

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**

APPELLEES' REPLY BRIEF

NELSON H. MOCK
Texas Bar No. 24003922
Texas RioGrande Legal Aid
4920 N. IH-35
Austin, Texas 78751
Tel. (512) 374-2723
Fax (512) 447-3940

ROBERT W. DOGGETT
Texas Bar No. 05945650
Texas RioGrande Legal Aid
4920 N. IH-35
Austin, Texas 78751
Tel. 512-374-2725
Fax 512-447-3940

STEPHEN GARDNER
Texas Bar No. 07660600
Law Office of Stephen Gardner
6060 North Central Expressway
Suite 560
Dallas, Texas 75206
Tel. 214-800-2830
Fax 214-800-2834

ROBERT L. WHARTON
Texas Bar No. 21243790
Texas Lone Star Legal Aid
P.O. Box 631070
Nacogdoches, Texas, 75963
Tel. (936) 560-1455
Fax (936) 560-4795

JEAN CONSTANTINE-DAVIS
D.C. Bar No. 250084
AARP Foundation Litigation
601 E. Street, N.W.
Washington, DC 20049
Tel. 202-434-2058

Oral Argument Requested

I. TABLE OF CONTENTS

I.	TABLE OF CONTENTS	ii
II.	INDEX OF AUTHORITIES	iii
III.	GENERAL ISSUES.....	1
	A. Scope of Appellees’ Allegations.....	1
	B. Issue Five: Right of Commissions to Make New Law	1
	C. Deference to be Given to Commissions.....	3
	D. Purpose of Enactments and Legislative History.....	3
IV.	SPECIFIC RULES	
	<u>Issue One:</u> 7 TEX. ADMIN. CODE §§ 153.1(11), 153.5(3),(4),(6),(8),(9),(12) (“Fee Cap Rules”)	6
	A. Common Meaning and Legislative Usage.....	6
	B. Practical Effect for Lenders of Commissions’ Rule.....	8
	C. <i>Thomison</i> and <i>Tarver</i>	10
	D. Other Statutory Definitions Not Accepted.....	12
	<u>Issue Two:</u> 7 TEX. ADMIN. CODE § 153.12(2) (“Oral Application Rule”)	13
	<u>Issue Three:</u> 7 TEX. ADMIN. CODE § 153.84(1) (“Convenience Check Rule”)	14
	<u>Issue Four:</u> 7 TEX. ADMIN. CODE § 153.22 (“Document Copy Rule”)	17
	<u>Issue Six:</u> 7 TEX. ADMIN. CODE § 153.15(2),(3) (“Power of Attorney Rule”)	18
	<u>Issue Seven:</u> 7 TEX. ADMIN. CODE § 153.51(1),(3) (“Disclosure Mailing Rule”)	20
V.	PRAYER	23
VI.	CERTIFICATE OF SERVICE	24
VII.	APPENDIX	

TABLE OF AUTHORITIES

Cases

<i>Aransas County v. Coleman-Fulton Pasture Co.</i> , 191 S.W. 553 (Tex. 1917)	3, 4
<i>C & H Nationwide v. Thompson</i> , 903 S.W.2d 315 (Tex. 1994).....	5, 7
<i>CenterPoint Energy Entex v. R.R. Comm'n</i> , 2006 Tex. App. LEXIS 5882 (Tex. App.—Austin 2006, pet. filed).....	2
<i>Ex parte Canady</i> , 140 S.W.3d 845 (Tex. App.—Houston [14 th Dist.] 2004, no pet.).....	4, 5
<i>Harrell v. Colonial Finance Corp.</i> , 341 S.W.2d 545 (Tex. App.— San Antonio 1960, writ ref'd n.r.e.).....	9
<i>McCulloch v. Maryland</i> , 17 U.S. 316, 407 (1819).....	1
<i>Morris v. Miglicco</i> , 468 S.W.2d 517, 519 (Tex. Civ. App.—Houston [14 th Dist.] 1971, writ ref'd n.r.e.)	9
<i>Palmer v. Coble Wall Trust Co.</i> , 851 S.W.2d 178 (Tex. 1992).....	4
<i>Pub. Util. Comm'n v. City Pub. Serv. Bd. of San Antonio</i> , 53 S.W.3d 310 (Tex. 2001).....	2
<i>Pub. Util. Comm'n v. GTE-Southwest, Inc.</i> , 901 S.W.2d 401 (Tex. 1995).....	2
<i>Rogers v. Frito-Lay, Inc.</i> , 611 F.2d 1074 (5th Cir.) <i>cert. denied</i> , 449 U.S. 889 (1980).....	5
<i>Rooms With a View, Inc. v. Private Nat'l Mortg. Ass'n</i> , 7 S.W.3d 840 (Tex. App.—Austin 1999, pet. denied)	5, 18, 19
<i>Sharp v. Cox Tex. Publs.</i> , 943 S.W.2d 206, 209 (Tex. App.—Austin 1997, no writ).....	2
<i>Southland Life Ins. Co. v. Egan</i> , 126 Tex. 160, 166 (Tex. 1935).....	8,9
<i>State v. Arellano</i> , 801 S.W.2d 128, 132 (Tex. App.—San Antonio 1990, no writ).....	4
<i>Stedman v. Georgetown Sav. Loan Ass'n</i> , 595 S.W.2d 486, 487 (Tex. 1979).....	8
<i>Stringer v. Cedant Corp.</i> , 23 S.W.3d 353 (Tex. 2000).....	13

<i>Sunwest Bank of El Paso v. Gutierrez</i> , 819 S.W.2d 673 (Tex. App.–El Paso 1991, writ denied).....	9
<i>Tarver v. Sebring Capital Credit Corp.</i> , 69 S.W.3d 708 (Tex. App.–Waco 2002, no pet.).....	10-11
<i>Texas Commerce Bank-Arlington v. Goldring</i> , 665 S.W.2d 103, 104 (Tex. 1984).....	8
<i>Texas Natural Res. Conservation Comm'n v. Lakeshore Util. Co.</i> , 164 S.W.3d 368, 377-378 (Tex. 2005).....	2
<i>Thomison v. Long Beach Mortgage</i> , 176 F.Supp.2d 714 (W.D. Tex. 2001).....	10-11
<i>Varel Mfg. Co. v. Acetylene Oxygen Co.</i> , 990 S.W.2d 486, 491 (Tex. App.–Corpus Christi 1999, no pet.).....	7
<i>Constitutional Provisions</i>	
TEX. CONST. Art. XVI, § 50(a)(6)(G).....	9
TEX. CONST. Art. XVI, § 50(a)(6)(H).....	12
TEX. CONST. Art. XVI, § 50(a)(6)(Q)(iv).....	19
TEX. CONST. Art. XVI, § 50(a)(6)(Q)(v).....	17
TEX. CONST. Art. XVI, § 50(g).....	13,14
<i>Statutes</i>	
TEX. EDU. CODE § 52.36 (Vernon 2006)	6, 7
TEX. FIN. CODE § 123.208(b) (Vernon 2006).....	8
TEX. FIN. CODE § 185.011(b) (Vernon 2006).....	8
TEX. FIN. CODE § 347.204(b) (Vernon 2006).....	8
TEX. GOV'T CODE §1474.053(b)(1) (Vernon 2000).....	8
TEX. OCC. CODE § 2001.610(b) (Vernon 2004).....	8
TEX. PROP. CODE § 41.002 (Vernon 2000).....	12
<i>Regulations</i>	
7 Tex. Admin. Code § 83.707(g) (2006).....	10
7 Tex. Admin. Code §153.8 (2006).....	12
7 Tex. Admin. Code §153.15(3) (2006).....	20
<i>Texas Rules of Civil Procedure</i>	
Tex. R. Civ. P. 21a.....	21

Other

Letter dated June 12, 1823, from Thomas Jefferson to
United States Supreme Court Justice William Johnson. S. PADOVER, THE COMPLETE
JEFFERSON 323 (1943).....17

Webster’s NEW WORLD COLLEGE DICTIONARY (4th ed.,
2001).....6

DICTIONARY.COM UNABRIDGED (v 1.1, 2007),
based on the RANDOM HOUSE UNABRIDGED DICTIONARY
(2006).....6

I. General Issues

A. Scope of Appellees' Allegations

Appellants allege that some people benefit because of home equity lending and that Texas has changed since the Panic of 1837. Appellees do not disagree; however, based upon the legislative history of Texas home equity lending law and its express language, it is clear that Texans were and are concerned about abusive, predatory lending taking root in their state. Despite Appellants' assertions, Appellees are not challenging the Homestead Provision itself or the right of the Commissions to interpret it. Rather, Appellees have challenged a small number of the interpretations issued by the agencies.

B. Issue 5: Right of Commissions to Make New Law

The Bankers quote *McCulloch v. Maryland*, “We must never forget that it is a constitution we are expounding.” Bankers' Reply at 1 (citing *McCulloch*, 17 U.S. 319, 407 (1819)). A supporting quote for their position would more appropriately be: “It is a constitution we are attempting to expand.” Appellants appear to maintain the Commissions have the power to do more than interpret the constitution despite the clear language of Section 50(u), its legislative history, and the delegation language in the Texas Finance Code. The Bankers argue that, because the Texas Constitution and Texas Finance Code give the Commissions the right to issue interpretations, and because the APA defines an interpretation as a rule, the Commissions have “rulemaking authority” – presumably, the right to issue new

rules that go beyond interpretation. Bankers' Response at 6-7. The Commissions do not even justify in their briefings assertions that they have legislative powers to create new rules. Their position fails.¹ The Commissions have no inherent authority of their own. *See Tex. Natural Res. Conservation Comm'n v. Lakeshore Util. Co.*, 164 S.W.3d 368, 377-378 (Tex. 2005).

This Court explained the difference between interpretative rules and legislative ones in *Sharp v. Cox Tex. Publs.*, 943 S.W.2d 206, 209 (Tex. App.—Austin 1997, no writ):

A rule that "clearly affects individual rights or obligations to the extent it applies is a legislative' as opposed to an interpretative' rule." A "legislative" rule has two characteristics: (1) it goes beyond interpretation to promulgate substantive provisions, and (2) the statute, which delegates to the agency the power to make rules, provides that those rules have authoritative force. The Comptroller clearly intended rule 3.299 to have the force of law by declaring a particular type of transaction a "sale" subject to sales tax. Rule 3.299 is binding, like a statute, provided the rule is within the power delegated to the agency, is the product of proper procedure, and is reasonable. In light of the Comptroller's authority to adopt rules consistent with common law and its reliance on *Cordovan* in promulgating rule 3.299, the rule is only reasonable to the extent that it interprets *Cordovan* correctly. The Comptroller's theory, enacted in rule 3.299, is that *Cordovan* creates a sale any time retailers pay to advertise in a magazine that is distributed free of charge. We hold that rule 3.299 is an incorrect reading of this Court's decision in *Cordovan* and is therefore unreasonable.

Id. (citations omitted).

¹ Agencies may exercise only those powers that the Legislature confers upon it in clear and express language, and they cannot errect and exercise what really amounts to a new or additional power for the purpose of administrative expediency. *Pub. Util. Comm'n v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 316, (Tex. 2001); *Pub. Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 407 (Tex. 1995); *CenterPoint Energy Entex v. R.R. Comm'n*, 2006 Tex. App. LEXIS 5882, 11-13 (Tex. App.—Austin 2006, pet filed).

In *Sharp*, the comptroller had the authority to issue a legislative rule; however, this Court still struck down the rule because it found the comptroller had incorrectly interpreted the law. Section 50(u) gives the Commissions no authority to legislate.

C. Deference to be Given to Commissions

If this Court gives the Commissions deference, it should be tempered because of the nature of their authority. Typically, courts have given agencies more deference where an agency was given broad legislative authority to enact new rules, and where the agency was charged with enforcement of its rules. *See Appellees' Brief* at 6-8. This is not the situation here – the authority of the Commissions is unusually narrow. The Commissions may only interpret the home equity law and cannot issue new rules or enforce them. While the Bankers' correctly point out that this case is different because the Commissions are interpreting the Texas Constitution (simply because the entire home equity law is in the Texas Constitution), it is also unusually narrow authority. Certainly if this Court finds the Commissions to have issued legislative rules without authority, or incorrectly interpreted the home equity law, it should, as it did in *Sharp*, find the rules unreasonable and declare them invalid.

D. Purpose of Enactments and Legislative History

Texas has historically considered the purpose of a statute or constitutional provision when interpreting it. In *Aransas County v. Coleman-Fulton Pasture Co.*, 191 S.W. 553, 554-55 (Tex. 1917), the Court held:

In different provisions of the Constitution, namely, section 56 of article 3, section 9 of article 8, section 2 of article 11, and section 24 of article 16, roads and bridges are dealt with as distinct subjects. In section 9 of article 8, the construction of each is recognized as a distinct purpose of taxation. Inasmuch as the term 'roads' is very plainly used in these sections in a specific sense, it is urged by the defendants in error that the same restricted meaning should be given it in the construction of section 52 of article 3. Such was the view of the Court of Civil Appeals. There is force in the position as a general rule of construction. *But the sense in which a term is used in other provisions of a constitution is not a conclusive test of its meaning in a particular provision. The spirit, purpose and scope of the particular provision are all to be consulted in the effort to determine with certainty the meaning of its terms.*

Id. (emphasis added).

Courts have appropriately used statements made on the floor of a chamber or committee,² committee reports,³ and House Research Organization reports⁴ to guide their understanding of enactments. One source that is not generally considered legislative history are statements or opinions of legislators made after the law is passed. The Commissions provide two cases that address this subject. Commissions' Response at 9-10. However, with one exception,⁵ all the statements, committee reports and HRO reports cited by Appellees were made during the enactment of the home equity provisions.

The Commissions' also criticize the testimony of Rep. Wolens for statements he made

² See *State v. Arellano*, 801 S.W.2d 128, 132 (Tex. App.—San Antonio 1990, no writ).

³ See *Ex parte Canady*, 140 S.W.3d 845, 850 (Tex. App.—Houston [14th Dist.] 2004, no pet.)

⁴ See *Palmer v. Coble Wall Trust Co.*, 851 S.W.2d 178, 182 (Tex. 1992).

⁵ Chairman Solomons made an impromptu statement to Leslie Pettijohn (Office of Consumer Credit Commissioner) about his concern that the Commissions were “making new law.” Appellees' Brief at 52. This statement was made well after he and others voted to adopt the resolution to put Section 50(u) to the voters. Appellees agree that this statement is not legislative history.

relating to other competing home equity amendments being considered. Commissions' Response at 10, fn 3. While he may have been speaking on amendments that did not ultimately pass, he was speaking during the session when various home equity laws and issues were being simultaneously considered. Rep. Wolens's statements are accepted as legislative history because laws of this nature are often discussed and passed using many competing versions.⁶ This Court has even considered legislative history from a bill on a different subject which was being considered during the same legislative session.⁷

Neither the Commissions nor Bankers, utilizing all their available resources and institutional knowledge, could locate a single shred of legislative history that contradicts the positions of Appellees.⁸ That is because Appellees' positions are consistent with the intent of the drafters.

⁶ See *Ex parte Canady*, 140 S.W.3d at 850 (“Although there is no direct legislative history regarding section 7.068 or section 7.162, there was some discussion on the House floor relating to a similar provision. ...”)

⁷ See *Rooms With a View, Inc. v. Private Nat'l Mortg. Ass'n*, 7 S.W.3d 840, 847 (Tex. App.—Austin 1999, pet. denied).

⁸ The Commissions provide the Court with a failed amendment to change the Fee Cap. Commissions' Response at 7. Although the amendment was not adopted, the Commissions assert that this is proof of some prior legislative intent. (It was proposed by Senator Royce West, not Representative George “Buddy” West”.) The Fee Cap had already been in place six years when the amendment was offered. Obviously, this is not legislative history for similar reasons as post enactment statements, and carries no weight. *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 328-29 (Tex. 1994) (Hecht, J., concurring and dissenting) (citations omitted); see also *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir. 1980) (what happened after a statute's enactment may be history and it may come from members of Congress, but it is not part of the legislative history of the original enactment).

II. Specific Rules

Issue 1: 7 TEX. ADMIN. CODE §§ 153.1(11), 153.5(3),(4),(6),(8),(9),(12) (“Fee Cap Rules”)

A. Common Meaning and Legislative Usage

Appellants claim that interest as defined by the Commissions is the commonly understood definition of interest, and the Legislature must have known or should be charged with knowing that years later the Commissions would define the interest exception in the Fee Cap using the usury definition. However, while Appellants provide definitions of interest that may support a broader view, they fail to provide other common definitions that define interest simply in terms of an amount paid over the life of the loan based on an interest rate.⁹

Similarly, Appellants fail to mention that, in many instances, the Texas Legislature has viewed the term “interest” simply in terms of a sum derived from an application of an interest rate.¹⁰ In fact, in Section 52.36 of the Texas Education Code, the Legislature even

⁹ See, e.g., Webster’s NEW WORLD COLLEGE DICTIONARY (4th ed., 2001) (defining interest as “a) money paid for the use of money. b) **the rate of such payment, expressed as a percentage per unit of time**” (emphasis added)); DICTIONARY.COM UNABRIDGED (v 1.1, 2007), based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2006), available at <http://dictionary.reference.com/browse/interest> (defining interest as “a) a sum paid or charged for the use of money or for borrowing money. b) **such sum expressed as a percentage of money borrowed to be paid over a given period, usually one year.**” (emphasis added)).

¹⁰ See, e.g., TEX. FIN. CODE § 123.208(b) (2006) (“A dividend or interest may be paid at a rate and on the conditions that the board authorizes.”); TEX. FIN. CODE § 185.011(b) (2006) (“If the final judgment of the court requires payment of a penalty, interest accrues on the penalty, at the rate charged on loans to depository institutions by the New York Federal Reserve Bank, beginning on the date the judgment is final and ending on the date the penalty and interest are paid.”); TEX. FIN. CODE § 347.204(b) (2006) (“Interest accrues on the insurance premium at a rate that does not exceed the interest rate or time price differential applicable to the credit transaction on the date the insurance is purchased.”) TEX. GOV’T CODE §1474.053(b)(1) (2006) (“the bonds may bear interest at a rate to be set by the commissioners court); TEX. OCC. CODE § 2001.610(b) (2006) (“The interest paid under Subsection (a)(1) is accrued at the rate charged on loans to depository institutions by the New York Federal Reserve Bank.”)

distinguishes between the terms “interest” and “origination fees.” TEX. EDU. CODE § 52.36 (Vernon 2006).

Nevertheless, the Commissions chose the usury definition to interpret the Fee Cap provision. Predictably, Appellants cite as proof of the definition of interest only cases concerning usury.¹¹ Appellees have no quarrel with the definition of interest in the usury context and are not requesting anyone change it. Rather, Appellees request the Court to reject the Commissions’ acceptance of the usury definition of interest for purposes of interpreting the Fee Cap provision of the home equity law.

While the Commissions and the Bankers assert that there can only be one view of interest, this is not the case.¹² The Legislature did not intend that the interest exception in the Fee Cap be defined using a broad definition such as that in Texas usury laws. The Commissions had the duty to correctly interpret the provision not based on linguistic purity or consistency, but rather based the intent of the drafters, the public, and the purpose they

¹¹ For example, in *Varel Mfg. Co. v. Acetylene Oxygen Co.*, 990 S.W.2d 486, 491 (Tex. App.–Corpus Christi 1999, no pet.), the court states, “**For purposes of the usury statute**, ‘interest’ is defined as ‘compensation allowed by law for the use or forbearance or detention of money.’” (emphasis added.) This Court in *Hardwick v. Austin Gallery of Oriental Rugs, Inc.*, 779 S.W.2d 438, 443 (Tex. App.–Austin 1989, writ denied), describes an amount being interest as follows: “The \$5,000.00 being “interest,” **for purposes of the usury statutes**, the company would be entitled...”

¹² See footnote 10; also *C & H Nationwide v. Thompson*, 903 S.W.2d 315, 325 (Tex. 1994) (“Although permitting the award of ‘interest’ on future damages does sacrifice a certain purity of meaning, as Justice Hecht makes clear in his dissent, the real question is whether the Legislature also indulged in this imprecise usage. Here Justice Hecht is less convincing. The structure of section 6 as a whole suggests to us that the Legislature did not use “interest” in such a logical, legalistic way.”)

sought to be achieved.¹³

B. Practical Effect for Lenders of Commissions' Rule

Under the Commissions' rule, there are few if any lender fees that fall under the three percent cap. Appellants dispute this and provide case examples of fees collected by lenders that would be included in the three percent cap.

The Commissions and Bankers cite *Texas Commerce Bank-Arlington v. Goldring*, 665 S.W.2d 103, 104 (Tex. 1984), to show that attorneys fees could be included in the Fee Cap if the fees were collected by a lender (since it is not interest in the usury context). However, as in *Texas Commerce Bank*, such fees are not paid for the lender's services, but rather through the lender for an attorney's services. Appellees have alleged that the Commissions' interest exception eviscerated the Fee Cap as it relates to fees charged and kept by lenders for their services, and *Texas Commerce Bank* does not contradict this allegation.

The Commissions cite *Stedman v. Georgetown Sav. Loan Ass'n*, 595 S.W.2d 486, 487 (Tex. 1979) to show that commitment fees could be included in the Fee Cap. Of course, *Stedman* concerned commitment fees in the context of a commercial loan. Commitment fees are not used in home equity lending. The Commissions also cite *Southland Life Ins. Co. v. Egan*, 86 S.W.2d 722 (Tex. 1935), for an example of a lender fee – prepayment penalty – that

¹³ *C & H Nationwide*, 903 S.W.2d at 334. Justice Doggett goes on to say, "The type of 'linguistic purity' demanded by Justice Hecht has seldom been a theme of effective lawmaking nor a regular requirement of our constitution. Perhaps such an approach is desirable in academia, but it is not appropriate for a court of law that is obligated to enforce what the legislature enacts." *Id.*, 334-335 (Doggett, J., concurring on this point).

would theoretically be included in the Fee Cap (since they are not interest for usury purposes). However, the Constitution already prohibits prepayment penalty fees in home equity loans. TEX. CONST. Art. XVI, § 50(a)(6)(G). The Commissions cite *Morris v. Miglicco*, 468 S.W.2d 517, 519 (Tex. App.–Houston [14th Dist.] 1971, writ ref'd n.r.e.), for brokerage fees that may be included in the three percent cap. Again, even if paid to a lender, these fees are not kept by the lender but pass-through fees (i.e. passing through the lender) going to a broker.

The Bankers cite *Harrell v. Colonial Finance Corp.*, 341 S.W.2d 545, 548 (Tex. App.–San Antonio 1960, writ ref'd n.r.e.), which concerned inspecting furniture and recording a chattel mortgage, neither of which are services provided by home equity lenders. Last of all, the Bankers cite *Sunwest Bank of El Paso v. Gutierrez*, 819 S.W.2d 673, 675 (Tex. App.–El Paso 1991, writ denied), which addresses whether or not casualty insurance related to a loan for the purchase of a truck is a fee or interest for usury purposes. Again this example is inapplicable, because such fees are pass-through fees, and there is no question that hazard insurance to insure the *property* is excluded from the Fee Cap.

Therefore, Appellants have not offered a case example of a fee that would fall under the three percent cap that is paid to a lender for a home equity loan and kept by the lender for a service of the lender. While Appellants come up with theoretical exceptions, in reality the Fee Cap as interpreted by the Commissions does not apply to lenders.¹⁴

¹⁴ Similarly, while usury laws are found in the Texas Finance Code, because of federal preemption, and state parity laws, they do not apply to home equity lenders either. *Preemption of Financial Services*

The trial court also found the Commissions' rules created an unconstitutional loophole:

This would mean of course that, with respect to a lender, the three percent cap would be essentially meaningless. Unless there were charges incurred by the lender which were paid to third party, and reimbursed by the borrower, all other charges would be interest, and it is hard to imagine how the three percent cap could ever be of any significance. ...

[A] lender could charge a point to originate the loan, a point to evaluate the loan, a point to maintain the loan, and a point to service the loan, and even though none of those points bore any relationship to the monthly interest rate being charged the borrower, they would not be subject to the three percent cap.

...

Because this seems so contrary to the clear language, purpose and intent of [the Constitution], I have decided to rule for Plaintiffs on this point.

Point 1, Rule 153.5, Letter from Honorable Scott H. Jenkins, dated October 7, 2005 (attached).

C. Thomison and Tarver

The Commissions' rules exclude at least two fees from the Fee Cap that are commonly charged by lenders that are considered interest for usury purposes – origination fees and discount points.¹⁵ The court in *Thomison* held that origination fees should be included in the

Study, Finance Commission of Texas and Credit Union Commission of Texas, December 2006.
<http://www.fc.state.tx.us/Studies/preemption.pdf>

¹⁵ As commonly understood in the industry, a “loan discount fee” or “discount point” is a fee paid by a borrower to lower the interest rate for the loan. Both loan discount fees and origination fees are interest for usury purposes. 7 TEX. ADMIN. CODE § 83.707(g) (2006); *Tarver v. Sebring Capital Credit Corp.*, 69 S.W.3d 708 (Tex. App.–Waco 2002, no pet.)

Fee Cap.¹⁶ The court in *Tarver* held that discount points should be excluded from the Fee Cap.¹⁷ After considering all the briefs and the opinion of the trial court, Appellees believe these two cases and the trial court's opinion can be reconciled.

If a fee is paid up front to originate, evaluate, maintain, record, or insure the loan, then it should be included in the Fee Cap – even if it is paid to a lender. This reading is consistent with the language of the Fee Cap and all the legislative history relating to it. In *Tarver*, the court merely followed the Commissions' commentary and found that a loan discount fee is interest for usury purposes and therefore excluded it from the Fee Cap. Appellees disagree with this analysis, but the holding in *Tarver* may still be correct. The question in *Tarver* could be restated: is a loan discount fee paid to originate, evaluate, maintain, record or insure the loan? Of course the Commissions do not define the term, but if a loan discount fee is paid to lower the interest rate of the loan (not originate, evaluate, maintain, record, or insure), then it should not be included in the Fee Cap. This reading is also consistent with the trial court's interpretation of the Fee Cap:

[D]efendants took the position that every charge made by the lender to originate, evaluate, maintain, or service the loan would construed, under usury law, as interest and therefore, none of these charges could ever be subject to the three percent fee cap. This would mean of course that, with respect to a lender, the three percent cap would be essentially meaningless. ... The agencies did not specify "discount points." The agencies elected to merely use the word "points" in 153.5(3). ... it would be reasonable to have a rule that clarifies that

¹⁶*Thomison v. Long Beach Mortgage*, 176 F.Supp. 2d 714, 716-18 (W.D. Tex. 2001), vacated, at the request of the parties pursuant to settlement, by 2002 U.S. Dist. LEXIS 27175 (W.D. Tex. 2002).

¹⁷ *Tarver*, 69 S.W.3d at 712.

discount points are not subject to the three percent cap.

Point 1, Rule 153.5, Letter from Honorable Scott H. Jenkins, dated October 7, 2005 (attached).

D. Other Statutory Definitions Not Accepted

If the Commissions had not used statutory usury laws to help define the Fee Cap, it would not have been without precedent. Certainly the Commissions have decided to ignore other definitions defined in Texas law in order to accommodate their purposes. The Texas Constitution specifically states that a home equity loan cannot be secured by any additional real or personal property other than the homestead. TEX. CONST. art. XVI, § 50(A)(6)(H). A homestead has been defined in Section 41.002 of the Texas Property Code. However, rather than use only the statutory definition of homestead that has also been refined by the courts through the years, the Commissions instead created a new definition of homestead. *See* 7 TEX. ADMIN. CODE 153.8 (expanding the definition of homestead to allow lenders to contractually acquire a security interest on items incidental to a homestead, including fixtures, easements, insurance proceeds, etc.) Appellees are not suggesting that the Commissions modify this rule defining homesteads to be consistent with the statutory definition, but rather to point out that the Commissions, for whatever reason, elected to ignore this definition and create an entirely new one.

Appellees have previously explained that the Commissions declined to adopt (or reject) a definition of “credit card” found in the Finance Code. Appellees’ Brief at 42-43.

The trial court also found this interesting.¹⁸ Contrary to allegations of the Bankers (Bankers' Reply at 13), neither Appellees nor the trial court faulted the Commissions for failing to adopt the Finance Code definition – Appellees merely point out the Commissions' hypocrisy.

Lenders have to comply with a variety of regulators, both state and federal. Utilizing a definition of interest for purposes of the Fee Cap that includes lender charges such as origination fees and excludes the interest charged over the life of the loan, including in its infancy (per diem interest), comports with the express language and intent of the constitutional provision. This is not a new definition of interest, but how the term is commonly used by the public and the Texas Legislature.

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

Despite continuing statements by the Commissions (Commissions' Brief at 15; Commissions' Response at 16), Appellees do not challenge the 7 TEX. ADMIN. CODE § 153.12(2) in so far as it permits the use of electronic applications.

Appellants cite *Stringer* in support of their positions. In *Stringer* there was a conflict between the substantive home equity law and the 50(g) notice.¹⁹ The Texas Supreme Court held the notice did not control,²⁰ and Appellants mention that the constitution was changed

¹⁸ Point 10, Rule 153.84, Letter from Honorable Scott H. Jenkins, dated October 7, 2005 (attached).

¹⁹ *Stringer v. Cedant Corp.* 23 S.W.3d 353, 356 (Tex. 2000).

²⁰ *Id.*

consistent with that holding. The amended Section 50(g) was designed to resolve a conflict should another arise. Obviously, the 50(g) notice is meant to give a correct explanation of the home equity law to borrowers as it exists. Thus, it is important to note that 50(g) notice was not modified to change the phrase “written application.” While Section 50(g) does not control in case of a conflict or provide a borrower with a substantive right where none exists elsewhere, it does provide this Court with a guide to what the drafters and adopters intended.

The trial court explained his reasoning in invalidating the rule:

The Constitutional language in question which prevents the closing from occurring before the twelfth day after the date that the owner “submits an application” evinces a clear intent for there to be a more formal application process by the owner than by merely saying “I would like to apply.” While an electronic application that is substantially the same as one that would be done on paper would certainly suffice, the Rule allowing for an oral application creates ambiguity, confusion, and hardly seems consistent with the language and clear intent of the twelve day waiting period following a formal application.

Point 3, Rule 153.12, Letter from Honorable Scott H. Jenkins, dated October 7, 2005 (attached).

Issue 3: 7 TEX. ADMIN. CODE § 153.84(1) (“Convenience Checks Rule”)

First, the Commissions state without citation to anything in or outside of the record that convenience checks “are not used by the lender to solicit the homeowner’s business ... [they] are requested by the borrowers after they have applied for the HELOC ” Commissions’ Response at 18. This statement is incorrect based upon the record; the record clearly demonstrates that convenience checks are often sent unsolicited to borrowers. *See*

Appellees' Brief at 41. While it is true that these checks are sent after a line-of-credit has already been approved, the entire point of the constitutional provision is to prohibit a host of methods for advancing these loan funds after the loan as been approved (*e.g.*, credit card). The Commissions do not believe these protections are necessary; however, it is not their place to decide.

Second, both the Commissions and the Bankers mistakenly allege that Appellees object to HELOC advances by any type of check. Commissions' Response at 19; Bankers' Reply at 12. Appellees do not have an objection to an advance by a written check so long as the checks are provided at the request of the borrower. Appellees allege and the trial court agreed that convenience checks are "similar devices." However, advances made using checks provided at the borrower's request are not similar enough to be constitutionally prohibited. Interestingly, the Commissions seem to agree. On page 21 of their Response, the Commissions explain what a convenience check "must" be: a device, requested by the borrower, that contains no prepayment term. Of course, this definition is not consistent with the record – nor is it consistent with reality – but it is consistent with the Commissions' belief that convenience checks are not sent unsolicited to borrowers. Of course, this confusion could easily be addressed if the Commissions would simply define the term. The Commissions have had plenty of time. In October 2005, the trial court stated his reasons for invalidating the rule:

The Constitutional prohibition of "preprinted solicitation check(s)" does not necessarily mean that all other "checks" are permitted. To determine whether

“convenience checks” are prohibited by the Constitution, it is necessary to discern the meaning of the entire provision in question ... the key to deciding this challenge is the phrase “similar device.” ... Statutory definitions alone, however, as discussed under [the Fee Cap], are not determinative when interpreting the language of our Constitution adopted by the people of Texas. The reason that “convenience checks” are prohibited, is that, in fact, they seem so clearly to be a “similar device.”

Point 10, Rule 153.84, Letter from Honorable Scott H. Jenkins, dated October 7, 2005 (attached).

Finally, regarding the other, undefined terms in the rule, the Commissions, again without citation, state:

[T]he Commissions failed to define the devices allowed by the interpretative rule: prearranged drafts, convenience checks and written transfer instructions. The Commissions did not include definitions because they reasonably concluded that these devices are generally understood by both lenders and borrowers. The term “written transfer instructions,” for example, does not require further elaboration.

Commissions’ Response at 20.²¹

The record does comport to the Commissions’ allegations. For example, the Bankers’ produced a witness for deposition, a Compass Bank senior counsel, and he did not know what a “written transfer instruction” was and erroneously believed that a “prearranged draft”

²¹ Appellees also complain of the lack of definition of numerous other exceptions to the loan advance rule: “electronic funds transfer,” “contacting a lender directly,” and “telephonic fund transfers.” See Appellees’ Brief at 40, fn 72. Given that the Commissions were creating exceptions to a constitutional rule that was designed to protect the public, one would think it reasonable to define the terms. The exception “contacting the lender directly” would seem to imply that the borrower initiates the contact, but in today’s world the phrase could mean anything. Given that advances in most every circumstance are somehow provided electronically, the “electronic funds transfer” exception could be widely used for most any advance. A telephone call made by a telemarker to borrower is arguably a “telephonic fund transfer.” There is undoubtedly a reason why the Commissions would rather not define these terms and why the Bankers did not even address the issue in their briefing.

is defined by Texas statute. (Sargent Deposition at 27, IV C.R. at 1017.) The Bankers claim that the Commissions' interpretations need only give a person of "ordinary intelligence" fair notice in order to avoid a vagueness challenge. Bankers' Reply at 14. If Mr. Sargent does not know what these terms mean, then the Commissions' rule fails the test.

Issue 4: 7 TEX. ADMIN. CODE § 153.22 ("Document Copy Rule")

The Constitution says: "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." TEX. CONST. art. XVI, § 50(a)(6)(Q)(v).

The Commissions say: "[The provision] is not intended to require that the borrower be given a copy of every piece of paper signed by the borrower that in any way relates to the loan." Commissions' Response at 23.

The Bankers say: "Without the interpretation the lender would have to guess, for example, as to whether [to provide the borrower a copy of] a drivers' license" Bankers' Reply at 16.

The Commissions provide nothing to support their view – no purpose, no legislative history, nothing. Meanwhile, the Bankers strain to come up with an example that might cause a debate among general counsels for large banks.²² Certainly a driver's license has a signature, however, the borrower does not sign it when the loan is being made. The Bankers

²² "Laws are made for men of ordinary understanding, and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties, which may make anything mean everything or nothing, at pleasure." Letter dated June 12, 1823, from Thomas Jefferson to United States Supreme Court Justice William Johnson. S. PADOVER, THE COMPLETE JEFFERSON 323 (1943).

provide little justification why they could not simply provide a copy of it, given that they make a copy of the borrower's driver's license for their files. One could explain reasons for the rule (*e.g.*, during discovery a party is entitled to learn what the other knows or has), but it is not entirely necessary in order to understand the provision's meaning. The express language, intent, and purposes are clear in this constitutional provision, and the Commissions simply ignored them.

The trial court invalidated this rule and simply held: "The rule is inconsistent with, and diminishes the protections of the Constitution" ²³

Issue 6: 7 TEX. ADMIN. CODE § 153.15(2),(3) ("Power of Attorney Rule")

Appellees assert that this rule is a new, unauthorized legislative rule. But even if this Court finds the Commissions have the authority to promulgate new law, this rule is inconsistent with the language and intent of the constitutional provision. This Court reviewed the Homestead provision at issue and recently stated:

Nor is it up to this Court to decide as Rooms urges that the legislature was overly paternalistic in imposing this protection. Texas courts have long held that homestead rights in Texas are "founded upon principles of the soundest policy." Homestead rights are intended to protect Texas families from destitution and homelessness and encourage feelings of "independence which are so essential to the maintenance of free institutions." Courts should liberally construe homestead provisions in a manner that promotes that intended purpose. *The legislature apparently believed it worthwhile to require that homestead liens be transacted away from the homestead, perhaps to*

²³ Point 8, Rule 153.22, referencing Point 7, Letter from Honorable Scott H. Jenkins, dated October 7, 2005 (attached).

lessen the danger of undue influence or duress, or to prevent an unscrupulous salesman from persuading a homeowner to impose such a lien without a full understanding of all the implications. We will not second-guess that decision.

Rooms With a View, Inc., 7 S.W.3d at 847 (citations omitted, emphasis added).

The Commissions second-guessed the Legislature and the voters, because they not only enacted a new legislative rule without authority, but they also contradicted the entire purpose of the constitutional provision—that is, to require the borrowers appear in pers at a law office, title office, or office of the lender. Appellants correctly point out that the home equity law already prohibits the use of powers-of-attorney in one context. TEX. CONST. art. XVI, § 50(a)(6)(Q)(iv) (borrower cannot sign a power of attorney confessing judgment). However, this language was a mirror of similar language adopted in at least three other places in Texas law. *See* Commissions’ Response 24-25. Rather than merely prohibit all powers-of-attorney, the Legislature broadly required the attendance of the borrowers at closing.

The Commissions mention that Texas law has long allowed powers-of-attorney in other contexts and prohibiting them would be a “significant departure from existing Texas law.” *See* Commissions’ Response at 25. Of course, up until 1997, home equity lending was not allowed either. Meanwhile the Bankers explain that there are a host of other protections, so there is little reason for another. Bankers’ Response at 8. If the rule was not needed, and there are a host of other protections for borrowers, then Appellees doubt this rule would have ever been enacted.

Finally, neither the Commissions nor the Bankers address in any of their five briefs Appellees’ challenge to the other part of Rule 153.15: “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.” TEX. ADMIN. CODE 153.15(3) (2006). The Commissions took this approach in response to Appellees’ challenge to Rule 153.13 – they refused to respond in briefing in the trial court, and refused to answer a direct question about it during oral argument. *See* Appellees’ Brief at 57-58, fn 102; Letter from Judge Jenkins dated October 7, 2005 (“During oral argument, counsel for Defendants declined to answer the Court’s question about whether this particular part of the rule violated the Constitutional provision in question.”). Ultimately the trial court invalidated the rule, and rather than appeal, the Commissions modified it. Once again, rather than explaining how Appellees have misunderstood the rule or simply fixing the rule, the Commissions remain silent and hope nobody notices. Appellees reassert that this section of the rule violates the constitutional requirement that the closing (*i.e.*, the execution of the documents consenting to the loan) be performed in a law office, title office or office of the lender.

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

The Bankers explain that Appellees are attempting to substitute the word “deliver” in place of “provide” based on the intent, purpose and legislative history of the home equity law. The Bankers explain that the Commissions could have enacted a rule that merely

required a lender to place a copies of the disclosure in their lobby and it would have complied with the constitutional requirement that the disclosure be provided. Bankers' Response at 11. Of course, such a rule would have also been unconstitutional for obvious reasons.

Meanwhile, the Commissions explain that their rule is similar to Rule 21a of the Texas Rules of Civil Procedure, which reads in part:

Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation ..., may be served by *delivering a copy to the party ... in person ... or by courier ... or by certified or registered mail ...* .

TEX. R. CIV. P. 21a.

Rule 21a uses “delivering” as opposed to “providing” and also requires certified or registered mail if a notice is sent by mail to a party. Regardless, the issue is not whether the Commissions’ rule is reasonable based on the Texas Rules of Civil Procedure. The issue is whether the Commissions have the authority to make law. If, as the Commissions suggest, the rule merely “incorporates existing legal principles,” why did the Commissions feel the need to enact it and defend it once challenged? If this Court holds that the Commissions have the authority to create legislative rules, then the Court should then review whether this rule is reasonable in light of the intent and purpose of the home equity lending law.

The Office of Consumer Credit Commissioner, an agency of the Texas Finance Commission, states on its website:

The Texas Constitution requires in Article 16, Section 50 that a 12-day waiting period must lapse from the time an application is taken AND the following consumer rights notice is given to the borrower to the closing. *For example,*

if a potential borrower submits an application on Monday, but doesn't receive a copy of the consumer rights notice until Wednesday, then the 12-day countdown would begin on Wednesday.

Office of Consumer Credit Commissioner, Disclosures Required By Law, Last Updated December 14, 2006. <http://www.occc.state.tx.us/pages/Legal/disclosures/discs.htm> (copy attached, emphasis added). The Office of Consumer Credit Commissioner reports to the Finance Commission and is actively engaged in the home equity lending interpretations. Commissioner Leslie Pettijohn appears at every joint meeting of the two Commissions to answer questions posed by these boards.²⁴ It would appear that the Commissioner's office engaged in a plain reading of the constitutional provision when this document was drafted, unlike when they drafted the Commissions' rules. Appellees agree with the Office of Consumer Credit Commissioner's that a borrower would have to receive the 50(g) notice to trigger the 12-day cooling off period.

²⁴ See e.g., Credit Union Commission Meeting Minutes, February 20, 2004 (Pl.s' Ex. 27, I C.R. Suppl. at 290).

V. PRAYER

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,



NELSON H. MOCK
Texas Bar No. 24003922
Texas RioGrande Legal Aid
4920 N. IH-35
Austin, Texas 78751
Tel. (512) 374-2723
Fax (512) 447-3940

ROBERT W. DOGGETT
Texas Bar No. 05945650
Texas RioGrande Legal Aid
4920 N. IH-35
Austin, Texas 78751
Tel. 512-374-2725
Fax 512-447-3940

STEPHEN GARDNER
Texas Bar No. 07660600
Law Office of Stephen Gardner
6060 North Central Expressway
Suite 560
Dallas, Texas 75206
Tel. 214-800-2830
Fax 214-800-2834

ROBERT L. WHARTON
Texas Bar No. 21243790
Texas Lone Star Legal Aid
P.O. Box 631070
Nacogdoches, Texas, 75963
Tel. (936) 560-1455
Fax (936) 560-4795

JEAN CONSTANTINE-DAVIS
D.C. Bar No. 250084
AARP Foundation Litigation
601 E. Street, N.W.
Washington, DC 20049

VI. 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:

Jack Hohengarten
Deputy Division Chief
Office of Solicitor General,
P.O. Box 12548
Austin, Texas 78711-2548
Attorney for Appellants Finance Commission and
Credit Union Commission of Texas

and

Craig Enoch
Winstead Sechrest & Minick, P.C.
401 Congress Avenue, Suite 2100,
Austin, Texas 78701
Attorney for Appellant Texas Bankers Association

on this 29th day of January, 2007.



ROBERT W. DOGGETT

VII. APPENDIX



COPY

SCOTT H. JENKINS
Judge
(512) 854-9308

LAWRENCE ANDREWS
Baillif
(512) 854-9397

NANCY HERRERA
Judicial Aide
(512) 854-9303

53RD DISTRICT COURT
TRAVIS COUNTY COURTHOUSE
P. O. BOX 1748
AUSTIN, TEXAS 78767
FAX (512) 854-9332

October 7, 2005

CHAVELA PRINCE
Official Reporter
(512) 854-9322

CONNIE JEFFERSON
Court Clerk
(512) 854-9457

BARBARA HANNON
Staff Attorney
(512) 854-9366

Ms. Ann Hartley
Assistant Attorney General
Financial Litigation Division
P.O. Box 12548
Austin, Texas 78711
Via Facsimile: (512) 477-2348

Mr. Robert Doggett
Texas Rio Grande Legal Aid
2201 Post Road, Suite 104
Austin, Texas 78704
Via Facsimile: (512) 477-3940

Mr. Stephen Gardner
Law Office of Stephen Gardner, PC
6060 North Central Expressway, Suite 560
Dallas, Texas 75206
Via Facsimile: (214) 800-2834

Filed in The District Court
of Travis County, Texas
on 10.7.05
at 4:20 P.M.
Amalia Rodriguez-Mendoza, Clerk

Re: Cause No. GN400269; *ACORN, et al. vs. Finance Commission of Texas, et al* in
the 126th Judicial District, Travis County, Texas

Dear Counsel:

I have concluded my consideration of your cross motions for Summary Judgment and I am writing to let you know about the decisions I have made. I will list these as points 1 through 10, though in some of the briefing they have been referred to as A through J.

Point 1, Rule 153.5: During oral argument, counsel for Defendants took the position that every charge made by the lender to originate, evaluate, maintain, or service the loan would be construed, under usury law, as interest; and therefore, none of these charges could ever be subject to the three percent cap. This would mean of course that, with respect to a lender, the three percent cap would be essentially meaningless. Unless there were charges incurred by the lender which were paid to a third party, and reimbursed by the borrower, all other charges would be interest, and it is hard to imagine how the three percent cap could ever be of any significance. Furthermore, adopting Defendants' use of usury law to interpret the Constitution so that it is "consistent" would mean that any change in usury law by the legislature could necessarily dictate a new and different interpretation of the Constitution.

I noted with interest that defense counsel's concluding argument (in her brief at the top of page 16) is that the challenged interpretation, 7 TAC 153.5, does not conflict with the Texas constitution, Article 16, Section 50 (a)(6)(E) by specifying that "discount points" are interest and are not subject to the three percent cap that limits fees. Therein lies the problem. The agencies did not specify "discount points." The agencies elected to merely use the word "points" in 153.5(3). As we all know, all points are not discount points. Discount points are essentially pre-payment of interest. They are a payment (each point being one percent of the loan amount) in exchange for a correspondingly lower monthly rate of interest. This process was explained by the Waco Court in the *Tarver* case. Compare this to the *Thomison* case, in which the borrower paid a one percent "origination fee." Though the fee was exactly one percent of the total loan, and therefore was a point, Judge Nowlin had no difficulty in finding that the "origination fee" was subject to the three percent cap in the Constitution. He distinguished discount points in a footnote and declined to reach the question of whether discount points were subject to the three percent cap. As I mentioned to counsel during oral argument, it seems to this Court that since discount points are clearly a pre-payment of interest and measurably correspond to a lower monthly interest rate, it would be reasonable to have a rule that clarifies that discount points are not subject to the three percent cap.

Under the agencies' rules, and in particular Rule 153.5(3), a lender could charge a point to originate the loan, a point to evaluate the loan, a point to maintain the loan, and a point to service the loan, and even though none of those points bore any relationship to the monthly interest rate being charged the borrower, they would not be subject to the three percent cap. In fact, it would not matter whether any of these charges were in the form of points. Because all of these charges by the lender are considered, at present, interest (as that term is technically defined in usury law), they are not subject to the three percent cap. Because this seems so contrary to the clear language, purpose and intent of Article 16, Section 50 (a)(6)(E), I have decided to rule for the Plaintiffs on this point.

Point 2, Rule 153.10: This point was withdrawn by counsel for Plaintiffs during oral argument, and the parties have agreed that it need not be addressed by the Court.

Point 3, Rule 153.12: The Constitutional language in question which prevents the closing from occurring before the twelfth day after the date that the owner "submits an application" evinces a clear intent for there to be a more formal application process by the owner than by merely saying "I would like to apply." While an electronic application that is substantially the same as one that would be done on paper would certainly suffice, the Rule allowing for an oral application creates ambiguity, confusion, and hardly seems consistent with the language and clear intent of the twelve day waiting period following a formal application. The plaintiffs prevail on this point.

Point 4, Rule 153.13: If for no other reason than that Rule 153.13 (4)(B) so clearly violates the Constitution, Plaintiffs prevail on this point as well. During oral argument, counsel for Defendants declined to answer the Court's question about whether this particular part of the rule violated the Constitutional provision in question. That is because this portion of the rule is so poorly drafted as to allow for a dramatic increase in the total amount of the actual fees, costs, points and charges on the date of closing over the amount in the pre-closing disclosure, provided that just one of the items of the charges decreases. Plaintiffs prevail on this point.

Point 5, Rule 153.15: Because I have concluded that this rule does not contradict the Constitutional provision in question, the Defendants prevail on this point.

Point 6, Rule 153.18 (3): The only reason for this particular subpart of the Rule is to allow lenders to have an owner submit an application to consolidate a non-homestead loan of that very lender in order to convert it to a homestead loan. This is precisely what the Constitution was intended to prevent. If that is not the meaning of the Rule, then it serves no purpose. Counsel for Defendants argues that this particular section can be interpreted to be consistent with the Constitution by concluding that it is not intended to allow the lender to consolidate its own non-homestead loan to a homestead loan by persuading the owner to fill out such an application. The Constitution, however, already allows the lender to require a debt consolidation if the debt is to another lender or if the prior debt is already secured by the homestead. What purpose then would subsection 3 of the rule serve other than to allow a lender to convert its own non-homestead debt to a homestead loan by "persuading" the borrower to fill out such an application? In fact, if Defendants have correctly "interpreted" the Constitution in Rule 153.12 (See Point 3 above), then the borrower could be persuaded to orally make this application. Plaintiffs prevail on this point.

Point 7, Rule 153.20: The rule is inconsistent with, and diminishes the protections of the Constitution, and Plaintiffs prevail on this point as well.

Point 8, Rule 153.22: For the same reasons as point 7, Plaintiffs prevail on this point.

Point 9, Rule 153.51: Because I have concluded that the language in the rule being challenged by the Plaintiffs is not inconsistent with the Constitutional provision in question, the Defendants prevail on this point.

Point 10, Rule 153.84: The Constitutional prohibition of "preprinted solicitation check(s)" does not necessarily mean that all other "checks" are permitted. To determine whether "convenience checks" are prohibited by the Constitution, it is necessary to discern the meaning of the entire provision in question, which prohibits the use of "credit cards, debit cards, preprinted solicitation check, or similar device...".

Cause No. GN400269

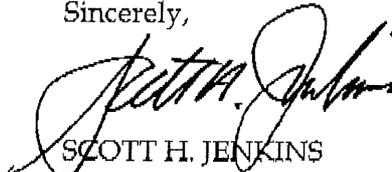
October 7, 2005

Page 4

The Defendants correctly point out on page 41 of their brief and Cross Motion, that the key to deciding this challenge is the phrase "similar device". They then go on to reference, in support of their position, the statutory definition of "credit card" found in Finance Code Sec. 346.001(2). The Defendants, however, have ignored the very definition that they cite, which equates "check" and "credit card". Furthermore, Finance Code Sec. 301.002(2), which Defendants do not cite, includes the use of a "check" when defining "credit card transaction." How then can Defendants maintain that a "convenience check" is not a prohibited "similar device"? Statutory definitions alone, however, as discussed under Point 1, are not determinative when interpreting the language of our Constitution adopted by the people of Texas. The reason that "convenience checks" are prohibited, is that, in fact, they seem so clearly to be a "similar device." Plaintiffs prevail on this point.

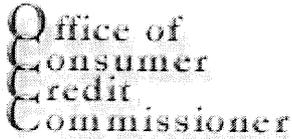
Please provide an order for the Court's signature which has been approved as to form by all counsel. Thank you for the manner in which you presented these motions and for your assistance to the Court.

Sincerely,

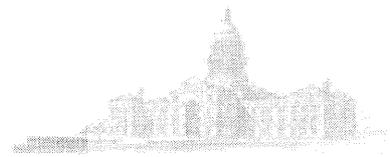


SCOTT H. JENKINS
Judge, 53rd District Court
Travis County, Texas

Orig: Ms. Amalia Rodriguez-Mendoza, Travis County District Clerk



Consumer Helpline: (800) 538-1579



En Español

- Searches & License Verifications
- Who We Are
- News Releases & Publications
- Consumer Brochures
- Speakers & Presentations
- Legal Statutes & Rules
- Interest Rates
- Licensing/Forms
- Links
- Employment
- Contact Us
- Home

Disclosures Required by Law

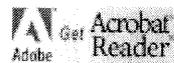
Home Equity Loans: The Texas Constitution requires in Article 16, Section 50 that a 12-day waiting period must lapse from the time an application is taken AND the following consumer rights notice is given to the borrower to the closing. For example, if a potential borrower submits an application on Monday, but doesn't receive a copy of the consumer rights notice until Wednesday, then the 12-day countdown would begin on Wednesday. Once the waiting period has passed, the loan can be closed.

★ **Home Equity Lending Contract Disclosure:** Home equity lenders must provide copies of this consumer rights notice to loan applicants. **Updated September 2003**

★ **Aviso Sobre El Crédito Que Se Concede:** Spanish version of the home equity lending contract disclosure

Spanish Disclosure for Certain Loans Made under Chapter 342 are required; see statutes 90.701 through 90.706 for the required act.

[State of Texas / TRAIL \(Texas Records and Information Locator\)](#)
[Texas Finance Commission / Department of Information Resources](#)
[Sunset Advisory Commission / Privacy Policy](#)
[Open Records Requests](#)



Last Updated: Thursday, December 14, 2006 13:59