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## Banking Law

Michael K. O'Neal

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# BANKING LAW

Michael K. O'Neal\*

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## I. INTRODUCTION

**T**HIS Survey focuses on several legislative developments. The 76th Texas Legislature adopted many bills affecting the banking industry, including the adoption of interstate branching legislation.<sup>1</sup>

This Survey also covers certain cases affecting the banking industry that involve legislation adopted in the 1997 Texas legislative session. The 75th Texas Legislature adopted, and voters approved in 1997, the most significant changes to the Texas homestead law<sup>2</sup> since enactment of the state's first Constitution and simultaneously joined every other state in

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1. See Tex. H.B. 2066, 76th Leg., R.S. (1999).

2. Texas laws protecting the homestead are expansive and deeply rooted. Homestead rights trace back to Texas' days as a republic, prior to admission into the Union. See Act approved Jan. 26, 1839, 3rd Cong. R.S., § 1, 1839 Repub. Tex. Laws 1236, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 125-26 (Austin, Gammel Book Co. 1889).

allowing homeowners to borrow against the equity build-up in their residences.<sup>3</sup> Texas House Joint Resolution 31 (the Amendment) amended section 50, article 16 of the Texas Constitution to broaden the types of liens that validly may be secured by "homestead" property. The Amendment added two new categories of authorized liens on the homestead—home equity loans and reverse mortgages—and made changes relating to the authorized lien on homesteads for home improvement loans. Litigation has arisen regarding the construction of these provisions, including the decisions discussed herein.

## II. LEGISLATION

### A. INTERSTATE BRANCHING

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994<sup>4</sup> (the Riegle-Neal Act or the IBBEA) established certain basic principles regarding the interstate activities of banks and bank holding companies. Beginning June 1, 1997, banks with different home states could merge or consolidate on an interstate basis.<sup>5</sup> States, however, had the ability to prohibit interstate mergers involving banks they had chartered, or national banks having their main office in the state, by enacting legislation before June 1, 1997 that prohibited merger transactions involving out-of-state banks.<sup>6</sup> This is commonly referred to as "opt-out" legislation.

In 1995, Governor George W. Bush signed into law a bill in which Texas elected to opt-out of interstate branching.<sup>7</sup> An issue arose regarding a deficiency in Texas' opt-out law. Congress had required states opting-out of the Riegle-Neal Act to apply legislation uniformly to all banks.<sup>8</sup> Banks, as defined by the Federal Deposit Insurance Act, include state savings banks.<sup>9</sup> The Texas law, however, excluded from its coverage state savings banks.<sup>10</sup> A state savings bank could merge and branch across Texas state lines, unlike any other state-chartered bank.<sup>11</sup>

The issue regarding the flaw in the opt-out law arose when NationsBank, N.A., Charlotte, North Carolina, sought to merge with its affiliate, NationsBank of Texas, N.A., based in Dallas. The Office of the Comp-

3. House Joint Resolution 31 (H.J.R. 31) amending the Texas Constitution was presented to the voters as Proposition 8 on the November 4, 1997 ballot.

4. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994) (codified at 12 U.S.C. § 1831 (1994)) [hereinafter IBBEA].

5. See Federal Deposit Insurance Act § 44 (1994), 12 U.S.C. § 1831u(a)(1) (1994) [hereinafter FDIA].

6. See FDIA § 44(a)(2), 12 U.S.C. § 1831u(a)(2)(A).

7. See Act of Sept. 1, 1997 75th Leg., ch. 1008, § 1. See TEX. FIN. CODE ANN. § 32.0095 (Vernon 1998) (repealed 1999) (formerly codified at TEX. REV. CIV. STAT. ANN. art. 489f). Only two states, Texas and Montana, opted-out.

8. See FDIA § 44(a)(2)(A), 12 U.S.C. § 1831u(a)(2)(A).

9. See FDIA §§ 3(a)(1) and (2), 12 U.S.C. §§ 1813(a)(1) and (2).

10. See TEX. FIN. CODE ANN. § 31.002(a)(50) (Vernon 1998) (repealed 1998).

11. See TEX. FIN. CODE ANN. ch. 92, subchapters H and I (Vernon 1998) (providing for the merger or consolidation of a Texas savings bank with a foreign savings bank).

troller of the Currency (OCC) not only approved the merger, but raised the deficiency with the Texas opt-out law in the process.<sup>12</sup>

The commissioner of the Texas Department of Banking (the Department) entered federal district court to challenge the OCC's decision and to obtain an injunction blocking the merger. In *Ghiglieri v. NationsBank of Texas*,<sup>13</sup> Judge Jorge Solis agreed with NationsBank and denied the injunction. A week later on May 13, 1998, after consulting with the governor and legislative leaders, the *Commissioner* announced that her office would accept applications for interstate merger and branching transactions for all state-chartered banks.<sup>14</sup>

With the arrival of interstate branching, the commissioner set up a task force to examine what structure the state's law should take. The goals were to review and recommend laws: (1) to ensure that a Texas state bank charter is a modern and competitive charter; and (2) to ensure that Texas is viewed as a favorable state in which to locate or relocate a bank's headquarters. House Bill 2066 incorporated the Task Force's recommendations. Among the key provisions are the following:

*Registration to do Business.* An out-of-state financial institution is required to register with the Texas Secretary of State prior to operating a branch or other office in Texas by complying with the Texas requirements relating to foreign corporations doing business in Texas.<sup>15</sup> This is a broader requirement than existed under prior law<sup>16</sup> in that it applies to all out-of-state financial institutions (e.g., savings associations, savings banks, credit unions, and trust companies), not just banks. An interstate branch or other office of an out-of-state financial institution that existed in Texas on September 1, 1999 must register before January 1, 2000.

*Appointment of Agent to Receive Service of Process.* The legislation provides for an optional designation of a registered agent by a Texas state bank or other Texas financial institution.<sup>17</sup>

*De Novo Branching by Texas State Banks.* A Texas state bank, with the Commissioner's prior approval, may establish and maintain a new branch

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12. See Decision of the Office of the Comptroller of the Currency on the Application to Merge Nationsbank of Texas, National Association of Dallas, Texas, with and into Nationsbank, National Association, Charlotte, North Carolina, OCC Corporate Decision No. 98-19, Apr. 2, 1998.

13. No. 3:97-CV-2897-P, 1998 U.S. Dist. LEXIS 6637 (N.D. Tex. May 5, 1998). The court, however, did not specifically address the viability of Texas' opt-out law.

14. See Texas Department of Banking Press Release (last modified May 13, 1998), <<http://www.banking.state.tx.us/exec/press47.html/>>; see also, Texas Department of Banking Opinion No. 98-27 (last modified July 30, 1998) (recognizing formally the fatal flaw) <<http://www.banking.state.tx.us/legal/opinions/98%2D27.html>>.

15. See TEX. FIN. CODE ANN. § 201.102 (Vernon Supp. 2000).

16. See TEX. FIN. CODE ANN. §§ 39.003, 59.001 (Vernon 1998) (requiring a designated agent for service of process for foreign banks and registering the office of an out-of-state bank).

17. See TEX. FIN. CODE ANN. § 201.103(a) (Vernon Supp. 2000).

(referred to as a *de novo* branch<sup>18</sup>) or acquire a branch in a state other than Texas.<sup>19</sup> Of course, the other state must permit the same.

*Entry by De Novo Branching on a Reciprocal Basis.* An out-of-state bank can establish a *de novo* branch in Texas if, among other things, the laws of the home state of the out-of-state bank would permit a Texas bank to establish and maintain a *de novo* branch in that state.<sup>20</sup>

*Deposit Cap.* An interstate merger of banks is not permitted in Texas if, upon “consummation of the transaction, the resulting bank, including all depository institution affiliates of the resulting bank, would control 20% or more of the total amount of deposits held by all depository institutions” in Texas.<sup>21</sup> Prior Texas law<sup>22</sup> established a similar 20% limit on market share.

*Age Law.* Other than the *de novo* branching discussed above, an out-of-state bank is not permitted to acquire a Texas bank in an interstate merger transaction unless the Texas bank has been in continuous operation for a period of five years as of the date the interstate merger becomes effective.<sup>23</sup>

*Super Wildcard.* The legislation includes a “super wildcard” or “super parity” provision.<sup>24</sup> The provision generally authorizes a Texas state bank to perform an act, own property, or offer a product or service that is at the time permissible within the United States for a depository institution organized under federal or state law subject to the same limitations and restrictions as are applicable to the other depository institution. Certain conditions or restrictions apply to this authority. A state bank that intends to exercise a power that is not otherwise authorized for state banks under Texas law must submit a letter to the Commissioner prior to exercising the power.<sup>25</sup> The bank may start to use the proposed power after the thirtieth day following the date the Commissioner receives the bank’s letter, unless the Commissioner designates an earlier date or forbids the activity. The Commissioner may prohibit a bank from exercising a power if it would adversely affect the safety and soundness of the bank. Also, the super wildcard provision may not be used by a Texas state bank

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18. A “de novo branch” is defined as “a branch of a bank located in a host state that: (A) is originally established by the bank as a branch; and (B) does not become a branch of the bank as a result of: (i) the acquisition of another bank or branch of another bank; or (ii) the merger or conversion involving [any such] . . . bank or branch.” TEX. FIN. CODE ANN. § 201.002(a)(12) (Vernon Supp. 2000).

19. *See id.* § 203.001.

20. *See id.* § 203.002.

21. *Id.* § 203.004.

22. *See* TEX. FIN. CODE ANN. § 38.002 (Vernon 1998) (repealed by Acts 1999, 76th Leg., ch. 344, § 9.002(3)).

23. *See* TEX. FIN. CODE ANN. § 203.005 (Vernon Supp. 2000).

24. *See id.* § 32.010(a).

25. *See id.* § 32.010(b).

to alter or negate the application of Texas laws with respect to the following:

- (1) establishment and maintenance of a branch in this state or another state or country;
- (2) sale of insurance products and services in this state;
- (3) permissible interest rates and loan fees chargeable in this state;
- (4) fiduciary duties owed to a client or customer by the bank in its capacity as fiduciary in this state;
- (5) consumer protection laws applicable to transactions in this state; or
- (6) real estate development, marketing, and sales activities in this state.<sup>26</sup>

*Discovery of Customer Records.* The provision regarding discovery of bank records is returned to the Texas Finance Code from the Civil Practice and Remedies Code.<sup>27</sup> The same section of the Texas Finance Code also governs the discovery of client records maintained by a trust institution.

*Attachment, Injunction, Execution, or Garnishment.* A claim against a customer of a financial institution must now be delivered or served at the address designated as the address of the registered agent of the financial institution.<sup>28</sup> If a financial institution files a registration statement with the Texas Secretary of State, a claim is not effective as to the financial institution if the claim is served or delivered to an address other than the designated address of the financial institution's registered agent.<sup>29</sup> This statute is designed to address two main concerns: (1) from the standpoint of an interstate financial institution, the practical problems that ensue if all kinds of claims against customers are served or delivered to all offices of its organization in Texas, and (2) from the standpoint of claimants, the difficulty of knowing where and how to serve or deliver a claim to an interstate financial institution.

*Public Deposits.* With the arrival of interstate branching, questions arose as to whether an interstate branch in Texas could hold public deposits given that certain authorizing statutes required funds be deposited with a bank "domiciled" or "located" in Texas. To address these questions, the Texas Financial Code provides that a legally operating interstate branch in Texas is considered to be in, within, located in, authorized to do business in, domiciled in, and chartered in this state.<sup>30</sup> Various sections of the Education Code, Government Code, Local Government Code, Natural Resources Code, Transportation Code, and Probate Code were also amended to authorize, among other things, public entities to

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26. See *id.* § 32.010(a).

27. See *id.* § 59.006.

28. See TEX. FIN. CODE ANN. § 59.008(a) (Vernon Supp. 2000).

29. See *id.* § 59.008(b).

30. See *id.* § 201.004(c).

place public funds with a bank that has its main office or a branch office in Texas.

*Multistate Trust Provisions.* House Bill 2066 also amended the Texas Trust Company Act by adding a chapter 9,<sup>31</sup> which, among other things, provides that an out-of-state trust company that establishes or maintains an office in Texas may conduct any activity at the office that would be authorized for a state trust company to conduct at its office.

*Law Applicable to Deposit Contracts.* Two provisions were enacted establishing that Texas law governs a deposit contract between a bank and a customer account holder if the branch or separate office of the bank that accepts the deposit contract is located in Texas.<sup>32</sup>

*Sale of Trust Department—Succession of Trust Powers.* The Texas Finance Code was amended to provide that in the sale of certain activities at a branch or other office a successor or purchasing financial institution with sufficient fiduciary authority may continue the office, trust, or fiduciary relationship without certain judicial action and without regard to certain other qualifications.<sup>33</sup> Section 59.004 now reads as follows:

(a) If, at the time of a merger, reorganization, conversion, sale of substantially all of its assets under Chapter 32 or other applicable law, or sale of substantially all of its trust accounts and related activities at a separate branch or other office, a reorganizing or selling financial institution is acting as trustee, guardian, executor, or administrator, or in another fiduciary capacity, a successor or purchasing financial institution with sufficient fiduciary authority may continue the office, trust, or fiduciary relationship:

- (1) without the necessity of judicial action or action by the creator of the office, trust, or fiduciary relationship; and
- (2) without regard to whether the successor or purchasing financial institution meets qualification requirements specified in an instrument creating the office, trust, or fiduciary relationship other than a requirement related to geographic locale of account administration, including requirements as to jurisdiction of incorporation, location of principal office, or type of financial institution.<sup>34</sup>

*Notice of Subsequent Event.* Section 201.008<sup>35</sup> requires each out-of-state state bank that has established and maintains an interstate branch in Texas to give written notice to the Commissioner within a prescribed period of time (generally, thirty days) before a merger or other transaction that would cause a change of control with respect to the bank or a bank holding company that controls the bank, if an application is required to be filed with the bank's home state regulator or a federal bank supervi-

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31. See *id.* TEX. FIN. CODE ANN. § 182.020 (referencing TEX. REV. CIV. STAT. ANN. art. 342a-9.001-9.306).

32. See TEX. FIN. CODE ANN. §§ 201.004 and 34.301(c) (Vernon Supp. 2000).

33. See *id.* § 59.004.

34. *Id.*

35. *Id.* § 201.008.

sory agency, including an application filed pursuant to the Change in Bank Control Act<sup>36</sup> or the Bank Holding Company Act.<sup>37</sup>

*Agency Activities.* The authority for state banks to act as agent for other financial institutions has been expanded.<sup>38</sup> Previously, a state bank could act as agent for a depository institution affiliate. The current statute removes the “affiliate” requirement and, therefore, a state bank can act as agent for unaffiliated depository institutions.

*Appointment and Service of Foreign Bank and Trust Company in Fiduciary Capacity.* The legislation amended section 105A of the Texas Probate Code to set forth provisions for a corporate fiduciary that does not have its main office or a branch office in Texas (referred to as “foreign corporate fiduciaries”).<sup>39</sup> Foreign corporate fiduciaries, having the corporate power to so act, may be appointed and may serve in Texas

as trustee (whether of a personal or corporate trust), executor, administrator, guardian of the estate, or in any other fiduciary capacity, whether the appointment be by will, deed, agreement, declaration, indenture, court order or decree, or otherwise, when and to the extent that the home state of the corporate fiduciary grants authority to serve in like fiduciary capacity to a corporate fiduciary whose home state is [Texas].<sup>40</sup>

Before qualifying or serving in Texas in any fiduciary capacity, the statute sets forth certain conditions for a foreign corporate fiduciary.

## B. BANK FRANCHISE TAXES

Texas franchise law had treated banks differently than other corporations. For banks, interest and dividend income had been allocated to the state of the bank’s headquarters. (Thus, banks whose only presence in Texas was through branches would return all their interest and dividend income to their “home state,” where their headquarters were located.) For corporations other than banks, interest and dividends are allocated to the state where the payor is located. In House Bill 2067, the Texas Legislature adopted an approach in which all banks are subject to Texas franchise taxes to the same extent as other corporations doing business in Texas.<sup>41</sup>

## C. REQUIRED INFORMATION FOR COMMERCIAL ACCOUNTS

House Bill 2800 amended the Texas Finance Code to protect holders of dishonored business checks and to clarify a financial institution’s right to disclose information to such a holder.<sup>42</sup> Financial institutions are required

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36. 12 U.S.C. § 1817(j) (Supp. 1999).

37. 12 U.S.C.A. § 1841 (1999).

38. See TEX. FIN. CODE ANN. § 59.005 (Vernon Supp. 2000).

39. TEX. PROB. CODE ANN. § 105A (Vernon Supp. 2000).

40. *Id.*

41. See TEX. TAX CODE ANN. § 171 (Vernon Supp. 2000).

42. See TEX. FIN. CODE ANN. § 277.001-277.003 (Vernon Supp. 2000).



to maintain certain information from business checking account holders<sup>43</sup> and must request that the account holder notify the financial institution of changes annually.<sup>44</sup> The information includes a corporation's certificate of incorporation and assumed name certificate and certain information regarding the business owner of a sole proprietorship. The financial institution is protected when disclosing this information to persons who hold returned or dishonored checks and who make a proper request for information, and it may charge a fee for providing such information.<sup>45</sup>

#### D. OMNIBUS FINANCE CODE CODIFICATION

Texas Senate Bill 1368 made nonsubstantive corrections to existing codes and new codes enacted by the 75th Legislature. The bill includes: (1) the codification of the Texas Trust Company Act into the new title 3, subtitle F of the Texas Finance Code;<sup>46</sup> and (2) the codification of the Texas Credit Title into Title 4 Subtitle A of the Texas Finance Code.<sup>47</sup> House Bill 10, the Texas Finance Code, and House Bill 1971, the Texas Credit Title, both took effect September 1, 1997 and created consternation for practitioners trying to find the applicable law and the proper manner to cite the same. Since the codification of the Texas Credit Title into the Texas Finance Code, the provisions should be easier to find and document.

#### E. REVOLVING CREDIT ACCOUNTS

House Bill 744 amended the Texas Finance Code to permit a revolving credit account that draws interest at a rate of up to 18% per year regardless of the account's balance,<sup>48</sup> and to authorize various fees.<sup>49</sup> The authorized fees include: (1) annual fees; (2) late charges; (3) cash advance charges; (4) returned check fees; and (5) fees for exceeding a credit limit. No interest on these fees is permitted.<sup>50</sup>

Each customer's monthly statement must contain the following notice in at least 10-point type that is conspicuously set out: "A LATE CHARGE OF FIVE PERCENT OF THE PAYMENT DUE OR A MAXIMUM OF \$15 WILL BE ASSESSED FOR A PAYMENT MADE 10 DAYS OR MORE AFTER THE DATE PAYMENT OF THIS BILL IS DUE."<sup>51</sup>

Additionally, a delinquency charge may be imposed, not to exceed \$15 (up from \$10) under a retail charge agreement.<sup>52</sup> In the event such a

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43. *See id.* § 277.002(a).

44. *See id.* § 277.002(b).

45. *See id.* § 277.003(c).

46. *See id.* §§ 181.001-199.005.

47. *See id.* §§ 301.001-339.005.

48. *See* TEX. FIN. CODE ANN. § 346.101(a).

49. *See, e.g., id.* § 346.103(a).

50. *See id.* § 346.103(c).

51. *Id.* § 346.103(c).

52. *See id.* § 345.157(b).

charge is imposed, a customer's monthly statement must also contain the following notice in at least 10-point type that is conspicuously set out: "A DELINQUENCY CHARGE OF \$15 MAY BE ASSESSED FOR A PAYMENT THAT IS IN DEFAULT FOR A PERIOD THAT IS LONGER THAN 21 DAYS."<sup>53</sup> The legislation requires a holder to send fifty cents of each delinquency charge collected, in excess of \$10, to the Comptroller of Public Accounts.<sup>54</sup>

#### F. DOCUMENTARY FEE IN RETAIL VEHICLE INSTALLMENT CONTRACT

House Bill 1510 provides that the documentary fee included in a vehicle retail installment contract shall not exceed either \$50 or a reasonable amount that both parties agreed to, and the contract must contain specific notice language regarding such fee.<sup>55</sup>

#### G. ADDITIONAL INTEREST FOR DEFAULT ON A SIMPLE INTEREST LOAN CONTRACT

House Bill 2337 amended the Texas Credit Title and the Texas Finance Code to permit default interest on loan contracts bearing simple interest as had been the case on loan contracts with precomputed interest (which may not exceed fifty-four cents for each dollar of scheduled installment).<sup>56</sup>

#### H. CHARGES FOR LOAN ADMINISTRATION AND APPLICATIONS

House Bill 2338 amended the Texas Credit Title and the Texas Finance Code to permit administrative fees for loan contracts, not to exceed \$25 for a loan of more than \$1,000 or up to \$20 for a loan of \$1,000 or less.<sup>57</sup> Fifty cents of each such fee shall be deposited with the Comptroller of Public Accounts.

#### I. QUALIFIED COMMERCIAL LOAN

House Bill 2781 amended the Texas Credit Title and the Texas Finance Code to clarify the definition of "qualified commercial loan" to clearly include committed revolving lines of credit (whether or not advanced) and syndicated transactions.<sup>58</sup> In addition, Texas Senate Bill 172 amended the Texas Credit Title and the Texas Finance Code to change the definition of "qualified commercial loan" to be a commercial loan of: (1) \$3 million or more if secured by real property, and (2) \$250,000 or more if not secured by real property, and, if less than \$500,000, requiring written verification from the borrower that he has been advised to seek and had the opportunity to seek legal advice and accounting advice in

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53. *Id.* § 345.157(e).

54. *See* TEX. FIN. CODE ANN. § 345.157(d) (Vernon Supp. 2000).

55. *See id.* § 348.006(c).

56. *See id.* §§ 342.203 and 342.206.

57. *See id.* §§ 342.201(e), 342.308(a)(9), 342.502(b).

58. *See id.* § 306.001(9).

connection with the loan.<sup>59</sup>

### III. CASE LAW

#### A. HOME EQUITY LITIGATION

Litigation has arisen pertaining to the construction of the Texas home equity provisions. As of end of the Survey period,<sup>60</sup> only two trial courts had issued significant decisions. In both cases the courts concluded that a lender could require a borrower to use equity loan proceeds to pay debts to other lenders.<sup>61</sup>

The Texas Constitution provides that a lender may not require that the proceeds of an equity loan be applied to pay other debt, except debt secured by the homestead or debt to another lender.<sup>62</sup> Section 50(g) sets forth a prescribed notice entitled "Notice Concerning Extensions of Credit." The notice states, in pertinent part, the following:

(Q) LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MUST:

(1) NOT REQUIRE YOU TO APPLY THE PROCEEDS TO ANOTHER DEBT THAT IS NOT SECURED BY YOUR HOME OR TO ANOTHER DEBT TO THE SAME LENDER.<sup>63</sup>

Thus, the notice does not track the language of section 50(a)(6)(Q)(i), and litigation has followed concerning the proper interpretation.

In *Stringer v. Cendant Mortgage Corp.*,<sup>64</sup> the court issued an order dismissing the case for failure to state a claim. In this case, the plaintiff alleged a lender could not require the debtor to use loan proceeds to pay debts not owed to the lender. In particular, the plaintiffs alleged they were required to use a portion of the equity loan to pay off debts to other lenders totaling \$106,174.02 and that the defendant improperly required the payment of debts from the loan proceeds that were not secured by a lien on the plaintiffs' home. The court ruled that a lender could require a borrower to pay off other debt to other lenders and stated:

While the constitutional provision at issue is not an example of the most artfully crafted provision, the Court's reading of the provision

59. *See id.*

60. One important decision has been rendered after the Survey period. On November 23, 1999, Judge Joe Kendall of the U.S. District Court for the Northern District of Texas-Dallas Division, entered a Memorandum Opinion and Order in *Doody v. Ameriquist Mortgage Co.*, No. 3:98-CV-1844-X, 1999 WL 1063424 (N.D. Tex. Nov. 23, 1999), in which he dismissed the plaintiffs' claims for ripeness. The Judge noted that there was no default by the plaintiffs under the loan and no effort by the defendant to foreclose its lien. Based thereon, the court held that the plaintiffs' declaratory judgment claims did not present a case of actual controversy and, therefore, the case was not ripe for judicial determination. An appeal to the Fifth Circuit is pending.

61. In *Doody v. Ameriquist Mortgage Co.*, a case decided after the Survey period, the court also made a similar conclusion holding that the defendant was allowed to require the borrower to apply the proceeds of the loan to repay debts to other lenders as a condition of the loan. *See Doody & Carrington*, 1999 WL 1063424 at \*5.

62. *See* TEX. CONST. art. XVI, § 50(a)(6)(Q)(i).

63. *Id.*

64. No. 6:98cv664 (E.D. Tex. Dec. 14, 1998).

does not find it to be ambiguous. The Court cannot interpret § 50(a)(6) to support Plaintiffs' argument, but rather agrees with Defendant's interpretation of the provision as having two separate and distinct exceptions to the general prohibition that a home equity lender cannot require the debtor to apply the proceeds to another debt.<sup>65</sup>

An appeal was made to the Fifth Circuit. The Fifth Circuit has certified the issue to the Texas Supreme Court.

In *McMahan v. Long Beach Mortgage Co.*,<sup>66</sup> the plaintiff sought, among other things, forfeiture of principal and interest on an equity loan based on defendant requiring plaintiffs to apply in excess of \$50,000 of the proceeds from the extension of credit to repay other debts which were not debts secured by the homestead. Thus, the proper interpretation of section 50(a)(6)(Q)(i) is also at issue in this case. On August 19, 1999, a U.S. magistrate judge recommended that all of plaintiffs' claims, including the claim pertaining to repayment of other debt, be dismissed. On September 20, 1999, the court accepted the recommendation and dismissed the plaintiff's claims.<sup>67</sup> An appeal is pending.

#### B. HOME IMPROVEMENT LITIGATION

Questions have also arisen relating to the appropriate interpretation of the Texas Constitution pertaining to the authorized lien on homesteads for home improvement loans. For example, in a letter dated December 12, 1997 (Request 1048),<sup>68</sup> Representative Kenny Marchant asked for an Attorney General's opinion on the following five questions relating to the changes:

Do the requirements of subparagraphs (A) through (D) apply only to contracts for work and material used to repair or renovate existing improvements?

Is the only requirement for a lien on homestead for work and material used in constructing new improvements that the contract be made in writing?

Will the following be considered repair or renovation of existing improvements: new house siding, roof replacement, and new windows?

Will additional improvements to a homestead, such as a new swimming pool or a new garage be considered "new improvements" for purposes of this constitutional provision, if the improvements do not replace similar existing improvements?

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65. *Id.*

66. No. SA-98-CA-491 OG (W.D. Tex. Sept. 20, 1999).

67. *See id.* In addition to the debt repayment issue, the plaintiffs also asserted that their loan closed less than twelve days after they signed a written loan application in violation of TEX. CONST. art. XVI, § 50(a)(6)(M)(i). This claim was also dismissed.

68. A copy is available at <<http://www.oag.state.tx.us/opinions/requests/rq1048.pdf>>.

Will a contract to build a new house be subject only to the requirement that it be "contracted for in writing?"<sup>69</sup>

The Texas Attorney General, however, decided not to respond to the request. Questions attendant to the construction of section 50(a)(5) are raised in the suits discussed below.

### 1. *Suits Alleging the Changes are Unconstitutional*

In *Rooms With A View, Inc. v. Private National Mortgage Association (d/b/a Pennie Mae)*,<sup>70</sup> the plaintiff brought suit for a lender's refusal to fund a home improvement loan in which the contract for services was signed at a title abstract company. Apparently, the lender refused to fund the loan because the contract for installation had been signed at a title abstract company, which the defendant contended did not meet the definition of a "title company" for purposes of section 50(a)(5)(D).<sup>71</sup> The plaintiff sought declaratory relief with respect to the following:

- the constitutionality of section 50(a)(5)(D) based upon the contention that the provision is unconstitutionally vague, in that persons of reasonable intelligence can and do differ on what constitutes a "title company" for purposes of execution of a home improvement contract;
- the constitutionality of section 50(a)(5)(D) based upon the contention that the limitation of the place of signature of the contract for home improvements violates the parties' rights to assemble, travel, and of due process and equal protection under the First and Fourteenth Amendments of the U.S. Constitution;
- the constitutionality of section 50(a)(5) based on the contention that the ballot presented to the public in voting on adoption and ratification of proposition 8<sup>72</sup> failed to inform voters of the changes proposed by proposition 8 with respect to home improvement contracts;
- the constitutionality of section 50 based on the contention the requirements infringe upon and interfere with interstate commerce; and
- the constitutionality and/or enforceability of section 50(a)(5)(C) based on the contention that the twelve day waiting period is void for vagueness.

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69. Rep. Kenny Marchant, *Request for Attorney General's Opinion 1048* (Dec. 12, 1997).

70. No. 98-09772 (345th Dist. Ct., Travis County, Tex., Feb. 11, 1999).

71. See TEX. CONST. art. XVI, § 50(a)(5)(D). Article 16 requires that "the contract for the work and material is executed by the owner and the owner's spouse only at the office of a third-party lender making an extension of credit for the work and material, an attorney at law, or a title company." *Id.*

72. H.J.R. 31 amending the Texas Constitution was presented to the voters as proposition 8 on the November 4, 1997 ballot as follows: "THE AMENDMENT TO THE TEXAS CONSTITUTION EXPANDING THE TYPES OF LIENS FOR HOME EQUITY LOANS THAT A LENDER, WITH THE HOMEOWNER'S CONSENT, MAY PLACE AGAINST A HOMESTEAD."

The court granted the defendant's motion.<sup>73</sup> The Austin Court of Appeals has affirmed the trial court's grant of summary judgment.<sup>74</sup>

## 2. *New Construction Suit*

Questions have arisen whether subsections 50(a)(5)(A)-(D)<sup>75</sup> apply to new construction rather than only to contracts for work and material used to repair or renovate existing improvements. One court has ruled on the issue.

In *Jim Walter Homes, Inc. v. William Spradlin*,<sup>76</sup> the defendant alleged that the plaintiff's lien relating to new construction was invalid for the failure to comply with sections 50(a)(5)(A)-(D). The plaintiff, a home builder, contracted with the defendant to build a residence on land owned by the defendant in Gonzales County, Texas. To secure the purchase price for the construction of the residence, the plaintiff took a lien upon the defendant's land. The defendant's attorney sent a letter alleging that the plaintiff's lien was invalid for failure to comply with sections 50(a)(5)(A)-(D) and demanded the plaintiff release the lien. The plaintiff instituted the suit to defend its lien. The court granted the motion for summary judgment filed by the plaintiff and ordered the following:

1. That the provisions and requirements of the Texas Constitution, article 16, section 50(a)(5)(A) through (D) are applicable only to a lien upon homestead property for the repair or renovation of existing improvements and that said provisions or requirements of said subsection (a)(5)(A) through (D) are inapplicable to a lien upon homestead property for the construction of new improvements; and
2. That the lien of Plaintiff Jim Walter Homes, Inc. . . is valid and enforceable with respect to the one acre homestead property of Defendant William L. Spradlin, more particularly described therein.<sup>77</sup>

° The Dallas court of appeals has affirmed the trial court's decision.<sup>78</sup>

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73. No. 98-09772 (345th Dist. Ct., Travis County, Tex., Feb. 11, 1999) (Order Granting Defendant's Counter Motion For Summary Judgment and Denying Plaintiff's Motion For Summary Judgment, April 1, 1999).

74. 7 S.W.3d 840 (Tex. App.—Austin 1999, pet. denied).

75. See TEX. CONST. art. XVI, §§ 50(a)(5)(A)-(D).

76. No. DV-98-2895-6 (134th Dist. Ct., Dallas County, Tex., Oct. 30, 1998).

77. *Id.*

78. 9 S.W.3d 473 (Tex. App.—Dallas 2000, pet. filed).

