Legal Opinion Letters and Texas Usury Laws.

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I.

INTRODUCTION

This article examines the subject of legal opinion letters issued by counsel in commercial transactions in situations involving Texas usury laws. The issues raised are not simple, partially because of the intricacies of Texas usury law and the difficulty of predicting its application in complex financial transactions. This article discusses both the general legal issues underlying the issuance of opinion letters in situations in which Texas usury law may apply and suggested language that may be applicable in certain specific situations.

In every business transaction in which legal opinions are issued, counsel to all parties spend a significant amount of time negotiating the language of those opinions.[1] In addition, lawyers spend a significant amount of time reviewing documents as part of the "due diligence" required to issue such opinions.[2] No young lawyer with a commercial practice escapes the tedious drudgery of these examinations.[3] The time and energy devoted to legal opinion letters is an indication both of their importance to the parties to business transactions and the realization of attorneys that opinion letters may have important legal consequences.[4]

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1. For a humorous (and not entirely inaccurate) look at such negotiations, see Fuld, *Lawyers' Standards and Responsibilities in Rendering Opinions*, 33 BUS. LAW. 1295 (1978).

2. The subject of due diligence has also provoked commentary. For a review of the type of examination that may be required in certain types of business transactions, see Soderquist, *Due Diligence Examinations*, 24 PRAC. LAW. 33 (March 1, 1978).

3. The practice of assigning the entire due diligence to be done with respect to commercial transactions to an inexperienced lawyer may be dangerous. The dangers have been noted by at least one commentator: "Too often the young lawyer called upon to make the examination is left to his own devices without being given the advance preparation necessary to insure his doing a thorough and competent job." Riordan & Wragg, *Examination of Corporate Books in Connection with Stock Offerings and Acquisitions*, 18 BUS. LAW. 677, 677 (1963).

4. The subject of the liability of an attorney with respect to the issuance is discussed in Section III *infra*.

Until quite recently the subject of legal opinion letters was generally ignored by the courts, legal practitioners and students of law. The filing of the complaint by the Securities and Exchange Commission against National Student Marketing Corporation,[5] however, changed matters dramatically. Recently, a large amount of attention and analysis has been focused on this subject, including the content, effect and consequences of the issuance of legal opinions.[6] This attention is not misplaced. The legal opinion letter is an integral part of a variety of commercial transactions. Very few substantial commercial loans or business acquisitions are consummated in the absence of an opinion of counsel for both sides to the transaction respecting a variety of matters.[7] Thus, there is a need for attorneys to carefully consider the ethical implications and legal consequences of issuing legal opinion letters on the subject of usury.

II.

Ethical Considerations

In view of the strategic importance of legal opinions to both client and counsel, it is important that lawyers and law firms develop standards governing the issuance of opinion letters generally. These standards are of particular importance when the legal opinion involves the question whether or not a particular loan violates Texas usury law. The very complexity of Texas usury law ensures that the negotiation and drafting of opinion letters may involve extremely difficult issues, and at every turn the attorney is faced with ethical questions.[8]

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5. SEC complaint, SEC v. National Student Marketing Corp., [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,360, at 91,913 (D.D.C., filed Feb. 3, 1972).

6. For a recent example of this increased interest and a helpful discussion of the problem, see Committee on Development in Business Financing, *Legal Opinions Given in Corporate Transactions*, 33 BUS. LAW. 2389 (1978). One symptom of this increased attention is a renewed interest in the importance of analytical, organizational, and drafting skills. For a recent analysis of this type, see Segall & Arouh, *How to Prepare Legal Opinions*, 25 PRAC. LAW. 29 (June 1, 1979).

7. Fuld, *Legal Opinions in Business Transactions - An Attempt to Bring Some Order Out of Some Chaos*, 28 BUS. LAW. 915, 915 (1973).

8. A recent symposium on this subject published in *The Business Lawyer* contained the following comment: "Usury is a prime example of that kind of an opinion where the lender is always trying to get the borrower's counsel to tell the lender that the usurious loan is not usurious." Panel Discussion, *Lawyers' Standards and Responsibilities in Rendering Opinions*, 33 BUS. LAW. 1321, 1325 (1978). The differences in bargaining power between borrower and lender encourage the lender to request opinions that lender's attorney would probably not render. In addition, this same difference in negotiating strength encourages the borrower's

At the onset, the attorney should consider the requirement of Canon 6 of the Code of Professional Responsibility that an attorney not handle a matter that the attorney knows or should know he is not competent to handle.[9] Thus, an initial consideration that must be weighed by an attorney who is requested to issue an opinion letter regarding usury is whether or not, given the intricacies of Texas usury law, the attorney involved has the knowledge and expertise necessary to issue such an opinion.[10]

Naturally, the appropriate subjects for legal opinions involve matters of law. Ethical Consideration 5 under Canon 7 of the State Bar of Texas Code of Professional Responsibility expressly authorizes certain legal opinions, stating: "A lawyer as adviser furthers the interests of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision."[11]

Obviously, the scope of legal opinions goes beyond general discussions of the ultimate resolution by the courts of matters of law. In fact, legal opinions are requested regarding a variety of legal issues, and the content and scope of these opinions are extremely broad.[12] Moreover, most legal opinions deal with mixed questions of fact and law—and as a practical necessity attorneys must often issue opinions involving mixed questions of fact and law.[13] The underlying facts are of critical importance in making any legal judgment with respect to mixed questions of fact and law. Without full knowledge of the facts, no adequate legal judgment can be made, and the responsibility of the lawyer to ascertain the facts is among the thorniest issues raised by legal opinions.

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counsel to give opinions that would be better off left ungiven. The practice of requesting opinions from opposing counsel that an attorney either would not give if requested in another commercial transaction or knows or should know are of questionable validity raises many serious ethical issues. *See* Fuld, *Lawyers' Standards and Responsibilities in Rendering Opinions,* 33 BUS. LAW. 1295, 1302 (1978).

9. State Bar of Texas, Rules and Code of Professional Responsibility DR 6-101 (1971) [hereinafter cited as State Bar of Texas Code].

10. The increase in the specialization of the legal profession increases the need for attorneys to consider whether they possess the professional expertise to practice in certain areas. *See generally* Comment, *Specialization: The Resulting Standard of Care and Duty to Consult,* 30 BAYLOR L. REV. 729 (1978).

11. State Bar of Texas Code, EC 7-5 (1971).

12. *See* Fuld, *Lawyers' Standards and Responsibilities in Rendering Opinions,* 33 BUS. LAW. 1295, 1298 (1978).

13. *Id.* at 1303.

Legal opinions concerning usury do not normally present difficult problems of factual investigation. The "facts" are principally contained in the documents to be executed by borrow and lender. The question to be answered with respect to the transaction is whether the structure of the loan creates a prohibited result. The answer to this question turns on the application of appropriate legal principles to the transaction as structured.[14] However, in a variety of circumstances, (for example a tacit agreement with respect to compensating balances) the "facts" important to the attorney's opinion may not be contained in the legal documents themselves.[15]

Certain general standards of professional responsibility regarding the duty of an attorney to make an investigation of the facts are applicable to attorneys requesting or issuing legal opinions. ABA Formal Opinion 335[16] indicates that an attorney must (i) make an inquiry of the client concerning the relevant facts, and (ii) make a personal inquiry, if any of the alleged facts or the facts taken as a whole are incomplete in a material respect or suspect, inconsistent, or on their face, or on the basis of other facts known to the attorney, open to question.[17] If all of the facts of a particular business transaction are contained in the documents executed by the parties, an attorney is entitled to rely on the documents in issuing an opinion with respect to the application of Texas usury law to the transaction as structured. But if there are agreements, express or tacit, which would effect the validity of the transaction under Texas usury law of which the attorney knows or ought to know, no opinion letter can

14. *See* Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1344 (5th Cir. 1972). "The question of whether usury exists is ascertained from the dominant purpose and intent of the parties embodied in the contract interpreted as a whole and in light of attending circumstances and the governing rules of law that the parties are presumed to have intended to obey." *Id.* at 1344.

15. Any attorney issuing an opinion must consider all such collateral agreements since all of the agreements, both oral and written, will be considered by the courts in determining whether the transaction is usurious. *See, e.g.*, Smith v. Stevens, 81 Tex. 461, 464-65, 16 S.W. 986, 987 (1891) (collateral agreement rendering otherwise valid contract usurious may be shown by parol); F.B. & D., Inc. v. Nathan Alterman Elec. Co., 394 S.W.2d 821, 823 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.) (parol evidence admissible to show usury though it contradicts unambiguous written agreement); Graham & Locke Invs., Inc. v. Madison, 295 S.W.2d 234, 243 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.) (separate instruments executed as part of same transaction are construed as single instrument).

16. 60 A.B.A.J. 488 (1974). The opinion expressly limits its applicability to opinions written as the basis for transactions involving sales of unregistered securities; however, its language gives important guidance concerning opinion letters issued in other types of transactions. *See id.* at 488.

17. *Id.* at 488-89.

be issued. In this connection, every opinion letter dealing with the question whether a transaction is valid under Texas usury law should be based expressly on the assumption that the transaction is as embodied in the definitive documents and no facts exist that have not been disclosed to counsel that affect the validity of the loan.[18]

Assuming the attorney has determined that some factual inquiry is necessary, the attorney must confront the question how far such an inquiry should extend. In determining the scope of the investigation to be made, it is important to consider the precise facts that need to be verified and the procedures necessary to verify these facts. In general, an attorney is entitled to rely on representations of fact made by the client. This sort of representation is usually made by means of a certificate executed by the client.[19] But once the attorney knows or has reason to know that the facts are not as represented, difficult ethical considerations again arise, and the attorney may not issue the opinion until he has put these doubts to rest.[20] The nature and scope of the necessary inquiry will vary in situations involving different transactions, different facts and different clients. Unfortunately, this determination must be made by the attorney without the benefit of any clearly enunciated guidelines.

As the preceding discussion indicates, legal opinions concerning

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18. This assumption is essential since the courts will look to the substance of a transaction rather than its form, to determine whether usury exists. *See, e.g.*, Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976); Delta Enterprises v. Gage, 555 S.W.2d 555, 558 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.); General Southwestern Corp. v. State, 333 S.W.2d 164, 168 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.).

19. A lawyer is entitled to rely on certifications of fact made to the lawyer by a client or other individual; however, as a matter of sound judgment a lawyer should carefully analyze the nature of the certifications of fact he is requesting. *See* Babb, Barnes, Gordon & Kjellenberg, *Legal Opinions to Third Parties in Corporate Transactions*, 32 BUS. LAW. 553, 555 (1977). An attorney is probably not entitled to rely on a certificate from the client with respect to matters of law. If an attorney desires to rely on representations of the client about matters of law, the opinion letter should specifically so state. With respect to mixed questions of law and fact the situation is more complex, and should be determined after the attorney evaluates (i) the precise facts necessary for the attorney to issue the opinion, (ii) the alternative methods available to verify these facts, and (iii) the importance of the facts to the opinion being rendered. *See id.* at 555. An attorney should evaluate any certificate requested from a client in terms of its utility should a dispute arise. Since these certificates are frequently drafted by the attorney relying on the contents thereof, the courts will probably interpret these certificates favorably to the client.

20. *See* Panel Discussion, *Legal Opinions Given in Corporate Transactions*, 33 BUS. LAW. 2389, 2404 (1978).

usury present difficult ethical considerations. This is particularly true of borrower's counsel. Because of the complexity of Texas usury law and the factual context in which these issues are raised, these difficult problems are not capable of easy resolution. The only real solution to the problems raised by legal opinions generally is for the organized bar to address the issue directly and formulate specific standards governing the specific language to be included in such opinions, the type of permitted qualifications and the legal meaning of such qualifications and the factual inquiry upon which such opinions are to be based.[21]

III.

Professional Liability

Obviously, the ethical standard to which a lawyer *ought* to adhere is not an adequate guide for determining the standard to which a lawyer *must* adhere in the practice of the legal profession.[22] Generally, "[a]n attorney is responsible to his client only for the want of ordinary skill, ordinary care, and reasonable diligence" in the practice of law.[23] If a client suffers an injury as a result of the failure of the attorney to employ the requisite skill, care and diligence, the attorney is liable for the injury sustained; however, if an attorney acts in good faith, to the best of his ability and with an ordinary degree of care, the attorney is not liable for the injury sustained.[24] In *Great American Indemnity Co. v. Dabney*[25] the court articulated the rule as follows:

> An attorney does not necessarily incur liability by giving a client erroneous advice provided he acts in good faith, and he is not bound to possess and exercise the highest degree of skill, nor is he an insurer of the results of his work, but is required to possess such legal knowledge and to exercise such skill and diligence as men of the legal profession commonly employ.[26]

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21. *See* Fuld, *Lawyers' Standards and Responsibilities in Rendering Opinions,* 33 BUS. LAW. 1295, 1314 (1978).

22. *Id.* at 1299-1300.

23. Fox v. Jones, 14 S.W. 1007, 1007 (Tex. Civ. App. 1889); *see* Beck, *Professional Liability and the Lawyer,* 39 TEX. B.J. 969, 970-71 (1976).

24. *See* Cook v. Irion, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ); Patterson & Wallace v. Frazier, 79 S.W. 1077, 1079-80 (Tex. Civ. App. 1904, no writ).

25. 128 S.W.2d 496 (Tex. Civ. App.—Amarillo 1939, writ dism'd judgmt cor.).

26. *Id.* at 501.

Thus, an attorney is not liable for negligence as a result of every error contained in any legal opinion issued by that attorney (absent some express agreement to the contrary) and an attorney is not liable for mistakes on questions of law with respect to which reasonable doubt exists among members of the legal profession.[27]

The complaint of the Securities and Exchange Commission in *Securities and Exchange Commission v. National Student Marketing Corp.*[28] is of some utility in delineating certain dangerous problem areas with respect to the issuance of legal opinions in corporate transactions generally. In *National Student Marketing,* two law firms and certain individual attorneys were charged with various violations of the Securities Act of 1933,[29] the Securities and Exchange Act of 1934[30] and rule 10b-5[31] as a result of the issuance of certain legal opinions in connection with the closing of a merger between National Student Marketing Corporation and Interstate Investment Company. The transaction at issue in *National Student Marketing* was fairly complex, and many of the complexities of interest to securities lawyers are not relevant for the purposes of this discussion.[32] A brief outline of the facts surrounding the issuance of the opinion letters involved in *National Student Marketing* is necessary, however, to appreciate the applicability of the principles involved in legal opinions issued in connection with commercial transactions.

At the closing of the proposed merger of National Student Marketing Corporation with Interstate Investment Company, among other matters, a "comfort letter", which was a prerequisite to the closing, was delivered by Peat, Marwick, Mitchell & Co. The comfort letter was required to state that the accounting firm had no reason to believe that (i) the unaudited interim financial statements of National Student Marketing Corporation for the nine month period ending May 31, 1969 were not prepared in accordance with

27. *See* Lucas v. Hamm, 364 P.2d 685, 689-90, 15 Cal. Rptr. 821, 825 (1961).

28. [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,360, at 91,913 (D.D.C., filed Feb. 3, 1972).

29. 15 U.S.C. §§ 77a-77b (1970).

30. *Id.* §§ 78a-78h-1.

31. 17 C.F.R. § 240.10b-5 (1978).

32. In discussing the facts of *National Student Marketing* the authors have relied entirely on the facts as set forth in the complaint filed by the Securities and Exchange Commission. It is important to remember that this procedure ignores "the other side of the story." *See* SEC complaint, SEC v. National Student Marketing Corp., [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,360, at 91,913 (D.D.C., filed Feb. 3, 1972).

generally accepted accounting principles and practices or (ii) those financial statements required any material adjustments in order that the operations of National Student Marketing Corporation be fairly presented.[33] In addition, the comfort letter was to state that National Student Marketing Corporation had not suffered any material adverse change in its financial position as a result of its operations from May 31, 1969, until five business days prior to the effective date of the proposed merger.[34] The comfort letter as issued did not, in the opinion of the Securities and Exchange Commission, satisfy the conditions of the merger agreement.[35]

Notwithstanding the problems with the comfort letter, the attorneys and law firms involved issued their legal opinions stating among other matters, that all steps taken to consummate the merger had been duly and validly taken and that the parties had not incurred any violation of any applicable federal or state regulation to the knowledge of counsel.[36] The issuance of these opinions was a condition to the consummation of the proposed merger.[37]

In the view of the Securities and Exchange Commission, the attorneys involved, when confronted with the various qualifications Peat, Marwick, Mitchell & Co. placed on the comfort letter, should have insisted that financial statements be revised and shareholders be resolicited, or failing to accomplish that revision, resigned from the representation of their respective clients and notified the Securities and Exchange Commission of the misleading financial state-

33. *Id.* at 91, 913-15.

34. *Id.* at 91, 913-15.

35. *Id.* at 91, 913-15. The comfort letter presented at closing was, according to the complaint of the Securities and Exchange Commission, dictated over the telephone and unsigned. The comfort letter, as dictated, stated that the examination of the auditors was still in process and disclosed significant adjustments to be made in the financial statements of National Student Marketing Corp. In addition, the complaint states that at closing (but before the merger was actually consummated) the auditors communicated a request to the attorney representing National Student Marketing Corp. that an additional qualification be placed in their comfort letter. Finally, about an hour subsequent to the closing, the auditors informed the attorney representing National Student Marketing Corp. that the auditors desired to add an additional qualification to their comfort letter stating that: "In view of the above mentioned facts, [the proposed qualifications] we believe that the companies should consider submitting corrected interim unaudited financial information to the shareholders prior to proceeding with the closing." *Id.* at 91,913-16. Thus, in the view of the Securities and Exchange Commission, the comfort letter, as issued during the various stages of the merger was insufficient and did not meet the requirements of the merger agreement. *Id.* at 91,913-15.

36. *Id.* at 91,913-16.

37. *Id.* at 91,913-16.

ments.[38] The suit was settled prior to an authoritative decision on the merits of the views of the Securities and Exchange Commission.[39]

It is difficult to apply a discussion of a complaint involving the mysteries of federal securities law, with its connotations of fraud and the public duty of persons and business entities concerning matters involving the purchase and sale of securities, to the question of what type of activity might constitute negligence on the part of an attorney issuing an opinion in an unrelated commercial context.[40] Nevertheless, *National Student Marketing* does lend some insight into the types of responses to certain common factual situations involving the danger of legal liability.

First, in *National Student Marketing* certain facts allegedly existed at the time the legal opinions were issued which either disclosed that certain conditions to closing (and, therefore, to the issuance of an opinion that all steps taken to consummate the merger had been validly taken) had not been completed in accordance with the express requirements of the merger agreement, or raised serious questions concerning whether those conditions had actually been met. Nevertheless, the legal opinions were issued and the merger was consummated (i) without any action or investigation on the part of counsel, (ii) without any qualification of the opinion letters

38. *Id.* at 91,913-17.

39. The settlement is reprinted in SEC v. National Student Marketing Corp., [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,027, at 91,598-599 (D.D.C. 1977).

40. There has been a considerable amount of speculation concerning the adverse effect that the filing of the complaint of the Securities and Exchange Commission in *National Student Marketing* will have upon the legal community. But even its most discussed aspect, the "duty" of an attorney to resign from the further representation of his client under certain circumstances, is not necessarily a revolutionary requirement to place upon attorneys. For a discussion of the duty of an attorney upon learning of a client's fraudulent conduct, see Hoffman, *On Learning of a Corporate Client's Crime or Fraud - the Lawyer's Dilemma,* 33 BUS. LAW. 1389 (1978). Certain authors contend that the application of the principles of the complaint in *National Student Marketing* would have an unwholesome effect on the attorney-client relationship. *See* Bermont, *The Sale of Opinion of Counsel: A Tentative Revolution,* 1974 CAL. ST. B.J. 133, note 7. The authors do not subscribe to this view as a general matter and doubt if it is correct. In any case, it is clear that the Securities and Exchange Commission intends to vigorously regulate the attorney-client relationship to inhibit attorneys from crossing the gray line between representing and counseling with a client and participating with the client in a course of conduct that, in the opinion of the Securities and Exchange Commission, is fraudulent. In addition, the Securities and Exchange Commission apparently intends to vigorously enforce certain standards of professional ethics among those who practice before it. For a recent example of this phenomena, see *In re Carter,* Administrative Proceedings No. 3-5464; United States of America Before the Securities and Exchange Commission (March 7, 1979).

that were in fact issued, and (iii) without significant delay by the parties to the proposed merger in order to consider the appropriate response to the questions raised by the comfort letter.[41] The issuance of a clean legal opinion in the face of facts raising doubts concerning its validity is almost certain to raise questions of negligence or fraud if some other party to the transaction, or any third party with standing to sue, is allegedly injured as a result of the issuance of the opinion.

Second, the Securities and Exchange Commission based a portion of its charge not so much on the issuance of the legal opinions themselves, but on the failure of the attorneys to act when apprised of the facts discussed above.[42] One does not have to share the views of the Securities and Exchange Commission concerning what action should have been taken to recognize that the failure to act in the face of facts that disclose a problem with a legal opinion may raise questions of negligence or fraud if some other party to the transacton, or any third party with standing to sue, is allegedly injured as a result of the issuance of the opinion.

The importance of legal opinions in securities transactions and the consequent responsibility of attorneys for their contents was succinctly stated by the court in *Securities and Exchange Commission v. Spectrum, Ltd.*[43] This case involved an action by the Securities and Exchange Commission to enjoin an attorney, among others, from violating federal securities law based on the attorney's issuance of a legal opinion concerning the sale of unregistered securities.[44] The lower court concluded that the attorney "may have been guilty of some negligence in preparing the opinion letter,"[45] but found no violation of federal securities law. The court of appeals reversed and remanded on the ground that the negligence standard is sufficient in the context of enforcement proceedings seeking equitable or prophylactic relief.[46] In so holding the court stated:

> We do not believe, moreover, that imposition of a negligence standard with respect to the conduct of a secondary participant is overly strict,

41. SEC complaint, SEC v. National Student Marketing Corp., [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,360, at 91,913-16 (D.D.C., filed Feb. 3, 1972). The merger was consummated as originally scheduled on October 31, 1969 without revision of the financial statements of National Student Marketing Corp.

42. *Id.* at 91,913-16.

43. 489 F.2d 535 (2d Cir. 1973).

44. *Id.* at 536.

45. *Id.* at 537 n.3.

46. *Id.* at 541.

> at least in the context of this case. The legal profession plays a unique and pivotal role in the effective implementation of the securities laws. Questions of compliance with the intricate provisions of these statutes are ever present and the smooth functioning of the securities markets will be seriously disturbed if the public cannot rely on the expertise proffered by an attorney when he renders an opinion on such matters.[47]

In the next paragraph of the opinion, the court of appeals, expanding on its theme, stated:

> In the distribution of unregistered securities, the preparation of an opinion letter is too essential and the reliance of the public too high to permit due diligence to be cast aside in the name of convenience. The public trust demands more of its legal advisers than "customary" activities which prove to be careless.[48]

Legal opinions concerning usury issued in connection with commercial transactions do not involve as delicate a set of public policy and legal issues as legal opinions issued in connection with securities transactions. Nevertheless, the same principles should apply in the context of a commercial transaction if an opinion is issued despite (i) the existence of facts bearing on the adequacy of the investigation of the attorney issuing the opinion of which such attorney either knows or ought to know if due diligence is exercised, or (ii) the existence of facts bearing on the veracity of the opinion of which the attorney issuing the opinion either knows or ought to know if due diligence is exercised.

In addition to common law negligence, under Texas law an attorney may be held liable for fraudulent conduct.[49] A professional may be held liable for fraud based on either an intentional misrepresentation or misrepresentation made under circumstances in which there could be no reasonable basis for a belief in its accuracy.[50] In *Ultramares Corp. v. Touche,*[51] Judge Cardozo discussed the nature of fraud in the context of an auditor's opinion stating:

> The defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of con-

47. *Id.* at 541-42.

48. *Id.* at 542.

49. *See* Porter v. Kruegel, 106 Tex. 29, 30-31, 155 S.W. 174, 175 (1913); Ames v. Putz, 495 S.W.2d 581, 583 (Tex. Civ. App.—Eastland 1973, writ ref'd); Holland v. Brown, 66 S.W.2d 1095, 1102 (Tex. Civ. App.—Beaumont 1933, writ ref'd).

50. Freeman, *Opinion Letters and Professionalism,* 1973 DUKE L.J. 371.

51. 174 N.E. 441 (N.Y. 1931).

> tract to make it with the care and caution proper to their calling. *Fraud includes the pretense of knowledge when knowledge there is none.*[52]

Ultramares involved the liability of an accountant under circumstances not involving fraud; however, the language of the case points to the rule of law applicable to an attorney issuing a legal opinion under circumstances in which either there was actual knowledge that the representations contained therein are false or when the circumstances indicate that there was no reasonable factual basis for the opinion rendered. Thus, an attorney who refuses to take cognizance of the obvious, who fails to investigate the facts under circumstances when an investigation is clearly necessary, or who bases an opinion on such a dearth of facts that the only legitimate inference is that there was no genuine belief in the veracity of the opinion issued, may be guilty of fraud.[53]

Generally, an attorney who fails to abide by the standard of care applicable to members of the legal profession is liable for any damages suffered by a client as a result.[54] The traditional rule holds that an attorney is not liable for negligence with respect to any third party who lacks privity with the attorney.[55] This rule of law was articulated in *Savings Bank v. Ward.*[56] In *Ward* an attorney investigated title to a piece of real property and certified to his client title to the tract. The title report was made at the sole request of the client, and the attorney apparently had no knowledge that the opinion was intended to be relied on by a third party. The opinion was

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52. *Id.* at 444 (emphasis added).

53. *See* Holland v. Brown, 66 S.W.2d 1095, 1102 (Tex. Civ. App.—Beaumont 1933, writ ref'd) (failure of attorney to disclose material facts and legal consequences constitutes actionable fraud). Although an attorney is not liable for errors of judgment, he does represent to his client that he possesses the requisite learning and ability to practice his profession. Cook v. Irion, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ). He also represents that he will use his best judgment and exercise reasonable diligence in applying his skills to his client's cause. *Id.* at 477; *see* Great Am. Indem. Co. v. Dabney, 128 S.W.2d 496, 501 (Tex. Civ. App.—Amarillo 1939, error dism'd judgm't cor.) (attorney has duty to obtain information on client's cause through reasonable diligence); *cf.* State Street Trust Co. v. Ernst, 15 N.E.2d 416, 422-23 (N.Y. 1938) (accountant's disregard of potential business losses in drawing up balance sheet constitutes actionable fraud).

54. *See, e.g.*, Cook v. Irion, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ); Great Am. Indem. Co. v. Dabney, 128 S.W.2d 496, 501 (Tex. Civ. App.—Amarillo 1939, error dism'd judgm't cor.); Patterson & Wallace v. Frazer, 79 S.W. 1077, 1080 (Tex. Civ. App. 1904, no writ).

55. Beck, *Professional Liability and the Lawyer*, 39 TEX. B.J. 970, 972 (1976).

56. 100 U.S. 195 (1879).

in fact shown to a third party who relied on the opinion in transferring the property in question. The Supreme Court held that an attorney is not liable to third parties under circumstances in which no privity exists.[57] There was a strong dissent, stating:

> [I]f a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found.[58]

In analyzing the liability of an attorney for opinions issued to third parties, it is important to remember that the situation goes beyond that present when an attorney issues an opinion under circumstances in which the attorney knows or ought to know that the opinion will be shown to and relied upon by third parties, or the opinion letter itself is addressed to a third party. Generally, this addressee certainly ought to be (and is) entitled to rely upon representations made by the attorney in the opinion.[59] Therefore, even if the doctrine of privity retains some vitality, in the ordinary transac-

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57. *Id.* at 200.

58. *Id.* at 207. *Savings Bank v. Ward* is a difficult decision to rationalize. If an attorney issues an opinion he knows or ought to know will be shown to a third party, there is very little that can be said in favor of limiting his liability to third parties who actually relied upon the opinion. It is interesting that the majority opinion in *Savings Bank v. Ward* makes note that the opinion was rendered "without any knowledge on the part of the defendant as to the purpose for which it was obtained." *Id.* at 197. A similar problem arises in analyzing the widely quoted decision of Justice (then Judge) Cardozo in Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931). In *Ultramares* an accounting firm was found not liable to a third party for losses sustained by such third party in connection with the negligent preparation of audited financial statements. The accounting firm prepared thirty-two copies of the audited financial statements certified with serial numbers as counterpart originals. Although the accounting firm did not know that the particular plaintiff in the cause of action at issue would be shown the financial statements, the court's opinion recognizes that the auditors knew that the certified financial statements would be exhibited to "banks, creditors, stockholders, purchasers, or sellers, according to the needs of the occasion, as the basis of financial dealings." *Id.* at 442. The Court of Appeals of New York overruled a decision of the Appellate Division reversing a dismissal granted by the trial court and reinstating the verdict. Frankly, it is difficult to defend the decision on any basis other than its strong reliance on precedent and the potential that such a decision would have to affect the liability of other professionals, and that is precisely the basis Cardozo used to justify his decision. Nevertheless, as has been pointed out previously, there is strong reason to doubt that *Ultramares* would be followed by modern courts. Freeman, *Opinion Letters and Professionalism,* 1973 DUKE L.J. 371, 382.

59. *See* RESTATEMENT (SECOND) OF TORTS § 552 (2) (a) (1977).

tion involving an opinion on the subject of usury the attorney issuing the opinion will probably not be entitled to prevent liability upon the ground of lack of privity.[60]

Legal opinions concerning the subject of usury, however, raise certain problems that considerably limit the situations in which they will result in liability. For example, if a lender requests an opinion of a borrower's attorney to the effect that a loan is not usurious under circumstances when the lender either knows or ought to know that a danger of usury exists, it will be extremely difficult for the lender to prove that it was entitled to rely on the opinion of borrower's counsel and that lender did in fact rely, even if borrower's counsel was negligent in the issuance of the legal opinion.[61] Since a lender doing business in Texas will normally be represented by Texas counsel, the issuance by borrower's counsel of an opinion stating that the loan does not involve usury probably does not relieve lender and its counsel of the duty to make an independent appraisal of the validity of the loan in question.[62]

IV.

Estoppel

After due consideration to questions concerning professional ethics and the standard of care to be exercised in issuing a legal opinion concerning Texas usury law, attorneys must consider the circumstances under which an opinion that a particular loan transaction is not usurious may estop a borrower from making a subsequent claim of usury. This issue must be examined in view of both the general principles of common law estoppel and the strict judicial construction of Texas usury statutes.

As a general rule, a party seeking to effect an estoppel must show that the party sought to be estopped (i) made a misrepresentation or concealed material facts (ii) with knowledge, actual or constructive, of those facts (iii) to a party without such knowledge or means of such knowledge (iv) with the intention that the misrepresenta-

60. *See* Fuld, *Lawyers' Standards and Responsibilities in Rendering Opinions*, 33 BUS. LAW. 1295, 1309-10 (1978).

61. *See* Miller v. First Bank, 551 S.W.2d 89, 98 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978). "Money lenders are presumed to recognize usury when they see it, and are on notice that it is illegal." *Id.* at 98.

62. *See* Townsend v. Adler, 510 S.W.2d 175, 176 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (ignorance of usury laws and that bargain struck is usurious no defense).

tion or concealment be acted on and (v) the party to whom it was made actually relied upon the misrepresentation or concealment to that party's prejudice.[63]

A series of assumptions can be inferred from the elements set forth above. First, the party sought to be estopped must have knowledge of the material facts at the time of the act or omission on the basis of which he is sought to be estopped. Second, there can be no basis for estoppel when it appears that the statements made by the party sought to be estopped ought to cause the relying party to investigate the facts and rely upon its own information.[64] Finally, no estoppel can arise when it is shown that, at the time of the transaction in question, both parties were or should have been equally well informed with respect to the material facts of the transaction.[65]

The elements of estoppel, as well as the assumptions inferred therefrom, point to the imposition of a duty upon the party seeking to effect an estoppel to exercise reasonable care and diligence in relying upon the statements of the other party that form the basis for estoppel. A vivid example of the imposition of this type of duty is found in *Pinedo v. Halper.*[66] The lender in this case claimed that he could neither read, write nor understand English, that he relied

63. *See, e.g.*, Miller v. First State Bank, 551 S.W.2d 89, 101 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978); Ellis v. Cleavinger, 298 S.W.2d 193, 194 (Tex. Civ. App.—Amarillo 1957, no writ); Gulbenkian v. Penn, 252 S.W.2d 929, 932 (Tex. 1952). Estoppel is applied to prevent a party from asserting a lawful claim because of some prior inconsistent statement or activity of that party. Although discussions of estoppel often mention fraud, estoppel does not normally require the "scienter" required to prove fraud and is used as a defense rather than as an affirmative claim. D. DOBBS, LAW OF REMEDIES 41-42 (1973). But in situations involving usury, the characteristics distinguishing estoppel and fraud are considerably blurred, given the penal nature and strict construction of Texas usury law. *See* Miller v. First State Bank, 551 S.W.2d 89, 101 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978) (estoppel to assert usury unavailable absent deceptive conduct).

64. *See* Hamour v. Commerce Farm Credit Co., 74 S.W.2d 1035, 1039 (Tex. Civ. App.—Amarillo 1934, writ dism'd).

> 'The party claiming the benefit of an estoppel must not only be without information relative to the material facts at the time he acts on such representation, but if at the time he acts he 'had the means by which, with reasonable diligence, he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he cannot claim to have been misled by relying on the representation or concealment.'

Id. at 1039 (quoting J. POMEROY, POMEROY'S EQUITY JURISPRUDENCE § 810, at 1662 (4th ed. 1918)).

65. *Id.* at 1039.

66. 18 S.W.2d 253 (Tex. Civ. App.—El Paso 1929, writ dism'd).

in good faith upon the borrower and borrower's attorney to prepare documents which were lawful, and that any agreement to charge usurious interest contained in the documents existed either through the ignorance of borrower and borrower's attorney or by virtue of a conspiracy by the borrower and his attorney to defraud the lender. The court concluded that there was no fiduciary relation existing between the lender and borrower or borrower's attorney; therefore, the lender had a duty to use ordinary care in seeing that the documents he executed did not call for an unlawful rate of interest.[67]

The recent case of *American Century Mortgage Investors v. Regional Center, Ltd.*,[68] however, recognizes a limit to the duty of reasonable care and diligence that a lender must exercise in relying upon the representations of a borrower. The borrowing entity in this case was a duly organized and validly existing corporation, but the principals of the corporation concealed from the lender certain documents showing that the corporate entity held title to the mortgaged property as trustee for a limited partnership. The court determined that since the loan documentation did not show on its face an intention to charge usurious interest, the party pleading usury had the burden to show the existence of some agreement, device or subterfuge to charge a usurious rate of interest, and that both parties contemplated such a purpose. The court also observed that: "Failure of the lender to make an investigation which might have disclosed facts establishing payments in excess of legally permitted interest is not equivalent to an intention to charge usury."[69]

Although the holding in *American Century Mortgage Investors* stipulates that a failure to investigate does not, by itself, evidence an intention to charge excessive interest, it does not foreclose a borrower similarly situated from establishing that a lender did know or should have known by the exercise of reasonable care that a given loan transaction was usurious. In addition, the court did not expressly hold that the borrower was estopped from raising a claim of usury. Rather the court concluded that:

> Accordingly, one who makes a representation on which another relies will not be heard to say that his own representation was not worthy of belief and should not have been accepted without investigation [citations omitted]. On the same reasoning we hold that a borrower

67. *Id.* at 255.
68. 529 S.W.2d 578 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).
69. *Id.* at 583.

> cannot assert a subterfuge of its own making to establish usury without proof that the lender participated in or had actual knowledge of the subterfuge.[70]

Thus, the estoppel effected by the court's holding in *American Century Mortgage Investors* prevented the borrower from denying the accuracy and reliability of its prior representations.[71]

In addition, Texas courts refuse to effect an estoppel against a borrower's claim of usury on the ground that the borrower originated or urged upon the lender the loan structure that rendered the loan usurious. The Texas Supreme Court noted in *Tanner Development Co. v. Ferguson*[72] that the negotiations of the parties to a loan transaction have some relevance in determining the dominant purpose and intent of the parties embodied in the loan contract, but concluded: "However, once the agreed terms have been reduced to writing in the form of a compulsory contract, the test of alleged usury is not concerned with which party might have originated the alleged usurious provisions."[73] Therefore, if a loan as finally structured by the parties is usurious, Texas courts will enforce a claim of usury against a lender even if the loan was structured in a particular manner at the borrower's request. The lender is under an obligation to make its own determination concerning whether or not the loan, as structured, is usurious.[74]

In addition to the difficulty of establishing the elements of estoppel under circumstances in which a borrower makes a claim under Texas usury law, which difficulty narrows the circumstances in which a lender can successfully plead estoppel, there are certain

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70. *Id.* at 583-84.

71. *Id.* at 583-84. An opinion letter by borrower's counsel may be somewhat analogous to an agreement by the borrower not to plead usury. Such an agreement is ineffective to waive a usury claim: "It would furnish too ready a mode for the evasion of the grave provisions of our organic and statutory law." Sturgis Nat'l Bank v. Smyth, 30 S.W. 678, 679 (Tex. Civ. App.), *writ dism'd*, 87 Tex. 649, 30 S.W. 898 (1895).

72. 561 S.W.2d 777 (Tex. 1977).

73. *Id.* at 781; *see* First State Bank v. Miller, 563 S.W.2d 572, 575 (Tex. 1978).

74. In the ordinary situation, a lender cannot avoid its responsibility for compliance with Texas usury law by claiming ignorance of the facts surrounding the loan. With respect to legal matters a lender should seek and rely upon advice of lender's own counsel. As one writer noted:

> If after review of all legal judgments a deal is struck, the proper protecter of the client's legal position is his own lawyer, not the other party's. It is quite obvious that either both parties agree on the legal consequences of the proposed action, or the client is willing to take the risk outlined by his own lawyer.

Bermant, 1974 CAL. ST. B.J. 132, 189.

legal principles indigenous to Texas usury law which limit the situations in which a claim of usury can be waived, compromised, or relinquished.

For example, the right to claim usury may be the subject of compromise and settlement. This was established in *Commerce Trust Co. v. Ramp,*[75] when the court articulated the rule stating:

> If the tainted obligation is with the full knowledge and consent of the borrower, finally cancelled or abandoned, and a new obligation, containing no part of the usury, is executed in legal form, and supported solely by the moral obligation resting upon the borrower to pay the money actually received with legal interest thereon, such new obligation is valid and enforceable.[76]

This rationale was followed in the case of *Southwestern Investment Co. v. Hockley County Seed & Delinting, Inc.*[77] In this case the Texas Supreme Court, in refusing writ of error, noted that a contract can be purged of usury by compromise and settlement if the old obligation has been abandoned and replaced by a new and valid one.[78] But the court concluded that, when a loan contract is usurious on its face, a mere reduction by the lender in the amount of interest to be paid by borrower to an amount within the statutory limits does not prevent a claim of usury.[79] Apparently, the court considered that a mere reduction in the amount of interest to be paid by borrower is not sufficient consideration for an agreement by borrower to waive a claim for usurious interest already contracted for or paid, and borrower is not estopped from claiming usury as a result of such an agreement.[80]

In addition to the difficulty of procuring a release of a potential usury claim due to the strict judicial scrutiny of release and settlement arrangements, it is difficult to contractually avoid a usury penalty by inserting so-called "savings clauses" in the loan documents. Savings clauses have been given effect by Texas courts since the decision of the Texas Supreme Court in the case of *Nevels v. Harris.*[81] This case held that such language is effective in cancelling

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75. 135 Tex. 84, 138 S.W.2d 531 (1940).

76. *Id.* at 89, 138 S.W.2d at 534.

77. 511 S.W.2d 724 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam*, 516 S.W.2d 136 (Tex. 1974).

78. Southwestern Inv. Co. v. Hockley County Seed & Delinting Co., 516 S.W.2d 136, 137 (Tex. 1974) (per curiam).

79. *Id.* at 137.

80. *See id.* at 137.

81. 129 Tex. 190, 102 S.W.2d 1046 (1937).

unearned interest in the event of acceleration of maturity of a note and in spreading front end interest to avoid exceeding the maximum legal rate permitted by law. But the court held that a lender may not exact usurious interest and then avoid usury penalties by disclaiming an intention to do what was plainly done.[82] Consequently, a savings clause will assist in determining the treatment of certain payments made pursuant to the loan documents but will not purge the loan of the taint of usury if the loan is usurious on its face.

In *Guetersloh v. C.I.T. Corp.*[83] the court held that when there is no evidence of an intent on the part of the lender to charge a usurious rate of interest, a *de minimus* error in calculating the interest due on a loan warrants a reformation of the note to correct that error.[84] In *Thornhill v. Sharpstown Dodge Sales, Inc.*[85] the court refused to invoke penalties for a technically usurious loan because the finance charge on the debt exceeded the maximum legal rate by a mere forty-two cents.[86] A borrower was denied recovery on a usury counterclaim in *O'Quinn v. Beanland*[87] under similar circumstances. The borrower successfully prevented a lender from recovering the principal due on a note by alleging that his deceased father was mentally incompetent at the time the note was executed. The court held that, (i) although it was usurious, the note was cancelled as a result of defendant's successful plea of mental incompetency, (ii) the cancellation was accomplished with the full knowledge and consent of the borrower and (iii) by successfully avoiding all obligation under the note, borrower lost the right to assert a cause of action based on usury.[88]

The foregoing discussion illustrates the kinds of circumstances in which Texas courts will not permit a borrower to successfully claim usury. If a usurious transaction has been reformed and replaced by a nonusurious transaction that is of mutual benefit to the parties, a borrower cannot later claim usury based upon the agreement he freely abandoned. If the parties have contracted with respect to the treatment and application of unearned interest resulting from the

82. *Id.* at 198, 102 S.W.2d at 1050; *see* Terry v. Teachworth, 431 S.W.2d 918, 926 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

83. 451 S.W.2d 759 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.).

84. *Id.* at 761.

85. 546 S.W.2d 151 (Tex. Civ. App.—Beaumont 1976, no writ).

86. *Id.* at 153.

87. 540 S.W.2d 526 (Tex. Civ. App.—San Antonio 1976, no writ).

88. *Id.* at 527-28.

occurrence of future events, a borrower will have no basis upon which to claim usury. In circumstances when minor, technical error results in a *de minimus* overcharge, a borrower will also not be permitted to claim usury. Finally, there are circumstances when it would be inequitable to permit a borrower to claim usury in connection with an obligation it has already avoided. But none of these circumstances indicates that a borrower can be prevented from claiming usury based upon the action of a third party—for example, the issuance by borrower's attorney of a legal opinion.

Thus, the doctrine of estoppel as applied under Texas usury law, and the principles of construction discussed above, raise serious problems regarding legal opinions upon matters involving Texas usury law. A lender, when faced with a claim of usury by a borrower, may seek to invoke the doctrine of estoppel based upon the legal opinion letter issued by borrower's counsel. Applying the analysis set forth above, the only substantial basis for effecting such an estoppel based upon a legal opinion issued by borrower's counsel is on the contention that the issuance of the legal opinion was part of a scheme perpetrated by the borrower upon the lender with the knowledgeable acquiescence, if not active participation, of borrower's counsel. Therefore, absent proof that the issuance of a legal opinion was part of a misleading course of conduct by borrower, borrower probably will not be estopped from claiming usury in connection with a loan based upon a legal opinion issued by his counsel.[89]

V.

Sample Opinion Language

In the typical commercial loan transaction, the lender will invariably request an unqualified opinion of borrower's counsel that the

89. This proposition is not surprising. The borrower should not ever be estopped from claiming usury based upon the actions of a third party unrelated to borrower. The essence of the doctrine of estoppel is that one who by his speech or conduct has induced another to act in a particular manner ought not be permitted to adopt an inconsistant position, attitude or course of conduct if such inconsistent position, attitude or course of conduct will cause an injury to another. 22 TEX. JUR. 2d *Estoppel* § 1 (1961) Thus, borrower should not ever be estopped from claiming usury based upon his attorney's opinion letter unless the opinion letter was issued as part of a misleading course of conduct affirmatively adopted by borrower. *See* Miller v. First State Bank, 551 S.W.2d 89, 101 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified,* 563 S.W.2d 572 (Tex. 1978).

contemplated loan is not usurious.[90] This request may appear by way of a "form" opinion promulgated by lender's counsel for the use of borrower's counsel stating, *inter alia*:

> That the transaction contemplated by the Loan Documents is not usurious under the applicable laws of the State of Texas.

More frequently, the request will appear in the lender's loan commitment as a condition precedent to closing. The condition may be stated in a form similar to the following:

> In addition to the other conditions of closing set forth herein, Borrower shall also cause to be delivered to Lender at closing the executed unqualified opinion of Borrower's counsel, in form and content acceptable to Lender and its counsel, asserting that all documents are validly executed and enforceable under the terms thereof, and are not in violation of any of the laws of the State of Texas, or any similar federal law, including, without limitation, any applicable usury laws or any agreement or restrictions applicable to Borrower and/or guarantors, if any.[91]

While these "requests" may appear to be relentless and unyielding, except for very uncomplicated and straight-forward loan transactions involving a simple stated rate of interest on the unpaid principal balance, for which an opinion is rarely required, attorneys can ill-afford to issue an unqualified usury opinion.[92]

The intricacies of Texas usury law are many, and the specific

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90. Although borrowers' counsel generally issue more opinions, the discussion in this article should also be helpful to lenders' counsel who must analyze and advise with respect to whether a particular loan is usurious. In addition, lenders' counsel are occasionally requested to issue an opinion concerning the adoption of a lending policy or procedure that may have usury implications, such as refunds on prepayment, sellers' points or variable interest rates, and may be requested to issue usury opinions as part of their representation of out of state institutional lenders.

91. Counsel should remember that the issuance of an opinion concluding that a loan is in compliance with all applicable laws or that the loan documents are enforceable in accordance with their terms may, by implication, be an opinion that the loan is not usurious. It is usually a good idea to separate the question of usury from the rest of the opinion by specifying that no opinion regarding usury is expressed except as expressly set forth in a certain paragraph of the opinion letter.

92. A lender's request for a usury opinion should be limited to language in form and substance similar to what its own counsel would issue in the same or similar circumstances. As one author has reminded us, legal opinions are not exempt from the Golden Rule. Fuld, *Lawyers' Standards and Responsibilities in Rendering Opinions*, 33 BUS. LAW. 1295, 1302 (1978). Nevertheless, lender's counsel will always be tempted to live by the modern version of the Golden Rule: "He who has the gold rules." The natural tendency of attorneys to give unbridled loyalty to a client creates difficulties in this regard.

purpose and structure of each loan transaction presents its own special considerations. Nevertheless, the following non-exhaustive list of general problems should be considered in analyzing a loan transaction for the purpose of issuing a usury opinion.[93]

1. *Reliance on Information Delivered by Client.* In many cases, the attorneys for the parties to a loan transaction do not participate in the negotiations establishing the terms and conditions of the loan. The attorneys' first contact with the transaction usually occurs when the commitment is delivered to counsel for preparation and negotiation of the loan documents. As previously indicated, there may be facts or circumstances known to one or more of the parties which are not reflected in the written commitment or the loan documentation and not otherwise conveyed to counsel. These situations include (i) an intended beneficial user of the loan proceeds other than the stated borrower, (ii) an understanding that the loan proceeds will be diverted to a use other than the purpose stated in the commitment or the loan documentation, or (iii) certain side agreements concerning rebates, additional charges or depository agreements having a material effect upon the substance of the legal opinion.

This situation arises in a variety of commercial transactions requiring an opinion of counsel, and attorneys who are requested to issue a legal opinion concerning the application of Texas usury law upon a particular transaction should be governed by the rules and cautionary measures for evaluating and relying upon information delivered by their clients as discussed above.[94] In addition to an analysis of the loan documents and supporting information delivered to the attorney, the attorney should include in the opinion a statement concerning reliance upon representations of the client and the accuracy of the documents in reflecting the nature of the loan transaction. This language generally reads as follows:

> In connection with the opinion stated below, we have relied upon representations of Borrower (Lender) concerning certain questions of fact material to our opinion. In addition, we have relied upon the accuracy of material factual matters contained in the instruments and documents we have examined in rendering this opinion.

93. The suggested language is offered primarily for illustration and should not be considered to be the definitive response to the problems discussed. An opinion issued in connection with a loan transaction will necessarily be tailored to the specific transaction.

94. See notes 16-21 *supra* and accompanying text.

Naturally, this language will have little meaning if the attorney knows or ought to know that the information conveyed to him by the client or reflected in the loan documents upon which the opinion is based is materially inaccurate.

2. *Fees and Charges Beyond Stated Interest.* Virtually all lending institutions are governed by explicit statutory regulation regarding the kinds and amounts of charges and fees, in addition to stated interest, that can be charged in a given loan transaction.[95] When the statutes do not expressly limit these fees and charges to the actual cost to the lender or to an amount set by statute, they establish a "reasonableness" standard for determining the type and amount of charges and fees that may be collected by the lender. The standard was clearly enunciated by the Texas Supreme Court in the case of *Gonzales County Savings and Loan Ass'n v. Freeman,*[96] when it held that courts could "determine the reasonableness of the expenses in light of the amount of actual work done,"[97] and that "penalties need bear some reasonable relationship to the amount of loss or inconvenience suffered by the lender due to prepayment or late payment by the borrower."[98]

Although *Freeman* dealt with a provision of the Texas Savings and Loan Act,[99] subsequent judicial pronouncements have indicated that Texas courts are following the general standard set by *Freeman* for determining whether various fees charged in loan transactions are bona fide charges and not interest.[100] Because the reasonableness of a fee or charge in a loan transaction is a question of fact rather than a legal issue, an attorney should qualify the opinion by stating the following assumption:

> That all brokerage, commitment, funding and loan fees and other charges made by Lender in connection with the transaction contemplated by the Loan Documents would be construed as charges bearing a reasonable relationship to the cost or risk of the service or accommodation for which it was charged, and not as a charge for the use, forbearance or detention of money.

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95. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 342-508 (Vernon Supp. 1978-1979), art. 852a-5.07, art. 5069-3.15(8), art. 5069-4.01(7), art. 5069-5.02(5) (Vernon 1964).

96. 534 S.W.2d 903 (Tex. 1976).

97. *Id.* at 908.

98. *Id.* at 908.

99. *See* TEX. REV. CIV. STAT. ANN. art. 852a-5.07 (Vernon 1964).

100. *See* Ross v. Walker, 554 S.W.2d 189, 189-90 (Tex. 1977); Gulf Atlantic Life Ins. Co. v. Price, 566 S.W.2d 381, 382 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.); Skeen v. Slavik, 555 S.W.2d 516, 521 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

There are, of course, many fees and charges that have been construed to constitute interest for purposes of determining whether a loan is usurious, particularly front end fees that do not constitute legitimate commitment fees or bear a reasonable relationship to a specific service rendered by the lender in connection with the loan transaction.[101] When these kinds of fees are charged in loans secured by an interest in real property, the parties may need to rely upon the so-called "spreading" statute[102] in order to avoid being subject to usury penalties. In preparing a usury opinion in this type of transaction, the attorney should add the following assumption:

> That if such fees or charges shall be deemed to be interest, they will be spread pursuant to Tex. Rev. Civ. Stat. Ann. art. 5069-1.07(a) so that they will not make the loan usurious.

In issuing a usury opinion relying upon the so-called "spreading" statute, one must always consider two as yet unknown factors: (i) whether the interest in real property securing the loan is of the type covered by the statute and (ii) whether the legislature, in enacting the statute, acted within its constitutional authority "to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest . . . ."[103] These considerations can be covered by the following assumption:

> That Tex. Rev. Civ. Stat. Ann. art. 5069-1.07(a) would be construed to apply to the transaction contemplated by the Loan Documents, and that the statute is constitutional, which has not yet been decided by the courts of Texas.

3. *Statutory Exceptions.* The money market pressures of recent years have contributed to the propensity of the legislature to enact legislation pursuant to its constitutional authority to classify loans and define and fix maximum rates of interest.[104] Although the lending community has had an opportunity to react to and deal with the statutory loan classifications adopted in 1975 and 1977 with respect to certain loans (i) made for the purpose of interim financing for construction on real property or financing or refinancing of im-

101. *See* Skeen v. Slavik, 555 S.W.2d 516, 520-21 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

102. TEX. REV. CIV. STAT. ANN. art. 5069-1.07(a) (Vernon Supp. 1978-1979). For an in depth analysis of the spreading statute, see St. Claire, *The Spreading of Interest Under the Actuarial Method*, 10 ST. MARY'S L.J. 753 (1979).

103. TEX. CONST. art. XVI, § 11.

104. *See id.*

proved real property,[105] (ii) made for the purpose of financing certain oil and gas exploration, development and reworking costs,[106] and (iii) insured by the Federal Housing Administration and the Veterans' Administration,[107] these statutes have not yet been construed by Texas courts. Furthermore, the scope and effect of recent legislation amending article 5069-1.07(b) to apply to loans in the original principal amount of $250,000 or more, as well as the new loan classification relating to loans secured by an interest in real property upon which is located dwelling units for not more than four families, have yet to be interpreted by the courts.[108] Consequently, lenders must second guess the judiciary with respect to its ultimate interpretation of these statutes. In reviewing the propriety of reliance upon these as yet untested statutory classifications, whether the review culminates in issuing an opinion or simply advice to the client, the attorney must use a two-fold analysis involving both the constitutionality of the statute and its applicability to the particular loan transaction in question.

In *Gonzales County Savings and Loan Ass'n v. Freeman*[109] the Texas Supreme Court invalidated that portion of section 5.07 of the Texas Savings and Loan Act that allowed savings and loans to charge premiums (such as points) for making loans.[110] The premise of the court's opinion was that while the legislature has authority to define and fix maximum rates of interest under article XVI, § 11 of the Texas Constitution, section 5.07 neither set a maximum rate of premium charges nor modified the definition of interest in its terms. That portion of section 5.07 was, therefore, declared not to be within the constitutional mandate.[111]

Attorneys must consider whether the new statutes will stand up to a constitutional challenge based upon the decision of the Texas Supreme Court in *Freeman.* For example, article 5069-1.09,[112] enacted by the legislature in 1977, provides that loans insured by the Federal Housing Administration and the Veterans' Administration

105. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.07(b) (Vernon Supp. 1978-1979).

106. *See* art. 5069-1.07(c) *id.*

107. *See* art. 5069-1.09 *id.*.

108. *See* 1979 Tex. Sess. Law Serv., ch. 305, § 1, at 704-05 (Vernon).

109. 534 S.W.2d 903 (Tex. 1976).

110. *Id.* at 908; *see* TEX. REV. CIV. STAT. ANN. art. 852a-5.07 (Vernon 1964).

111. *See* Gonzales County Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 908 (Tex. 1976).

112. TEX. REV. CIV. STAT. ANN. art. 5069-1.09 (Vernon Supp. 1978-1979).

may bear a rate of interest or may be discounted at a rate permitted by applicable law. Although the new statute creates a new loan classification pursuant to the legislature's constitutional authority, it neither sets a maximum rate of interest for the two stated classes of loans nor modifies the definition of interest. It is arguable that the maximum rates of interest for these kinds of loans are regulated by applicable federal law and that the statute creating these classes of loans therefore falls within the constitutional mandate. Nevertheless, it is entirely possible that the legislature's failure to include a specific maximum rate of interest within the language of the statute renders it unconstitutional.[113]

A similar problem is raised by article 5069-1.07(c) concerning oil and gas exploration and development loans;[114] however, this provision is less susceptible to constitutional attack because the language of the statute establishes the maximum rate of interest as being the same as the statutory maximum rate for corporations other than non-profit corporations. Since the courts have frequently interpreted and upheld the corporate exception to the ten percent interest ceiling,[115] it is likely that this new statutory loan classification can withstand a constitutional challenge.

Since the judiciary has yet to review and render an interpretation of these statutes, a usury opinion issued in connection with a loan made under any of these statutes should be qualified by an assumption about the constitutionality of the particular statutory loan classification, as follows:

> That the enactment of (cite the statute involved) is not in violation of the Constitution of the State of Texas.

Article 5069-1.07(c) as discussed above, refers to loans made for the purpose of the payment of "the direct or indirect costs" of oil and gas exploration, development and reworking.[116] The language of this statute leaves considerable latitude in the scope of the legislation with its express recognition of "indirect costs" associated with oil and gas activities.

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113. The recent cutoff of VA and FHA loans in Texas is evidence of lenders' wariness over the constitutionality of this statute. *See* San Antonio Light, May 3, 1979, at 6-A, col. 1; San Antonio Light, May 1, 1979, at 1, col. 4.

114. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.07(c) (Vernon Supp. 1978-1979).

115. *See* art. 1302-2.09 *id.*

116. *See* art. 5069-1.07(c) *id.* This statute was reputedly drafted to apply to a very narrow set of circumstances involving a particular loan transaction. Thus, its applicability to a broader ring of circumstances is questionable.

Article 5069-1.07(b), insofar as it related to loans made for the purpose of "financing or refinancing of improved real property,"[117] presented the unresolved question of what improvements are necessary to qualify the loan as a "financing or refinancing of improved real property." Neither the statute nor its legislative history indicated what definition of improved real property was intended. Article 5069-1.07(b) also provoked debate concerning loans made for the purpose of "interim financing for construction on real property,"[118] with regard to whether the $500,000 specified amount had to be entirely applicable to actual construction costs or also included the purchase money proceeds for the land on which the construction would take place and certain non-construction "soft" costs related to the construction.

The newly enacted revision of article 5069-1.07(b),[119] has rendered moot the interpretive difficulties of the previous version; however, it raises new questions regarding the scope of the exemptions to the statute. Article 5069-1.07(b), as amended, permits an interest rate not to exceed eighteen percent on certain loans of $250,000 or more.[120] Exempted from its coverage are loans secured by a lien on a building used as a single one-to-four family residence occupied by the borrower, loans secured by a lien on land intended to be used primarily for agricultural or ranching purposes, and loans otherwise covered by the corporate exception.[121] One can foresee interpretive difficulties similar to those discussed above in defining loans secured by "a lien on land intended to be used primarily for agricultural or ranching purposes."[122]

Until there has been either judicial interpretation or additional statutory clarification of the applicability of the statutes discussed above, attorneys and their clients are left to negotiate and consummate these transactions amidst imperfect statutory guidelines, advice of counsel and the risk that they may overextend the applicability of the particular statute involved. Consequently, the opinion of counsel issued in connection with a transaction consummated pursuant to one of these statutory exceptions should be qualified by the following:

117. *See* art. 5069-1.07(b) *id.*
118. *See id.*
119. *See* 1979 Tex. Sess. Law Serv., ch. 305, § 1, at 704-05 (Vernon).
120. *See id.*
121. *See id.*
122. *See id.*

That (cite the statute involved) would be construed to apply to the transaction contemplated by the Loan Documents . . . .

4. *Prepayment and Acceleration.* Most mortgage lending transactions are structured to include front end fees and charges that, under appliable law, constitute interest in addition to the stated rate for the loan.[123] In anticipation of this construction, lenders calculate the amount of charges that can be spread safely over the entire term of the loan without exceeding the maximum legal rates and limit front end fees and charges to that amount.[124] If, however, the term of the loan is shortened, whether by voluntary prepayment or acceleration upon default, the spreading of these front end fees and charges may no longer be possible to prevent the loan from being usurious.

Article 5069-1.07(a)[125] provides a safeguard for loans secured by an interest in real property whose terms are shortened by prepayment. By application of this statute, lenders can refund to the borrower the amount of interest received for the actual term of the loan that exceeds the maximum lawful rate or can credit the amount of the excess against amounts owing under the loan. Assuming that the statute is constitutional, this provision is a "safe harbor" for loans whose terms are shortened by voluntary prepayment.

In the event of involuntary acceleration upon default, however, lenders must rely upon the "savings clause" language contained in the loan documents. The doctrine that a savings clause can have this effect stems from the time-honored case of *Nevels v. Harris*,[126] discussed above, in which the court held that a note is not usurious if by its express terms all unearned interest is cancelled should the note be matured before its stated maturity date.[127] This doctrine was recently reaffirmed in *Tanner Development Co. v. Ferguson*,[128] in which the Texas Supreme Court held that "it was error to convert the prepaid interest into principal or to apply it to principal in any

123. *See* Riverdrive Mall, Inc. v. Larwin Mortgage Investors, 515 S.W.2d 5, 8 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); Terry v. Teachworth, 431 S.W.2d 918, 925 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

124. For an example of such calculations, see generally St. Claire, *The Spreading of Interest Under the Actuarial Method*, 10 ST. MARY'S L.J., 753 (1979).

125. TEX. REV. CIV. STAT. ANN. art. 5069-1.07(a) (Vernon Supp. 1978-1979).

126. 129 Tex. 190, 198, 102 S.W.2d 1046, 1050 (1937).

127. *Id.* at 198, 102 S.W.2d at 1050; *see* Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1344-45 (5th Cir. 1972).

128. 561 S.W.2d 777, 782 (Tex. 1977).

manner other than as specifically provided in the 'savings clauses' of the note and deed of trust."[129] Counsel should pay particular attention to the wording of the savings language contained in the loan documents and include in an opinion the following:

> That in the event of acceleration of the Note in such a way that the interest chargeable thereon is greater than that allowed by law, the courts will give effect to the "savings language" contained in the Note.[130]

5. *Applicable Law.* Ordinarily, the loan documents will provide that Texas law applies to the loan in question. Under these circumstances, a Texas attorney will want to limit the opinion to Texas and federal law, and include in the opinion the following language:

> In rendering the foregoing opinion we have assumed that Texas law applies to the transaction embodied in the loan documents, and this opinion is expressly limited to applicable Texas and federal law.

Frequently, the parties to a loan transaction will have attempted to structure a loan transaction so that Texas law does not apply and will have expressly included in the loan documents a choice of law provision to the effect that the law of some other jurisdiction is to apply. Under these circumstances, a Texas lawyer may be requested to opine that Texas courts will give effect to the choice of law provision and will apply the law of the other jurisdiction.

In a number of decisions, Texas courts have given effect to choice of law provisions contained in a contract.[131] In addition, Texas

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129. *Id.* at 782.

130. It is crucial that lender's counsel carefully review the default and acceleration notice forms used by his client to see that those notices do not inadvertently call for payment of interest that has not yet accrued. This has been strictly construed to be a "charging" of interest that can render a loan usurious despite claims of a bona fide error. *See* Commercial Credit Corp. v. Chasteen, 565 S.W.2d 342, 345 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); Moore v. Sabine Nat'l Bank, 527 S.W.2d 209, 213 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.). Lender's counsel should also be aware of the current debate concerning the method of calculating the amount of front end fees and charges that can be added to a loan without rendering it usurious. The so-called "judicial," "statutory," and "actuarial" methods generally being used and discussed arrive at markedly different results, and lender's counsel should analyze and review with his client the consequences of its adopting the "wrong" method. *See* St. Claire, *The Spreading of Interest Under the Actuarial Method,* 10 ST. MARY'S L.J. 753 (1979).

131. The principal Texas decisions with respect to choice of law in the area of usury include the following: Lubbock Hotel Co. v. Guaranty Bank & Trust Co., 77 F.2d 152 (5th Cir. 1935); Building & Loan Ass'n v. Griffin, 90 Tex. 480, 39 S.W. 656 (1897); Dugan v. Lewis, 79 Tex. 246, 14 S.W. 1024 (1891); Conner & Walker v. Donnell, Lawson & Co., 55 Tex. 167

courts presume that the parties to a transaction intended to reach a valid agreement and will ordinarily construe instruments and documents in a manner that will validate the transaction in question.[132] On the other hand, the courts will not give effect to a subterfuge created solely for the purpose of evading Texas usury law.[133]

In determining whether to give effect to a choice of law provision contained in loan documents, Texas courts will weigh the facts to determine whether the transaction as structured by the parties has a reasonable relationship to the jurisdiction whose law the parties chose to govern the transaction to warrant the application of the law of that jurisdiction.[134] In determining whether sufficient contacts exist, the courts should consider at least the following factors: the location of the lender's principal place of business; the lender's other contacts with the state of Texas; the situs of negotiations to the transaction; the place of the execution of the definitive documents; the place where the closing and funding of the loan in question occurred; the location of any security; the place where payment is to be made; and the jurisdiction chosen by the parties.[135]

Under these circumstances, the opinion should include a brief review of the state of the law with respect to choice of law provisions[136] and then state language similar to the following:

(1881); Securities Inv. Co. v. Finance Acceptance Corp., 474 S.W.2d 261 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.); Peoples Bldg. Loan & Sav. Ass'n v. Bessonette, 48 S.W. 52 (Tex. Civ. App. 1898, writ ref'd).

132. *See* Blackford v. Commercial Credit Corp., 263 F.2d 97, 113 (5th Cir. 1959).

133. *See* Building & Loan Ass'n v. Griffin, 90 Tex. 480, 488, 39 S.W. 656, 659 (1897).

134. *See* Teas v. Kimball, 257 F.2d 817, 823 (5th Cir. 1958); National Sur. Corp. v. Inland Properties, Inc., 286 F. Supp. 173, 190 (E.D. Ark. 1968), *aff'd*, 416 F.2d 457 (5th Cir. 1969); Securities Inv. Co. v. Finance Acceptance Corp., 474 S.W.2d 261, 272 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).

135. See cases cited note 131 *supra*.

136. A summary statement such as the following should suffice:

> As in most conflicts of law questions, there is no certain and reliable touchstone for insuring that the law of a particular jurisdiction will be applied to determine whether a given loan transaction is usurious. Generally speaking, Texas courts will review the objective features of a loan transaction to determine whether a reasonable relationship exists between the loan transaction and the law of the jurisdiction sought to be applied. Nevertheless, the courts will peer beyond the most elaborate contrivance as a device to evade Texas usury laws if it can be shown that the substance of the transaction is plainly at odds with a contractual choice of law provision.
>
> In determining whether to apply Texas law or the law of another state to a particular loan transaction, Texas courts will look to factors such as the following in connection with the transaction: location of lender's principal office; lender's contact with Texas; place of negotiation; place of execution closing, and funding; location of secu-

We have assumed the validity and accuracy of the following facts in connection with the Loan: that Lender's principal office is located in _____; that Lender has not transacted business and is not "doing business" in Texas within the contemplation of Texas law; that the Loan has been negotiated in _____; that the documents evidencing the Loan will have been executed in _____; that the Loan will have been closed in _____; that all loan proceeds have been paid over to Borrower in _____ so as to become the property of Borrower and at its risk in _____; that the security for the Loan will be located in _____ at closing of the Loan and from time to time in other states during the term of the Loan; that the Loan Documents expressly provide that they are governed by the laws of the State of _____; that the Loan Documents provide that the Loan is payable only in _____; and that the Loan is actually payable only in _____.

We have also assumed without independent investigation that there are no facts or circumstances in connection with the Loan of which we have not been made aware that would lead a Texas court to conclude that the Loan is a contrivance or device to evade the Texas usury laws.

Based on the foregoing assumptions, and assuming that the facts pertaining to the Loan and the Texas authorities applicable thereto are properly presented and argued to a Texas court, it is our view that a Texas court would hold that a reasonable relationship exists between the Loan and the law of the State of _____ and would therefore give effect to the provisions in the Loan Documents that the laws of _____ govern the terms thereof in determining whether the Loan is usurious.[137]

VI.

Conclusion

Legal opinions play an important role in a variety of commercial transactions. As one prominent authority noted:

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rity; express choice of law provision in the loan documents; and the traditional critical factor of place of payment.

137. The authors are cognizant of the recent holding in Gutierrez v. Collins, 22 Tex. Sup. Ct. J. 417 (June 13, 1979), in which the Texas Supreme Court overruled the common law doctrine of *lex loci delicti* for determining conflicts cases sound in tort in favor of a "most significant relationship" test. *Id.* at 419-20. Since conflict of law questions in tort cases result in the ultimate determination of whether or not a particular jurisdiction can reach an alleged tortfeasor, it is doubtful that this decision will have a substantial impact on the reasonable relationship approach to evaluating a contractual choice of law provision as discussed in this article.

> In many ways, a legal opinion is the quintessence of a business lawyer's practice.
>
> The preparation of a legal opinion requires thought and skill in protecting the interests of the public, the interests of the client and the self-interest of the lawyer, while at the same time submitting something that will be acceptable to the other lawyer and suitable to the situation. All of this requires judgment, knowledge of the law, knowledge of the facts and the ability to deal with people.[138]

Unfortunately, legal opinions on the subject of usury have not been treated with either a high view of their importance or a lofty vision of the role of the attorney issuing them. Too often the issuance of opinions is viewed as a game in which lender's counsel attempts to extract an opinion he would not give under the same or similar circumstances from a borrower's counsel who is bent upon qualifying his opinion to the point that it is useless. The result of this unfortunate procedure is that lenders receive a false sense of security based upon the opinion of an attorney who neither represents the lender nor intends to render an opinion upon which the lender can rely. None of this is calculated to benefit attorneys or the legal profession, much less their clients, in the long run.

If a lender is truly looking for comfort or guidance in order to structure a loan transaction that will not run afoul of usury law, he should look to his own attorney who is in a position to properly represent the interests of the lender. Such an opinion could discuss the possible or probable legal interpretations of facts that will enable the client to analyze transactions with an understanding of the potential risks involved. Businessmen are accustomed to making business decisions based on probabilities and "quantitative opinions" of the type suggested are not unknown or unheralded.[139] In any case, in an area as complex as Texas usury law, as a practical matter it is frequently impossible to do more than evaluate the risks inherent to a particular transaction. If legal opinions are to serve any purpose in the area of usury, it is for the purpose of apprising the client of the legal issues and problem areas involved in order to aid the client in making business judgments with regard to consummating loan transactions.

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138. Fuld, *Legal Opinions in Business Transactions - An Attempt to Bring Some Order out of Some Chaos*, 28 BUS. LAW. 915, 945 (1973).

139. *See generally* Vagts, *Legal Opinions in Quantitative Terms: The Lawyer as Haruspex or Bookie?*, 34 BUS. LAW. 421 (1979).

The attempt to alter the practice of attorneys and lenders with respect to the issuance of legal opinions on the subject of usury will not be automatic or easy. The attempt will require a concerted effort on the part of the bar as part of a general evaluation of the role of opinion letters in commercial transactions and the promulgation by the bar of standards governing both the types of opinions that will be requested and given by attorneys and the circumstances in which those opinions will be given.