



STATE OF TEXAS

# OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

POST OFFICE BOX 2107  
AUSTIN, TEXAS 78768

1011 SAN JACINTO BOULEVARD  
512/475-2111

July 20, 1982 No. 82-14

Mr. Miles H. Appleberry  
Attorney at Law  
800 N.W. Loop 410  
730 GPM South  
San Antonio, Texas 78216

Re: Request for an Official Interpretation  
on Seller's Points

Dear Mr. Appleberry:

This is to acknowledge receipt of your letter dated April 1, 1982 and to confirm our recent conversation concerning "seller's points" paid to a lender by a property seller in connection with a secondary mortgage loan made by the lender to a buyer/borrower which loan is subject to Article 5069-Chapter 5, V.T.C.S. As outlined in your letter the lender would make the Chapter 5 loan at a lower interest rate if a certain amount of points are paid to the lender by the seller of the real property.

I am aware that the revised Regulation Z, Section 226.4(c)(5) excludes "seller's points" from the definition of finance charge as that term is used in the federal statute and regulations. However, since such federal enactments are for disclosure purposes, we do not view them as being controlling as to the Texas statutory definition of what constitutes interest in credit transactions in this state. Additionally, I have recently been advised that the Federal Reserve Board is considering amending its position with regard to "seller's points." It is my understanding that in the near future a proposed revision of the current regulation relating to "seller's points" will be published in the Federal Register and comments invited on two new alternative methods of treatment of this issue.

In any case, Chapter 5 (along with Article 1.04 of Article 5069) prescribes the amount of interest as well as other charges which may be contracted for, charged or received in connection with a Chapter 5 transaction. Article 5.02(5) specifically prohibits all other than authorized charges from being received by the lender.

Article 1.01(a), Article 5069 defines "Interest" as "...the compensation allowed by law for the use or forbearance or detention of money...." This definition of interest does not prescribe nor mention the source of the compensation. Rather it is written in terms of "compensation allowed," which I believe would have to mean compensation to the lender for the use of the lender's money. Also, as previously mentioned, Article 5.02(5) prohibits other than authorized charges from being directly or indirectly

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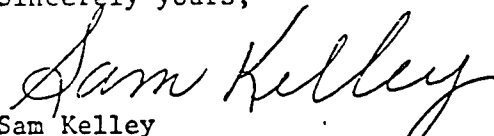
"charged, contracted for, or received...." (underline mine). Again, the statutory language is phrased in the context of "receiving" compensation or charges, which could only be referring to the amounts a lender can get.

As of this writing, as best as I have been able to determine, there is no clear court decision in Texas deciding the "seller's points" question. In Letter Interpretation No. 81-9, July 14, 1981, I mentioned the case of American Savings and Loan Association v. United States, Civil No. H-77-833 (S.D. Tex. 1978) which was not a final decision but a ruling on a motion for summary judgment. The case was later settled. That court, in considering "seller's points," indicated that such would be interest when directly or indirectly and ultimately paid by the borrower. The court did not elaborate as to whether there would have been a different result if the "points" had not been paid directly or indirectly by the borrower but rather solely by the seller.

Because of the lack of case law on the "seller's points" question at this time, I will not herein express our view as to how they should be treated in other than Chapter 5 transactions. It does appear, however, that the definition of "interest" in Article 1.01(a) can be read so as to include them as interest.

It is our position with regard to a Chapter 5 transaction that "seller's points" are interest and in fact must be treated as such in order to be received. Article 1.04 and Chapter 5 authorize the lender to receive certain interest and other enumerated charges on a Chapter 5 loan. All other charges are prohibited if not authorized. There is no provision authorizing a lender to receive "seller's points." Therefore, if a lender is to receive "seller's points" such compensation must be considered as a part of the interest received on the loan. Since "seller's points" are received at the time of the loan they should be considered as prepaid interest in calculating the interest rate on the contract for the purpose of determining whether the rate charged is within the lawful interest rate ceiling.

Sincerely yours,

  
Sam Kelley  
Consumer Credit Commissioner