

CASE NO. 03-06-00273-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,

v.

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 District Court
Travis County, Texas*

**RESPONSE BRIEF OF APPELLANT
TEXAS BANKERS ASSOCIATION**

Craig T. Enoch	SBN 00000026	Brian T. Morris	SBN 14469600
Peter A. Nolan	SBN 15062600	Michael K. O'Neal	SBN 15283080
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RESPONSIVE ISSUES PRESENTED

- ISSUE 5:** Under the APA, an interpretation of the law is a "rule." Therefore, the Commissions have rulemaking authority because they are authorized to interpret the Constitution.
- ISSUE 6:** The Constitution requires a home equity loan to be "closed only at the office of the lender, an attorney at law, or a title company." An interpretation that requires a home equity loan to be "closed only at an office of the lender, an attorney at law, or a title company" and recognizes that a borrower may be represented by an attorney-in-fact and may provide consent by delivery is consistent with the Constitution.
- ISSUE 7:** Under the Constitution, a home equity loan may not be closed before the twelfth day after the lender "provides" the Section 50(g) notice to the homeowner. An interpretation that allows for a rebuttable presumption that notice was provided if the lender mailed notice and recognizes that compliance may be evidenced by an established system of verifiable procedures is consistent with the Constitution.

STATEMENT OF FACTS

Appellant Texas Bankers Association ("TBA") filed its Appellant's Brief with this Court on August 30, 2006. Appellees (collectively "ACORN") filed a combined response/cross-appeal on December 8, 2006, responding to TBA's brief and raising three issues on cross-appeal.¹ TBA then replied. TBA's Appellant's Brief and Reply state the facts relevant to this case, which are adopted by reference. TBA, however, would offer the following abbreviated summary of facts to provide the court with background information pertinent to the issues raised on cross-appeal:

A. Texas voters amended the Constitution to permit home equity loans.

In response to a perfect storm of economic problems that occurred in the mid-nineteenth century, Texas law was changed to preserve the homestead rights of Texas citizens.² In 1997, the Legislature and Texas voters approved an amendment to the Texas Constitution ("Constitution"), becoming the fiftieth state to allow its citizens to take out home equity loans.³ Texans facing large or unexpected expenses now have increased financial flexibility with the option to use the equity in their homes to obtain a loan, typically with a lower interest rate and with greater tax benefits than an unsecured line of

¹ ACORN raises three issues by cross-appeal, however, only two of the issues are tied to challenged interpretations. The third issue (Issue 5—whether the Commissions have rulemaking authority) was not raised as a stand-alone question in the trial court. Rather, ACORN alleged that the power of attorney interpretation addressed in Issue 6 was a "new rule" but did not otherwise seek an independent declaration that the Commissions have no rulemaking authority.

² TEX. CONST. art. XVI, § 50, Interpretive Commentary (Vernon 1993) ("The direct cause of the law was the United States Panic of 1837 and the ensuing depression during which numerous families lost homes and farms through foreclosures, and in the Republic of Texas business became stagnate, money scarce, and credit unobtainable.").

³ See *Spradlin v. Jim Walter Homes, Inc.* 34 S.W.3d 578, 579 (Tex. 2000); TEX. CONST. art. XVI, § 50(a)(6); TEX. CONST. art. XVI, § 50, Interpretive Commentary (Vernon 1993).

credit.⁴ From 2002 to 2005, lenders extended over \$30 billion in first lien home equity credit to Texas borrowers.⁵ The overall benefit to Texas consumers is substantial considering that in 2003 Comptroller Strayhorn concluded Texas consumers would save \$741 million by replacing \$12.7 billion in higher-cost non-tax-deductible loans with home equity lines of credit.⁶

B. Texas voters further amended the Constitution to give the Legislature the power to interpret the home equity lending provisions.

The 1997 constitutional amendments outlined, in broad terms, home equity lending practices and prohibitions. But the amendments lacked guidance for lenders trying to determine whether a particular action or provision would violate the Constitution and require them to forfeit the principal and interest on a loan.⁷ In 2003, Texas citizens again voted to amend the Constitution, this time to authorize the Legislature to delegate "the power to interpret Subsections (a)(5)-(a)(7), (e)-(p), and (t)" of Section 50 of the Constitution to one or more state agencies.⁸ The Legislature delegated this interpretive power to the Finance Commission and the Credit Union Commission (the "Commissions").⁹

⁴ Bill Analysis, HOUSE RESEARCH ORGANIZATION, 5 (May 9, 1997) HJR 31.

⁵ 2004 Home Equity Lending Report issued by the Office of Consumer Credit Commissioner; 2006 Home Equity Lending Report issued by the Office of Consumer Credit Commissioner.

⁶ *Home Equity Lines of Credit Good Choice for Texas*, Opinion-Editorial by Carole Keeton Strayhorn, Texas Comptroller, September 10, 2003.

⁷ Bill Analysis, HOUSE RESEARCH ORGANIZATION, 4 SJR 42.

⁸ TEX. CONST. art. XVI, § 50(u).

⁹ TEX. FIN. CODE §§ 11.308, 15.413.

C. The Commissions issued interpretations—two of which ACORN challenges on appeal.

The Commissions issued, among others, the following interpretations:

7 TEX. ADMIN. CODE § 153.15 – Closing Location (Issue 6):¹⁰

An equity loan may be closed only at an office of the lender, an attorney at law, or a title company. The lender is anyone authorized under Section 50(a)(6)(P) that advances funds directly to the owner or is identified as the payee on the note.

....

- (2) A lender may accept a properly executed power of attorney allowing the attorney-in-fact to execute closing documents on behalf of the owner.
- (3) A lender may receive consent required under Section 50(a)(6)(A) by mail or other delivery of the party's signature to an authorized physical location and not the homestead.

7 TEX. ADMIN. CODE § 153.51 – Providing Written Notice (Issue 7):¹¹

An equity loan may not be closed before the 12th day after the lender provides the owner with the consumer disclosure on a separate instrument.

- (1) If a lender mails the consumer disclosure to the owner, the lender shall allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery.

....

- (3) A lender may rely on an established system of verifiable procedures to evidence compliance with this section.

ACORN asked the trial court to declare the foregoing interpretations invalid.¹²

The trial court denied ACORN's request.¹³ On cross-appeal, ACORN appeals that

¹⁰ Pertaining to TEX. CONST. art. XVI, § 50(a)(6)(N).

¹¹ Pertaining to TEX. CONST. art. XVI, §§ 50(a)(6)(M)(i), 50(g).

¹² CR 612-655.

¹³ CR 1106-1107.

portion of the trial court's judgment. Because the Commissions have broad power to interpret the home equity lending provisions in the Constitution and the Commissions' interpretations are consistent with the Constitution, that portion of the trial court's judgment should be affirmed.

ARGUMENT

A. The Constitution was amended to provide broad interpretive authority to the Legislature which properly delegated the authority to the Commissions.

Texas law does not support ACORN's proposition that the Commissions should be given little deference. In fact, all of the cases ACORN relies on for support are distinguishable because the cases deal with typical legislative grants of agency power rather than a constitutionally-mandated power to interpret provisions in the Constitution.¹⁴ Consequently, ACORN can point to no authority supporting a narrow application of the Commissions' "power to interpret Subsections (a)(5)-(a)(7), (e)-(p), and (t)" of Section 50 of the Constitution.

Further weighing against a narrow review is the fact that the separation of powers clause of the Constitution states that the general separation of powers rule does not affect express grants of power that would otherwise violate the separation of powers rule: "[t]he powers of the Government of the State of Texas shall be divided into three distinct departments . . . and no person, or collection of persons, being of one of these

¹⁴ Appellees' Response ("Response"), pp. 4-8.

departments, shall exercise any power properly attached to either of the others, *except in the instances herein expressly permitted.*"¹⁵

The Constitution confers interpretive authority on the Legislature and does not subordinate this interpretive authority to the judicial branch in the event of a subsequent challenge.¹⁶ To the contrary, the Constitution makes no reference to judicial review in the grant and only refers to judicial interpretation in the safe harbor portion of Section 50(u), which states that an act or omission does not violate the Constitution if it is in accordance with an interpretation "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 . . .*"¹⁷

Therefore, at a minimum, the Commissions are on even footing with Texas appellate courts in their ability to interpret the Constitution and, once the agencies have issued an interpretation, the Constitution does not specifically authorize courts to review that interpretation *de novo*. As the two constitutional provisions challenged on cross-appeal have now been interpreted by the Commissions, the Commissions' constitutional interpretive authority may be exclusive. Setting this question aside, an application of the general rules pertaining to questions of constitutional interpretation reveal that the

¹⁵ TEX. CONST. art. II, § 1 (emphasis added).

¹⁶ Section 50(u) states: "The legislature may by statute delegate 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."

¹⁷ TEX. CONST. art. XVI, § 50(u)(2).

Commissions' interpretations are entirely consistent with the Constitution, they provide necessary guidance to borrowers and lenders, and the trial court properly affirmed the interpretations.

RESPONSIVE ISSUES PRESENTED

ISSUE 5: Under the APA, an interpretation of the law is a "rule." Therefore, the Commissions have rulemaking authority because they are authorized to interpret the Constitution.

In the trial court ACORN did not seek a broad declaration that the Commissions do not have rulemaking authority. Rather, ACORN raised the rulemaking issue as a subsidiary point to its challenge of the interpretation found at 7 TEX. ADMIN. CODE § 153.15 (Closing Location Interpretation – Issue 6).¹⁸ In fact, the prayer for relief in ACORN's motion for summary judgment made no mention of a request for a declaration regarding any "rulemaking" question.¹⁹ Thus, this issue is properly addressed in conjunction with ACORN's challenge to 7 TEX. ADMIN. CODE § 153.15. Even assuming the issue was raised in the trial court, briefed by the parties in the cross-motions for summary judgment, and ruled on by the trial court, the trial court properly determined that the Commissions have the power to interpret the Constitution.

In accordance with Section 50(u), the Legislature delegated interpretive power to the Commissions.²⁰ The delegation of power empowers the Commissions to issue interpretations of Sections 50(a)(5)-(7), (e)-(p), (t), and (u) of the Constitution.²¹ Under

¹⁸ See Plaintiffs' Amended Motion for Summary Judgment and Brief in Support, CR 638, 642-643.

¹⁹ *Id.* at CR 655.

²⁰ TEX. FIN. CODE §§ 11.308, 15.413

²¹ *Id.*

the Texas Administrative Procedures Act ("APA"), a "rule" is defined as "*a state agency statement* of general applicability that: (i) implements, *interprets, or prescribes law* or policy . . ."²² Accordingly, an interpretation of a constitutional provision is a "rule" under the APA, and ACORN's argument that the Commissions lack rulemaking authority must fail.

ISSUE 6: The Constitution requires a home equity loan to be "closed only at the office of the lender, an attorney at law, or a title company." An interpretation that requires a home equity loan to be "closed only at an office of the lender, an attorney at law, or a title company" and recognizes that a borrower may be represented by an attorney-in-fact and may provide consent by delivery is consistent with the Constitution.

Under Section 50(a)(6)(N) of the Constitution, home equity loans are to be closed "only at the office of the lender, an attorney at law, or a title company."²³ ACORN succinctly sums up this constitutional requirement, stating: "[t]he provision requires closings to occur at an office of the lender, title company or attorney."²⁴ Consistent with the Constitution, the Commissions interpreted Section 50(a)(6)(N) to require that loans be closed at the office of the lender, an attorney at law, or a title company, issuing the following interpretation:²⁵

An equity loan *may be closed only at an office of the lender, an attorney at law, or a title company*. The lender is anyone authorized under Section 50(a)(6)(P) that advances funds directly to the owner or is identified as the payee on the note.

....

²² TEX. GOV. CODE § 2001.003(6)(emphasis added).

²³ TEX. CONST. art. XVI, § 50(a)(6)(N).

²⁴ ACORN's Response ("Response"), p. 53.

²⁵ 7 TEX. ADMIN. CODE § 153.15 (emphasis added).

- (2) A lender may accept a properly executed power of attorney allowing the attorney-in-fact to execute closing documents on behalf of the owner.
- (3) A lender may receive consent required under Section 50(a)(6)(A) by mail or *other* delivery of the party's signature to an authorized physical location and not the homestead.

The interpretation also clarifies that the Constitution does not prohibit the use of an attorney-in-fact to represent the borrower at the closing or from delivering consent to an authorized physical location, specifically identifying these as permissible methods of homeowner consent while maintaining the requirement that the closing occur at the office of a lender, an attorney at law, or a title company.

Rather than demonstrate how the Commissions' interpretation is inconsistent with the Constitution, ACORN chooses to assail the interpretation as somehow opening the floodgates to possible "shenanigans" of unscrupulous brokers, lenders, title companies and family members. But this simplistic view ignores the fact that the Constitution contains numerous other consumer protections. For example, a home equity loan must, among other things, be: (1) evidenced by a written agreement; (2) made with the consent of each owner and each owner's spouse; (3) made without recourse for personal liability against each owner and the spouse of each owner; (4) secured by a lien that may be foreclosed only by a court order; (5) closed no sooner than 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) and one business day after the date that the owner of the homestead receives a final itemized disclosure of the actual fees, points, interest, costs,

and charges that will be charged at closing; (6) made without requiring the owner of the homestead to sign any instrument in which blanks are left to be filled in; and (7) made subject to the right of the owner of the homestead and any spouse of the owner to rescind the extension of credit without penalty or charge within three days after the extension of credit is made.²⁶

While the Constitution requires home equity loans be closed at the office of the lender, an attorney at law, or a title company, the Constitution does not alter the standard methods by which a person may provide consent to a transaction. Presumably, the Legislature knew how to draft a constitutional amendment barring consent through a power of attorney since the home equity loan provisions in the Constitution contain such a prohibition. Section 50(a)(6)(Q)(iv) states the owner of the homestead may not be required to "sign a . . . power of attorney to the lender or to a third person to confess judgment or to appear for the owner in a judicial proceeding."²⁷ But there is no similar prohibition on the use of a power of attorney or mail delivery to facilitate the execution of closing documents. The Commissions' interpretation confirms that borrowers who are otherwise unable to appear in person at the closing due to work, military service,²⁸ illness, or other hardship may still consent to a home equity loan. Because the challenged interpretations do not change the requirement in Section 50(a)(6)(N) that the closing

²⁶ See generally TEX. CONST. art. XVI, § 50(a)(6).

²⁷ TEX. CONST. art. XVI, § 50(a)(6)(Q)(iv).

²⁸ For instance, soldiers deployed overseas typically use a power of attorney to provide consent. Although ACORN claims that it understands that soldiers have used JAG law offices to close loans, the military promotes the use of a power of attorney for deployed soldiers. http://deploymentlink.osd.mil/deploy/prep/deploy_checklist.shtml.

occur at the offices of the lender, an attorney or a title company, the trial court properly upheld the interpretation at 7 TEX. ADMIN. CODE § 152.15.

ISSUE 7: Under the Constitution, a home equity loan may not be closed before the twelfth day after the lender "provides" the Section 50(g) notice to the homeowner. An interpretation that allows for a rebuttable presumption that notice was provided if the lender mailed notice and which recognizes that compliance may be evidenced by an established system of verifiable procedures is consistent with the Constitution.

Under Section 50(a)(6)(M)(i) a home equity loan may not be closed before "the 12th day after . . . the lender *provides* the owner a copy of the notice prescribed by [Section 50(g)]."²⁹ The Commissions issued the following interpretation:

7 Tex. Admin. Code § 153.51:

An equity loan may not be closed before the 12th day after the lender provides the owner with the consumer disclosure on a separate instrument.

(1) If a lender mails the consumer disclosure to the owner, the lender shall allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery.

....

(3) A lender may rely on an established system of verifiable procedures to evidence compliance with this section.

Although the word "provide" is not defined in the Constitution, in common usage, it means "to supply or make available."³⁰ Contrast this with the word "deliver" that is found at Section 50(a)(6)(Q)(x)(d) and means, in common usage, "to take and hand over to or leave for another."³¹ Also contrast the word "provide" with the word "send" that is

²⁹ TEX. CONST. art. XVI, § 50(a)(6)(M)(i)(emphasis added).

³⁰ Webster's New Collegiate Dictionary, 9th Ed., p. 948 (1988).

³¹ *Id.* at p. 336.

found in three places in the home equity provisions³² and means, in common usage, "to dispatch by means of communication."³³

ACORN attempts to substitute the requirement that a lender "deliver" notice in place of the requirement that a lender simply "provide" notice, arguing that external sources such as legislative history support this strained interpretation. This interpretation impermissibly rewrites the Constitution, however, because the two words have separate and distinct meanings. Given the use of the word "provide" in the Constitution, the Commissions were, conceivably, free to interpret "provide" as simply requiring a lender to make copies of the disclosure available in its customer lobby. The Commissions did not do so. Rather, the Commissions interpreted the Constitution to require a minimum of three extra days where the disclosure is provided by mail, allowing for a rebuttable presumption of sufficient mailing and delivery after the three-day period. This rebuttable presumption is similar to the presumption that arises when a litigant proves that a document was mailed, in a letter properly addressed, and with postage prepaid.³⁴ In addition, the interpretation provides that the lender may rely on an established system of verifiable procedures to evidence compliance.

The Commissions' interpretation is not in conflict with the Constitution because it does not alter the requirement that the lender provide the required notice, but simply allows for a rebuttable presumption of delivery and evidence of compliance through an

³² TEX. CONST. art. XVI, §§ 50(a)(6)(Q)(x)(b)-(c) and (e).

³³ Webster's New Collegiate Dictionary, p. 1071.

³⁴ See *Southland Life Ins. Co. v. Greenwade*, 159 S.W.2d 854, 857 (Tex. 1942); *McMillin v. State Farm Lloyds*, 180 S.W.3d 183, 206-07 (Tex. App.—Austin 2005, pet. denied)

established system of verifiable procedures. The borrower is not prohibited from dispelling the presumption entirely by disputing that notice was provided. Therefore, the challenged interpretation, 7 TEX. ADMIN. CODE § 153.51, does not conflict with the Constitution and the trial court properly denied ACORN's request to invalidate the interpretation.

CONCLUSION AND PRAYER

Home equity lenders remain concerned about whether a particular action would violate the Constitution and have relied on the Commissions' interpretive guidance in making home equity loans in Texas. The interpretations found at 7 TEX. ADMIN. CODE §§ 153.15 and 153.51 are consistent with the Constitution and were issued in accordance with the constitutional grant of "power to interpret Subsections (a)(5)-(a)(7), (e)-(p), and (t)" of Section 50 of the Constitution.³⁵ Accordingly, the trial court properly upheld the interpretations.

Appellant Texas Bankers Association therefore requests that the Court affirm the trial court's decision to uphold 7 TEX. ADMIN. CODE §§ 153.15 and 153.51 as valid interpretations. Texas Bankers Association further prays for all other relief to which it may be entitled.

³⁵ TEX. CONST. art. XVI, § 50(u).

Respectfully submitted,

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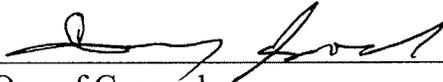
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