

contained in the Board rule now before us. A court cannot substitute its judgment for that of the legislative branch of the government. There is no provision of the Board's rule here involved that bears any reasonable relationship to the public welfare. It is clear that the rule is advanced for the economic protection of a particular class rather than for the protection of the public generally. There is no evidence of any need for the regulation insofar as the public is concerned. Simply stated, the Board has failed to discharge its burden that there was substantial evidence in existence at the time of the adoption of the rule to justify its adoption. See *Kost v. Texas Real Estate Commission*, 359 S.W.2d 306, (Tex.Civ.App.1962, writ ref'd). Not only has the Board failed in this regard, but more important, it has, in adopting this rule, exceeded the authority conferred upon it by law. In striking down a regulation promulgated by a Board, this Court in *Teachers Retirement System of Texas v. Duckworth*, 153 Tex. 141, 264 S.W.2d 98 (1954) adopted the opinion of the Court of Civil Appeals, Tex.Civ.App., 260 S.W.2d 632. The adopted language which is applicable here reads:

"Even if it can be said that the regulation adopted by the Board making the last payment due on the last day of the month next preceding the month in which the beneficiary dies has the effect of canceling the exceptions to the common-law rule against apportionment which would otherwise be applicable to this case, we are inclined to agree with appellee that the judgment must still be sustained because, as contended by her, the Board was without power to adopt and enforce the regulation. It has been held in this State that the Board of Insurance Commissioners can exercise only the authority conferred upon it by law * * * "in clear and unmistakable terms, and will not be deemed to be given by implication, nor can it be extended by inference, but must be strictly construed."

* * * Commercial Standard Ins. Co. v. Board of Insurance Com'rs of Texas, Tex.Civ.App., 34 S.W.2d 343, 345, writ refused. And in like manner has the power of the Railroad Commission of Texas been construed."

There is another reason which is perhaps greater than any reason thus far advanced to support the argument that the rule should be stricken down by the courts. The rule strikes at the fundamental right of an optometrist to lawfully engage in his profession. I agree with the Respondents that the rule impairs the obligation of contracts. Not only that, it is arbitrary and capricious in nature and has been adopted without regard to the law as enacted by the Legislature and in violation of both the state and federal constitutions. The rule amounts to a taking of Respondents' property without due process of law. The rule has not been enacted for the benefit of the public, but to the contrary there is every indication that the rule has been adopted to protect the economic welfare of a few optometrists, despite the fact that the rule will place in jeopardy property rights which the Legislature has thus far chosen to safeguard. Some of the consequences of this unwarranted rule will be to prohibit the use of an assumed name in the practice of optometry and to impose strict limitations on the operation of multiple offices and the splitting of fees with employee-optometrists. The maintenance of 82 offices at many locations in Texas, at a cost of between \$10,000.00 and \$12,000.00 per office and at a cost of more than \$1,000,000.00 in publicizing the assumed name "Texas State Optical", so far as the record shows, means nothing to the relators, but it should have some significance to this Court in deciding the question of the validity of the rule. In this connection, I repeat that there is no evidence in the record which would tend to show any public need or necessity for the rule. To the contrary, the rule arbitrarily interferes with private business in that it imposes unnecessary restrictions upon the