1404, 1410-11 (5th Cir. 1994) (finding untimely Rule 60(b)(6)

clear that ABC knew or should have known of the attorney-client relationship between Powers and ORIX possibly by as early as 1990, probably by March 1991, and certainly by no later than March 22, 1993.

First, John A. Roberts, III, the president of Paisano Construction Company, stated that Wolfe became aware of the relationship between Powers and ORIX sometime in 1990: "Soon after I settled my lawsuit [January 17, 1990], I got a call from Frank Wolfe. . . . I told him that his ABC lawsuit was not affected, that my lawyers, White, Huseman, Pletcher & Powers, had agreed not to sue Credit Alliance for anybody else, but that the ABC lawsuit was specifically excepted from that agreement." Roberts claims that he discussed the settlement agreement with Wolfe again in August 1992.

Second, on March 25, 1991, Powers was deposed in the presence of Newbern, ABC's bankruptcy counsel. During that deposition, Powers' counsel (and law firm partner) Anthony E. Pletcher acknowledged on the record))while Newbern was present))that ORIX had retained Powers and his firm:

> There is a settlement agreement in which certain matters have been agreed to, and in that matter that was entered by our law firm, we have agreed to act as a consultant to litigation. However, there is an exception to that wherein it specifically and expressly acknowledges a pending lawsuit styled ABC Asphalt, Inc., ABC Utilities, Inc. and Utilities Equipment Leasing Company, Inc. versus Orix Credit Alliance, Inc., and which is pending in the United States District Court for the

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motion where facts relevant to motion, i.e., alleged disqualification of judge, were known to movant before court ruled on motions for summary judgment, but movant waited until after adverse judgment to raise disqualification issue).

> Northern District of Texas, Forth Worth Division in which Credit Alliance and our law firm acknowledge that our law firm is representing plaintiffs [ABC] in the designated litigation in which the plaintiffs are making a claim against Credit Alliance, and it specifically says "Nothing in the consulting relationship created hereby is intended or will be construed to authorize or permit White, Huseman to give any consulting advise which would be contrary to its fiduciary interests to its clients in that litigation. Any conflict of interest created hereby is waived by Credit Alliance.

Thus Newbern, ABC's counsel, obtained actual knowledge of the existence of Powers' consulting agreement during Powers' deposition. A client is charged with the knowledge obtained by his counsel, even in the context of a bankruptcy proceeding.[15]

Third, on March 22, 1993, Powers, in an uncontroverted affidavit, claims that he was told by Henry W. Simon, Jr., another of Wolfe's representatives, that Wolfe "was concerned that I [Powers] was not representing his [Wolfe's] best interest because of an agreement between myself and ORIX. I stated to Mr. Simon that a relationship existed between White, Huseman and ORIX as a result of prior litigation."

And fourth, Wolfe, the president of ABC, admitted in his affidavit that he knew of the existence of the Powers-ORIX settlement agreement "[i]n late 1992 or early 1993," and he added that when he learned of the agreement, "I spoke with Bryan Powers regarding his agreement with [ORIX] . . . and he would not discuss the details of the agreement but stated that as a result of his

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[15]See Bernstein Seawell & Kove v. Bosarge, 813 F.2d 726, 730 (5th Cir. 1987) (`[A] client "is considered to have `notice of all facts, notice of which can be charged upon the attorney.'"' (quotations omitted)); see, e.g., In re Glow, 111 B.R. 209, 218 (Bankr. N.D. Ind. 1990).

agreement with [ORIX], he was basically their employee." As Wolfe obviously knew that Powers was an attorney, at the instant Wolfe learned that Powers was ORIX's "employee," Wolfe knew or should have known that Powers and ORIX had entered into an attorney-client relationship.

Nevertheless, ABC chose not to alert the court of Powers' possible conflict of interest until August 1993))three months after the district court had rendered summary judgment against ABC in ABC I. Although ABC knew of Powers' possible conflict of interest before the judgment was entered, it made a "free, calculated, and deliberate choice" to take its chances with Powers up until the moment it became certain that its gamble did not pay off. As we recently reiterated,

> "[t]he broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests."[16]

By lying behind the log until after it received an adverse judgment to play its alternative "conflict card," ABC failed to protect its own interests in a timely fashion. ABC cannot now seek a second bite at the apple under Rule 60(b)(6). No manifest injustice is present here.

B. SUMMARY JUDGMENT

We next consider whether the district court erred in granting summary judgment in favor of ORIX in ABC I. We review de novo a

[16]Edward H. Bohlin Co., 6 F.3d at 356 (quoting United States v. O'Neil, 709 F.2d 361, 373 n.12 (5th Cir. 1983)).

grant of summary judgment.[17] Summary judgment is proper if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law.[18]

ABC's primary underlying theory for recovery in ABC I is that acceleration provisions contained in certain of the agreements between ABC and ORIX violate Texas usury law.[19] The parties agree that New York does not provide a cause of action for usury to business consumers.[20] Therefore if New York law applies, summary judgment in favor of ORIX is proper.

Before delving into the conflict of law issue before us, we pause, as we did in In re Worldwide Trucks, Inc.,[21] to reiterate the unique maxims applicable to claims of usury under Texas law. Because of the penal nature of those laws, the Texas usury statutes are strictly construed.[22] "If there is any doubt as to the intent of the parties to the transactions alleged to be usurious, a presumption of nonusurious intent will lead a court to resolve such

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[17]Fields v. Hallsville Indep. Sch. Dist., 906 F.2d 1017, 1019 (5th Cir. 1990), cert. denied, 498 U.S. 1026 (1991).

[18]Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

[19]The allegedly usurious provisions permit acceleration not only of principal and earned interest, but also of unearned interest.

[20]See Davidson Oil Country Supply, Inc. v. Klockner, Inc., 908 F.2d 1238, 1248 (applying New York law), reh'g granted on other grounds, 917 F.2d 185 (5th Cir. 1990).

[21]948 F.2d 976, 979 (5th Cir. 1991).

[22]Id. (citing Tygrett v. University Gardens Homeowners' Ass'n, 687 S.W.2d 481, 484-85 (Tex. App.)Dallas 1985, writ ref'd n.r.e.)).

doubt in favor of a finding of legality."[23] "Finally, the existence of usury must be examined within the framework of the entirety of the transaction, considering all the documents interpreted as a whole in light of the circumstances."[24]

The district court held that New York law applies to all of the transactions, as (1) the promissory notes on which ABC bases its claims for usury are negotiable instruments; (2) negotiable instruments are governed by the Uniform Commercial Code (UCC); (3) both New York and Texas UCC choice of law provisions permit the parties to select the law of any state that has a "reasonable relation" to the transaction; and (4) the parties here agreed that the law of New York, which has a reasonable relation to the transactions, would apply where necessary to make enforceable all provisions of the agreements. ABC assigns several points of error to the district court's syllogism, many of which it failed to raise below. In considering ABC's arguments, we find it convenient to segregate all of the subject transactions into two groups, "the Darr Notes" and "the Asphalt Notes and the UELCO Notes."

1. The Darr Notes

UELCO executed five notes and security agreements to Darr Equipment Company (Darr Notes), which were then assigned to ORIX. ABC argues that the district court erred in concluding that New York law applied to those notes as (1) all five Darr Notes contain

[23] Id. (citing Tygrett, 687 S.W.2d at 485).

[24] Id. (citing Tygrett, 687 S.W.2d at 485).

an identical clause that states that the "[p]arties agree that Texas law shall apply"; and (2) the Darr Notes are not negotiable instruments, and thus Texas common law, not UCC, conflicts of law principles apply, and Texas substantive law would govern the notes under that body of law.

ORIX responds that the district court properly found that the parties intended the Darr Notes to be governed by New York law. ORIX correctly notes that ABC failed to alert the district court to the existence of the clause providing that the substantive law of Texas would govern the Darr Notes. But even if we were to consider that clause and conclude that Texas law were applicable, ABC still would have no cause of action in usury: The notes, by their express terms, are exempted from Texas usury law under that state's "price differential doctrine," which excludes from the definition of "interest" charges for the "privilege of purchasing goods or services . . . in installments over a period of time."[25]

The basis of the district court's grant of summary judgment was that all of the notes were governed by New York law; the court did not appear to reach ORIX' argument that the Darr Notes were exempted from Texas usury law under the time price doctrine. Nonetheless, the summary judgment record makes clear that the Darr Notes are exempted from Texas usury law under the time price

[25] International Harvester Co. v. Rotello, 580 S.W.2d 418, 421 (Tex. App.--Houston 1979, no writ); see TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a) (West 1987) ("`Interest' is the compensation allowed by law for the use or forbearance or detention of money; provided however, this term shall not include any time price differential however denominated arising out of a credit sale.").

doctrine; and, of course, we may affirm a summary judgment on any basis supported by the record.[26]

"Application of the time price doctrine requires proof of three elements:

1. The seller clearly offered to sell the goods for both a cash price and a credit or time price;
2. The purchaser was aware of the two offers; and
3. The purchaser knowingly chose the higher time price."[27]

Each of the five Darr Notes expressly provides that UELCO, "having been quoted both a time price . . . and a cash price[,] . . . elect[s] to purchase the equipment described below on a time price basis." The signature of Frank A. Wolfe Jr., as president of UELCO, appears on each of the five Darr Notes. By signing the Darr Notes, UELCO, through its agent, Wolfe, confirmed that (1) it was offered both a cash sale and a time price; (2) it was aware of the two offers, and (3) it knowingly chose the higher time price. Those facts establish that ORIX is entitled to invoke the time price doctrine.

UELCO attempts to generate a genuine issue of material fact regarding the application of the time price doctrine to the Darr Notes by proffering Wolfe's affidavit. In that document, Wolfe claims that he was not offered both a cash sale and a time price on two pieces of equipment, a Caterpillar 235 Excavator and a

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[26]See Forsyth v. Barr, 19 F.3d 1527, 1534 n.1 (5th Cir.) ("[E]ven if we were to conclude that the reasons given by the district court do not support summary judgment, we may affirm it on any other grounds supported by the record."), cert. denied, 115 S. Ct. 195 (1994).

[27]Kinerd v. Colonial Leasing Co., 800 S.W.2d 187, 190 (Tex. 1990) (citations omitted).

Caterpillar 963 Track Loader, which were secured by two of the Darr Notes. Wolfe did not know which of two notes, one dated June 30, 1986 and the other dated September 24, 1986, corresponds to the particular Caterpillar 235 Excavator that he claims he purchased without being offered a cash price. Resolving that factual ambiguity is immaterial to the resolution of the issues before us, however, as Wolfe claims only that he was not offered a cash price for one of the excavators, and both notes secure the same type of equipment and are for the same amount, $239,700.

Wolfe does not discuss the other three Darr Notes, which concern respectively a used Caterpillar 966D Tractor, a new Caterpillar 235 Excavator, and a new Caterpillar 225 Excavator; and ABC offered no other evidence to refute the express terms of those agreements. As the terms establish a prima facie case that the time price doctrine applies, the conclusion is inescapable that ORIX is entitled to summary judgment regarding those three Darr Notes.

Relative to the remaining two Darr Notes, Wolfe is apparently arguing that, contrary to the plain meaning of the documents that he signed, he was not offered a cash price for the equipment; he was unaware of that offer; and he did not knowingly choose the higher time price. But Wolfe's affidavit fails to raise a genuine issue of material fact regarding whether ORIX is entitled to summary judgment because those Darr Notes are exempted from Texas usury laws under the time price doctrine. As one Texas Court of Appeals has explained, "[a]bsent fraud, one is presumed to know the

contents of a document and has an obligation to protect [himself] by reading documents before signing them."[28] When Wolfe affixed his signature to the Darr Notes, he affirmed that UELCO was offered both a cash sale and a time price; UELCO was aware of the two offers; and UELCO knowingly chose the higher time price))the consequence of which is that those notes are exempted from Texas usury law under the time price doctrine. Wolfe's post hoc recollection that he was not offered a cash sale for two pieces of equipment is not evidence that ORIX (or Darr) fraudulently induced or misrepresented facts to convince Wolfe to execute the Darr Notes))and it is evidence of such fraud, actual or constructive, that Wolfe must proffer to escape the conclusive effect of his signature on the five Darr Notes.[29] As Wolfe failed to aver to facts sufficient to satisfy the elements of fraud, his affidavit fails to raise a genuine issue of material fact that precludes the application of the time price doctrine to the Darr Notes. Moreover, it appears that ABC neither pled fraud as a defense to the Darr Notes nor expressly raised this fact issue to the trial court, thus prohibiting us from considering that issue on appeal as

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[28]Eubank v. First Nat'l Bank of Bellville, 814 S.W.2d 130, 134 (Tex. App.))Corpus Christi 1990, no writ); Estate of Degley v. Vega, 797 S.W.2d 299, 304 (Tex. App.))Corpus Christi 1990, no writ) ("A party who signs a contract is charged with notice of its contents as a matter of law."); First City Mortgage Co. v. Gillis, 694 S.W.2d 144, 147 (Tex. App.))Houston 1985, writ ref'd n.r.e) ("If no fraud is involved, one who signs an agreement without knowledge of its contents is presumed to have consented to its terms and is charged with knowledge of the agreement's legal effect.").

[29]See Eubank, 814 S.W.2d at 135.

grounds for reversal.[30] We therefore turn our attention to the remaining transactions that form the predicate of ABC's claims in ABC I.

2. The Asphalt Notes and the UELCO Notes

To obtain financing from ORIX, Asphalt executed two promissory notes (Asphalt Notes), both made payable to ORIX, one in the amount of $227,100 and dated March 26, 1985, and the other in the amount of $735,600 and dated April 3, 1985. Subsequently, Asphalt entered into contracts with ORIX to extend the repayment terms of the notes. Each note is secured by a security agreement (Asphalt Security Agreements), dated March 26, 1985 and April 4, 1985 respectively. The Asphalt Notes do not contain a choice of law provision.

UELCO participated in numerous separate transactions with ORIX, which comprised promissory notes, conditional sale or lease contracts, and loan extension contracts (collectively, the "UELCO Notes"). Thirteen of the UELCO Notes were consolidated in the Consolidation Note. As with the Asphalt Notes, ORIX obtained a separate security agreement, the Consolidation Security Agreement, as collateral for the Consolidation Note. The Darr Notes, discussed above, were also consolidated and restated in that document. The Consolidation Note was a new promissory note with different terms, the proceeds of which were used to extinguish those prior obligations.

[30] See id. at 134 (failure to plead fraud as affirmative defense or expressly present issue to trial court precludes review of issue on appeal).

The Consolidation Note was later superseded by yet another promissory note, the Replacement Note, which added a fourteenth agreement))a conditional sales contract between UELCO and T-K-O Equipment Co. (TKO Contract) that T-K-O Equipment Co. assigned to ORIX after the Consolidation Note had been executed. The Replacement Note lists all fourteen UELCO Notes and states that it extinguishes and replaces all of those notes and the Consolidation Note. The UELCO Notes are no longer viable instruments, as the Replacement Note expressly provides that,

> all obligations, rights and claims whatsoever arising under the old notes and at law in respect of the old notes, be completely extinguished, cancelled, waived and released to the same extent as if the old notes had never existed.

"Old notes," in turn, were defined to include the "original obligations" between UELCO and ORIX. The Replacement Note does not contain an express choice of law provision, but it does provide that "any security agreements," "mortgages," or "security interests" previously granted continue to secure all indebtedness and that the provisions contained in any "security agreement or mortgage or other related writing" remain in effect unless those provisions conflict with the terms of the Replacement Note.

Both the Asphalt Security Agreement and the Consolidation Security Agreement contain an identical choice of law provision, which expresses that the applicable law would be the law (1) of the state where the security was located, or (2) where the parties maintained their principal place of business, whichever

jurisdiction rendered the contract enforceable.[31] The TKO Contract similarly states that it will be governed by the law of the state where the parties reside or maintain their principal place of business, whichever jurisdiction renders the contract enforceable.[32]

To determine which state's law applies to the Asphalt Notes and the Replacement Note, ABC argues, we must consider only the terms of those notes themselves. To venture outside the four corners of those documents would be error, posits ABC, as that would render the notes nonnegotiable, a result inconsistent with

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[31]In pertinent part, the security agreements provided that:

> The term "Mortgage Obligations" as used herein shall mean and include any and all loans, advances, payments, extensions of credit, endorsements, guaranties, benefits and financial accommodations heretofore or hereafter made, . . . whether under any present or future agreement or instrument between Mortgagor and Mortgagee or otherwise, including, without limitation, any obligations and\or indebtedness or any and every kind arising out of one or more conditional sale contracts, equipment lease agreements, notes, security agreements . . . . Intending that each and every provision of this Mortgage be fully effective and enforceable according to its items, the parties agree that the validity, enforceability and effectiveness of each provision hereof shall be determined by the law of the state where the Mortgaged Property may be located or the residence or principal place of business of Mortgagor or Mortgagee, whichever renders each such provision effective. . . .

[32]The contract reads, in part,

> [i]ntending that the each and every provision of this contract note be fully effective according to its terms, the parties agree that the validity, enforceability and effectiveness of each provision hereof shall be determined by the law of the state of residence or principal place of business of the Buyer, Seller or Holder, whichever renders each such provision effective.

the intent of the parties and the policy of the UCC. As none disputes that neither the Asphalt Notes nor the Replacement Note contains a choice of law provision, ABC takes the position that the law of the "place of payment" applies,[33] which, in this case, is Texas. To the extent that the Asphalt Notes and the Replacement Note are ambiguous as to which state's law governs, ABC entreats us to invoke the venerable doctrine of contra proferentum and to construe the terms strictly against the drafter, ORIX.[34]

ORIX responds that we should enforce the choice of law provisions contained in the Asphalt Security Agreement, the Consolidation Security Agreement, and the TKO Contract, as those documents are part of each respective transaction and evince the parties' intent to render every provision in those contracts enforceable. ORIX concludes that, to the extent ABC might be correct in maintaining that a provision in one or more of those agreements is usurious (and thus illegal) under Texas law, the law of New York would govern the provision because it would be enforceable under that state's law. After examining all of the documents, the district court agreed with ORIX, applied New York law, and granted summary judgment in favor of ORIX.

a. The Parties' Capacity To Select the Governing Law

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[33]See, e.g., Cessna Fin. Corp. v. Morrison, 667 S.W.2d 580, 585 (Tex. App.)Houston 1984, no writ) ("[T]he promissory note expressly provided for payment in Kansas, and the laws of that State therefore govern the substantive rights and liabilities of the parties." (citations omitted)).

[34]See Gonzalez v. Mission Am. Ins. Co., 795 S.W.2d 734, 737 (Tex. 1990).

Parties to a contract have some flexibility in choosing which state's law will govern their agreement. The UCC, as adopted in Texas, provides, in pertinent part, that:

> Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this title applies to transactions bearing an appropriate relation to this state.[35]

This provision clearly allows parties to select the state whose law will govern a particular transaction))even if that state's contacts to the transaction are less significant and substantial than those of another state))as long as the transaction bears a "reasonable relation" to the selected state.[36] It is undisputed that ORIX is incorporated and maintains its primary place of business in New York. And we have previously stated that if one of the parties to a transaction maintains offices in a particular state, then that state has a sufficient nexus to the transaction to satisfy the UCC's requirements.[37] Wisely, therefore, the parties do not dispute

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[35]TEXAS BUS. & COMM. CODE ANN. § 1.105(a) (West 1994) (emphasis added); accord N.Y. U.C.C. LAW § 1-105(1) (McKinney 1993).

[36]See, e.g., Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co., 642 F.2d 744, 749-50 (5th Cir. 1981) ("While the Texas contacts with the transaction are indeed the most significant, nevertheless the determinative issue is, for reasons to be stated, whether there is a reasonable relationship between Mississippi and the transaction so as to require the courts to honor the parties' express choice of Mississippi law to apply to their transaction.").

[37]See Admiral Ins. Co. v. Brinkcraft Dev., Ltd., 921 F.2d 591, 593 (5th Cir. 1991) (stating that "maintain[ing] . . . principal offices in New York gives New York some relation to the note").

that the presence of a "reasonable relationship" between New York and the transactions, so we must ascertain only whether the parties intended to apply New York law.

b. The Parties' Intent

Secure in the knowledge that Texas law would permit ORIX and ABC to select New York law to govern the transactions at issue here, we next consider whether they made that choice. The resolution of this issue turns on the extent to which we may refer to documents other than the promissory notes to divine the parties' intent. If our review is limited to the four corners of the Asphalt Notes and the Replacement Note, as ABC maintains, then Texas law would apply under the place of payment rule; but if our inquiry is not so constrained, then New York law would govern the transactions.

To determine the intent of the parties, both the common law of Texas and its version of the UCC require that we construe together as one contract the promissory notes and other related writings. As explained in Texas State Bank of Austin v. Sharp,[38]

> It is settled in Texas that where two or more instruments, executed contemporaneously or at different times, pertain to the same transaction, the instruments will be read together even though they do not expressly refer to each other. The rule stated is applicable also to instruments executed in connection with the same transaction when one or more of the instruments are promissory notes. The rule as established in a vast body of case law in this state was incorporated by the Legislature in the Texas Uniform Commercial Code.[39]

[38]506 S.W.2d 761 (Tex. App.)Austin 1974, writ ref'd n.r.e.).

[39]Id. at 763 (citations omitted) (emphasis added).

Texas' common law rule that documents pertaining to the same transaction will be read together to determine the intent of the parties has often been applied when, as here, the issue is whether a particular clause is usurious.[40]

Texas' common law rule of contract interpretation dovetails nicely with § 3.119 of the Texas version of the UCC. That section provides that:

> (a) As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.
>
> (b) A separate agreement does not affect the negotiability of an instrument.[41]

As the official comment to the provision explains,

> [t]he section applies to negotiable instruments the ordinary rule that writings executed as part of the same transaction are to be read together as a single

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[40] Jim Walter Homes, Inc. v. Shuenemann, 668 S.W.2d 324, 327 (Tex. 1984) ("In construing the contract, we initially follow the well established principle that, in order to ascertain the entire agreement between contracting parties, separate documents executed at the same time, for the same purpose, and in the course of the same transaction are to be construed together." (citing Jones v. Kelley, 614 S.W.2d 95 (Tex. 1981)) and Nevels v. Harris, 102 S.W.2d 1046, 1048 (Tex. 1937)); see, e.g., In re Worldwide Trucks, Inc., 948 F.2d 976, 979 (5th Cir. 1991) ("[T]he existence of usury must be examined within the framework of the entirety of the transaction, considering all the documents interpreted as a whole in light of the circumstances."); Meisler v. Republic of Tex. Sav. Ass'n, 758 S.W.2d 878, 884 (Tex. App.))Houston 1988, no writ) ("When one or more of the instruments involved in a transaction are promissory notes, the rule of incorporation by reference applies so that the instruments will be read together whether or not they expressly refer to one another.").

[41] TEX. BUS. & COMM. CODE ANN. § 3.119 (West 1994).

> agreement. As between the immediate parties a negotiable instrument is merely a contract, and is no exception to the principle that the courts will look to the entire contract in writing.[42]

Moreover, the official comments contain examples of the types of writings that are to be read together as part of the entire contract:

> This section is limited to the effect of a separate written agreement executed as a part of the same transaction. The separate writing is most commonly an agreement creating or providing for a security interest such as a mortgage, chattel mortgage, conditional sale or pledge.[43]

Contrary to ABC's argument, therefore, construing a negotiable instrument in light of other documents does not necessarily destroy the negotiability of that instrument. Furthermore, the "separate writings" here consist of two security agreements and a conditional sales contract))indisputably the types of writings contemplated by the drafters of the official comment.[44] Texas law makes clear, therefore, that the intent of the parties is to be ascertained by

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[42]Id. § 3.119 cmt. 3.

[43]Id. § 3.119 cmt. 1.

[44]We further note that holders of the note in due course are protected from unexpected changes or additions to the terms and conditions of a negotiable instrument derived from a separate written agreement, as they are "not affected by any limitation of his rights arising out of the separate written agreement" as long as they had "no notice of the limitation" when they took the instrument. As the official comment observes:

> Other parties, such as an accommodation indorser, are not affected by the separate writing unless they were also parties to it as part of the transaction by which they became bound on the instrument.

Id. § 3.119 cmt. 2.

reference to those separate writings if they and the promissory notes pertain to the same transaction.

When we apply these teachings to the instant facts, we see clearly that our search for the parties' intent is not limited to the four corners of the Asphalt Notes and the Replacement Note. The Asphalt Notes and the Asphalt Security Agreements were executed simultaneously and are obviously part of the same transaction. Although the Replacement Note was executed after both the Consolidation Security Agreement and the TKO Contract were executed, the record makes clear that all three documents pertain to the same transactions and thus must be read in pari materia to find the intent of the parties. As the choice of law provisions in the Asphalt Security Agreements, the Consolidation Security Agreement, and the TKO Contract unequivocally command that contract provisions be interpreted in a manner that renders them enforceable, the parties must have intended that New York law govern any clause that would be usurious under Texas law, and we so conclude.

C. Motion to Amend Complaint

ABC contends that the district court erred in denying its motion to file an amended complaint in ABC I after ABC obtained the Bolstad Deposition, in which he claimed that ORIX engaged in various fraudulent business practices. ABC filed its motion to amend its complaint in ABC I just twenty-eight days after the

Bolstad Deposition was taken in connection with another usury suit against ORIX.

In light of this "new" information, ABC filed a motion for leave to file an amended complaint in which it sought to add several new claims, including some sounding in tort and others alleging various deceptive trade practices[45] and RICO violations.[46] ORIX responds that the district court did not abuse its discretion in denying ABC's motion to amend, as the motion lacked merit: It was taken pursuant to discovery in an unrelated case; it deals with an unrelated office of ORIX; and it concerns unrelated borrowers and transactions. ORIX further contends that the motion was untimely as it was filed on the eve of trial.

The district court denied ABC's motion for leave to amend its complaint, reasoning that "it was untimely and unmeritorious." We review for an abuse of discretion a district court's decision to deny a party leave to amend a complaint.[47] We do so, however, mindful that Federal Rules of Civil Procedure Rule 15(c) "severely restricts the judge's freedom" in denying a party's request for leave to amend, as it counsels that such permission should be granted absent a "substantial reason."[48]

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[45]These claims were brought under the Texas Deceptive Trade Practices-Consumer Protection Act, TEXAS BUS. & COMM. CODE ANN. §§ 17.41-17.63 (West 1987 & Supp. 1995).

[46]Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962, 1963 (1988).

[47]Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 (5th Cir. 1981) (citations omitted).

[48]Id. at 597-98.

The district court explained its rationale for denying ABC's motion for leave to amend its complaint in the court's order denying ABC's Rule 60(b) motion:

> [The motion] was filed almost twenty-one months after the discovery cutoff, eight months after entry of the joint pretrial order, and less than three months before the trial date (which had been reset at the request of the parties). Further, at the time the motion was filed, the court had under consideration a motion for reconsideration of defendant's motion for summary judgment. As for its merits, the motion contained only speculation that another cause of action could be stated if discovery were to be reopened so that [ABC] could undertake a fishing expedition. Allowance of the late amendment would have significantly disrupted the proceedings and would not have been in the interest of justice.

The record supports the district court's findings, which themselves support the conclusion that the motion was both untimely and unmeritorious))either of which, standing alone, would suffice to justify the district court's decision to deny ABC's motion for leave to amend its complaint.[49] No error is presented.

D. RES JUDICATA

The Trustee argues that the district court erred in granting summary judgment in favor of ORIX in ABC II, based on an erroneous conclusion that that suit was barred by res judicata. In determining whether a suit is precluded by res judicata, we consider the following four factors:

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[49]See Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 228 (5th Cir. 1983) ("When the motion is presented after undue delay or when it would occasion undue prejudice to the opposing party, the denial of leave is a proper exercise of the district court's discretion.").

(1) The parties be identical in both suits,
(2) A court of competent jurisdiction rendered the prior judgment,
(3) There was a final judgment on the merits of the previous decision,
(4) The plaintiff raises the same cause of action or claim in both suits.[50]

At trial, the Trustee conceded all but one element of res judicata, i.e., that ABC I and ABC II do not involve the same cause of action, and argued only that a final determination between private litigants regarding private state actions cannot have preclusive effect in a core bankruptcy proceeding, such as ABC II, when the Trustee is objecting to a creditor's claim.

On appeal, however, the Trustee apparently abandoned his prior position that res judicata cannot apply in core bankruptcy proceedings. Such a concession appears to be prudent: In Grogan v. Garner,[51] the Supreme Court clarified that collateral estoppel principles apply in core bankruptcy proceedings, in that case a discharge exception proceeding. The Trustee has failed to explain))and we discern no logical reason))why res judicata would not likewise apply to the instant cases.

Rather than reurge the position that he took before the trial court, the Trustee attempts to raise for the first time on appeal various alternative legal arguments to explain why the district court erred in applying res judicata to bar ABC II. In general,

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[50]In re Howe, 913 F.2d 1138, 1143 (5th Cir. 1990) (citing Nilsen v. City of Moss Point, 701 F.2d 556, 559 (5th Cir. 1983) (en banc) and Latham v. Wells Fargo Bank, N.A., 896 F.2d 979, 983 (5th Cir. 1990)).

[51]498 U.S. 279, 284 n.11 (1991).

"[a] party cannot raise a new theory on appeal that was not presented to the court below."[52] In certain exceptional circumstances we have, in our discretion, addressed an issue for the first time on appeal,[53] but it suffices that no such circumstances are present here. First, the Trustee offers no explanation for failing to present his alternative legal theories to the trial court. The Trustee certainly cannot blame Powers))after all, it was Hill, not Powers, who filed the papers in ABC II opposing ORIX' motion for summary judgment. Second, the conclusion whether res judicata applies here is not "beyond any doubt."[54] Third, no notions of judicial economy militate in favor of an exercise of discretion,[55] as the Trustee had an opportunity to present his arguments to the trial court but chose not to do so. Additionally, further factual development might be needed to resolve the arguments newly minted on appeal. And fourth, our refusal to consider the Trustee's new arguments will not result in

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[52]Capps v. Humble Oil & Ref. Co., 536 F.2d 80, 82 (5th Cir. 1976); accord Little v. Liquid Air Corp., 37 F.3d 1069, 1071 n.1 (5th Cir. 1994) (en banc) (per curiam) ("Our inquiry . . . is limited to the summary judgment record and the plaintiffs may not advance on appeal new theories or raise new issues not properly before the district court to obtain reversal of the summary judgment.").

[53]See, e.g., Murray v. Anthony J. Bertucci Constr. Co., 958 F.2d 127, 128 (5th Cir.), cert. denied, 113 S. Ct. 190 (1992).

[54]Singleton v. Wulff, 428 U.S. 106, 121 (1976).

[55]Cf. American Eagle Ins. v. United Technologies Corp., 48 F.3d 142, 145, reh'g granted on other grounds, No. 93-1841, 1995 WL 230570 (5th Cir. Apr. 19, 1995).

grave injustice.[56] We therefore decline the Trustee's invitation to exercise our discretion to address the merits of his new arguments.

For the foregoing reasons, the judgment of the district court is, in all respects,

AFFIRMED.

[56]See Hogue v. United Olympic Life Ins. Co., 39 F.3d 98, 102 (5th Cir. 1994), petition for cert. filed, 63 U.S.L.W. 3756 (U.S. Apr. 10, 1995) (No. 94-1657).