NO. 03-06-00273-CV

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

VS.

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 126th Judicial District Court,
Travis County, Texas

THE FINANCE COMMISSION AND THE CREDIT UNION COMMISSION'S CONSOLIDATED BRIEF REPLYING TO ACORN'S RESPONSE AND RESPONDING TO ACORN'S CROSS POINTS

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The Finance Commission of Texas and the Credit Union Commission of Texas (the "Commissions") now reply to the responsive portion of Acorn's consolidated brief; *and* respond to the cross points contained in that brief.

I. The Commissions' interpretation of "any interest," a term in Article XVI, Section 50(a)(6)(E) of the Texas Constitution, is reasonable. (7 Tex. Admin. Code §§ 153.1(11) and 153.5(3)(4)(6)(8)(9) and (12).)

A. Introduction

In their opening brief, the Commissions emphasized these points. The Commissions' definition of "interest" is: (1) consistent with the ordinary meaning of "interest"; (2) consistent with dictionary definitions of interest; (3) identical to the statutory definition of interest; (4) identical to the courts' definition of interest in Texas case law; and (5) entirely consistent with the approach taken by the *Tarver* court. As shown below, Acorn has failed to refute any of these points credibly.

Article XVI, section 50(a)(6)(E) of the Texas Constitution caps fees charged to the borrower at three percent of the original principal amount of the loan. In calculating fees subject to the cap, interest—"*any* interest"—is excluded from the calculation. The home equity amendments, however, do not contain a definition of interest.

The Commissions, therefore, interpreted the term "any 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). Section 301.002(a)(4) of the Texas Finance Code defines "interest" to mean "compensation for the use, forbearance, or detention of money." TEX. FIN. CODE ANN. § 301.002(a)(4) (Vernon 2006).

The Texas Finance Code definition, which the interpretative rules incorporate, is in turn consistent with ordinary, dictionary definitions 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").

Consistent with these definitions, the Commissions have also clarified that prepaid interest, such as points, is interest and not fees. 7 TEX. ADMIN. CODE § 153.5(3) (2006). Conversely, origination fees that are *not* interest do count toward the three-percent fee cap. 7 TEX. ADMIN. CODE § 153.5(6) (2006).

The approach taken by the Commissions has two basic premises. First, the term "any interest" in section 50(a)(6)(E) means just that: any and all interest including prepaid interest, and not just the interest paid in monthly installments under the promissory note itself. Second, and consistent with a long line of Texas cases, the issue of whether a charge is interest or a distinct fee is determined not by the label put on the charge but by the economic substance of the charge itself. If the charge is in fact "compensation for the use, forbearance, or detention of money," it is interest.

This approach is entirely consistent with that of the Waco Court of Appeals in *Tarver v. Sebring Capital Credit Corp.*, 69 S.W.3d 708, 711-12 (Tex. App.–Waco 2002, no pet.), which interpreted section 50(a)(6)(E) and held that discount points on a home equity loan are interest, not fees subject to the constitutional cap:

> 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." *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.*

B. Acorn's response is wholly unconvincing.

Acorn has failed to refute credibly any of the points made by the Commissions in their opening brief.

1. Acorn does not identify the source of its "commonly understood" definition of interest, which it offers in lieu of the Commissions' definition.

In response to the Commissions' opening brief, Acorn first offers this: The Commissions' definition is unlawful, because it is inconsistent with the "meaning the voters intended," which Acorn knows to be the "interest required by the promissory note" itself. *See* Acorn's Response at 8, 14, 15. According to Acorn, "[t]he Fee Cap did not exclude prepaid interest, only interest as it is commonly understood" by the voters. *See* Acorn's Response at 16. But Acorn never explains how this process of divination has taken place—how Acorn alone has discerned what voters did and did not understand when they approved the amendments. It complains, for example, that the Commissions used the statutory definition of "interest" rather than the "commonly understood" meaning, but does not divulge the source of this commonly understood meaning or explain how it has been ascertained by Acorn. Acorn does not explain why the Commissions should ignore a long line of Texas cases analyzing whether loan charges are interest, or why they should abandon the statutory definition of interest in favor of Acorn's "commonly understood meaning."

2. Acorn has incorrectly framed the issue before this Court.

In its brief, Acorn asserts the issue is this: "The simple question is whether the constitutional limit on the fees to originate, evaluate, maintain, record, insure and service a home equity loan was meant to apply to lenders." *See* Acorn's Response at 11. Acorn adds that "[t]he Commissions' rule exempts fees paid to lenders from the Fee Cap despite the intentions of the Legislature and voters."

Acorn incorrectly states both the issue before this Court and the legal effect of the Commissions' interpretation. There is no question that the fee cap applies to lenders. The issue is what charges are considered interest under Texas law and what charges are considered fees and therefore subject to the cap.

The case *First Bank v. Tony's Tortilla Factory*, 877 S.W.2d 285, 287 (Tex.1994) stands for the proposition that if a lender performed a service other than lending money, that service would justify a fee or charge under Texas law. The test is whether the lender has given "distinctly separate and additional consideration" that would justify the fee. *First Bank*, 877 S.W.2d at 287. Therefore, under Texas law, a lender may charge a fee that would not be interest and would be subject to the fee cap. *Id.* Acorn's assertion that the Commissions' interpretation excludes fees paid to lenders is simply wrong. Texas Courts have identified a number of charges by the lender that fall outside the definition of interest.[1]

Acorn also mistakenly contends that the Commissions' definition of interest would reach charges which are "stipulated by the parties" to be interest. As support for this assertion, Acorn relies on *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777 (Tex. 1977), which used the phrase "interest stipulated by the parties." Acorn again misstates the law in Texas. The language in *Tanner* it relies on is taken out of context. Acorn uses the quote to suggest that parties to a transaction may simply characterize a charge as interest when it is not. But *Tanner* does not stand for this proposition. Rather, *Tanner* was addressing an interest rate *contracted for* by the parties in the loan agreement. In analyzing the contract rate agreed to

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[1] The *Tony's Tortilla* case is only one of the more recent Texas cases on this point:

> Fees which are an additional charge supported by a distinctly separate and additional consideration, other than the simple lending of money, are not interest and thus do not violate the usury laws. *Goldring*, 665 S.W.2d at 104; *Freeman*, 534 S.W.2d at 906; *Greever v. Persky*, 140 Tex. 64, 165 S.W.2d 709, 712 (Tex. 1942). Several Texas cases have recognized that certain charges are not considered interest. *Goldring*, 665 S.W.2d at 104 (attorney's fee); *Stedman v. Georgetown Sav. & Loan Ass'n*, 595 S.W.2d 486, 489 (Tex. 1979) (commitment fee); *Freeman*, 534 S.W.2d at 906 (commitment fee); *Southland Life Ins. Co. v. Egan*, 126 Tex. 160, 86 S.W.2d 722, 724-25 (Tex. 1935) (prepayment penalty); *Bearden v. Tarrant Sav. Ass'n*, 643 S.W.2d 247, 249 (Tex. App.--Fort Worth 1982, writ ref'd n.r.e.) (prepayment penalty); *Morris v. Miglicco*, 468 S.W.2d 517, 519 (Tex. Civ. App.--Houston [14th Dist.] 1971, writ ref'd n.r.e.) (brokerage fee).

Tony's Tortilla Factory, 877 S.W.2d at 287.

by the parties, the court applied the formula for calculating interest that has been recognized by Texas courts. *Tanner*, 561 S.W.2d at 785.

But parties to a loan may not change the true nature of monies paid to the lender by labeling the charges in a certain manner. The correct legal principle is that labels do not control, even where certain charges are expressly referred to as interest. *Coppedge v. Colonial Sav. & Loan Ass'n.*, 721 S.W.2d 933, 936 (Tex. App.–Dallas 1986, writ ref'd n.r.e.)[2]; *see infra* at I(B)(4). Because the Commissions' definition incorporates the definition applied by Texas courts, fees mischaracterized or labeled as interest by the parties would still be subject to the fee cap.

3. The legislative history does not show that the Legislature intended to exclude from the cap only that interest which is paid under the note.

Acorn attempts to find additional support for its definition by pointing to what it views as legislative history. Acorn's discussion of this history lacks merit for several reasons.

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[2] As the *Coppedge* Court explained:

> We first must determine whether the $9,100 was in fact interest. Interest is the compensation allowed by law for the use, forbearance, or detention of money. Tex. Rev. Civ. Stat. Ann. art. 5069-1.01(a) (Vernon 1971). Through its attorney, Colonial demanded $9,100 as "back interest" due as a result of the Coppedges' alleged breach of the due-on-sale clause in the deed of trust that secured their loan from Colonial. Although the label "back interest" is not controlling, *see Gonzales County Savings & Loan Association v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976), the factual basis for Colonial's claim to the $ 9,100 indicates that Colonial sought that sum as additional compensation for the Coppedges' use of its money.

Coppedge, 721 S.W.2d at 933.

a. **Acorn's discussion gives insufficient weight to the text itself.**

First, in interpreting a word or term, the place to begin is with the provision itself. Whether the text is statutory or constitutional, 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 (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 and thereby expands the scope of the term to include not just interest paid under the note, but any and all charges which constitute "interest" under Texas law. If the Legislature had intended "any interest" to mean only the contract rate of interest per annum, it very easily could have used the term "contract rate of interest," or "interest rate" or "per annum interest," but it did not. In fact, during the 78th legislative session, Senator West tendered a floor amendment to SJR 42, which would have used just this formulation, changing the 3% fee cap provision as follows:

> does not require the owner or the owner's spouse to pay, in addition to the contract rate of interest on the original principal amount of the extension of credit, fees, points, or other charges to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, 5.5 percent of the original principal amount of the extension of credit . . . (emphasis added).

Proposed Amendment from Sen. George "Buddy" West, 2nd Reading F1(S), Tex. S.J. Res. 42, 78th Leg., R.S. (May 14, 2003) (See Appendix "A" to this Brief); see also Debate on Tex. S.J. Res. 42 on the Floor of the Senate, 78th Leg., R.S. (May 14, 2003) (audiotape available at http://www.senate.state.tx.us/avarchive/ramav.php?ram=00001423, starting at 30:35, 54:15). Senator West's proposed amendment was rejected, however. In choosing the broader phrase "any interest," it is unlikely the Legislature or voters intended to exclude only one type of interest from the cap while including all others.

b. Acorn also sidesteps the Legislature's own definition of interest.

Acorn also fails to acknowledge the significance of the Legislature's own definition of interest. That definition was in place—first in Article 5069-1.01 and later in the Texas Finance Code—long before the home equity amendments at issue were drafted and ratified. 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).

Acorn attempts to sidestep this rule of statutory interpretation by arguing that, since the statutory definition of "interest" varies from its "commonly understood" meaning, this court should ignore it. Acorn's Response at 8, 13. But as shown above, the statutory definition of "interest"—"compensation for the use, forbearance, or detention of money"—is consistent with the word's ordinary meaning. *See supra* at I(B)(1 & 2). There is nothing esoteric about the statutory definition of interest, and no reason to suppose that voters did not understand prepaid interest, for example, when they approved the home equity amendments.

Even assuming *arguendo* that the Commissions' definition varies from the "commonly understood meaning," Acorn has misstated the applicable rule of interpretation. When a term of art is used in the Texas Constitution, Texas courts look not to the common understanding of that term, but to the meaning the term of art has within the subject area. *Lake LBJ Mun. Util. Dist. v. Coulson*, 839 S.W.2d 880, 892 (Tex. App.–Austin 1992, no writ). In *Lake LBJ,* the court interpreted the phrase "municipal corporation" in view of its meaning within the specific context of sovereign immunity, rather than the common understanding of that term. Acorn ignores that "interest" has a well-established legal meaning within the mortgage environment and is used as a term of art under Texas law.

Similarly, when Texas courts interpreted the phrase "ex post facto," they did not base their interpretation on the commonly understood meaning. Rather, Texas courts have accepted that "ex post facto" is a term of art. *Grimes v. State*, 807 S.W.2d 582, 584 (Tex. Crim. App. 1991). The *Grimes* court determined that the appropriate definition to use was the contemporary term of art as it had evolved through court cases.

Like the terms "municipal corporation" and "ex post facto," the term "interest" is a term of art used in the mortgage lending industry and specifically based on statutory and case-law definitions. Those definitions should control here.

c. The legislative materials Acorn relies on either do not constitute legislative history or are silent regarding the meaning of "any interest."

Further, the legislative history Acorn cites consists largely of comments by individual legislators. But the statement of a single legislator, even the author and sponsor of the legislation, does not determine legislative intent. *See generally Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex.1993) ("[T]he intent of an individual legislator, even a statute's principal author, is not legislative history controlling the construction to be given a statute. It is at most persuasive authority as might be given the comments of any learned scholar of the subject."); *C & H Nationwide, Inc. v. Thompson,* 903 S.W.2d 315, 328 (Tex.1994) (Hecht, J., concurring and dissenting) ("While the perspectives of individual legislators on the meaning of statutes may be instructive, they do not govern construction of the statute. We are obliged to effectuate the intent of the Legislature and not merely that of some of its members. It is not unusual for intentions concerning particular legislation to vary among its supporters. We must assume that the Legislature and has done its very best to express its intent in the words of the statute itself. Even when those words leave us in such doubt as to the Legislature's purpose that we must look beyond the provision for assistance, it is ordinarily inappropriate to consider the views of individual legislators.")

Finally, the materials cited by Acorn do not show that the Legislature intended that certain types of interest be included in the fee cap while other types are excluded. They are in fact silent on this issue.[3]

4. Acorn's reliance on 7 Tex. Admin. Code § 153.5(6) to show the Commissions have exceeded their authority is misplaced.

Next, Acorn takes aim at section 153.5(6), which clarifies that: "Charges an owner or an owner's spouse is required to pay to originate an equity loan that are *not* interest *are* fees subject to the three percent limitation." 7 TEX. ADMIN. CODE § 153.5(6) (2006) (emphasis

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[3] On page 19 of its brief, for example, Acorn sets out testimony by Rep. Wolens to the House Committee on Financial Institutions. The testimony is cited as consideration on Tex. H.J.R. 31. The Corrected Minutes of the public hearing actually show that Rep. Wolens provided testimony on HB 447 and HJR 44. The two pieces of legislation that Rep. Wolens provided testimony on were left pending on that day; obviously, HB 447 and HJR 44 did not pass.

added). This provision is similar to section 153.5(3), which clarifies that charges that *are* interest under the law, for example per diem interest and points, are *no*t fees subject to the three percent limitation.

Both provisions, consistent with longstanding Texas case law, underscore that a charge which is in fact compensation for the use, forbearance or detention of money is by definition interest, regardless of the label placed upon it by the lender. *Gonzales County Savs. & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976), citing TEX. REV. CIV. STAT. art 5069-1.01(a) [now TEX. FIN. CODE § 301.002(a)(4) (Vernon 2006)]. Charges which are in fact interest remain so, regardless of the label used. Where there is a dispute as to whether the label is merely a device to conceal the true nature of the charge, a question of fact is raised. *Id., citing Greever v. Persky*, 140 Tex 64, 165 S.W.2d 709 (1942).

Acorn complains that under section 153.5(6) "origination fees"may not count toward the fee cap. While this is true, it is also true that the Commissions' interpretative rule simply recognizes the obvious: charges labeled "origination fees" may, in fact, constitute interest under the law. *See Terry v. Teachworth*, 431 S.W.2d 918, 924 (Tex. Civ. App.—Houston [14thDist.] 1968, writ ref'd n.r.e.). If, however, such fees are not interest under the law, then as section 153.5(6) acknowledges, they will be counted as fees subject to the cap.

The problem with Acorn's position is that it wants the label, and not the economic substance or reality of the charge, to control. Another problem is that, were Acorn's analysis accepted, certain charges would be treated simultaneously as fees under Section 50(a)(6)(E) and as interest under the Texas Finance Code and Texas case law.

5. The case law "authority" cited by Acorn has no precedential value.

In their opening brief, the Commissions cited as support *Tarver v. Sebring Capital Credit Corp.*, 69 S.W.3d 708, 711-12 (Tex. App.–Waco 2002, no pet.), in which the court of appeals interpreted section 50(a)(6)(E) and held that discount points on a home equity loan are interest, not fees subject to the constitutional cap. *See supra* at I(A). In response to this, Acorn asserts that case law interpreting the fee cap is unsettled, *see* Acorn's Response at 29, citing *Thomison v. Long Beach Mortgage Co.*, 176 F. Supp. 2d 714 (W.D. Tex. 2001), *vacated*, No. CIV.A. A:00CA783JN, 2002 WL 32138252. But that case has been vacated and has no precedential value. *E.g.*, *United States v. Rice*, 635 F.2d 409, 410 (5th Cir. 1981); *Ridley v. McCall*, 496 F.2d 213, 214 (5th Cir. 1974).

6. Conclusion: Acorn's attempt to make public policy should be rejected.

In essence, Acorn's legal arguments are a thinly veiled attempt to have this court make public policy by changing the legal definition of interest. If, as Acorn urges, prepaid interest is considered a fee subject to the cap, the amount of additional fees that may be lawfully charged to the borrower will be reduced. While one may applaud or deplore such a policy, the courts should not be the ones to fashion it under the guise of "interpreting" Section 50(a)(6)(E). If the Legislature had intended to exclude from the cap only that interest which is paid under the promissory note itself, it surely knew how to say so, and surely would *not* have resorted to the broad phrase "any interest." In the absence of constitutional language mandating the result urged by Acorn, the court should uphold the reasonable interpretation of the Commissions.

II. The Commissions reasonably interpreted "an application" in Section 50(a)(6)(M)(i) to include electronic and oral applications, as well as written applications. (7 Tex. Admin. Code § 153.12 .)

> 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. (emphasis added.)

The Commission reasonably interpreted the term "an application" to include electronic and oral applications. *See* 7 TEX. ADMIN. CODE § 153.12 (2006). Acorn—consistent with its narrow interpretation of the term "any interest"—advocates restricting the phrase "an application" to *written* applications even though this restriction finds no support in the plain language of the text itself.

But the Commissions are not authorized to engage in rule making that "imposes additional burdens, conditions, or restrictions in excess of or inconsistent with" the relevant constitutional language. *See e.g., Office of Pub. Util. Counsel v. Public Util. Comm'n*, 104 S.W.3d 225, 232 (Tex. App.—Austin 2003, no pet.); *Office of Pub. Util. Counsel v. Public Util. Comm'n*, 131 S.W.3d 314, 321 (Tex. App.—Austin 2004, pet. denied.)

The Legislature could have easily limited the language in Section 50(a)(6)(M)(i) to a "written application," but it chose not to do so. Acorn attempts to characterize this as an oversight. The Commissions, on the other hand, view the unrestricted language as a strong indication of legislative intent. In permitting oral and electronic home equity loan applications, Section 50(a)(6)(M)(i) simply recognizes prevailing commercial practices. For example, 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. 12 C.F.R. § 202.2(f) (2005).

Acorn makes two policy arguments in support of its more restrictive interpretation. First, in the absence of a written application, it reasons, confusion may arise as to when the twelve-day cooling-off period begins to run. Second, tying the commencement of the twelve-day period to submission of a written application ensures applicants will have sufficient time to consider whether they truly want use their home equity as security for the loan.

But the Commissions' interpretation reasonably balances these concerns against the need to recognize prevailing business practices and the desire, on the part of lenders and potential borrowers alike, for convenience. As the Commissions have already noted, the applicant does not become obligated to do *anything* on expiration of the twelve-day period. The twelve days are simply a waiting period. At the end of the period, the applicant can always elect not to close on the loan. Second, and just as important, the waiting period is triggered not by the application alone, but also by the constitutionally mandated written disclosure of a borrower's legal rights. The twelve days commence on *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); *see infra* at V(B).

Finally, the Constitution actually contains two waiting periods. In addition to the twelve-day rule, the borrower has three days to rescind the loan, without penalty or charge, after the extension of credit is actually made. TEX. CONST. Art. XVI, § 50(a)(6)(Q)(viii). In view of these protections, the home equity amendments to the Constitution sensibly permit electronic and oral applications, as the Commissions' interpretation recognizes.

Acorn's sole legal argument is that Section 50(g)'s form disclosure provision refers to a "written application." According to Acorn, this means Section 50(a)(6)(M)(i) is also referring to a written application, and the need to submit one in each and every instance where a potential borrower applies for a home equity loan. But as the Commissions have already pointed out in their opening brief, this reasoning was rejected by the Supreme Court in *Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353, 357 (Tex. 2000). There, the Court held that the substantive provisions in Section 50(a)(6) prevail over the form notice requirements in Section 50(g). Section 50(g)'s notice provisions, the court explained, do 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. 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."

Acorn attempts to distinguish *Stringer* by arguing that here there is no irreconcilable conflict between the substantive provision in Section 50(a)(6)(M)(i) and Section 50(g)'s reference to a "written application"—that provisions here can be harmonized. But the provisions here do conflict: Section 50(a)(6)(M)(i) permits written, electronic and oral applications, whereas the form notice set out n Section 50(g) refers only to a "written application." In view of this conflict, the holding in *Stringer* applies with equal force here.

Acorn theorizes that, unlike the provisions in *Stringer*, the provisions here can be harmonized simply by "interpreting" Section 50(a)(6)(M)(i) to mean "written applications" only. But this approach would go well beyond mere interpretation and "impose[] additional burdens, conditions, or restrictions in excess of or inconsistent with" the text itself. *See e.g., Office of Pub. Util. Counsel*, 104 S.W.3d at 232.

Acorn, moreover, does not explain how its reliance on the phrase "written application" in Section 50(g) can be squared with the trial court's conclusion that electronic applications *are* permitted under Section 50(a)(6)(M)(i).[4] If, as Acorn contends, the conflicting provisions can be resolved only by "interpreting" Section 50(a)(6)(M)(i) to mean "written applications," then electronic applications are also prohibited. But as the trial court recognized, and as Acorn now implicitly recognizes, the Legislature and voters could not have intended this result. Accordingly, this court should follow *Stringer* and hold that the broader, substantive provisions in Section 50(a)(6)(M)(i) prevail over the form notice provision in Section 50(g).

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[4] Acorn did not appeal that portion of the judgment which upheld the interpretation insofar as it permits the use of electronic applications.

III. 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' interpretation reasonably implements these prohibitions. (7 Tex. Admin. Code § 153.84.)

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. 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. TEX. CONST. Art. XVI, § 50(t)(2). Further, a borrower may not obtain an advance on the line of credit by credit card, debit card, preprinted solicitation check or similar device. TEX. CONST. Art. XVI, § 50(t)(3).

A. The Commissions reasonably concluded the prohibition on preprinted solicitation checks did not include convenience checks, which are used by the borrower *after* obtaining the loan to draw down amounts.

Section 50(t)(3) does not otherwise limit the allowable methods for obtaining advances. For this reason, Interpretive Rule 153.84 clarifies that a homeowner may use such devices as prearranged drafts, convenience checks or written transfer instructions to obtain advances.

B. Acorn's challenge to this interpretative rule is unpersuasive.

Acorn's complaint here is twofold. It first complains that the interpretation allows the use of convenience checks even though they are a device "similar" to "preprinted solicitation checks" and thus prohibited by Section 50(t)(3). It also complains that the Commissions did not define terms such as a "convenience check." Both arguments lack merit.

1. A convenience check is not similar to a preprinted solicitation check, and the home equity amendments do not prohibit the use of all types of checks in connection with HELOCs.

Turning to Acorn's first argument, a convenience check is not similar to a preprinted solicitation check. The Commissions have reasonably defined "preprinted solicitation check" as a check that: (1) is provided to an owner for the purpose of soliciting the 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.

Convenience checks, on the other hand, 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 borrowers, *after* they have obtained the HELOC, to draw down amounts on the line of credit. The convenience checks are requested by the borrowers after they have applied for the HELOC, received the twelve-day notice, and formally closed on the loan.

Indeed, under the home equity amendments, HELOCs *cannot* be initiated by a convenience check. Nor can a lien against the homestead be created through the use of a convenience check. The following constitutional provisions would be violated if a lender attempted to do so: Sections 50(a)(6)(M), 50(a)(6)(N), 50(a)(6)(Q)(v), 50(a)(6)(Q)(vi), 50(a)(6)(Q)(viii), 50(a)(6)(Q)(ix), 50(c), 50(g), and 50(t)(4). Thus, the use of convenience checks is necessarily limited to a pre-existing relationship between a borrower and a lender after the HELOC has been closed. Accordingly, a convenience check is not a device "similar" to a preprinted solicitation check.

True, both devices are "checks." But the Legislature and voters did not intend to prohibit all checks—only "preprinted solicitation checks." Acorn, once again, fails to recognize the significance of the language chosen by the Legislature and approved by voters. The Legislature could have drafted language prohibiting the use of "checks" to draw on the line of credit, but it declined to do so. Acorn's interpretation ignores a fundamental tenet of construction, in that it would render meaningless the terms "preprinted" and "solicitation." *See Doody v. Ameriquest Mortgage Co.*, 49 S.W.3d 342, 344 (Tex. 2001) (court's should "strive to avoid a construction that renders any provision meaningless or inoperative").

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 specifically prohibited devices. Yet, this is precisely what Acorn advocates when it argues that the terms "preprinted solicitation checks" and "similar device" should be read expansively to prohibit all "checks" including convenience checks.

Indeed, in view of the trial court's judgment, which also invalidated prearranged drafts and written transfer instructions as allowable methods for accessing advances on a HELOC (4 C.R. at 1106-7), Acorn is advocating a policy that would rule 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. If the Legislature had intended to limit the methods for accessing advances on a HELOC to personal visits to, or direct communications with, the lender, it could have chosen language that said so. The language it did choose, however, does not justify the expansive prohibition advocated by Acorn.

2. The Commissions did not need to define "prearranged drafts," "convenience checks" or "written transfer instructions," which are permitted by the home equity amendments, because those terms are generally understood.

Acorn next argues that the 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.

The heart of Acorn's criticism appears to be directed toward the lack of a definition for "convenience checks." But again, it was reasonable for the Commissions to conclude that this term is generally understood and requires no further elaboration. Acorn is nonetheless concerned that, in the absence of a restrictive definition for convenience checks, certain devices may become permissible even though they are "similar" to preprinted solicitation checks and thus prohibited. But this is precisely why the Commissions did define the term "preprinted solicitation check."

A device labeled 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, in view of the Commissions' definition of preprinted solicitation check, it is clear that 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). Thus, the Commissions' interpretations prevent a lender from sending partially completed checks to borrowers to encourage them to increase their HELOC debt.

In essence, Acorn's challenge to this interpretation rests on its notion that the Commissions could have done better, that they could have fashioned definitions that afforded greater clarity. As shown above, the challenged interpretations do provide the clarity needed to implement the home equity amendments. Moreover, even assuming *arguendo* that there were room in the interpretations for greater clarity, such a showing would not constitute grounds for invalidating the rules as unlawful.

The Commissions' interpretations are subject to review under the Administrative Procedure Act (APA). TEX. FIN. CODE §§ 11.308, 15.413 (Vernon Supp. 2006). Therefore, as Acorn itself concedes, in order to establish an interpretative rule's invalidity, the plaintiff must establish that the rule: (1) contravenes specific statutory or constitutional language; (2) runs counter to the general objectives and goals of the provision being interpreted; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant constitutional provisions. *See* Acorn's Response at 4.

As shown by the discussion above, Acorn's challenge does not meet this standard. Indeed, the interpretations it urges this court to adopt, in lieu of the Commissions' rules, do not find support in the plain language of the text itself and would themselves be invalid under the APA.

IV. 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.)

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: that copies of all documents signed by the owner at closing must be provided. 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, in their interpretation, 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 the lender provides them. If the written application is signed at closing, which occurs when 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. Disclosures are provided to consumers before they enter into transactions in order to provide information timely; there is no real benefit for the same disclosures to be provided to the same consumers again after the completion of the transaction. Providing the same disclosure multiple times could create confusion.

V. Commissions' Response to Acorn's cross-points (Acorn's Issues Five, Six and Seven).

In Issues Five, Six and Seven, Acorn appeals that portion of the judgment which upheld two interpretative rules. As shown below, the trial court correctly concluded that Acorn's challenge to these rules lacks merit.

A. The Commissions' rule reasonably clarifies that section 50(a)(6)(N), which specifies the location of the closing, does not change existing Texas law with respect to the use of a properly executed power of attorney. (7 Tex. Admin. Code § 153.15.)

The first rule challenged by Acorn in its cross-appeal is Rule 153.15. That rule simply confirms that Section 50(a)(6)(N), which specifies the location of the closing, does not change existing Texas law with respect to the use of a properly executed power of attorney. The rule, in other words, recognizes an existing principle of law—that on presentation of a properly executed power of attorney the attorney-in-fact may execute documents on behalf of the principal—and then clarifies that Section 50(a)(6)(N) does not change that law. As a result of the Commissions' clarification, consumers will continue to have the option of using a power of attorney, which may provide much-needed flexibility where, for example, one spouse is unable to attend the closing due to work, travel or illness.

Texas courts have long recognized and upheld instruments by which one person, the principal, appoints another person, the attorney-in-fact, as agent and confers on the attorney-in-fact the authority to perform specified acts on behalf of the principal. *See, e.g., Olive-Sternenberg Lumber Co. v. Gordon*, 143 S.W.2d 694, 698 (Tex. Civ. App.–Beaumont 1940), *rev'd on other grounds*, 159 S.W.2d 845 (1942); *Comerica Bank-Texas v. Texas Commerce Bank Nat'l Ass'n*, 2 S.W.3d 723, 725 (Tex. App.—Texarkana 1999, pet. denied).

The Texas Legislature is also familiar with powers of attorney, having limited or prohibited their use in only a handful of specifically described circumstances. *See* TEX. FIN. CODE ANN. § 342.504 (Vernon 2006) (prohibiting a consumer lender from taking a power of attorney authorizing the lender to confess judgment or to appear for the borrower in a judicial proceeding); TEX. FIN. CODE ANN. §§ 345.354, 345.355 (Vernon 2006) (a retail installment contract may not contain a power of attorney to confess judgment or contain a provision by which the buyer executes power of attorney appointing the contract holder as buyer's agent in the repossession of goods.)

Similarly, the home equity amendments themselves specify only one circumstance where use of a power of attorney is prohibited. Article XVI, section 50(a)(6)(Q)(iv) 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 . . . .] is made on the condition that . . . *the owner of the homestead not sign a confession of judgment or power of attorney to the lender or to a third person to confess judgment or to appear for the owner in a judicial proceeding*. (emphasis added).

The express mention or enumeration of one person, thing, consequence or class is tantamount to the express exclusion of all others. *Texas Real Estate Comm'n v. Century 21 Sec. Realty, Inc.*, 598 S.W.2d 920, 922 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.). Just as with statutes limiting the use of such instruments in certain specified circumstances, the home equity amendments' express prohibition of powers of attorney *to confess judgment* strongly suggests that the Legislature and voters did not intend to prohibit the use of such instruments altogether. Logically, the narrowly tailored prohibitions, or negatives, imply the affirmative of what has not been negated.

Acorn's competing interpretation would drastically expand the prohibition in Section 50(a)(6)(Q), doing away with all powers of attorney used in connection with home equity loan closings, and would constitute a significant departure from existing Texas law.

The Commissions, however, are not at liberty to fashion rules that impose additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant constitutional provisions. Absent a clearer directive in the constitutional text, the Commissions should not use their interpretative authority to prevent Texas consumers from availing themselves of the valid commercial convenience of a power of attorney.

In its essence, Acorn's first cross-point boils down to another policy argument. Acorn believes that, without the prohibition it advocates, unscrupulous lenders will be free to engage in abusive business practices and to circumvent the requirement that the closing take place at the offices of the lender, attorney or title company. *See* Acorn's Response at 55. The issue, however, is not whether the policy Acorn advocates is *reasonable*, but whether legislative intent to fashion such a policy can be *reasonably inferred* from the home equity amendments. As shown above, it cannot.

The Commissions' interpretation in 7 T.A.C. § 153.15 is consistent with Texas Constitution art. XVI, § 50(a)(6)(N), appropriately limits the place where closings can occur and should be upheld.

B. Section 50(g) states that the equity loan may not be closed before the 12th day after the lender "provides" the owner with the required consumer disclosure. Rule 153.51 reasonably clarifies that if the disclosure is mailed, the borrower is presumed to have received it in three days, not including Sundays and federal legal holidays. (7 Tex. Admin. Code § 153.51.)

The constitution requires that 12 days before closing the lender "provide" the written disclosure specified in 50(g). *See supra* at Part II. However, the word "provide" is not defined. Nor does this constitutional amendment specify how the 12-day period is calculated in the event the disclosure is mailed. Finally, Section 50(g) does not spell out how the lender establishes it delivered the disclosure in the event of a dispute.

The Commissions' interpretation, set out in 7 TAC § 153.51, sensibly addresses each of these issues. First, it reasonably clarifies that the lender can mail the disclosure—and then specifies that if it is mailed, a period of three days (not including Sundays or legal federal holidays) will be added to the twelve-day period. A rebuttable presumption of actual delivery also arises from proof of mailing.

The Commissions' clarification that the lender may "provide" the disclosure by mailing it is consistent with the term's ordinary meaning. WEBSTER'S NEW COLLEGIATE DICTIONARY (9th ed. 1984) (defining "provide"as "to supply or make available (something wanted or needed")). The Code Construction Act provides that "words and phrases shall be read in context and construed according to the rules of grammar and common usage." TEX. GOV'T CODE ANN. § 311.011(a) (Vernon 2005).

The definition is also consistent with the Texas courts' understanding of the term. The Texas Court of Criminal Appeals, in analyzing the requirements of section 3(a)(5) of Article 38.22 in the Texas Code of Criminal Procedure, has held that "provide" means to "make available or furnish." *Lane v. State*, 933 S.W.2d 504, 515-16 (Tex. Crim. App.1996). The court stated:

> We find that the word "provide" is capable of two meanings: (1) to make available; furnish, or (2) to supply or equip. The Random House Dictionary of the English Language, 2nd ed., Unabridged, 1556 (1987). As in the text of the statute, both definitions may be used in conjunction with the preposition "with." *Id.* If the first definition is correct, then the statute merely requires that

> defense counsel be given access to a copy of the recording. On the other hand, if the second definition is correct, then actual delivery may be required.

If words and phrases have acquired a technical or particular meaning, whether by legislative definition or otherwise, they should 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 [1st Dist.] 2003, pet. ref'd.). To the extent that the term "provide" has acquired a more particular or technical meaning, the Commissions' interpretation is consistent with that meaning as well. That is, it is consistent with other law, such as the Texas Rules of Civil Procedure, specifying how actual delivery to a particular person may be accomplished within a particular time.

Rule 21a of the Texas Rules of Civil Procedure addresses precisely the issues raised by Section 50(g)'s delivery requirement. It provides that service by mail "shall be complete upon deposit of the paper . . . in a post office or official depository under the care and custody of the United States Postal Service." When the paper is mailed, Rule 21a adds three days to the prescribed period and establishes a rebuttable presumption that the mailed document was actually received. The Commissions' interpretation sensibly borrows from these provisions to provide borrowers and lenders alike with a uniform, readily ascertainable method for determining how and when delivery under Section 50(g) is accomplished.

Acorn first argues that with respect to the presumption, the Commissions have created a new rule, rather than simply interpreting Section 50(g). Once again, however, the Commissions' interpretative rule simply incorporates existing legal principles. *See Smith v. Holmes*, 53 S.W.3d 815, 817 (Tex. App.– Austin 2001, no pet) (citing *Thomas v. Ray*, 889

S.W.2d 237, 238 (Tex.1994) for principle that "mailing a document creates a rebuttable presumption that it was received.") The challenged interpretation does not create new law. Rather, in conformity with existing law, it spells out how a lender shows compliance with the 12-day requirement, while retaining a borrower's right to show the lender failed to comply.

Acorn next argues that the interpretation departs from the constitutional language, which requires that the borrower *actually* receive the disclosure twelve days before the closing. Acorn fails to understand that consistent with existing law, the presumption is *rebuttable*. The Commissions' interpretation does not change or shorten the twelve-day requirement. If the mailed disclosure is not received within three days—or is not received at all—nothing in the rule precludes the borrower from establishing that fact.

In the *Limestone Construction* case, this Court of Appeals recognized two methods of rebutting the presumption of service:

> In this case, the presumption of service was rebutted in two ways. First, Limestone's attorney unequivocally denied receiving notice of the summary judgment motion, notice of the hearing, or even notice that the post office had attempted to deliver those items. The second is Summit's own affidavit. At most, Summit's affidavit and attachments demonstrate that the postal service attempted to deliver Summit's summary judgment motion somewhere in the ZIP code corresponding to Limestone's attorney's office and that the package was eventually returned "unclaimed."

Limestone Constr., Inc. v. Summit Commercial Indus. Prop., 143 S.W.3d 538, 545 (Tex. App. – Austin 2004, no pet).

A legal presumption is a rule of law, statutory or judicial, by which the finding of a basic fact gives rise to the existence of the presumed fact, until the presumption is rebutted.

Trevino v. Atchison, Topeka & Santa Fe Ry. Co., 958 S.W.2d 204, 215, n. 7 (Tex. App. – Houston [14th Dist.] 1997, pet. denied). A presumption is not evidence, and it vanishes when opposing evidence is introduced that the notice in question was not received. *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987); *see also Limestone Constr.*, 143 S.W.3d 538 (Tex. App. – Austin 2004, no pet).

Finally, plaintiffs complain that the lender is allowed to offer evidence of its established system of verifiable procedures to show proper and timely notice. This is not unfair or inconsistent with Section 50(g) because the borrowers are always free to offer evidence they did not receive proper notice. It is to be reasonably expected that lenders will have established systems of verifiable procedures, since many of their rights and remedies are contingent on proper and timely written disclosure.

This fact is only one consideration if there is an issue about whether a borrower had the Section 50(g) notice for the required 12 days before closing. If a borrower wants more time to consider the information in the notice, a later closing can be arranged. If the borrower informs the lender of the notice problem, the cure provisions in Section 50(a)(6)(Q)(x) allow the loans to be made after any compliance failure on the lender's part is corrected.

Subparagraph (x)(f) directs that a 12-day notice problem (not addressed under Subparagraphs (x)(a)-(e)) is cured with a $1,000 refund or credit and an offer to refinance the loan at no cost, as follows:

> (f) if the failure to comply cannot be cured under Subparagraphs (x)(a)-(e) of this paragraph, curing the failure to comply by a refund or credit to the owner

> of $1,000 and offering the owner the right to refinance the extension of credit with the lender or holder for the remaining term of the loan at no cost to the owner on the same terms, including interest, as the original extension of credit with any modifications necessary to comply with this section or on terms on which the owner and the lender or holder otherwise agree that comply with this section.

VI. CONCLUSION AND PRAYER

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 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. The Commissions, as cross-appellees, also pray that with respect to 7 Tex. Admin. Code §§ 153.15 and 153.51 the trial court's judgment be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2007, a true and correct copy of the foregoing document, **The Finance Commission and the Credit Union Commission's Consolidated Brief Replying to Acorn's Response and Responding to Acorn's Cross Points,** was sent by facsimile transmission and certified mail, return receipt requested, to the following counsel of record:

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APPENDIX

Texas Legislature Online
Amendment Search Results

Legislature: 78(R) - 2003
Number of Amendments: 12

Bill	Reading	Number	Author	Coauthor	Type	Action	Action Date	Text
SJR 42	S 2	F1	West		Amendment	Failed	05/14/2003	
SJR 42	S 2	F2	West		Amendment	Failed	05/14/2003	
SJR 42	S 2	F3	West		Amendment	Failed	05/14/2003	
SJR 42	S 2	F6	West		Amendment	Failed	05/14/2003	
SJR 42	S 2	F9	Shapleigh		Amendment	Failed	05/14/2003	
SJR 42	S 2	F10	Shapleigh		Amendment	Failed	05/14/2003	
SJR 42	S 2	F11	Shapleigh		Amendment	Withdrawn	05/14/2003	
SJR 42	S 2	F12	Carona		Amendment	Adopted	05/14/2003	
SJR 42	S 2	F13	Carona		Amendment	Adopted	05/14/2003	
SJR 42	H 2	1	Solomons		Amendment	Adopted	05/24/2003	
SJR 42	H 2	2	Wolens		Amendment	Adopted	05/24/2003	
SJR 42	H 2	3	Denny		Amendment	Adopted	05/24/2003	

Amend CSSJR 42 as follows:

(1) Strike Section 50(a)(6)(E), Article XVI, Texas Constitution, and substitute:

(E) does not require the owner or the owner's spouse to pay, in addition to the contract rate of [~~any~~] interest on the original principal amount of the extension of credit, fees, points, or other charges to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, 5.5 [~~three~~] percent of the original principal amount of the extension of credit;

(2) Strike Section 50(g)(E), Article XVI, Texas Constitution, and substitute:

"(E) FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 5.5 [~~3~~] PERCENT OF THE LOAN AMOUNT;