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## Commercial Lending: *Independent Finance Institute v. Clark*: How the Oklahoma Supreme Court Allowed a Twenty-Seven-Year-Old Footnote to Force Political Reform of the Supervised Lending Industry

Frank Sullivan III

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## NOTES

### Commercial Lending: *Independent Finance Institute v. Clark*: How the Oklahoma Supreme Court Allowed a Twenty-Seven-Year-Old Footnote to Force Political Reform of the Supervised Lending Industry

#### I. Introduction

Recently, the Oklahoma Supreme Court, in *Independent Finance Institute v. Clark*,<sup>1</sup> held that supervised lenders had incorrectly applied an ambiguously worded state statute for twenty-seven years.<sup>2</sup> This opinion caused events that have forced supervised lenders throughout Oklahoma to refund a substantial amount of money to consumers.<sup>3</sup> In *Clark*, the majority ruled that the loan-refinancing fees charged by supervised lenders of small loans since 1969 were excessive.<sup>4</sup> In so holding, the Oklahoma Supreme Court disregarded a state agency's long-held statutory interpretation and instead gave deference to a little-known footnote that was inserted into the ambiguous statute, not by the state legislature, but by West Publishing Company.<sup>5</sup> Notably, at the time of the Supreme Court decision, the state legislature had amended the ambiguously worded statute to clarify the substantive consumer law issues involved.<sup>6</sup> The court's decision in *Clark* did not follow established legal principles and functioned, instead, to ratify the use of an attorney general's opinion as a political weapon.<sup>7</sup> On appeal, the U.S. Supreme Court denied certiorari.

The *Clark* opinion raises two issues that merit attention. First, a *nongovernmental* entity, whose duty was merely to publish the statute, inserted the footnote with which the court agreed in determining legislative intent.<sup>8</sup> Serious questions arise regarding the capacity of West Publishing to insert editorial marks that have the effect of interpreting Oklahoma law. The second issue raised is the utter lack of

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1. 1999 OK 43, 990 P.2d 845.

2. See *id.* ¶¶ 12-13, 990 P.2d at 851.

3. See Shaun Schafer, *Loan-Interest Repayment on Track*, TULSA WORLD, July 16, 2000, at A13.

4. See *Clark*, ¶ 15, 990 P.2d at 851.

5. *Id.* ¶ 20, 990 P.2d at 853-54 n.44.

6. See *id.* ¶ 16, 990 P.2d at 852. Compare 14A OKLA. STAT. § 3-205 (2001), with 14A OKLA. STAT. § 3-205 (1971).

7. See Joe Robertson, *Loan-Industry Reforms Taking Shape*, TULSA WORLD, Feb. 15, 1998, at A1 (detailing the effects of the 1997 reforms); see also Shaun Schafer, *Loan Firms Refunding High Fees*, TULSA WORLD, Sept. 26, 2000, at A1 (explaining that some supervised lenders have filed extensions because they were unable to refund the money that the state has demanded).

8. West Publishing Company is recognized as the official compiler of Oklahoma Statutes in title 75, section 180 of the Oklahoma Statutes, but it is not a governmental agency, and the state exercises no control over West.

deference given to the Oklahoma Department of Consumer Credit's (the Department) long-standing interpretation of sections 3-205 and 3-508A and B of the Oklahoma Consumer Credit Code (the Code).<sup>9</sup> Traditionally, Oklahoma courts give a great amount of deference to an agency's statutory interpretation, but the *Clark* court dismissed the Department's twenty-seven-year interpretation, reasoning that unambiguous statutes are not open to agency interpretation.<sup>10</sup>

Importantly, this note does not analyze whether the lending practices exercised in Oklahoma before the 1997 reform were optimal for both lenders and consumers. Rather, this note focuses on the manner in which Oklahoma case law was utilized to affect *nonlegislative* political reform. Part II of this note details the factual background of the *Clark* case. Part III analyzes the *Clark* case, specifically focusing on the issue concerning West's official capacity with regard to Oklahoma statutes. Part IV examines the Oklahoma Supreme Court's refusal to give deference to the Department's interpretation of the ambiguous statutes. Part V addresses the court's treatment of the central issue in the case — the intent of the 1969 Oklahoma legislature. Part VI highlights the ramifications of the precedent set by *Clark* on Oklahoma law, and Part VII concludes the note.

## II. Factual Background

### A. The Creation of the Statutory Ambiguity

In 1969, the Oklahoma State Legislature enacted the Oklahoma Uniform Consumer Credit Code.<sup>11</sup> The original Code was a product of the National Conference of Commissioners on Uniform State Laws (NCCUSL), but the Oklahoma legislature substantially amended the law before enactment.<sup>12</sup> Specifically, the legislature amended the portions of the Code concerning supervised loans.<sup>13</sup>

In Oklahoma, supervised loans are consumer loans in which the rate of the finance charge exceeds 10% per year.<sup>14</sup> Supervised lenders are persons who make supervised loans.<sup>15</sup> The version of the Code promulgated by the NCCUSL included section 3-508, which listed the finance charges that lenders could impose when making a supervised loan.<sup>16</sup> The Oklahoma legislature divided the section into parts A and B, providing in A that large supervised loans could incorporate finance

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9. The Oklahoma Department of Consumer Credit's original purpose was to administer the Oklahoma Consumer Credit Code. The Department currently regulates small lenders, pawnshops, credit service organizations, rent-to-own lessors, precious gem dealers, and health spas. In addition, the Department also administers Regulation Z, which governs truth in lending. See Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84, ¶ 1; see also 14A OKLA. STAT. §§ 6-501 to -512 (2001); Duties of Administrator, OKLA. ADMIN. CODE § 160:1-1-1.2 (2000).

10. See *Clark*, ¶ 13, 990 P.2d at 851.

11. See *id.* ¶ 15, 990 P.2d at 851.

12. See *id.*

13. See *id.* ¶ 15, 990 P.2d at 851-52. Compare 14A OKLA. STAT. § 3-508A (1971), and 14A OKLA. STAT. § 3-508B (1971), with UNIF. CONSUMER CREDIT CODE § 3-508 (1968).

14. See 14A OKLA. STAT. § 3-501 (2001).

15. See *id.*

16. See *Clark*, ¶ 15, 990 P.2d at 851-52.

charges in accord with the original section 3-508, but providing in B that small supervised loans could charge higher fees.<sup>17</sup> Indeed, section 3-508B permitted supervised lenders to collect an acquisition charge and an installment account handling charge "in lieu of the lower loan finance charges which are available to large lenders under 3-508A."<sup>18</sup> In other words, the basis for the fee difference between sections A and B was the fact that small amounts of credit with short maturities require greater charges than larger amounts to be economically feasible for lenders.<sup>19</sup> The higher fees insured that supervised lenders would be able to make small short-term loans legally and receive a profitable return.

While the Oklahoma legislature divided section 3-508 into two sections, it failed to alter other sections of the Code that referred to original section 3-508 to reflect the division.<sup>20</sup> As a result, section 3-205, which concerns the procedures necessary to refinance supervised loans, referred to a nonexistent section — section 3-508.<sup>21</sup> Section 3-205 stated that lenders could impose refinancing charges in accord with section 3-508; however, the Oklahoma version of the Code had a 3-508A and a 3-508B — thereby presenting an ambiguity.<sup>22</sup>

#### B. The Footnote

The Code, as passed by the legislature and signed by the Governor in 1969, contained this ambiguity.<sup>23</sup> However, in the process of publishing the 1969 statutes, an employee of West Publishing apparently noticed the ambiguity and, being familiar only with the original section, inserted a footnote into the annotations of section 3-205 stating that the text referring to section 3-508 "[s]hould read (section 3-508A)."<sup>24</sup>

Whether supervised lenders did not notice the footnote or simply chose to disregard it, they followed a reasonable interpretation of the ambiguous statute by charging the fees allowed by the specific section under which the loan was initially made.<sup>25</sup> Thus, lenders charged fees according to part 3-508A when an "A" loan was refinanced and charged fees according to part 3-508B when a "B" loan was refinanced.<sup>26</sup> If the lenders had followed the footnote's advice, both "A" and "B" lenders could have only charged finance charges according to section 3-508A upon

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17. See Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84, ¶¶ 3-4. Notably, the exact dollar amount that serves as the dividing line between large and small supervised loans is periodically adjusted for inflation. See 14A OKLA. STAT. § 1-106 (2001). At the time of the attorney general's opinion, any loan over \$640 constituted a large supervised loan, while loans of \$640 or less were small supervised loans. See OKLA. ADMIN. CODE § 160:20-1-17 (2000). The rationale for the division is that small loans need greater charges to be feasible. See Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84, ¶ 4.

18. Clark, ¶ 10, 990 P.2d at 850; see also 14A OKLA. STAT. § 3-508B (1971) (amended 1997).

19. See Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84, ¶ 4.

20. See Clark, ¶ 4, 990 P.2d at 848.

21. See *id.*; see also 14A OKLA. STAT. § 3-205 (1971) (amended 1997).

22. See Clark, ¶ 4, 990 P.2d at 848.

23. See *id.*

24. 14A OKLA. STAT. § 3-205 (1971) (amended 1997).

25. See Clark, ¶ 5, 990 P.2d at 849.

26. See *id.*

refinancing.<sup>27</sup> However, the Oklahoma Department of Consumer Credit endorsed the lenders' interpretation.<sup>28</sup> The Department maintained this stance until 1996 — nearly thirty years. These facts are especially important because Oklahoma law gives the Department clear power to supervise the administration of the Code.<sup>29</sup>

#### C. 1996: The Footnote Is Addressed by the Attorney General

On August 1, 1996, the Administrator of the Department, Charles Jones, requested an opinion from Attorney General Drew Edmondson with regard to the proper fees that lenders could charge when refinancing a "B" loan.<sup>30</sup> On February 20, 1997, the Attorney General found that the publisher's footnote, instead of the twenty-seven-year interpretation by the Department, was the proper interpretation of Oklahoma lending law.<sup>31</sup> As a result, the Administrator of the Department notified state supervised lenders that the opinion would be enforced beginning March 3, 1997.<sup>32</sup> The decision ignited a flurry of activity in the supervised loan industry because many lenders believed that enforcement of the opinion would drive some supervised lenders out of business.<sup>33</sup>

#### D. The Motivations Behind the Attorney General's Opinion

Starting in 1996, Charles Jones began to level significant criticism against the supervised lending industry.<sup>34</sup> Notably, it was Charles Jones who had requested the attorney general's opinion. In light of Mr. Jones's outspoken criticism, many lenders viewed the attorney general's opinion not as an accurate interpretation of the law, but as a political weapon — an attempt to drive the industry to reform in the legislature.<sup>35</sup>

27. See *id.* ¶ 12, 990 P.2d at 851.

28. See *id.* ¶ 5, 990 P.2d at 849.

29. See *id.* ¶ 12, 990 P.2d at 851.

30. See *id.* ¶ 6, 990 P.2d at 849; Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84.

31. See *Clark*, ¶ 6, 990 P.2d at 849; Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84, ¶ 8.

32. See *Clark*, ¶ 6, 990 P.2d at 849. Note there was not to be retroactivity.

33. See Joe Robertson, *Small Loan Opinion May Cost Lenders*, TULSA WORLD, Feb. 21, 1997, at A1. Because small loans have short maturities and are overwhelmingly refinanced, only original loans for short periods would earn the charges that the legislature contemplated were necessary to permit legal, short-term, small-amount consumer credit. *Id.*

34. See Joe Robertson, *Judge Gives Small-Loan Lenders New Lease*, TULSA WORLD, Apr. 17, 1997, at A1.

35. See *id.* In fact, that is exactly what the attorney general's opinion succeeded in doing. Lenders, wary of the consequences of the opinion, opted to quickly accept long-requested reform measures in exchange for a more favorable lending law than that imposed by the opinion. See Joe Robertson, *Curbs Sought on Refinancing Small Loans*, TULSA WORLD, May 15, 1997, at A1 [hereinafter Robertson, *Curbs Sought*]. The result was a hastily drawn and skillfully passed bill, enacted at the end of the 1997 legislative session, that secured higher fees than section 3-508A, but regulated the aggregation of charges on frequent refinancings. See Joe Robertson, *Effort Pays Off: Small-Loan Bill Overcomes Enormous Task, Long Odds*, TULSA WORLD, June 1, 1997, at A1 [hereinafter Robertson, *Effort Pays Off*]; see also 14A OKLA. STAT. § 3-205 (2001); 14A OKLA. STAT. § 3-508B(4) (2001).

### *E. The Political Battle Enters the Judicial Arena*

In response to the attorney general's opinion, and before the industry resorted to the legislature, the Independent Finance Institute and twenty-seven lenders initiated a suit, pursuant to the declaratory judgment provision of the Oklahoma Administrative Procedures Act,<sup>36</sup> to enjoin the Department from forcing lenders to comply with the attorney general's opinion.<sup>37</sup> The lenders argued that the twenty-seven-year interpretation of the Oklahoma Department of Consumer Credit controlled the issue, and that lenders should be allowed to charge fees pursuant to section 3-508B upon refinancing a loan.<sup>38</sup> The trial court granted the lenders a temporary restraining order, prohibiting the Department from enforcing the attorney general's opinion.<sup>39</sup>

Subsequently, the court entered a declaratory judgment in favor of the lending industry on April 30, 1997.<sup>40</sup> The district court placed a permanent injunction on the Department, prohibiting enforcement of the attorney general's opinion, holding that the Code allowed supervised lenders to impose handling fees and acquisition charges pursuant to section 3-508B when refinancing a "B" loan.<sup>41</sup> In response, the Attorney General publicly warned all lenders who chose to follow the court's ruling that they could face "criminal charges" if the decision were overturned.<sup>42</sup> After this notice, lenders could either rely on the court's ruling or charge the lesser fees and possibly drive themselves out of business. This situation forced the lending industry to seek redress in the state legislature.

The Administrator of the Department appealed the trial court's decision to the Oklahoma Supreme Court.<sup>43</sup> In a 1999 opinion, the court, by a 5-4 margin, held that the 1969 legislature intended the law to be as the footnote stated, and thus reversed the judgment of the trial court.<sup>44</sup> Because the U.S. Supreme Court denied certiorari,<sup>45</sup> the decision stands as Oklahoma law.<sup>46</sup>

### *III. West's Official Status with Regard to Oklahoma Law*

Particularly troublesome in *Clark* is the fact that the supreme court relied, in part, on a footnote inserted into the Oklahoma statutes by a *nongovernmental* entity. This

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36. 75 OKLA. STAT. § 306(D) (2001).

37. See *Clark*, ¶ 7, 990 P.2d at 849.

38. See *id.*

39. See *id.* ¶ 7, 990 P.2d at 849-50.

40. See *id.* ¶ 8, 990 P.2d at 850.

41. See *id.*

42. Robertson, *supra* note 34.

43. See *Clark*, ¶ 8, 990 P.2d at 850.

44. See *id.* ¶ 20, 990 P.2d at 853-54.

45. *Indep. Fin. Inst. v. Clark*, 1999 OK 43, 990 P.2d 845, *cert. denied sub nom. Sec. Fin. Corp. v. Clark*, 529 U.S. 1054 (2000).

46. Importantly, the 1997 amendments to the statute superseded the Oklahoma Supreme Court's interpretation of supervised lending law. However, the reasoning used by the court to ignore the Department's interpretation is still good law.

footnote, inserted by West Publishing, initially appeared in the 1969 Session Laws.<sup>47</sup> The attorney general's opinion stated that West Publishing Company is the official compiler of the Oklahoma Statutes;<sup>48</sup> however, that fact alone should not support the proposition that any footnote added by West becomes Oklahoma law. Other than the reference noted in the attorney general's opinion, West Publishing Company is nowhere mentioned as having any authority to create or change Oklahoma statutory law. As compiler, West's duties are merely to present the statutes *as enacted by the legislature*.<sup>49</sup> In the annotation to section 3-205, West not only presented the statutes, but it also attempted to reconcile the ambiguity created by the amendments to the Uniform Consumer Credit Code as promulgated by the NCCUSL.<sup>50</sup> There are two problems with relying on West's annotations: (1) Oklahoma law can be substantively affected by an unknown and unelected individual and (2) to guard against such, time and expense must be exerted to review carefully West's work.

#### A. *The Attorney General's Treatment of the West Footnote*

In *Clark*, West's official status is not dealt with in detail, but the attorney general's opinion addressed the subject more extensively.<sup>51</sup> The opinion noted that the West footnote not only appeared in the 1969 Session Laws, but also in the 1969 and 1970 Supplement to the Oklahoma Statutes.<sup>52</sup> Additionally, the opinion mentioned that the 1971, 1981, and 1991 recodifications of the Oklahoma Statutes all contained the footnote.<sup>53</sup> Further, the legislature had directed West to submit a compiled copy of the Oklahoma Statutes to the Oklahoma Supreme Court for acceptance.<sup>54</sup> The attorney general stated that "[t]he Court, upon approval of the manuscript, is directed to certify the same 'as to accuracy, completeness and correctness.'"<sup>55</sup> Based upon this rationale, the opinion concluded that "[i]n adopting the 1971 recodification of the Oklahoma Statutes prepared by West Publishing Company, the Legislature not only adopted West's compilation of the statutes, but also adopted the annotations to the statutes."<sup>56</sup>

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47. See *Clark*, ¶ 12, 990 P.2d at 850-51.

48. See Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84, ¶ 11.

49. As official compiler, West's published statutes are the official laws of Oklahoma; however, the supreme court acknowledges that a publisher's revisions cannot substantively affect the law. See *Clark*, ¶ 12, 990 P.2d at 851.

50. See *Clark*, ¶ 15, 990 P.2d at 851; Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84, ¶ 6 (citing Bryce A. Baggett & Fred H. Miller, *The Oklahoma Version of the Uniform Consumer Credit Code*, in 14A OKLA. STAT. ANN. (West 1969) (appearing as part of the introduction to the Oklahoma Consumer Credit Code).

51. See Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84, ¶¶ 11-13.

52. See *id.* ¶ 14.

53. See *id.* Oklahoma is required by its state constitution to "revise, digest and promulgate" the Oklahoma Statutes every ten years. OKLA. CONST. art. V, § 43.

54. 75 OKLA. STAT. § 177 (2001).

55. Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84, ¶ 12.

56. *Id.* ¶ 13.

Of the reasons relied upon by the Attorney General in formulating his opinion, one of the most suspect is the proposition that a footnote is an "annotation," as recognized by the Oklahoma legislature. The Attorney General cited *Webster's Third New International Dictionary's* definition of "annotation" to support the claim that a "footnote" is an "annotation."<sup>57</sup> This definition is important because the section that authorizes the 1971 Oklahoma statutory compilation specifically states that the statutes as "compiled, codified and annotated . . . are hereby adopted."<sup>58</sup> However, the Attorney General failed to recognize that the Oklahoma legislature had provided its own definition of an "annotation."<sup>59</sup> The statutory definition of "annotation" makes no mention of footnotes.<sup>60</sup> Instead, title 75, section 175, entitled Annotations and Citations, speaks only of decisions.<sup>61</sup> Citing *Webster's* should be secondary to the authoritative definition provided in the same title and chapter as the 1971 statutory adoption clause. Hence, the Attorney General's reliance on *Webster's* is misplaced, and the 1971 statutes as "annotated" should not include the footnote inserted by West Publishing Company.

*B. The Oklahoma Supreme Court's Treatment of the West Footnote*

The Oklahoma Supreme Court chose to sidestep the issue of West's footnote by focusing instead on legislative intent.<sup>62</sup> However, the court did briefly mention decisional law that the attorney general's opinion overlooked.<sup>63</sup> The Attorney General reasoned that the footnote became law when it was included in the recodification of the Oklahoma Statutes, but the Oklahoma Supreme Court noted that a publisher's revision only becomes part of a statute if the revision does not substantively change the law.<sup>64</sup> The supreme court cited a Missouri case, *Protection Mutual Insurance Company v. Kansas City*,<sup>65</sup> that held that statutory revisors may not substantively change the meaning of a law or its intent.<sup>66</sup> Therefore, any revision that changes a statute's meaning is ineffective, and the law is as originally enacted.<sup>67</sup> The *Clark* court also cited *City of Ouray v. Olin*,<sup>68</sup> which held that a revisor's addition of words was allowed because the substantive meaning of the statute was not changed.<sup>69</sup> The supreme court correctly recognized that the validity of West's footnote depended solely upon whether the footnote reflected the 1969 legislature's intent. Because the court ultimately adopted the footnote's

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57. *Id.* ¶ 14.

58. 75 OKLA. STAT. § 184 (2001).

59. *See id.* § 175.

60. *Id.*

61. *Id.*

62. *Indep. Fin. Inst. v. Clark*, 1999 OK 43, ¶ 14, 990 P.2d 845, 851.

63. *See id.* ¶ 20, 990 P.2d at 854 n.44.

64. *See id.* ¶ 20, 990 P.2d at 853-54 (citing *Protection Mut. Ins. Co. v. Kansas City*, 504 S.W.2d 127, 130 (Mo. 1974)).

65. 504 S.W.2d 127 (Mo. 1974).

66. *See id.* at 130.

67. *See id.*

68. 761 P.2d 784 (Colo. 1988).

69. *See id.* at 791.

interpretation, it follows that the majority believed that the footnote did not substantively change the statute as intended by the legislature.<sup>70</sup>

#### IV. *The Highest Respect for a State Agency's Interpretation?*

In adopting the rationale of the West footnote, both the attorney general's opinion and the *Clark* court gave no deference to the Oklahoma Department of Consumer Credit's long-held, contrary interpretation of section 3-205. In fact, the attorney general's opinion did not even mention the fact that a state agency had allowed lenders to practice supervised lending in a manner contrary to the West footnote.<sup>71</sup> Unlike the Attorney General, the *Clark* majority recognized that "construction of an ambiguous or uncertain statute by an administrative agency charged with its administration, although not controlling, is entitled to the highest respect from the courts — especially when construction is definitely settled and uniformly applied for a number of years."<sup>72</sup> Despite this recognition, the *Clark* court rejected the Department's twenty-seven-year statutory interpretation, finding instead that Oklahoma supervised lenders had been charging excessive fees during those twenty-seven years.<sup>73</sup> The *Clark* court cited *Hendrick v. Walters*,<sup>74</sup> reasoning that deference should not be given to a state agency's interpretation when the interpretation is unreasonable and clearly wrong.<sup>75</sup>

In *Hendrick*, the plaintiff argued that then-Governor David Walters had forfeited his office because he did not take an oath as prescribed by statute.<sup>76</sup> The *Hendrick* court held that the Governor did not forfeit his office because an amendment had impliedly repealed the statute that required an oath to be taken.<sup>77</sup> The court reasoned that both the attorney general and administrative agencies had consistently interpreted the statute to be *nonbinding* when a public official took office.<sup>78</sup> The *Hendrick* court recognized that the interpretation of an administrative agency charged with a statute's enforcement should be given deference.<sup>79</sup> The court stated that unless an administrative agency's "construction is found clearly wrong, it should not be cast aside."<sup>80</sup>

In *Clark*, the Oklahoma Supreme Court relied on *Hendrick* to disregard the Department's long-standing interpretation of section 3-205.<sup>81</sup> The *Clark* court

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70. See *Indep. Fin. Inst. v. Clark*, 1999 OK 43, ¶ 20, 990 P.2d 845, 853-54.

71. This fact is surprising, considering that the attorney general is required by law to give a written legal opinion in response to a question posed. See 74 OKLA. STAT. § 18b(A)(5) (2001). One would assume that the opinion would address the issues relevant to the question posed.

72. *Clark*, ¶ 13, 990 P.2d at 851.

73. See *id.*

74. 1993 OK 162, 865 P.2d 1232.

75. See *Clark*, ¶ 13, 990 P.2d at 851.

76. See *Hendrick*, ¶ 1, 865 P.2d at 1234-35.

77. See *id.* ¶ 18, 865 P.2d at 1242.

78. See *id.* ¶¶ 19-21, 865 P.2d at 1242-43.

79. See *id.* ¶ 22, 865 P.2d at 1243.

80. *Id.*

81. See *Indep. Fin. Inst. v. Clark*, 1999 OK 43, ¶ 13, 990 P.2d 845, 851.

stated, "This case does not belong in the line of cases which hold that long-standing enforcement by an administrative agency is entitled to great weight."<sup>82</sup> The *Clark* court rejected the Department's interpretation of section 3-205 primarily because the Department had recently conceded that the attorney general's opinion was the correct interpretation of section 3-205.<sup>83</sup> This rationale, however, is questionable considering the fact that the Department's interpretation could be dictated by the political allegiances of its new Administrator. As the saying goes, "where you stand depends upon where you sit."

The fact that the 1997-1999 Department agreed with the attorney general's opinion does not imply that the Department's prior twenty-seven years of interpretation were wrong. Such reasoning is suspect given the fact that the members of the supervised lending industry had unsuccessfully attempted to oust Charles Jones, the then-Administrator of the Department who requested the attorney general's opinion.<sup>84</sup> In addition, Jones had commented that before he became administrator, the Department had "acted as the industry's cheerleader, not its regulator."<sup>85</sup> In other words, it was likely not difficult to elicit Jones's concession that the attorney general had correctly interpreted section 3-205. Although the court stated that "this reason standing alone might not be sufficient to reach this result," and that "other factors" contributed to the court's conclusion, it is clear that the majority placed excessive emphasis on the Department's "concession."<sup>86</sup>

#### V. *The Intent of the 1969 Oklahoma Legislature*

The *Clark* court did address the crucial issue of the case — the intent of the 1969 legislature. The court stated that "[t]he determination of legislative intent controls statutory interpretation."<sup>87</sup> Thus, the key issue in *Clark* was whether the legislature intended section 3-205 to allow refinancing fees in accordance with only section 3-508A. The court determined the legislature's intent by noting several general principles: (1) legislative intent is ascertained from the entire act; (2) relevant provisions contribute to interpretation; and (3) doubt may be resolved by reference to a statute's enacted history.<sup>88</sup>

The *Clark* court also placed emphasis on the specific fact that the Oklahoma legislature had amended sections 3-205 and 3-508B in 1997.<sup>89</sup> The amendments to the relevant sections cleared up any ambiguity created by the reference to the nonexistent section 3-508 by (1) making section 3-205 refer to section 3-508A only

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82. *Id.*

83. *See id.*

84. *See Joe Robertson, Small-Loan Lenders Show Little Interest in New Fees*, TULSA WORLD, Feb. 25, 1997, at A1.

85. Robertson, *supra* note 34.

86. *See Clark*, ¶ 13, 990 P.2d at 851. The "other factors" referenced in the court's reasoning are likewise questionable. *Id.* ¶ 14, 990 P.2d at 851 (citing *Smicklas v. Spitz*, 1992 OK 145, ¶ 8, 846 P.2d 362, 366).

87. *Id.* ¶ 14, 990 P.2d at 851 (citing *Smicklas*, ¶ 8, 846 P.2d at 366).

88. *See id.*

89. *See id.* ¶ 16, 990 P.2d at 852.

and (2) adding language to section 3-508B that created refinancing provisions for "B" loans.<sup>90</sup> The *Clark* court stated that "[a] subsequent amendment to an act can be used to ascertain the meaning of a prior statute."<sup>91</sup> In so stating, the court relied on *Quail Creek Golf v. Oklahoma Tax Commission*.<sup>92</sup> In *Quail Creek*, the Oklahoma Supreme Court used a 1991 amendment as evidence of legislative intent regarding a 1982 act.<sup>93</sup> Although settled law supports the proposition that a subsequent amendment can be considered evidence of prior legislative intent,<sup>94</sup> a subsequent amendment's probative value logically must decrease with the increase in time between the two acts. In *Clark*, the 1997 amendment was used to determine the intent of the 1969 legislature.

Notably, not only had twenty-eight years passed, but the 1997 amendments also did not support the Attorney General's position. The lending industry was the catalyst behind the amendments passed in 1997, and the primary reason for the change was to avoid the Attorney General's flawed interpretation.<sup>95</sup> Unlike the attorney general's opinion, the amendments do not limit "B" loan refinancing fees to section 3-508A, but provide that "B" loan refinancers can charge fees higher than those detailed in section 3-508A.<sup>96</sup> The *Clark* court recognized that while not dispositive, "these housekeeping amendments support the Department's position."<sup>97</sup> This conclusion is patently wrong.

Concededly, the amendments do substantially limit the charges of lenders who refinance loans and do reduce the allowable fees when initially granting loans. However, they do not support the proposition that the 1969 legislature intended "B" lenders to be limited to the fees allowed in section 3-508A upon refinancing.<sup>98</sup> On the contrary, the amendments support the position of the Oklahoma lenders. Unlike the attorney general's opinion, the amendments allow acquisition fees and installment-handling account charges when a "B" loan is refinanced.<sup>99</sup> Despite this contradiction, the *Clark* court concluded that the amendments support the position of the Attorney General because the amendments require supervised lenders to rebate acquisition fees and installment-handling charges that the lenders had not earned at the time of refinancing.<sup>100</sup> For example, when a "B" loan is initially issued to a debtor, the lender imposes acquisition fees and installment-handling charges.<sup>101</sup> If the loan is later refinanced, the amendment allows lenders to assess

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90. See *id.* Notably, the amendments did not render the *Clark* decision moot because the decision did affect the interpretation of section 3-508B between the time the Attorney General released his opinion and the effective date of the amendments.

91. *Id.*

92. 1996 OK 35, ¶ 10, 913 P.2d 302, 304.

93. See *id.* ¶¶ 7-11, 913 P.2d at 303-04.

94. *Clark*, ¶ 16, 990 P.2d at 852 (citing *Quail Creek*, ¶ 10, 913 P.2d at 304).

95. See Robertson, *Curbs Sought*, *supra* note 35; Robertson, *Effort Pays Off*, *supra* note 35.

96. See 14A OKLA. STAT. § 3-508B (2001).

97. *Clark*, ¶ 16, 990 P.2d at 852.

98. See 14A OKLA. STAT. § 3-508B (2001).

99. See *id.*

100. See *Clark*, ¶ 16, 990 P.2d at 852.

101. See 14A OKLA. STAT. § 3-508B (2001).

additional acquisition fees and installment-handling charges at 3-508B rates, but it also requires the lender to refund the portion of the original acquisition fees and installment-handling charges that were not yet earned.<sup>102</sup> This provision is fair because when a loan is refinanced before its term, some of the debt that was to be paid in the future would have acquisition fees and installment-handling charges attached to it.<sup>103</sup> Thus, a lender would have no right to fees imposed on money that it will collect by refinancing.

The Oklahoma Supreme Court concluded that the legislature could not have intended that lenders be allowed to charge acquisition fees and installment-handling account charges on money that the lender had refinanced.<sup>104</sup> The court's reasoning relies on an argument advanced by the attorney general's opinion.<sup>105</sup> The opinion states that the Oklahoma Code is closely related to the Texas Code, citing *The Oklahoma Version of the Uniform Consumer Credit Code*.<sup>106</sup> The Attorney General stated that both Texas and Oklahoma differentiate between small "B" loans and large "A" loans. The Attorney General reasoned that both states had divided section 3-508 because both legislatures had realized that extending small amounts of credit was not commercially feasible considering the modest finance charges that could be imposed coupled with the high risk of default.<sup>107</sup> As a result, the legislatures allowed "B" lenders to charge an acquisition fee and an installment-handling charge in lieu of the lower finance charges allowed in section 3-508.<sup>108</sup>

However, the Attorney General found that the two Codes differ in the manner in which refinancings take place. The Texas Code allowed a lender, upon refinancing a "B" loan, to levy the fees provided for in section 3-508B, but required the lender to rebate the fees that were not earned at the time of the refinancing.<sup>109</sup> In contrast, the Oklahoma version did not clearly require lenders to rebate the unearned fees upon refinancing because the section requiring that, 3-205, referred only to section 3-508. Thus, the Attorney General concluded that, in contrast to Texas, the Oklahoma legislature had intended to limit the allowable fees to those provided for in section 3-508A.<sup>110</sup>

Essentially, the Attorney General, and later the supreme court, viewed the Oklahoma version of the Code as a trade-off. The *Clark* court reasoned that the legislature could not have allowed Oklahoma lenders to charge the higher "B" loan fees without requiring them to rebate unearned fees upon refinancing.<sup>111</sup> However, the lack of clarity as to rebates in the 1969 Code was not a deliberate trade-off; section 3-205 should have referred to both sections 3-508A and 3-508B. It is

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102. *See id.*

103. *See id.*

104. *See Clark*, ¶¶ 18-19, 990 P.2d at 853.

105. *See Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84, ¶ 16.*

106. *See Baggett & Miller, supra* note 50.

107. *See Op. Okla. Att'y Gen. No. 96-84, 1996 OK AG 84, ¶ 18.*

108. *See id.*

109. *See id.* ¶¶ 17-18.

110. *See id.* ¶¶ 18-19.

111. *Indep. Fin. Inst. v. Clark*, 1993 OK 43, ¶ 18, 990 P.2d 845, 853.

important to note that section 3-205, as adopted by the 1969 legislature, was unchanged from the version promulgated by the NCCUSL. The legislature simply failed to address the issue of "B" loan refinancing charges because the legislature was unaware of the issue. The 1997 amendment did require rebates of unearned fees upon refinancing a "B" loan, but neither that fact nor the rationale of the supreme court and attorney general support the proposition that the legislature originally intended the Oklahoma Code to be a trade-off. While Oklahoma lenders may have been allowed to earn more money than Texas lenders, standing alone, this does not indicate that the legislature intended the Code to be a trade-off.

To bolster its rationale, the supreme court pointed out the fact that the Code's general purpose was to protect consumers, and that this general purpose was evidence of the legislature's intent to limit Oklahoma lenders to section 3-508A finance charges upon refinancing a "B" loan.<sup>112</sup> However, the supreme court failed to recognize that allowing feasible, legal credit protects consumers from resorting to illegal loansharking and that the Code also balances the interests of Oklahoma lenders in the formulation of its rules. If there had been no prior agency interpretation, and the statute was entirely void of any indication of legislative intent, then the ambiguity might have been correctly resolved in *Clark*. However, *Clark* overlooks the fact that the department charged with administration of the Code had already interpreted the statute.

The most potent indicator of the legislature's intent is its inaction. For twenty-seven years, the legislature did not contest the Department's practice of allowing lenders to assess acquisition fees and installment-handling account charges when refinancing "B" loans. While the *Clark* court chose not to defer to the Department's long-standing interpretation, it should have at least considered that the legislature did not act to revise the ambiguity until the Attorney General issued his opinion against Oklahoma lenders. This is evidence that the legislature acted in 1997 because it believed that the attorney general's opinion incorrectly interpreted the law.<sup>113</sup>

#### *VI. Ramifications of the Clark Decision*

Ultimately, the determination of legislative intent was the primary issue in *Clark*. The majority had to choose between two sources to find the legislature's intent: (1) the West footnote or (2) the almost three decades of consistent interpretation by the Department. The *Clark* court recognized that the footnote would be invalid if it substantively affected Oklahoma law, but passed over this complication by declaring that the footnote correctly expressed the intent of the 1969 legislature.<sup>114</sup> In fact, the court stated that "[o]bviously, the Legislature originally intended, as the publisher of the 1969 Session Laws indicated by a footnote to the statute, that the

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112. *See id.*

113. *See Robertson, Effort Pays Off, supra* note 35. Robertson's article is an excellent account of the factors that came together to pass the 1997 reform measures.

114. *See Clark*, ¶¶ 13-15, 990 P.2d at 851-52.

reference to § 3-508 '[s]hould read Section 3-508A."<sup>115</sup> This declaration is unsupported. In reality, the 1969 legislature failed to recognize a problem; no evidence of an intent by the legislature for a trade-off exists. The only real evidence is the construction given by the agency that was created to oversee the implementation of the Code.

The consequences of the *Clark* decision have taken a toll on the small lending industry.<sup>116</sup> It is possible that because of the legislature's mistake the supervised lending industry had been legally taking advantage of consumers;<sup>117</sup> however, the proper avenue to correct such a problem is the legislature itself. Charles Jones, the Administrator of the Department, found an alternate way to force reform on the industry, and the Attorney General was willing to cooperate. The trial court was wise enough to apply the law correctly, but the slim majority of the Oklahoma Supreme Court simply stamped their approval on the tactics of the Attorney General and Charles Jones.<sup>118</sup> Notably, Charles Jones was fired from his position as a result of the turmoil that was experienced by the supervised lending industry.<sup>119</sup>

One of the most disturbing aspects of the *Clark* opinion is the fact that the supreme court's decision only affected the lending industry during the six months between the trial court's decision and the effective date of the 1997 legislative amendments.<sup>120</sup> After the amendments were passed, the entire industry knew to either conform its practices to the new law or face the consequences. However, in the interim, when the trial court had interpreted the law favorably to the industry, some lenders ignored the attorney general's threats of criminal prosecution, relied upon the trial court's judgment, and continued to charge the higher fees. Thus, the opinion only affected those lenders who relied on the trial court's ruling during this interim period.<sup>121</sup>

As a result of the supreme court's opinion, the Department initiated a "Refund Plan" that required lenders to repay the higher fees, amounting to millions of dollars, that they had charged during the six-month interim.<sup>122</sup> The lenders had no choice in that six-month period. They could have charged lesser fees, in accord with the attorney general's opinion, and potentially forfeited millions. On the other hand, they

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115. *Id.* ¶ 20, 990 P.2d at 853.

116. *See* Robertson, *supra* note 7.

117. Indeed, evidence suggests that some members of the supervised lending industry were encouraging frequent refinancings, resulting in an interest rate of 200% or more. *See* Robertson, *supra* note 34.

118. This is not to say that the Attorney General conspired with Charles Jones or even had any intentions of forcing reform in the supervised lending industry. However, the attorney general's opinion cannot withstand legal analysis.

119. *See* Robertson, *supra* note 34.

120. *See* Clark, ¶ 21, 990 P.2d at 854.

121. The *Clark* court recognized that making the decision apply retroactively to all lenders that had used the higher refinancing fees since 1969 would be inappropriate. *Id.* Therefore, the cut-off date for retroactive application of the supreme court's opinion was the date that the attorney general's opinion was to begin being enforced. *Id.*

122. *See* Shaun Schafer, *Consumers to Get Refunds for Loan Company Overcharges*, TULSA WORLD, Aug. 10, 2000, at A1.

were entitled to rely on the judgment of the trial court. It is questionable whether the state can legally force a refund, considering that the lenders justifiably relied upon an interpretation by an Oklahoma administrative agency and a state court.<sup>123</sup>

### VII. Conclusion

Even though the final outcome of this ordeal may be fruitful for the state and consumers, the ends do not justify the means. Charles Jones may have been justified in his criticism of the Department's policy during the nearly three decades before he became the administrator. However, the law simply should not have allowed reform to take place in the manner in which it did. In the future, it is imperative to enlist the assistance of the legislature, not the judiciary, when a glaring ambiguity is discovered in Oklahoma statutes.

Unfortunately, the precedent set by the *Clark* court will now be cited in every brief combating an agency's interpretation of a law. Furthermore, this precedent will empower judges to engage in judicial activism, as the *Clark* majority did — deciding what they think the legislative intent should be, arbitrarily admitting or denying evidence of administrative interpretation. Ultimately, such legal analysis amounts to nothing more than judges deciding what the law *should* be, not what it actually *is*. By the same token, in the future a publisher's footnotes can likewise be either recognized or stricken. This decision, as the *Clark* court states, "does not belong in the line of cases which hold that long-standing enforcement by an administrative agency is entitled to great weight," for the line of cases that the *Clark* majority mentions were, unlike the case at bar, more soundly based on the law.<sup>124</sup>

*Frank Sullivan, III*

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123. This is an entirely separate issue that deserves its own article. The author is not aware of any lawsuit disputing the state's authority to force the refund, but lenders should consider the possibility that their reliance on the trial court's judgment estops the state from demanding refunds.

124. *Clark*, ¶ 13, 990 P.2d at 851.