



STATE OF TEXAS

OFFICE OF CONSUMER CREDIT COMMISSIONER

SAM KELLEY, Commissioner

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August 9, 1985 85-10

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Gentlemen:

This is to acknowledge receipt of your letter dated July 18, 1985 in which you request an opinion of this office concerning Article 5069-15.10(b), V.T.C.S. which provides as follows:

"This Chapter 15 on and after its effective date shall apply(b) to all arrangements and accounts created after the enactment of this Chapter 15 unless the agreement providing for such arrangement or account provides otherwise."

The question you pose in your letter is as follows:

"1. May a commercial, investment, agricultural, and consumer revolving line of credit be lawfully secured by a deed of trust lien on real estate, if the deed of trust (or other loan document) provides that the parties agree that Chapter 15 of the Consumer Credit Code shall not apply?"

Article 5069 - Chapter 15 is applicable to revolving loans and revolving triparty credit agreements and is broad enough to cover transactions made for personal, family or household use as well as for those for business, commercial, agricultural or investment purposes (Article 15.04). As can be seen from the above quoted portion of Article 15.10, Chapter 15 is applicable to all arrangements and accounts (as defined in Chapter 15) created after its effective date (August 27, 1979) unless the agreement provides otherwise.

Since the enactment of Chapter 15 it has been the view of this office that a simple statement in the agreement to the effect that Chapter 15 is not applicable to the agreement would suffice to remove the agreement from the coverage of Chapter 15. As far as I know there has been no court decision on the point and this is still the position of this office.

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As you point out in your letter, an agreement which is subject to Chapter 15 may not be secured by a lien on real estate since Article 15.07 limits collateral to that which is authorized by Article 5069 - Chapter 4, and Article 4.04(2) prohibits the taking of a lien on real estate as collateral for a Chapter 4 loan.

It is the position of this office that a commercial, investment and/or agricultural revolving line of credit may be lawfully secured by a deed of trust on real estate if the credit agreement provides that the parties agree that Chapter 15 will not be applicable to the agreement.

Our opinion is not the same with regard to consumer transactions (those made for personal, family or household use). Article 5069 - 1.04(5) provides that a person extending open-end credit primarily for personal family or household use and charging an Article 1.04 rate shall be subject to either Chapter 15 or the applicable Chapter of Subtitle 2 of Article 5069. If an agreement for personal, family or household use credit normally subject to Chapter 15 and on which Article 1.04 rates are charged provides that Chapter 15 is not applicable, that agreement becomes subject to Chapter 4 which, as already noted, prohibits the taking of real estate as collateral. It is possible to have an open-end loan agreement subject to Chapter 3 (Article 1.04 rates are not applicable to Chapter 3) but that Chapter also prohibits the taking of real estate as collateral (Article 3.20(2)). Thus, with the one exception noted below, there is no statutory authorization for an open-end loan agreement made primarily for personal, family or household use secured with real estate.

Senate Bill 1152, Section 3, 69th Texas Legislature, Regular Session, which will be codified as Article 5069 - 5.02(4) provides for open-end loan agreements in Article 5069 - Chapter 5, which could be secured by secondary mortgage real estate liens. However, because of the Texas homestead limitations (liens on homesteads only for taxes, improvements or purchase money) it is felt that this provision will not be used extensively. It would be possible, however, to secure an open-end line of credit under Chapter 5 with non homestead real estate and make various advances from time to time which were not for taxes, improvements or purchase money. Senate Bill 1152 becomes effective August 26, 1985.

Sincerely,


Sam Kelley
Consumer Credit Commissioner