

IN THE THIRD COURT OF APPEALS  
Austin, Texas

TEXAS BANKERS ASSOCIATION,  
THE FINANCE COMMISSION OF TEXAS, and  
THE CREDIT UNION COMMISSION OF TEXAS  
*Appellants, Cross-Appellees*

RECEIVED

SEP 06 2006

VS.

DEPARTMENT OF BANKING  
AUSTIN, TEXAS

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN), VALERIE  
NORWOOD, ELISE SHOWS, MARYANN ROBLES-VALDEZ, BOBBY MARTIN, PAMELA  
COOPER, AND CARLOS RIVAS  
*Appellees, Cross-Appellants*

On Appeal from the 126<sup>th</sup> Judicial District Court,  
Travis County, Texas

BRIEF OF APPELLANTS  
THE FINANCE COMMISSION OF TEXAS AND  
THE CREDIT UNION COMMISSION OF TEXAS

GREG ABBOTT  
Attorney General of Texas

KENT C. SULLIVAN  
First Assistant Attorney General

EDWARD BURBACH  
Deputy Attorney General for Litigation

DAVID C. MATTAX  
Chief, Financial Litigation Division

JACK HOHENGARTEN  
Deputy Division Chief  
State Bar No. 09812200

Tel: (512) 475-3503  
Fax: (512) 477-2348

DON CRUSE  
Assistant Solicitor General  
Tel: (512) 936-1827  
Fax: (512) 474-2697

Office of Solicitor General  
P.O. Box 12548  
Austin, Texas 78711-2548

*Counsel for Appellants*  
*The Finance Commission of Texas and The Credit Union Commission of Texas*

ORAL ARGUMENT REQUESTED ..... August 30, 2006

## IDENTITY OF PARTIES AND COUNSEL

### A. Parties and Other Interested Entities

Defendants/Appellants/Cross Appellees: Finance Commission of Texas and Credit Union Commission of Texas (State)

Intervenor/Appellants/Cross Appellees: Texas Bankers Association (TBA)

Plaintiffs/Appellees/Cross Appellants: Association of Community Organizations for Reform Now (ACORN)

Valerie Norwood, Elise Shows, Maryann Robles-Valdez, Bobby Martin, Pamela Cooper, and Carlos Rivas (Individuals)

Amici Curiae: Independent Bankers Association of Texas, et al.

### B. Attorneys

#### For Defendants/Appellants/Cross Appellees:

State

GREG ABBOTT  
Attorney General of Texas

KENT C. SULLIVAN  
First Assistant Attorney General

EDWARD BURBACH  
Deputy Attorney General for Litigation

DAVID C. MATTAX  
Chief, Financial Litigation Division

(on appeal)

JACK HOHENGARTEN  
Deputy Division Chief  
Financial Litigation Division  
Texas Bar No. 09812200  
Tel: (512) 475-3503  
Fax: (512) 477-2348

DON CRUSE  
Assistant Solicitor General  
Office of Solicitor General  
Texas Bar No. 24040744  
Tel: (512) 936-1827  
Fax: (512) 474-2697

(court below)

ANN HARTLEY  
Assistant Attorney General  
Financial Litigation Division  
Texas Bar No. 09157700  
Tel: (512) 936-1313  
Fax: (512) 477-2348  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

**For Intervenor/Appellant/Cross Appellee:**

TBA

CRAIG T. ENOCH  
Texas Bar No. 00000026  
WINSTEAD SECHREST & MINICK, P.C.  
401 Congress, Suite 210  
Austin, TX 78701  
Tel: (512) 370-2800  
Fax: (512) 370-2850

**For Plaintiffs/Appellees/Cross Appellants:**

ACORN (Lead Counsel)

BRUCE E. PRIDDY  
Texas Bar No. 16322700  
LAW OFFICES OF BRUCE PRIDDY  
15851 North Dallas Parkway, Suite 500  
Dallas, TX 75001  
Tel: (214) 228-7745  
Fax: (972) 732-0316

STEPHEN GARDNER  
Law Offices of Stephen Gardner, PC  
6060 North Central Expwy., Suite 560  
Dallas, TX 75206  
Tel: (214) 800-2830  
Fax: (214) 800-2834

JEAN CONSTANTINE-DAVIS  
AARP Foundation Litigation  
601 E. Street, N.W.  
Washington, D.C. 20049  
Tel: (202) 434-2058  
Fax: (202) 434-6464

Individuals

ROBERT W. DOGGETT  
Texas Bar No. 05945650  
Texas Rio Grande Legal Aid. Omc.  
4920 N. IH-35  
Austin, TX 78751  
Tel: (512) 374-2725  
Fax: (512) 447-3940

ROBERT WHARTON  
Texas Bar No. 21243790  
TEXAS LONE STAR LEGAL AID  
106 Hill Top Road  
Huntsville, TX 77320  
Tel: (936) 594-9774  
Fax: (936) 560-4795

Co-Counsel

NELSON H. MOCK  
Texas Bar No. 24003922  
TEXAS RIO GRANDE LEGAL AID  
4920 N. IH-35  
Austin, TX 78751  
Tel: (512) 374-2723  
Fax: (512) 447-3940

**For Amici Curiae:**

Independent Bankers  
Association of Texas, et al.

Of Counsel:  
KAREN M. NEELEY  
Texas Bar No. 14861450  
COX, SMITH, & MATTHEWS, INC.  
111 Congress Avenue, Suite 2800  
Austin, Texas 78701-4084  
Tel: (512) 703-6315  
Fax: (512) 703-6399

**TABLE OF CONTENTS**

IDENTITY OF PARTIES & COUNSEL ..... ii

INDEX OF AUTHORITIES ..... viii

STATEMENT OF THE CASE ..... 1

ISSUES PRESENTED ..... 2

STATEMENT OF FACTS ..... 3

SUMMARY OF THE ARGUMENT ..... 4

ARGUMENT ..... 7

I. Issue One: It was reasonable for the Commissions to interpret the Legislature’s use of the term “any interest” in Article XVI, Section 50(a)(6)(E) of the Texas Constitution to have the same meaning as the definition used by the Legislature in the Texas Finance Code and as defined by Texas case law. (7 Tex. Admin Code §§ 153.1(11) and 153.5(3)(4)(6)(8)(9) and (12)). ..... 8

    A. The constitutional amendments and the Commissions’ interpretive rules ..... 8

    B. Plaintiffs’ challenge to Rules 153.1(11) and 153.5(3) lacks merit ..... 9

        1. The Commissions’ interpretation of “any interest” gives effect to the plain language of Section 50(a)(6)(E) ..... 9

        2. It was also reasonable for the Commissions to conclude that the Legislature, when it drafted Section 50(a)(6)(E), was aware of its own definition of interest and knew that Texas case law also interpreted the term. .... 10

        3. The Commissions’ definition is consistent with, and must be read in the context of, existing case law ..... 12

II. Issue Two: Because Section 50(a)(6)(M)(i) uses the term “an application” and does not restrict the application to any particular type, the Commissions’ interpretation—which recognizes that applications may be submitted orally—is reasonable and consistent with the Constitution. 7 Tex. Admin Code § 153.12 . . . . . 15

    A. The constitutional amendments and the Commissions’ interpretive rules 15

    B. An oral application is “an application” and Section 50(a)(6)(M)(i) does not limit applications to “written applications” . . . . . 16

III. Issue Three: Section 50(t)(3) authorizes the use of home equity lines of credit, but prohibits the use of a “credit card, debit card, *preprinted solicitation* check, or similar device to obtain an advance.” The Commissions reasonably concluded this prohibition did not include convenience checks, which are used by the borrower *after* obtaining the loan to draw down amounts. 7 Tex. Admin Code § 153.84 . . . . . 19

    A. The Constitutional amendments and the Commissions’ interpretive rules . . . . . 19

    B. The Constitution authorizes advances on home equity lines of credit and consistent with this, the interpretive rule reasonably identifies permissible devices for obtaining such advances, including convenience checks . . . . . 20

    C. Convenience checks are not “similar” to “preprinted solicitation checks,” which are expressly prohibited by Section 50(t)(3) . . . . . 21

IV. The Commissions reasonably interpreted constitutional provisions that required the lender to provide copies of all closing documents to the borrower . . . . . 23

    A. The Constitutional amendments and the Commissions’ interpretive rules . . . . . 23

    B. After the trial court invalidated Section 153.22, the Commissions proposed amending the rule and published their proposed amendment in the Texas Register for notice and comment . . . . . 24

C. However, since the earlier version of section 153.22 has not yet been repealed, the Commissions provide the following briefing to preserve their position in this appeal, in the event the proposed amended rule is not adopted . . . . . 25

CONCLUSION AND PRAYER . . . . . 27

CERTIFICATE OF SERVICE . . . . . 30

APPENDIX . . . . . Tab

## INDEX OF AUTHORITIES

### STATE CASES

<i>Brazoria County v. Texas Comm'n on Env'tl. Quality</i> , 128 S.W.3d 728 (Tex. App.—Austin 2004, no pet.) .....	23
<i>City of Beaumont v. Bouillion</i> , 896 S.W.2d 143 (Tex. 1995) .....	10
<i>Doody v. Ameriquest Mortgage Co.</i> , 49 S.W.3d 342 (Tex. 2001) .....	8
<i>First Bank v. Tony's Tortilla Factory</i> , 877 S.W.2d 2857 (Tex. 1994) .....	14
<i>First USA Mngt., Inc. v. Esmond</i> , 960 S.W.2d 625 (Tex. 1997) .....	14
<i>Gonzalez County Sav. &amp; Loan Ass'n v. Freeman</i> , 534 S.W.2d 903 (Tex. 1976) .....	14
<i>L.B. Foster v. State</i> , 106 S.W.3d 194 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd.) .....	12
<i>McBride v. Clayton</i> , 140 Tex. 71, 166 S.W.2d 125 (Tex. 1942) .....	10, 11
<i>Railroad Comm'n of Texas v. Lone Star Gas Co.</i> , 844 S.W.2d 679 (Tex. 1992) .....	8
<i>Rooms With a View, Inc. v. Private Nat'l. Mortgage Ass'n, Inc.</i> , 7 S.W.3d 840 (Tex. App.—Austin 1999, pet. denied), cert. denied <i>National Ass'n of Remodeling Indus.—Houston Chapter, Inc. v. Rooms With a View</i> , 121 S. Ct. 72, 531 U.S. 826, 148 L.Ed.2d 36 (2000)) .....	8
<i>Stringer v. Cendant Mortgage Corp.</i> , 23 S.W.3d 353 (Tex. 2000) .....	19
<i>Sunwest Bank of El Paso v. Gutierrez</i> , 819 S.W.2d 673 (Tex. App.—El Paso 1991, writ denied) .....	11
<i>Tarver v. Sebring Capital Credit Corp.</i> , 69 S.W.3d 708 (Tex. App.—Waco 2002, no pet.) .....	13, 14

**STATE STATUTES**

Tex. Const. Art. XVI ..... 11, 16, 21

Tex. Fin. Code Ann. §§ 11.308, 15.413 (Vernon Supp. 2006) ..... 3

Tex. Fin. Code § 301.002(a)(4) (Vernon Pamp. 2006) ..... 4, 5, 9, 11, 13

Tex. Gov't Code Ann. § 311.011(b) (Vernon 2005) ..... 11

**LEGISLATIVE HISTORY**

House Research Organization, Bill Analysis,  
Tex. S.J. Res. 42, 78<sup>th</sup> Leg., R.S. (May 23, 2003) at 5 ..... 3, 4, 27

House Research Organization, Bill Analysis,  
Tex. H.J. Res. 31, 75<sup>th</sup> Leg., R.S. (May 9, 1997) at 5 ..... 3

**FEDERAL REGULATIONS**

12 C.F.R. § 202.2(f) (2005) ..... 18

**STATE REGULATIONS**

29 Tex. Reg. 87 (2004) ..... 13

31 Tex. Reg. 5080 (2006) ..... 15

31 Tex. Reg. 5511 (2006) ..... 1

7 Tex. Admin. Code 153.15(2) (2006) ..... 25

7 Tex. Admin. Code § 153.12 (2006) ..... 1

7 Tex. Admin. Code § 153.5(3) (2006) ..... 1, 2, 15

7 Tex. Admin. Code §§ 153.13 (2006) ..... 14

7 Tex. Admin. Code §§153.1(11) (2006) ..... 1, 2, 19

7 Tex. Admin Code § 153.84 (2006) ..... 2, 8, 9, 14

7 Tex. Admin. Code § 153.22 (2006) ..... 1, 2, 24, 25

7 Tex. Admin. Code 153.51(1) (2006) ..... 13

**OTHER AUTHORITIES**

Webster's New Collegiate Dictionary (9th ed. 1988) ..... 10

American Heritage College Dictionary (3d ed., 1997) ..... 10

Black's Law Dictionary (8th ed. 2004) ..... 10

## STATEMENT OF THE CASE

*Nature of the case.* The individual plaintiffs and ACORN (below, “ACORN” or “plaintiffs”) brought suit under APA section 2001.038 and Chapter 37 of the Texas Civil Practices & Remedies Code, challenging the validity of interpretive rules relating to home equity lending. (1 C.R. at 3). The interpretations were adopted by the Finance Commission and the Credit Union Commission (below, the “Commissions”).

*Course of proceedings.* On cross-motions for summary judgment, the court denied ACORN’s challenge to 7 TAC 153.15(2) and (3) and Rules 7 TAC 153.51(1) and (3), but declared invalid all other interpretations challenged by plaintiffs. *See* Appendix Tab A. The Commissions then repealed 7 TAC §§ 153.13, 153.18 and 153.20, which the trial court had declared invalid, and adopted new interpretative rules in their place. 31 Tex. Reg. 5080 (2006). Accordingly, the Commissions’ appeal of the judgment regarding those interpretations is moot. The Commissions’ appeal is therefore limited to the following interpretive rules, which are still in effect:

- A. 7 TAC §§153.1(11) and 153.5(3)(4)(6)(8)(9) and (12) (interpreting “any interest”).
- B. 7 TAC § 153.12 (oral applications).
- C. 7 TAC § 153.84 (convenience checks).
- D. 7 TAC § 153.22 (requiring that copies of all closing documents be provided to homeowner).

## ISSUES PRESENTED

**Issue One:** It was reasonable for the Commissions to interpret the Texas Legislature's use of the term "any interest" in Article XVI, Section 50(a)(6)(E) of the Constitution as having the same meaning as the Legislature's definition of interest in the Texas Finance Code and as defined by Texas case law. (7 TEX. ADMIN CODE §§ 153.1(11) and 153.5(3)(4)(6)(8)(9) and (12)).

**Issue Two:** Because Section 50(a)(6)(M)(i) of the Constitution uses the term "an application" and does not restrict the application to any particular type, the Commissions' interpretation—which recognizes that applications may be submitted orally—is reasonable and consistent with the Constitution. (7 TEX. ADMIN CODE § 153.12).

**Issue Three:** Section 50(t)(3) authorizes the use of home equity lines of credit, but prohibits the use of a "credit card, debit card, *preprinted solicitation* check, or similar device to obtain an advance." The Commissions reasonably interpreted this prohibition to not include convenience checks, which are used by the borrower *after* obtaining the loan, to draw down amounts. (7 TEX. ADMIN CODE § 153.84).

**Issue Four:** The Commissions reasonably interpreted constitutional provisions that require the lender to provide copies of all closing documents to the borrower. (7 TEX. ADMIN CODE § 153.22).

## STATEMENT OF FACTS

Under current Texas law, homeowners may now choose to borrow against their home equity—almost always at a significantly lower rate than an unsecured line of credit, and with greater tax benefits. HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS, Tex. H.J. Res. 31, 75<sup>th</sup> Leg., R.S. (May 9, 1997) at 5.

When Texas voters approved amendments to the home equity provisions in the Texas Constitution in 2003, they authorized the legislature to delegate to one or more state agencies the authority to issue interpretations of those amendments:

Article XVI, Section 50 of the Texas Constitution provides:

(u) The legislature may by statute delegate to one or more state agencies the power to interpret Subsections (a)(5)-(a)(7), (e)-(p), and (t), of this section. An act or omission does not violate a provision included in those subsections if the act or omission conforms to an interpretation of the provision that is:

- (1) in effect at the time of the act or omission; and
- (2) made by a state agency to which the power of interpretation is delegated as provided by this subsection or by an appellate court of this state or the United States.

The legislature delegated this interpretive authority to the Finance Commission and Credit Union Commission. TEX. FIN. CODE ANN. §§ 11.308, 15.413 (Vernon Supp. 2006). Delegation serves to minimize further additions to the already lengthy constitutional amendments<sup>1</sup> and affords interested persons an opportunity to comment on proposed interpretations in a structured and efficient manner.

---

<sup>1</sup> Section 50(a)(6) contains seventeen subsections which, in turn, contain additional subsections (For example, Section 50(a)(6)(Q) contains eleven subsections).

The House Research Organization Bill Analysis for S.J. Res. 42 noted that:

Home equity lenders in Texas often are uncertain about whether a particular action would violate the Constitution and require them to forfeit the principal on a loan. However, since home equity lending in Texas is authorized by the Constitution rather than by statute, no state agency is authorized to give guidance on the Constitution's meaning. That uncertainty translates into higher interest rates for all home equity loans as lenders try to cover the market risk they face. SJR 42 would solve the problem by giving the Finance and Credit Union Commissions the responsibility of clarifying home equity law. This would enable lenders to make loans with confidence that their actions were within the law, thus lowering their risk and, consequently, lowering the interest rates charged to consumers.

HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS, Tex. S.J. Res. 42, 78<sup>th</sup> Leg., R.S. (May 23, 2003) at 5.

The Commissions' interpretations are subject to review under the Administrative Procedure Act (APA).<sup>2</sup> The issue here is whether several interpretations adopted by the Commissions are a proper exercise of their authority.

### SUMMARY OF THE ARGUMENT

*First issue:* The Commissions interpreted the constitutional term "any interest" to mean "interest" as defined in the Texas Finance Code § 301.002(a)(4) and as interpreted by the courts. This interpretation is reasonable and consistent with the plain language of Section 50(a)(6)(E). First, it gives effect to the provision's plain language. Second, it reasonably presumes the Legislature, when it drafted Section 50(a)(6)(E), must have been aware of its own definition of interest in the Finance Code and must have intended that the

---

<sup>2</sup> "An interpretation under this section is subject to Chapter 2001, Government Code." Tex. Fin. Code §§ 11.308 and 15.413 (Vernon Supp. 2006).

term “interest” in the Constitution have the same meaning as the existing statutory definition. Third, the Commissions’ interpretation was consistent with rules of statutory construction, particularly the principle that words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

*Second issue:* Under Section 50(a)(6)(M)(i), a loan may not be closed before the twelfth day following the later of the date an application is submitted or the date the required disclosure is provided. The Commissions reasonably interpreted the term “application” to include oral applications. The twelve-day rule does not restrict the “application” that must be submitted to any particular type of application (i.e., to oral, written or electronic form). So an interpretation that merely recognizes that an application may be submitted orally or electronically is consistent with the Constitution’s general language. That general language is intended to allow the Commissions to address technical and practical issues, such as balancing the need for a “bright line” date that commences the waiting period with the desire—on part of lenders and borrowers alike—for convenience.

Plaintiffs’ concern that this interpretation does not protect consumers is unfounded for at least two reasons. First, the twelve-day waiting period is triggered not only by the date of the application, but also by the date the borrower receives a copy of the required consumer disclosure. Second, the waiting period is intended to give homeowners sufficient time to decide whether they really want to place the homestead at risk in exchange for the loan. Whether the application is oral or written does not affect this time period. In any case,

plaintiffs' objection misses the relevant inquiry—whether the interpretation is reasonable and consistent with Section 50(a)(6)(M)(i).

*Third issue:* Section 50(t)(3) authorizes home equity lines of credit (“HELOCs”), but prohibits borrowers from obtaining advances “by credit card, debit card, preprinted solicitation check or similar device.” The Commissions reasonably clarified that a homeowner is not prohibited from using such devices as prearranged drafts, convenience checks or written transfer instructions to obtain advances. Plaintiffs take issue with the use of convenience checks, arguing they are a device “similar” to “preprinted solicitation checks” and thus prohibited under Section 50(t)(3).

But a convenience check is not similar to a preprinted solicitation check. Convenience checks are requested by the borrower as a convenient method for drawing down amounts on the HELOC. Unlike preprinted solicitation checks, they are not used by the lender to solicit additional advances and do not contain such preprinted terms as the amount or the payee.

If the Legislature had intended in Section 50(t)(3) to prohibit all types of checks, it surely knew how to say so: it could have easily drafted language prohibiting the use of “checks” to obtain advances. Plaintiffs' interpretation ignores the significance of the terms “preprinted” and “solicitation,” despite the fundamental tenet of construction requiring that no term be rendered meaningless or inoperative.

*Fourth Issue:* Section 50(a)(6)(Q)(v) requires 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.*" The constitutional provision uses the term "extension of credit" twice in the same sentence to mean the closing. The Commissions reasonably interpreted this section to require that the lender provide copies of all closing documents to the borrower. If the drafters had intended the copies requirement to apply to all documents related to the loan process, they would have said so. The interpretation reasonably distinguishes the pre-closing application process from the actual closing and requires only that documents signed at the closing be provided to the borrower.

### ARGUMENT

"[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 Envtl. 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).

When a Texas court construes the Texas Constitution, it uses the same guidelines as in interpreting statutes. *Rooms With a View, Inc. v. Private Nat'l. Mortgage Ass'n, Inc.*, 7 S.W.3d 840 (Tex. App.—Austin 1999, pet. denied), cert. denied, *National Ass'n of Remodeling Indus.-Houston Chapter, Inc. v. Rooms With a View*, 121 S.Ct. 72, 531 U.S. 826, 148 L.Ed.2d 36 (2000).

In *Doody v. Ameriquest Mortgage Co.*, 49 S.W.3d 342 (Tex. 2001), the Texas Supreme Court construed another part of Section 50. In doing so, the Court discussed the some of the tenets it uses in construing the Constitution:

When interpreting our state constitution, we rely heavily on its literal text and must give effect to its plain language . . . (citations omitted). We construe constitutional provisions and amendments that relate to the same subject matter together and consider those amendments and provisions in light of each other. (citations omitted). And we strive to avoid a construction that renders any provision meaningless or inoperative. (citations omitted).

**I. Issue One: It was reasonable for the Commissions to interpret the Legislature’s use of the term “any interest” in Article XVI, Section 50(a)(6)(E) of the Texas Constitution to have the same meaning as the definition used by the Legislature in the Texas Finance Code and as defined by Texas case law. (7 Tex. Admin Code §§ 153.1(11) and 153.5(3)(4)(6)(8)(9) and (12)).**

**A. The Constitutional amendments and the Commissions’ interpretive rules.**

Article XVI, section 50(a)(6)(E) of the Texas Constitution provides:

[The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for . . . an extension of credit that . . . ] 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. (emphasis added).

The Commissions have interpreted the term “interest” to mean “interest as defined in the Texas Finance Code § 301.002(a)(4) and as interpreted by the courts.” 7 Tex. Admin Code § 153.1(11) (2006). The Commissions have also adopted this clarification:

153.5(3) - Charges that are Interest. Charges an owner or an owner’s spouse is required to pay that constitute interest under the law, for example per diem interest and points, are not fees subject to the three percent limitation.

Because interest does not count toward the three-percent fee cap, plaintiffs complain that the Commissions' interpretation is too broad, exceeding the "commonly understood meaning" of interest and allowing lenders to charge for items that would otherwise be subject to the cap.<sup>3</sup>

**B. Plaintiffs' challenge to Rules 153.1(11) and 153.5(3) lacks merit.**

At the outset, it is important to note that Section 50(a)(6)(E) of the Constitution carves out "any interest" from the three-percent fee cap, but does not define or otherwise limit "interest" to any particular type of interest.

**1. The Commissions' interpretation of "any interest" gives effect to the plain language of Section 50(a)(6)(E).**

When interpreting the Constitution, a court must begin with the literal text and give effect to its plain language. *McBride v. Clayton*, 140 Tex. 71, 166 S.W.2d 125, 128 (Tex. 1942). In giving effect to the plain language for purposes of interpretation, courts presume the language was carefully selected and interpret words as they are generally understood. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148 (Tex. 1995). Section 50(a)(6)(E) carves out "*any interest*" from the fee cap. Section 50(a)(6)(E) does not define the term "interest." Rather, it simply refers to "any interest," thereby expanding the scope of the term to include any and all items which are interest.

---

<sup>3</sup> The trial court also invalidated subsections (4)(6)(8)(9) and (12) of interpretative rule 153.5. But these provisions were invalidated because each one picks up the term "interest" as defined in sections 153.1(11) and 153.5(3). Therefore, if sections 153.1(11) and 153.5(3) are valid, the other subsections in rule 153.5 are valid as well. If, as the trial court concluded, sections 153.1(11) and 153.5(3) are invalid, then the Commissions concede that the other subsections in rule 153.5(3) must be invalidated as well. Either way, the analysis is the same: the result turns on the validity of the Commissions' definition of interest in sections 153.1(11) and 153.5(3).

The Commissions' interpretative rules are consistent with the dictionary definition of interest—that is, “a charge for borrowed money generally a percentage of the amount borrowed.” WEBSTER'S NEW COLLEGIATE DICTIONARY (9th ed. 1988) (defining “interest” as “a charge for borrowed money generally a percentage of the amount borrowed”); AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed., 1997) (defining “interest” as “a charge for a loan, usually a percentage of the amount loaned”); BLACK'S LAW DICTIONARY (8th ed. 2004) (defining “interest” as “the compensation fixed by agreement or allowed by law for the use or detention of money”).

The statutory definition of interest used in the Commissions' interpretation is substantively similar to dictionary definitions of interest. “Interest,” as defined in Section 301.002(a)(4) of the Texas Finance Code, means “compensation for the use, forbearance, or detention of money.” TEX. FIN. CODE ANN. § 301.002(a)(4) (Vernon 2006). Plaintiffs do not challenge this statutory definition, only the Commissions' use of it in their interpretive rule.

2. **It was also reasonable for the Commissions to conclude that the Legislature, when it drafted Section 50(a)(6)(E), was aware of its own definition of interest and knew that Texas case law also interpreted the term.**

In Texas, the term “interest” has been defined by statute and case law. *Sunwest Bank of El Paso v. Gutierrez*, 819 S.W.2d 673 (Tex. App.—El Paso 1991, writ denied). Though “interest” is not defined in Section 50(a)(6)(E) or elsewhere in Section 50(a)(6), Section 11 provides “the legislature shall have authority to . . . define interest . . .” TEX. CONST. Art. XVI, § 11. Section 11 of Article XVI predates Section 50(a)(6). Thus, long before

Section 50(a)(6)(E) was written and approved by the voters in 2003, the Texas Legislature defined the term “interest”—in Article 5069-1.01 and later in the Texas Finance Code.

It was entirely reasonable for the Commissions to conclude the Legislature, in using the term “any interest” in Section 50(a)(6)(E), was aware of its own definition of interest. The Legislature is presumed to act “with full knowledge of the existing condition of the law and with reference to it.” *McBride v. Clayton*, 140 Tex. 71, 166 S.W.2d 125, 128 (1942). And because of this presumption of Legislative awareness, it was reasonable for the Commissions to conclude the Legislature intended the term “any interest” in the Constitution to have the same meaning as the definition of interest in the Finance Code. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise shall be construed accordingly. TEX. GOV’T CODE ANN. § 311.011(b) (Vernon 2005); *see also L.B. Foster v. State*, 106 S.W.3d 194 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, pet. ref’d.)

Plaintiffs, on the other hand, argued below that the “commonly understood meaning” of the term “interest” is something other than interest as it is defined by statute and Texas case law. (3 C.R. at 785). Plaintiffs would define “any interest” as interest that is “described in the promissory note and is generally specified as a percentage rate to be applied to the remaining, unpaid principal.” Plaintiffs do not cite any authority to support this definition. Nor do they give any reason why this Court should give more deference to their suggested definition than to the Legislature’s definition.

Despite the absence of any supporting authority, and contrary to the plain language of Section 50(a)(6)(E), Plaintiffs contend that charges which are interest for purposes of a purchase money loan secured by a homestead, a home improvement loan, a car loan and virtually every type of consumer credit transaction are not “interest” for a home equity loan, but are instead fees. Plaintiffs’ interpretation ignores the presumption that the Legislature acts with knowledge of existing laws. Plaintiffs’ interpretation, if accepted, would also require this Court to find an exception to the definition of interest for home equity loans, even though there is no constitutional or statutory authority to support it.

**3. The Commissions’ definition is consistent with, and must be read in the context of, existing case law.**

Section 153.5(3) correctly confirms that charges that constitute interest, such as “per diem interest and points,” are not fees subject to the cap. In a case directly on point, the Waco Court of Appeals has held that discount points on a home equity loan are interest, not fees subject to the three-percent cap. *Tarver v. Sebring Capital Credit Corp.*, 69 S.W.3d 708, 711-12 (Tex. App.–Waco 2002, no pet.).

The *Tarver* Court analyzed the question in depth:

We note that points are calculated as a percent of the principal. That is how interest is calculated. The difference is that points are calculated once on the original principal balance, whereas interest is calculated monthly on a decreasing principal balance. In either case, there is a percent charged in relation to the principal balance. In addition, points are one of two forms of consideration paid by a borrower to a lender: (1) interest as a percentage of the principal balance, charged over time for the use of the money, and (2) points calculated as a percentage of the loan amount, charged “up-front” to obtain a lower interest rate.

Moreover, the court reasoned, “statutory and administrative definitions of and references to ‘interest’ either expressly or impliedly include points.”<sup>4</sup> *Id.* at 712. “Therefore, we hold that points are a form of ‘interest’ and not subject to the three-percent limitation [in Article XVI, Section 50(a)(6)(E)].” *Id.*

Plaintiffs complain about the Commissions’ use of the term “points” rather than “discount points” in 7 TAC § 153.5(3), arguing that “points” is too expansive. But their challenge is not a reasonable reading of the interpretive rule, which states: “Charges an owner or an owner’s spouse is required to pay that constitute interest under the law, *for example* per diem interest and points, are not fees subject to the three percent limitation.”

Thus, the interpretation does no more than reiterate the principle—articulated in Section 50(a)(6)(E)—that interest does not count toward the three-percent cap. The term

---

<sup>4</sup> The *Tarver* court observed that, among those statutory and administrative definitions that included points, were:

Bank loans: “(a) A bank may require a borrower to pay all reasonable expenses and fees incurred in connection with the making, closing, disbursing, extending, readjusting, or renewing of a loan ..... (d) Fees and expenses charged and collected as provided by this section are not considered a part of the interest or compensation charged by the bank for the use, forbearance, or detention of money.” Tex. Fin. Code § 34.203 (Vernon 1998).

Interest rates and usury: “ ‘Interest’ means compensation for the use, forbearance, or detention of money. ...” Tex. Fin. Code § 301.002(a)(4) (Vernon Supp 2002).

Consumer loans: “Prepaid Interest – 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 T.A.C. § 1.102(20).

Secondary loans: “Interest-bearing loan. In an interest-bearing secondary mortgage loan, an authorized lender may contract for, charge, or receive any rate of interest [allowed by law]. Prepaid interest in the form of points, such as origination or discount fees, may be contracted for, charged, or received by an originating lender, so long as the total amount of interest contracted for [does not exceed that allowed by law].” 7 T.A.C. § 1.701(b).

Usury: “Discount points. Discount points are treated as interest. Discount points are aggregated with other interest charges for the purposes of a usury calculation.” 7 T.A.C. § 1.707(f).

“points,” along with “per diem interest,” is used only as an example of interest that would not be subject to the cap.

Rule 153.5(3) must be read alongside, and harmonized with, the definition of interest in 7 TAC § 153.1(11). Rule 153.1(11) makes clear that the term “any interest” in Section 50(a)(6)(E) is consistent with interpretations of that term by the Texas courts. It has been settled in Texas for many years that the label assigned to a charge is not determinative, that courts must look past the label to the charge itself to determine whether it is interest. *First USA Mngt., Inc. v. Esmond*, 960 S.W.2d 625, 627 (Tex. 1997); *First Bank v. Tony's Tortilla Factory*, 877 S.W.2d 285, 287 (Tex. 1994); *Gonzalez County Sav. & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976). This substance-over-form approach is echoed by the agencies themselves in the Preamble to Title 7, Chapter 153 of the Texas Administrative Code:

Texas case law is replete with illustrations of the proposition that the name of a particular fee or charge is irrelevant. The true inquiry must be whether or not the item constitutes interest. If it is in fact interest, the name is of no consequence.

29 Tex. Reg. 87 (2004).

This point is made by Rule 153.5(3) itself: it refers to “points” only in connection with “charges . . . that constitute interest *under the law* . . .” The rule exempts from the fee cap only those “points” that are interest and recognized as such by applicable law. Finally, the juxtaposition of the terms “points” and “per diem interest” also emphasizes the Commissions’ intent to exempt only interest from the three-percent cap, and not fees that are merely labeled as points. Thus, under any reasonable reading of the Commissions’

interpretive rule, a lender cannot simply label fees that are not interest as “points” to circumvent the constitutional cap. Plaintiffs’ strained reading to the contrary is unreasonable.

**II. Issue Two: Because Section 50(a)(6)(M)(i) uses the term “an application” and does not restrict the application to any particular type, the Commissions’ interpretation—which recognizes that applications may be submitted orally—is reasonable and consistent with the Constitution. 7 Tex. Admin Code § 153.12.**

**A. The constitutional amendments and the Commissions’ interpretive rules.**

Article XVI, Section 50(a)(6)(M)(i) provides that:

[The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for . . . . an extension of credit that . . . .] is closed not before: (i) 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.

The Commissions adopted 7 TAC § 153.12 interpreting Section 50(a)(6)(M)(i). The

rule states:

Closing Date: 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.

- (1) Submission of a loan application to an agent acting on behalf of the lender is submission to the lender.
- (2) A loan application may be given orally or electronically.

The trial court invalidated the rule as to oral applications, but upheld it as to electronic applications.

**B. An oral application is “an application” and Section 50(a)(6)(M)(i) does not limit applications to “written applications”**

The Constitution, it is important to note, actually contains two waiting periods. First, under the “twelve-day rule” a loan may not be closed before the twelfth day following the later of the date an application is submitted or the date the required disclosure is provided. TEX. CONST. Art. XVI, § 50(a)(6)(M)(I). Second, after the extension of credit is made, the borrower has three days to rescind the loan without penalty or charge. TEX. CONST. Art. XVI, § 50(a)(6)(Q)(viii).

The twelve-day rule in the Constitution does not restrict the “application” that must be submitted to any particular type of application (i.e., to oral, written or electronic form). Accordingly, an interpretation that merely recognizes that an application may be submitted orally or electronically is consistent with the general language of Section 50(a)(6)(M)(i).

Plaintiffs argued below that Section 50(a)(6)(M)(i) does not state an application may be submitted orally, and they are correct: the Constitution is silent on this point. This argument, however, *defeats* rather than supports their contention that the Constitution somehow limits the type of application that may be used by the parties to the transaction.

In using the term “application” without specifying the form of application, the Constitution allows the Commissions to address technical and practical issues related to the twelve-day waiting period. One such issue was balancing the need for a “bright line” date that commences the twelve-day waiting period with the desire—on part of lenders and borrowers alike—for convenience. Subsection (M)(i) restricts the timing of the home equity closing to twelve days after later of when the owner submits an application or when the

lender provides the owner the notice. The closing is delayed in order to help make certain that the owner really wants to place the homestead at risk in exchange for the money advanced. Whether the application is oral or written does not appear to have a direct relation to the consumer protection.

Moreover, as the Commissions were undoubtedly aware, allowing oral and electronic home equity loan applications is simply a recognition of common commercial practices. Indeed, Federal Reserve Board Regulation B—which implements the Equal Credit Opportunity Act (title VII of the Consumer Credit Protection Act)—defines “application” as an *oral or written* application:

*Application* means an *oral or written request* for an extension of credit that is made in accordance with procedures established by a creditor for the type of credit requested. The term does not include the use of an account or line of credit to obtain an amount of credit that is within a previously established credit limit. A completed application means an application in connection with which a creditor has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (including, but not limited to, credit reports, any additional information requested from the applicant, and any approvals or reports by governmental agencies or other persons that are necessary to guarantee, insure, or provide security for the credit or collateral).

12 C.F.R. § 202.2(f) (2005) (emphasis added). While the constitutional amendments do impose certain formalities, they do not restrict Texans to outdated business practices.

Finally, plaintiffs overlook the fact that the twelve-day waiting period is triggered not only by the date of the application, but also by the date the borrower receives a copy of the required consumer disclosure. If, for example, disclosure is made sometime after the loan application is completed, it is the disclosure date that will trigger the running of the twelve-

day period: “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.*” Thus, plaintiffs’ concern that the borrower maybe rushed to closing, and denied the opportunity to carefully consider the prospective transaction, is unfounded.

The plaintiffs may still believe it is unwise to permit the use of oral applications, because of the possibility that the borrower could become confused as to when the twelve-day waiting period actually commences. But this policy concern ignores the relevant inquiry—whether the Commissions’ interpretation is reasonably consistent with the Constitution’s language. Because Section 50(a)(6)(M)(i) does not impose any limitation on the type of application that may be submitted, the Commissions reasonably interpreted “an application” to include oral applications. Their interpretation should be upheld.

Plaintiffs further allege the notice described in Section 50(g) “provides some insight” as to whether an oral application will suffice. (3 C.R. at 632). In other words, Plaintiffs contend Section 50(g)’s reference to a “written application” should lead to the conclusion that Section 50(a)(6)(M)(i) requires submission of a written application in every instance where a borrower takes out a home equity loan.

But the Supreme Court has rejected the argument that Section 50(g) controls, holding Section 50(g)’s notice provision does not independently establish rights or obligations for the extension of credit—rather, Section 50(a)(6) and the loan documents themselves provide the substantive rights and obligations. *Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353, 357

(Tex. 2000). Moreover, following *Stringer*, Section 50(g) was amended to provide: "YOUR RIGHTS ARE GOVERNED BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE."

**III. Issue Three: Section 50(t)(3) authorizes the use of home equity lines of credit, but prohibits the use of a "credit card, debit card, *preprinted solicitation* check, or similar device to obtain an advance." The Commissions reasonably concluded this prohibition did not include convenience checks, which are used by the borrower *after* obtaining the loan to draw down amounts. 7 Tex. Admin Code § 153.84.**

**A. The Constitutional amendments and the Commissions' interpretive rules.**

Article XVI, Section 50(t)(3), of the Texas Constitution provides:

A home equity line of credit is a form of open-end account that may be debited from time to time, under which credit may be extended from time to time and under which:

.....

(3) the owner does not use a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance;

To interpret this provision, the Commissions adopted Section 153.84, which provides in pertinent part:

§ 153.84. Restrictions on Devices and Methods to Obtain a HELOC Advance:  
Section 50(t)(3)

A HELOC is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which an owner is prohibited from using a credit card, debit card, preprinted solicitation check, or similar device to obtain a HELOC advance.

(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 fund transfers, and electronic fund transfers. Examples of devices that are not prohibited similar devices include prearranged drafts, convenience checks, or written transfer instructions.

....  
(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 payee; and

(C) is not requested by the borrower or owner.

**B. The Constitution authorizes advances on home equity lines of credit and consistent with this, the interpretive rule reasonably identifies permissible devices for obtaining such advances, including convenience checks.**

Section 50(t)(3) expressly allows home equity lines of credit (“HELOCs”) that provide borrowers with the flexibility to manage their home equity loans without being forced to borrow the entire amount of a traditional home equity loan. A homeowner, say, who is making semiannual college tuition payments, would not have to take out multiple loans or take out a large loan in anticipation of payments that might not be due for months or even years.<sup>5</sup>

To protect borrowers, HELOCs are subject to the same requirements as traditional home equity loans, such as the 12-day waiting period, the opportunity to rescind the loan, and the required notice that lenders must provide. Any single debit or advance must be not less than \$4,000. TEX. CONST. Art. XVI, § 50(t)(2).

---

<sup>5</sup> A Special Report issued by the Texas Comptroller of Public Accounts in March 2003 details the benefits of HELOCs. The report estimates that, as of March 2003, it was estimated that \$12.7 billion in higher-cost non-tax deductible loans could be supplanted by HELOCs—resulting in annual savings of \$741 million for Texas consumers. “Home Equity Lending Gaps in Texas,” Special Report, March 2003, Texas Comptroller of Public Accounts.

Though a borrower may not obtain an advance on the line of credit by credit card, debit card, preprinted solicitation check or similar device, Section 50(t)(3) does not otherwise limit the allowable methods for obtaining advances. For this reason, Rule 153.84 clarifies that a homeowner may use such devices as prearranged drafts, convenience checks or written transfer instructions to obtain advances.

**C. Convenience checks are not “similar” to “preprinted solicitation checks,” which are expressly prohibited by Section 50(t)(3).**

While Section 50(t)(3) expressly prohibits the use of a credit card, a debit card, preprinted solicitation check or any “similar device” to obtain an advance, it does not prohibit prearranged drafts, convenience checks, or written transfer instructions—devices whose use can be reasonably expected in connection with HELOCs. Plaintiffs, however, take issue with the rule’s authorization of convenience checks, arguing they are similar to preprinted solicitation checks and thus prohibited under the “similar device” language in Section 50(t)(3). (3 C.R. at 816).

But a convenience check is not similar to a preprinted solicitation check. A preprinted solicitation check includes at least one preprinted payment term, such as the amount that may be drawn down. For this reason, the Commissions have reasonably defined “preprinted solicitation check” as a check that: (1) is provided to an owner for the purpose of soliciting origination of a HELOC or additional advances on an existing HELOC; (2) contains at least one preprinted key payment term, such as the amount or payee; and (3) is not requested by the borrower or owner.

By negative implication, then, a convenience check cannot have the attributes of a preprinted solicitation check, as that term is defined in the interpretive rule. Nor can it be a “similar device.” Accordingly, a permissible “convenience check” must be a device that: (1) is requested by the borrower (in contrast to an unsolicited check mailed by the lender); (2) contains no preprinted key payment terms such as amount; and (3) is provided by the lender at the borrower’s request for the purpose of allowing the borrower to obtain advances conveniently (as opposed to being provided without a request from the borrower for the purposes of soliciting the borrower to obtain an additional advance). Under the current interpretation, the lender will not be able to encourage the borrower to increase the debt on the HELOC by unilaterally sending partially completed checks.

The key here is that convenience checks, as that term is generally understood, are not used by the lender to solicit the homeowner’s business, nor are they “preprinted” (in the sense that they contain a preprinted amount.) Rather, they are a convenience for the borrower *after* obtaining the loan to draw down amounts on the HELOC. The convenience checks are requested by the borrower after they have applied for the HELOC, received the twelve-day notice, and formally closed the loan. Accordingly, a convenience check is not a device “similar” to a preprinted solicitation check.

The plaintiffs theorize that the two devices are the same because they are both “checks.” But this superficial analysis does not pass muster. First, if the legislature had intended in Section 50(t)(3) to prohibit all checks, it surely knew how to say so: it could have easily drafted language prohibiting “checks.” And as previously cited, one of the

fundamental tenets of construction requires that no term may be rendered meaningless or inoperative. Any interpretation that ignores the terms “preprinted” or “solicitation” would clearly violate basic rules of construction. *See Supra* at 8.

Further, because the Legislature chose to expressly prohibit certain devices, a method for accessing a HELOC is not prohibited unless it is among those expressly prohibited devices or unless it is “similar” to those devices. Just as the Commissions may not interpret home equity constitutional provisions in a manner that authorizes devices prohibited by those provisions, so the Commissions may not interpret those provisions in a manner that expands the list of prohibited devices. Yet this is precisely the result Plaintiffs advocate when they argue that the terms “preprinted solicitation checks” and “similar device” should be read expansively to prohibit all “checks” including convenience checks.<sup>6</sup>

**IV. The Commissions reasonably interpreted constitutional provisions that required the lender to provide copies of all closing documents to the borrower. 7 Tex. Admin Code § 153.22.**

**A. The Constitutional amendments and the Commissions’ interpretive rules.**

Article XVI, Section 50(a)(6)(Q)(v) provides:

[The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for . . . an extension of credit that . . . is made on the condition that:] the lender, at the time the extension of credit is made, provide to the owner of the homestead a copy of all documents signed by the owner that relate to the extension of credit.

---

<sup>6</sup> The trial court’s judgment also invalidated prearranged drafts and written transfer instructions as allowable methods for accessing advances on a HELOC (4 C.R. at 1106-7). This result effectively rules out all methods for obtaining advances, except personal visits to the lender’s place of business or personal calls to the lender during business hours.

Initially, the Commissions adopted the following rule interpreting Section 50(a)(6)(Q)(v):

At closing, the lender must provide the owner with a copy of all documents 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. 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.

**B. After the trial court invalidated Section 153.22, the Commissions proposed amending the rule and published their proposed amendment in the Texas Register for notice and comment.**

After the trial court invalidated Section 153.22, the Commissions proposed amending this section to read:

[The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for . . . an extension of credit that ... is made on the condition that:] 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.

(1) The phrase "documents signed by the owner related to the extension of credit," as used in Section 50(a)(6)(Q)(v), means documents that are:

(A) in the lender's actual or constructive possession, custody, or control;

(B) signed by the owner as a condition to obtaining the equity loan; and

C) intended either:

(i) as information for use in the process of evaluating or underwriting the equity loan; or

(ii) to alter or create a legal obligation of a party to the equity loan.

(2) The phrase "possession, custody, or control," as used in this section, means that the lender either has physical possession of the document or has a right to possession of the original document that is equal or superior to the person who has physical possession of the document.

The Commissions filed this proposed amendment with the Office of the Secretary of State on June 30, 2006 and it was published in the Texas Register for notice and comment on July 14, 2006. *See* 31 Tex. Reg. 5511 (2006).

**C. However, since the earlier version of section 153.22 has not yet been repealed, the Commissions provide the following briefing to preserve their position in this appeal, in the event the proposed amended rule is not adopted.**

In all likelihood, the Commissions will take up the issue of whether to adopt the proposed amended rule, and repeal the original version, at their next joint meeting. But because the original version has not been repealed, the Commissions provide the following briefing in support of the current rule, in order to preserve their position in this appeal.<sup>7</sup>

When a homeowner begins the process of obtaining a home equity loan, the loan application is the first step. The application, which is often submitted to a broker rather than a lender, is used for underwriting. In the course of underwriting, current and previous mortgage documents are examined, credit checks are performed, and employment is verified. The information amassed by the underwriter, but not included in the closing documents, may include tax returns or W-2's, drivers licenses, pay stubs, utility bills, a current deed of trust,

---

<sup>7</sup> Because repeal of the current version would moot Plaintiffs' challenge to 7 TAC § 153.22, the Commissions will promptly notify this court, in the event they adopt the proposed amended rule at their next open meeting, that they are withdrawing their appeal of this issue.

credit and employment information about the borrower and the borrower's spouse, as well as statements of the borrower's net worth.

Other application-related documents include the good faith estimate of anticipated fees and charges, and the terms and cost of credit as an annual percentage rate, which by federal law must be given to the borrower before closing.<sup>8</sup>

Section 50(a)(6)(Q)(v) requires 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.*"

The constitutional provision uses the term "extension of credit" twice in the same sentence to mean the closing. If the drafters had intended the copies requirement to apply to all documents related to the loan process, they would have said so. The interpretation at issue distinguishes the pre-closing application process from the actual closing and requires that only documents signed at the closing be provided to the borrower.

The Commissions reasoned that most of the documents involved in the application process, including the application itself, are based on information furnished by the borrower. Thus, it is the borrower who is in a position to retain copies of all documents furnished in the course of the underwriting process. When the underwriting is performed by a third-party, as is often the case, the lender may not have copies of those documents.

In contrast, the documents signed by the borrower at closing are usually prepared by the lender. The borrower will probably not have access to copies of *these* documents unless

---

<sup>8</sup> See Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(a); see also Truth in Lending Act, 15 U.S.C. § 1601-1666j and 12 C.F.R. § 226.5b .

the lender provides them. If the written application is signed at closing, which occurs if the loan application process has been initiated by telephone or electronically, then a copy of the application is required to be provided under Section 50(a)(6)(Q)(v).

The purpose of Section 50(a)(6)(Q)(v) is to assure that the borrower is provided copies of those documents that set forth the borrower's rights and obligations with respect to the loan. It 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.

Plaintiffs complained below that borrowers will not be provided with copies of various disclosures. There are a number of disclosures that are provided to the borrower during the loan process. These disclosures have already been provided to the borrower and there is not a real benefit to the borrower receiving them again at closing.

### **CONCLUSION AND PRAYER**

The wisdom of the Constitution's grant of interpretive authority to the Finance Commission of Texas and the Credit Union Commission of Texas is best summed up in the House Research Organization's report on the 2003 home equity loan constitutional amendments:

Home equity lenders in Texas often are uncertain about whether a particular action would violate the Constitution and require them to forfeit the principal on a loan . . . SJR 42 would solve the problem by giving the Finance and Credit Union commissions the responsibility of clarifying home equity law . . . Another reason for giving interpretive authority to a state agency, as proposed by SJR 42, is to allow the more minor details to be established outside of the Constitution without making that document more unwieldy than necessary.

(May 23, 2003) at 5.

It is not possible to adopt rules that satisfy every concern raised by lenders and borrowers. Nor is it sufficient grounds for striking down a rule to conclude that the Commissions struck the wrong policy balance or that they could have fashioned better rules. As shown above, the Commissions' rules are reasonable and consistent with the plain language of the constitutional amendments relating to home equity lending. Therefore, they should be upheld as valid.

WHEREFORE, PREMISES CONSIDERED the Commissions respectfully request that the trial court's judgment be reversed and rendered with respect to the following rule interpretations: 7 Tex. Admin. Code §§153.1(11) and 153.5(3)(4)(6)(8)(9) and (12); 7 Tex. Admin. Code § 153.12; 7 Tex. Admin. Code § 153.84; and 7 Tex. Admin. Code § 153.22.

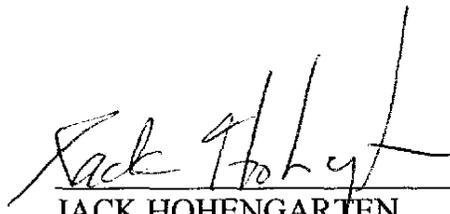
Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

KENT C. SULLIVAN  
First Assistant Attorney General

EDWARD BURBACH  
Deputy Attorney General for Litigation

DAVID C. MATTAX  
Chief, Financial Litigation Division



---

JACK HOHENGARTEN

Deputy Division Chief

Financial Litigation Division

Texas Bar No. 09812200

Tel: (512) 475-3503

Fax: (512) 477-2348

DON CRUSE

Assistant Solicitor General

Texas Bar No. 24040744

Tel: (512) 936-1827

Fax: (512) 474-2697

Office of the Solicitor General

P.O. Box 12548

Austin, Texas 78711-2548

**Counsel for Appellants**

**The Finance Commission of Texas and**

**The Credit Union Commission of Texas**

**CERTIFICATE OF SERVICE**

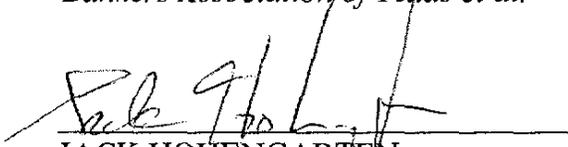
I hereby certify that on August 30, 2006, a true and correct copy of the foregoing document, **Brief of Appellants the Finance Commission of Texas and the Credit Union Commission of Texas**, was sent by facsimile transmission and certified mail, return receipt requested, to the following counsel of record:

Bruce E. Priddy  
Law Offices of Bruce Priddy  
15851 North Dallas Parkway, Ste. 500  
Addison, TX 75001  
FAX: (214) 393-4001  
*Attorney for Appellees ACORN*

Robert W. Doggett  
Texas Rio Grande Legal Aid  
2201 Post Road, Ste. 104  
Austin TX 78704  
Fax: (512) 447-3940  
*Attorney for Appellees Valerie  
Norwood, Elise Shows, Maryann  
Robles-Valdez, Bobby Martin, Pamela  
Cooper, and Carlos Rivas*

Craig T. Enoch  
Alex S. Valdes  
WINSTEAD SECHREST & MINICK, P.C.  
401 Congress, Suite 2100  
Austin, Texas 78701  
Tel: (512) 370-2800  
Fax: (512) 370-2850  
*Attorney for Appellants TBA*

Karen M. Neeley  
COX, SMITH, & MATTHEWS, INC.  
111 Congress Avenue, Suite 2800  
Austin, Texas 78701-4084  
Tel: (512) 703-6315  
Fax: (512) 703-6399  
*Attorney for Amici Curiae Independent  
Bankers Association of Texas et al.*

  
\_\_\_\_\_  
JACK HOHENGARTEN

**APPENDIX**

Final Summary Judgment and  
Temporary Stay Order dated April 29, 2006 .....Tab A



No. GN 400269

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

IN THE DISTRICT COURT

PLAINTIFFS,

Filed In The District Court  
of Travis County, Texas  
on 5-01-06 r.f.  
at 11:57 A.M.  
Amalia Rodriguez-Mendoza, Clerk

VS.

FINANCE COMMISSION of TEXAS, and )  
CREDIT UNION COMMISSION of TEXAS, )

OF TRAVIS COUNTY, TEXAS

DEFENDANTS,

VS.

TEXAS BANKERS ASSOCIATION, )

DEFENDANT-INTERVENOR. )

126th JUDICIAL DISTRICT

**FINAL SUMMARY JUDGMENT AND TEMPORARY STAY ORDER**

Plaintiffs challenge the validity of rules adopted by Defendants Finance Commission of Texas and Credit Union Commission of Texas which purport to interpret Article XVI, Section 50(a)(6) of the Texas Constitution. Defendants along with Intervenor Texas Bankers Association defended the rules. There are no genuine issues of material fact, and the parties are entitled to judgment as a matter of law. The Court has considered all pleadings, motions, cross motions, responses, replies and other materials filed with the Court. After consideration of these materials and considering arguments of counsel, the Court ORDERS and declares the following rules invalid or denies Plaintiffs relief:

- 1. Rules 7 TAC 153.1(11), 153.5(3), (4), (6), (8), (9), and (12) are invalid;



000094589

2. Rule 7 TAC 153.12(2) is invalid as to orally submitted applications, and not invalid as to electronically submitted applications;

3. Rule 7 TAC 153.13(4) is invalid;

4. Plaintiffs' challenge to Rules 7 TAC 153.15(2) and (3) is denied;

5. Rule 7 TAC 153.18(3) is invalid;

6. Rule 7 TAC 153.20 is invalid;

7. Rule 7 TAC 153.22 is invalid;

8. Plaintiffs' challenge to Rules 7 TAC 153.51(1) and (3) is denied; and

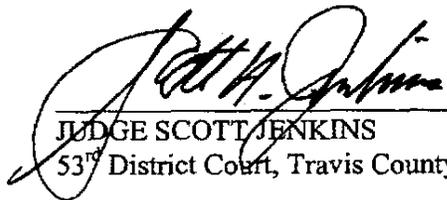
9. Rule 7 TAC 153.84(1) is invalid.

It is further ORDERED that this judgment is stayed in all respects for thirty days, and the rules declared to be invalid by this judgment remain in effect during that time regardless of whether this judgment is superseded by the posting of a bond, filing a notice of appeal or other action of a party.

All other relief requested by any party is denied. Costs are taxed against Defendants.

This order disposes of all claims and all parties and is final and appealable.

Signed this 29<sup>th</sup> day of April, 2006.

  
\_\_\_\_\_  
JUDGE SCOTT JENKINS  
53<sup>rd</sup> District Court, Travis County, Texas