



STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

AL ENDSLEY, Commissioner

2601 NORTH LAMAR  
AUSTIN, TEXAS 78705-4207

(512) 479-1280  
(214) 263-2016  
(713) 461-4074  
FAX (512) 479-1293

Writer's Direct Number:

512/479-1291

March 30, 1993

RQ-92-3

Mr. Thomas H. Weed  
BONHAM, CARRINGTON & FOX, P.C.  
Attorneys at Law  
400 One Shell Plaza  
Houston, TX 77002-4906

Dear Mr. Weed:

RE: Requested Interpretation of Article 5069-5.01 and Article 5069-1.04 and Article 5069-1.07,  
Vernon's Texas Civil Statutes

You have stated that from time to time financial institutions desire to make a loan secured by both a first lien on one lot or tract of real property and a second other junior lien on another lot or tract of real property.

For purposes of the request you have established the presumption that the loans are not to be repaid in ninety (90) days or less, that they will be paid in more than one installment, that the proceeds of the loans will be used for family, personal, or household use and that the property on which the second or junior lien will be created has a dwelling designed for occupancy by four families or less.

You have asked the following questions:

- "1. Can such a loan be made legally under the laws of the State of Texas? and
2. Would Article 5069-5.01 et seq. be applicable to such loan?"

You have observed that you have found no express prohibition against a transaction as described above. We do not disagree.

We believe that the legislature in enacting the consumer credit subtitle to the Texas Credit Code was carefully attempting to protect consumers through specific regulatory language and through restricting, to varying degrees, who was authorized to enter into various credit transactions. In authorizing the making of secondary mortgage loans pursuant to Chapter 5, the legislature only authorized banks, savings and loans, credit unions and persons holding a regulated loan license to make such loans. I believe as a general rule that an administrative agency should not "legislate" by

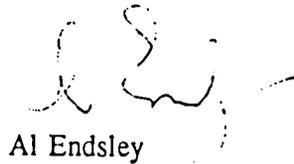
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using its interpretive authority to expand the scope of legislative enactments. It appears inconsistent with the Legislature's Declaration of Legislative Intent to condone the taking both a first lien on real estate along with the taking of a second lien which falls within the parameters the Legislature sought to regulate in Chapter 5.

Although you gave us opportunity to declare that such a proposed loan secured by first and second liens was subject to the jurisdiction of Chapter 5, you were quick to point out that it could be argued that the existence of the first lien could take such transactions out from under any effective regulation by the state. We believe that is clearly contrary to the Legislature's intent to provide a state regulatory framework for the protection of its citizens.

We decline to provide authorization and a safe harbor for the type of transactions you have describe.

Sincerely,



Al Endsley

AE:jjm

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This interpretation was approved by the Finance Commission of Texas at its meeting on March 30, 1993, pursuant to Article 5069-2.02A(10), Vernon's Texas Civil Statutes.