

CLIENT COPY

No. 03-0600273-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

TEXAS BANKERS ASSOCIATION,
FINANCE COMMISSION OF TEXAS, and
CREDIT UNION COMMISSION OF TEXAS
Appellants,

vs.

ASSOCIATION OF COMMUNITY ORGANIZATIONS
FOR REFORM NOW (ACORN), VALERIE NORWOOD,
ELSIE SHOWS, MARYANN ROBLES-VALDEZ,
BOBBY MARTIN, PAMELA COOPER, and CARLOS RIVAS,
Appellees.

On Appeal from the 126th Judicial District Court,
Travis County, Texas

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Shonda Novak, *Foreclosures in Travis hit 14-Year High*, AUSTIN-AMERICAN STATESMAN, Mar. 19, 2005, at F1 3

III. STATEMENT OF THE CASE

Plaintiffs challenged the validity of nine rules related to home equity loans and adopted by the Finance Commission of Texas and the Credit Union Commission of Texas (“Commissions”). The Texas Bankers Association (the “Bankers”) later intervened.

After considering oral argument and motions for summary judgment, the trial court found that seven of the nine rules were invalid and denied Plaintiffs’ challenge to the two remaining rules. This appeal followed, with the Commissions and the Bankers challenging the trial court’s invalidation of the seven rules and Plaintiffs challenging the other two rules. Since the filing of the appeal, the Commissions repealed three of the seven invalidated rules, and so the Commissions and Bankers now appeal only four of the seven rules originally found to be invalid.

The trial court invalidated the following rules, a decision now appealed by the Commissions and Bankers (also referred to as Appellants):

- * **Fee Cap Rules:** 7 TEX. ADMIN. CODE §§ 153.1(11), 153.5(3),(4),(6),(8), (9),(12)
- * **Oral Application Rule:** 7 TEX. ADMIN. CODE § 153.12(2)
- * **Convenience Check Rule:** 7 TEX. ADMIN. CODE § 153.84(1)
- * **Document Copy Rule:** 7 TEX. ADMIN. CODE § 153.22

The trial court did not invalidate the following rules, a decision now appealed by Plaintiffs (referred to as Appellees):

- + **Power of Attorney Rule:** 7 TEX. ADMIN. CODE § 153.15(2),(3)
- + **Disclosure Mailing Rule:** 7 TEX. ADMIN. CODE § 153.51(1),(3)

IV. ISSUES PRESENTED

- Issue One: Does the constitutional limit on fees to originate, evaluate, maintain, record, insure, and service a home equity loan apply to lender fees? (The Commissions exempt lender fees.)
- Issue Two: Does the Texas Constitution require a homeowner to submit a written application in order to obtain a home equity loan? (The Commissions require no more than applications taken by telemarketers over the phone.)
- Issue Three: Does the Texas Constitution prohibit a borrower from accessing his home equity loan using methods that appear to be similar to constitutionally prohibited methods? (The Commissions create exceptions without defining or distinguishing them from the prohibited methods.)
- Issue Four: Does the phrase “The lender, at the time the extension of credit is made, [must] provide the owner of the homestead a copy of all documents signed by the owner related to the extension of credit” mean what it says? (The Commissions say it means something else.)
- Issue Five: Can the Commissions enact a home equity lending rule that does more than interpret the Texas Constitution? (The Commissions claim they have more authority than the Constitution states.)
- Issue Six: Can the constitutional requirement that a home equity loan closing occur in a specific location be evaded with a simple power of attorney? (The Commissions say so.)
- Issue Seven: Does the Texas Constitution require a notice be received by a borrower prior to obtaining a home equity loan? (The Commissions do not require receipt, only presume receipt if the lender has an undefined mailing procedure.)

V. STATEMENT OF FACTS

The Texas Constitution, Article XVI, Section 50 (referred to as "Section 50" or "the Homestead Provision"), protects Texas homeowners from losing their home to debt with few exceptions (e.g., taxes and debts for purchase or improvement of the property). The Homestead Provision is a Texas creation and has a three-fold purpose: (1) to preserve the integrity of the family as a basic element of social organization, (2) to provide Texas borrowers with homes for their families so as to prevent them from becoming a burdensome charge upon the public, and (3) to retain in Texans the feeling of freedom and sense of independence deemed necessary to the continued existence of democratic institutions. TEX. CONST. art. XVI, § 50, interp. commentary (Vernon 1993).

The Homestead Provision was enacted in response to the "United States Panic of 1837" and the ensuing depression in which numerous families lost homes and farms through foreclosures. *Id.* The first form of the provision was promoted by President Mirabeau B. Lamar of the Republic of Texas and passed by the Texas Congress in 1839, and was most likely the first homestead protection law of its kind in any country in the world.¹ A recent Texas Supreme Court opinion further explained this history:

Texans were familiar with chattel exemptions for family clothing, furniture, and the tools or implements of the family's wage earner, which, while under Spanish colonial law and the law of Mexico, could not be attached for the forced payment of debt. As the authors of the interpretative commentaries to the Texas Constitution of 1876 note: "it was no great step to extend the

¹ Louis J. Wortham, *A History of Texas: From Wilderness to Commonwealth*, Vol. 4, Ch. LI (Wortham-Molyneaux Company, 1924) ("When it is considered that in so enlightened a country as Great Britain imprisonment for debt was still in vogue at the time this act was passed in the Republic of Texas, its progressive character is given striking emphasis."), also available at <http://www.kvanah.com/txmilmus/wortham/443.htm>.

concept underlying these chattel exemptions to the family home and land." The drafters of this State's first Constitution, "determined to safeguard the homestead by putting it beyond the reach of legislators as well as creditors by incorporating an exemption provision in the constitution." The homestead exemption was carried forward in the Constitutions of 1861 and 1866. The Constitution of 1869 saw major changes in the exemption. The three circumstances in which a homestead may be foreclosed were added; i.e., "for the purchase thereof, for the taxes assessed thereon, or for labor and materials expended thereon ...". Again in 1876, the language of the homestead provision changed substantially. The legislature's "power" and "duty" to protect the homestead from forced sale of "any" debt was deleted; that language was replaced with a direct pronouncement that the family homestead "shall be and is hereby protected from forced sale, for payment of all debts...." Further, and with the obvious intent to make the homestead's protective policy abundantly clear, the Constitution of 1876 also included the language: "No mortgage, trust deed, or other lien on the homestead shall ever be valid."

Inwood North Homeowners' Ass'n v. Harris, 736 S.W.2d 632, 638 (Tex. 1987) (citations omitted).

For over 150 years Texas protected its homeowners from losing their homes to lenders who made loans for purposes other than to purchase or repair the home. In 1997, a new exception to the Homestead Provision was created (referred to as the "Home Equity Amendment"). However, the text of the new exception and the clear legislative intent expressed during its passage demonstrate that the purpose of the Homestead Provision and the concerns of the 1800s were not forgotten. "[M]any of the provisions of the constitutional amendment permitting home equity loans [in Texas] were designed to address the predatory lending problems that borrowers have faced in other states."²

The issue before this Court is whether the Commissions' interpretation of the Texas

² Julia Patterson Forrester, *Home Equity Loans in Texas: Maintaining the Texas Tradition of Homestead Protection*, 55 SMU L. REV. 157, 164-165 (Winter 2002).

Constitution is authorized by law and consistent with the language and intent of the Homestead Provision.³ Wherever appropriate, Appellees provide hypotheticals and background for some of the constitutional provisions so that the Court can better understand the intent of the Homestead Provision and the harm it is still intended to prevent.⁴

VI. SUMMARY OF THE ARGUMENT

Unlike most agency delegations of power, the Commissions were not given any authority to prescribe law or policy, make new rules, or implement any constitutional provision.⁵ Rather, the Commissions were given one job -- to "interpret" certain sections of the Homestead Provision.⁶

³ Appellees have alleged in prior pleadings that some of the Commissions' rules are an attempt to rewrite the Homestead Provision in the interest of convenience to the financial services industry and will expand predatory lending in Texas. Appellees have also alleged in prior pleadings that the process used by the Commissions was flawed. Appellants have responded that the Commissions' process is fair and balanced, its rules cannot please everyone, and its interpretative authority will lower risk and result in lower interest rates for Texas borrowers. However, the process used to enact the rules, and whether such rules were enacted to benefit the industry or will ultimately help the public at large, are not questions now before this Court.

⁴ At present Texas leads the nation in total foreclosures (36,362 from August 2005 through July 2006). *A Study of Residential Foreclosures in Texas*, Texas Department of Housing and Community Affairs, (Sept. 29, 2006) at 35, also available at <http://www.tdhca.state.tx.us/ppa/docs/hrc/06-HB1582Rpt-Foreclosures.pdf>, citing data compiled by Foreclosure.com. See also *Texas Leads the Nation in Total Home Foreclosures: Easy Loans Get Blamed*, SAN ANTONIO EXPRESS NEWS, Mar. 13, 2005, at 1L (Pl.s' Ex. 29, I C.R. Suppl. at 296); Shonda Novak, *Foreclosures in Travis hit 14-Year High*, AUSTIN AM.-STATESMAN, Mar. 19, 2005, at F1 (Pl.s' Ex. 29, I C.R. Suppl. at 299).

⁵ TEX. CONST. art. XVI, § 50(u); TEX. FIN. CODE ANN. § 11.308 (Vernon Supp. 2006) ("The finance commission may, on request of an interested person or on its own motion, issue interpretations of Sections 50(a)(5)-(7), (e)-(p), (t), and (u), Article XVI, Texas Constitution. An interpretation under this section is subject to Chapter 2001, Government Code, and is applicable to all lenders authorized to make extensions of credit under Section 50(a)(6), Article XVI, Texas Constitution, except lenders regulated by the Credit Union Commission. The finance commission and the Credit Union Commission shall attempt to adopt interpretations that are as consistent as feasible or shall state justification for any inconsistency."); TEX. FIN. CODE ANN. § 15.413 (Vernon Supp. 2006) (identical authority given to credit union commission).

⁶ "Interpretation and construction of written instruments are not the same. A rule of construction is one which either governs the effect of an ascertained intention, or points out what the court should do in the absence of express or implied intention, while a rule of interpretation is one which governs the ascertainment of the meaning of the maker of the instrument." BLACK'S LAW DICTIONARY 818 (6th ed. 1990) (citing *In re Trust Co.*, 89 Misc. 69, 151 N.Y.S. 246, 249 (1915)).

Appellees challenged the validity of some of the rules adopted by the Commissions because they are not interpretative and because they are new rules that the Commissions have no authority to enact. Appellees also challenged the validity of some of the rules because they contradict the plain meaning and intent of the constitutional provisions. In both instances, the Commissions improperly exceeded their authority to interpret the Texas Constitution.

VII. ARGUMENT

A. SUBSTANTIVE VALIDITY - STANDARD OF REVIEW

Appellees made a substantive validity challenge pursuant to the Administrative Procedure Act (“APA”) and Declaratory Judgment Act.⁷ To establish a rule's invalidity, a challenger must show that the rule: (1) contravenes specific statutory language; (2) runs counter to the general objectives of the statute; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions. *See Office of Pub. Util. Counsel v. Public Util. Comm'n*, 104 S.W.3d 225, 232 (Tex. App.–Austin 2003, no pet.); *Office of Pub. Util. Counsel v. Public Util. Comm'n*, 131 S.W.3d 314, 321 (Tex. App.–Austin 2004, pet. denied).⁸

Appellees show below how each disputed rule is invalid pursuant to the above

⁷ TEX. GOV'T CODE ANN. § 2001.038 (Vernon 2000); TEX. CIV. PRAC. & REM. CODE ANN. Ch. 37 (Vernon 1997). Appellees withdrew their procedural challenge alleging the Commissions did not provide a reasoned justification for the disputed rules. Thus, Appellees have not addressed the standards of review related to procedural challenges (e.g., arbitrary and capricious, substantial compliance, etc.) Appellees continue to make a constitutional due process (due course of law) claim regarding only 7 TEX. ADMIN. CODE § 153.84(1). See discussion *infra*, at 36.

⁸ These recent cases dealt with challenges to the validity of PUC rules pursuant to Section 39.001(f) of the Texas Utilities Code; however, the standard of review is the same for validity challenges made pursuant to Texas Government Code § 2001.038.

authorities; however, statutory (and constitutional) interpretation is a question of law, and therefore this Court should review the disputed rules *de novo* and without deference to the Commissions' interpretations. Texas courts are not bound by agency interpretations.⁹ The Texas Supreme Court has never adopted the federal deference standard as stated in *Chevron, U.S.A., Inc., v. NRDC, Inc.*, 467 U.S. 837 (1984), and often does not give an agency much deference at all.¹⁰

The Commissions mistakenly imply throughout their brief that this Court should uphold the interpretations because they are reasonable. Commissions' Brief at 2, 4, 5, 6, 7, 11, 13, 15, 18, 28. For authority the Commissions state:

[C]onstruction of a statute by an agency charged with its enforcement is entitled to serious consideration, as long as the construction is reasonable and does not contradict the plain language of the statute itself. *Brazoria County v. Texas Comm'n on Env'tl. Quality*, 128 S.W.3d 728, 734 (Tex. App.—Austin 2004, no pet.) (citing *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993)); see also *Railroad Comm'n of Texas v. Lone Star Gas Co.*, 844 S.W.2d 679 (Tex. 1992).

Commissions' Brief at 7. However, this Court in *Brazoria County* did not state that an agency rule should be upheld if it is reasonable and does not contradict the statute. Rather, this Court held it should give an agency some deference but only where the agency is

⁹ *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *Rylander v. Fisher Controls Int'l, Inc.*, 45 S.W.3d 291, 299 (Tex. App.—Austin 2001, no pet.); *Entex v. Railroad Comm'n*, 18 S.W.3d 858, 862 (Tex. App.—Austin 2000, pet. denied); *City of Alvin v. Public Util. Comm'n*, 143 S.W.3d 872, 881 (Tex. App.—Austin 2004, no pet.) (“We are not bound by an agency’s interpretation of a statute that it administers or enforces.”)

¹⁰ *Cf. PUC of Tex. v. CPSB of San Antonio*, 53 S.W.3d 310, 316 (Tex. 2001) (court rejected *Chevron* and agency’s interpretation).

charged with enforcement of the statute they are interpreting. *Brazoria County*, 128 S.W.3d at 734.

In *Brazoria County*, the Texas Transportation Commission enacted so-called “environmental speed limits” and other rules in Brazoria County in order to curb air pollution as required by the Federal Clean Air Act. The county challenged the authority of the commission to issue the rules. This Court upheld the commission’s authority because the Legislature had given the Transportation Commission the authority to modify speed limits, and ultimately ratified the changes.¹¹ However, in the case at bar the Commissions do not have broad statutory authority or any enforcement authority for violations of Sections 50(a)(6) and 50(g) of Article XVI (the constitutional provisions they are attempting to interpret in this case). Thus, *Brazoria County* and the other authorities cited by the Commissions are not applicable. The courts have given agencies more deference when their rule making powers are broad.¹² However, because of the narrow grant of authority and the nature of that authority, deference to the Commissions’ interpretations should be limited at

¹¹ The Legislature changed the law prohibiting the enactment of future environmental speed limits by the Transportation Commission, but left the ones already enacted in place. *Brazoria County*, 128 S.W.3d at 736.

¹² See *Gerst v. Oak Cliff Sav. & L. Ass’n*, 432 S.W.2d 702, 706 (Tex. 1968) (court held rules valid because Finance Commission had broad powers) quoting *Kee v. Baber*, 303 S.W.2d 376, 390 (Tex. 1957) (agency action upheld because it had power to “make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this Act”); *Texas State Board of Examiners in Optometry v. Carp*, 412 S.W.2d 307, 313 (Tex. 1967), *cert. denied*, 389 U.S. 52 (1967) (“We believe that the Legislature, by investing the Board with broad rule-making powers ‘[for] the enforcement of the Act’ and ‘[for] the regulation of the practice of optometry,’ contemplated that the Board would use these powers to correct the evils generally classified in Article 4563, or some other provision of the Optometry Act.”)

most.¹³ Although the rules are unreasonable, this is not the appropriate standard with which to review the Commissions' disputed interpretations of the Texas Constitution.

There are additional factors that support giving little or no deference to the interpretations of the agencies in the case at bar. First, the constitutional interpretations at issue do not relate to scientific evidence or technical data requiring special advanced knowledge to review.¹⁴ It takes little technical training to understand constitutional language such as: "a borrower is to receive a copy of all documents signed by the owner related to the loan."¹⁵ Prior to the Commissions' interpretations, the courts alone addressed disputes involving the interpretation of the home equity provisions, and no courts stated or implied that the underlying facts at issue were complex or technical. This case does not involve experts lining up on either side of the issues.

Second, the Commissions are interpreting constitutional provisions that were not just passed by the Legislature and the Governor, but also by the voters. This is an important distinction and one of first impression. When an agency is merely interpreting a statute that was passed by the Legislature and approved by the Governor, the agency has to be mindful of these officials since they can directly control the agency by appointment, budget, sunset,

¹³ See *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137-38 (Tex. App. -- Austin 1986, writ ref'd n.r.e.) (Bank commission overstepped authority; statute did not expressly or impliedly allow commission to reopen proceedings and reconsider approval of appellant's funeral services plan); *Kawasaki Motors v. Motor Vehicle Comm'n*, 855 S.W.2d 792, 797-798 (Tex. App. -- Austin 1993, no writ) (statutory grant of powers to agency was general in nature and did not convey the express power to order payments to dealers).

¹⁴ See *Allied Bank Marble Falls v. State Banking Bd.*, 739 S.W.2d 73, 79 (Tex. App.--Austin 1987), *rev'd on other grounds*, 748 S.W.2d 447 (Tex. 1988) (agency, not reviewing court, has the responsibility to determine the meaning of the evidence based on its technical and scientific expertise).

¹⁵ See discussion *infra*, at 44.

and statute. Constitutional amendments are approved by the voters, but the voters do not have the ability to directly impact an agency so easily. It is important for the courts to review constitutional interpretations by the Commissions with little or no deference in order to ensure that the voters' intentions are protected.

B. CONSTITUTIONAL INTERPRETATION AND PLAIN MEANING

When reviewing a constitutional provision, one should use the plain meaning of the words in the provision and consider the effect that the drafters and the voters intended.¹⁶ Simply put, this Court should consider the “natural, obvious and ordinary meaning” of the constitution, as it was understood by the citizens who adopted it. *State v. Clements*, 319 S.W.2d 450, 452 (Tex. Civ. App.—Texarkana 1958, writ ref'd). The Commissions sometimes claim to embrace the “plain meaning,” but only after using technical definitions found elsewhere in the law and used in different contexts. Then, they claim the Legislature should have been aware of the technical definition, so presumably the plain meaning should be ignored. Commissions' Brief at 11.

Appellees assert that a constitutional provision should be reviewed in context and given meaning the voters intended. There is no question that the legislators were using the plain meaning of words when they debated the constitutional language in this case, rather than some other technical meaning promoted by the Commissions and Bankers. *See e.g.*, Commissions' Brief at 10; Bankers' Brief at 13. The rules of construction for a

¹⁶ *See Doody v. Ameriquest Mortg. Co.*, 49 S.W.3d 342, 344 (Tex. 2001) (In reviewing home equity provision of the constitution the court stated: “We strive to give constitutional provisions the effect their makers and adopters intended.”) *citing Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353, 355 (Tex. 2000); *Republican Party v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997), *City of El Paso v. El Paso Cmty. Coll. Dist.*, 729 S.W.2d 296, 298 (Tex. 1986).

constitutional provision may be the same as that for statutes; however, a constitutional provision must be given its ordinary meaning without limitation.¹⁷

Legislative history is extremely important in order to understand their intent and purpose of the constitutional protections passed by the Legislature and the voters. In addition to statements made by legislators, documentary proof of the intent is provided by the bill analyses adopted by the committees that approved the legislation and the bill analysis performed and distributed by the House Research Organization before being voted on by legislators.¹⁸

Appellants would prefer this Court not consider the legislative history in this case.¹⁹ However, the Commissions admitted in open court the ambiguity of some of the provisions of Section 50 in dispute. (R.R. at 82.) Further, on October 20, 2006, the Commissions adopted a joint resolution stating in part:

[W]hereas, some inherent ambiguities in the language of Article XVI, Section 50, have created uncertainty for the Commissions about the intent of the framers of the Constitution regarding certain issues of home equity lending; and

¹⁷ “[T]he Texas Constitution derives its force from the people of Texas. This is the fundamental law under which the people of this state have consented to be governed. Accordingly, in construing a constitutional provision, this Court has always given effect to the intention of the framers and ratifiers of the provision.” *Sears v. Bayoud*, 786 S.W.2d 248, 251 (Tex. 1990) (internal citations omitted).

¹⁸ The House Research Organization (“HRO”) is a nonpartisan source of impartial information on legislation and issues considered by the Texas Legislature. The HRO is an independent administrative department of the Texas House of Representatives. It is governed by a broadly representative steering committee of 15 House members elected by the House membership to set policy for the organization, approve its budget, and ensure that its reports are objective. During legislative sessions, the HRO publishes the Daily Floor Report, which includes analyses of all legislation, except local and consent bills scheduled for floor debate on the daily House calendar. Each bill analysis consists of a digest of the bill’s provisions, background, arguments for and against, and additional pertinent information. See <http://www.hro.house.state.tx.us/frame6.htm>

¹⁹ The Commissions never address legislative history, and the Bankers trivialize it. Bankers’ Brief at 8-9.

Whereas, these ambiguities render the Commissions' rulemaking on certain issues of home equity lending vulnerable to litigation as well as criticism from representatives of both industry and consumers; and

...

NOW, THEREFORE, BE IT RESOLVED, that the Credit Union Commission of Texas and the Finance Commission of Texas do hereby request that the 80th Legislature consider clarifying amendments to Article XVI, Section 50 of the Texas Constitution to improve clarity and provide additional guidance regarding home equity lending and the Commissions' interpretative authority.

Resolution of the Credit Union Commission of Texas and the Finance Commission of Texas, Oct. 20, 2006.²⁰ Thus, even Appellants cannot deny that legislative history is very important in this case.²¹ And, even if a statute is unambiguous, this Court may still consider the object sought to be attained, the circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001); *City of Alvin v. Public Util. Comm'n*, 143 S.W.3d 872, 881 (Tex. App.–Austin 2004, no pet.). An earlier court put it this way:

The Constitution of a State is higher in authority than any law or order made by any body assuming to act under it. Every positive direction in it contains an implication against everything contrary to it, or which would **frustrate or disappoint the purpose** of that provision.

Powell v. State, 17 Tex. Ct. App. 345, 349 (Tex. Crim. App. 1884) quoting (Cooley's *Const. Lim.*, 4th ed., 108) (emphasis added).

²⁰ See Appendix; also available at <http://www.fc.state.tx.us/Home%20Equity/intresolu.htm>.

²¹ *Huntsville Independent School District v. McAdams*, 221 S.W.2d 546, 549 (Tex. 1949) (“[A]n eminent text writer has said that if a literal interpretation of a statute ‘leads to absurd results, the words of the statute will be modified by the intention of the legislature. The modern cases also indicate that courts today rather than beginning their inquiry with the formal words of the act consider from the start the legislative purpose and intention. This tendency is to be commended for it is more consonant with the proper judicial use of statutory materials.’” (citation omitted).)

C. ISSUES PRESENTED

Issue One: 7 TEX. ADMIN. CODE §§ 153.1(11), 153.5(3),(4),(6),(8),(9),(12) (“Fee Cap Rules”)²²

Texas Constitutional Provision	Commissions’ Rules Invalidated
<p>Section 50(a)(6)(E): "does not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit;"</p>	<p>§153.5.Three percent fee limitation: Section 50(a)(6)(E). An equity loan must not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit. ... <i>(6) Charges to Originate. Charges an owner or an owner's spouse is required to pay to originate an equity loan that are not interest are fees subject to the three percent limitation.</i> [Note: subpart (6) is listed in bold for illustration purposes only. The Court also invalidated subparts (3), (4), (8), (9), and (12) of this rule, and the definition contained in Rule 153.1(11).]</p>

a. Fee Cap: The Two Sentence Summary

The simple question here is whether the constitutional limit on the fees to originate, evaluate, maintain, record, insure, and service a home equity loan was meant to apply to lenders. The Commissions’ rule exempts fees paid to lenders from the Fee Cap despite the intentions of the Legislature and the voters.

²² Titles given to rules are merely for the convenience of the parties and the court.

b. Fee Cap: The Commissions' Exception Swallows the Rule

Article XVI, Section 50(a)(6)(E) of the Texas Constitution, commonly referred to as the “Three Percent Cap” or “Fee Cap,” was hailed as an important step in combating predatory lending²³ and intended as a meaningful limitation of the fees that a borrower could be charged to obtain a home equity loan.²⁴ However, the Commissions rendered the Fee Cap nearly meaningless by removing from the limitation the fees charged by lenders. For example, according to the Commissions’ interpretation, all origination fees charged by lenders are not subject to the Fee Cap.²⁵ As explained in their briefs, the Commissions focused on the “interest” exception in the Fee Cap as a justification for the rule. Ironically, they defined “interest” using the usury²⁶ definition, which was designed to protect consumers

²³ According to the Office of the Texas Consumer Credit Commissioner, the Fee Cap was the “Texas Response” to the predatory lending practice of lenders “packing” excessive fees in a loan. Office of the Texas Consumer Credit Commissioner, *Strategic Plan for the Period 2003-2007*, 15 (2002) (Pl.s’ Ex. 4, I C.R. Suppl. at 73).

²⁴ See, e.g., Kathleen Engel and Patricia McCoy, *A Tale of Three Markets: The Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1312 (2001) (“Texas took the lead with an amendment to the Texas Constitution, which took effect on January 1, 1998, prohibiting prepayment penalties and balloon payments on all home equity loans and imposing a three percent cap on points for those loans, regardless of the interest rate.”) (Pl.s’ Ex. 5, I C.R. Suppl. at 75-76).

²⁵ The Commissions’ rule might fool the uninitiated into thinking origination fees are included in the Fee Cap: “Charges an owner or an owner’s spouse is required to pay to originate a loan that are not interest are fees subject to the three percent limitation.” Rule 153.5(6). However, origination fees paid to lenders are considered interest by the Commissions for purposes of the fee cap. See 7 TEX. ADMIN. CODE §§ 83.707(g), 153.1(11) (2006). Thus, these lender fees are excluded from the Fee Cap, according to the Commissions’ interpretation. Similarly, the Commissions concede that if their definition of interest is invalid, then the other challenged rules related to the Fee Cap are also invalid. Commissions’ Brief at 9, fn. 3.

²⁶ Usury is prohibited by Section 11, Article XVI, of the Texas Constitution. Under this constitutional prohibition, a “usurious” loan is a loan with “a greater rate of interest” than the maximum rate. “The Legislature shall have the authority to define interest and fix maximum rates.” *Id.* The Texas usury statute is now codified in the Texas Finance Code, § 301.001 et seq. Section 301.002(4) is the Legislature’s definition of “interest” for purposes of the constitutionally-mandated usury prohibition. According to the leading text on Texas usury law, the “general rule is simply that any sum charged by the lender that is paid to the lender in addition to the charges labeled as ‘interest’ and principal is presumed to be consideration for the use of the money loaned by the lender, and, therefore is interest.” D. Nicewander et al, *Texas Usury Law Handbook* 47 (West 1997).

from abusive lenders.²⁷ Under this broad concept of interest, **any compensation paid to the lender** for making the loan is considered interest and excluded from the Fee Cap by the Commissions' rule.²⁸ This definition of interest not only consists of "interest stipulated by the parties" but also encompasses "judicially declared interest" as well.²⁹

c. Fee Cap: Plain Language Ignored

The plain language of Section 50(a)(6)(E) broadly limits the fees that a borrower may be charged to obtain a home equity loan: "fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit." Significantly, the Texas Constitution makes no distinction regarding to whom the fees are paid; fees paid to "any person" are to be limited if they are "to originate, evaluate, maintain, record, insure, or service" the loan.³⁰ An origination fee paid to a mortgage broker, for example, is not

²⁷ *George A. Fuller Company of Texas v. Carpet Company*, 823 S.W.2d 603, 604 (Tex. 1992) ("It is the intent of the Legislature in enacting this revision [of the statute on interest] to protect the citizens of Texas from abusive and deceptive practices now being perpetrated by unscrupulous operators, lenders and vendors in both cash and credit consumer transactions ... and thus serve the public interest of the people of this State.")

²⁸ A "charge which is in fact compensation for the use, forbearance or detention of money is, by definition, interest regardless of the label placed upon it by the lender." *Gonzales County Savings & Loan v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976); *see also First USA Management, Inc. v. Esmond*, 960 S.W.2d 625, 627 (Tex. 1997) ("whether an amount of money is interest depends not on what the parties call it but on the substance of the transaction"); *see also Walker v. Ross*, 548 S.W.2d 447, 450 (Tex. App.—Fort Worth 1977, writ ref'd n.r.e.) ("It is clear that where the face amount of the loan is greater than the amount actually advanced, the principal upon which the lender may charge interest is the amount advanced, and the difference (where there are no valid charges) is considered pre-payment of interest.") (citations omitted).

²⁹ *See Tanner Development Co. v. Ferguson*, 561 S.W.2d 777, 785 (Tex. 1977) (a loan is usurious if the "stated interest rate plus any discount fees, points, or other front-end charges that are judicially determined to be interest" exceeds the lawful rate).

³⁰ The Constitution makes the correct distinction. Fifteen years of litigation with predatory lenders has plainly established that the name of the fee and the payee is of absolutely no importance. The Fee Cap sought to control the proliferation of "junk" fees packed into mortgage loans – whether paid to lenders, brokers, appraisers, title insurers or whomever.

considered interest for usury purposes³¹ and is included in the Fee Cap.³² However, if the same origination fee is paid to the lender, under the Commissions' interpretation, the fee is excluded from the Fee Cap. In drafting the Fee Cap, care was taken to include every possible fee that a lender could require a borrower to pay and limit them to three percent of the loan amount. One can hardly think of a more inclusive formulation to describe the possible fees that a borrower could be charged. In Section 50(a)(6)(E), the phrase "in addition to any interest" immediately precedes the broad definition of fees and confirms the broad scope of the Fee Cap. Contrary to the Commissions' interpretation, the phrase did not create a substantive exclusion to the Fee Cap for fees considered interest for usury purposes.

As commonly understood and used in Section 50(a), "interest" and "fees" refer to the two distinct sets of costs a borrower must pay to obtain a home equity loan. The promissory note evidences the borrower's obligation to repay the principal plus interest in periodic installments. The note specifies the interest the borrower must pay for the loan.³³ A typical promissory note will provide that: "Interest will be charged on unpaid principal until the full amount of principal has been paid. I will pay interest at a yearly rate of ___ %." With the exception of a small amount for *per diem* interest paid at closing, the interest will be paid in

³¹ See *Home Savings Association of Dallas County v. Crow*, 514 S.W.2d 160, 165 (Tex. Civ. App. – Dallas 1974), *aff'd* 522 S.W.2d 457 (Tex. 1975) ("Charges paid by a borrower to a broker as compensation for procuring a loan are not properly to be considered as interest in determining whether the loan is usurious.")

³² 7 TEX. ADMIN. CODE § 153.5(7) (2006) ("Charges an owner or an owner's spouse is required to pay to third parties for separate and additional consideration for activities relating to originating a loan are fees subject to the three percent limitation. . . . Examples of these charges include...mortgage brokers' fees to the extent authorized by applicable law.")

³³ See TEX. BUS. & COM. CODE ANN. § 3.112 (b) (Vernon 2004) ("Interest may be stated in an instrument ... as a fixed or variable rate or rates.")

monthly payments for the term of the loan. This simple interpretation of interest is consistent with Appellants' definitions provided by their own dictionaries.³⁴

In addition to paying interest on the loan, most lenders will also require borrowers to pay certain upfront charges and closing costs (*i.e.*, "fees that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit"). These fees are separate and apart from the borrower's interest obligation under the promissory note. These fees are usually deducted from the loan proceeds at closing and essentially added to the loan principal. These are the plain meanings of the terms in question. As used in Section 50(a)(6)(E) and as commonly understood, a bright, easily-discernable line separates "interest" and "fees." "Interest" refers to the interest required by the promissory note. "Fees" refer to the other charges that a borrower must pay to obtain the loan. The fact that certain fees may be treated as interest for usury purposes does not change this dichotomy.

The reference to "interest" in the constitutional provision clarifies that payments of "interest" as commonly understood are not limited by the Fee Cap. The language of the cap provision is so encompassing that, absent the "in addition to any interest" phrase, the Fee Cap could be read to include the borrower's monthly interest payments. With this phrase, monthly interest payments are excluded from the Fee Cap. However, it was not intended that origination fees and other charges paid to the lender to obtain the loan be excluded from the Fee Cap.

³⁴ Appellants cite dictionaries as the source of the plain meaning of interest. Commissions' Brief at 10; Bankers' Brief at 15. Their dictionaries define interest as a percentage of the loan principle – other charges and fees are not mentioned. The dictionary definitions do not state or suggest that interest is any other fee or charge a lender requires a borrower to pay up front to obtain a loan.

Appellants are attempting to define interest to include “prepaid interest,” which the Commissions have defined as: “Interest paid separately in cash or by check before or at consummation in a transaction, or withheld from the proceeds of the credit at any time. Some common terms such as points, discounts, and origination fees have been used to identify this charge.” 7 TEX. ADMIN. CODE § 1.102(20) (2006). The Fee Cap did not exclude prepaid interest, only interest as it is commonly understood.

d. Fee Cap: Other Constitutional Provisions Provide Insight

At least twelve days before a home equity loan can be made, a borrower must be given a disclosure notice which describes various aspects of a home equity loan.³⁵ TEX. CONST. art. XVI, § 50(g). One provision of the notice required by Section 50(g) informs the borrower that: “Fees and charges to make the loan may not exceed 3 percent of the loan amount.” Section 50(g) was adopted along with the Fee Cap, and there is no exception for fees and charges paid to the lender mentioned in the disclosure notice. It is uncontroverted that the disclosure notice attempts to describe a home equity loan to a prospective borrower.

³⁵ “An extension of credit described by Subsection (a)(6) of this section may be secured by a valid lien against homestead property if the extension of credit is not closed before the 12th day after the lender provides the owner with the following written notice on a separate instrument:

“NOTICE CONCERNING EXTENSIONS OF CREDIT DEFINED BY SECTION 50(a)(6), ARTICLE XVI, TEXAS CONSTITUTION:

“SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION ALLOWS CERTAIN LOANS TO BE SECURED AGAINST THE EQUITY IN YOUR HOME. SUCH LOANS ARE COMMONLY KNOWN AS EQUITY LOANS. IF YOU DO NOT REPAY THE LOAN OR IF YOU FAIL TO MEET THE TERMS OF THE LOAN, THE LENDER MAY FORECLOSE AND SELL YOUR HOME. THE CONSTITUTION PROVIDES THAT:

“(A) THE LOAN MUST BE VOLUNTARILY CREATED WITH THE CONSENT OF EACH OWNER OF YOUR HOME AND EACH OWNER’S SPOUSE;

“(B) THE PRINCIPAL LOAN AMOUNT AT THE TIME THE LOAN IS MADE MUST NOT EXCEED AN AMOUNT THAT, WHEN ADDED TO THE PRINCIPAL BALANCES OF ALL OTHER LIENS AGAINST YOUR HOME, IS MORE THAN 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME;

“(C) THE LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE UNLESS YOU OR YOUR SPOUSE OBTAINED THIS EXTENSION OF CREDIT BY ACTUAL FRAUD;

“(D) THE LIEN SECURING THE LOAN MAY BE FORECLOSED UPON ONLY WITH A COURT ORDER;

“(E) FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 3 PERCENT OF THE LOAN AMOUNT; ...”

TEX. CONST. art. XVI, § 50(g).

The language used to describe the Fee Cap was chosen because there was never any intent to exclude lender fees from the three-percent limitation. Because the language in Section 50(g) is persuasive, Appellants will attempt to minimize it.³⁶ Appellants' strained position is that the Legislature erred when they drafted Section 50(g), the notice creates no rights or obligations itself, and therefore it should be ignored. However, reading the Fee Cap and the disclosure notice together, they show no intention to exempt lender fees from the three-percent limitation.³⁷

In fact, throughout Section 50 "interest" is used as it is commonly understood. Section 50(a)(6)(L)(i) requires that the home equity loan be repaid in periodic installments and states, "each of which equals or exceeds the amount of accrued interest as of the date of the scheduled installment." This provision only makes sense if "interest" refers to the interest payable monthly under the promissory note.

Another example can be found in Section 50(a)(6)(M)(ii), which was added in 2003.³⁸ This provision requires the lender to provide a "final disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing." The fact that "interest" is listed

³⁶ Appellants will cite *Stringer v. Cedant Corp.*, 23 S.W.3d 353 (Tex. 2000), which held that Section 50(g)'s notice provision does not independently establish rights or obligations of a home equity loan. However, *Stringer* involved two conflicting provisions of the Constitution, and the Court found nothing in those provisions or legislative history that gave reason for the conflict. *Id.* at 356. As a result, the Court held that one provision prevailed over the other and ruled that Section 50(g) does not independently establish rights or obligations. *Id.* Subsequently, Section 50(g) was modified to express this holding. Tex. S.J.R. 42, 78th Leg., R.S. (2003). Here, there is no such conflict between the Fee Cap and Section 50(g).

³⁷ *Helena Chemical Company v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) ("We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone.") citing, *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978).

³⁸ Tex. S.J.R. 42, 78th Leg., R.S. (2003).

along with “fees, points,” and “costs, and charges” is significant. In construing constitutional provisions, a court must “avoid a construction that renders any provision meaningless or inoperative.” *Stringer*, 23 S.W.3d at 355. If “interest” includes fees considered interest for usury purposes, the reference to “points” is totally unnecessary. Section 50(a)(6)(M)(ii) confirms the meaning of “interest” as used throughout Section 50 – it does not include charges, fees, points or costs charged at closing.

e. Fee Cap: Legislative History Uncontroverted

In 1997 the 75th Legislature began home equity lending with the passage of House Joint Resolution 31 (“H.J.R. 31”). The original, filed version of H.J.R. 31 contained few consumer protections and did not provide a limitation on fees. (Pl.s’ Ex. 6, I C.R. Suppl. at 97). Because of substantial opposition, numerous consumer protections had to be included in order for the measure to pass. Representative Steve Wolens authored a competing resolution to allow home equity lending, H.J.R. 44, that contained numerous consumer protections including a fee limitation similar (but not identical) to Section 50(a)(6)(E). (Pl.s’ Ex. 7, I C.R. Suppl. at 99). Rep. Wolens’s version of the fee limitation imposed a three percent fee limit on loans secured by first mortgages and a five percent limit on loans secured by inferior liens. Tex. H.J.R. 44, 75th Leg., R.S. (1997) (Pl.s’ Ex. 7, I C.R. Suppl. at 100-101, lines 5-23 through 6-2).

On March 24, 1997, the House Financial Institutions Committee considered H.J.R. 31. Before hearing public testimony, the Committee heard from Rep. Wolens, who urged the Committee to adopt the numerous consumer protections in his home equity lending

proposal and explained to the Committee his “Ten Commandments” of home equity lending protections. In discussing the limitation on fees, the following exchange took place:

Rep. Wolens [explaining his Ten Commandments]: ... Number 8. Thou shalt limit the fees... . I am talking about the title policy, the survey, the appraisal, the lawyer, the origination fee, blah blah blah... . My approach is charge whatever you want to but you got to stop at some limit that this committee and the legislature thinks is reasonable.

Unidentified voice: Chairman Wolens, your bill takes all of the fees and collectively the limit is three and five percent?

Rep. Wolens: Yeah. We don't say what you can or what you can't. All we say is do what you want but at three and five percent we are turning off the lights. It is just to keep these charges from getting out of hand.

Consideration of Tex. H.J.R. 31, 75th Leg., R.S., Before the House Comm. on Financial Institutions (March 24, 1997) (Tape 1, Side B).³⁹

The Committee then heard public testimony from, among other witnesses, Rob Schneider from Consumers Union. Mr. Schneider explained that homeowners are harmed by “excessive costs associated with abusive equity loans” and that “excessive fees are cited as the reason many loans become excessively costly.” Testimony of Rob Schneider, Tex. H.J.R. 31, 75th Leg., R.S., Before the House Comm. on Financial Institutions (March 24, 1997). (Pl.s’ Ex. 8, I C.R. Suppl. at 103). On behalf of Consumers Union, Mr. Schneider urged the Committee to “limit the overall fees that may be charged to a borrower, to no more

³⁹ Appellees provided legislative history in a tape format when available and also verified the transcription in their motion for summary judgment. (Pl.s’ Amend. Mot. S.J., III C.R. at 657).

than three percent of the total of the loan, regardless of whether it is a first or subsequent lien.” *Id.*

H.J.R. 31 was revised extensively in the House Financial Institutions Committee. Three additional authors – Representatives Marchant, Danberg, and Solomons – were added to this revised version of H.J.R. 31, which was expanded from approximately 190 words to over 2,300 words. (Pl.s’ Ex. 9, I C.R. Suppl. at 110). The bulk of the revisions added the consumer protections proposed by Rep. Wolens, Mr. Schneider and others. On April 17, 1997, the House Financial Institutions Committee approved the Committee Substitute version of H.J.R. 31. This version included a limitation on fees almost identical to the version ultimately adopted:

(h) A lender or any holder of an equity loan may not:

(8) require the borrower to pay, in addition to any interest, fees to the lender or any other person that are necessary to originate, evaluate, maintain, record, insure, or service the loan that exceed, in the aggregate, three percent of the original principal amount of the equity loan;

Tex. H.J.R. 31, Committee Substitute, 75th Leg., R.S. (1997). (Pl.s’ Ex. 9, I C.R. Suppl. at 112).

The Committee adopted the suggestion of Mr. Schneider to limit fees of the loan, regardless of whether the security of the loan was a first mortgage or an inferior lien, instead of Mr. Wolens’ proposal to increase the limit to five percent on loans secured by all liens other than first liens.

The “in addition to any interest” phrase came from Wolens’ proposal.⁴⁰ There was no suggestion in the committee proceedings that this language was intended as a substantive exclusion to the limitation. In fact, the committee’s bill analysis indicated that the phrase was not essential to the meaning of the fee limitation:

Sec. 50 (h) Provides that a lender or holder of an equity loan may not:

(8) require the borrower to pay over 3% fees to originate, evaluate, maintain, record, insure, or service the loan ...

House Comm. on Financial Institutions, Bill Analysis, Tex. H.J.R. 31, 75th Leg., R.S. (1997). (Pl.s’ Ex. 10, I C.R. Suppl. at 115).

On May 10, 1997, the House of Representatives considered H.J.R. 31. Rep. Wolens offered an amendment to substitute another version of H.J.R. 31 over the version voted out of committee. Proposed amendment, Tex. H.J.R. 31, 75th Leg., R.S. (1997) (Pl.s’ Ex. 12, I C.R. Suppl. at 126). This version, which contained approximately 3,200 words, added even more consumer protections. The fee limitation in this version was identical to the fee limitation in the version ultimately adopted:

(6) an extension of credit that:

⁴⁰ In the floor debate on H.J.R. 31 Rep. Wolens provided some insight to the genesis of the “in addition to any interest” language in the fee limitation. Rep. Wolens explained that the source of many of the protections in H.J.R. 31 was a 1994 article in *Barron’s* on reverse annuity mortgages and that this version of H.J.R. 31 protected home equity borrowers and reverse mortgage holders from every abuse found in the article. House Floor Debate, Tex. H.J.R. 31, 75th Leg., R.S. (May 9, 1997) (Tape 141, Side A). The July 4, 1994 issue of *Barron’s* contained an article detailing the pitfalls of reverse annuity mortgages. Andrew Bary, *Reversals of Fortune*, *Barron’s Magazine*, July 4, 1994, at 23. In discussing fees associated with reverse annuity mortgages, the article states: “In addition to interest charges, there are a variety of upfront fees and other closing costs that amount to roughly 3% of the amount of equity a borrower pledges.” *Id.* (Pl.s’ Ex. 11, I C.R. Suppl. at 119).

(E) does not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit;

Tex. H.J.R. 31, 75th Leg., R.S. (1997). (Pl.s' Ex. 12, I C.R. Suppl. at 126).

Rep. Wolens explained on the floor of the Texas House of Representatives the Ten Commandments of home equity protections contained in this version of H.J.R. 31. With respect to the fee limitation, Rep. Wolens explained: "The fees are limited by the *lenders* to three percent." House Floor Debate, Tex. H.J.R. 31, 75th Leg., R.S. (May 9, 1997) (Tape 140, Side B) (emphasis added). No suggestion was made that the limitation excluded fees considered interest. Quite the opposite, a bill analysis of H.J.R. 31, as adopted by the House, was performed by the Senate Research Center, and it described the "consumer protections" to include "limits on extra interest, fees and charges." Senate Research Center, Bill Analysis, Tex. H.J.R. 31, 75th Leg., R.S. (May 15, 1997). (Pl.s' Ex. 13, I C.R. Suppl. at 133). Moreover, Rob Schneider testified to the Senate State Affairs Committee that Consumers Union was in "strong support" of the version of H.J.R. 31 passed by the House because the "additional consumer protections that were needed before the bills could gain [Consumers Union's] support" were, in fact, added to this version of H.J.R. 31.⁴¹ The Senate began consideration of H.J.R. 31 on May 24, 1997. In the floor debate, Senator Jerry Patterson, the Senate sponsor, was asked about the fee limitation by Senator Gonzalo Barrientos:

⁴¹ Mr. Schneider provided the Committee with a "summary of what we believe are important consumer protections that were made in the House version of the bill." Consideration of H.J.R. 31, 75th Leg., R.S., Senate Comm. on State Affairs (May 17, 1997) (Tape 1, Side B). This summary confirms that "HJR 31 limits total fees to 3 percent of principal amount." (Pl.s' Ex. 14, I C.R. Suppl. at 135).

Sen. Barrientos: My last question has to do with fees, the loan fees. How does your legislation deal with these fees?

Sen. Patterson: We have capped the fees at three percent of the loan amount.

Sen. Barrientos: Elaborate on that.

Sen. Patterson: If the loan is \$10,000, the maximum closing cost can be no more than \$300. No closing costs in excess of three percent of the loan amount.

Sen. Barrientos: So there is a cap?

Sen. Patterson: That's correct.

Sen. Barrientos: Thank you senator.

Senate Session, Tex. H.J.R. 31, 75th Leg., R.S. (May 24, 1997) (Tape 4 of 5, side A).

Sen. Patterson was subsequently questioned about the consumer protections in H.J.R. 31 by Senator Mike Moncrief. Sen. Moncrief had a letter from American Association of Retired Persons (AARP) outlining their concerns about proposed home equity lending in Texas, and he went point-by-point through each concern to see what protections were contained in H.J.R. 31.

Sen. Moncrief: Fair terms for home equity loans prohibiting unfair fees and loan provisions?

Sen. Patterson: Three percent cap.

Senate Session, Tex. H.J.R. 31, 75th Leg., R.S. (May 24, 1997) (Tape 4 of 5, side B).

Again, no suggestion was made that the limitation contained an exclusion for fees

considered interest by the usury statute. The Legislators were undoubtedly using the plain meaning for fees and interest.

f. Fee Cap: Intent of the Voters

On November 4, 1997, Texas voters approved H.J.R. 31 in a statewide election. “The primary rule in interpreting the Texas Constitution is to give effect to the intent of the voters who adopted it.” *Winger v. Pianka*, 831 S.W.2d 853, 856 (Tex. App. – Austin 1992, writ denied).

The plain meaning of Section 50(a)(6)(E) and the common understanding of the operative terms are pivotal here. Since the Commissions rely on case law construing a statutory definition both from a different context and broader than the common understanding of the term, it does not appear that the Commissions gave the “intent of the voters who adopted it” much thought. The Home Equity Amendment itself requires that the Fee Cap be explained to borrowers with the following words: “Fees and charges to make the loan may not exceed 3 percent of the loan amount.” TEX. CONST. art. XVI, § 50(g). One would be hard-pressed to argue that the voters’ understanding of the Fee Cap differed from this required explanation.

Descriptions of the Fee Cap to the public during 1997 confirm this understanding. Press reports contemporaneous with the Legislature’s passage of H.J.R. 31 described the provision without any reference to a substantive exclusion. For example: “The bill also requires that: ... lending fees would be limited to 3 percent of the loan.” Associated Press, *Senate OKs home equity amendment; Move would expand borrowing ability*, DALLAS

MORNING NEWS, May 25, 1997 (Pl.s' Ex. 50, I C.R. Suppl. at 140). In the fall of 1997, numerous press and other media reports describing the Home Equity Amendment reported that fees would be limited to three percent of the loan. For example, the Financial Industry Issues, a newsletter published by the Federal Reserve Bank of Dallas (an institution that one would think would be knowledgeable in this area), explained: "There is also a cap of 3 percent of the equity loan value on all fees charged by the lender in connection with the equity loan." *Financial Industry Issues*, published by the Federal Reserve Bank of Dallas (3rd Quarter 1997) (Pl.s' Ex. 16, I C.R. Suppl. at 142, 143). Counsel for the Appellees have been unable to find any mass communications to the public from this time period that suggested that the Fee Cap contained an exclusion for lender fees.

The House Research Organization prepared a detailed explanation of the Home Equity Amendment (*i.e.*, Proposition 8) and the other 13 proposed amendments on the November 4, 1997 ballot. Eight pages were devoted to the Home Equity Amendment. In the neutral exposition of the proposed amendment, the Fee Cap was described as follows: "The total amount of fees to originate, evaluate, maintain, record, insure or service the loan could not exceed 3 percent of the principal." House Research Organization, Constitutional Amendments, September 5, 1997, 18 (Pl.s' Ex. 17, I C.R. Suppl. at 166). The "Supporters Say" section added that: "Other strong consumer protection provisions would cap fees. . ."

Id. at 22 (Pl.s' Ex. 17, I C.R. Suppl. at 170). No suggestion was made that lender fees were excluded from the Fee Cap, at least before the Home Equity Amendment was adopted.⁴²

g. Fee Cap: Rule Defeats Purpose

Mindful of the potential harm to Texas homeowners, the drafters of the Home Equity Amendment sought to allow home equity lending in Texas while, at the same time, minimizing the abusive lending practices experienced in other states.⁴³ In fact, the Home Equity Amendment is often described as the first anti-predatory lending law in the United States.⁴⁴

⁴² Once the Commissions' interpretation went into effect, lenders have comfortably charged Texans fees that would have otherwise broken the Fee Cap. Almost six years after the Home Equity Amendment was adopted, the Commissions' found an Austin American Statesman article that stated: "Take extra care with closing costs. They're capped at 3 percent of the loan amount, but that's not a real cap; costs classified as 'interest' aren't included." (Coms. D.s' Cross Mot. S.J., III C.R. 720).

⁴³ Rep. Kenny Marchant, a Republican Representative from Carrollton who played a central role in putting together the compromise H.J.R. 31, called the Home Equity Amendment the "strictest, most consumer-friendly, safest home equity bill in the United States." Bruce Hight, *Tradition Falls Away as House Approves Home Equity Bill*, AUSTIN AM.-STATESMAN, May 30, 1997, at A1 (Pl.s' Ex. 18, I C.R. Suppl. at 192). See also R.G. Ratcliffe, *Texas voters to decide fate of home equity loans/Proposal is placed on Nov. 4 ballot/75th Legislature*, HOUSTON CHRONICLE, May 30, 1997, at A1 ("I recommend this home equity bill as the strictest, most consumer-friendly, safest home equity bill in the United States," said state Rep. Ken Marchant, R-Dallas.) (Pl.s' Ex. 18, I C.R. Suppl. at 195); John W. Gonzalez, *Home equity plan OK'd/Long-sought measure OK'd/75th Legislature*, HOUSTON CHRONICLE, May 10, 1997, at A1 (Co-author Rep. Ken Marchant, R-Carrollton, called the measure "the safest home-equity bill in the United States.") (Pl.s' Ex. 18, I C.R. Suppl. at 197). Sen. Jerry Patterson, a Republican from the Houston suburb of Pasadena who sponsored H.J.R. 31 called it the most "consumer friendly" equity lending legislation in the 50 states." Mary Alice Robbins, *Senate wants to put equity issue to voters*, LUBBOCK AVALANCHE-JOURNAL, May 24, 1997 (Pl.s' Ex. 18, I C.R. Suppl. at 199).

⁴⁴ According to the Office of the Consumer Credit Commissioner of Texas: "Although North Carolina often is recognized as the first state to pass comprehensive predatory lending legislation in 1999, Texas actually took the first legislative steps to address predatory lending issues. Texas' 1998 Home Equity Lending Amendment contains numerous protections against what many term predatory lending practices." Office of the Consumer Credit Commissioner, *Strategic Plan for the Period 2003-2007*, 14 (2002) (Pl.s' Ex. 4, I C.R. Suppl. at 72).

Charging borrowers excessive up-front fees has been a pervasive problem with home equity lending for many years in other states.⁴⁵ In fact, the Departments of Housing and Urban Development and Treasury in their landmark joint report on predatory lending identified “Excessive Fees and Packing” as one of the four main categories of abusive lending practices. Departments of HUD and Treasury, *Curbing Predatory Home Mortgage Lending*, (June 2000) (hereinafter “HUD/Treasury Joint Report”).⁴⁶ (Pl.s’ Ex. 20, I C.R. Suppl. at 222). The HUD/Treasury Joint Report found that “in many instances the Task Force saw evidence of fees that far exceeded what would be expected or justified based on economic grounds, and fees that were ‘packed’ into the loan amount without the borrower’s understanding.” HUD/Treasury Joint Report at 2.⁴⁷ (Pl.s’ Ex. 20, I C.R. Suppl. at 222). According to the Office of the Consumer Credit Commissioner of Texas, the Fee Cap was the “Texas Response” to the problem of excessive fees described in the HUD/Treasury Joint Report.⁴⁸

⁴⁵ In 1994, a joint committee of the United States Senate and House of Representatives announced: “Considerable testimony before the Senate and House Banking Committees has indicated that communities lacking access to traditional lending institutions are being victimized. . . by second mortgage lenders, home improvement contractors, finance companies, and banks who peddle high-rate, **high-fee** home equity loans to cash-poor homeowners.” Conference Report 103-652, H.R. 3474, 103rd Cong. 2d Session at 158 (August 2, 1994) (emphasis added) (Pl.s’ Ex. 19, I C.R. Suppl. at 211).

⁴⁶ Only a portion of the report was included in the record. The entire 119-page report is available at <http://www.huduser.org/publications/hsefin/curbing.html>.

⁴⁷ The Office of the Consumer Credit Commissioner of Texas, in nearly identical language, acknowledged the predatory nature of these practices: “The lender packs excessive fees, including unnecessary insurance coverage, other up-front charges, and additional junk fees (escrow waiver fees, fax fees, copy charges, etc.) into the loan agreement without the borrower’s understanding. Often the fees far exceed what would be expected or justified based upon economic grounds.” Office of the Consumer Credit Commissioner, *Strategic Plan for the Period 2003-2007*, 15 (2002) (citing HUD/Treasury Joint Report at 2) (Pl.s’ Ex. 4, I C.R. Suppl. at 73).

⁴⁸ *Id.* (citing HUD/Treasury Joint Report at 2) (Pl.s’ Ex. 20, I C.R. Suppl. at 222).

Preventing lenders from charging Texas borrowers excessive fees for home equity loans was the specific object and purpose of the Fee Cap. Points and other fees paid to the lender were precisely the excessive fees cited as harmful by the HUD/Treasury Joint Report on Predatory Lending. By excluding points, origination fees, and other fees paid to lenders, the Commissions completely defeated the purpose of the Fee Cap.

This dismantling of the Fee Cap is particularly harmful because, for the vast majority of Texas home equity loans, there are **no** legal restrictions on the fees lenders can charge borrowers. While Appellants argue for the usury definition of interest to exclude fees from the Fee Cap, the Texas usury statute itself does not limit the interest rate on most of these loans because of federal preemption.⁴⁹ The vast majority of home equity loans made in Texas pursuant to Section 50(a)(6) – over 85 percent of the loans representing over 90 percent of the total dollar value of the equity loans made – are first mortgage loans⁵⁰ and thus unregulated by the Texas usury laws. In fact, many home equity lenders often require first

⁴⁹ Federal preemption as imposed by Section 501 of the federal Depository Institutions Deregulation and Monetary Control Act of 1980 (“DIDMCA”) eliminated all state law interest rate limitations on residential loans so long as the loan is secured by a first lien mortgage. 12 U.S.C. §1735f-7 (2005). Because of DIDMCA, the interest rate limitations and other usury prohibitions in the Texas Finance Code (and elsewhere in Texas law) are not applicable to first mortgage loans. See *Pineda v. PMI Mortgage Insurance Co.*, 843 S.W.2d 660, 670 (Tex. App.–Corpus Christi 1992, writ denied) (“DIDMCA applies and preempts Texas usury laws regarding mortgage loans secured by first liens on residential real estate.”); 7 TEX. ADMIN. CODE § 153.16(1) (2006) (Interest rates on certain first mortgages are not limited on loans subject to DIDMCA).

⁵⁰ According to the 2003 Home Equity Lending Report, Office of Consumer Credit Commissioner, since 2000, lenders made 148,664 first lien Texas home equity loans with a total dollar value of \$12.36 billion and 26,384 second lien loans with a total dollar value of \$1.22 billion.

mortgage liens precisely to take advantage of the unlimited interest rates allowed by federal law.⁵¹

h. Fee Cap: Existing Case Law Interpreting Fee Cap Mixed

Few cases have been decided interpreting the Fee Cap. One federal court reviewed whether origination fees should be included in the Fee Cap. In *Thomison v. Long Beach Mortgage*, 176 F.Supp. 2d 714 (W.D. Tex. 2001), the federal District Court for the Western District of Texas held that, notwithstanding the fact that origination fees were considered interest by the usury statute⁵², origination fees were still included in the Fee Cap.⁵³ *Thomison* was vacated, at the request of the parties pursuant to settlement, by 2002 U.S. Dist. LEXIS 27175 (W.D. Tex. 2002). (Pl.s' Ex. 21, Motion to Vacate, I C.R. Suppl. at 240). Without explanation or comment, the Commissions declined to follow *Thomison* and enacted 7 TEX. ADMIN. CODE § 153.5(6).

A Texas court of appeals reviewed whether discount points should be included in the Fee Cap. In *Tarver v. Sebring Capital Credit Corp.*, 69 S.W.3d 708, (Tex. App. – Waco 2002, no pet.), the Waco Court of Appeals held that “points” were excluded from the Fee

⁵¹ See Cathy Lesser Mansfield, *The Road to Subprime “HEL” Was Paved With Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S. CAL. L. REV. 473 (2000). See also her Declaration, which discusses the Commissions’ definition of interest and its effect on the Fee Cap. (Pl.s’ Ex. 30, I C.R. Suppl. at 305-314).

⁵² “An origination fee is treated as interest. An origination fee is aggregated with other interest charges for the purposes of a usury calculation.” 7 TEX. ADMIN. CODE § 83.707(g) (2006).

⁵³ Judge Nowlin observed: “The bottom line is this: Defendant charged Plaintiffs \$680 and chose to call it a ‘loan origination fee.’ The Texas Constitution prohibits ‘fees ... necessary to originate’ loans such as this one. The idea that this charge would not fall within the meaning of § 50(a)(6)(E) would seem laughable to the average citizen; and it should. Words have meaning. Sometimes the meaning is vague or ambiguous, but where words used are identical, the inquiry should be over.” *Thomison*, 176 F.Supp. 2d at 717-18 (emphasis in original), *vacated, at the request of the parties pursuant to settlement*, by 2002 U.S. Dist. LEXIS 27175.

Cap.⁵⁴ In reaching this conclusion, the court relied largely on the precursor to the regulations challenged herein (*i.e.*, the October 7, 1998 Regulatory Commentary on Equity Lending Procedures).⁵⁵ (Pl.s' Ex. 22, I C.R. Suppl. at 246). The focus of the *Tarver* opinion was whether points were considered interest, and the court correctly determined that they were under the usury statute. Whether the constitutional language actually requires that interest defined in the usury context be excluded from the Fee Cap was not seriously examined by the Waco Court; it merely accepted the Regulatory Commentary as adopted by the Commissions' departments. Moreover, it is important to note that Section 50(a)(6) has been modified since *Tarver*. Section 50(a)(6)(M)(ii) was added to the Texas Constitution after *Tarver* was decided and removed any remaining doubt that "interest" as used in Section 50(a)(6) does not include fees considered interest. See discussion *supra* at 17.

"The rule has long prevailed in this State that constitutional provisions should not be given a technical construction which would defeat their purpose." *Sears v. Bayoud*, 786 S.W.2d 248, 252 (Tex. 1990) quoting *Cramer v. Sheppard*, 167 S.W.2d 147, 154 (1942). After examining the plain language, other provisions of the Texas Constitution, the

⁵⁴ "[C]harges that constitute interest under the law, including, for example, points are not fees subject to the three percent limit." *Tarver*, 69 S.W.2d at 712.

⁵⁵ "After H.J.R. 31 amended the Texas Constitution to allow homeowners to access the equity in their homestead through a loan, four administrative agencies [each governed by one of the Commissions] joined in signing the October 8, 1998, Regulatory Commentary on Home Equity Lending (the 'Commentary'). The four agencies were: Office of Consumer Credit Commissioner, Texas Department of Banking, Texas Savings & Loan Department and the Texas Credit Union Department.

...
Proposed Chapter 153 is derived, for the most part, from the Commentary except to the extent that the Commissions consider it necessary to expound on or clarify the Commentary." Commentary to 7 TEX. ADMIN. CODE § 153, 28 Tex. Reg. 9646 (Nov. 7, 2003) (Pl.s' Ex. 2, I C.R. Suppl. at 35).

legislative history, the representations to the voters, and the purpose of the provision – the trial court properly held that the Fee Cap applies to lender fees and invalidated the applicable rules enacted by the Commissions. Appellees request this Court affirm the decision of the trial court.

Issue Two: 7 TEX. ADMIN. CODE § 153.12(2) (“Oral Application Rule”)

Does the Texas Constitution require a homeowner to submit a written application in order to obtain a home equity loan? (The Commissions require no more than applications taken by telemarketers over the phone.)

Texas Constitutional Provision	Commissions’ Rule Invalidated
<p>Section 50(a)(6)(M)(i): “is closed not before the 12th day after the later of the date that the owner of the homestead submits an application to the lender for the extension of credit or the date that the lender provides the owner a copy of the notice prescribed by Subsection (g) of this section;”</p>	<p>§153.12.Closing Date: Section 50(a)(6)(M)(i). An equity loan may not be closed before the 12th calendar day after the later of the date that the owner submits an application for the loan to the lender or the date that the lender provides the owner a copy of the required consumer disclosure. For purposes of determining the earliest permitted closing date, the next succeeding calendar day after the date the lender provides the owner a copy of the required consumer disclosure is the first day of the 12-day waiting period. The equity loan may be closed at any time on or after the 12th calendar day after the date the consumer disclosure is provided to the owner.</p> <p>(1) Submission of a loan application to an agent acting on behalf of the lender is submission to the lender.</p> <p>(2) <i>A loan application may be given orally or electronically.</i>³⁶</p>

Section 50(a)(6)(M)(i) mandates a "cooling-off" period to assure the homeowner fully understands and appreciates the nature and gravity of the transaction. The provision

³⁶ Appellees only challenged whether an application can be given orally. The trial court only struck that portion of Rule 153.12(2).

prohibits an equity loan from closing less than twelve days after the homeowner "submits an application" to the lender. The trial court effectively held that an oral loan application is an insufficient trigger for the "cooling-off" period and that a written application is required in order to apply for a home equity loan.

The Legislature and voters approved another provision in the Home Equity Amendment as part of the disclosure notice required to be given to the homeowner:

(M) THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU
SUBMIT A **WRITTEN** APPLICATION TO THE LENDER

TEX. CONST. art. XVI, § 50(g) (emphasis added). There is no conflict between Section 50(g) Section 50(a)(6)(M)(i). Reading Section 50 as a whole, giving effect to the words chosen,⁵⁷ a lender must receive a written application and wait 12 days before closing.

Appellants suggest that since *Stringer v. Cedant Corp.* held that Section 50(g)'s notice provision does not independently establish rights or obligations, it should be ignored. Bankers' Brief at 23, Commissions' Brief at 18-19, citing *Stringer*, 23 S.W.3d 353, 357 (Tex. 2000). However, unlike this case, *Stringer* involved two conflicting provisions of the Constitution, and the Court found nothing in them or the legislative history to resolve the conflict. *Stringer*, 23 S.W.3d at 356. As a result, the Court held that one provision prevailed over the other and ruled that Section 50(g) does not independently establish rights or obligations. *Id.* Here, there is no such conflict between the two constitutional provisions of

⁵⁷ Even a common sense reading of the term "submits an application" evokes the act of physically submitting a written loan application, not a casual phone call. This Court must give effect to the plain language of the Constitution. *Doody v. Ameriquest Mortgage Co.*, 49 S.W.3d 342, 344 (Tex. 2001).

Section 50(a)(6)(M)(i) and Section 50(g). Read together, they clearly illustrate the drafters' intent that the loan application be in writing. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (“We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone.”) (citation omitted).

The Commissions' interpretation is also inconsistent with the intent of the drafters to assure that homeowners are adequately protected. While the Bankers may trivialize the facts as “snippets of legislative history,”⁵⁸ the statements and actions of the Legislators reveal a profound struggle to develop equity lending safeguards that protect Texas families. Chief among the legislators' wishes was the creation of rigid procedural requirements before a loan could be made. For example, one key legislator commented that “I want there to be formality in the process and I don't want it to be casual.”⁵⁹ The legislator went on to elaborate: “We put a lot of formality into this bill so that the equity loan is not casual, it's not accidental, you just don't get this stuff off the internet or all this stuff that comes in through the mail, you sign it and all of the sudden your home has been put up for collateral. We want formality in the process.”⁶⁰

⁵⁸ Bankers' Brief at 9.

⁵⁹ Testimony of Rep. Steven Wolens, Before the House Comm. on Financial Institutions, Tex. H.B. 447, Tex. H.J.R. 44, Tex. H.J.R. 31, 75th Leg., R.S. (March 24, 1997) (Tape 1, Side B).

⁶⁰ *Id.*

Allowing oral loan applications decreases this required formality and waters down the intended protections.⁶¹ Simply put, a written loan application is more formal than a phone call.⁶² Nevertheless, Appellants argue that the formalities of a written loan application “restrict Texans to outdated business practices.” Commissions’ Brief at 17. Regardless of whether the Commissions or others believe that these constitutional requirements are inconvenient, unnecessary, or cumbersome, they are not discretionary. Appellants may not prefer the words adopted by the Texas Legislature or the voters; however, it is not within the province of this case to debate their wisdom.

The Commissions assert that Appellees’ concerns are unfounded because the 12-day cooling-off period also runs from the date the lender provides a copy of the required pre-loan disclosure. Commissions’ Brief at 18. Yet the Commissions also argue that the disclosure notice is presumed to have been delivered three days after mailing and allow delivery to a borrower’s broker, further weakening this cooling off protection.⁶³ Moreover, allowing oral

⁶¹ The Commissions even go so far as to state that even if the Constitution requires a written application, “a lender could just as easily treat a postcard with the borrower’s name and phone number as a written application.” Commissions’ Brief at 22. Consider, also, the definition of an oral application offered in open court by the Commissions’ counsel:

The Court: What is an oral application?

Commissions’ Attorney: “Dear Mr. Bank, I want to go on vacation. Love, Ann. Send papers, please.”

(R.R. at 99). These examples belie the legislative intent and the formality of the process required by the Constitution, and Appellees would encourage the Commissions to adopt a definition of application to prevent this abuse if it appeared necessary.

⁶² Without utilizing a written loan application, each lender determines when the application is submitted, and it may very well mean a telephone call where the telemarketer merely clicks a few boxes on a computer screen claiming that the homeowner applied for a loan (and the telemarketer might very well be paid by the number of applications obtained). There is no way for a borrower to know what the lender’s agent understood them to say. There is no way a borrower can know what their application contains. Such a process is not formal, can lead to abusive lending practices, and is not what the drafters or the voters intended.

⁶³ See discussion of 7 TEX. ADMIN. CODE §153.51, *infra* at 58.

applications whittles down constitutional protections for homeowners in the home equity lending process.⁶⁴ For example:

“Initial credit applications may become critical documents in determining what amounts borrowers originally sought, and may become increasingly subject to manipulation by lenders. This is particularly true in the case of elderly borrowers, as applications are generally completed by agents of the lender, and simply signed by the borrower, who often signs the form while still blank.”

Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing A Cure for the Home Equity Loss Ailing the Elderly*, 10 B.U. PUB. INT. L.J. 1, 35 (2000). In the end, though, the issue before this court is whether the interpretation is consistent with a plain reading and intent of the constitution, and it is not.

Further examination of legislative intent supports Appellees’ conclusions. The Section-by-Section Analysis of the resolution leading to the amendment states that “[A] lender or holder of an equity loan may not close the loan before the twelfth day after the lender *receives the completed application*.” House Comm. on Financial Institutions, Bill Analysis, Tex.C.S.H.J.R. 31, 75th Leg. (April 20, 1997) (emphasis added) (Pl.s’ Ex. 10, I C.R. Suppl. 116). Like the term “submits an application,” a common sense reading of “receives a completed application” evokes a written communication, not an oral one.

Lastly, the Commissions cite the Equal Credit Opportunity Act as an example of common practices that allow oral and written applications. Commissions’ Brief at 17.

⁶⁴ For a problematic set of facts, take the case of *Newton v. United Companies Financial Corp.*, 24 F.Supp.2d 444, 457 (E.D. Penn. 1998), where applicants did not fill out a written application for credit. “Instead, the applicant or a contractor or broker made an initial request, and then United gathered all the necessary information and filled out a written application. In each plaintiff’s case, the written application created by United, and seen for the first time and signed by each borrower at closing, does not reflect the terms of the credit requested by the plaintiff.” *Id.*

Whether federal law requires written applications for home equity loans is not the question before the Court.⁶⁵ Rather, the question is whether the Texas Constitution requires written applications in order to obtain a home equity loan. Indeed, the maze of federal statutes, regulations, and commentaries may have been why the drafters intended home equity loan applications be written. In any case, while lenders and borrowers can exchange information on the phone, the issue is whether the information must be reduced to writing 12 days before the loan closes. For example, nothing prevents a lender from taking information by phone, creating a document, and e-mailing it to the borrower for signature. However, in order to comply with the plain meaning of the Constitution and the intent of the drafters, a written application must be submitted at least twelve days before the closing. Any other interpretation is inconsistent with language and intent of the Homestead Provision of the Texas Constitution. The trial court incorrectly invalidated this rule.

Issue Three: 7 TEX. ADMIN. CODE § 153.84(1) (“Convenience Check Rule”)

Does the Texas Constitution prohibit a borrower from accessing his home equity loan using methods that appear to be similar to constitutionally prohibited methods? (The Commissions created exceptions without defining or distinguishing them from the prohibited methods.)

⁶⁵ It is further worth noting that the Equal Credit Opportunity Act (ECOA) is an anti-discrimination statute designed to deter and remedy credit discrimination. To better protect the public, ECOA applies to both oral and written applications. See 12 C.F.R. § 202.2(f) (2005). Also, while the Commissions correctly point out that the commentary to 12 C.F.R. Section 202.4(c) of Regulation B states that a lender does not necessarily need to use a written application signed by the borrower in order to comply with the rule, the practice of using a computerized entry system (and not a written application) could thwart an investigation into whether ECOA violations or other violations of law have occurred. See, e.g., *FTC v. Capital City Mortgage Corp.*, 321 F.Supp.2d. 16, 23 (D.D.C. 2004) (“In this case, the FTC alleges that Defendants failed to take written applications or collect required information, thus making it more difficult for it determine whether Capital City was discriminating against credit applicants based on their race, national origin, sex, martial status, or age.”)

Texas Constitutional Provision	Commissions' Rule Invalidated
<p>Section 50(t)(3): “the owner does not use a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance;”</p>	<p>§153.84 Restrictions on Devices and Methods to Obtain a HELOC Advance: Section 50(t)(3). ... <i>(1) A lender may offer one or more non-prohibited devices or methods for use by the owner to request an advance. Permissible methods include contacting the lender directly for an advance, telephonic funds transfers, and electronic funds transfers. Examples of devices that are not prohibited similar devices include prearranged drafts, convenience checks, or written transfer instructions.</i> ... (4) A preprinted solicitation check, which is a prohibited device under Section 50(t)(3), is a check that: (A) is provided to an owner for the purpose of originating a HELOC or to a borrower for the purpose of soliciting additional advances on an existing HELOC; (B) contains at least one preprinted key payment term, such as the amount or the payee; and (C) is not requested by the borrower of owner.</p>

To protect Texas homeowners from abusive lending practices and ensure that homes are not frivolously put at risk, the Texas Constitution limits the ways that homeowners can draw on a home equity line of credit. Specifically, the Texas Constitution prohibits the use of a “credit card, debit card, preprinted solicitation checks, or *similar device* to obtain an advance” on a line of credit. TEX. CONST. art. XVI, § 50(t)(3) (emphasis added). However, Rule 153.84 allows for the use of “convenience checks” and a host of other devices that the Commissions do not define. 7 TEX. ADMIN. CODE § 153.84(1) (2006). Despite the insistence of the Bankers and the Commissions to the contrary, “convenience checks” are, at the very least, “similar devices,” and therefore prohibited by the Constitution.

The Commissions defined “preprinted solicitation check” and attempted to give meaning to every word of this term. *See* 7 TEX. ADMIN. CODE § 153.84(4) (2006).⁶⁶ Regrettably, however, the Commissions failed to offer definitions and qualifications for any of the other devices, including convenience checks, that the Commissions decided are *not* prohibited by the Constitution. Instead, without defining them, the rule simply list permissible and non-prohibited devices.⁶⁷ The Rule does not explain why the listed devices are not prohibited “similar devices” or even what makes these devices like or unlike the three prohibited devices. TEX. CONST. art. XVI, § 50(t)(3); 7 TEX. ADMIN. CODE § 153.84 (2006). It is this utter lack of clarity in the Rule that has produced the absurd result of all parties in this case seeking to interpret the Commissions’ interpretation of the Texas Constitution. It is also this laxness of the Rule that produces unconstitutional results.

If the Commissions were to actually interpret Section 50(t)(3), they would either: (1) define prohibited devices and explain what makes them similar to credit cards, debit cards, and preprinted solicitation checks, or (2) define non-prohibited devices and explain why they are unlike those that are prohibited. The Commissions did neither. While acknowledging that prohibited devices are those akin to credit cards, debit cards, or preprinted solicitation checks, the Commissions never attempt – either in the interpretations or in their briefs – to

⁶⁶ The Commissions incorrectly state the trial court invalidated the preprinted solicitation check rule and then attempted to defend it. Commissions’ Brief 26-27. Only 7 TEX. ADMIN. CODE § 153.84(1) was invalidated by the court.

⁶⁷ The interpretation inexplicably lists some devices as “permissible” and others as “not prohibited” without defining the distinction, if any, between those two terms.

offer any distinction between the constitutionally-prohibited devices and the ones they permit.⁶⁸

Appellees challenge the inclusion of devices, including convenience checks, that are undefined and that create exceptions that swallow the constitutional rule. Some checks provided to the Commissions by a commenter during the public hearing considering this rule are a case in point.⁶⁹ The checks were labeled “Convenience Checks” and would have drawn on a credit card account. (Pl.s’ Ex. 28, I C.R. Suppl. at 293, referred to in prior briefing by the parties as “Tab 28 checks” or “Exhibit 28 checks”). While these Tab 28 checks may not exactly be “preprinted solicitation checks” as defined by the Commissions, these checks are at least similar devices and still prohibited by Section 50(t)(3). The Commissions did not address them at the hearing and continue to waffle in their briefing and oral argument on this issue.⁷⁰ Without a definition of convenience check, it is quite likely that these checks are

⁶⁸ The Bankers fare no better in the attempt to clarify the nature of prohibited devices under the Constitution. The Bankers reject the suggestion that, under the principle of *ejusdem generis*, any interpretation of “similar devices” should look to what credit cards, debit cards, and preprinted solicitation checks have in common – i.e., the fact that they all provide quick and ready advances. Bankers’ Brief at 29-30. However, in the case cited by the Bankers, the Texas Supreme Court stated that “[u]nder the rule of *ejusdem generis*, where specific and particular enumerations of persons or things in a statute are followed by general words, the general words are not to be construed in their widest meaning or extent, but are to be treated as limited and applying only to persons or things *of the same kind or class as those expressly mentioned.*” *Stanford v. Butler*, 181 S.W.2d 269, 272 (Tex. 1944) (emphasis added). In any case, the Bankers themselves fail to identify any *alternative* characteristic to the three prohibited devices that might guide an interpretation. As a result, the Commissions’ interpretation of Section 50(t)(3) simply ignores the “similar device” language.

⁶⁹ Credit Union Commission Meeting Minutes at 3, Feb. 20, 2004 (Pl.s’ Ex. 27, I C.R. Suppl. at 290). The commenter provided the Commissions with the checks and an enclosed letter he received unsolicited. The letter’s header states “Relax, Write a Check and Start Saving.” (Pl.s’ Ex. 28, I C.R. Suppl. at 293).

⁷⁰ Appellants originally distanced themselves from any characterization of the Tab 28 checks because they were related to credit cards. (Comm’ns D.s’ Cross Mot. S.J. at 44, III C.R. at 749). Subsequently, they appeared to acknowledge that “. . . a solicitation check, or the ‘similar device’ described by Tab Exhibit 28, cannot be used to solicit a new home equity borrower or to encourage a home equity borrower to obtain an advance.” (Comm’ns D.s’ Cross Mot. S.J. at 47, III C.R. at 752). However, at oral argument on the motions for summary judgment, the Commissions’ counsel denied that they had made any determinations about Exhibit 28, but stated: “I think a convenience check probably could be construed as Exhibit 28.” (R.R. at 128.)

similar to the other prohibited devices in Section 50(t)(3).⁷¹ The constitutionally-mandated notice itself states:

YOU MAY NOT USE A CREDIT CARD, DEBIT CARD, SOLICITATION CHECK, OR SIMILAR DEVICE TO OBTAIN ADVANCES UNDER THE LINE OF CREDIT

TEX. CONST. art. XVI, § 50(g) (emphasis added).

The perils of the convenience check exception are illustrative of the broader problem with this Rule, specifically the lack of a definition for this and other devices.⁷² Despite this, Appellants contend that there is a commonly understood definition of convenience checks that makes them obviously permissible devices. Bankers' Brief at 30. The reality is that the commonly understood definition of a convenience check illustrates why they should be impermissible devices. Convenience checks are frequently cited as tied to credit card

⁷¹ Appellants' position at its core is an exercise in *ipse dixit*. They begin with the ultimate conclusion that convenience checks are not similar to the prohibited devices of credit cards, debit cards, or preprinted solicitation checks. Bankers' Brief at 28. They next state that the Commissions defined the prohibited, preprinted solicitation checks in a certain manner. In contrast, they announce the Commissions determined that convenience checks are permissible. From this we can "infer" or conclude by "negative implication" that convenience checks are not preprinted solicitation checks. Hence, convenience checks must not be prohibited. Bankers' Brief at 28-29; Commissions' Brief at 22. While Appellees do not contend that convenience checks are preprinted solicitation checks, the fact that they may not qualify under that definition does not mean they are permissible devices. Apparently, a device is prohibited or not prohibited because the Commissions say it is or is not. Far from providing a clear safe harbor, an interpretation based on this kind of circular reasoning is clearly irrational and invalid.

⁷² While convenience checks have the most obvious flaws as devices, Appellees believe the other undefined and unlimited devices Appellants claim are permissible and non-prohibited are – simply because they are undefined and unlimited – invalid interpretations of the constitution. For example, an "electronic fund transfer" could mean almost anything. The others have similar flaws. The Bankers' witness, a Compass Bank senior counsel, did not know what a "written transfer instruction" was and erroneously believed that a "prearranged draft" is defined in a Texas statute. (Sargent Dep. at 27, IV C.R. at 1017). "Contacting a lender directly" seems fairly reasonable, assuming the borrower initiates the contact, but the Commissions failed to include this requirement in their rule. Finally, if "telephonic fund transfers" are found to be a proper exception, lenders might be free to telemarket borrowers, soliciting them to make additional advances on their home equity loan by phone calls, and subjecting Texas homeowners to hosts of abuses.

accounts.⁷³ They typically arrive unsolicited, often when borrowers are already deeply in debt.⁷⁴ They have been widely criticized in recent years as a very expensive way to access credit and are typically mailed by financial institutions to increase usage by active cardholders and energize dormant accounts.⁷⁷ The issuance of credit card convenience checks by banks has become so utterly routine that they have been widely implicated in a range of criminal activities.⁷⁸ Indeed, the Bankers produced a witness, Compass Bank's senior counsel, who admitted that a convenience check can be used without the verification and authentication his bank would ordinarily require in a credit card transaction⁷⁹ and that his bank sends convenience checks to HELOC borrowers unsolicited.⁸⁰ These commonly

⁷³ Bankers' witness, Scott Sargent testified in his deposition that Compass Bank issues convenience checks with their credit cards. (Sargent Dep., IV C.R. at 1002). See also, *Ong v. Sears, Roebuck and Co.*, 388 F. Supp. 2d 871 (N.D. Ill. 2004); *Panem v. MBNA America Bank, N.A.*, 2006 Bankr. LEXIS 2347, 42-43 (Bankr. D. Colo. 2006); *East v. AT&T Universal Card Servs. Corp.*, 1999 U.S. Dist. LEXIS 9963 (N.D. Tex. 1999).

⁷⁴ See, e.g., *Panem*, 2006 Bankr. LEXIS at 43 (Court criticized bank because it sent unsolicited convenience checks to borrowers with substantial debts they could not repay. "It would be unjust to allow a creditor to blindly request its cardholders utilize convenience checks and then allow that creditor to later claim nondischargeability on the basis of fraud under the premise that the creditor had *absolutely no duty to consider the debtors' then current financial condition before making the offer*" (emphasis in original)); *In re: Ashland*, 307 B.R. 317, 319 (Bankr. D. Mass. 2004) (bankruptcy case in which convenience checks had been mailed with monthly credit card statement and used, in part, to hire bankruptcy counsel).

⁷⁷ See, e.g., *Panem*, 2006 Bankr. LEXIS at 12; *AT&T Universal Card Servs. Corp. v. Akdogan (In re Akdogan)*, 204 B.R. 90, 92 (Bankr. D.N.Y. 1997).

⁷⁸ See *United States v. Alaroncon-Simi*, 300 F.3d 1172 (9th Cir. 2002) (convictions involving defendants' digging through trash dumpster in search of credit card convenience checks, which they wrote out and deposited in their own accounts); *United States v. Riley*, 335 F.3d 919, 923 (9th Cir. 2003) (convictions based on participation in a conspiracy to pass fictitious financial instruments, including stolen credit card convenience checks); *United States v. Joseph*, 310 F.3d 975, 976 (7th Cir. 2002) (conviction for stealing credit card convenience checks that were deposited into fraudulent accounts); *United States v. Omoruyi*, 260 F.3d 291, 293 (3rd Cir. 2001) (blank 'convenience checks' attached to the bottom of First USA credit card statements stolen from mail in Texas; three American Express convenience checks stolen from the mail in New York).

⁷⁹ Sargent Dep. at 21-23 (IV C.R. at 1011-13).

⁸⁰ Sargent Dep. at 20 (IV C.R. at 1010).

held definitions of convenience checks would only support their prohibition as “similar devices” under the Texas Constitution.

The Commissions propose in their brief that convenience checks could be checks not having the attributes of an illegal preprinted solicitation check. Commissions’ Brief at 22. One of the key attributes of a convenience check, according to the Commissions brief, could be that the check does not have a preprinted key payment term, such as an amount. *Id.* Similarly, the senior general counsel to Compass Bank, offered by the Bankers in deposition, testified that one of the fundamental differences between a convenience check (presumably one allowed by the Commissions) and a preprinted solicitation check is the element of control, because a solicitation check has the amount or the payee filled in, and therefore the borrower has less control in using the device.⁸¹ Neither the Commissions nor the Bankers offer any distinctions between credit cards, which are prohibited by the constitution, and convenience checks, which are authorized by the Commissions. In fact, there are no more controls on a borrower who uses a credit card than one who uses a convenience check. Therefore, convenience checks should be prohibited devices just as credit cards, because they are clearly similar devices.

Furthermore, there is a statutory definition of “credit card”:

"Credit card" means a card, confirmation, or identification or *check* or other written request by which a customer obtains access to a revolving credit account.

⁸¹ Sargent Dep. at 25-26 (IV C.R. at 1015-16).

TEX. FIN. CODE § 346.001(2) (Vernon 2006) (emphasis added). A strict reading of this definition would likely include most, if not all, the devices in 153.84(1) as “credit card” transactions and thus prohibited by Section 50(t)(3). That is, the Finance Code’s definition of credit card would likely include a “convenience check,” “prearranged draft,” “written transfer instructions,” or “electronic transfer,” none of which are defined by Rule 153.84(1). The Commissions considered this statutory definition and acknowledged the inherent conflict between their rule and the statute; however, rather than prohibit a device like a convenience check or other similar devices, the Commissions considered evading the issue with a different definition of “credit card.”⁸² In the end, for reasons unknown, the Commissions simply did not define what “credit card” means in Section 50(t)(3).

The Homestead Provision provides a variety of protections to Texas homeowners from abusive lending practices and ensures that homes are not frivolously put at risk. The limitation on the specified devices that can be used to draw on home equity loans is one of those protections. But Section 50(t)(3)’s reference to “similar devices” makes clear that the list is not comprehensive. Yet the Commissions disingenuously claim they have no authority to “interpret those provisions in a manner that expands the list of prohibited devices,” and

⁸² The Commissions stated: “One commenter recommended that the term ‘convenience check’ be excluded from the definition of ‘credit card’ contained in §346.001(2), Texas Finance Code. The Commissions evaluated this recommendation and determined to modify the interpretation to include a definition of ‘credit card transaction’ as defined in §301.001(1), Texas Finance Code.” 29 Tex. Reg. 2308 (Mar. 5, 2004) (Pl.s’ Ex. 3, I C.R. Suppl. at 50).

that the interpretation, though vague, is not unconstitutionally so.⁸³ Commissions' Brief at 23; Bankers' Brief at 30-31.

The Commissions were plainly authorized to provide an interpretation of the "similar devices" language that would protect homeowners from devices that have characteristics similar to the prohibited ones, while also providing lenders with a clearly defined safe harbor that gives them certainty about what devices are permissible.⁸⁴ Rule 153.84 does neither, making it unconstitutionally vague and invalid.⁸⁵ This rule also conflicts with the plain language of the constitution. The trial court correctly invalidated this rule.

Issue Four: 7 TEX. ADMIN. CODE § 153.22 ("Document Copy Rule")

Does the phrase "The lender, at the time the extension of credit is made, [must] provide the owner of the homestead a copy of all documents signed by the owner related to the extension of credit" mean what it says? (The Commissions say it means something else.)

⁸³ Appellants do not substantially defend against the vagueness challenge. Instead, they claim that the constitutional provision, Section 50(t)(3), puts people on notice of what conduct can be punished. Bankers' Brief at 30-31. They claim that, because Rule 153.84 only clarifies the Texas Constitution by defining "preprinted solicitation checks" and lists *permissible* devices, it is sufficiently clear to put people on notice. This argument confirms Appellees' worst fears that the undefined devices in Rule 153.84(1) provide a safe harbor far more generous than the Texas Constitution contemplated such that a Court facing a challenge to the use of a device denominated a "convenience check" will be forced to find the lender in compliance. The trial court found this to be unacceptable and so should this Court. Because the Commissions were given the unique ability to interpret the Texas Constitution, they cannot exercise that power in a way that clearly creates uncertainty to the detriment of lenders and borrowers alike.

⁸⁴ Indeed, the Commissions defined other terms in Section 50(t) and explained their reasons for doing so: "The constitutional provisions do not detail every aspect of home equity lending. ... For example, Section 50(t) contains terms that are not defined, even though definitions are necessary for clear meaning and consistent application." 29 Tex. Reg. 2307 (Mar 5, 2004) (emphasis added) (Pls' Ex. 3, I C.R. Suppl. at 49).

⁸⁵ The Commissions' failure to define the meaning of convenience checks and the other devices in Rule 153.84(1) makes the rule "so vague that men of common intelligence must . . . guess at its meaning . . ." Lone Star Gas Co. v. Kelly, 16 S.W.2d 446, 448 (Tex. 1942).

Texas Constitutional Provision	Commissions' Rule Invalidated
<p>Section 50(a)(6)(Q)(v): [a home equity loan is made on the condition that] “the lender, at the time the extension of credit is made, provide the owner of the homestead a copy of all documents signed by the owner related to the extension of credit;”</p>	<p>§153.22.Copies of Documents: Section 50(a)(6)(Q)(v). At closing, the lender must provide the owner with a copy of all documents <i>that are signed at closing in connection with the equity loan. The lender is not required to give the owner copies of documents that were signed by the owner prior to closing, such as those signed during the application process.</i> Because of their nature some documents, for example, a notification of the election of an owner or an owner's spouse not to rescind under the right of rescission must be signed after the date of closing. The lender must provide the owner copies of documents signed after the date of closing within three business days.</p>

The text of Section 50(a)(6)(Q)(v) of the Texas Constitution is clear; it requires no interpretation. There are two operative parts of this provision. First, the constitution addresses *when* the lender must provide the documents to the homeowner – *i.e.* “at the time the extension of credit is made”, which can reasonably be the closing of the loan. TEX. CONST. art. XVI § 50(a)(6)(Q)(v). Second, the constitution addresses *which documents* are to be provided to the homeowner—*i.e.* “all documents signed by the owner related to the extension of credit.” *Id.*

The Commissions' rule improperly seeks to limit the documents a lender provides to a homeowner by stating that the lender must provide the homeowner with copies of only those documents “that are signed at closing in connection with the equity loan.” 7 TEX. ADMIN. CODE § 153.22 (2006). Further, under the rule, the “lender is not required to give the owner copies of documents that were signed by the owner prior to closing, such as those

signed during the application process.” *Id.* The constitutional provision does not impose these limitations. In fact, the bill analysis prepared by the House Research Organization states that this constitutional provision requires lenders or holders of equity loans to “give the borrower a copy of the promissory note and all other documents signed by the borrower that relate to the equity loan.”⁸⁶ Documents signed before closing, including various disclosures, the application for the loan, employment verification, and similar documents, are “related to the extension of credit,” and a lender is therefore constitutionally required to give the owner copies of these documents.

There are many reasons a lender should be required to fully disclose to a homeowner all terms, conditions, and aspects of a loan in the form of copies of documents related to the loan. For example, with a copy of a loan application, a homeowner could know exactly what information an unscrupulous lender had when arriving at the decision to make a particular loan.⁸⁷ Did a lender provide a borrower with all the acknowledged disclosures? These are related to the extension of credit and should be provided to the borrower at closing regardless of when they are signed. If the lender does not provide a required disclosure prior to closing,

⁸⁶ Tex. House Research Org., Bill Analysis, H.J.R. 31, 75th Leg., R.S., at 3 (May 9, 1997) (Pl.s’ Ex. 25, I C.R. Suppl. at 267).

⁸⁷ “Initial credit applications may become critical documents in determining what amounts borrowers originally sought, and may become increasingly subject to manipulation by lenders. This is particularly true in the case of elderly borrowers, as applications are generally completed by agents of the lender, and simply signed by the borrower, who often signs the form while still blank. It should be noted that the signing of “any instrument in which blanks are left to be filled in” is itself a violation of the Texas Constitution, but obviously the proof problem remains.” Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing A Cure for the Home Equity Loss Ailing the Elderly*, 10 B.U. PUB. INT. L.J. 1, 35 (2000).

there may not be a remedy available to a homeowner for such a violation.⁸⁸ Furthermore, if a homeowner has a signed employment verification, this could allow the homeowner to understand how a lender came to a particular decision with regard to a loan. Under the Commissions' rule, however, a lender would not have to provide any of these documents to a homeowner unless they were signed at closing. This rule therefore violates the Texas Constitution.

Despite the assertion to the contrary by the Bankers, no court has addressed whether documents signed before closing should be provided to a borrower at closing. In the only case that even touches on the rule, the Fifth Circuit in *Pelt v. US Bank Trust Nat'l Ass'n* parrots the language of the Texas Constitution, stating that in § 50(a)(6)(Q)(v) "the phrase 'signed by the owner' simply identifies which – of the numerous documents presented at the closing of the home equity loan – must be copied and given to the borrower: **only those that the borrower actually signs in connection with the loan.**"⁸⁹ The *Pelt* court's interpretation of Section 50(a)(6)(Q)(v) does not limit those documents a lender gives a homeowner to those signed at the closing, since that question was never raised by either of the parties. In fact, there was evidence in *Pelt* that, on the day of closing, the lender provided the borrower with copies of all loan documents.⁹⁰

⁸⁸ For example, the Real Estate Settlement Procedures Act requires a borrower receive a good faith estimate of closing costs within three business days, yet the Act provides no private right of action to a borrower. See 12 U.S.C. § 2603 (2006); 24 C.F.R. § 3500.7 (2006).

⁸⁹ *Pelt v. US Bank Trust Nat'l Ass'n*, 359 F.3d 764, 768 (5th Cir. 2004) (emphasis added).

⁹⁰ In the *Pelt* case, there was evidence that "unsigned copies of all loan documents were provided to Plaintiffs on the day of the closing and that copies of the signed documents were made available to the Plaintiffs shortly thereafter." *Id.* at 766. The issue before the court in *Pelt*, unlike the controversy in this case, was whether it was proper for a lender to

Some may complain that this constitutional provision inconveniences lenders because they may have to provide the borrower with a document more than once, or they may have to provide a document the lender does not consider significant. However, even if convenience were a consideration – and it should not be – the lender is in the best position to provide a homeowner with full disclosure of the terms, conditions, and aspects of a loan in the form of all signed documents related to the loan. A lender undoubtedly makes copies of all relevant documents for its own files, and it would require little effort to make a second copy for the homeowner. On the other hand, the harm for a homeowner who does not receive all signed documents could be great. As intended by the Texas Constitution, a borrower with documents to back up a claim of a constitutional violation by a lender will be better able to protect his or her rights and remedies and discourage unscrupulous lenders from engaging in predatory lending practices.

The Commissions assert that the purpose of this constitutional provision is to assure that the “borrower is provided copies of those documents that set forth the borrowers’ rights and obligations with respect to the loan.”⁹¹ Yet the Commissions’ rule does not even propose to do this, since under that rule the lender does not have to provide the homeowner with any document that sets forth a right or obligation and that is signed by the homeowner before closing. The rule posited by the Commissions is not an interpretation, but rather a

provide a borrower with unsigned copies of documents the borrowers had already signed. *Id.* At 768-69.

⁹¹ Commissions’ Brief at 27.

modification of a constitutional mandate. Accordingly, the trial court was correct in invalidating the Commissions' rule.

Issue Five: Can the Commissions enact a home equity lending rule that does not interpret the Texas Constitution? (The Commissions claim they have more authority than the constitution states.)

The Commissions have no authority to enact new rules; they only have the authority to interpret specific provisions of the Texas Constitution. TEX. CONST. art. XVI § 50(u); TEX. FIN. CODE §§ 11.308, 15.413 (Vernon Supp. 2006). Despite this, the Commissions have gone beyond mere interpretation, contravened specific constitutional and statutory language, and exceeded their authority by enacting new rules. See discussion *infra* at 53 (for Rule 153.152) and at 60 (for Rule 153.51(3)).

Where the grant of authority is broad, the courts have given agencies deference.⁹² However, in the case at bar, Commissions do not have any such broad authorizations, express or implied, and cannot exercise such authority. “[An] agency may not, however, on a theory of necessary implication from a specific power, function, or duty expressly delegated, erect and exercise what really amounts to a new and additional power or one that contradicts the

⁹² See *Gerst v. Oak Cliff Sav. & L. Ass'n*, 432 S.W.2d 702, 706 (Tex. 1968) (court held rules valid because Finance Commission had broad powers) quoting *Kee v. Baber*, 303 S.W.2d 376, 390 (Tex. 1957) (agency action upheld because it had power to “make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this Act.”); *Texas State Board of Examiners in Optometry v. Carp*, 412 S.W.2d 307, 313 (Tex. 1967), *cert. denied*, 389 U.S. 52 (1967) (“We believe that the Legislature, by investing the Board with broad rule-making powers '[for] the enforcement of the Act' and '[for] the regulation of the practice of optometry,' contemplated that the Board would use these powers to correct the evils generally classified in Article 4563, or some other provision of the Optometry Act.”).

statute, no matter that the new power is viewed as being expedient for administrative purposes.”⁹³

In the preamble to the rules in question, the Commissions imply that they have more than interpretative authority:

These interpretations are intended to not only construe the actual language of the provisions, **but also to provide a practical framework** for home equity lending that reflects the constitutional language and the intent of the legislature and the voters.

Preamble, 7 TEX. ADMIN. CODE § 153 (2004) (Joint Financial Regulatory Agencies comprised of Finance Commission and Credit Union Commission) (emphasis added), 29 Tex. Reg. 85 (Jan 2, 2004) (Pl.s’ Ex. 2,3, I C.R. Suppl. at 18). The Commissions even now maintain they have more than interpretive authority. Take, for instance, this recent assertion by the Commissions:

In addition, the commissions interpret the extent of their interpretive authority to include not only determinations of the explicit meaning of words and terms in Section 50, **but also to encompass “filling in the gaps” with respect to material matters that are inadequately addressed in Section 50**, including possible addition of further details to the extent the commissions believe this to be necessary to fully implement the intent and purposes of Section 50.

31 Tex. Reg. 9022 (Nov. 3, 2006) (adopting amendment to Rule 153.13) (emphasis added).

⁹³ *Sexton v. Mount Olivet Cemetery Ass’n*, 720 S.W.2d 129, 137-38 (Tex. App. -- Austin 1986, writ ref’d n.r.e.) (citations and emphasis in original omitted; bank commission overstepped authority, statute did not expressly or impliedly allow commission to reopen proceedings and reconsider approval of appellant’s funeral services plan); *Kawasaki Motors v. Motor Vehicle Comm’n*, 855 S.W.2d 792, 797-798 (Tex. App. -- Austin 1993) (statutory grant of powers to agency was general in nature and did not convey the express power to order payments to dealers).

However, the language of the Texas Constitution and the statutes regarding the Commissions' interpretative authority limits this authority, and this is supported by legislative history. Concurrent with the adoption of Section 50(u) by S.J.R. 42, S.B. 1067 was passed to specifically name the agencies charged with interpretation. The bill analysis adopted by the House Financial Institutions Committee stated the following about S.B. 1067:

No state agency has the authority to interpret constitutional provisions relating to home equity law, leaving the resolution of questions over the meaning of the law exclusively to the judiciary. ... S.B. 1067 is enabling legislation for a provision of S.J.R. 42, a proposed constitutional amendment relating to home equity lending, which would permit the Legislature to delegate to one or more state agencies the authority to interpret home equity constitutional provisions.

...

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

...

House Comm. on Financial Institutions, Bill Analysis, Tex. S.B. 1067, 78th Leg., R.S. (2003) (emphasis added) (now codified as the Texas Finance Code §§ 11.308, 15.413).⁹⁴ (Pl.s' Ex. 23, I C.R. Suppl. at 259).

There is simply no authority for the Commissions to issue new rules, modify constitutional provisions, "fill in gaps" or to develop any so-called "framework." The Commissions are empowered only to issue interpretations of the specific language of

⁹⁴ Senate Business and Commerce Committee adopted a bill analysis for S.B. 1067 similar to the House Committee on Financial Institutions: "This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency." Senate Comm. on Business and Commerce, Bill Analysis, Tex. S.B. 1067, 78th Leg., R.S. (2003) (Pl.s' Ex. 24, I C.R. Suppl. at 262).

particular constitutional provisions. It is instructive that Texas House Representative Burt Solomons, Chairman of the House Financial Institutions Committee, and the sponsor of S.J.R. 42, and S.B. 1067 more recently stated:

The safe harbor and interpretations were meant to try to follow the law, and try to conservatively scrutinize the issues that were out there, and *not to be making new law. And I think everybody ... I think most of you know that*, so anyway that was my thought, one reason we agreed to do it this way is we hope for the best in that connection.

Chairman Burt Solomons, speaking with Leslie Pettijohn, Consumer Credit Commissioner of Texas, considering Tex. H.J.R. 52, Before the House Comm. on Financial Institutions, 79th Leg., R.S. (March 21, 2005) (emphasis added).⁹⁵ Although there is no ambiguity regarding the limits of the Commissions' authority, the Commissions acted anyway, and meanwhile hope the Legislature and voters will give them the authority in a subsequent enactment.⁹⁶

Issue Six: 7 TEX. ADMIN. CODE § 153.15(2),(3) ("Power of Attorney Rule")

Can the constitutional requirement that a home equity loan closing occur in a specific location be evaded with a simple power of attorney? (The Commissions say so.)

⁹⁵ The Finance Commission oversees the Office of Consumer Credit Commissioner. TEX. FIN. CODE ANN. § 11.002(a) (Vernon Supp. 2006). H.J.R. 52 proposed a constitutional change to home equity lines of credit. Because there is no tape available, this statement and its context can be reviewed online at: <http://www.house.state.tx.us/fx/av/committee79/50321p16.ram> (starting at counter 5:01:05). Appellees verified the transcript of this statement in their motion for summary judgment. (Pls' Amend. Mot. S.J., III C.R. at 657).

⁹⁶ Resolution of the Credit Union Commission of Texas and the Finance Commission of Texas, October 20, 2006, included in Appendix; also available <http://www.fc.state.tx.us/Home%20Equity/jntresolu.htm>.

Texas Constitutional Provision	Commissions' Rules Challenged
<p>Section 50(a)(6)(N): "is closed only at the office of the lender, an attorney at law, or a title company;"</p>	<p>§153.15.Location of Closing: Section 50(a)(6)(N). An equity loan may be closed only at an office of the lender, an attorney at law, or a title company. The lender is anyone authorized under Section 50(a)(6)(P) that advances funds directly to the owner or is identified as the payee on the note.</p> <p>(1) An equity loan must be closed at the permanent physical address of the office or branch office of the lender, attorney, or title company. The closing office must be a permanent physical address so that the closing occurs at an authorized physical location other than the homestead.</p> <p><i>(2) A lender may accept a properly executed power of attorney allowing the attorney-in-fact to execute closing documents on behalf of the owner.</i></p> <p><i>(3) A lender may receive consent required under Section 50(a)(6)(A) by mail or other delivery of the party's signature to an authorized physical location and not the homestead.</i></p>

a. Rule 153.15(2) is not an interpretation of any provision of the Texas Constitution

Rule 153.15(2) does not actually interpret Section 50(a)(6)(N) at all and therefore is an unauthorized rule. This constitutional provision relates only to the location of closing a home equity loan. The provision requires closings to occur at an office of the lender, title company or attorney. TEX. CONST. art. XVI, § 50(a)(6)(N). Meanwhile, the Commissions' interpretation relates to who may sign the loan documents on behalf of a homeowner. This

alone warrants invalidation.

b. Rule 153.15(2) improperly creates a loophole.

In addition to being a new, unauthorized rule, Rule 153.15(2) effectively creates a huge loophole to the constitutional requirement that a home equity loan be closed at the office of a lender, title company or attorney. The rule enables a lender, broker or some other person to obtain, at the homeowner's kitchen table, a power of attorney that authorizes anyone named in the power of attorney to sign the loan documents at one of the acceptable locations. The Commissions claim this rule is convenient, because if a spouse is unavailable to sign documents, a power of attorney could be granted to the other spouse who would then attend the closing. However, the Commissions do not include in this rule any limitation requiring that the power of attorney be specific, durable, and granted only to a spouse in exceptional circumstances. In fact, the Commissions' rule would allow a borrower to execute a general power of attorney to a door-to-door salesman on a homeowner's front porch, and then that salesman could attend the closing rather than the homeowner.

Substituting a piece of paper for the borrower's appearance at the closing does not comply with the plain language and intent of the constitutional provision. For example, when describing the protections in H.J.R. 31, Representative Debra Danburg stated that "...[the borrower] cannot sign a lien against their house in those high-pressure situations at their kitchen tables, and that's the real protection of the Barrientos amendment."⁹⁷ And when

⁹⁷ Testimony of Rep. Debra Danburg, Floor Debate, Tex. H.J.R. 31, 75th Leg., R.S. (May 29, 1997) (Tape 231, Side B).

asked if it will be necessary for the home equity borrower to execute the loan documents at the financial institution, Rep. Danburg stated that, “[i]f it's a lien that will go on the homestead, there are a number of places in the legislation where they can sign it, but their home is not one of those.”⁹⁸ The objectives of the Act are further demonstrated by Representative Steven Wolens during his testimony at the public hearing of the House Committee on Financial Institutions on March 24, 1997: “We put a lot of formality into this bill so that the equity loan is not casual, it's not accidental, you just don't get this stuff off the internet or all this stuff that comes in through the mail, you sign it and all of a sudden your home has been put up for collateral. We want formality in the process.”⁹⁹

A rule allowing a lender to take a lien by securing the homeowner's signature on a power of attorney at a kitchen table, barber shop, or card table in a mall can hardly be considered a conservative consumer protection. Such a practice conflicts with the intent expressed by Rep. Burt Solomons during his statements from the floor debate of H.J.R. 31 when he said, “I believe, as a real estate lawyer with 17 years experience in this business, that if you're going to have these types of [home equity] loans for the first time in the state of Texas, you need to have a very conservative, consumer-oriented protection bill”¹⁰⁰

Certainly, a power of attorney in lieu of a personal appearance at a closing will

⁹⁸ *Id.*

⁹⁹ Testimony of Rep. Steven Wolens, Before the House Comm. on Financial Institutions, Tex. H.B. 447, Tex. H.J.R. 44, Tex. H.J.R. 31, 75th Leg., R.S. (March 24, 1997) (Tape 1, Side B).

¹⁰⁰ Testimony of Rep. Burt Solomons, Floor Debate, Tex. H.J.R. 31, 75th Leg., R.S. (May 29, 1997) (Tape 141, Side B).

increase the likelihood of fraud and abuse. This rule opens the door to the forgeries and shenanigans of unscrupulous brokers, lenders, title companies, and maybe other family members willing to take advantage of their next of kin. The Commissions themselves state that the constitutional provision at issue was intended:

[T]o prohibit the coercive closing of an equity loan at the home of the owner. The requirement that the closing occur at the physical address of the lender, attorney, or title company eliminates the possibility of the closing occurring at the residence of the owner, and also eliminates confusion on the part of the owner who wishes to rescind an equity loan.

29 Tex. Reg. 90 (Jan. 2, 2004) (Pl.s' Ex. 2, I C.R. Suppl. at 23).

Finally, there is no underlying legitimate need for this exception. There are few places in the world that do not have a law office, title office, or office of the lender. Appellees understand that lenders have even arranged for soldiers in the Iraq War to utilize Judge Advocate General (JAG) law offices to close loans. Regardless of the intentions of the Commissions when they drafted this rule and the flexibility the rule may provide in legitimate circumstances, the rule remains directly at odds with the plain language and intent of the applicable constitutional provision, and therefore is invalid.

c. Rule 153.15(3) Directly Contradicts Constitutional Language

Moreover, Subpart (3) of the rule is problematic and arguably contradicts the constitution:

A lender may receive consent required under Section 50(a)(6)(A) by mail or other delivery of the party's signature to an authorized physical location and

not the homestead.

7 TEX. ADMIN. CODE § 153.15(3) (2006). The constitution specifically requires an owner and spouse to consent to a home equity loan.¹⁰¹ Consent to a home equity loan is given at a closing. Rule 153.1(3) defines a closing in part as “the act of signing the equity loan agreement by each owner and the spouse of each owner.” As previously discussed, Section 50(a)(6)(N) requires the closing of the loan to be in a specific place – office of the lender, title company or attorney. However, Rule 153.15(3) appears to allow consent to be merely mailed “to an authorized location” (i.e., office of the lender, a title company or attorney).

Thus, Rule 153.15(3) could be read to allow an owner to give consent – e.g., close the loan – anywhere, and mail or deliver the executed closing documents to an authorized location. Appellees initially presumed this construction of the rule to be in error. However, Appellants have never denied such a reading of the rule during this case and never explained the purpose of the rule. Thus, Appellees must assume it to be an intended construction of the rule.¹⁰² At best, Rule 153.15(3) is a poorly drafted rule subject to misinterpretation by

¹⁰¹ [To be valid, a home equity loan must be] “secured by a voluntary lien on the homestead created under a written agreement with the consent of each owner and each owner’s spouse.” TEX. CONST. art. XVI § 50(a)(6)(A).

¹⁰² The following will illustrate the significance of Appellees’ continued concern about this rule. Appellees noted a construction problem with another rule adopted by the Commissions, Rule 7 TEX. ADMIN. CODE § 153.13(4)(B) (29 Tex. Reg. 94-95 (Jan. 2, 2004), now repealed) (Pl.s’ Ex. 2, I C.R. Suppl. at 27-28). Appellees notified the Commissions about the problem and filed suit on January 29, 2004. The Commissions failed to address the problem or even respond to Appellees’ allegation regarding 153.13(4)(B) in their briefs to the trial court. It was not until oral argument on the cross-motions for summary judgment 21 months later did the Commissions reluctantly acknowledge the problem:

The Court: It’s a real problem.

[Commissions’ counsel]: – the aggregate error could be in the lender’s favor. I agree.

The Court: Isn’t that a real problem for you? And doesn’t that mean you could have a major swing in money, you could have way more than a hundred dollars and way more than .125 percent change in the lender’s favor and hit the homeowner with it – the borrower at the last minute at closing, and the interpretation says that would be okay. I don’t think that’s what the agencies meant for it to say. I don’t think that’s what they intended. I think they meant the aggregate is in the consumer’s favor, but that’s not what it says.

lenders and borrowers alike. At worst, the rule directly contradicts the express language of the constitution. Either way, this Court should invalidate the rule.

Issue Seven: 7 TEX. ADMIN. CODE § 153.51(1),(3) (“Disclosure Mailing Rule”)

Does the Texas Constitution require a notice be received by a borrower prior to obtaining a home equity loan? (The Commissions do not require receipt, only presume receipt if lender has a mailing procedure.)

Texas Constitutional Provision	Commissions’ Rules Challenged
<p>Section 50(g): “An extension of credit described by Subsection (a)(6) of this section may be secured by a valid lien against homestead property if the extension of credit is not closed before the 12th day after the lender provides the owner with the following written notice on a separate instrument:”</p>	<p>§153.51. Consumer Disclosure: Section 50(g). An equity loan may not be closed before the 12th day after the lender provides the owner with the consumer disclosure on a separate instrument.</p> <p><i>(1) If a lender mails the consumer disclosure to the owner, the lender shall allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery.</i></p> <p>(2) Certain provisions of the consumer disclosure do not contain the exact identical language concerning requirements of the equity loan that have been used to create the substantive requirements of the loan. The consumer notice is only a summary of the owner’s rights, which are governed by the substantive terms of the constitution. The substantive requirements prevail regarding a lender’s responsibilities in an equity loan transaction. A lender may supplement the consumer disclosure to clarify any discrepancies or inconsistencies.</p> <p><i>(3) A lender may rely on an established system of verifiable procedures to evidence compliance with this section.</i></p>

[Commissions’ counsel]: I agree.

The Court: Okay. So don’t you lose on this point?

[Commissions’ counsel]: Do I have to answer it?

The Court: I’m sorry?

[Commissions’ counsel]: Do I have to answer it?

The Court: No, you don’t have to answer that. I think you just did.

Hearing on Motion for Summary Judgment, Sept. 8, 2005, RR. 104. Even after oral argument, the Commissions failed to fix the problem. On April 29, 2006, the trial court struck the rule. Subsequently, the rule was repealed and was re-enacted with some modifications.

Article XVI, Section 50(g) of the Texas Constitution mandates that the lender provide the owner with a specifically worded notice laying out the various terms and conditions of a home equity loan. Only after the twelfth day the notice is provided can the lender secure a lien against the homestead. TEX. CONST. art. XVI, § 50(g). The constitutional provision ensures that the owner actually receives, and has time to review, understand and consider the advisories in the notice before he closes the loan. However, the Commissions' interpretation contradicts the constitution by presuming that a borrower received the notice after three days from mailing. The interpretation also creates a new, unauthorized rule by allowing a lender to demonstrate it was mailed by showing that it has "established procedures" rather than proving the notice was actually provided to an individual borrower in a particular case.

In Subpart (1) of the interpretation, the Commissions appear to define the word "provides" of the constitution as merely mailing the notice to the borrower to some unspecified address and waiting three days – as opposed to requiring actual receipt by the borrower. However, this view is contrary to the intent of the constitutional provision. The Texas Legislature did not intend for Texas homeowners to be able to obtain home equity loans on a whim. Section 50(g) set up the so-called "twelve-day cooling off period" to give a borrower sufficient time to consider the ramifications of obtaining a home equity loan. The intent of this provision was for a borrower to have twelve days to consider the ramifications which are spelled out in the notice. Therefore, the twelve-day period should only begin from the date the notice is received, not three days from mailing.

The Commissions themselves agree that “provides” in Section 50(g) means actual receipt of the notice:

One commenter suggested that the constitution does not require each owner to receive the consumer disclosure in Section 153.51 and that this should be specifically stated in the interpretation. The Commissions have considered this suggestion and decline to make this change. **The Commissions believe that the language in the constitution is clear in stating that the consumer disclosure must be received by the owner, and not “each owner.”**

29 Tex. Reg. 91 (Jan. 2, 2004) (emphasis added).¹⁰³ (Pl.s’ Ex. 2, I C.R. Suppl. at 24). Thus, the twelve days must not begin from an arbitrary date, but from the date the notice was actually received by the borrower. In some cases receipt may be sooner than three days from mailing, in others it may be longer. Regardless, the constitutional provision should not be interpreted as the average time it takes a borrower to receive the notice, if that is indeed a purpose of the rule. Rather, each loan must comply with the constitution, and the cooling-off period should begin upon actual receipt of the notice.

Furthermore, in subpart (3) of the interpretation, the Commissions are creating a rule, not interpreting. See discussion *supra*, at 49. Section 50(g) of the Texas Constitution does not provide for any presumption or other evidentiary standard to establish that a lender has provided the owner with the notice. The Commissions have no authority to create new rules, and Rule 153.51(3) should be invalidated on this basis alone.

¹⁰³ However, the Commissions have oddly stated that the notice is considered delivered if it is sent to the broker for the homeowner. 29 Tex. Reg. 89 (Jan. 2, 2004) (Pl.s’ Ex. 2, I C.R. Suppl. at 22).

Perhaps in this rule the Commissions were attempting to emulate procedures for foreclosure notices in Texas. At present, Texas borrowers facing foreclosure do not have to actually receive a notice of a foreclosure sale. TEX. PROP. CODE § 51.002; *Hausmann v. Texas Savings & Loan Ass'n*, 585 S.W.2d 796, 799-800 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.). A lender wishing to foreclose need only mail the notice by certified mail to the borrower's last known address. Of course, if actual receipt were a requirement for foreclosure, some borrowers may intentionally avoid being served in an effort to avoid or delay the foreclosure. However, foreclosures are completely unlike home equity loans. An applicant for a home equity loan will have every incentive to accept a notice sent by certified mail if he cannot obtain the loan otherwise. Thus, a lender does not even have a legitimate need for this new rule. Furthermore, even a foreclosure notice is required to be sent by certified mail so there is some proof of mailing and proof of receipt of the notice (if it is accepted). TEX. PROP. CODE § 51.002.

Not only do the Commissions presume receipt by mailing rather than by actual acknowledgment of receipt by the borrower (e.g., certified mail), the Commissions' interpretation creates a presumption that the consumer disclosure was provided if the lender has verifiable procedures for mailing the notices in general. (The Commissions declined to define verifiable procedures, so presumably any verifiable procedure, regardless of its features, will do.) Thus, the Commissions do not require actual receipt by the borrower, nor do they require a lender to show any proof that a particular notice was actually mailed. And, the Commissions go even further:

The Commissions believe that the broker must be an agent of a lender to give the twelve day notice the effect intended in the Constitution. This does not prohibit a lender from meeting the twelve day notice requirement by sending the notice to the borrower by delivering it to the *borrower's broker*.

29 Tex. Reg. 89 (Jan. 2, 2004) (emphasis added) (Pl.s' Ex. 2, I C.R. Suppl. at 22).

In sum, the Commissions believe actual receipt is required by Section 50(g), yet the Commissions do not require the notice be sent to the borrower directly, do not require certified mail to show proof of mailing, shift the burden to borrowers to disprove it was provided, and allow lenders to rely on undefined "procedures" to prove the notice was mailed. Rules 153.51(1) and (3) violate the plain language and intent of Section 50(g), and 153.51(3) is an unauthorized rule the Commissions have no authority to adopt.

VIII. CONCLUSION AND PRAYER

The Commissions conclude their argument by stating that the "wisdom of the Constitution's grant of interpretive authority" to the Commissions is best summed up in a lengthy quote they included from a House Research Organization's (H.R.O.) report. Commissions' Brief at 27. That quote, included in two places in the Commissions' brief, concludes that the Commissions interpretive authority includes allowing "more details to be established outside the Constitution" and attributes to the Commissions' interpretive authority the lowering of the risk to lenders and the lowering of interest rates charged to consumers. *Id.* at 4, 27. The Bankers coincidentally concluded their brief with portions of the very same quote. Bankers' Brief at 34. While both implied the quote was HRO analysis,

in fact it was not. Both the Commission and the Bankers failed to mention that the quote was a summary of what the supporters (e.g., bankers) said about the constitutional change which would grant a state agency the power to interpret the Texas Constitution. The proposed constitutional change was not without opposition,¹⁰⁴ and HRO did not adopt or accept the position of either the supporters or the opposition. House Research Organization, Bill Analysis, Tex. S.J.R. 42, 78th Leg., R.S. (May 23, 2003).¹⁰⁵ (Pl.s' Ex. 26, I C.R. Suppl. at 278). In the end, the wisdom of the Constitution's grant of interpretive authority is that the Commissions are not allowed to dilute the protections granted to homeowners by the Texas Constitution.

Next, the Commissions state it is "not possible to adopt a rule that satisfies every concern raised by lenders and borrowers." Commissions' Brief at 28. Appellees have numerous concerns about the rules enacted by the Commissions; however, Appellees only challenge those that are unauthorized new rules or rules that are contrary to the intent and plain meaning of the constitutional provision they claim to interpret. The Commissions must adopt rules that comply with the law, or those rules must be stricken.

¹⁰⁴ Take, for instance, this quote in the H.R.O. report of what *opponents* had to say:

The current economic downturn has resulted in a higher foreclosure rate, forcing people out of their homes for defaulting on debt unrelated to the homestead itself. With the foreclosure rate increasing, government should be working to protect homeowners' investments rather than making it easier for them to lose their homes.

House Research Organization, Bill Analysis, Tex. S.J. Res. 42, 78th Leg., R.S. (May 23, 2003) (Pl.s' Ex. 26, I C.R. Suppl. at 283).

¹⁰⁵ Also, while the supporters of the change mention that a violation of the Homestead Provision can result in forfeiture of the principle and interest of a home equity loan, this remedy is only available if a lender fails to cure a violation within 60 days after the borrower notifies it of the violation. There is no such penalty for intentional, knowing or repeated violations – a penalized lender is one who refused to cure after given 60 days to do so. TEX. CONST. art. XVI, § 50(a)(6)(Q)(x).

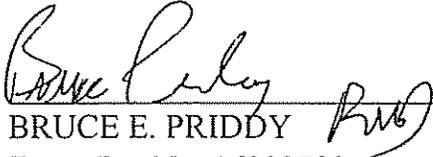
The Commissions also claim that a rule should not be stricken because it could be better. Commission's Brief at 28. The Commissions suggest that the Court uphold the rules because they are reasonable and consistent with the plain language of the constitution. *Id.* Although the rules are unreasonable, this is not the appropriate standard with which to review the Commissions' disputed interpretations of the Texas Constitution. Appellees must show only that the rules contravene the language, run counter to the general objective of the constitution, or impose additional burdens, conditions, or restrictions inconsistent with the constitution. Also, because of the narrow grant of authority to the Commissions, this Court should give little or no deference to the Commissions' interpretations. On these bases, the challenged rules should be held to be invalid.

Regardless how the Commissions' interpretations might be justified, the Homestead Provision of the Texas Constitution was not enacted for stability, flexibility, or convenience. Home equity lending might have been convenient and helpful to a Texas family before 1997, but it simply was not permitted. Although the constitution was changed in 1997 to permit home equity loans, the text of the Homestead Provision and the clear legislative intent show that the purpose of the Homestead Provision was not abandoned. The Commissions as state agencies do not have the authority to enact new rules, nor can they ignore the language or intent of the Homestead Provision, despite any motives they might have or convenience they might seek to provide.

Wherefore, Appellees request the Court of Appeals:

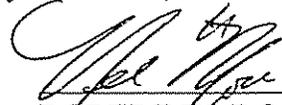
- a. affirm the judgment of the trial court in so far as it declared the following rules invalid: 7 TEX. ADMIN. CODE §§ 153.1(11); 153.5(3),(4),(6),(8),(9),(12); 153.12(2); 153.22; and 153.84(1);
- b. reverse and render the judgment of the trial court and declare the following rules invalid: 7 TEX. ADMIN. CODE §§ 153.15(2),(3) and 153.51(1),(3); and
- c. grant court costs, and any other relief to which Appellees are entitled.

Respectfully submitted,


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IX. CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent certified mail return receipt requested to:

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Attorney for Appellants Finance Commission and
Credit Union Commission of Texas

and

Craig Enoch
Winstead Sechrest & Minick, P.C.
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Attorney for Appellant Texas Bankers Association

on this 8th day of December, 2006.



ROBERT W. DOGGETT

**RESOLUTION
OF
THE CREDIT UNION COMMISSION OF TEXAS
AND
THE FINANCE COMMISSION OF TEXAS**

WHEREAS, the Credit Union Commission of Texas and the Finance Commission of Texas ("Commissions") have been delegated the authority to interpret the home equity lending provisions of Art XVI, Section 50 of the Texas Constitution (Article XVI, Section 50), by Article XVI, Section 50(u), and §11.308 and §15.413 of the Texas Finance Code; and

WHEREAS, the Commissions have carefully considered and adopted interpretations of Article XVI, Section 50, in good faith and in accordance with the plain language of the Constitution and the perceived intent of the Legislature and people of the State of Texas; and

WHEREAS, some inherent ambiguities in the language of Article XVI, Section 50, have created uncertainty for the Commissions about the intent of the framers of the Constitution regarding certain issues of home equity lending; and

WHEREAS, these ambiguities render the Commissions' rulemaking on certain issues of home equity lending vulnerable to litigation as well as criticism from representatives of both industry and consumers; and

WHEREAS, the Commissions believe further amendment of Article XVI, Section 50 could more clearly state the intent of the legislature and people of Texas concerning home equity lending in Texas and the increased clarity and certainty would best serve the interests of the citizens of this state.

NOW, THEREFORE, BE IT RESOLVED, that the Credit Union Commission of Texas and the Finance Commission of Texas do hereby request that the 80th Legislature consider clarifying amendments to Article XVI, Section 50 of the Texas Constitution to improve clarity and provide additional guidance regarding home equity lending and the Commissions' interpretive authority.

*Given under my hand at Austin, Texas
On the 20th day of October
In the year two thousand and six*

*Given under my hand at Austin, Texas
On the 20th day of October
In the year two thousand and six*

Gary L. Janacek
Chair, Credit Union Commission of Texas

John L. Snider
Chair, Finance Commission of Texas

FINANCE COMMISSION OF TEXAS,)	IN THE COURT OF APPEALS
CREDIT UNION COMMISSION OF)	
TEXAS, and TEXAS BANKERS)	
ASSOCIATION,)	
)	
Appellants,)	
)	
vs.)	FOR THE THIRD DISTRICT
)	
ASSOCIATION OF COMMUNITY)	
ORGANIZATIONS FOR REFORM)	
NOW (ACORN), VALERIE NORWOOD,)	
ELISE SHOWS, MARYANN ROBLES-)	
VALDEZ, BOBBY MARTIN, PAMELA)	
COOPER, and CARLOS RIVAS)	
)	
Appellees.)	AUSTIN, TEXAS

Affidavit of Robert W. Doggett

State of Texas)

County of Travis)

Before me, the undersigned authority, appeared Robert W. Doggett and after being duly sworn stated the following:

“1. My name is Robert W. Doggett. I am over the age of 21 and fully competent to give this affidavit.

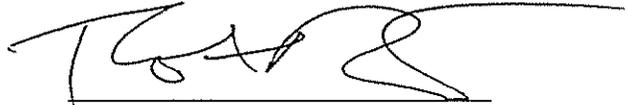
2. I am an attorney and represent Appellees in the above-styled and numbered cause now pending before the Court of Appeals.

3. On October 20, 2006, I attended a joint public meeting of the Finance Commission of Texas and Credit Union Commission of Texas, Appellants in the above-styled and numbered cause now pending before the Court of Appeals (hereinafter “Commissions”).

4. On October 20, 2006, I witnessed both Commissions pass a resolution entitled
"Resolution of the Credit Union Commission of Texas and the Finance Commission of Texas."

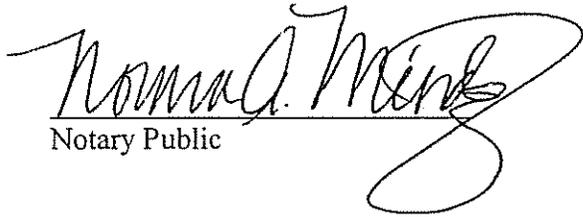
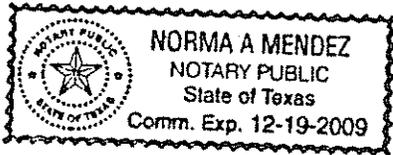
A true and correct copy of the resolution is attached as an exhibit to this affidavit.

5. I hereby verify that the statements in this affidavit are true and correct and based upon
personal knowledge."



Robert W. Doggett

Subscribed and sworn to before me this 21st day of November, 2006.


Notary Public