
Office of
Consumer
Credit
Commissioner



Leslie L. Pettijohn
Commissioner

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May 22, 2000

Ms. Karen M. Neeley
General Counsel
Independent Bankers
Association of Texas
1700 Rio Grande Street, Suite 100
Austin, TX 78701

Dear Karen:

Our Office is in receipt of your letter dated March 13, 2000. In your letter, you request an informal advisory letter pertaining to the utilization of 360/365 calendar day calculation on commercial loans in the State of Texas.

The Texas courts have recognized three separate and distinct methods for counting days and calculating interest which are as follows:

1. 360/360 day calendar;
2. 360/365 day calendar; and
3. 365/365 day calendar or 366/366 day calendar.

In the absence of a definitive position by the Texas Legislature, the Texas courts have required the creditors to utilize a 365/365 day calendar or 366/366 day calendar (leap year). In the case of *Lawler v. Lomas & Nettleton Mortgage Investors*, 691 S.W.2d 593 (Tex. 1985), the Texas Supreme Court held as follows:

“ . . . The remaining issue pertaining to loan 607 is whether the original loan was usurious. Lomas & Nettleton Financial sent the Lawler Investment Company monthly statements reciting a 10 percent per annum rate of interest but calculated the per diem rate based on a 360-day year. In other words, interest was charged at a rate of 10.139 per cent per annum. The relevant maximum legal rate of interest chargeable on loans to noncorporate entities was 10 percent per annum. Tex. Rev. Civ. Stat. Ann. art. 5069-1.02 (Vernon 1971). One of the requisite elements of usury is ‘exaction of a greater compensation than allowed by law for the use of the money by the borrower.’ *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982). Furthermore, a lending institution’s practice of charging a per diem rate of interest

Ms. Karen M. Neeley
May 22, 2000
Page 2

based on a 360-day year cannot be characterized as an 'accidental or bona fide error.' Tex. Rev. Civ. Stat. Ann. art. 5069-1.06 (Vernon Supp. 1985).
Accordingly, we hold that the original 607 loan obligation was usurious. . . ."

Since the *Lawler v. Lomas & Nettleton Mortgage Investors* case, two courts have upheld the ruling that the calculation of interest should be based upon a 365/365 day calendar: (1) *GXG, Inc. v. Texacal Oil & Gas*, 977 S.W.2d 403, 421 (Tex. Civ. App. — Corpus Christi 1998, writ denied) and (2) *Federal Savings & Loan Insurance v. Kralj*, 968 F.2d 500 (5th Cir. 1992, reh. den.).

In 1997, the Texas Legislature modified the law to allow the utilization of 360/360 day calendar on commercial loans. To accomplish this task, the Texas Legislature enacted House Bill 1971 (*Texas Credit Title*, Tex. Rev. Civ. Stat. Ann. art. 5069-1H.003). Effective September 1, 1997, *Texas Credit Title*, Tex. Rev. Civ. Stat. Ann. art. 5069-1H.003 was re-codified into Section 306.003 of the TEXAS FINANCE CODE to read as follows:

"A creditor and an obligor may agree to compute the term and rate of a commercial loan based on a 360-day year consisting of 12 30-day months. For purposes of this chapter, each rate ceiling expressed as a rate per year may mean a rate per year consisting of 360 days and of 12 30-day months."

In your letter dated March 13, 2000, you indicate as follows:

"... (t)he statute itself indicates that 'a creditor and an obligor may agree to compute the term and rate of a commercial loan based on a 360-day year consisting of twelve 30-day months.' (Emphasis added) The use of word 'may' is significant. According to the Code Construction Act, §311.016 Government Code, the word 'may' creates a discretionary authority or grants permission or a power. . . ."

Although our Office does not disagree with your conclusions about the use of the word "may," the word "may" signifies the authority to utilize a 360/360 day calendar, in lieu of, the 365/365 day calendar prescribed by the courts. The statute nor the courts have authorized the use of 360/365 calendar day basis calculation. The use of a 360/365 calendar yields a higher interest charge than a 360/360 or 365/365 day calendar calculation. Because the Texas Legislature authorized the use of 360/360 day calendar and the courts have required the use of 365/365 day calendar in the absence of any statutory authority, both methods are acceptable.

If a lender assessed, charged, or received interest at the maximum Chapter 303 rate utilizing a 360/365 calendar day calculation basis, it is the position of this office that the lender would

Ms. Karen M. Neeley
May 22, 2000
Page 3

violate the usury penalties of Section 305.001 of the TEXAS FINANCE CODE. Specifically, Section 305.001 of the TEXAS FINANCE CODE indicates as follows:

“(a) A creditor who contracts for, charges, or receives interest that is greater than the amount authorized by this subtitle is liable to the obligor for an amount that is equal to the greater of:

(1) three times the amount computed by subtracting the amount of interest allowed by law from the total amount of interest contracted for, charged, or received; or

(2) \$2,000 or 20 percent of the amount of the principal, whichever is less.

(b) This section applies only to a contract or transaction subject to this subtitle.

(c) A creditor who charges or receives interest in excess of the amount contracted for, but not in excess of the maximum amount authorized by law, is not subject to penalties for usurious interest but may be liable for other remedies and relief as provided by law.”

Hopefully, this response addresses your question.

Sincerely,



Leslie L. Pettijohn

LLP:jjm

ACCT. NO.....
 NAME.....
 CONT.DATE..... *****
 IST DUE DATE.. 12-Jun-00
 AMT.FIN..... 10000.00
 PMT. AMT..... 917.1900
 A.P.R..... 18.000000
 PMTS./YEAR..... 12

ACCT. NO 0
 NAME 0
 AMT. FIN. \$10,000.00
 A.P.R. 18.0000%
 TERMS MONTHLY
 CONT. DATE. 05/12/00
 FINAN. CHG. \$1,006.28

Total Pmts
 11006.28

365/365

	DATE	PMT AMT	ADD DAYS	FIN.CHG.	PRIN	BALANCE	UNPD INT
Int. based on # of add. days in period. and monthly till end of contract	05/12/00					\$10,000.00	
Enter data in column to right of lines above.	1 06/12/00	\$917.19	31	\$152.88	\$764.31	\$9,235.69	\$0.00
	2 07/12/00	\$917.19	30	\$136.64	\$780.55	\$8,455.13	\$0.00
	3 08/12/00	\$917.19	31	\$129.26	\$787.93	\$7,667.20	\$0.00
	4 09/12/00	\$917.19	31	\$117.21	\$799.98	\$6,867.23	\$0.00
	5 10/12/00	\$917.19	30	\$101.60	\$815.59	\$6,051.63	\$0.00
	6 11/12/00	\$917.19	31	\$92.52	\$824.67	\$5,226.96	\$0.00
	7 12/12/00	\$917.19	30	\$77.33	\$839.86	\$4,387.10	\$0.00
	8 01/12/01	\$917.19	31	\$67.07	\$850.12	\$3,536.98	\$0.00
	9 02/12/01	\$917.19	31	\$54.07	\$863.12	\$2,673.86	\$0.00
	10 03/12/01	\$917.19	28	\$36.92	\$880.27	\$1,793.59	\$0.00
	11 04/12/01	\$917.19	31	\$27.42	\$889.77	\$903.82	\$0.00
	12 05/12/01	\$917.19	30	\$13.37	\$903.82	\$0.00	\$0.00

\$1,006.28

ACCT. NO.....
 NAME.....
 CONT. DATE..... *****
 IST DUE DATE.. 12-Jun-00
 AMT. FIN..... 10000.00
 PMT. AMT..... 916.8000
 A.P.R..... 18.000000
 PMTS./YEAR..... 12

ACCT. NO 0
 NAME 0
 AMT. FIN. \$10,000.00
 A.P.R. 18.0000%
 TERMS MONTHLY
 CONT. DATE. 05/12/00
 FINAN. CHG. \$1,001.60

Total Pmts
 11001.60

360/360

	DATE	PMT AMT	ADD DAYS	FIN.CHG.	PRIN	BALANCE	UNPD INT
Int. based on # of add. days in period.	05/12/00					\$10,000.00	
and monthly till end of contract							
Enter data in column to right of lines above.	1 06/12/00	\$916.80	31	\$150.00	\$766.80	\$9,233.20	\$0.00
	2 07/12/00	\$916.80	30	\$138.50	\$778.30	\$8,454.90	\$0.00
	3 08/12/00	\$916.80	31	\$126.82	\$789.98	\$7,664.92	\$0.00
	4 09/12/00	\$916.80	31	\$114.97	\$801.83	\$6,863.10	\$0.00
	5 10/12/00	\$916.80	30	\$102.95	\$813.85	\$6,049.24	\$0.00
	6 11/12/00	\$916.80	31	\$90.74	\$826.06	\$5,223.18	\$0.00
	7 12/12/00	\$916.80	30	\$78.35	\$838.45	\$4,384.73	\$0.00
	8 01/12/01	\$916.80	31	\$65.77	\$851.03	\$3,533.70	\$0.00
	9 02/12/01	\$916.80	31	\$53.01	\$863.79	\$2,669.90	\$0.00
	10 03/12/01	\$916.80	28	\$40.05	\$876.75	\$1,793.15	\$0.00
	11 04/12/01	\$916.80	31	\$26.90	\$889.90	\$903.25	\$0.00
	12 05/12/01	\$916.80	30	\$13.55	\$903.25	(\$0.00)	\$0.00

\$1,001.60

ACCT. NO.....
 NAME.....
 CONT. DATE..... *****
 1ST DUE DATE.. 12-Jun-00
 AMT. FIN..... 10000.00
 PMT. AMT..... 918.3900
 A.P.R..... 18.000000
 PMTS./YEAR..... 12

.CCT. NO 0
 NAME 0
 AMT. FIN. \$10,000.00
 A.P.R. 18.0000%
 TERMS MONTHLY
 CONT. DATE. 05/12/00
 FINAN. CHG. \$1,020.63

Total Pmts
 11020.63

360/365

	DATE	PMT AMT	ADD DAYS	FIN. CHG.	PRIN	BALANCE	UNPD INT
Int. based on # of add. days in period. and monthly till end of contract	05/12/00					\$10,000.00	
Enter data in column to right of lines above.	1 06/12/00	\$918.39	31	\$155.00	\$763.39	\$9,236.61	\$0.00
	2 07/12/00	\$918.39	30	\$138.55	\$779.84	\$8,456.77	\$0.00
	3 08/12/00	\$918.39	31	\$131.08	\$787.31	\$7,669.46	\$0.00
	4 09/12/00	\$918.39	31	\$118.88	\$799.51	\$6,869.95	\$0.00
	5 10/12/00	\$918.39	30	\$103.05	\$815.34	\$6,054.60	\$0.00
	6 11/12/00	\$918.39	31	\$93.85	\$824.54	\$5,230.06	\$0.00
	7 12/12/00	\$918.39	30	\$78.45	\$839.94	\$4,390.12	\$0.00
	8 01/12/01	\$918.39	31	\$68.05	\$850.34	\$3,539.78	\$0.00
	9 02/12/01	\$918.39	31	\$54.87	\$863.52	\$2,676.26	\$0.00
	10 03/12/01	\$918.39	28	\$37.47	\$880.92	\$1,795.33	\$0.00
	11 04/12/01	\$918.39	31	\$27.83	\$890.56	\$904.77	\$0.00
	12 05/12/01	\$918.39	30	\$13.57	\$904.82	(\$0.05)	\$0.00

\$1,020.63