Business Law Section Newsletter

Fall 2012

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Message From The Chair

Fellow Section Members:

I am pleased to report in this newsletter that the Committee is working to make the Business Law Section even more robust and user-friendly for our 4,260 members. The Section has been active in seeking ways to revise its offerings. Please be sure to stay tuned for updates.

Upcoming events:

Advanced Business Law 2012 at the Crowne Plaza River Oaks, near the Galleria, Houston, November 1-2, 2012 (Section members get a $25 discount); **Choice and Acquisition of Entities in Texas 2013** in San Antonio, March 24, 2013; **Essentials of Business Law 2013** in Dallas, March 14-15, 2013; and **State Bar of Texas Annual Meeting** at the Anatole Hotel in Dallas, June 20-21, 2013 (presented jointly by the Business Law Section and the Corporate Counsel Section).

We welcome a new president for the State Bar of Texas. Buck Files was sworn in as president on June 15. We look forward to his contributions to the Bar and congratulate him on his new position.

I hope that you find this newsletter interesting and useful.

Greg Samuel
Chair of the Business Law Section, 2011-12

Austin Court of Appeals Analyzes Standard to Pierce the Veil of a Limited Liability Company

By: Professor Elizabeth Miller
Professor of Law, Baylor Law School

Shook v. Walden, __ S.W.3d __, 2012 WL 895946 (Tex. App.—Austin 2012, pet. filed).

Holding: the common law standard for piercing the veil of a Texas LLC (i.e., the standard before the 2011 adoption of a legislative standard for LLCs) was the same as the legislative actual fraud standard governing veil piercing of corporations rather than the more liberal standard for corporate veil piercing set forth in Castleberry v. Branscum.

The principal issue in this appeal was the appropriate standard for piercing the veil of a limited liability company before the 2011 amendment to the Business Organizations Code extending the statutory standards governing veil piercing of corporations to LLCs. The court concluded that, assuming veil-piercing principles can be applied to LLCs, a claimant seeking to pierce an LLC's veil with respect to a contractual liability of an LLC must prove (as has long been required by statute when piercing the veil of a corpora-

Austin Court of Appeals Analyzes Standard to Pierce the Veil of a Limited Liability Company (*Continued from Page 1*)

tion) that the person on whom the LLC's liability is to be imposed used the LLC to perpetrate actual fraud for the person's direct personal benefit.

The Waldens entered into two contracts with S & J Endeavors, LLC under which the LLC would convey a residential lot to the Waldens and construct a residence on the lot. Disputes relating to the construction work arose, and there was a protracted delay in transfer of the title to the lot. The Waldens sued the LLC, and its two members/managers, Shook and Jaehne, asserting numerous tort and contract theories. The jury found that the LLC breached the construction contract, that Shook and Jaehne were liable for the LLC's contractual liabilities on the basis of alter ego and single business enterprise, and that the LLC was operated as a sham. The trial court entered judgment against the LLC, Jaehne, and Shook based on these findings. Shook appealed.

On appeal, the Waldens conceded that the single business enterprise finding could not support a judgment against Shook because the version of the single business enterprise theory submitted to the jury in this case was materially identical to that rejected by the Texas Supreme Court in *SSP Partners v. Gladstrong Invs. (USA) Corp*. Thus, the alter ego and sham theories remained as potential bases for the judgment against Shook. Shook did not dispute that the concept of veil piercing applied to an LLC but argued that the Waldens were required to prove that he used the LLC to perpetrate a fraud for his direct personal benefit in order to impose on him the contractual liability of the LLC. The Waldens argued that the common law veil-piercing principles articulated in *Castleberry v. Branscum*, which only required constructive fraud, applied in the absence of any statutory standards in the LLC context.

The court reviewed the development of Texas veil-piercing law going back to the *Castleberry* case. Prior to 1989, Article 2.21 of the Texas Business Corporation Act mandated that the liability of a shareholder of a Texas corporation was limited to the value of the shareholder's shares and did not reference any exception under which a shareholder could be held individually liable for the corporation's obligations. Notwithstanding this statutory language, courts had long held that a corporation's separate existence could be disregarded as a matter of equity in certain circumstances. In 1989, however, the Texas Business Corporation Act ("TBCA") was amended to partially codify and limit judicial application of veil-piercing principles in reaction to the Texas Supreme Court's 1986 decision in *Castleberry*, in which the court stated that piercing the corporate veil on the basis of "sham to perpetrate a fraud" merely required a showing of constructive fraud regardless of whether the underlying claim arose in tort or contract. Article 2.21 of the TBCA was amended in 1989 to provide that a corporation's contractual obligation could not be imposed on a shareholder "on the basis of actual or constructive fraud, or a sham to perpetrate a fraud" except on proof that the shareholder "caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud" on the claimant "for the direct personal benefit of the shareholder." The 1989 amendments also provided that a shareholder had no liability for a contractual obligation of the corporation "on the basis of the failure of the corporation to observe any corporate formality." Article 2.21 was further amended in 1993 and 1997 in several respects, which included broadening the actual fraud requirement to any obligation "relating to or arising from" a corporation's contractual obligation and to claims based on alter ego or any other similar theory.

Meanwhile, as these developments regarding corporate veil piercing were taking place, the legislature authorized the creation of LLCs by passing the Texas Limited Liability Company Act ("TLLCA") in 1991. The TLLCA was later recodified in the Business Organizations Code ("BOC"). Article 4.03 of the TLLCA provided that LLC members and managers were not liable for the debts, obligations, or liabilities of the LLC without mention of veil-piercing principles as an exception. This approach was carried forward in the BOC until the legislature added new Section 101.002 of the BOC in 2011 specifying that the BOC provisions applicable to corporate veil piercing (Sections 21.223 and 21.224) also apply to LLCs, their members, and their

Austin Court of Appeals Analyzes Standard to Pierce the Veil of a Limited Liability Company (*Continued from Page 2*)

managers. Shook acknowledged, however, that the 2011 amendment did not impact this case, which was governed by prior law.

Shook relied upon state and federal decisions that have applied corporate veil-piercing standards to LLCs, but the court of appeals pointed out that courts in those cases have done so without analysis of why the corporate standards apply. The Waldens argued that comparison of the corporate and LLC statutes evidenced a legislative intent that the veil-piercing standards applicable to corporations not apply to LLCs (at least prior to 2011) since the legislature conspicuously omitted from the LLC statute the types of restrictions it imposed in the corporate context. In the absence of any statutory standards for veil-piercing of LLCs, the Waldens reasoned that the equitable principles set forth in *Castleberry* applied. The court of appeals noted that its research had revealed a Wisconsin federal district court veil-piercing decision governed by Texas law in which the court had essentially employed the same reasoning advanced by the Waldens. The court of appeals noted as an incidental matter that the legislative history of the 2011 amendments to the LLC statutes reflected that the amendments were in part a response to perceived confusion generated by the Wisconsin federal court's decision. The court of appeals agreed with the Waldens that the veil-piercing restrictions and limitations in the TBCA did not, as a matter of statutory construction, extend to LLCs at any time relevant to this case and that the veil-piercing remedy in this case would be governed by extra-statutory equitable principles. However, the court stated that it did not automatically follow that proper application of those principles to the LLC must track *Castleberry* as the Waldens presumed.

The court discussed the balancing of competing principles required in the application of veil-piercing principles and concluded that the legislative policy judgments made in the aftermath of *Castleberry* and the balancing of interests must necessarily inform judicial application of equitable veil-piercing principles to LLCs. The court stated that it was following the example set by the Texas Supreme Court in the context of equitable prejudgment interest. In that context, the supreme court overruled prior precedent in deference to legislative policy judgments made and conformed preexisting equitable accrual and compounding methodologies to statutory standards even in cases that the statute did not reach. Although the Waldens stressed that the legislature did not enact a statute to govern veil piercing of LLCs at times relevant to this case, the Waldens offered no reason why the relative equities present with respect to claims to pierce the veil of an LLC with respect to a contract claim would categorically differ from those present in the corporate context. Nor could the court perceive any, and the court concluded that the courts should be guided by the framework provided by the legislature in determining equity with respect to veil-piercing claims against LLCs. The court observed that its conclusion was consistent with the results in other Texas cases although the reasoning was admittedly not made explicit in those cases. The court also noted that a contrary conclusion was not suggested by the fact that the legislature later saw fit to amend the LLC statute to explicitly incorporate the veil piercing standard prescribed in the corporate statutes.

Deferring to and applying the legislative actual fraud standard governing veil-piercing of corporations required reversal of the judgment against Shook because there were no findings or proof that Shook caused the LLC to be used to perpetrate actual fraud for his direct personal benefit.

A dissenting justice argued that the equitable standard set forth in *Castleberry* was the correct approach in this case given the absence of a statutory standard. Because an actual fraud finding is not required under *Castleberry*, the dissenting justice would have affirmed the judgment imposing personal liability on Shook based on the jury's findings (which the dissenting justice considered to be supported by the record) that the LLC was operated as the alter ego Shook and as a sham.

The Potential Usury Implication of Charging Fees to Borrowers in Commercial Credit Transactions

By: Scott G. Night, Partner, and Erin England, Associate, Haynes & Boone LLP

In this article, we examine the potential usury implications under Texas law of charging certain fees in connection with commercial credit transactions. We provide a summary of Texas law with respect to the definition of interest, and discuss whether certain types of fees are treated as interest under Texas law.

The Texas Finance Code (the "***Finance Code***") defines "*interest*" as the compensation allowed by law for the use, forbearance, or detention of money.[1] "*Usurious interest*" means interest in excess of the maximum amount allowed by law.[2] In general, a lender may, without being usurious, impose a separate charge or fee on a borrower for any distinctly separate and additional consideration other than the simple lending of money.[3] As a result, Texas courts have held that a number of fees and charges that lenders have imposed in loan transactions are not interest. Nevertheless, regardless of what the parties call an amount in a loan transaction, if it is "in fact compensation for the use, forbearance, or detention of money [it] is, by definition, interest."[4]

In 2005, the Texas Legislature amended the definition of "*interest*" to include the following language:

> The term [interest] does not include compensation or other amounts that are determined or stated by this code or other applicable law not to constitute interest or that are permitted to be contracted for, charged, or received in addition to interest in connection with an extension of credit.[5]

This language was added to clarify the fact that any other compensation, such as certain fees and charges (*e.g.*, late charges and prepayment penalties), that are determined *not* to constitute interest, or that are permitted in addition to interest, are expressly excluded from the definition of "*interest*."

A. Fees That Do Not Constitute Interest. Because of the broad definition of interest, there are only a handful of categories of fees and other charges that either the courts have consistently held to not constitute interest or that are excluded from the definition of interest under the Finance Code. Such fees and charges include bona fide commitment fees, third party expenses, prepayment fees, and certain late fees.

1. **Bona Fide Commitment Fees**. Generally, Texas courts have held that a "*bona fide*" commitment fee is not interest.[6] In the case of a bona fide commitment fee, the borrower purchases an option to enter into the loan at a future date. Therefore, the commitment fee has distinct and separate consideration apart from the actual lending of money.[7] Where there is a dispute as to whether a charge is a bona fide commitment fee or merely a device to conceal usury, a question of fact is raised.[8] To determine whether the fee constitutes a "*bona fide*" commitment fee, courts have considered whether:

a. The fee is payable prior to the funding of the loan;
b. The fee is payable whether or not the lender actually makes the loan; and
c. The commitment documentation actually binds the lender to make the loan.[9]

Although many credit facilities involve upfront fees that the parties describe as "commitment fees," such fees are rarely paid in advance of closing and are more often payable only if the transaction closes. In addition, commitment letters often include a number of conditions precedent that give the lender a great deal of (if not total) discretion whether to close and/or fund the loan. In these instances, it is likely that a court would find that such fees are not "*bona fide*" commitment fees.

The Texas Court of Appeals in *Rollingbrook Investment Co. v. Texas National Bank*[10] held that the renewal of a matured loan is a separate transaction for which a bona fide commitment fee may be charged. In *Rollingbrook*, the bank agreed, in exchange for payment of a fee, to make a new loan in the future (within 90 days of the date of the commitment letter) that it was not otherwise obligated to make.[11] In other words, until the offer of the commitment, the borrower had no right to renew the loan.[12] Under these facts, the offer to make the new loan in the future constituted separate and additional consideration, and therefore the commitment fee paid for the option to make another loan was held to be a bona fide commitment fee and not interest.[13] While the holding in this case is favorable to lenders, we think that the facts of the case are unique. For example, we

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do not think lenders typically issue a commitment letter to renew an existing loan at a future date. Moreover, the borrower in this case paid the renewal fee at the time it accepted the lender's commitment letter, which was in advance of the effective date of the extension of the loan.[14]

2. **Reimbursement of Third Party Expenses**. A lender will typically require the borrower to reimburse the lender for its costs incurred in connection with making the loan. Generally, bona fide expenses that the lender pays to third parties not affiliated with the lender in connection with the loan should not constitute interest.[15] Examples of such third party expenses include fees paid to outside counsel, appraisal fees, inspection fees, broker fees, title policy premiums, and recording fees. When such expenses are actually incurred and are paid in good faith to those furnishing the services, and no part of the payment is received by the lender, then the fees should not be classified as interest.[16]

In a bankruptcy case involving Texas law, the court held that fees for in-house legal services as well as fees paid to outside legal counsel were both interest.[17] On appeal, the district court reversed the bankruptcy court's finding with respect to legal fees paid to *outside* counsel.[18] According to the district court, separate and additional consideration existed for the legal services provided by outside counsel, and therefore the legal fees paid to outside counsel did not constitute interest.[19] The district court affirmed the lower court's ruling that in-house attorneys' fees were disguised interest.[20]

3. **Prepayment Fees**. In 2005, the Texas Legislature amended the Finance Code to provide that, with respect to a commercial loan, a creditor and an obligor may agree to a prepayment premium, penalty, make-whole amount, or similar fee or charge, whether payable upon voluntary or involuntary prepayment, acceleration of the maturity of the loan, or other cause that involves premature termination of the loan, and such amounts do not constitute interest.[21]

A district court explained the rationale behind this provision, which was essentially a codification of Texas case law, by noting that "where the contract grants the borrower the right to prepay (a right that the parties must agree upon), a prepayment premium is not compensation for the use, forbearance, or detention of money, rather it is a charge for the option or privilege of prepayment."[22]

4. **Late Fees**. In general, Texas courts have held that a late charge constitutes interest. The Finance Code, however, authorizes a lender to charge certain late fees in connection with commercial loans and provides that such late fees are not interest.[23] The parties to a commercial loan may agree to a late charge, in addition to other interest authorized under the Finance Code, on the amount of any installment or other amount in default for a period of at least ten (10) days in an amount not to exceed five percent (5%) of the total amount of the installment or other amount.[24] If a lender desires to charge a late fee or default interest on different terms, then Texas common law will apply and such amounts will be considered interest.

B. Fees That Constitute Interest. Other than the few exceptions applicable to the fees discussed above, all other fees will likely be considered interest. Some common examples of fees that constitute interest include the following:

1. **Facility Fees.** In the *Auto International Refrigeration* case discussed above, the court determined that an annual facility fee charged in connection with a revolving line of credit constituted interest.[25] Under the facts of the case, the borrower was obligated to pay the lender an annual facility fee in the amount of 1.00% of the facility limit, payable on each anniversary of the date the loan was initially advanced.[26] The court held that because the lender was already obligated to have the agreed principal available to the borrower, any agreement to hold

Contracts Committee

Chair:
Nick Peters

Description:
The Contracts Committee is currently working on project regarding boilerplate provisions in Texas.

Get Involved:

If you would like to help with the project or join the Contracts Committee please contact Nick Peters at nick.peters@meritenergy.com

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open funds that the lender had already agreed to lend would fail for lack of mutuality of consideration.[27] Therefore, the annual facility fee could not be deemed a bona fide commitment fee due to the lack of separate and additional consideration.[28]

Most facility fees (whether paid at the inception of a credit facility or on a periodic basis during the term thereof) should be treated as interest. An "unused" or similar fee where the lender has committed to make advances in the future and the fee is calculated on the unused commitment should be distinguishable and could be considered a "bona fide" commitment fee.[29] Unfortunately, there are no cases that address such a fee.

2. **Amendment/Waiver Fees.** Amendment, consent, and waiver fees likely constitute interest since such fees are generally not supported by any separate or independent consideration of the loan.

3. **Extension/Renewal Fees**. As discussed above, if a fee is paid merely for an extension of the debt (i.e. purely an extension fee, not a fee for the option to borrow money in the future), then the fee is not a bona fide commitment fee, and the fee is interest.[30] Therefore, most renewal and extension fees should be considered interest.

In connection with a revolving line of credit, a lender could argue that the renewal fee constitutes a commitment fee since it is paid at the beginning of the renewal term whether or not the borrower uses the facility. Unfortunately, there are no cases that discuss renewal fees in this scenario specifically. In addition, the courts in the cases involving facility fees have found such fees to be interest. As a result, the lender should generally consider renewal fees to be interest.

C. Spreading. The Finance Code provides that, in determining whether a commercial loan is usurious, the interest rate is computed by amortizing or spreading, using the actuarial method during the stated term of the loan, all interest at any time contracted for, charged, or received in connection with the loan.[31] If the loan is paid in full before the end of its stated term, and the amount of interest received for the shortened term would cause the loan to be usurious, then the lender shall refund any excess interest or credit the excess interest against amounts owing under loan.[32] Texas courts have emphasized the point that spreading is applicable to "charges that the parties themselves have called interest or that a court would deem interest regardless of the label given the charge by the parties."[33] As a result, even if certain fees charged in connection with a commercial loan are considered interest, the lender should have the benefit of spreading the amount of such fees and other interest over the entire term of the loan, thereby avoiding a usury violation.

If a loan is renewed and extended, then the question often arises whether fees imposed at the inception of the original loan may be spread over the renewal term ("***forward***" spreading) or whether fees charged at the time of the renewal and extension may be spread over the period *prior to* such renewal and extension ("***backward***" spreading). There is little case law in Texas regarding forward and backward spreading, and hence there are conflicting views as to whether a lender may forward or backward spread. In one view, it would seem consistent with the statutory language that because a creditor may spread only over the "stated term" of a loan, then it follows that each renewal term must stand on its own for purposes of the interest calculation.[34]

In the case of a term loan or a revolving or advancing facility that has material outstanding during the term of the facility, the various fees discussed above that are interest will often spread over the term of the loan or facility (particularly in light of the current low interest rate environment). In the case of a facility that has no usage, the lender may be able to argue than any fees are not interest because there was never a loan. In the case of a facility that has some, but low, usage, the fees that are interest may not spread over the term of the facility. The interest rate on the facility, the amount of fees, and facility usage are all key components to determining whether the interest and fees that are interest spread over the term of the facility. As a result, lenders should monitor the loan history of facilities where the total interest and fees may be an issue.

D. Savings Clauses. A usury savings clause should always be included in loan documents governed by Texas law. The savings clause typically will provide that the loan documents should be interpreted so as to automatically reduce the interest contracted for, charged, or received to the maximum lawful rate or amount.

A typical example of using a savings clause to defeat a usury claim is where (a) the borrower has paid an up-front fee to the lender that a court later deems to be interest, and (b) the borrower then defaults and the loan is accelerated, or the borrower decides to prepay the loan, after the loan was made and prior to the scheduled maturity date. If the borrower had paid

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the loan as scheduled, then, because of spreading, such fee would not have caused the loan to be usurious. By virtue of the usury savings clause, the lender would be entitled to rebate any usurious interest and not be guilty of contracting for, charging, or receiving usurious interest.

Texas courts have repeatedly enforced savings clauses to defeat a violation of the usury statutes. In *Woodcrest Assoc., Ltd. v. Commonwealth Mortgage Corp.*,[35] the court held that a savings clause in the loan documents prevented an otherwise usurious charge in a demand letter from being usurious.[36] In *In re Casbeer*,[37] the Fifth Circuit held that a savings clause prevented a profits assignment from the borrower to the lender from being usurious.[38] In *Myles v. Resolution Trust Corp.*,[39] the court held that the savings clause in a note prevented a provision providing for acceleration of all amounts due under the note from being usurious.[40] The obligor had argued that such provision called for payment of unearned interest. In *First State Bank v. Dorst*,[41] the note provided for increases in the rate of interest on the loan upon the happening of certain events, with no limitation on such increases.[42] The court held that the savings clause made clear that, despite the open-ended contingency, the intent of the parties was for the loan to be non-usurious.[43]

A usury savings clause will not prevent a loan from being usurious where the note is "*usurious on its face*."[44] In other words, a savings clause is ineffective "if it is *directly contrary* to the explicit terms of the contract."[45] For example, in *Kaplan v. Tiffany Dev. Corp.*,[46] as part of a loan transaction, and in consideration for such loan, the borrower granted to the lender an undivided interest in real property securing the loan.[47] The trial court found that the value of such undivided interest was at least $50,000, which caused the effective interest rate under the loan to be usurious.[48] The court refused to enforce the savings clause contained in the note because the note was usurious by its explicit terms.[49]

E. Cure Rights. A creditor may avoid usury penalties under the Texas Finance Code[50] under certain circumstances. A lender has no liability for a usury violation if the lender (a) within sixty (60) days after *actually discovering* a violation, corrects the violation by taking whatever actions and by making whatever adjustments are necessary to correct the violation, and (b) gives written notice to the obligor of the violation prior to the obligor giving written notice to the lender or filing an action alleging a usury violation.[51]

"*Actually discovering*" does not require reasonable diligence to discover the violation, and therefore does not include situations where the lender should have discovered or known about the violation.[52] Actual discovery of a violation in an *unrelated* transaction, however, may be sufficient to find actual discovery in other transactions (including the related transaction) if the violation is of such a nature that it is necessarily repeated in other transactions.[53]

One case interpreting the cure statute held that, to be effective, the notice must acknowledge the existence of a usury violation and be accompanied by the adjustment or correction required to comply with the usury laws.[54] In this case, the lender made demand for payment of the debt but excluded certain "fees" that would cause the loan to be usurious.

Related to the cure statute is the provision in the statute that requires obligors to notify creditors under certain circumstances prior to filing a usury claim. If a lender contracts for or charges usurious interest, then the obligor must send notice to the creditor at least sixty (60) days prior to filing suit seeking usury penalties.[55] The notice itself must be sufficiently detailed for the creditor to identify the alleged violation.[56] If the lender corrects the violation within sixty (60) days, then it is not liable for the violation.[57] The notice is not required in the case of a counterclaim.[58]

With the limited exceptions set forth above, lenders should consider most fees and other

Newsletter Submissions

If you would like to submit an article for inclusion in the Business Law Section's Newsletter, please email it to our Newsletter Committee Chair, Shanna Nugent, at snugent@slnlegal.com or Vice Chair, Wendy Curtis, at wcurtis@akingump.com. The Newsletter Committee reserves the right to edit contributions for clarity and content.

Keeping Your Email Address Updated

With the electronic distribution of the newsletter, it will be important for every Section member to keep an updated email address with the State Bar of Texas since that agency will distribute the email on behalf of the Section. You may update your email address at the MyBarPage of the State Bar's website. Please note that the Section will not sell or distribute your email address to anyone, including the State Bar's CLE Division.

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charges in connection with a loan to be interest together with all other interest on such loan for purposes of complying with the Texas usury statutes.[59] Even if fees and other charges are interest, lenders may be able to spread such fees and charges over the term of the facility and/or rely on a savings clause to avoid a usury violation. In some circumstances, lenders may be able to cure a usury violation under the Finance Code as long as the lender complies with the cure provisions set forth therein.

ANNEX A

Type of Fee or Charge	Not Interest	Interest	Likely Interest	Unclear
Amendment Fee			√	
Appraisal Fee (not paid to a third party)		√		
Appraisal Fee (paid to a third party)	√			
Attorneys' Fees (in house)		√		
Attorneys' Fees (paid to a third party)	√			
Commitment Fee (Bona Fide)	√			
Commitment Fee (not Bona Fide)		√		
Collateral Inspection Fees (not paid to a third party)		√		
Collateral Inspection Fee (paid to a third party)	√			
Documentation Fee (not paid to a third party)		√		
Facility Fee (paid on commitment regardless of usage)		√		
Late Fee (not specifically authorized by Texas Finance Code)		√		
Late Fee (specifically authorized by Texas Finance Code)	√			
Prepayment Fee, Penalty, or Make-Whole Fee	√			
Renewal or Extension Fee			√	
Unused Facility Fee (paid on the unused portion of the commitment)				√
Waiver Fee			√	

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1 TEX. FIN. CODE ANN. § 301.002(a)(4) (Vernon 2006).

2 *Id*. at § 301.002(a)(17).

3 *Greever v. Persky*, 165 S.W.2d 709, 712 (Tex. 1942).

4 *First USA Mgmt., Inc. v. Esmond*, 960 S.W.2d 625, 627 (Tex. 1997); *Gonzales County Savs. & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976).

5 TEX. FIN. CODE ANN. § 301.002(a)(4) (Vernon 2006).

6 *Stedman v. Georgetown Sav. and Loan Ass'n,* 595 S.W.2d 486 (Tex. 1979); *Gonzales*, 534 S.W.2d at 903.

7 *Stedman*, 595 S.W.2d at 494.

8 *Id*. at 488.

9 *Id*.; s*ee also Gonzales*, 534 S.W.2d at 906.

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10 790 S.W.2d 375 (Tex.App.–Amarillo 1990, writ denied).

11 *Id*. at 378.

12 *Id*.

13 *Id*. at 379.

14 *Id*. at 378.

15 *See, e.g.*, *Texas Commerce Bank - Arlington v. Goldring*, 665 S.W.2d 103 (Tex. 1984); *Imperial Corp. of America v. Frenchman's Creek Corp.*, 453 F.2d 1338 (5th Cir. 1972).

16 *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931 (Tex. 1991).

17 *In re Auto Int'l Refrigeration*, 275 B.R. 789, 807 (Bankr. N.D. Tex. 2002*), rev'd in part and remanded in part by Mims v. Fidelity Funding, Inc*., 307 B.R. 849 (N.D. Tex. 2002).

18 *Mims*, 307 B.R. at 857.

19 *Id*.

20 *Id*.

21 TEX. FIN. CODE ANN. § 306.005 (Vernon 2006).

22 *Achee Holdings, L.L.C. v. Silver Hill Fin. LLC*, 342 Fed. Appx. 943, 2009 U.S. Dist. LEXIS 9666 (S.D. Tex., Feb. 9, 2009).

23 Robert R. Wisner, *Usury and Texas Credit Laws* (Eleventh Edition, March 2012).

24 TEX. FIN. CODE ANN. § 306.006(1).

25 *In re Auto Int'l Refrigeration*, 275 B.R. at 802.

26 *Id*. at 803.

27 *Id*.

28 *Id*.

29 An example of an unused commitment fee is as follows: Borrower shall pay to Lender an unused fee equal to one half of one percent (.5%) per annum on the unused portion of the Commitment, payable quarterly in arrears.

30 *Rollingbrook,* 790 S.W.2d at 375.

31 TEX. FIN. CODE ANN. § 306.004(a) (Vernon 2006).

32 *Id*. at § 306.004(b).

33 *Armstrong v. Steppes Apartments, Ltd*., 57 S.W.3d 37, 47-48 (Tex.App.–Fort Worth 2001, pet. denied); s*ee also Tanner Development Co. v. Ferguson*, where the Texas Supreme Court restated the rule that in testing a transaction for usury, the interest stipulated by the parties, as well as judicially determined interest, are to be spread over the term of the underlying loan. 561 S.W.2d 777, 786 (Tex. 1977) (affirming *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937)).

34 Robert R. Wisner, *Usury and Texas Credit Laws* (Eleventh Edition, March 2012).

35 775 S.W.2d 434 (Tex. App.–Dallas 1989, writ denied).

36 *Id*. at 439.

39 787 S.W.2d 616 (Tex. App.– San Antonio 1990, no writ).

40 *Id*. at 619.

41 843 S.W.2d 790 (Tex. App.–Austin 1992, writ denied).

42 *Id*. at 794.

The Potential Usury Implication of Charging Fees to Borrowers in Commercial Credit Transactions (*Continued from Page 9*)

43 *Id*.

44 *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937).

45 *First State Bank*, 843 S.W.2d at 793 (emphasis the court's).

46 69 S.W.3d 212 (Tex. App.–Corpus Christi 2001,no pet.).

47 *Id*. at 215-16.

48 *Id.* at 219.

49 *Id.*

50 As we have discussed, the cure rights apply to claims under the Texas Finance Code. We do not express any conclusions regarding the availability of the cure statutes to claims under the National Bank Act.

51 TEX. FIN. CODE ANN. § 305.103 (Vernon 2006).

52 *Id*.

53 *Id*.

54 *In re Kemper*, 263 Bankr. 773 (Bankr. E.D. Texas 2001).

55 TEX. FIN. CODE ANN. § 305.006(b) (Vernon 2006).

56 *Id*.

57 *Id*. at § 305.006(c).

58 *Id*. at § 305.006(d).

59 See ***Annex A*** for a summary of the treatment of certain fees.

CFPB Targets Law Firm with First Civil Enforcement Action

By: Justin M. Long, Partner, Bracewell & Giuliani, and John Podvin, Partner, Haynes & Boone LLP

The Consumer Financial Protection Bureau (the "CFPB") that was created under Title X of the Dodd-Frank Act has filed its first ever civil enforcement action targeting - a Los Angeles law firm. The complaint was filed on July 18, 2012 and is leveled at Charles Gordon and his law firm, The Gordon Law Firm, P.C., and centers on allegations that the firm charged advance fees to provide mortgage assistance relief services and then provided "little, if any, meaningful assistance" to home owners.

The CFPB alleges that Mr. Gordon and his firm made false and misleading representations to consumers that constituted a deceptive act or practice in violation of Sections 1031 and 1036 of the Consumer Financial Protect Act of 2010 (the "CFPA"). The complaint also alleges that the defendants were "mortgage assistance relief service providers" violated Regulation O which constitutes an "unfair, deceptive, or abusive act or practice under the CFPA."

The CFPB is seeking injunctive relief, the refund of money's paid by consumers and costs for bringing the action. A copy of the original complaint can be reviewed by following this link: https://texasbusinesslaw.org/committees/newsletter/Charles%20Gordon.pdf/view

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

ELECTION PROTECTION YOU HAVE THE RIGHT TO VOTE

1-866-OUR-VOTE ▪ www.866OurVote.org

WE NEED YOU TO HELP US PROTECT THE RIGHT TO VOTE IN TEXAS!

The Lawyers' Committee for Civil Rights Under Law seeks legal volunteers for Election Protection to help ensure millions of Americans are able to vote. The 2012 Presidential Election is only months away and we need to get prepared early– YOU ARE THE KEY TO OUR SUCCESS!

What is Election Protection? Election Protection – led by the Lawyers' Committee – is the nation's largest non-partisan voter protection coalition. Through the 1-866-OUR-VOTE hotline, Election Protection simultaneously helps tens of thousands of voters overcome obstacles to the ballot box while also collecting data that makes the case for meaningful reform at the local and national level. Election Protection guides voters through the entire voting process, from registration to the polls on Election Day and beyond.

How YOU can help: Election Protection is currently recruiting attorneys, paralegals, and law students to:

- Participate in a legal field deployment on Election Day to ensure the process is running properly.
- Serve on an Election Protection Legal Committee (ELPCs)
- We are looking for volunteers in Houston and Dallas

Legal Field Volunteers

Legal field volunteers are attorneys, paralegals and law students, who provide Election Protection with trained mobile legal resources on Election Day. Legal Field Volunteers serve both a reporting role by communicating issues and problems to leadership and a substantive role by responding to apparent significant issues at the polls.

Election Protection Legal Committee Members (ELPCs)

ELPCs are a critical component of the Election Protection Program. They develop a multi-faceted Election Protection program incorporating both pre and Election Day activities like meeting with election officials, reaching out to local media, litigating where necessary, recruiting and training volunteers, coordinating on-the-ground efforts and much, much more.

All volunteers must participate in a 2-hour training and work a 4-6 hour shift on Election Day.

Sign Up to Volunteer!

Visit volunteer.866OurVote.org

Find out more information

Contact Dara Lindenbaum at DLindenbaum@lawyerscommittee.org

CLE Credit:

Don't miss the Business Law Section sponsored CLE's listed on the back cover!

Judicial CLE and the Business Law Section

By: Evan Young, Senior Associate
Baker Botts

Business lawyers try to avoid the need for going to court. But when judicial resolution is inevitable, Texas lawyers and their clients hope to rely on judges who understand business and business law, and whose judgment and experience allow them to resolve disputes fairly and quickly. The Business Law Section shares that interest.

Like practicing attorneys, judges must receive annual continuing legal education. For a state as large as Texas, this entails an expansive duty to provide judicial CLE. From the justices of the Texas Supreme Court to the state's trial judges, the Texas judiciary is about 1,100 strong. (That number triples if one includes municipal and justice courts). The vast bulk of them preside over district courts and county courts-at-law, the primary trial courts where business disputes in Texas are resolved in the first instance.

The Texas Center for the Judiciary is the lead entity tasked with ensuring that these judges are well equipped with up-to-date information about the law and the functioning of the judicial system. The Texas Judicial Foundation is a separate entity; it raises money to support programming for judicial education and enrichment, such as that which the Texas Center provides. These two organizations seek to provide balanced, accurate, high-quality CLE to Texas judges on a wide range of substantive topics.

The need for judicial CLE provided by these organizations is great. District judges have an average length of service of only 8 years. Most new judges may be expert in certain areas in which they previously practiced, but most will also need resources to get up to speed on the many other areas of law in which they will be called up on to rule. In this time of governmental austerity, budgets are tight—and being cut. But the need has not shrunk. If anything, it continues to grow.

The Business Law Section has long worked the Texas Center to identify topics of possible interest for judges; emerging issues about which Texas judges should be informed; and potential resources, including speakers, that can be provided at low or no cost. In response to shrinking budgets, the Section has pledged a grant to the Foundation this year, which will assist it in funding judicial CLE programming. Ultimately, the Section hopes that it, and its members, will make possible a wide-ranging curriculum about business and business law for any Texas judge who wishes to take advantage of it.

We're on the Web!
www.texasbusinesslaw.org

UPCOMING CLE PROGRAMS

Advanced Business Law 2012:
Crowne Plaza River Oaks - Near the Galleria, Houston, Texas,
November 1-2, 2012
Section members get a $25 discount

Choice and Acquisition of Entities in Texas 2013
San Antonio - May 24, 2013

Essentials of Business Law 2013
Dallas - Mar 14-15, 2013

State Bar of Texas Annual Meeting
Anatole Hotel, Dallas, Texas—June 20-June 21, 2013
Presented jointly by the Business Law Section and the Corporate Counsel Section

Business Law Section members breaking bread at a meeting.