CHOICE-OF-LAW OPINIONS IN MORTGAGE LOAN TRANSACTIONS

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1997 ACREL MID-YEAR MEETING
Scottsdale, Arizona
April 4, 1997
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INTRODUCTION

Choice-of-law opinions are often required from the borrower’s attorney (the “Opinion Giver”) in transactions which involve parties and/or properties located in more than one state, especially where the laws of one of the states include one or more undesirable features (e.g., usury, one-action rule).

ACCORD/REPORT "DEFAULT" CHOICE OF LAW OPINIONS

In an effort to achieve national uniformity in opinion letters, the Section of Business Law of the American Bar Association published in 1991 the work product of its two-year project on business law opinion letters. The Third-Party Legal Opinion Report of the Section of Business Law, 57 The Business Lawyer 167 (1991), republished at 29 Real Property, Probate and Trust Law Journal 487 (1994). That publication includes a Foreword, a Legal Opinion Accord (often referred to, and referred to in this Article B, as the “Accord”), Commentary, an Illustrative Opinion Letter and Guidelines. Because the Accord expressly excludes certain legal opinion issues respecting liens on real property (see § 19(h) of the Accord), it was supplemented by an adaption to mortgage loan transactions published by a Joint Drafting Committee of the Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers. Report on Adaptation of the Legal Opinion Accord, 29 Real Property, Probate and Trust Law Journal 569 (1994) (often referred to, and referred to in this Article B, as the “Report”). Acknowledging that the following summary should not be considered to be a substitute for a thorough reading of the full text of Sections 10(b), (c) and (d) of the Accord (with subsections (b) and (c) having themselves been explained and qualified by Sections 8 and 9 of the Report), the following subparagraphs of this Article B set out a summary of the “default” choice-of-law opinions adopted by the Accord and the Report (i.e., the opinions which are incorporated by reference into a “Remedies Opinion” in the absence of any specific choice-of-law opinion):

(a) With regard to the Opinion Giver’s opinion as to the existence and good standing of the Client (i.e., incorporated into the Remedies Opinion, as explained in Paragraph 10.4 of the Commentary to the Accord), the laws of the Client’s organization are deemed to apply to such opinion [Accord, § 10(c)]. For example, if the Client is a
Delaware corporation, then the laws of the State of Delaware are deemed to be applicable to the implied opinion that the Client is in existence and in good standing in the State of Delaware; accordingly, if the Opinion Giver is not licensed in the State of Delaware, he or she may wish to obtain a supporting opinion from a Delaware lawyer with regard to the Client’s existence and good standing status in that State.

(b) With regard to the Opinion Giver’s opinion as to the substantive aspects of the Transaction Documents (i.e., not the choice-of-law provisions, if any, in such Transaction Documents), the law of the jurisdiction whose laws are being addressed by the Opinion Giver in the Opinion (normally being the laws of the state of the Opinion Giver) shall be deemed to govern the Transaction Documents [Accord § 10(b) and Report § 8]. For example, even if the Transaction Documents specify the laws of the State of New York as being applicable to the Transaction, if the Opinion Giver is a Texas attorney and the Opinion Letter includes a Remedies Opinion without a specific reference to the laws of the State of New York, then as to that Remedies Opinion by the Texas Opinion Giver, the laws of the State of Texas are deemed to apply to the Remedies Opinion.

(c) With regard to the choice-of-law provisions, if any, in the Transaction Documents, if and to the extent that the choice-of-law provisions designate the law of the jurisdiction being addressed by the Opinion Giver in the Opinion (which the Accord defines as the “Opining Jurisdiction”), the Opinion is deemed to include an opinion that such choice-of-law provisions will be given effect under the choice-of-law rules of the Opining Jurisdiction [Accord § 10(d)(i)]. The Report provides an exception to this rule, however, in the event that the application of the Law of the Opining Jurisdiction would be “contrary to a fundamental public policy of the Law of an Other Jurisdiction” (defined below) which has the most significant relationship to the Transaction [Report § 9]. For example, if the Opinion Giver is a Texas attorney and the Transaction Documents specify the laws of the State of Texas as being applicable to the Transaction, then the Remedies Opinion is deemed to include an opinion that such choice-of-law provision will be given effect by a federal or state court in the State of Texas -- unless such court determines that its application of the choice-of-law provision would be contrary to a fundamental public policy of the laws of another state which had the most significant relationship to the Transaction.

(d) If and to the extent that the choice-of-law provisions designate the law of a jurisdiction other than the Opining Jurisdiction (which the Accord defines as an “Other Jurisdiction”), the Opinion is not deemed to include an opinion as to what law governs the Transaction. For example, if the Opinion Giver is a Texas attorney and the Transaction Documents specify the laws of the State of Arizona, then the Texas Opinion Giver is not deemed to be rendering any opinion on the validity of that choice-of-law provision (i.e., unless the Opinion Letter includes an express choice-of-law opinion).

C. AN EXPRESS CHOICE-OF-LAW OPINION

In those transactions where the Opinion Giver has agreed to render an express choice-of-law opinion, is comfortable with the choice-of-law designation in the Transaction Documents and does not need to qualify his or her opinion, the following sentence will generally suffice:
“Choice of Law. A court in the State of ______________ (the “Opining Jurisdiction”), or a federal court applying the choice-of-law rules of the Opining Jurisdiction, will give effect to the provisions of the Transaction Documents which provide that such documents will be governed by the laws of the State of ______________ (the “Designated Jurisdiction” [Note: The “Designated Jurisdiction” may be the Opining Jurisdiction or may be an “Other Jurisdiction”]), and will hold that [Note: If applicable, add “except for the provisions of the Deed of Trust relating to the creation and protection of collateral and foreclosure upon collateral,”] the Transaction Documents are to be governed by and construed in accordance with the laws of the Designated Jurisdiction, without giving effect to the choice-of-law rules of the Designated Jurisdiction.”

Where the situation warrants a reasoned opinion, the above opinion may be used but then qualified as may be appropriate in accordance with the laws and practices of the particular “Opining Jurisdiction.”

D. **RESTATEMENT SECTIONS 187 AND 188**

For those states which have adopted all or portions of the Restatement (Second) of Conflict of Laws, Attachments “A” and “B” of this Outline (at pages 22 and 23) set out the two Restatement provisions which are most applicable to choice-of-law opinions in contractual transactions, Sections 187 and 188.

E. **TEXAS**

1. **TEXAS COMMON LAW: GRADUAL ACKNOWLEDGMENT OF THE RESTATEMENT.**


in part Woods-Tucker Leasing Corp. of Georgia v. Hutcheson-Ingram Development Company, 626 F.2d 401 (5th Cir. 1980). In the fall of 1980, the Fifth Circuit rendered the first Woods-Tucker opinion (the opinion appearing at 626 F.2d 401) dealing with enforcement of a contractual choice-of-law provision. In writing the opinion for the 2-to-1 majority of the court, Justice Johnson, formerly a justice on the Texas Supreme Court, declared that Texas choice-of-law cases established a strong policy applying Texas law where necessary to protect the interests of Texas debtors, i.e., “lex debitoris.” (Of all cases listed in paragraph 1.1 immediately above in this Outline, Justice Johnson could cite only the Griffin case -- an 1897 decision -- as authority for its conclusion.) The majority opinion also noted that in Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979), the Texas Supreme Court had applied the most significant contacts analysis with respect to a choice-of-law determination involving torts. The majority accordingly determined that Texas law applied to the transaction notwithstanding the fact that the parties had designated Mississippi law in the documentation of the transaction. A vigorous dissent by Justice Tate served to forecast the possibility of a rehearing. In the second Woods-Tucker opinion (the opinion appearing at 642 F.2d 744) Justice Tate, writing for a unanimous court, reversed the first opinion and held that Mississippi law governed the transaction. In rejecting the “lex debitoris” principles espoused in its first opinion, the court in its second opinion noted that Section 1.105(a) of the Texas Business and Commerce Code, i.e., Texas’ codification of the Uniform Commercial Code (see paragraph 2.1 on pages 8-9 of this Outline), demonstrated Texas’ preference that the parties’ contractual choice of law will be upheld if the forum so chosen bears a “reasonable relation” to the transaction. The court further acknowledged that a lender might well seek to secure the benefits of another state’s law to avoid the usury law of the State of Texas, but that such desire would not, by itself, create a “contrivance” which would defeat the designated choice of law. In response to the borrower’s contention that the 1897 Texas Supreme Court decision in Building & Loan Association of Dakota v. Griffin, 90 Tex. 480, 39 S.W. 656 (1897) required the application of Texas law (which contention had formed the basis of the first Woods-Tucker opinion), the court in its second opinion concluded: “We do not find the Griffin case persuasive.” 642 F.2d at 752.

E.1.3 Duncan v. Cessna: Texas’ First Adoption of the Restatement in a Contractual Context. Although the Texas Supreme Court had in 1979 adopted the Restatement (Second) of Conflicts of Laws for tort actions, Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979), and although at least one appellate court in 1980 acknowledged the Restatement in a contract case, First Commerce Realty Investors v. K-F Land Company, 617 S.W.2d 806 (Tex. Civ. App. -- Houston [1st Dist.] 1980, writ ref’d n.r.e.), the first actual adoption of the Restatement in a contract case occurred in 1984 in the Texas Supreme Court opinion of Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984). The Duncan v. Cessna opinion, however, did not include an adoption of all contract choice-of-law principles in the Restatement; instead, the Court merely held that “except those contract cases in which the parties have agreed to a valid choice of law clause” (665 S.W.2d at 421), the law of the most significant relationship test under Section 6 of the Restatement will apply to the transaction. As noted by one commentary on the Duncan v. Cessna opinion:

“By its reference [in Duncan v. Cessna] to a ‘valid choice of law clause,’ the supreme court affirmed the efficacy of such clause but did not indicate whether other sections of the Restatement, e.g., RESTATEMENT . . . § 187, entitled ‘Law of the State Chosen by the Parties,’ should be considered in analyzing whether a particular choice of law would be enforced. In Gutierrez the supreme court made
specific reference not only to Section 6 but also to id. § 145, which sets forth contacts to be taken into account in applying section 6 in the torts context. In Duncan the court made no reference to id. § 188, which lists the contacts to be taken into account in applying section 6 in the context of a contracts matter. Whether this omission was deliberate is not clear. Note, however, that the comments to section 6 refer to numerous other sections of the Restatement and made it clear that the drafters of the Restatement did not intend for section 6 to be read in a vacuum.”


E.1.4 DeSantis v. Wackenhut Corporation: The First Opinion. The DeSantis case did not involve a loan transaction but instead involved a non-competition agreement in an employment relationship. Quoting from the Texas Supreme Court’s statement of the relevant facts:

“In June 1981, . . . [Edward] DeSantis interviewed for a position with Wackenhut Corporation. At that time, Wackenhut, . . . was chartered and headquartered in Florida. . . . At Wackenhut’s request, DeSantis signed a noncompetition agreement at the inception of his employment. The agreement recites that it was ‘made and entered into’ on August 13, 1981, in Florida, although DeSantis signed it in Texas. . . . In the agreement DeSantis covenanted that as long as he was employed by Wackenhut and for two years thereafter, he would not compete in any way with Wackenhut in a forty-county area in south Texas . . . . Finally, DeSantis and Wackenhut agreed ‘that any questions concerning interpretation or enforcement of this contract shall be governed by Florida law.’ [emphasis added]

“DeSantis remained manager of Wackenhut’s Houston office for nearly three years, until March 1984, when he resigned . . . . Following his resignation DeSantis invested in a company which marketed security electronics. He also formed a new company, Risk Deterrence, Inc. (‘RDI’), to provide security consulting services and security guard services to a limited clientele.

“Wackenhut sued DeSantis and RDI in October 1984 to enjoin them from violating the noncompetition agreement, and to recover damages for breach of the
agreement and for tortious interference with business relations.” 793 S.W.2d at 675-76.

The trial court and lower appellate court ruled in favor of Wackenhut, in part holding that the choice-of-law designation in the noncompetition agreement, designating Florida law, was valid and determinative, i.e., thereby causing to be irrelevant the Texas law relating to noncompetition agreements. Those lower court holdings as to choice of law and, accordingly, the validity of the noncompetition agreement, were reversed by the Texas Supreme Court, whose first opinion was published in July 1988. DeSantis v. Wackenhut Corporation, 31 Tex. Sup. Ct. J. 616. Despite the fact that the Supreme Court found the choice-of-law designation to be invalid, therefore causing Texas law to apply to the issue in question (i.e., voiding the noncompetition agreement as being in violation of Texas law), the opinion did contain some “good news” for those seeking a definitive body of choice-of-law guidelines. The “good news” of the initial DeSantis opinion was its unequivocal adoption of Section 187 of the Restatement (Second) of Conflicts of Laws. The Supreme Court first quoted the entirety of Section 187 (footnote 2 of the Supreme Court’s opinion) and then stated as follows:

“Contract law seeks to protect the justified expectations of the parties and to provide certainty as to their rights under the contract. In multi-state transactions, these objectives are best met by allowing the parties to agree that the law of a particular jurisdiction shall control their contractual relations. Section 187 of the Restatement (Second) of Conflict of Laws promotes these objectives of certainty and predictability by making such choice of law clauses generally enforceable . . . . [two sentences comprising the “bad news”, quoted and discussed below]. We accordingly adopt the rule of Section 187.” 31 Tex. Sup. Ct. J. at 618 (1988).

Unfortunately, in the same paragraph as the above-quoted “good news,” the Court added the following unfortunate analysis -- “bad news” for those desiring a Restatement standard in Texas:  

“At the same time, it sets two important limits on the parties’ autonomy. There must be a reasonable relationship between the parties and the chosen state [Note: That aspect was not the “bad news.”], and the law of the chosen state must not be contrary to a fundamental public policy of the State of Texas.” 30 Tex. Sup. Ct. J. at 618 [emphasis added in order to highlight the “bad news”].

This “bad news” was repeated two paragraphs later in the opinion: “The law of another jurisdiction . . . must differ in such a way as to directly impinge upon the rights created in support of a fundamental policy of the State of Texas.” 30 Tex. Sup. Ct. J. at 618 [emphasis added]. And another “bad news” statement appears on page 820 of the opinion: “In the absence of a valid choice of law clause, Texas law is controlling.” 30 Tex. Sup. Ct. J. at 618 [emphasis added]. Why do the above sentences constitute “bad news”? Because the Court inadvertently failed to spell out the Restatement analysis and, accordingly, seemed to suggest an inclination either for the “law of the forum” (i.e., Texas public policy controls for all cases tried in Texas courts, regardless of which state has the most
significant contacts to the transaction) or for “lex debitoris” (where the law of the “chosen state” is not to be followed if it contravenes the public policy of the debtor’s state of residence).

E.1.5  The Second (Final) DeSantis Opinion.  Almost immediately after publishing its initial opinion in the DeSantis case, the Supreme Court granted a rehearing to the litigants. Then, nearly two years later its initial opinion -- it may have taken that much time for the Supreme Court to have read all the Amicus Curiae briefs! -- the Supreme Court withdrew that opinion and issued its revised final opinion.  DeSantis v. Wackenhut Corporation, 793 S.W.2d 670 (1990), cert. denied, 498 U.S. 1048 (1991).  In its latter opinion the Supreme Court removed all prior “this state” and “Texas law is controlling” statements and, instead, followed literally the provisions of Restatement:

“We believe the rule is best formulated in Section 187 of the RESTATEMENT and will therefore look to its provisions in our analysis of this case.  Section 187 states:  [quoting Section 187 in full].  This issue before us -- whether the noncompetition agreement in this case is enforceable -- is not “one which the parties could have resolved by an explicit provision in their agreement”.  See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment d (1971).  We therefore apply section 187(2).

“The parties in this case chose the law of Florida to govern their contract.  Florida has a substantial relationship to the parties and the transaction because Wackenhut’s corporate offices are there, and some of the negotiations between DeSantis and George Wackenhut occurred there.  Thus, under section 187(2) Florida law should apply in this case unless it falls within the exception stated in section 187(2)(b).  Whether that exception applies depends upon three determinations:  first, whether there is a state the law of which would apply under section 188 of the RESTATEMENT absent an effective choice of law by the parties, or in other words, whether a state has a more significant relationship with the parties and their transaction than the state they chose; second, whether that state has a materially greater interest than the chosen state in deciding whether this noncompetition agreement should be enforced; and third, whether that state’s fundamental policy would be contravened by the application of the law of the chosen state in this case.  More particularly, we must determine:  first, whether Texas has a more significant relationship to these parties and their transaction than Florida; second, whether Texas has a materially greater interest than Florida in deciding the enforceability of the noncompetition agreement in this case; and third, whether the application of Florida law in this case would be contrary to fundamental policy of Texas.
“Section 188 of the RESTATEMENT provides that a contract is to be governed by the law of the state that ‘has the most significant relationship to the transaction and the parties’, taking into account various contacts in light of the basic conflict of laws principles of section 6 of the RESTATEMENT. In this case, that state is Texas. [emphasis added] … [followed by the Supreme Court’s analysis of the facts of this particular case and why such facts supported the Supreme Court’s conclusion that Texas had the most significant relationship in this particular case].” 793 S.W.2d at 677-79.

Although one appellate court’s opinion published immediately after the final DeSantis opinion indicated that the lower court had written its opinion prior to its awareness of the Supreme Court’s final position, State National Bank v. Academia, Inc., 802 S.W.2d 282, 289 (Ct. App. -- Corpus Christi 1990, writ denied) (which in dicta still used the term “this state” as a substitute for a Section 187 analysis -- but which in that dicta cited the Supreme Court opinion as a 1988 opinion, i.e., the year in which the first DeSantis opinion had been rendered), another subsequently published opinion clearly followed the approach adopted in the final DeSantis opinion, i.e., correctly applying Restatement Sections 187 and 188. Chase Manhattan Bank, N.A. v. Greenbriar North Section II, 835 S.W.2d 720, 725-27 (Ct. App. -- Houston [1st Dist.] 1992, no writ history). Accord: Bergman v. Bergman, 888 S.W.2d 580 (Ct. App. -- El Paso 1994, no writ history); CPS International, Inc. v. Dresser Industries, Inc., 911 S.W.2d 18 (Ct. App. -- El Paso 1995, writ denied); Accelerated Christian Education, Inc. v. Oracle Corporation, 925 S.W.2d 66 (Ct. App. -- Dallas 1996, no writ history); Salazar v. Coastal Corporation, 928 S.W.2d 162 (Ct. App. -- Houston [14th Dist.] 1996, no writ history).

2. STATUTORY OVERLAY.

E.2.1 Uniform Commercial Code. Texas’ version of the Uniform Commercial Code, i.e., Chapters 1-11 of the Texas Business and Commerce Code, includes Section 1.105(a), which provides as follows:

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

Question: When does the Uniform Commercial Code apply to a mortgage loan transaction? (Perhaps the UCC program at this Mid-Year Meeting will provide guidance as to that question.)

E.2.2 Texas Business and Commerce Code § 35.51. In 1993 the Texas Legislature enacted Section 35.51 of the Texas Business and Commerce Code, a choice-of-law statute which is not limited to Uniform Commercial Code transactions. Pursuant to that statute, a transaction which has a value in excess of $1,000,000 is classified as a “qualified transaction”; and for most “qualified transactions,” if the transaction “bears a reasonable relation to the jurisdiction [designated by the parties],” then the laws of that jurisdiction shall apply to the transaction “regardless of whether the application of that law is contrary to a fundamental or public policy of...
this state or any other jurisdiction.” In addition, for purposes of this statutory provision, “a transaction bears a reasonable relation to a particular jurisdiction if:

“(1) a party to the transaction is a resident of that jurisdiction;

“(2) a party to the transaction has its place of business or, if that party has more than one place of business, its chief executive office or an office from which it conducts a substantial part of the negotiations relating to the transaction, in that jurisdiction;

“(3) all or part of the subject matter of the transaction is located in that jurisdiction;

“(4) a party to the transaction is required to perform a substantial part of its obligations relating to the transaction, such as delivering payments, in that jurisdiction; or

“(5) a substantial part of the negotiations relating to the transaction, and the signing of an agreement relating to the transaction by a party to the transaction, occurred in that jurisdiction.”

E.2.3 Savings Institutions. Section 9.03 of the Texas Savings and Loan Act provides as follows:

“A contract made by any foreign association with any citizen of this State shall be deemed and considered a Texas contract and shall be construed by all the courts of this State according to the laws of this State.”

This statutory provision is the only example found by this author of “lex debitoris” under Texas law. Note, however, that Section 9.06 of the same Act appears to limit the above-quoted requirement to state chartered savings institutions by providing as follows: “Federal associations are not foreign corporations or associations.” [emphasis added].

3. EXAMPLES OF CHOICE-OF-LAW QUALIFICATIONS.

When a Texas Opinion Giver provides a qualified choice-of-law opinion, the qualification may take a form comparable to the applicable examples set out on Attachment “C” to this Outline (at pages 24-26).

F. ARIZONA

1. THANKS TO BRUCE MAY.

The Arizona case which is analyzed in this Section was provided to this author by ACREL member Bruce B. May, Streich Lang, Renaissance One, Two N. Central Avenue, Phoenix, Arizona 85004-2391. However, any errors in the following analysis are solely the fault of this author (i.e., Wallenstein), and should not be attributed to Bruce.

2. LEGAL ANALYSIS.

Arizona courts follow the Restatement to determine which state’s laws apply in a contract action. Cardon v. Cotton Lane Holdings, Inc., 841 P. 2d 198 (Ariz. 1992) (in which case the
Supreme Court of Arizona applied California law, thus precluding a deficiency judgment following a trustee’s sale). The Supreme Court’s statement of the applicable law was unequivocal in that case: “If the parties to a contract expressly choose the law governing their contract, as the parties did in this case, their choice of law will be honored if the requirements of Restatement § 187 are met.” Cardon, 841 P. 2d 198, 203.

G. **CALIFORNIA**

1. **THANKS TO ROY GEIGER.**

   The analysis in this Section was provided to this author by ACREL member Roy S. Geiger, Irell & Manella, 333 South Hope Street, Suite 3300, Los Angeles, California 90071-3042. However, as with my disclosure in Article F above, any errors in the following analysis are solely the fault of this author (i.e., Wallenstein) and should not be attributed to Roy.

2. **LEGAL ANALYSIS.**

   In 1992 the California Supreme Court adopted Section 187 of the Restatement, *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459 (1992). A portion of the Supreme Court’s opinion in that case, however, raises the possibility of an inadvertent misinterpretation of Section 187 by the Supreme Court in a manner comparable to the Supreme Court of Texas in its first DeSantis opinion (see paragraph 1.4 in Article E of this Outline, beginning at page 5):

   “In determining the enforceability of arm’s length contractual choice-of-law provisions, California courts shall apply the principles set forth in Restatement Section 187.

   * * *

   “If . . . either test [essentially, the Section 187(2) tests] is met, the court must next determine whether the chosen state’s law is contrary to a fundamental policy [emphasis in original] of California. . . If . . . there is a fundamental conflict with California law, the court must then determine whether California has a ‘materially greater interest than the chosen state in the determination of the particular issue’. . . If California has a materially greater interest than the chosen state, the choice of law shall not be enforced.”

Prior to the *Nedlloyd* case, California courts had developed a “governmental interest analysis” for choice-of-law determinations. *Reich v. Purcell*, 67 Cal. 2d 551 (1967); and some California commentators have observed that the *Nedlloyd* case may not have eliminated all reference to such “governmental interest analysis.” Especially because of California’s one-action rule, the choice-of-law issue has been of significant interest to California real estate attorneys; and, fortunately, several thorough analyses have been published. Arnold, “Antideficiency Protections in Multi-State Transactions,” *Presentation to Real Property Section of L.A. County Bar* (October 6, 1994); Guttenberg and Sherlin, “A Lender’s Guide to California’s Antideficiency Laws in Multistate Transactions, Part I,” 14 CEB Real Prop. L. Rep. 1 (January 1991); Guttenberg and Sherlin, “A Lender’s Guide to California’s Antideficiency Laws in Multistate Transactions, Part II,” 14 CEB Real Prop. L. Rep. 54 (February 1991); Shadduck, “Application of California’s Antideficiency Statutes in Conflict of Laws Context,” 73 Calif. L. Rev. 1332 (1985); Shadduck,
“Safe Harbors for Foreclosing Creditors in Multiple-State Security Contexts: California’s Antideficiency Statutes and Choice-of-Law Doctrine,” 10 Calif. Real Prop. J. 1 (No. 5, Fall, 1992). An impressive review of all prior analyses, as well as a thorough academic and practical treatment of the topic, was prepared by Roy Geiger and Howard Heitner in a presentation given in 1995 to the Benjamin J. Crocker Symposium sponsored by the Los Angeles Bar Association. Geiger and Heitner, “Multistate Transactions” (1995). Finally, and without intending to supplant the more thorough publications which he and others have contributed (i.e., cited immediately above), Roy has granted permission for his recent summary, entitled “The Choice of Law Opinion and ‘As If’ Opinion,” to be included as Attachment “D” to this Outline (at pages 27-30).

H. MARYLAND

1. THANKS TO ED LEVIN.

   The Maryland cases which are analyzed in this Section were provided to this author by ACREL member Edward J. Levin, Piper & Marbury, Charles Center South, 36 South Charles Street, Baltimore, Maryland 21201. However, as with my disclosure in Article F above, any errors in the following analysis are solely the fault of this author (i.e., Wallenstein), and should not be attributed to Ed.

2. LEGAL ANALYSIS.

   Maryland courts follow Section 187 of the Restatement in determining whether to honor the contracting parties’ choice-of-law clause in a contract, Kronovet v. Lipchin, 415 A.2d 1096 (1980), as analyzed at American Motorists Insurance Co. v. Artra Group, Inc., 338 Md. 560, 572, 659 A.2d 1295 (1995) (although in its opinion in the American Motorists Insurance Co. case, the Court appeared to make an error in interpreting Section 187 similar to the error made by the Texas Supreme Court in its initial opinion in DeSantis v. Wackenhut, discussed in paragraph 1.4 of Article E of this Outline, i.e., confusing the Restatement’s “state which has a materially greater interest than the chosen state” for “the forum state”). With regard to a contract with no choice-of-law provision, Maryland courts will apply lex loci contractus, but with a special renvoi exception which applies Restatement Section 188 when the place of contracting would apply Maryland law. American Motorists Insurance Co., supra.

I. MICHIGAN

1. THANKS TO BILL DUNN.

   The observation in this Section was provided by ACREL member -- and fellow panelist on this program -- William B. Dunn, Clark Hill, 500 Woodward Avenue, Suite 3500, Detroit, Michigan 48226-3435.

2. OBSERVATION.

   Bill Dunn observes that in his experience parties to a transaction in which Michigan has a contact seldom seek to avoid Michigan law; therefore, attorneys in Michigan generally do not give choice-of-law opinions.

J. NEW YORK

1. THANKS TO KARL HOLTZSCHUE AND LARRY PREBLE.

   The analysis in this Section was provided to this author by ACREL members (i) Karl B. Holtzschue, Counselor at Law, 122 East 82nd Street, Apartment 3C, New York, New York
10028-0859, and (ii) Laurence G. Preble, O’Melveny & Myers, Citicorp Center, 153 East 53rd Street, New York, New York 10022-4611.

2. LAW.

Section 5.1401 of the New York General obligation Law authorizes the parties to an agreement covering at least $250,000.00 to adopt New York law, even if neither the transaction nor any of the parties to the agreement have any relationship to the State of New York:

“§ 5-1401. Choice of law

“1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one of section 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code.

“2. Nothing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement or undertaking.”

3. ANALYSES.


K. OBSERVATIONS FOR RESTATEMENT STATES

1. IS THERE A PUBLIC POLICY CONCERN FOR USURY?

If usury does not rise to the level of “public policy” under the Restatement § 187, then the choice of law in usury-sensitive loan transactions may be readily delegated to the state with the most lenient usury laws, provided that such state has a “reasonable relationship” to the transaction.

(a) Texas. A strong case can be presented for the absence of any public policy for usury -- especially, to quote the Restatement, “a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.”. In fact, the United States Fifth Circuit Court of Appeals concluded just
that in Woods-Tucker Leasing Corp. of Georgia v. Hutcheson-Ingram Development Company, 642 F.2d 744 (5th Cir. 1981), discussed at paragraph 1.2 in Article E of this Outline (page 4). Moreover, the cases cited in paragraph 1.1 in Article E of this Outline (pages 3 and 4) are noteworthy on this issue in that none of the appellate courts made use of a public policy argument to reject an otherwise-proper choice-of-law designation in the loan documents. See also Cook v. Frazier, 765 S.W.2d 546 (Tex. App. -- Fort Worth 1989, no writ history), where the appellate court ignored public policy arguments (although citing the second Woods-Tucker opinion and both citing and quoting the Griffin opinion on the issue of subterfuge and contrivance) and held that a contractual designation of Utah law was valid in a contract in which all elements of the contract were Texas-related except the situs of the real property being sold, and the interest rate was 179% for the first fourteen years and 45% for the remaining sixteen years. [Note: Before expressing grave sympathy for the “oppressed” buyer-borrower in this case, understand that the properties being purchased were time-share investment properties, that the transaction was consummated in 1981 (pre-1986 Tax Reform Act) and that the buyer-borrowers instituted litigation several years after the transaction and apparently only after the IRS disallowed their tax deductions. Also understand that a usury judgment was upheld as to one of the two transactions, i.e., the one in which the time-share property was located in Arkansas instead of Utah.] Hopefully, this impressive case array should settle the issue. On the other hand, the “Declaration of Legislative Intent” which precedes Title 79 of the Texas Statutes, excerpts from which are quoted below, sure sounds like a public policy pronouncement!

“The Legislature finds as facts and determines:

“(1) Many citizens of our State are being victimized and abused in various types of credit and cash transactions. These practices impose a great hardship upon the people of our State.

* * *

“(5) These facts conclusively indicate a need for a comprehensive code of legislation to clearly define interest and usury, . . . and to provide firm and effective penalties for usury and other prohibited practices.”

And although the fervor of that “Declaration of Legislative Intent” most likely stems from concerns for consumer credit abuses, Article 5069-1.02 (which is part of Subtitle 1 and not in the consumer subtitles) includes the following sentence: “All contracts for usury are contrary to public policy [Note: At least the statutory provision does not say “fundamental public policy”!] and shall be subject to the appropriate penalties prescribed in Article 1.06 of this Subtitle.”

(b) Other States. Case authority from states other than Texas appears to be inconclusive. See Bundy v. Commercial Credit Co., 157 S.E. 860, 864 (N.C. 1931) (usury does not “necessarily offend the public policy of this state”); Gamer v. DuPont Glore Forgan, Inc., 65 Cal. App. 3d 280, 287, 135 Cal. Rptr. 230 (1976) (California “has
no strong public policy against a particular rate of interest so long as the charging of that rate is permitted by law to the specific lender”); Mencor Enterprises, Inc. v. Hets Equities Corporation, 235 Cal. Rptr. 464, 470, 190 Cal. App. 3d 432 (1987) (public policy is one of three “issues of fact requiring evidentiary hearings”); O’Brien v. Shearson Hayden Stone, Inc., 586 P.2d 830 (Wash. 1978), affirmed on rehearing, 605 P.2d 779 (Wash. 1980) (holding that the public policy of the State of Washington is evidenced by a statutory pronouncement on usury and that such public policy overrides a choice-of-law designation to another state). However, at least one thorough and direct analysis of the public policy issue in usury-sensitive loan transactions was provided by the Florida Supreme Court in 1981:

“As with most shibboleths, the invocation of strong public policy to avoid application of another state’s law is unwarranted in this case. Although a few jurisdictions do attach such a public policy to their usury laws, it is generally held that usury laws are not so distinctive a part of a forum’s public policy that a court, for public policy reasons, will not look to another jurisdiction’s law which is sufficiently connected with a contract and will uphold the contract. . . [authority cited]. The few courts that do rely on a public policy exception in a usury-choice of law situation invariably are dealing with the individual, and often consumer, borrower. See, e.g., Lyles v. Union Planters National Bank, 239 Ark. 738, 393 S.W.2d 867 (1965). We do not think the mere fact that there exists in Florida a usury statute which prohibits certain interest rates establishes a strong public policy against such conduct in this state where interstate loans are concerned.” Continental Mortgage Investors v. Sailboat Key, Inc., 395 So.2d 507, 509 (Fla. 1981).

(c) Conclusion: Convincing arguments have been made -- and have been followed by several courts -- that usury does not rise to the level of a “public policy” or “fundamental policy.” However, until the public policy issue has been specifically addressed by a state’s courts, this author believes that a conservative view would acknowledge the possibility that, upon specific review of the issue, a court might hold that public policy is activated by usury concerns.

2. DOES RESTATEMENT SECTION 203 RELATE TO THE USURY PUBLIC POLICY ISSUE?

As an issue possibly ancillary to the usury public policy issue, this author will analyze another Restatement provision, Section 203, which provides as follows:

“The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of §188.”
Whether or not Section 203 bears on the public policy issue is still open to question.

(a) The context of Section 203 suggests that its sole purpose is to validate certain contracts which do not contain choice-of-law designations. In other words, the Section appears to be intended to protect parties who neglect to consider the choice-of-law problem but do genuinely intend their contracts to be valid under the laws of a state which has a substantial relationship to the transaction. For example, note the following excerpt from the Restatement’s official “Comments” to Section 203:

“Rationale. A prime objective of both choice of law (see § 6) and of contract law is to protect the justified expectations of the parties. Subject only to rare exceptions, the parties will expect on entering a contract that the provisions of the contract will be binding upon them. For this reason, the courts will not apply an invalidating rule to strike down the contract unless the value of protecting the justified expectations of the parties is outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied. Usury is a field where this policy of validation is particularly apparent.”

See, e.g., Miller v. Premier Corporation, 608 F.2d 973, 986 (4th Cir. 1979), citing Section 203 for this very point. Accord: Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 408, 47 S Ct. 626, 627 (1927); Fahs v. Martin, 224 F.2d 387, 397 (5th Cir. 1955); Moyer v. Citicorp Homeowners, Inc., 799 F.2d 1445 (11th Cir. 1986); Burr v. Renewal Guaranty Corp., 468 P.2d 576 (Arizona 1970); Goodwin Brothers Leasing, Inc. v. H. & B. Incorporated, 597 S.W.2d 303, 308 (Tennessee 1980); Shull v. Dain, Kalman & Quail, Inc., 267 N.W.2d 517, 520 (Nebraska 1978); Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507 (Florida 1981); and Mencor Enterprises, Inc. v. Hets Equities Corporation, 235 Ca.Rptr. 464, 190 Cal.App.3d 435 (Cal. App. 4th Dist. 1987). See also Matlock v. Data Processing Security, Inc., 607 S.W.2d 946 (Tex. Civ. App. -- Ft. Worth 1980, aff’d as modified by 618 S.W.2d 327, Tex. 1981), for a Texas court’s following the validation concept (interestingly, in light of the fact situation in the DeSantis case, in a case including a covenant not to complete) without specific mention of Section 203. In addition, a subsequent Comment to Section 203, briefly addressing an express choice of law by the parties, appears to limit the parties’ right to choose applicable law only in the following situation:

“The parties will not be permitted, by means of a choice-of-law provision, to obtain still more favorable treatment for the contract by application of the local law of a state which has no substantial relationship to the contract. Usury laws are designed to protect a person against the oppressive use of superior bargaining power and thus represent an important policy of the enacting state (compare § 187, Comment g). They would largely be deprived of efficacy if the parties could effectively choose to be governed as to usury by
the local law of a state which has no substantial relationship to the contract.” [emphasis added].

(b) Nevertheless at least one commentary has analyzed Section 203 and has concluded that Section 203 not only validates but also limits i.e., it limits the parties’ ability to choose the law governing their transaction:

“Thus, the Restatement requires that the jurisdiction whose law is chosen bear a substantial relationship to the contract. Moreover, the rate of interest charged must not greatly exceed the permissible rate of the state most significantly affected by or related to the transaction.” [emphasis added].


(c) The Restatement itself is also, alas, a bit ambivalent as to how Section 203 relates to a designated choice of law in a contract. For example, Topic 1, Chapter 8 of the Restatement (Sections 186-207) contains the following “mixed signals”: 
### “Signals” That Section 203 Has No Effect On Express Choice-of-Law Designations

<table>
<thead>
<tr>
<th>Section</th>
<th>Reasons</th>
</tr>
</thead>
<tbody>
<tr>
<td>187</td>
<td>This Section contains no mention of Section 203 as an exception; there is merely a general exception for a “fundamental policy.”</td>
</tr>
<tr>
<td>188</td>
<td>In contrast to Section 187, Section 188 specifically mentions Section 203 (showing that the Restatement authors could link the sections together where they believed them to be related).</td>
</tr>
<tr>
<td>203</td>
<td>See the above-quoted “Rationale” and other “Comment.”</td>
</tr>
</tbody>
</table>

### “Signals” That Section 203 May Limit an Express Choice-of-Law Designation

<table>
<thead>
<tr>
<th>Sections</th>
<th>Reason</th>
</tr>
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</table>
187, 203  
Comment g. to Section 187 is cited specifically in the fifth sentence of Comment e. to Section 203, indicating possibly that the latter section (i.e., Section 203) is an embellishment of the “policy” referred to generally in the former section.

189-197  
The introductory note to these sections expressly recognizes the possibility that a choice-of-law designation will supersede the rules expressed in all such sections other than Sections 192 and 193. No such introductory note precedes the group of provisions including Section 203.

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### Ambivalent “Signal”

<table>
<thead>
<tr>
<th>Sections</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>198-207</td>
<td>All of these sections except Section 203 and Section 206 make reference either to a designated choice of law or to Sections 187 and 188. Section 203 noticeably fails to include such reference.</td>
</tr>
</tbody>
</table>

(d) One distinguished ACREL member has reviewed the above authorities and analysis and has concluded that the issue should be deemed settled, i.e., that Section 203 is solely a validation provision for transactions in which no choice-of-law designation has been made in the contract. Roberts, Harry M., Jr., “Choice of Law for Mortgage Loans,” The University of Texas School of Law Mortgage Lending Institute (1989). This author acknowledges the persuasive logic for such a conclusion; however, he believes that a conservative view would also acknowledge the possibility that, upon specific review of the issue, a court might hold that the limitation in Section 187 for a “fundamental policy” incorporates, as the “fundamental policy” on usury, Section 203.
(e) Two final notes: First, even if Section 203 does apply to contractual choice-of-law designations, keep in mind that Section 203 does not necessarily require a court to analyze the public policy of its state. Instead it requires the court to analyze the law of the state which, under Section 188, has the “most significant relationship to the transaction and to the parties.” Second, applying Section 203 as a “fundamental policy” embellishment would cause courts to ignore a choice-of-law designation only when the contract provided for a rate of interest which is “greatly in excess” (quoting from Section 203) of the rate permitted by the “general usury law” (?) (also quoting from Section 203) of the “most-significant-relationship” state.

3. **MOST SIGNIFICANT RELATIONSHIP.**

Unless a statutory overlay applies, it is essential for attorneys representing lenders and borrowers in a loan transaction to understand Restatement Section 188, which sets out rules for determining the “most significant relationship.” In fact, Section 188(2) lists the following five “contacts to be taken into account” (quoted below, with unofficial commentary by this author):

  “(a) the place of contracting.” The official Comments to Restatement Section 188 define “the place of contracting” as “the place where occurred the last act necessary, under the forum’s rules of offer and acceptance, to give the contract binding effect, . . .” [emphasis added]. Accordingly, parties to a loan transaction may wish to assure that “the last act necessary” occurs in the chosen state. To be sure, this author does not recommend artificially causing the borrower’s complete entourage to travel to the chosen state, where no business reason exists for such travel. However, where the lender’s office is actually located in the chosen state and the borrower’s office is in another state, a single financial officer or other representative of the borrower might hand-carry the loan documents, previously signed by the borrower in the state of the borrower’s office, to the chosen state for execution in the chosen state by the lender.

  “(b) the place of negotiation of the contract.” When negotiations occur all in one state, this contact is deemed by the official Comments to be “a significant contact.” Often, the negotiations cannot realistically occur all in the chosen state; in fact, often the parties’ sole goal with regard to this contact is to neutralize the negotiations which by necessity occur in part in the state of the debtor’s residence, i.e., they wish merely to create a “wash” with regard to this contact. However, attorneys for lenders should, well before any particular transaction, advise their clients that if a lender has its home office in a state whose usury law it will wish to utilize, it should take care to have significant negotiations occur with the home office -- even if the lender has a local office in the state of the debtor’s residence. Conversely, if the lender’s local office in the state of the debtor’s residence is totally autonomous and does not answer to its home office in the chosen state, the contact of place-of-negotiation might be “a significant contact” under Section 188 against the chosen state.

  “(c) the place of performance.” In a loan transaction the place of performance will generally be the home state of the lender, which in turn, will
generally be the chosen state. This contact is generally considered to be a significant contact. In fact, Section 195 of the Restatement specifies the “local law of the state where the contract requires repayment be made” as the single significant contact for determining “the validity of a contract for the repayment of money lent and the rights created thereby” (in the absence of an effective choice of law by the parties). Also note that Section 188(3) expresses a presumption in favor of any state which meets the requirements for satisfying both the place of negotiation and the place of performance. However, the official Comments to Section 188 state that “the place of performance can bear little weight in the choice of the applicable law when (1) at the time of contracting it is either uncertain or unknown, . . ..” Accordingly, this author recommends against the often-used provision in promissory notes which specifies that the promissory note is payable at a specific address in the chosen state . . .” or at any other address which the holder of this promissory note may from time to time designate.” Instead, this author recommends that the provision be limited to the following: “or at any other address in the State of ____________ [i.e., the designated state] which the holder of this promissory note may from time to time designate.”

“(d) the location of the subject matter of the contract.” Although listed as one of the five contacts in Section 188(2), this contact should be viewed in light of the following official Comment to Restatement Section 203: “Contacts of lesser importance are the place where the note was drawn and dated, the place where the borrowed money is to be used and the situs of land given as security for the debt.” [emphasis added]. On the other hand, this author has noted at least one Texas case which -- incorrectly, in the opinion of this author -- has concluded that in a purchase-money financing transaction (i.e., including a sale of real property), the law of the situs is a significant contact. In fact, the court stated (in what appears to be dicta): “When, as is the case here, real property is the essence of a transaction and the underlying contract, the law of the situs controls.” Cook v. Frazier, 765 S.W.2d 546, 550 (at headnote [8]) (Tex. App. -- Fort Worth 1989, no writ history). In a footnote to the quoted sentence, however, the court in the Cook case also commented: “This rule does not apply when realty is merely collateral or security for a loan and is not the subject of the actual transaction.” Id.

“(e) the domicile residence, nationality, place of incorporation and place of business of the parties.” This contact may be a significant one; however, it generally results in a “wash”, i.e., the lender’s place of business is generally the chosen state although the debtor resides in another state.

One additional caution should be added to the above suggestions. Various Texas cases have recognized the “subterfuge” or contrivance” exceptions to choice-of-law designations in Texas. See, for example, Cook v. Frazier, 765 S.W.2d 546, 549-50 (Tex. App. -- Fort Worth 1989, no writ history), where the court emphatically dismissed an attempt by the lender to characterize the borrowers as Utah partnerships when the partners in the so-called partnerships were all Texas residents. “We do not find the Utah partnerships to be a valid contract with the State of Utah. They were formed as a means to avoid Texas law and substantiate the choice of law.” Id.
S.W.2d at 550. Accordingly, this author recommends against attempts to create artificial contacts with the chosen state.

L. OBSERVATION FOR STATUTORY OVERLAY STATES

For those states with a statutory overlay, it is appropriate to highlight Section 4(l) of the Accord, which authorizes the Opinion Giver to assume as follows, without stating such assumption in the Opinion Letter (unless, as explained in Section 5 of the Accord, the Opinion Giver has actual knowledge to the contrary):

“(l) The constitutionality or validity of a relevant statute, rule, regulation or agency action is not in issue unless a reported decision in the Opining Jurisdiction has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity.”

M. FINAL RECOMMENDATION: BIFURCATE THE MORTGAGE

Because foreclosure laws are generally unique from state to state, some attorneys specify in the mortgage document that it will be governed by the law of the state in which the property is located, even though the parties have chosen another state’s laws to govern the loan transaction as a whole. Unfortunately, this “blanket” choice-of-law designation in the mortgage document may lend some doubt as to the validity and/or effect of the designation of the other state’s law in the loan agreement, promissory note, etc. -- especially when, as in most mortgage documents, the particular mortgage document contains provisions which incorporate and reconfirm the debtor’s payment obligations. In Arizona, for example, the Supreme Court of Arizona recently faced this very conflict, i.e., the Credit Agreement and Note designated California law and the Deed of Trust designated Arizona law; and in that case the Court was able to reconcile the discrepancy only because the Deed of Trust contained a “conflicts clause” which deferred to the Credit Agreement in the event of any conflict between the two documents. Cardon v. Cotton Lane Holdings, Inc., 841 P.2d 198, 202 (1992). Inasmuch as the Restatement provides separate provisions for choice-of-law presumptions as to indebtedness repayment (Section 195) and mortgages (Sections 228-30), and further in light of Comment i to Restatement Section 187 which acknowledges that “the parties may choose to have different issues involving their contract governed by the local law of different states [subject, of course, to the limitations expressed in Section 187],” this author suggests that the choice-of-law provision in a mortgage document bifurcate the designations in order to avoid even an arguable inconsistency in choice-of-law designations. In fact, the “statutory overlay” in Texas, Section 35.51 of the Texas Business and Commerce Code, appears to welcome bifurcation by providing that in a “qualified transaction” (essentially, a commercial transaction in excess of $1,000,000.00) the parties may “agree in writing that the law of a particular jurisdiction [with a “reasonable relation” to the transaction] governs an issue relating to the transaction “[emphasis added]. A sample bifurcation provision is as follows:

“Governing Law. This Mortgage/Deed of Trust and all other loan documents shall be governed by and construed in accordance with the laws of the State of [the designated jurisdiction], except to the extent of matters relating to the creation, perfection and foreclosure of liens and the enforcement of rights and remedies against the mortgaged property, which matters shall be governed by the
laws of the State of _______ [the jurisdiction where the mortgaged property is located].

A more thorough provision, prepared by California attorneys Roy Geiger (Irell & Manella; see Article G of this Outline) and Howard Heitner (O’Melveny & Myers), is included as Attachment “E” to this Outline (at pages 31 and 32).
SECTION 187 OF THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS

§ 187. Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.
ATTACHMENT “B”

SECTION 188 OF THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS

§ 188. Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.
ATTACHMENT “C”

TEXAS QUALIFICATION FOR OPINION LETTER WITH CHOICE OF LAW

A. Qualification Based Upon Statutory-Overlay Choice of Law. Our opinion in paragraph ___ of this letter is based upon the provisions of Section 35.51 of the Texas Business and Commerce Code (the “Code”), which provides in relevant part as follows:

“(I)f the parties to a qualified transaction agree in writing that the law of a particular jurisdiction governs an issue relating to the transaction, including the validity or enforceability of an agreement relating to the transaction or a provision of the agreement, and the transaction bears a reasonable relation to that jurisdiction, the law, other than conflict of laws rules, of that jurisdiction governs the issue regardless of whether the application of that law is contrary to a fundamental or public policy of the state or of any other jurisdiction.”

We have concluded that the transaction evidenced by the Transaction Documents satisfies the statutory definition of a “qualified transaction” because the loan amount is at least $1,000,000.00. [Note: If the first loan advance is less than $1,000,000.00, then perhaps a further qualification should be added if there is a question as to whether the lender is “obligated” to advance at least $1,000,000.00.] Please note, however, that even if the transaction constitutes a “qualified transaction,” the stipulation in the Transaction Documents that the laws of the State of ______ shall govern the Transaction Documents will not be enforced pursuant to Section 35.51 of the Code unless the transaction bears a “reasonable relation” to the State of _________. We have concluded that there is a “reasonable relation” to the State of __________, based upon the following assumptions:

(i) We have assumed that ______.

(ii) We have assumed that ______.

(iii) We have assumed that ______.

(iv) We have assumed that the loan is not usurious or otherwise illegal under the laws of the State of ________ [the designated state].

B. Qualification Based Upon Restatement Choice of Law. [Note: Use this form of qualification if the transaction is not a “qualified transaction” pursuant to Section 35.51 of the Texas Business and Commerce Code.] Our opinion in paragraph ___ of this letter is based upon the choice-of-law analysis in Sections 187 and 188 of the Restatement (Second) of Conflicts of Laws, which has been adopted by the Supreme Court of Texas. DeSantis v. Wackenhut Corporation, 793 S.W.2d 670 (Tex. 1990). Section 187 permits the parties to a transaction to designate which state’s law shall govern the transaction, as long as the following prerequisites are satisfied: (1) the designated state has a reasonable relation to the transaction; and (2)
application of the law of the chosen state would not be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of Section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties. We have concluded that both such prerequisites have been satisfied, based upon the following assumptions:

(i) We have assumed that _____.

(ii) We have assumed that _____.

(iii) We have assumed that _____.

(iv) We have assumed that the loan is not usurious or otherwise illegal under the laws of the State of ________________ [the designated state].

C. Further Qualification If a Concern for “Contrivance”. [Note: This qualification may be added to either of the above paragraphs.] We also assume that neither the choice of law nor the “reasonable relation” between the contract and the chosen jurisdiction constitute a contrivance to evade Texas law. In Hi Fashion Wigs Profit Sharing Trust v. Hamilton Investment Trust, 579 S.W.2d 300 (Tex. Civ. App.--Eastland 1979, no writ history), the court enforced a choice-of-law provision which bore a reasonable relation to the parties and transaction, but added the requirement that the transaction must be free from the taint of a contrivance to evade the application of Texas law, and that in selecting another jurisdiction’s laws to govern a contract, the parties could not avoid the application of Texas law via “sham, subterfuge or coercion.” And in Cook v. Frazier, 765 S.W.2d 546, 549-50 (Tex. App.--Fort Worth 1989, no writ history), the court emphatically dismissed an attempt by the lender to characterize the borrowers as Utah partnerships when the partners in the so-called partnerships were all Texas residents. “We do not find the Utah partnerships to be a valid contract with the State of Utah. They were formed as a means to avoid Texas law and substantiate the choice of law.” 765 S.W.2d at 550. Accordingly, for purposes of this opinion, we have assumed that the parties are acting in good faith, with no intent to enter into or create a sham or a contrivance to evade the application of Texas law.

D. Further Qualification If a Concern for Usury as a “Public Policy”. [Note: This qualification should not be necessary in an opinion relying upon Section 35.51 of the Texas Business and Commerce Code, unless the Opinion Giver has a concern that the statute’s express override of “public policy” will not be honored by Texas courts. But also note in this regard that in an Accord-based opinion, Section 4(l) of the Accord grants to the Opinion Giver an automatic assumption of statutory validity.] Our opinion is further qualified by the possibility that Texas courts may refuse to recognize a choice-of-law designation if the transaction violates the public policy of the State of Texas. In Castilleja v. Camero, 414 S.W.2d 424 (1967), for example, the Texas Supreme Court held that in order to refuse a right of action accruing under the laws of another state as against public policy, it must appear that enforcement would be against “good morals” or the “natural justice” of the enforcing jurisdiction. This requirement is ambiguous at best, and Texas courts have not yet clearly defined the parameters of “good
morals” or “natural justice.” The more recent holding of the Texas Supreme Court in *DeSantis v. Wackenhut Corporation*, 793 S.W.2d 670 (Tex. 1990), although in litigation involving an employment relationship (i.e., a covenant not to compete) instead of a loan transaction, expressly addressed the issue as to whether choice of law will be invalidated on the grounds that it would violate public policy. The *DeSantis* opinion followed the analysis set out in Section 187 of the Restatement (Second) of Conflicts of Laws, under which a contractual choice of law will be disregarded only when it would be contrary to a “fundamental policy” of a state in the determination of a particular issue, and then only if such state is the one which has the most significant relationship to the transaction and the parties. See Restatement, §§ 187, 188. There appear to be no Texas state cases involving an express choice of law which have considered the public policy issue in a usury context. The issue was addressed, however, in the federal case of *Woods-Tucker Leasing Corporation of Georgia*, 626 F.2d 744 (5th Cir. 1981), where the United States Court of Appeals for the Fifth Circuit first found public policy considerations to be determinative but then, reversing itself in a rehearing opinion, held that public policy considerations would not invalidate the parties’ otherwise-proper choice of law. Accordingly, we believe that the “public policy” of the State of Texas should not be used by a court to invalidate the parties’ express choice-of-law designation; however, we cannot guarantee that result.
ATTACHMENT “D”
ATTACHMENT “E”

BIFURCATED CHOICE-OF-LAW PROVISION
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