



STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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July 21, 1981 No. 81-11

Mr. Robert C. Bass, Jr.
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1040 American Bank Tower
221 W. 6th Street
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Dear Mr. Bass:

This is to acknowledge receipt of your letter of May 29, 1981 in which you pose two questions concerning open accounts evidenced by written agreements in existence on May 8, 1981, the effective date of H.B. 1228. I will first set out the fact situation as outlined in your letter and then the questions you presented. Your fact situation is as follows:

"A commercial enterprise sells goods and services (e.g. construction materials and, in some cases, labor for installation thereof) to other commercial concerns. These goods and services are not sold by the Seller for personal, family, household, or agricultural use. The Seller requires its commercial customers to execute a written credit application and a charge or open-account agreement prior to selling any goods (or services) on credit. When such agreement is executed, the seller will permit the Buyer to purchase goods on "open account" in that the buyer is billed for the goods in the month following their purchase. The charge or open-account agreement expressly provides that, if the goods are not paid for within a certain time period, the buyer will be charged interest thereon at the rate of 10% per annum. In summary, the Seller presently sells to commercial enterprises or concerns on "open-account" pursuant to a written charge or open-account agreement that provides for interest at the rate of 10% per annum. These sellers wish to modify their open-account or charge agreements to increase the interest rate to 18% per annum. It should be noted that these presently existing open-account or charge agreements do not contain a provision permitting the unilateral modification of the terms thereof. Additionally it should be noted that such agreements have not, heretofore, been regulated by Chapters 3-15 of Texas Consumer Credit Code."

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Your questions are as follows:

- (1) "Can the seller employ the unilateral notice procedure provided in Article 5069-1.04(i)(1) and (2) to modify (increase) its presently existing written charge agreements with commercial, non-consumer customers by increasing the rate of interest (to 18% per annum) charged for late payment on open account sales made pursuant to the written agreements?"
- (2) "Or, must the Seller first obtain from the customer an executed agreement which contains a provision that expressly permits the seller to modify unilaterally the interest rates pursuant to Article 5069-1.04(i)?"

The facts set out in your letter indicate to me that as of May 8, 1981, the effective date of H.B. 1228, the creditor in question had entered into written agreements which evidenced what I would refer to as "open accounts." Prior to the effective date of H.B. 1228, there was no statutory definition of "open account" or "open-end account." As you of course know, Article 1.01(f) now sets out a definition of "open-end account," which I will not quote here, and Articles 1A.01 and 1.04(i) provide for the conversion and amendment of "open-end accounts."

I am convinced that the accounts described in your letter are "open accounts" but the question is whether they are "open-end accounts" as defined by Article 1.01(f) so as to be subject to Articles 1A.01 and 1.04(i).

Article 1A.01 provides as follows:

"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 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."

As can be seen, Article 1A.01 applies to "open-end accounts" existing on the effective date of the Act (H.B. 1228) and not previously subject to Article 1.04 as amended. The open accounts described would have been subject to Article 1.04 as it was prior to May 8, 1981, but of course have not been converted so as to take advantage of and conform with its provisions since it was amended by H.B. 1228. They have not, therefore, been subject to the provisions of Article 1.04 as amended.

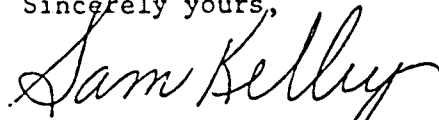
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Additionally, since the definition in Article 1.01(f) of "open-end accounts" came into existence as of May 8, 1981, the only method of determining those that were in existence at that time is to determine if those "open accounts" existing as of May 8, 1981 conform to the definition of "open-end account" which became effective on that date. If such "open accounts" meet the Article 1.01(f) definition of "open-end account" then those accounts are subject to the provisions of Articles 1A.01 and 1.04(i). I am of the opinion that the accounts described in your letter meet the requirements of that definition and therefore fall within the purview of Articles 1A.01 and 1.04(i).

I am also of the opinion that the accounts described in your letter, although previously subject to the "old" Article 1.04, have not been previously subject to Article 1.04 as amended, as that term is used in Article 1A.01. The reason the phrase "not previously subject to Article 1.04, as amended" is used in Article 1A.01 is to make possible an initial conversion of "open-end accounts" to the new provisions of Article 1.04 but to require that the other provisions of 1A.01 be complied with only once; i.e. on the initial conversion to Article 1.04 provisions and not on subsequent changes made pursuant to Article 1.04(i). Thus, that portion of Article 1A.01 which requires that the "old" balances be retired in accordance with the "old" contract need be complied with only once -- at the time of the conversion of the "open-end accounts" to the new Article 1.04 provisions. On subsequent changes to these already converted accounts, the provisions of Article 1A.01 are not applicable since such accounts have previously been subject to Article 1.04 as amended.

Therefore, I am of the opinion that the contracts described in your letter meet the definition of "open-end account" in Article 1.01(f) and that they are subject to Articles 1A.01 and Article 1.04(i). In the event they are converted to Article 1.04 provisions pursuant to these Articles, compliance must be had with all of the provisions of Articles 1A.01 and 1.04(i), and the existing balances should be retired at the old interest rates.

Sincerely yours,



Sam Kelley
Consumer Credit Commissioner