



STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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July 13, 1981 No. 81-8

Mr. Daniel W. Sykes
McDonald, Sanders, Ginsburg,
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Continental National Bank Building
Fort Worth, Texas 76102

Dear Mr. Sykes:

This is to acknowledge receipt of your letter dated June 9, 1981 in which you pose two questions relating to Articles 1.04(i)(1)(C), 1.04(i)(2), and 1A.01 of Article 5069, V.A.C.S. In an attempt at clarity, I herein set out a portion of your letter and the two questions you present as follows:

"Article 1A.01, as added by H.B. 1228, provides in part that in order to amend an open-end account existing on the effective date of the Act, the creditor 'must allow the obligor to pay the balance then existing at the rate previously agreed to and at the minimum payment terms previously agreed to.' On its face, this requirement appears to apply regardless of whether the account debtor agrees to continue his account under the new interest rate or decides to terminate his account. On the other hand, Article 1.04(i)(1)(C) and Article 1.04(i)(2) seem to indicate that the creditor is required to permit the account debtor to pay off the existing balance at the previously existing agreed rate and payment schedule only in the event that the account debtor elects to terminate the agreement rather than be subject to the new interest rates.

"On the basis of your interpretation of the above somewhat conflicting provisions, I would appreciate your answer to the following questions:

- "1. Is a creditor electing to implement the provisions of Article 1.04 to an open-end account existing on the effective date of H.B. 1228 required to allow the account debtor to pay the balance 'then existing' at the rate and on the minimum payment terms previously agreed to in each instance or is the creditor required to permit this only in the event that the account debtor chooses to terminate his account rather than be subject to the new interest rates?

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"2. Is the 'balance then existing,' as referred to in Article 1A.01, the balance on the account existing as of May 8, 1981, the effective date of the Act, or is it the balance existing as of the date that the amended rate goes into effect as to the account?"

Article 1A.01 as finally passed by the 67th Legislature contains language which, at least to me, seems to be unfortunate. Since my response to your questions is based heavily upon what I perceive to be the intent of the Legislature, I decided to set out the three versions of Article 1A.01 as it appeared during various stages of the legislative process. The first version is 1A.01 as it was when reported from the House Financial Institutions Committee in the Committee Substitute for H.B. 1228 and before House debate; the second version is 1A.01 after being amended by the House during debate and as it was passed by the House and sent to the Senate; and the third version is 1A.01 after being changed by the Senate Economic Development Committee in the Senate Committee Substitute for H.B. 1228 and as it finally passed the Senate, was concurred with by the House, and enacted into law.

First, Article 1A.01 as it was before being amended during House floor debate:

"CONVERSION OF OPEN-END ACCOUNTS. Any creditor electing to implement the provisions of Article 1.04 of this Title, as amended, to an open-end account existing on the effective date of this Act and not previously subject to Article 1.04, as amended, must comply with Section (i), Article 1.04, of this Title. Until the obligor accepts the change in a manner specified by that article, the obligor has the right to pay off the balance existing on the open-end account on the date of the notice in accordance with the preexisting agreement of the parties and at the rate previously agreed on."

Secondly, Article 1A.01 after House floor amendment and as it was passed by the House and sent to the Senate:

"CONVERSION OF OPEN-END ACCOUNTS. Any creditor electing to implement the provisions of Article 1.04 of this Title, as amended, to an open-end account existing on the effective date of this Act and not previously subject to Article 1.04, as amended, must allow the obligor to pay the balance then existing at the rate previously agreed to and at the minimum payment terms previously agreed to. For this purpose, payments on an account will be applied to charges on the account in the order in which the charges accrue."

Thirdly, Article 1A.01 as it appeared in the Senate Committee Substitute for H.B. 1228 and as it was finally enacted into law:

"CONVERSION OF OPEN-END ACCOUNTS. Any creditor electing to implement the provisions of Article 1.04 of this Title, as amended, to an open-end account existing on the effective date of this Act and not previously subject to Article 1.04, as amended, must allow the obligor to pay the balance then existing at the

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rate previously agreed to and at the minimum payment terms previously agreed to. For this purpose, payments on an account may be applied by the creditor to the balance existing on the account on the effective date of this Act prior to applying same to credit extended after the effective date of this Act."

I would like to mention that in working on this response to your inquiries, I have read the transcription of the House floor debate on the amendment to Article 1A.01 offered by Representative Bob McFarland, which amendment was adopted by the House (2nd version) and subsequently changed by the Senate (3rd version).

In response to your first question, I am of the opinion that the provisions of Articles 1.04(i)(1)(C) and 1.04(i)(2) are not in conflict with Article 1A.01 as these three sections relate to the treatment of current balances on open-end agreements. As I read Article 1.04(i)(1)(C), it does not direct how current balances should be treated with respect to rate changes; it only requires notice of whether the new rate(s) affect such balances. Article 1.04(i)(2) gives the right to the customer to pay off current balances at the old rates and terms if he/she at the time of the change (either the initial conversion to Article 1.04 provisions or some future change) elects to reject the new terms.

In our view, Article 1A.01 goes further than either of the above-mentioned provisions and requires that the terms of liquidation of current balances on open-end accounts be at the old terms and rates when the initial conversion is made to Article 1.04 rates. However, Article 1A.01 is applicable only to initial conversions and not to subsequent changes made later in the life of the open-end account. Article 1A.01 is applicable of course whether the customer rejects or accepts the new agreement after conversion.

I think that reference to some legislative history is helpful in arriving at the above conclusion. As you can see from the previously quoted "first" version of Article 1A.01 as it was worded prior to the adoption of the House floor amendment offered by Representative McFarland, if it had remained unchanged it would have basically corresponded with the wording of Article 1.04(i)(2) and would have allowed the new higher rates to be assessed on current balances if the new terms were accepted by the customer. There was a good deal of sentiment expressed by a number of the Representatives to the effect that the current balances in the event of conversion should remain unchanged as to rates and terms no matter whether the new agreement was accepted or rejected. As a result, Representative McFarland's amendment was adopted by the House and Article 1A.01 as passed by the House read as it appears in the "second" version in this letter. As you can see, the words "must allow" were added by the McFarland amendment, and I think it clear that the intent of the Legislature was to in effect "freeze" current balances at the old rates and terms. There would have been no need for the McFarland amendment otherwise, since a creditor, prior to the amendment, certainly had the option of allowing the debtor to pay off the old balances at the old rate. I might also add that the floor debate on the amendment which I have had transcribed makes clear, at least to me, that the legislative intent was to "freeze" current balances at the old rates and terms. Therefore, I am of the opinion that Article 1A.01 mandates that the debtor has the right to pay off existing balances at the old rates and terms previously

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agreed to when a creditor elects to implement the provisions of Article 1.04. I believe that Article 1A.01 controls over any possible contradictory language in Article 1.04(i)(1)(C) or Article 1.04(i)(2). However, Article 1A.01 is applicable only to the initial conversion of the account, and on changes subsequent thereto the provisions of Article 1.04(i) are applicable.

In formulating a response to your second question as to which balance Article 1A.01 makes reference, I have also placed emphasis on what I believe to be legislative intent. In my opinion, during the course of its legislative consideration, Article 1A.01 became somewhat "garbled" and unclear on this question.

As pointed out earlier, before the McFarland amendment in the House (1st version), the last sentence of Article 1A.01 referred to the balance existing on the date of the notice of the new rates, but the debtor had a right to pay off that balance at the old rates and terms only if he/she rejected the new Article 1.04 terms. During debate on the McFarland amendment, repeated references were made to the fact that the amendment would ensure that debtors would be allowed to pay off at the old rates and terms the balances existing at the time of the changeover to the new higher rates. (A transcript of this discussion will be made available to anyone interested.) Additionally, that date was and still is in accord with the language of Articles 1.04(i)(1)(C) and 1.04(i)(2). I believe that the McFarland amendment ensured that existing balances on the date of the implementation of the new Article 1.04 rates be paid off according to the existing contractual agreements previously entered into by the parties.

To summarize at this point, I believe it clear that after adoption of the McFarland amendment, the language of Article 1A.01 as well as the House debate clearly indicates that the intent was that the "balance then existing" referred to the balance in existence at the time of implementation of the new Article 1.04 rates and not to the balances on the date of the Act. The first sentence of the McFarland amendment dealing with this point remained unchanged and was subsequently enacted into law, which I think is important to note.

The only change made by the Senate in the Committee Substitute to H.B. 1228 was the rewording of the last sentence in Article 1A.01. As it passed the House, the sentence was as follows:

"For this purpose, payments on an account will be applied to charges on the account in the order in which the charges accrue."

As changed by the Senate and finally passed, it now reads:

"For this purpose, payments on an account may be applied by the creditor to the balance existing on the account on the effective date of this Act prior to applying same to credit extended after the effective date of this Act."

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As can be seen, the House version was worded differently and was mandatory, while the Senate version made optional the application of payments. But for some reason the Senate version for the first time, in the last sentence, contains the words "balance existing on the date of the Act." But this sentence applies only to the permissible method of allocating payments; it does not mandate which balance is paid off at the old rates and terms. Additionally, the last sentence is probably unnecessary, since its optional method of allocation of payments was probably available to the creditor anyway. Watson v. Cargill, Inc. Nutrena Division, 573 SW2d 35, (Waco, Ct. Civ. App., 1978, ref. n.r.e.); First National Bank in Dallas v. Whirlpool Corp., 517 SW2d 262 (Sup. Ct. of Tex. 1974).

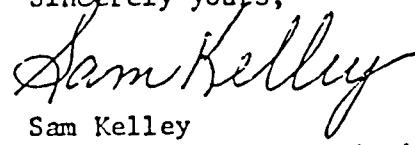
I am aware of the fact that it can be argued that other interpretations of the language of Article 1A.01 could be reached. I am convinced, however, that the views expressed herein are an accurate representation of the intent of the sponsors of both H.B. 1228 and the amendments in question as well as the Legislature as a whole and enable a fair and practical result to be reached.

Therefore, it is our position that:

1. Article 1A.01, on subject contracts, mandates that all balances existing at the time of implementation of new Article 1.04 rates be paid off at old rates and terms. Stated another way, the phrase "balance then existing" in Article 1A.01 means the balance as of the implementation of Article 1.04.
2. Article 1A.01 is applicable only to the initial implementation by a creditor of Article 1.04 provisions, and thereafter a creditor does not have to comply with Article 1A.01 but should comply with Article 1.04(i), if applicable.
3. The last sentence of Article 1A.01 is optional and does not mandate anything but is available to a creditor if desired.
4. The principle of allocation of payments set out in Article 1A.01 is also available to a creditor not only to balances existing on the date of the Act but also to balances existing at the time of implementation of the Article 1.04 provisions. I believe this result is in keeping with the language of Article 1A.01 and the holdings in the cases previously cited.

I apologize for the length of this reply, but I wanted to set out what I believe to be important legislative history relating to your questions.

Sincerely yours,


Sam Kelley
Consumer Credit Commissioner