



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 20, 1996

The Honorable Don Henderson
Chair, Senate Jurisprudence Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711-2068

Letter Opinion No. 96-149

Re: Whether Texas usury laws, V.T.C.S.
art. 5096, apply to a particular transaction
(ID# 39000)

Dear Senator Henderson:

You ask whether Texas usury laws, V.T.C.S. art. 5096, apply to a particular transaction. You provide the following facts:

As part of a securities offering, Texas individuals executed Powers of Attorney permitting out of state Party to execute a note to a related Party. The resulting note is fully executed and performable outside of Texas. All payments are flow-through payments in the securities transaction and Texas investors are to receive net only after Power of Attorney holder has paid the Payee under the note. Texas investors have no knowledge of payment or non-payment. Subsequently, assignee of note declares a default and makes demand for payment. Calculations for the purpose of this demand would have been excessive if Texas law applied.

You ask if article 5096 "extend[s] to demands made in Texas to its citizens made by out of state parties" or if it "only prohibit[s] Texas generated demands under Texas Notes."

In essence, you ask whether Texas usury prohibitions would apply to the transaction you describe or if the law of some other jurisdiction would apply. Were the Texas investors to file a usury action in a Texas court, Texas choice of law rules would apply.

Texas choice of law rules provide that the law of the state with the most significant relationship to the issues in question will be applied to resolve those issues. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984). . . .

Texas law provides that parties to a contract may choose the law applicable to their transaction so long as the law has a reasonable relationship to the contract. [Citations omitted.] Choice of law provisions, however, may not be utilized as a subterfuge to avoid the

usury law that would otherwise apply. . . . *Dugan v. Lewis*, 14 S.W. 1024 (1891).

Cook v. Frazier, 765 S.W.2d 546, 549 (Tex. App.—Ft. Worth 1989, no writ). In determining whether a transaction has a significant relationship to Texas, a court would consider, for example, the citizenship of the parties to the transaction, where the contracts were negotiated and executed, and where payments were made. *See id.*; *Commercial Credit Equip. Corp. v. West*, 677 S.W.2d 669, 674 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

The determination whether a transaction has a significant relationship to Texas justifying the application of Texas usury laws requires the examination of all the circumstances of the transaction, including the terms of the note and any other contract documents. Furthermore, if the contract documents contain a choice of law provision, one must consider whether the law has a reasonable relationship to the contract and whether the choice of law provision is a subterfuge to avoid the usury law that would otherwise apply. *See Cook*, 765 S.W.2d at 549. Because this office is not equipped to make findings of fact¹ and does not construe contracts between private parties,² these matters are beyond the purview of the opinion process.³

¹*See, e.g.*, Attorney General Opinions DM-383 (1996) at 2 (questions of fact are inappropriate for the opinion process), DM-98 (1992) at 3 (questions of fact cannot be resolved in opinion process), H-56 (1973) at 3 (improper for attorney general to pass judgment on matter that would be question for jury determination), M-187 (1968) at 3 (attorney general cannot make factual findings).

²*See, e.g.*, Attorney General Opinions DM-383 at 2 (interpretation of contract not appropriate function for opinion process), DM-192 (1992) at 10 (“This office, in the exercise of its authority to issue legal opinions, does not construe contracts.”), JM-697 (1987) at 6 (“review of contracts is not an appropriate function for the opinion process”).

³In addition, because the transaction appears to have been part of a securities offering, a court would also consider to what extent federal securities laws would govern the dispute.

S U M M A R Y

The determination whether a transaction has a significant relationship to Texas justifying the application of Texas usury laws requires the examination of all the circumstances of the transaction, including the terms of the note and any other contractual documents, which may contain a choice of law provision.

Yours very truly,

A handwritten signature in black ink that reads "Mary R. Crouter". The signature is written in a cursive style with a long, sweeping tail on the letter "t".

Mary R. Crouter
Assistant Attorney General
Opinion Committee