

President
Michael C. Savas, CTIP



Executive Vice President & CEO
Leslie Midgley, CAE

July 9, 2019

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

REF: No. 19-0238; Cathay Bank v. Lyda Swinerton Builders, Inc.

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, a new lender pays off a prior lien and "steps into the shoes" of the prior lien position and amount of the discharged lien while keeping an intervening creditor in its same lien position. This is the settled expectation of lenders in this state and a primary impetus for refinancing encumbered property. As Cathay Bank testified in the trial court, but for the availability of subrogation to the ad valorem tax liens, it would have never made its loan to the landowner. This Court also explicitly "recognize[s] 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). It 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). Even the Texas Department of

Insurance recognizes the broad availability of subrogation, as 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 Basic Manual, Rate Rule 8. The risk of broken priority and claims on the title policy is greatly reduced, consumers benefit from reduced rates, and intervening lienholders are unaffected.

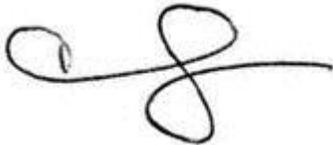
Contrary to the real estate community's settled expectations, the court of appeals reversed Cathay Bank's summary judgment based on subrogation, applied a previously unknown theory of "hybrid subrogation," and remanded the case for a "balancing of the equities." But the facts are simple, and this should have been an easy case under current law. Cathay Bank discharged prior, superior liens – the ad valorem tax liens – which should have been paid by the landowner and borrower. Therefore, Cathay Bank is entitled to the priority of the tax liens it discharged via subrogation, and that subrogation has no negative effect on the priority of the builder's mechanic's liens. That the discharged liens are unrecorded tax liens (as opposed to a deed of trust or other lien) does not preclude subrogation. The law is clear that a lender is not required to comply with the tax lien transfer statutes in the Texas Tax Code to be entitled to subrogation. *Lyda Swinerton Builders, Inc. v. Cathay Bank*, 409 S.W.3d 221, 247 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (internal citations omitted).

Certainly, the equities may be considered in the application of equitable subrogation. But if the Court determines that the equities must be considered in subrogation to an unrecorded tax lien, then the title insurance industry and the lenders of this state need explicit guidance, limitations, and parameters as to how they are to be analyzed and applied. Thus far, there have been none. The cases relied upon by the court of appeals for its theory of subrogation do not provide how subrogation to a tax lien may be accomplished or what equitable factors courts should consider in applying subrogation beyond protecting and recognizing the existing lien priorities. They simply end their analyses by finding that common law subrogation to a tax lien is possible. For example, in *McDermott v. Steck Co.*, the court held that "[h]aving discharged a senior incumbrance (the tax lien) to protect his own title, appellant was in equity entitled to subrogation to that lien as against a junior incumbrancer (Steck)." 138 S.W.2d 1106, 1109 (Tex. Civ. App. 1940). That court did not elaborate, stating only that "[i]n so far as concerns the question at issue, there is no difference in principle between a tax lien and other incumbrance. The rule is one of general application based upon established principles of equity jurisprudence of long standing." *Id.* There was not a discussion of any specific equitable factors weighing in favor of or against the subrogated lender. *Id.* Likewise, the court in *Dotson v. Pahl* held that the person who paid the tax liens was entitled to invoke the doctrine of subrogation. 206 S.W.2d 272, 273 (Tex. Civ. App.—Austin 1947, no writ). Again, the court did not identify any nuance to the equity of subrogation. See also *Chicago Title Ins. Co. v. Lawrence Invest., Inc.*, 782 S.W.2d 332, 335 (Tex. App.—Fort Worth 1989) (finding that lender was subrogated to tax lien, but not discussing the equities of that subrogation). In *Smart v. Tower Land & Inv. Co.*, this Court held that "[u]nder various circumstances [the lender] may be subrogated to the taxing authority's lien to the extent necessary for his own equitable protection" but "[w]hen not compelled by the equities of the situation, full subrogation to all special privileges accompanying the taxing authority's constitutional and statutory lien will be denied." 597 S.W.2d 333, 338 (Tex. 1980). Yet again, there was no explanation of the lender's "equitable protection" or the "equities of the situation" that could preclude subrogation.



Equitable subrogation has traditionally been a common law theory that looks at the existing lien priorities and applies to keep an intervening creditor in its same position. At the same time, the new lender is subrogated to the lien position and amount of the discharged lien. Thus, no equities have been changed. The contractual subrogation clause in the deed of trust addresses the need to avoid a “volunteer” or uninvited third party to interlope and pay existing liens without the borrower’s request or approval. At the same time, the contractual subrogation provides record notice of the possibility of subrogation, as Cathay Bank’s deed of trust and its contractual subrogation clause did in this case. In sum, if the courts are to now impose new requirements, parameters or limitations to equitable subrogation, then TLTA respectfully requests clarification and guidance from the Court. Specifically, if the Court finds that an analysis of the equities of subrogation is required in this instance of an unrecorded prior lien created by statute, we ask that the Court delineate when and how a new lender may be equitably subrogated to an ad valorem tax lien that it has discharged. Must the lender provide specific notice to intervening lienholders and creditors that it seeks to foreclose a tax lien? Or is judicial foreclosure, including naming all other lienholders as defendants, the only means to preserve subrogation to a tax lien? If the broad outlines of the subrogation doctrine are to be limited in any way, the title insurance industry and real estate lenders in this state need certainty as to when subrogation will and will not be available.

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 1,434 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 July 9, 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

<p>Counsel for Petitioner:</p> <p>Kent Hofmann LOCKE LORD LLP 600 Congress Ave., Ste. 2200 Austin, TX 78701</p> <p>Ben A. Baring, Jr. Sharon A. Haldstead Paul J. McConnell, III R. Travis Piper DE LANGE, HUDSPETH, McCONNELL & TIBBETS, L.L.P. 1177 W. Loop South, Ste. 1700 Houston, TX 77027</p>	<p>Counsel for Respondent:</p> <p>Gregory M. Cokinos Craig H. Clendenin Anthony T. Golz COKINOS, BOSIEN & YOUNG Four Houston Center 1221 Lamar Street, 16th Floor Houston, TX 77010</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

/s/ Aaron Day

Aaron Day

