



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 16, 1993

Honorable Stephen H. Smith  
District Attorney  
119th Judicial District of Texas  
Tom Green County Courthouse  
San Angelo, Texas 76903-5835

Letter Opinion No. 93-86

Re: Whether the filing, by a person or entity not authorized to conduct banking business, of an assumed name certificate for a purported bank violates article 342-902 of the Texas Banking Code of 1943, V.T.C.S. arts. 342-101 to 342-1113 (ID# 21028)

Dear Mr. Smith:

You have asked whether the filing of an assumed name certificate for a purported bank by a person who is not authorized to conduct a banking business violates article 342-902 of the Texas Banking Code of 1943 (the "Banking Code"), V.T.C.S. arts. 342-101 to 342-1113. You have added the following facts:

An individual in San Angelo, Tom Green County, Texas, has filed an assumed business name certificate pursuant to Chapter 36 of the Business and Commerce Code, and in the certificate gives the name of the business as a bank. There is already a chartered national bank in San Angelo doing business under the same name.

Section 36.10, subsection (a), of the Business and Commerce Code requires an assumed name certificate to set forth, *inter alia*,

(1) the assumed name under which such business or professional service is *or is to be* conducted or rendered;

... ; and

(4) a statement specifying that the business or professional service that is *or is to be* conducted or rendered in the county under such assumed name is being *or will be* conducted or rendered as a proprietorship . . . or some other form of unincorporated business or professional association or entity, as the case may be. [Emphasis added.]

You have informed us that the certificate in question conforms with section 36.10 in indicating alternatively that the business is being conducted or will be conducted as a bank.

Article 342-902 of the Banking Code provides in pertinent part:

It shall be unlawful for any person . . . :

(1) To conduct a banking or trust business *or to hold out to the public that it is conducting a banking or trust business.* [Emphasis added.]

The statute recognizes exceptions for lawfully established public banks and private banks that were operating on the effective date of the statute. *See* V.T.C.S. art. 342-902(2). We assume that the person in question does not fit within any of these exceptions.

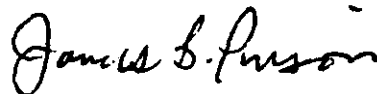
Given these facts, we believe that the mere filing of the assumed name certificate did not constitute holding out that the person was conducting a banking business in violation of the statute. The use of the disjunctive present and future tenses in the certificate in regard to the conducting of business indicates that one is holding out to the public that he either is conducting a banking business now or intends to conduct a banking business in the future. The latter alternative is not a violation of the article 342-902, which prohibits holding out that one currently is conducting a banking business. The certificate lacks definiteness as a representation that one is conducting a banking business and therefore cannot support a finding of violation of the statute.

It is unnecessary to speculate about the individual's intentions, and we do not intend to suggest that they were less than honorable, but we would not approve of the usage of the assumed name recording system for abusive purposes. We have not considered here the question of whether the assumed name filing that you describe may in certain circumstances violate some other law.

### S U M M A R Y

The filing of an assumed name certificate that indicates only disjunctively that a person not authorized to conduct a banking business currently is conducting a banking business or intends to conduct such a business in the future does not violate article 342-902 of the Banking Code as a representation to the public that one is conducting a banking business.

Yours very truly,



James B. Pinson  
Assistant Attorney General  
Opinion Committee