President
Michael C. Savas, CTIP

TLTA
TEXAS LAND TITLE ASSOCIATION

Executive Vice President & CEO
Leslie Midgley, CAE

November 12, 2019

Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Suite 104
Austin, Texas 78711

Re: No. 19-0712; *Federal Home Loan Mortgage Corporation v. Zepeda*

TO THE SUPREME COURT OF TEXAS:

Founded in 1908, the Texas Land Title Association (TLTA) is a statewide trade association representing the Texas title insurance industry and currently serving over 15,000 professionals involved in the safe and efficient transfer of real estate. In the course of their daily work, our membership serves over a million consumers each year. With active members in every Texas county, TLTA membership comprises approximately 90 percent of the title insurance agents and underwriters licensed to do business in Texas. From time to time, cases come before the Court that have significant impact on real estate commerce in Texas and which impact the ability of TLTA's members to safely insure title to real property. On those occasions, we will endeavor to share with the Court our support of those parties who advocate the sanctity of the Texas real property laws and doctrines. The TLTA has received no compensation for the preparation of this letter.

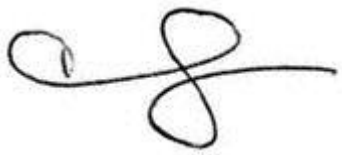
This case involves the application of subrogation, a doctrine fundamental to the Texas title insurance industry. Through subrogation, when a new lender pays off a prior lien, it "steps into the shoes" of the prior lien position to the extent, and only to the extent, of the discharged lien. This is the settled expectation of lenders in this state, based upon over 100 years of decisions by this Court. But for the availability of subrogation, lenders would be reluctant to refinance encumbered property. This Court has explicitly "recognize[d] the importance of this doctrine to lenders in this state. It serves to protect a lienholder from intervening liens, at least to the amount of the initial lien, when the lienholder has discharged a prior superior lien." *Diversified Mortg. Investors v. Lloyd D. Blaylock Gen. Contractor,* 576 S.W.2d 794, 807 (Tex. 1978). This Court has "stressed that the doctrine of equitable subrogation works to protect homestead property. Without equitable subrogation, lenders would be hesitant to refinance homestead property due to increased risk that they might be forced to forfeit their liens. The ability to refinance provides homeowners the flexibility to rearrange debt and avoid foreclosure." *LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d 616, 620 (Tex. 2007).

In *LaSalle Bank*, this Court held that the forfeiture provisions of the Texas Constitution regarding home equity loans did not preclude equitable subrogation to the prior lien discharged by the new home equity loan. This, of course, is the opposite of Zepeda's position. The subrogation doctrine benefits consumers, as the Texas Department of Insurance recognizes the broad availability of subrogation, and the promulgated title insurance rates for loan title policies include substantial credits for new loans that satisfy, renew, or extend prior loans. *See* Texas Title Insurance Manual, Rate Rule 8. Without subrogation, the risks to lenders and title insurers are increased, and those increased costs will necessarily lead to increased loan and title insurance rates. Moreover, the refusal to apply subrogation will benefit any intervening claimants, whose equities are unaffected by the refinance and subrogation – an unjust and unwarranted result.

Here, Zepeda would have this Court abrogate *LaSalle Bank* and its progeny, and deny FHLMC subrogation to the amount its loan paid off, while canceling the new loan. The result is that Zepeda receives an enormous windfall from a non-substantive error, even though no party has been harmed and no equities impaired. Zepeda justifies this position by citing equitable maxims; yet, she ignores the uncontroverted maxim that "equity abhors a forfeiture." Subrogation provides a bridge between two harsh results – the borrower gets no windfall, but the lender gets back only what it paid to discharge the borrower's prior debt, while forfeiting the balance of its loan. Since the new lender is subrogated only to the amount of the discharged lien, the position of the parties does not change, as the borrower owes only what was owed prior to the new loan. And because the lender is only subrogated to the discharged amount, prudent lenders must continue to ensure compliance with the Texas Constitution to avoid forfeiture of all amounts exceeding the amount of discharge. Why should this solution that has existed for more than one hundred years be undone now? Zepeda has no answer.

If the Court is to supersede *LaSalle Bank* and rule that forfeiture under the Texas Constitution abrogates the centuries-old subrogation doctrine, then TLTA respectfully requests clarification and guidance from the Court regarding the conditions under which subrogation will or will not be recognized, so lenders and title insurance companies can decide whether to make or insure a loan. Specifically, if the rule is to be different where the lender has an "opportunity" to cure the defect but does not, we ask that the Court provide a bright-line rule which will allow the real estate industry the certainty which it requires. Knowing when and how subrogation does or does not apply to such a "missed opportunity" – something that is not of record – will create new challenges in examining title and relying on recorded documents.

Sincerely,



Aaron Day
Director of Government Affairs & Counsel
Texas Land Title Association
aaron@tlta.com
State Bar No. 24037899

CERTIFICATE OF COMPLIANCE

I certify that this document contains 958 words in the portions of the document are subject to the word limits of the Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ Aaron Day
Aaron Day

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, a true and correct copy of the foregoing amicus letter has been served by electronic mail to all attorneys of record.

/s/ Aaron Day
Aaron Day

Counsel for Petitioner:

B. David L. Foster
Locke Lord LLP
600 Congress Ave., Suite 2200
Austin, TX 78701

W Scott Hastings
Daron L Janis
Locke Lord LLP
2200 Ross Avenue, Suite 2800
Dallas, TX 75201

Counsel for Respondent:

Parth Gejji
Constance H. Pfeiffer
Beck Redden LLP
1221 McKinney, Suite 4500
Houston, TX 77010

Robert Lane
Joshua Gordon
The Lane Law Firm
6200 Savoy Drive, Suite 1150
Houston, TX 77036

/s/ Aaron Day
Aaron Day