# IN THE SUPREME COURT OF TEXAS

NO. 14-0714

ALICE M. WOOD AND DANIEL L. WOOD, PETITIONERS,

v.

HSBC BANK USA, N.A. AND OCWEN LOAN SERVICING, L.L.C., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

**Argued December 8, 2015**

CHIEF JUSTICE HECHT, joined by JUSTICE GREEN and JUSTICE WILLETT, dissenting.

The day the Woods closed their home equity loan, July 2, 2004, they could have known whether it complied with the requirements of Article XVI, Section 50 of the Texas Constitution, and had they thought it did not, they could have immediately insisted that any noncompliance be cured. They did nothing, apparently happy to have the loan. Eight years later, long after the original lender had parted with the note, they sued the current holder, HSBC Bank, for what are fairly characterized as technical violations of the constitutional requirements, seeking to invalidate the lien on their homestead securing the loan. They have now abandoned all of their complaints but one—one involving at most a few hundred dollars—that respondents have not conceded. The Court holds that the Woods could have waited as long as they liked to sue, indeed, that the Constitution itself gives them this right. The Court's position, injecting instability into land titles, has been rejected by the

Fifth Circuit and by four Texas Courts of Appeals—every appellate court that has considered the matter. I would join them and therefore respectfully dissent.

A home equity loan that does not comply with Section 50 is invalid. The simple question is *when*: when the noncompliance occurs, or after a failure to cure as allowed by Section 50? If the latter, a borrower's complaint is subject to the residual four-year statute of limitations, running from the closing date.[1] If the former, no statute of limitations applies.

Section 50(a) provides that the homestead is "protected from forced sale" with specific exceptions.[2] Section 50(c) states: "No mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt *described by* this section . . . ."[3] In context, a "valid" lien is one that can be foreclosed.[4] Home equity loans are described by Section 50(a)(6), which describes an "extension of credit", secured by a lien on a homestead, that meets various requirements.[5] A few include:

- the total debt secured by the homestead must not exceed 80% of its fair market value when the loan is made;[6]

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[1] TEX. CIV. PRAC. & REM. CODE § 16.051.

[2] TEX. CONST. art. XVI, § 50(a).

[3] *Id.* § 50(c) (emphasis added).

[4] *Garofolo v. Ocwen Loan Serv.*, ___ S.W.3d ___, ___ (Tex. 2016) ("[Section 50(a)] simply describes what a home-equity loan must look like if a lender wants the option to foreclose on a homestead upon borrower defaults.").

[5] Home equity loans are also addressed in other parts of Section 50.

[6] TEX. CONST. art. XVI, § 50(a)(6)(B).

- certain fees must not exceed 3% of the original principal amount of the loan;[7]
- the loan must not close before the 12th day after the borrower submits a loan application and the lender gives a prescribed notice regarding home equity loans;[8]
- the loan must not close before one business day after the homeowner receives a copy of the loan application and itemized closing statement;[9]
- the loan must close at an office of the lender, an attorney, or a title company;[10]
- the borrower must be given a copy of all signed loan documents;[11]
- the borrower must be given three days to rescind the loan[12] and notified of that right;[13] and
- when the loan is paid, the borrower must be given the note and a release of lien.[14]

These are but a few of the many requirements.[15]

Section 50(a)(6)(Q)(x) provides that, with an exception not pertinent here,

> the lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the lender or holder fails to comply with the lender's or holder's obligations under the extension of credit and fails to correct the failure to comply not later than the 60th day after the date the lender or

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[7] *Id.* § 50(a)(6)(E).

[8] *Id.* § 50(a)(6)(M)(i).

[9] *Id.* § 50(a)(6)(M)(ii).

[10] *Id.* § 50(a)(6)(N).

[11] *Id.* § 50(a)(6)(Q)(v).

[12] *Id.* § 50(a)(6)(Q)(viii).

[13] *Id.* § 50(g) (paragraph (Q)(8) of the prescribed notice).

[14] *Id.* § 50(a)(6)(Q)(vii).

[15] *See Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 571 n.14 (Tex. 2013) ("With just under 6,000 words and over 150 sub-parts, Section 50 is by far the longest, most complex section of the Texas Constitution.").

> holder is notified by the borrower of the lender's failure to comply [in one of several prescribed ways].[16]

The ways in which a lender or note holder may cure noncompliance include remitting overcharges,[17] modifying the loan,[18] and delivering documents and obtaining signatures.[19] If those fail to cure the noncompliance, the lender or note holder can cure by offering the borrower $1,000 and the opportunity to refinance at no cost.[20]

Although the cures are expressly intended to avoid forfeiture of principal and interest, we held in *Doody v. Ameriquest Mortgage Co.* that they also preserve the validity of the lien securing the loan.[21] *Doody*'s holding is critical to this case. There, the home equity lender discovered after the loan was made that it had charged the borrowers more than 3% of the principal in fees and cured its noncompliance by refunding the excess. The borrowers nevertheless sued, contending that the cure provisions avoided only forfeiture, not invalidation of the lien on their homestead, pointing to the language of Section 50(a)(6)(Q)(x), which mentions only forfeiture.[22] We rejected that contention. By curing as it had, the lender avoided forfeiture and preserved the validity of the homestead lien.[23]

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[16] TEX. CONST. art. XVI, § 50(a)(6)(Q)(x).

[17] *Id.* § 50(a)(6)(Q)(x)(a).

[18] *Id.* § 50(a)(6)(Q)(x)(b)–(c), (e).

[19] *Id.* § 50(a)(6)(Q)(x)(d).

[20] *Id.* § 50(a)(6)(Q)(x)(f). A lender's lack of authority to make home equity loans and the absence of a written loan agreement signed by each owner and each owner's spouse cannot be cured. *Id.* § 50(a)(6)(Q)(xi).

[21] 49 S.W.3d 342, 347 (Tex. 2001).

[22] *Id.* at 343.

[23] *Id.* at 345.

Since Section 50(c) invalidates a lien on a homestead not "described by" the Section, the effect of *Doody*'s holding is that a home equity loan is described by the cure provisions as well as the loan requirements. It is as if Section 50(a)(6)(Q)(x) read as follows:

> the lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit, **and the lien on the homestead securing the extension of credit shall be invalid,** if the lender or holder fails to comply with the lender's or holder's obligations under the extension of credit and fails to correct the failure to comply not later than the 60th day after the date the lender or holder is notified by the borrower of the lender's failure to comply [in one of several prescribed ways].

Thus, neither a forfeiture nor an invalidation of a homestead lien occurs until the lender has both failed to comply with its obligations under the loan requirements and failed to cure. Though *Doody* did not focus on the timing of an invalidation of a homestead lien, the holding makes clear that it occurs only after a failure to cure.

This is consistent with other provisions of Section 50. Section 50(a) protects the homestead from forced sale with exceptions. The subject of the provision is the enforcement of a lien on a homestead, not whether the lien is in some abstract sense void. Section 50(i) provides that "[a] purchaser for value without actual knowledge may conclusively presume that a lien securing an extension of credit described by Subsection (a)(6) of this section was a valid lien securing the extension of credit with homestead property" under certain circumstances.[24] The Court reads this provision as abolishing the common law rule that a void instrument conveys nothing, not even to a bona fide purchaser for value. But a better interpretation is that a bona fide purchaser need not be

[24] TEX. CONST. art. XVI, § 50(i).

concerned that a lien may be invalid but is protected by a conclusive presumption that the lien actually was valid. Similarly, Section 50(h) provides that a lender or assignee for value "may conclusively rely" on the borrower's acknowledgment of the fair market value of the home under certain circumstances.[25] The provision assumes the lien is valid until challenged as noncompliant and uncured.

Compliance with the constitutional requirements is not always clear or easily determined. Here, the Woods initially alleged that their loan was noncompliant in four particulars: the total-indebtedness-to-value ratio exceeded 80%, they paid fees in excess of 3% of principal, they were not informed of their right to rescission within three days of closing, and they never received copies of all the loan documents. They appear to have abandoned all but the excessive fees allegation, and HSBC Bank does not concede that excessive fees were charged. The Woods' position is that an otherwise apparently valid lien has always been invalid, only no one knew it, and will continue to be invalid until HSBC Bank cures the noncompliance. This theory of metaphysical invalidity is a cynical inversion of ordinary assumptions in dealing with land titles: that home equity loans are potentially invalid though unchallenged and without an opportunity for cure.

I agree with the Court that if a home equity lien is valid subject to being invalidated for noncompliance with the constitutional loan requirements and a failure to cure, then the borrower must sue to challenge the lien within four years of the alleged noncompliance—i.e., from the closing of the loan. Because the Court holds that a homestead lien is invalid from the moment of

[25] *Id.* § 50(h).

noncompliance, a borrower has forever to challenge it—after evidence and witnesses are gone, and proof has become difficult or impossible.

Every appellate court that has addressed the issue has concluded that the four-year statute of limitations applies to claims like those brought by the Woods: the U.S. Court of Appeals for the Fifth Circuit, and the Texas Courts of Appeals for the Third, Fifth, Sixth, Thirteenth, and Fourteenth Districts.[26] They are correct.

I respectfully dissent.

Nathan L. Hecht
Chief Justice

Opinion delivered: May 20, 2016

[26] *Priester v. JP Morgan Chase Bank, N.A.*, 708 F.3d 667, 674 (5th Cir. 2013); *Kyle v. Strasburger*, No. 13-13-00609-CV, 2015 WL 7567523, at *3–5 (Tex. App.—Corpus Christi Nov. 24, 2015, pet. filed) (mem. op.) (case no.16-0046); *In re Estate of Hardesty*, 449 S.W.3d 895, 911–912 (Tex. App.—Texarkana 2014, no pet.); *Wood v. HSBC Bank USA*, 439 S.W.3d 585, 590–592 (Tex. App.—Houston [14th Dist.] 2014, pet. granted) (the instant case); *Santiago v. Novastar Mortg., Inc.*, 443 S.W.3d 462, 469–470 (Tex. App.—Dallas 2014, pet. denied); *Williams v. Wachovia Mortg. Corp.*, 407 S.W.3d 391, 394–397 (Tex. App.—Dallas 2013, pet. denied); *Schanzle v. JPMC Specialty Mortg. LLC*, No. 03-09-00639-CV, 2011 WL 832170, *4 (Tex. App.—Austin March 11, 2011, no pet.).