STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

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SAM KELLEY, Commissioner

December 8, 1981 No. 81-30

Mr. William T. Deane
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Attorneys at Law
P. O. Box 2725
Harlingen, Texas 78550

Dear Mr. Deane:

This is to acknowledge receipt of your letter dated September 17, 1981 in which you ask us to state the position of this Office with regard to questions concerning variable rate agreements established prior to the enactment of H.B. 1228. I have decided to quote a portion of your letter as follows:

> "Please advise as to whether or not a national bank is prohibited from charging a variable rate up to a ceiling of 24% under Article 5069-1.04, when the date of the promissory note is prior to enactment of the House Bill 1228 (Article 5069-1.04 as amended). For example, if a customer in our bank presently has a 'floating rate' note at two points over prime rate Republic National Bank of Dallas, and at the time of making such note, the maximum that could be charged to such individual was 10% (i.e. in 1977), would the bank still be limited to such interest ceiling that was in effect in 1977 (the date of the note) or, would the bank be entitled to allow the variable rate (i.e. two points over prime rate) to fluctuate and yield an interest as high as 24% (simple interest).
>
> "In addition, in the situation where a note was executed prior to enactment of H.B. 1228 (Article 5069-1.04 as amended), and such note provide that interest after default (or in the event of default) shall be at the 'highest lawful rate', does such provision for 'highest lawful rate' allow the bank at present to charge 24% simple interest."

I have been unable to find a Texas court decision on precisely the questions you have presented. In the case of Frank v. State Bank & Trust Co., 263 S.W. 255, 258 (Tex.Comm.App. 1924), holding modified 10 S.W.2d 704, is found the following statement:

> "Where a contract contains an express promise for the payment of interest, or such an agreement is properly to be implied on the principle that the law then in force as to interest is incorporated into the contract, the obligation as to interest is within the protection of the constitution and any subsequent statute is void which attempts to remit such interest or to change the rate at which it shall be computed."

My reading of the Frank case indicates that the above statement might have been dictum, but nevertheless it is an expression of that court's understanding of the law on this point. I have been unable to locate a subsequent court decision which has relied upon the Frank case on this point. The court in Frank took the above statement from 12 Corpus Juris p. 1058, Const. Law Sec. 706. Subsequently, the Frank case was cited in 4 American Law Reports, Annotated, p. 932, 937, in an article concerning retrospective effect and application of interest rate statutes. That article points out that although there is some division of authority, the general rule is that a subsequent enactment affecting the rate of interest recoverable or the right to interest ordinarily will not apply where there is an existing contractual obligation, express or implied, fixing the rate of interest recoverable.

There are a number of Texas court decisions stating that the laws which are in effect at the time of making the contract are applicable thereto and become a part of the contract as if expressly referred to or incorporated therein. Griffin's Estate v. Summer, 604 S.W.2d 221, (San Antonio Ct.Civ.App. 1980, writ ref., n.r.e.). References to several decisions similar to the Griffin's Estate case may be found in the Texas Digest, Contracts, Sec. 167.

Additionally, based upon the legislative record and the many conversations I have had with the people involved with the enactment of H.B. 1228, I believe it accurate to state that there is no evidence of any legislative intent that the interest rates authorized by H.B. 1228 have retrospective applicability.

Therefore, in response to your first question, it is our position that the bank could not utilize the interest rates authorized by Art. 1.04 with respect to a variable rate transaction with a "floating rate" of two points above prime when such transaction was agreed to in 1977.

It is our position that the applicable law limiting the interest rate on the transaction at the time it was agreed to remains applicable. We would have the same response to your second question for the same reasons. At the time the parties agreed to the interest after default provision, the law applicable at that time and allowing for an interest charge after default would still be applicable and the creditor should not utilize the provisions of Art. 1.04 to arrive at the appropriate interest charge.

Sincerely yours,

Sam Kelley

Sam Kelley
Consumer Credit Commissioner