STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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March 21, 1984 84-5

Mr. Norman H. Cohn
Shaw's
203 East Houston
San Antonio, Texas 78205

Dear Mr. Cohn:

This is to acknowledge receipt of your letter in which you ask for an expression of our opinion with regard to the addition to the unpaid balance of a retail charge agreement subject to Article 5069Chapter 6, V.T.C.S. of a charge made for a returned check given in payment of the amount or of a portion thereof owed on such account.

In 1983 the Texas Legislature passed Senate Bill 921, now codified as Article 9022, V.T.C.S., which authorizes the holder of a check upon its return following its dishonor by a payor to charge the drawer or endorser a processing fee not to exceed $15.00.

Since the enactment of Chapter 6 in 1967 it has been the position of this office that since there was no statutory authorization for the assessment of a returned check charge for a dishonored check given in full or partial payment of an account balance on a Chapter 6 retail charge agreement that a merchant was not authorized to make such a charge. Because of this position that such a charge was not proper it necessarily followed that any such charge could not properly be added to a retail charge agreement balance. It is now our view that Article 9022 authorizes a creditor to charge a returned check charge for a dishonored check given in full or partial payment of a balance on a Chapter 6 retail charge agreement. The more difficult question is whether such creditor may debit the customer's retail charge agreement balance for the amount of the returned check charge and charge a time price differential on the amount of the returned check charge. We think it clear that a returned check charge could not be debited to a retail charge agreement balance unless the underlying account agreement so provided, so the resolution of all related questions turns on whether a Chapter 6 retail charge agreement may so provide.

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There is of course no specific authorization in Chapter 6 for the inclusion in a retail charge agreement of a provision which would allow for the debiting of an account balance with a returned check charge. Conversely, there is no provision in Chapter 6 - similar to those in Chapters 3, 4 or 5 (3.15(8), 4.01(7) and 5.02(5)) - which specifically prohibits the contracting for or collecting of any charge not specifically authorized. It can be argued that since Chapter 6 does not have such a prohibition that the creditor should be able to place a provision in the agreement that a returned check charge could be debited to an account balance.

This office has through the years consistently taken the position that unless the Texas Legislature expressly states through legislation that a charge (whether it be interest, time price differential, insurance, or some other) may be made on a credit transaction, then such charge may not be made. It has been and still is our basic approach that in the area of charges on credit transactions, since the legislature has repeatedly and comprehensively dealt with the issues, that this office as an administrative agency should not expand upon the allowable charges on a credit transaction. It is true that this instance of a returned check charge is different from the usual "other charge" issue which we have had to deal with because the legislature in Article 9022 has stated that the holder of a returned check has the authority to make a charge. But, Article 9022 contains no authorization for a merchant creditor to add such a charge to a retail charge agreement balance.

As previously mentioned, although Chapter 6 does not have a corresponding section to the "other charges prohibition" sections found in Chapters 3, 4 and 5, we have taken the position that if a charge is not authorized by Chapter 6 to be provided for in and made pursuant to a retail charge agreement that such a charge may not be made. We believe this position to be correct for several reasons. For example, in Title 79, Article 5069, Declaration of Intent, Section 1(5) is found the following statement:

> "(5) These facts conclusively indicate a need for a comprehensive code of legislation to clearly define interest and usury, to classify and regulate loans and lenders, to regulate credit sales and services, and place limitations on charges imposed in connection with such sales and services...." (Emphasis added)

It seems apparent that the Legislature intended to place restrictions and limitations on charges in connection with credit sales by enactment of the provisions of Article 5069. Additionally, Article 8.01(a) provides as follows:

> "(a) Any person who violates this Subtitle by contracting for, charging or receiving interest, time price differential or other charges which are greater than the amount authorized by this Subtitle, shall forfeit to the obligor twice the amount of interest or time price differential and default and deferment charges contracted for, charged or received, and reasonable attorneys' fees fixed by the court."

As can be seen, violations occur if charges greater than those authorized by Subtitle Two of Article 5069 are made. This provision does not refer to charges authorized by law other than Article 5069 but rather only to those authorized by Article 5069.

Also, Article 6.03(3) and (4) set out what time price differential charges and other provisions for which the retail charge agreement may provide. After providing for the time price differential charges in 6.03(3) and (4), the last sentence of (4) states as follows:

> "In addition, such retail charge agreement may provide for the payment of an attorney's reasonable fee where it is referred for collection to an attorney, not a salaried employee of the holder of the contract, and for court costs and disbursements."

The legislature has thus provided that certain other charges may be provided for in a retail charge agreement and it seems that an appropriate inference may be drawn that there was no legislative intent that other unnamed charges could be authorized in the contract.

Therefore, in view of the language in the Declaration of Legislative Intent, the restrictive nature of the penalty sections in Chapter 8, the fact that the Legislature has authorized certain items such as attorneys' fees to be provided for in the agreement infers that other charges are not authorized, and because of our basic attitude that this office should not by administrative interpretation expand upon the area of allowable charges in connection with a credit transaction in the absence of clear legislative intent to that end, it is the position of this office that a Chapter 6 retail charge agreement should not contain a provision which would allow for an Article 9022 returned check charge to be debited to the account balance. The creditor would of course be authorized to debit the account balance for the amount represented by the returned check and would be authorized to assess and collect an Article 9022 charge separate from the Chapter 6 account balance.

Sincerely,

Sam Kelley

Sam Kelley
Consumer Credit Commissioner