



STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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July 22, 1982 No. 82-15

Mr. Daniel A. Winterbottom, Jr.
Attorney at Law
2001 Bryan Tower, Suite 3858
Dallas, Texas 75201-2193

Re: Seller's Points

Dear Mr. Winterbottom:

This is to acknowledge receipt of your letter dated April 19, 1982 concerning "seller's points" received by a lender in connection with a secondary mortgage loan subject to the provisions of Chapter 5, Article 5069, V.T.C.S.

Several of the questions you presented are discussed in our Letter Interpretation No. 82-14 dated July 20, 1982. Without going into as much detail here it is our position that "seller's points" may be received by a lender in connection with a Chapter 5 transaction provided they are treated as prepaid interest. You may consider Letter Interpretation No. 82-14 as a portion of this response to you.

You then pose questions not considered by us in No. 82-14. I will quote a portion of your letter:

"If you determine, however, that Seller's Points are interest, then we request your opinion as to proper method of computation of the effective interest rate for purposes of Chapter V, Article 5069, V.T.C.S. Specifically:

"(a) Is Article 5069-1.07(a) applicable? As the 'refund,' provided for in the second sentence of Article 5069-1.07(a), in the event a prepayment would cause the interest received for the actual period of existence of the loan to exceed the maximum lawful rate, is to be made 'to the borrower,' then arguably the provisions of the first sentence which permit the amortization of 'all interest at any time contracted for, charged, or received from the borrower' could be interpreted to apply only to interest contracted to be paid by, or paid by, the Borrower. On the other hand, the statute could be interpreted to apply to 'interest' on the loan 'charged' to the Seller;

"(b) If Article 5069-1.07(a) is applicable, should any refund be made to the Seller or the borrower;"

Article 1.07(a) provides as follows:

"On any loan or agreement to loan secured or to be secured, in whole or in part, by a lien, mortgage, security interest, or other interest in or with respect to any interest in real property, determination of the rate of interest for the purpose of determining whether the loan is usurious under all applicable Texas laws shall be made by amortizing, prorating, allocating, and spreading, in equal parts during the period of the full stated term of the loan, all interest at any time contracted for, charged, or received from the borrower in connection with the loan. However, in the event the loan is paid in full by the borrower prior to the end of the full stated term of the loan and the interest received for the actual period of the existence of the loan exceeds the maximum lawful rate, the lender contracting for, charging, or receiving all such interest shall refund to the borrower the amount of the excess or shall credit the amount of the excess against amounts owing under the loan and shall not be subject to any of the penalties provided by law for contracting for, charging, or receiving interest in excess of the maximum lawful rate."

It is our position that Article 5069-1.07(a) is applicable to the type of transaction discussed herein in which "seller's points" are received by the lender. We are of the opinion that because of Article 1.07(a) "seller's points" may be "spread" as provided in that Article. I realize that the Article mentions interest received from the borrower and makes no reference to anything such as "seller's points." However, it would not seem consistent to say that interest such as "buyer's points" can be spread but that "seller's points" may not. I feel relatively sure that the Legislature in enacting Article 1.07(a) intended that a lender be able to spread all interest received no matter the source. It is our position therefore that Article 1.07(a) is applicable to secondary mortgage loans subject to Chapter 5 and that "seller's points" may be "spread" as provided in Article 1.07(a).

The last portion of Article 1.07(a) provides that in the event of prepayment in full of the loan prior to the end of its term if the interest received for the actual period of the existence of the loan exceeds the lawful rate the lender shall refund to the borrower the amount of the excess or credit that amount to principal.

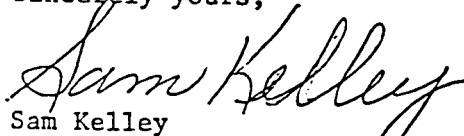
Again the statute does not specifically mention what should be done in the event there have been seller's points in connection with the transaction. Although it could be contended that any portion of excess interest attributable to the seller's points should be refunded to the borrower it will be the position of this Office that the lender has acted properly if all of the excess interest refund is made to the borrower or credited to the principal. The words of the statute direct that any refund be made to the borrower or credited to the principal still owed by the borrower, and it seems to me that any other reading of this portion of the statute would create substantial practical difficulties. It would seem to be a good idea if the contractual agreements contained a provision providing that any interest refunds would be paid to the borrower or credited to principal.

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Since our response to your inquiry is that Article 1.07(a) is applicable to this type transaction, I will not respond to your alternative questions.

Sincerely yours,


Sam Kelley
Consumer Credit Commissioner