



STATE OF TEXAS

# OFFICE OF CONSUMER CREDIT COMMISSIONER

AL ENDSLEY, Commissioner

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Mr. Douglas Bircher  
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1700 First City Tower II  
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Dear Mr. Bircher:

You have posed the question as to whether loan processing fees may be charged on loans made pursuant to Chapters 3, 4, 5 and Article 1.04 of Article 5069, V.T.C.S. (Texas Credit Code). You mention the Banker's Digest article of September 28, 1987 suggesting banks increase their profit on loans by simply adding a \$100.00 processing fee to each loan.

The law is quite clear as to loans made pursuant to Chapters 3, 4 and 5. Only those charges authorized in those chapters may be charged on such loans. Articles 3.15(8), 4.01(7) and 5.02(7) expressly prohibit unauthorized charges and Article 8.01(a) clearly provides a penalty of double the "interest" charges for contracting for charging or receiving "...other charges which are greater than the amount authorized...." This opinion is supported by Belzung v. Capitol Bank, 598 S.W.2d 14, (Tex.Civ.App.--Dallas 1980, writ ref'd n.r.e.) where the court found that a \$5.00 "account service charge" was not authorized on a Chapter 4 loan. In that case the witness for the bank was unable to explain any use to which that charge was put. In Bundrick v. First National Bank of Jacksonville, 570 S.W.2d 12, 17 (Tex.Civ.App.--Tyler 1978, writ ref'd n.r.e.) the court determined that a \$10.00 charge to cover mailing costs and a \$2.00 charge for a coupon book violated Article 4.01(7).

As to loans made pursuant to Subtitle One, Article 1.04 there is neither an expressed provision for, nor prohibition against charges other than interest. Interest is the only charge authorized in Article 1.04. In examining loan transactions with charges other than interest the courts have not established any flat prohibition of such fees or charges. They have distinguished between charges which were for specific,

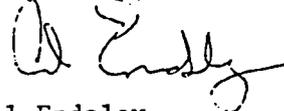
identifiable purposes and ruled that they were not interest. On the other hand, charges not identifiable as for a specific purpose have been held to be interest and in some cases created a usury violation. Gonzales County Savings and Loan Association v. Freeman, 534 S.W.2d 903 (Tex. 1976).

You have also asked whether commercial installment loans are governed by Chapter 4 noting that Subtitle Two is entitled "Consumer Credit."

Commercial installment loans may be governed by Chapter 4 (see Letter Interpretation 81-23). Prior to enactment of H.B. 1228 in May, 1981 many commercial installment loans were made pursuant to Chapter 4 because it provided the lender with a higher allowable interest rate. Also in that era a lender could avail himself of the provisions of Article 1302-2.09 if the borrower was a corporation and get an even higher rate. The lender could pick the statute he wanted and document his loans accordingly. I believe the title of Subtitle Two (Consumer Credit) is not legally restrictive or decisive. See Section 311.024 of the Government Code. Under Article 1.04, as amended by H.B. 1228, a lender may charge the same rate of interest on a "Chapter 1 loan" as on a "Chapter 4 loan." A lender charging Article 1.04 rates on a commercial installment loan is clearly not compelled to comply with Chapter 4 (see Article 1.04(n)(1)). On the other hand a lender may, by contractual language, create a loan that is clearly intended to be subject to Chapter 4. A lender trying to make a loan that is not subject to Chapter 4 should avoid using any contractual language or provisions that are unique to Chapter 4. Provisions particularly unique include 5% late charges or interest for default, certain insurance disclosures and perhaps provisions for deferment in precomputed loans. If the documentation of a commercial installment loan met all of the requirements of Chapter 4, I believe it could be properly construed as being governed by Chapter 4 absent compelling evidence to the contrary. It would therefore seem prudent to incorporate a provision in a commercial installment loan contract specifying the law applicable to that loan.

In summary, lenders should not add any sort of a fee to a loan unless they are assured that it is authorized if subject to Subtitle Two and not prohibited by law if otherwise subject to Article 5069. If not prohibited, the lender should know whether the courts have accepted that type fee as legitimate under the same conditions. If its legitimacy cannot be established then the lender should determine if the loan would be usurious if the fee was deemed interest.

Sincerely,



Al Endsley  
Consumer Credit Commissioner