HOME EQUITY MORTGAGE LENDING IN TEXAS 2018

By:
Thomas E. Black, Jr.
David F. Dulock
Daniel S. Engle

Revised January 1, 2018
Video Edition

TABLE OF CONTENTS

1. What Makes Texas Different – Article 16, Section 50(a) 2

2. What is Homestead Property 3

3. Home Equity Lending – The Rules 4

4. 2% Limit – Chart.. 22

5. Home Equity Lending Update 2018 Commentary, Case Law and Regulatory Interpretation 23

6. Proposed Amendments for 7 TAC Chapter 153 101

7. Texas Constitution Article XVI Section 50(a) 118

8. Texas 50 (a)(6) Loans Originating on a Wholesale Basis Closed in Wholesaler's Name through Mortgage Broker (12-Day Notice) 119

9. Borrower Notification to Lender of Home Equity Violation — Official Interpretation §153.93 121

10. Equitable Subrogation Revives Invalid Texas Home Equity (Client & Friends Memo) 123

11. Texas Home Equity Loans – Various Questions and Answers 125

12. Forms 132

    - Notice Concerning Extensions of Credit Defined by Section 50(a)(6), Article XVI, Texas Constitution F-1
    - Notice Concerning Refinance of a Home Equity Loan—(f-2) Notice.................... F-4
    - Affidavit Made Pursuant to Subsection (f-1) of Article XVI, Section 50 of Texas Constitution—f-2 Affidavit F-5
    - Texas Home Equity Loan/HELOC Closing Instructions Addendum F-7
    - Acknowledgement as to Fair Market Value of Homestead Property F-10
    - Notice of Right to Cancel... F-11
    - Certificate of Non-Cancellation of Loan F-12
    - Texas Home Equity Election Not to Rescind F-13
    - Texas Home Equity Receipt of Copies…………………………………………....F-14
    - Election to Proceed with Refinance of Texas Home Equity Loan F-15
    - Texas Home Equity FNMA/FHLMC Security Instrument F-16
    - Texas Home Equity FNMA/FHLMC Affidavit and Agreement F-35
    - Texas Home Equity FNMA/FHLMC Fixed Rate Note F-41
    - Notice Concerning Extensions of Credit Defined by Section 50(a)(6), Article XVI, Texas Constitution (Spanish) F-47
    - Notice Concerning Refinance of a Home Equity Loan – (f-2) Notice (Spanish) F-51

WHAT MAKES TEXAS DIFFERENT?

Article XVI, Section 50(a), of the Texas Constitution provides the homestead of a family, or single adult person, shall be, and is hereby protected from forced sale for the payment of all debts except for eight specific types of debt. The eight permissible debts to establish a valid lien on homestead property under Section 50(a) are:

- 50(a)(1) purchase money.
- 50(a)(2) taxes due on the homestead.
- 50(a)(3) an owelty partition imposed against the entirety of the property by a court order or a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or award of a family homestead in a divorce proceeding.
- 50(a)(4) the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner.
- 50(a)(5) home improvement loan or new construction on homestead property.
- 50(a)(6) a home equity loan, the requirements of which are set forth in this manual.
- 50(a)(7) a reverse mortgage.
- 50(a)(8) conversion and refinance of personal property lien secured by a manufactured home to a real property lien.

Only these eight specific debts can result in a valid lien in homestead property. Other debt, not meeting these criteria, cannot properly attach to homestead property.

Fannie Mae and Freddie Mac prohibit 50(a)(6) loans to be used to purchase the homestead: *See* Fannie Mae 2017 Selling Guide, B5-4.1-01, Texas Section 50(a)(6) Mortgage Loans (03/29/2016), Loan Origination and Compliance ("The proceeds from a Texas Section 50(a)(6) mortgage must not be used to acquire or improve the homestead if a mortgage for that purpose could have been made under a different provision of the Texas Constitution. Fannie Mae has no other restrictions on the use of the loan proceeds."); *See also* Freddie Mac Single Family Seller/Servicer Guide, 4301.7: Texas Equity Section 50(a)(6) Mortgages (08/17/16), (b) Eligible Mortgages ("A Texas Equity Section 50(a)(6) Mortgage must be one of the following, depending on the applicable facts: A cash-out refinance Mortgage, as described in Section 4301.5, or a "no cash-out" refinance Mortgage as described in Section 4301.4. A Texas Equity Section 50(a)(6) Mortgage may not be a special purpose cash-out refinance Mortgage.")

WHAT IS HOMESTEAD PROPERTY?

To establish a “homestead” a person or family must show a combination of both an intent to owner occupy the property as a permanent residence and some overt act in the use of the property in the intended manner.

In Texas, homestead property is either Urban or Rural. Article XVI, Section 51, of the Texas Constitution limits the size of Urban and Rural homesteads. The homestead in a city, town or village, shall consist of lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land. The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon.

Under Section 41.002(c) of the Texas Property Code, a homestead is considered Urban if located within the limits of a municipality or its extra territorial jurisdiction or a platted subdivision , and served by police protection, paid or volunteer fire protection, and if at least three of the following services are provided by a municipality or under contract to the municipality: a) electric; b) natural gas; c) sewer; d) storm sewer; and e) water.

A family’s Rural homestead shall consist of not more than two hundred acres of land which may be in one or more parcels. A single adult’s Rural homestead shall consist of not more than one or more parcels totaling up to a hundred acres. The term Rural homestead is not defined in the Constitution or the Texas Property Code, therefore, to determine if the homestead is Rural it must fail to satisfy the criteria set forth in Section 41.002(c) of the Texas Property Code for urban homesteads.

CLOSED-END SECTION 50(A)(6) HOME EQUITY LENDING

EXECUTIVE SUMMARY

The requirements which must be followed in order to originate a valid Texas “Cash Out” or “Equity Loan” are set forth in Section 50(a)(6), Article XVI of the Texas Constitution. The scope of this paper and presentation is limited to closed-end loans made under 50(a)(6). This paper does not cover HELOC loans made under 50(t). “Cash Out” loans may be made for any purpose. Pursuant to the authority granted under Section 50(u), Article XVI of the Texas Constitution, the Texas Legislature delegated the power to interpret these provisions to the Finance Commission of Texas and The Texas Credit Union Commission. Effective January 8, 2004, these State Agencies have issued interpretations. In this presentation for simplicity sake they will be jointly referred to as “The Finance Commission”.

A lender must satisfy each and every one the following conditions in order to have a valid home equity lien on a homestead. Home Equity Loans that fail to comply with any of the various requirements are invalid until properly cured.

1. Voluntary Lien
Texas Constitution Article XVI, Section 50(a)(6)(A)

7 TAC 153.2

The equity loan must be "secured by a voluntary lien on the homestead created under a written agreement with the consent of each owner and each owner's spouse". The consent of each owner and spouse is required regardless of whether a spouse has a community property interest or other interest in the homestead. Consent to the lien is indicated by signing a written consent to the mortgage (deed of trust) included in the mortgage or by a separate document. We do not recommend consent by a separate document. The lender may, at its option, also require the owner and owner's spouse to consent to the equity loan (in addition to the consent required for the lien).

2. Limitation of Equity Loan Amount
Texas Constitution Article XVI, Section 50(a)(6)(B)

7 TAC 153.3

The principal amount of the equity loan, when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead, may not exceed 80% of the fair market value of the homestead on the date the equity loan is made.

3. Non-recourse
Texas Constitution Article XVI, Section 50(a)(6)(C)

7 TAC 153.4

An equity lien must be without recourse for personal liability against each owner and the spouse of each owner, unless the owner or spouse obtained the equity loan by actual fraud. Absent actual fraud, a lender must look only to the homestead to satisfy the debt and may not pursue a deficiency judgment. The legal standard of "actual fraud" is not "constructive fraud" and requires dishonesty of purpose or intentional breaches of duty designed to injure another or to gain an undue and unconscientious advantage.

4. Judicial Foreclosure
Texas Constitution Article XVI, Section 50(a)(6)(D)

The lien may be foreclosed only with the authority of a court order. The Texas Supreme Court has promulgated rules for an expedited foreclosure proceeding specific to equity loans. The general foreclosure rules are set forth as Rule 735 of the Texas Rules of Civil Procedure. The expedited rules are set forth as Rule 736.

5. Two Percent Fee Limitation
Texas Constitution Article XVI, Section 50(a)(6)(E)
7 TAC 153.5

Neither the owner nor the owner's spouse may be required to pay, in addition to any interest, or any bona fide discount points used to buy down the interest rate, any fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the equity loan that exceed, in the aggregate, 2% of the original principal amount of the equity loan, excluding fees for: (i) an appraisal performed by a third party appraiser; (ii) a property survey performed by a state registered or licensed surveyor; (iii) a state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law; or (iv) a title examination report if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law. Per diem interest and bona fide discount points (*i.e.*, discount points that truly correspond to a reduced interest rate and are not required to originate, evaluate, maintain, record, insure, or service the equity loan) are interest and are not subject to the 2% limitation. A lender may rely on an established system of verifiable procedures to evidence that the discount points it offers are bona fide, which may include documentation of options that the owner is offered in the course of negotiation, including a contract rate without discount points and a lower contract rate based on discount points.

6. Closed End Credit
Texas Constitution Article XVI, Section 50(a)(6)(F)

An equity loan may not be an open-end account that may be debited from time to time or under which credit may be extended from time to time unless the open-end account is a home equity line

of credit under Section 50(t). Section 50(t) home equity line of credit loans (HELOCS) are, generally, beyond the scope of this manual. The scope of this manual is limited to closed end home equity loans.

7. Prohibition on Prepayment Penalties

Texas Constitution Article XVI, Section 50(a)(6)(G)

7 TAC 153.7

The equity loan must be "payable in advance without penalty or other charge". All or any portion of an equity loan may be paid early without being charged a penalty. Lockout provisions, (*i.e.*, a provision in a loan agreement that prohibits a borrower from paying the loan early) are considered prepayment penalties.

8. Security of the Equity Loan

Texas Constitution Article XVI, Section 50(a)(6)(H)

7 TAC 153.8

The equity loan may not be "secured by any additional real or personal property other than the homestead". Only homestead property may secure an equity loan. The following items incidental to the homestead are not considered "additional real or personal property" securing an equity loan: escrow reserves for taxes and insurance; an undivided interest in a condominium unit or planned unit development; insurance and condemnation proceeds; fixtures; and easements for ingress and egress to and from the homestead. The following are considered "additional real or personal property" prohibited by Section 50(a)(6)(H) from securing an equity loan: a guaranty or surety of an equity loan; a contractual right of offset in an equity loan agreement; a cross-collateralization clause in an equity loan agreement; and, for an equity loan on an urban homestead that is secured by more than 10 acres, the acreage in excess of 10 acres. For rules as to rural homesteads see page 3 herein.

As to mixed use homestead properties (owner occupied living quarters and business or rental use) we recommend the following rules to our clients:

1. Single Structure - Homestead rights run with the lot and not with the improvements. Therefore, if the homestead property is improved with a single structure, there are no

additional real or personal property issues with a single structure even if a portion of the structure is not used as owner-occupied living quarters. Note, HOWEVER, that Fannie Mae/Freddie Mac allow only single family homes as eligible collateral for Texas home equity loans.

2. Separate Structure – If there are separate structures on real property used as the borrower's homestead, fact issues may arise as to whether the additional structure is used separately in such a manner as to question whether it is part of the homestead. Should this occur, we advise our clients not to make an equity loan secured by the property unless: (1) the borrowers sign an affidavit that the entire property is used for homestead purposes; (2) a review of the tax certificate reflects that the entire premises is subject to a homestead exemption; (3) neither a physical inspection of the property nor the appraisal establishes that the separate structure is being used for non-homestead purpose; (4) the closing instructions to the title company provide: "Please note that there are separate structures on the property which borrower's asserts are all used in a manner consistent with homestead use; and (5) the Title company will issue a T-42 and T-42.1 endorsement without exception or deletion.

9. <u>Acceleration</u>
Texas Constitution Article XVI, Section 50(a)(6)(J)
7 TAC 153.9

An equity loan may not be accelerated because of a decrease in the market value of the homestead or because of the owner's default under other indebtedness not secured by a *prior* valid encumbrance against the homestead. This means that the equity loan may not include a crossdefault provision (*i.e.*, a provision in the equity loan agreement that puts the borrower in default if the borrower defaults on another obligation) unless the equity loan is subordinate to a prior valid lien secured by the homestead. The equity loan may not be accelerated, however, as a result of a default occurring under a loan secured by the homestead that is subordinate to the equity loan. Also, an equity loan may contain a provision that allows acceleration of the loan if the owner defaults under the covenants of the equity loan agreement—for example, a covenant to maintain the property or not remove improvements that indirectly affects the homestead's market value.

10. <u>Only One Equity Loan at a Time</u>

Texas Constitution Article XVI, Section 50(a)(6)(K)

7 TAC 153.10

The homestead may be secured by *only one* equity loan at a time. Any other debt concurrently secured by the homestead must be one of the other types of permitted debts specified in Article XVI, Section 50(a)(1)-(a)(5) or (a)(8) of the Texas Constitution. An equity loan may not be secured by a homestead that also secures a HELOC (Section 50(t)) or a reverse mortgage (50(a)(7)). If, under Texas Law the property ceases to be the homestead of the owner, then as to this "one at a time Rule," the lender may treat what was previously a home equity mortgage as a non-homestead mortgage.

11. <u>Refinance of a Home Equity Loan</u>

Texas Constitution Article XVI, Section 50(f)(1) or (f)(2))

A refinance of debt secured by the homestead, any portion of which is a home equity loan under Section 50(a)(6), may not be secured by a valid lien against the homestead unless:

(1) the refinance is another Section 50(a)(6) equity loan or a Section 50(a)(7) reverse mortgage; or

(2) all of the following conditions are met:

(A) the refinance is not closed before the first anniversary of the date the Section 50(a)(6) equity loan was closed;

(B) the refinance does not include the advance of any additional funds other than:

(i) funds advanced to refinance a debt described by Sections 50(a)(1) through (a)(7) (*i.e.*, purchase money, taxes due, owelty of partition, refinance of prior lien including federal tax lien, homestead improvements, home equity, or reverse mortgage, respectively); or

(ii) actual costs and reserves required by the lender to refinance the debt;

(C) the refinance of the Section 50(a)(6) equity loan is of a principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the refinance of the Section 50(a)(6) equity loan is made; and

(D) the lender provides the owner the written notice ("Notice") required by and promulgated in Section 50(f)(2)(D) on a separate document not later than the third business day after the date the owner submits the loan application to the lender and at least 12 days before the date the refinance of the Section 50(a)(6) equity loan is closed. The text of the Notice is found on page F-4 in this manual.

12. Effect of Home Equity Loan Refinance under Section 50(f)(2)
Texas Constitution Article XVI, Section 50(f-1)

The lien securing a refinance of a Section 50(a)(6) equity loan under Section 50(f)(2) is deemed to be a Section 50(a)(4) "rate and term" refinance lien against the homestead. An affidavit by the owner or the owner's spouse acknowledging that the Section 50(f)(2) requirements have been met (*see Rule 11 above*) conclusively establishes that the Section 50(a)(4) "rate and term" refinance requirements have been met.

13. Substantially Equal Monthly Payments
Texas Constitution Article XVI, Section 50(a)(6)(L)(i)
7 TAC 153.11

The equity loan must be "scheduled to be repaid in substantially equal successive periodic installments, not more often than every 14 days and not less often than monthly, beginning no later than two months from the date the equity loan is made". This "substantially equal" restriction prohibits a balloon payment (defined as "an installment that is more than an amount equal to twice the average of all installments scheduled before that installment") or a graduated payment feature on an equity loan. Further, interest only equity loans are not allowed—"some amount of principal must be reduced with each installment". The "date the equity loan is made" is defined as the date the equity loan closes. If the owner or spouse sign on different days, or if the non-married joint owners sign on different days, the date of the last signing is the date the equity loan closes. Loans that close at month-end, but fund in the next month, must utilize an "interest credit" option in order to avoid the first installment occurring more than two months from the date the equity loan closes.

14. <u>Closing Date (Twelve-Day "Cooling Off" Period)</u>

Texas Constitution Article XVI, Section 50(a)(6)(M)(i)

7 TAC 153.12

An equity loan may not be closed before the 12th calendar day after the later of the date that the owner of the homestead submits a loan application to the lender for the equity loan or the date that the lender provides the owner a copy of the disclosure required by Section 50(g) (see our discussion in 16 below regarding the disclosure). The "lender" is defined as anyone authorized under Section 50(a)(6)(P) ("authorized lender") that advances funds directly to the owner or is identified as the payee on the note. Wholesale lenders have three options - (1) close in the name of the broker that delivered the Disclosure, (2) wait 12 days from the date the wholesale lender receives the application and provides the Disclosure to the owner, or (3) appoint the broker as limited agent for purposes of delivering the Disclosure (*See* Clients and Friends Memorandum, page 119). In calculating the 12-day period, the next succeeding calendar day after the later of the date that the owner submits a loan application to the lender for the equity loan, or the date that the lender provides the owner a copy of the disclosure is the first day of the 12-day period. The loan may close any time on or after the 12th day.

15. <u>Form of Twelve Day Disclosure</u>

Texas Constitution Article XVI, Section 50(g)

7 TAC 153.51

Section 50(g) sets forth the specific text of the disclosure that must be provided to an owner in connection with closing an equity loan. The disclosure must be on a separate instrument. Only one copy needs to be provided to married owners. Although the Constitution does not require that the disclosure be signed or dated by the owner, we suggest adding these items to the disclosure to aid in documenting the date of an owner's receipt of the disclosure. Further, lenders should include a signature line for non-borrowing, non-titled spouses because "owner" is defined as "a person who has the right to possess, use, and convey, individually or with the joinder of another person, all or part of the homestead" (See page 81). Lenders that do not wish to require signatures and dates "may rely on an established system of verifiable procedures to evidence compliance" with this provision. If the discussions with the borrower are conducted primarily in another language, the lender must, prior to closing, provide an additional copy of the disclosure in that other language. The Spanish translation is contained on the Finance Commission's website.

16. Pre-closing Disclosure

Texas Constitution Article XVI, Section 50(a)(6)(M)(ii)

7 TAC 153.13

An equity loan may not close until one business day after the date that the owner of the homestead receives a copy of the most current version of the loan application (if not previously provided) and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing (collectively the "Pre-closing Disclosure"), or any calendar day thereafter. As a matter of practice that final itemized disclosure is typically given in the form of a Closing Disclosure (CD). If one or more of the fees, points, interest, charges and costs set forth on the CD is greater than the disclosed rate or amount on the initial CD, the Finance Commission allows a lender to reduce the fees or closing costs without postponing the date of closing. "Business Day" is defined as "all calendar days except Sunday and these federal legal public holidays: New Year's Day, the birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day and Christmas Day."

17. One-Year Prohibition

Texas Constitution Article XVI, Section 50(a)(6)(M)(iii)

7 TAC 153.14

An equity loan may not be closed before the first anniversary of the closing date of any other equity loan secured by the same homestead property, except for a refinance cure under the cure provision of Section 50(a)(6)(Q)(x)(f). "Closing date" is the date the previous equity loan documentation was signed. This provision prohibits refinancing the previous equity loan before one year has elapsed since the loan's closing date or, if the previous equity loan has been paid off, closing a new equity loan on the same homestead property before one year has elapsed since the previous equity loan's closing date. Further, since an owner may have only one equity loan secured by the same homestead at any one time, then, subject to the one year prohibition, any previous equity loan would be required to be paid off or refinanced by the subsequent equity loan.

18. <u>Location of Closing</u>

Texas Constitution Article XVI, Section 50(a)(6)(N)

7 TAC 153.15

An equity loan may be closed only at the permanent physical address of the office or branch office of *the* lender, *an* attorney, or *a* title company. This is to insure that the closing occurs at an authorized physical location other than the homestead. If a power of attorney is to be used on behalf of the owner or owner's spouse, the power of attorney must be signed at one of the above authorized physical locations. Before closing an equity loan under a power of attorney, check with the title company because some title companies will not insure an equity loan if a power of attorney is used for the owner or owner's spouse.

19. <u>Rate of Interest</u>

Texas Constitution Article XVI, Section 50(a)(6)(O)

7 TAC 153.16

Lenders may contract for and receive any fixed or variable rate of interest authorized under statute. Equity loans must amortize and contribute to the amortization of principal. Variable rate loans, which are defined as loans in which the lender can contractually adjust the interest rate after closing in accordance with an *external index*, must have substantially equal payments between each interest rate adjustment that pay the accrued interest and a portion of the principal. Discounted variable rate loans are allowed.

20. <u>Authorized Lenders</u>

Texas Constitution Article XVI, Section 50(a)(6)(P)

7 TAC 153.17

An equity loan must be made by one of the following authorized lenders: a bank, savings and loan association, or credit union doing business under the laws of Texas or the United States, including a subsidiary of a bank, savings and loan association, savings bank or credit union; a Federally chartered lending instrumentality; an FHA authorized lender (full eagle); a person licensed under Chapter 342 of the Texas Finance Code; a registered mortgage banker; a licensed mortgage company; a person related to the homestead property owner within the second degree of affinity

or consanguinity; and a person who sold the homestead property to the current owner and provided all or part of the purchase financing.

21. Limitation on Application of Proceeds
Texas Constitution Article XVI, Section 50(a)(6)(Q)(i)
7 TAC 153.18

The lender may not *require* the owner to apply the proceeds of an equity loan to repay other debt except debt secured by the homestead or debt to another lender or creditor. For example, a lender may not make an equity loan to an owner and require that the proceeds from that loan be used to repay unsecured debt to the lender. However, a lender may require the repayment of unsecured or other debt owed to another lender or creditor.

22. No Assignment of Wages
Texas Constitution Article XVI, Section 50(a)(6)(Q)(ii)

An equity loan must be made on the condition that the owner not assign wages as security for the equity loan. Court decisions have upheld that the standard FNMA/FHLMC "home equity loan" documents do not contain any such assignment.

23. No Blanks in Any Instrument
Texas Constitution Article XVI, Section 50(a)(6)(Q)(iii)
7 TAC 153.20

An equity loan must be made on the condition that the owner not sign any instrument in which blanks relating to substantive terms contained in the instrument are left to be filled in. The term "instrument" means a document that creates or alters a legal obligation of a party. This Section is intended to prohibit someone completing blanks after the owner has signed the instrument, thereby altering a party's obligation created in the instrument.

24. <u>No Confession of Judgment or Power of Attorney</u>

Texas Constitution Article XVI, Section 50(a)(6)(Q)(iv)

An equity loan must be made on the condition that the owner not sign a confession of judgment or power of attorney to the lender or to a third party to confess judgment or to appear for the owner in a judicial proceeding. A confession of judgment is the owner's written agreement to the entry of a judgment against the owner upon the owner's default. Courts have upheld that the standard FNMA/FHLMC "home equity loan" documents do not contain any such provisions.

25. <u>Copies of Documents</u>

Texas Constitution Article XVI, Section 50(a)(6)(Q)(v)

7 TAC 153.22

A lender is required at closing, to provide the owner with a copy of the final loan application (usually the 1003) and all executed documents signed by the owner at closing. One copy of these documents may be provided to married owners. The lender is not required to give the owner copies of documents signed by the owner prior to or after closing.

26. <u>Security Instrument Disclosure</u>

Texas Constitution Article XVI, Section 50(a)(6)(Q)(vi)

The security instrument securing the equity loan must contain a disclosure that the equity loan is an equity loan defined by Section 50(a)(6), Article XVI, Texas Constitution. "THIS SECURITY INSTRUMENT SECURES AN EXTENSION OF CREDIT THAT IS THE TYPE OF CREDIT DEFINED BY SUBSECTION (a) (6) OF SECTION 50, ARTICLE XVI OF THE TEXAS CONSTITUTION."

27. Release or Assignment of Lien
Texas Constitution Article XVI, Section 50(a)(6)(Q)(vii)

7 TAC 153.24

Within a "reasonable time" after payment in full of the equity loan, and without charge, the lender must either: (1) cancel and return the promissory note to the owner and give the owner a release of lien document, in recordable form, or (2) provide the owner with a copy of the note endorsement and the document assigning the lien to the new lender that is refinancing the equity loan. A "reasonable time" is 30 days. An affidavit of lost note, or equivalent, may be returned to the owner in lieu of the original note, if the original note has been lost or imaged.

28. Right of Rescission
Texas Constitution Article XVI, Section 50(a)(6)(Q)(viii)

7 TAC 153.25

The owner and/or the owner's spouse may rescind an equity loan within three days after the equity loan is made without penalty or charge. Compliance with the right of rescission provisions in the Truth-in-Lending Act and Regulation Z (which requires three "business days") satisfies this requirement if the notices required by the Truth-in-Lending Act and Regulation Z are given to all owners and to each owner's spouse.

29. Fair Market Value Determination
Texas Constitution Article XVI, Section 50(a)(6)(Q)(ix)

The owner and the lender must sign a written acknowledgement as to the fair market value of the homestead on the date the equity loan is made. Typically, this is a separate form signed by the lender and the owner *at closing*, an example of which is set forth on page F-11 in this manual. If the written acknowledgment of fair market value is not signed at closing by the lender or borrower, this is a violation by the lender under Section 50(a)(6)(Q)(x) that must be timely corrected post-closing to make the loan valid (*see* Rule 32(d) below).

30. Forfeiture of Principal and Interest for Lender's Failure

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)

7 TAC 153.91 – Adequate Notice of Failure

7 TAC 153.92 – 60 Day Cure Period

7 TAC 153.93 – Methods of Notification

A lender or any holder of the equity loan note forfeits all principal and interest if the lender or holder fails to comply with the lender's or holder's obligations under the equity loan and does not correct that failure by the 60th day after the date the lender or holder is notified by the borrower of the lender's failure to comply. There is no requirement that the notice to be in writing; however, the notice must include a reasonable identification of the borrower and the loan, and a reasonable description of the alleged failure to comply. The notice is not required to state the particular provision of Section 50(a)(6) that was violated. At closing, the lender or holder may, but is not required to, make a reasonably conspicuous designation in writing of the location where the borrower may deliver a written or oral notice of a violation. For a discussion of the pros and cons regarding the borrower's method of notification and whether to provide the borrower with a specific address for such notification, see our Clients and Friends Memorandum on page 121 in this manual. The 60-day cure period is counted in calendar days. Day one of the 60-day cure period is the day after the lender or holder receives the borrower's notice. If day 60 is a Sunday or federal legal public holiday, the 60-day cure period is extended to include the next day that is not a Sunday or federal legal public holiday.

31. Effect of Curing a Violation

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)

7 TAC 153.95

Section 50(a)(6)(Q)(x) establishes the methods for a lender or holder to cure the most common equity loan violations. If the lender or holder timely corrects a violation of Section 50(a)(6) under one or more of these methods, then the correction validates the otherwise invalid equity lien. A lender or holder who cures a violation under Section 50(a)(6)(x) before receiving the borrower's notice of the violation receives the same protection as if the lender or holder had timely cured the violation after receiving the notice.

Note, however, that even if the lender or holder fails to cure the violation, if a portion of the equity loan proceeds were used to pay off a valid lien on the homestead under subsection (a)(1) through (a)(5) of Section 50, the lender or holder will be equitably subrogated to that prior valid lien in the amount of the payoff.

32. Cure Provisions
Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)
Texas Supreme Court Decisions

The cure provisions under Section 50(a)(6)(Q)(x) were recently the subject of two May 20, 2016 decisions by the Texas Supreme Court—*Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 and *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474. *Wood* held that equity loans that fail to comply with the requirements of Section 50(a)(6) are invalid until cured and, therefore, suits seeking to declare them invalid are not subject to any statute of limitations. Wood overrules a line of Texas and Federal court cases that held a four-year limitations period applies to a suit seeking to invalidate defective home equity liens. Thus, borrowers are no longer limited to a four-year window to bring such an action. *Garofolo* held that there is no *constitutional right* to forfeiture of all principal and interest of a home equity loan for an uncured Section 50(a)(6) violation that was able to be cured by one of the cure provisions identified in Section 50(a)(6)(Q)(x). Instead, the Court held that suits for forfeiture for these curable but uncured Section 50(a)(6) violations must be brought as breach-of-contract actions under the terms and conditions of the loan agreement. *Garofolo* also held that if none of the cure provisions in Section 50(a)(6)(Q)(x) will cure the violation, the borrower may only sue for specific performance and/or actual damages. Unlike actions to quiet title due to an invalid lien, these breach-of-contract actions are subject to the four-year statute of limitations. Note that these violations are distinct from the "fatal errors" discussed in Rule 33 below.

(a) **<u>Overcharges</u>**

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)(a)

7 TAC 153.94

If the borrower pays fees over the 2% limit, a prepayment penalty, or an interest rate not allowed by statute, this cure provision permits a lender or holder to cure the applicable violation by refunding an amount equal to (i) the overcharge of the 2% limit, (ii) the amount of the prepayment penalty or (iii) the amount of the interest that exceeds the allowable amount, as applicable, by mailing, delivering in person or by a delivery carrier the required amount to the owner or crediting that amount to the borrower's account.

(b) **<u>Violation of 80% Rule or Additional Collateral Rule</u>**

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)(b)

7 TAC 153.94

If an equity loan exceeds the 80% fair market value rule, when made, or is secured by "additional real or personal property" beyond the homestead, this cure provision allows a lender or holder to cure the applicable violation by sending the owner a written acknowledgement by mail, delivering in person or by a delivery carrier, that the lien is valid only in the amount that the equity loan does not exceed the 80% fair market value rule or the equity loan is not secured by the "additional real or personal property", as applicable.

(c) **<u>Prohibited Other Amount, Percentage, Term or Provision</u>**

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)(c)

7 TAC 153.94

This cure provision allows a lender or holder to cure any other amount, percentage, term, or other provision prohibited by Section 50(a)(6) by sending the owner a written notice by mail, delivering in person or by a delivery carrier that modifies the prohibited amount, percentage, term, or other provision to a permitted amount, percentage, term or other provision and adjusts the account of the borrower to ensure that the borrower is not required to pay more than a permitted amount and is not subject to a prohibited term or provision.

(d) **Copies of Required Documents and Fair Market Value Acknowledgment**

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)(d)

7 TAC 153.94

If the owner fails to receive the required copies of the final loan application and the executed documents signed by the owner at closing, this cure provision allows a lender or holder to cure this violation by delivering the required documents to the borrower by mail, delivering in person or by a delivery carrier. If the acknowledgment of fair market value of the homestead is not signed by the lender or the owner, or both, this cure provision allows a lender or holder to cure this violation by obtaining the appropriate signatures and delivering the fully executed acknowledgment to the borrower by mail, delivering in person or by a delivery carrier.

(e) **More than One at a Time**

Texas Constitution Article XVI, 50(a)(6)(Q)(x)(e)

7 TAC 153.94

If a lender makes a home equity loan when there is an existing valid home equity loan secured by the same homestead, the lender or holder may cure this violation by sending the owner a written acknowledgement by mail, delivering in person or by a delivery carrier that the accrual of interest and all of the owner's obligations under the extension of credit are abated while the prior home equity loan remains secured by the homestead.

(f) **Refinance Cure**

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)(f)7 TAC 153.95

7 TAC 153.96

If a violation is unable to be cured by one of the above cure provisions, then this cure provision allows the lender or holder to cure the violation by a refund or credit to the owner of $1,000 and offering the owner the right to refinance the equity loan with the lender or holder for the remaining term of the loan at no cost to the owner on the same terms, including interest, as the original equity loan with any modifications necessary to comply with Section 50(a)(6) or on terms on which the owner and the lender or holder otherwise agree that comply with Section 50(a)(6). The lender or

holder has the option to either refund the $1000 to the borrower or to credit it to the borrower's account. The lender or holder and borrower may modify the loan without completing the requirements of a refinance. If the borrower accepts the offer to modify or refinance, the lender or holder must make a good faith attempt to modify or refinance within a reasonable time not to exceed 90 days after the borrower accepts the offer. The borrower's refusal to cooperate fully with an offer that complies with this section to modify or refinance an equity loan does not invalidate the lender's protection for correcting a failure to comply.

33. <u>Fatal Errors</u>

Texas Constitution Article XVI, Section 50(a)(6)(a)(xi)

This Section states that the lender or holder of the equity loan note shall forfeit all principal and interest of the equity loan if it is made by a person other than an authorized lender (*see* Rule 20 above) or "if the lien was not created under a written agreement with the consent of each owner and each owner's spouse, unless each owner and each owner's spouse who did not initially consent subsequently consents." The first violation is not curable under the cure provisions in Section 50(a)(6)(a)(x) because they do not apply to a violation under Section 50(a)(6)(a)(xi). The second violation, while legally curable, is highly unlikely given that the cure requires the subsequent consent of the owner and/or owner's spouse.

THE 2% LIMIT – EXAMPLES OF FEES INCLUDED AND EXCLUDED

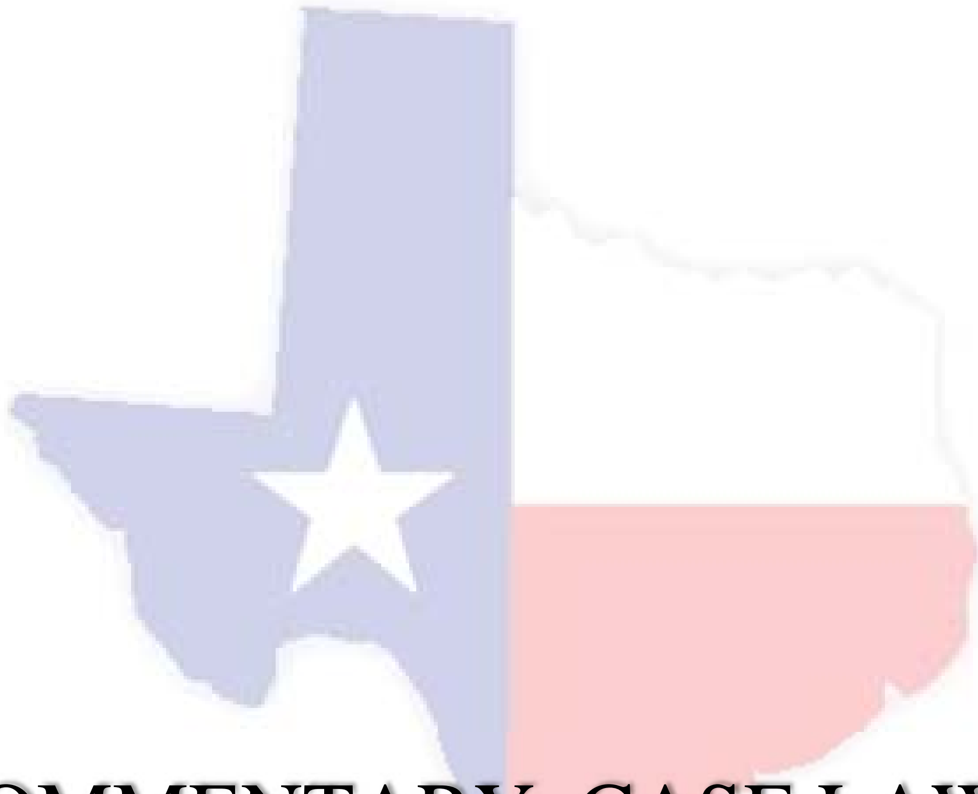
Examples of
Borrower Paid Fees
Included

Administrative Fee
Appraisal **NOT** performed by third party appraiser
Assignments Fee
Brokerage Fee
Certification that HOA Maintenance Fee is Current
Closing Fee
Commitment Fee
Courier Fees
Credit Life (if required by Lender)
Credit Report
Deed Restrictions
Document Preparation
Escrow Fee
Escrow Waiver
Flood Certification
HOA Transfer Fee
Mortgage Insurance
Origination Fee
Pest Inspection
Processing Fee
Property Tax Certification
Property Tax Service Fee
Recording Fees
Survey **NOT** performed by state licensed or registered surveyor
Underwriting Fee
Warehouse Fee

Examples of
Borrower Paid Fees
Not Included

Appraisal performed by third party appraiser
Authorized Premiums for Endorsements to Mortgagee Title Insurance Policy
Base Premium for Mortgagee Title Insurance Policy
Discount Points (If legitimate and bona fide)
Flood Insurance
Hazard Insurance
HOA Maintenance Fees
Late Charges
Per Diem Interest
Post Default Attorney Fees
Property Tax
Survey performed by state licensed or registered surveyor
Title Examination Report if cost is less than Base Premium for Mortgagee Title Insurance Policy
(If no title insurance policy is being issued)

HOME EQUITY LENDING UPDATE 2018



COMMENTARY, CASE LAW, AND REGULATORY INTERPRETATION

By:
Thomas E. Black, Jr.
David F. Dulock
Daniel S. Engle

Revised January 1, 2018

To: Clients and Friends

From: Thomas E. Black, Jr., David F Dulock, Daniel S Engle

Date: January 1, 2018

Subject: **Closed-End Section 50(a)(6) Home Equity Lending**

The requirements which must be followed in order to originate a valid Texas "Cash Out" or "Equity Loan" are set forth in Section 50(a)(6), Article XVI of the Texas Constitution. The scope of this paper is limited to closed-end loans made under 50(a)(6). This paper does not cover HELOC loans made under 50(t). "Cash Out" loans may be made for any purpose. Pursuant to the authority granted under Section 50(u), Article XVI of the Texas Constitution, the Texas Legislature delegated the power to interpret these provisions to the Finance Commission of Texas and the Texas Credit Union Commission. Effective January 8, 2004, these State Agencies began issuing interpretations, which are codified in the Texas Administrative Code in 7 TAC Chap. 153. In this presentation these State Agencies will be jointly referred to as the "Finance Commission".

A lender must satisfy each and every one the following conditions in order to have a valid home equity lien on a homestead. Equity loans that fail to comply with any of the various requirements are invalid until properly cured.

The text below will be separated into three sections: (A) Commentary – a description of the constitutional provision, (B) Case Law – an analysis of the various court decisions dealing with the particular provision, and (C) Regulatory Interpretation – the text of the applicable Finance Commission interpretation with an appropriate "Our Comment" on the interpretation if needed. If a provision does not have relevant case law or regulatory interpretations, those sections are removed. After the constitutional provisions are sections detailing additional points of case law relevant to Home Equity Lending, a short list of pertinent constitutional provisions and statutes related to Home Equity Lending, a description of the Title Insurance Endorsements related to Home Equity Lending (the T-42 and T-42.1), and potential "problem areas" in regard to Home Equity Lending.

1. Voluntary Lien

Texas Constitution Article XVI, Section 50(a)(6)(A)

7 TAC 153.2

(A) Commentary

The equity loan must be "secured by a voluntary lien on the homestead created under a written agreement with the consent of each owner and each owner's spouse". The consent of each owner and spouse is required regardless of whether a spouse has a community property interest or other interest in the homestead. Consent to the lien is indicated by signing a written consent to the mortgage (deed of trust) included in the mortgage or by a separate document. We do not recommend consent by a separate document. The lender may, at its option, also require the owner and owner's spouse to consent to the equity loan (in addition to the consent required for the lien).

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.2. Voluntary Lien: Section 50(a)(6)(A). An equity loan must be secured by a voluntary lien on the homestead created under a written agreement with the consent of each owner and each owner's spouse.

(1) The consent of each owner and each owner's spouse must be obtained, regardless of whether any owner's spouse has a community property interest or other interest in the homestead.

(2) An owner or an owner's spouse who is not a maker of the note may consent to the lien by signing a written consent to the mortgage instrument. The consent may be included in the mortgage instrument or a separate document.

(3) The lender, at its option, may require each owner and each owner's spouse to consent to the equity loan. This option is in addition to the consent required for the lien.

Our Comment: We believe that the consent of the owner's spouse to a lien on the homestead by execution of a document separate from the lien instrument violates Section 50(c), Article XVI, of the Texas Constitution, Section 5.001 of the Family Code, and Texas case law (see *Villarreal v. Laredo Nat'l Bank*, 677 S.W.2d 600 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.)), all of which require that the spouse execute the lien instrument. We do not recommend the practice of consent by a separate document. We recommend that the owner and owner's spouse always sign the deed of trust.

2. Limitation of Equity Loan Amount

Texas Constitution Article XVI, Section 50(a)(6)(B)

7 TAC 153.3

(A) Commentary

The principal amount of the equity loan, when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead, may not exceed 80% of the fair market value of the homestead on the date the equity loan is made.

(B) Case Law

1. Appraisal. *Wells Fargo Bank, N.A. v. Leath*, 425 S.W.3d 525 (Tex. App.—Dallas Jan. 6, 2014). In this case, Wells Fargo sought an order for foreclosure on Leath's homestead due to default on a $340,000 home equity loan. Leath filed an answer to Wells Fargo's application for foreclosure and also filed this declaratory judgment action to abate the foreclosure. In both pleadings, Leath alleged that Wells Fargo was not entitled to foreclose on his homestead because the home equity loan violated subsection 50(a)(6)(B) in that it exceeded eighty percent (80%) of the homestead's fair market value at closing and that Wells Fargo failed to cure this error within the sixty day cure period. Leath's allegations were made even though Leath and the lender had signed an acknowledgment that the fair market value of the homestead at closing was $425,000 based on an independent appraisal. Leath won at trial as the jury credited testimony by the appraiser that the fair market value at closing was $421,400.

Leath later won on appeal and in a rehearing of the appeal in which Wells Fargo argued for the first time that the written acknowledgment of fair market value fell within a safe harbor established in Article XVI, Section 50(h) of the Texas Constitution which states: "[a] lender or assignee for value may conclusively rely on the written acknowledgment as to the fair market value of the homestead property made in accordance with Subsection (a)(6)(Q)(ix) of this section if: (1) the value acknowledged to is the value estimate in an appraisal or evaluation prepared in accordance with a state or federal requirement applicable to an extension of credit under Subsection (a)(6); and (2) the lender or assignee does not have actual knowledge at the time of the payment of value or advance of funds by the lender or assignee that the fair market value stated in the written acknowledgment was incorrect." The appellate court rejected this argument on the basis that an issue raised for the first time at a rehearing is waived under Texas law.

2. Equitable Subrogation. Also of note in this case was that a portion of the home equity loan was used to pay off a prior valid lien in the homestead, which entitles a lender to equitable subrogation to the extent of the equity loan proceeds used to pay off the prior lien (see discussion on equitable subrogation in the Additional Case Law Section towards the end of this memo). Wells Fargo raised this as an alternative defense for the first time on appeal. The appellate court denied this defense as waived because it was not raised at trial.

(C) Regulatory Interpretation and Comments

§153.3. Limitation on Equity Loan Amount: Section 50(a)(6)(B). An equity loan must be of a principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the extension of credit is made. For example, on a property with a fair market value of $100,000, the maximum amount of debt against the property permitted by Section 50(a)(6)(B) is $80,000. Assuming existing debt of $30,000, the maximum amount of the equity loan debt is $50,000.

(1) The principal amount of an equity loan is the sum of:

(A) the amount of the cash advanced; and

(B) the charges at the inception of an equity loan to the extent these charges are financed in the principal amount of the loan.

(2) The principal balance of all outstanding debt secured by the homestead on the date the extension of credit is made determines the maximum principal amount of an equity loan.

(3) The principal amount of an equity loan does not include interest accrued after the date the extension of credit is made (other than any interest capitalized and added to the principal balance on the date the extension of credit is made), or other amounts advanced by the lender after closing as a result of default, including for example, ad valorem taxes, hazard insurance premiums, and authorized collection costs, including reasonable attorney's fees. **Our Comment:** See ***Sims v. Carrington Mortg. Services, L.L.C.*****, 440 S.W.3d 10 (Tex. May 16, 2014, reh'g denied Oct. 03, 2014)**, (permitted post-closing modification that included capitalized interest, which resulted in a principal balance at modification exceeding 80% of the fair market value of the homestead).

(4) On a closed-end multiple advance equity loan, the principal balance also includes contractually obligated future advances not yet disbursed.

3. Non-recourse

Texas Constitution Article XVI, Section 50(a)(6)(C)

7 TAC 153.4

(A) Commentary

An equity lien must be without recourse for personal liability against each owner and the spouse of each owner, unless the owner or spouse obtained the equity loan by actual fraud. Absent actual fraud, a lender must look only to the homestead to satisfy the debt and may not pursue a deficiency judgment. The legal standard of "actual fraud" is not "constructive fraud" and requires dishonesty

of purpose or intentional breaches of duty designed to injure another or to gain an undue and unconscientious advantage.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.4. Nonrecourse: Section 50(a)(6)(C). An equity loan must be without recourse for personal liability against each owner and the spouse of each owner, unless the owner or spouse obtained the extension of credit by actual fraud.

(1) If an owner or the spouse of an owner cosigns an equity loan agreement or consents to a security interest, the equity loan must not give the lender personal liability against an owner or an owner's spouse.

(2) A lender is prohibited from pursuing a deficiency except when the owner or owner's spouse has committed actual fraud in obtaining an equity loan.

(3) To determine whether a lender may pursue personal liability, the borrower or owner must have committed "actual fraud." To obtain personal liability under this section, the deceptive conduct must constitute the legal standard of "actual fraud." Texas case law distinguishes "actual fraud" from "constructive fraud." "Actual fraud" encompasses dishonesty of purpose or intentional breaches of duty that are designed to injure another or to gain an undue and unconscientious advantage.

4. Judicial Foreclosure

Texas Constitution Article XVI, Section 50(a)(6)(D)

(A) Commentary

The lien may be foreclosed only with the authority of a court order. The Texas Supreme Court has promulgated rules for an expedited foreclosure proceeding specific to equity loans. The general foreclosure rules are set forth as Rule 735 of the Texas Rules of Civil Procedure. The expedited rules are set forth as Rule 736.

(B) Case Law:

1. Foreclosure Generally. ***Wilson v. Aames Capital Corp.*****, 2007 WL 3072054 (Tex.App—Houston [14 Dist.] 2007 no pet.)** is a home equity foreclosure case in which Wilson asserted that Aames, as the party seeking to foreclose a home equity lien on Wilson's homestead, had the burden to prove that the lien satisfied all the home equity requirements of subsections 50(a)(6)(A)-(Q). In a

memorandum opinion, the appellate court held that judicial economy dictates that the lender's failure to comply with the home equity requirements of section 50(a)(6) is an affirmative defense to be raised by the homestead owner.

Accord, citing the *Wilson* case, ***Chambers v. First United Bank & Trust Co.*, 419 B.R. 652, 2009 WL 3245420 (Bankr. E.D. Tex.—Sherman Division 2009)** ***aff'd by*** **2013 WL 5915238 (5th Cir. 2013),** discussed in Constitutional Provision 21 below.

***Thweatt v. Deutsche Bank Nat. Trust Co.*, 2014 WL 2538691 (Tex. App.—Houston [1 Dist.], 2014)**, involves appellant Thweatt's appeal of the trial court's order granting appellee bank's application for foreclosure of its home equity lien against Thweatt's homestead pursuant to Texas Rule of Civil Procedure 736. The appellate court dismissed Thweatt's appeal because Rule 736 expressly prohibits such appeals, citing also prior appellate court holdings to the same effect.

2. Statute of Limitation for Commencing Foreclosure Actions. ***Burney v. Citigroup Global Markets Realty Corp.*, 244 S.W.3d 900 (Tex.App.—Dallas, 2008)**, involved the issue of when the four-year statute of limitations to foreclose the lien begins to run on a home equity loan in default. The court correctly noted that: (i) under Tex. Civ. Prac. & Rem. Code §16.035(a), a four-year statute of limitations applies to a suit to foreclose on a real property lien; (ii) the statute of limitations begins to run from an installment note's maturity date or the date of its acceleration; and (iii) acceleration of a note requires clear and unequivocal notice of intent to accelerate and notice of acceleration. Under the facts of this case, the borrower received a notice of intent to accelerate (October 18, 1999) but no specific notice of acceleration was sent to the borrower. On April 5, 2000, the original lender filed an application for expedited foreclosure proceedings (which was later dismissed for want of prosecution) and notified the borrower of its filing. The court held that: (1) the lender's notice to the borrower of the filing of the application constituted notice of acceleration and, thus, acceleration of the loan occurred on April 5, 2000, "thereby triggering the running of the four-year statute of limitations[;]" to foreclose the lien and (2) as the present lender's foreclosure action did not commence until November 2004, it was barred because it was outside the four-year statute of limitations period.

Note: Although the court did state that the note was accelerated on April 5, 2000, from other statements in the opinion it is unclear the exact date the running of the statute of limitations commenced. Was it the date the notice of the filing of the application for expedited foreclosure proceedings was sent to the borrower (*not stated in the opinion, but presumably sometime in April 2000*) or the date the application was filed (April 5, 2000)? Since the dates were apparently so close together, it did not affect the court's decision.

Mendoza v. Wells Fargo Bank, N.A., 2015 WL 338909 (S.D. Tex.—Houston Div. Jan 23, 2015) mainly concerns non-home equity lending issues – *i.e.*, abandonment and rescission of acceleration to avoid the foreclosure four-year statute of limitations in §16.035(b) of the Texas Civil Practice and Remedies Code. But in deciding this case for the lender, the court also held that the home equity security instrument's anti-waiver provision (*i.e.*, in Section 11 of the Fannie Mae/Freddie Mac Texas Home Equity Security Instrument, Form 3044.1, 1/01(Rev. 10/03)), which states that "[a]ny forbearance by Lender in exercising any right or remedy including ... acceptance of payments ... in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy[,]" did not bar lender's abandonment of acceleration.

(C) Regulatory Interpretation and Comments

None

5. Two Percent Fee Limitation

Texas Constitution Article XVI, Section 50(a)(6)(E)

7 TAC 153.5

(A) Commentary

Neither the owner nor the owner's spouse may be required to pay, in addition to any interest, or any bona fide discount points used to buy down the interest rate, any fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the equity loan that exceed, in the aggregate, 2% of the original principal amount of the equity loan, excluding fees for: (i) an appraisal performed by a third party appraiser; (ii) a property survey performed by a state registered or licensed surveyor; (iii) a state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law; or (iv) a title examination report if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law. Per diem interest and bona fide discount points (i.e., discount points that truly correspond to a reduced interest rate and are not required to originate, evaluate, maintain, record, insure, or service the equity loan) are interest and are not subject to the 2% limitation. A lender may rely on an established system of verifiable procedures to evidence that the discount points it offers are bona fide, which may include documentation of options that the owner is offered in the course of negotiation, including a contract rate without discount points and a lower contract rate based on discount points.

(B) Case Law:

The following are cases interpreting the fee cap. Note that case summaries will refer to a "three percent" fee cap (that only excludes interest) as that was the cap at the time of the decision.

1. Hazard Insurance. ***Doody v. Ameriquest Mortgage Co.*****, 242 F.3d 286 (5th Cir. 2001)**, held that hazard insurance premiums do not count against the three percent fee cap mandated by subsection 50(a)(6)(E) because they do not constitute fees necessary to originate the home equity loan (*see also* §153.5(16) of the Interpretations). In addition, the Fifth Circuit court certified two questions to the Texas Supreme Court on a related three percent fee cap violation issue, which is discussed in No. 2 below. Upon receiving the Texas Supreme Court's answer to the first certified question, the Fifth Circuit court in a *per curiam* opinion (see *Doody v. Ameriquest Mortg. Co.*, 263 F.3d 435 (5th Cir.) 2001)) vacated the district court's dismissal order and remanded with instructions to enter judgment for *Ameriquest* denying all relief sought by Doody.

2. Curing Fee Cap Violation. ***Doody v. Ameriquest Mortgage Co.*****, 49 S.W.3d 342 (Tex. 2001)**, involves the following two certified questions from the Fifth Circuit in the related *Doody* case discussed in No. 1 above, and one question from the plaintiff:

> Certified Questions: (1) Under the Texas Constitution, if a lender charges closing costs in excess of three percent, but later refunds the overcharge, bringing the charge costs within the range allowed by section 50(a)(6)(E), is the lien held by the lender invalid under section 50(c)?
>
> (2) If this question is reached, may the protections of section 50 of the Texas Constitution be waived by a buyer who accepts a refund of any overcharged amounts when the loan contract provides that accepting such refund waives any claims under section 50?
>
> Plaintiffs' Question: (3) If a loan made pursuant to section 50(a)(6) requires the borrower to pay, at the inception of the loan, premiums to insure the homestead from casualty loss, do these premiums constitute "fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit" under section 50(a)(6)(E)?

The Texas Supreme Court answered the first certified question favorably to lenders by permitting the lender to cure the violation within a reasonable time (*i.e.*, approximately three months after closing). In interpreting the pre-2003 non-specific cure provision of subsection 50(a)(6)(Q)(x) to permit a cure of the three percent fee cap violation, the Court also held that subsection 50(a)(6)(Q)(x) applied to all curable violations of subsection 50(a)(6). Because the court answered "no" to the first certified question, it was not necessary to answer the second certified question.

The Texas Supreme Court declined to answer plaintiffs' question regarding hazard insurance premiums because the Fifth Circuit had not certified that question to it.

Note: The Supreme Court's refusal to answer this question leaves open the possibility that if this issue is presented to the Texas Supreme Court in another case, the Court may decide this issue independent of the Fifth Circuit's *Doody* decision discussed in No. 1 above, and of Regulatory Interpretation §153.5(16).

The expanded cure provisions of subsections 50(a)(6)(Q)(x)(a) through (f) added by the 2003 amendments to subsection 50(a)(6)(Q)(x) and the Texas Supreme Court *Doody* decision leave the following "cure" questions unanswered:

> (1) Excluding the specific cures enumerated in subsections 50(a)(6)(Q)(x) (a) through (e), are there "curable" violations to which the Texas Supreme Court *Doody* decision would still be applicable, or is the default cure provision of subsection 50(a)(6)(Q)(x)(f) the exclusive cure for these other violations?
>
> (2) If there are other curable violations to which the Texas Supreme Court *Doody* decision still applies, what cure period is applicable – the 60-day limit in subsection 50(a)(6)(Q)(x) or a "reasonable time" determined by the court?

3. Discount Points. Section 50(a)(6)(E), amended by Senate Joint Resolution 60 (SJR 60), effective for equity loans closing after January 1, 2018, now states that "*bona fide* discount points used to buy down the interest rate" are not fees subject to Section 50(a)(6)(E). This is a codification of established

case law. We recommend that lenders be cautious in allowing borrowers the option of buying down the interest rate by paying discount points. Lenders should carefully document the rate and fee options offered to borrowers (*see*, for guidance, Regulatory Interpretation 153.5(3)(B) below). When discount points are being paid, our home equity loan package includes a document the borrower signs electing to pay discount points in order to obtain a lower interest rate. This document should be used only when points are being paid to reduce the interest rate and not when the "discount points" include other fees.

The following two cases help illustrate this point. *Finance Commission of Texas v. Norwood* held that legitimate discount points are not subject to the 3% fee cap, which major holding was codified by SJR 60 and provides guidance on how SJR 60 will likely be interpreted; and *Penrod v. Bank of New York Mellon* illustrates the importance of having the borrower sign a properly drafted discount point election document.

***Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)**, ***supplemented on* January 24, 2014**, clarifies that bona fide discount points are not subject to the three percent fee cap. It defines interest as used in subsection 50(a)(6)(E) as "the amount determined by multiplying the loan principal by the interest rate … over a period of time." It states "[l]egitimate discount points to lower the loan interest rate, in effect, substitute for interest … that true discount points are not fees 'necessary to originate, evaluate, maintain, record, insure, or service' but are an option available to the borrower and thus not subject to the 3% cap." *Norwood* did not clarify or explain what it meant in using the words "legitimate" and "true" as descriptive qualifiers for the discount point exclusion instead of the commonly accepted qualifier "bona fide."

***Penrod v. Bank of New York Mellon*, 824 F.Supp.2d 754 (S.D.Tex. 2011)**. Plaintiffs argued that the $4,400 in discount points they paid were not properly excluded from the three percent fee cap because of a fact question whether or not the discount points bought down the loan's interest rate. The court, without citing case authority or analyzing the law, held that the discount points were properly excluded from the three percent limit. In reaching this conclusion, the court relied exclusively on the Discount Point Acknowledgment the plaintiffs admitted they signed in order to induce the making of the loan, which read: "I acknowledge that I am electing to pay discount point(s) in this extension of credit transaction in order to obtain a lower interest rate. I acknowledge that I could have obtained a loan with fewer or no discount point(s), but that the loan would have had a correspondingly higher interest rate. I acknowledge that discount point(s) are 'interest' under Texas law and that, accordingly, they are excluded from the 3% limit on fees [under Section 50(a)(6)(E)]." The court stated this "demonstrates that the discount points are properly excluded from the three percent limit."

4. Yield Spread Premium. *Cerda v. 2004-EQR1 L.L.C.*, 612 F.3d 781 (5th Cir. 2010). At closing, the mortgage broker received a $3,675 yield spread premium from the lender. The court held that the yield spread premium (*selling a loan at an interest rate higher than market rates*) paid to the mortgage broker by the lender did not count toward the [then] three percent fee cap. The borrower had also paid $11,025 in discount points; the court did not find discount points and a yield spread premium on the same loan to be inconsistent.

5. Lender Credit/YSP. *Maluski v. US Bank NA*, 349 F. App'x 971, 2009 WL 3403195 (5th Cir. 2009) involves a general closing cost credit given by the lender to the borrower at settlement and the

payment of a yield spread premium (YSP) by the lender to the mortgage broker, and how they relate to a violation of the three percent fee cap.

The court held that the lender's general closing cost credit disclosed on the HUD-1 Settlement Statement, which was not disclosed as being applied to specific charge(s), reduced the total fees subject to the three percent fee cap disclosed on the HUD-1 Settlement Statement to the permitted three percent limit, even though the Bank lacked evidence of how the credit was applied and, as asserted by Maluski, the credit theoretically could have been applied to interest charged at closing.

The court also held that the YSP paid to the mortgage broker by the lender is not included in the three percent fee cap because, although the lender may ultimately recoup the YSP over the life of the loan through the higher interest rate charged, "this indirect payment [of the YSP by the borrower] is not contemplated by a plain reading of the state constitution [subsection 50(a)(6)(E)]."

***Abernathy v. Deutsche Bank Nat'l Trust Co.*, 2013 WL 4056225 (Tex. App.—Austin 2013)**, involved a $2,640 general lender credit and how to apply it when total loan fees include fees subject to the 3% fee cap and fees not subject to the 3% fee cap. Abernathy's equity loan was subject to a $2,640 3% fee cap. The loan fees totaled $8,148.89, $5,244.70 of which was subject to the 3% fee cap. The lender's closing instructions (signed by Abernathy) instructed the closing agent to disburse payments to the broker and to the lender and disclosed that the closing agent reduced the amount due the lender by the amount of the lender credit and did not reduce the $2,911.70 in broker fees included in the $5,244.70 subject to the 3% fee cap. The HUD-1, however, disclosed the $2,640 general lender credit on page 1 and $8,148.89 in fees on page 2. Abernathy argued she had paid $2,911.70 in fee cap fees (*i.e.*, the broker fees), which sum exceeded the fee cap, and the general lender credit had reduced the non-3% fees. The appellate court held that the general lender credit reduced the 3% fee cap fees (thereby reducing those fees below the 3% cap) and not the non-cap fees, and stated "Abernathy's position requires the court to view the total transaction in a manner that violates the constitution, rather than complies with the constitution." This case indicates that courts may opt to use the preclosing documentation (*i.e.*, the closing instructions) only as a method to determine the net cash due each party to the transaction and not as evidence to determine where lender credit funds were actually applied.

***McCallum v. Wells Fargo Bank, N.A.*, 2009 WL 3166070 (W.D. Tex.—Austin Division, 2009)** held that fees subject to the three percent cap that were paid by the lender are not used in calculating the total fees subject to the three percent fee cap, citing *Tarver v. Sebring Capital Credit Corp.*, 69 S.W.3d 708 (Tex.App.—Waco, 2002, no pet.) as authority (in *Tarver*, the lender had absorbed excess fees as a credit to comply with the three percent fee cap).

<u>(C) Regulatory Interpretation and Comments</u>

§153.5. Three percent fee limitation: Section 50(a)(6)(E).

[Note: These Interpretations have been partially superseded by recent changes to the Texas Constitution by Senate Joint Resolution 60 (SJR 60), effective for equity loans closing after January 1, 2018, and until new Regulatory Interpretations are issued, should be read in light of those changes.

SJR 60 reduced the fee limitation in Section 50(a)(6)(E) to two percent and excluded certain fees from the two percent fee cap limit—i.e., for third-party appraisal and survey; lender title insurance and endorsements; title examination report.

An equity loan must not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit.

(1) Optional Charges. Charges paid by an owner or an owner's spouse at their sole discretion are not fees subject to the three percent fee limitation. Charges that are not imposed or required by the lender, but that are optional, are not fees subject to the three percent limitation. The use of the word "require" in Section 50(a)(6)(E) means that optional charges are not fees subject to the three percent limitation.

(2) Optional Insurance. Insurance coverage premiums paid by an owner or an owner's spouse that are at their sole discretion are not fees subject to the three percent limitation. Examples of these charges may include credit life and credit accident and health insurance that are voluntarily purchased by the owner or the owner's spouse.

(3) Charges that are Interest. Charges an owner or an owner's spouse is required to pay that constitute interest under §153.1(11) of this title (relating to Definitions) are not fees subject to the three percent limitation. **Our Comment:** Interpretation 153.1(11) of the Definitions (7 TAC 153.1) defines interest for purposes of Sections 50(a)(6)(E) as "the amount determined by multiplying the loan principal by the interest rate over a period of time."

(A) Per diem interest is interest and is not subject to the three percent limitation.

(B) Legitimate discount points are interest and are not subject to the three percent limitation. Discount points are legitimate if the discount points truly correspond to a reduced interest rate and are not necessary to originate, evaluate, maintain, record, insure, or service the equity loan. A lender may rely on an established system of verifiable procedures to evidence that the discount points it offers are legitimate. This system may include documentation of options that the owner is offered in the course of negotiation, including a contract rate without discount points and a lower contract rate based on discount points.

(4) Charges that are not Interest. Charges an owner or an owner's spouse is required to pay that are not interest under §153.1(11) of this title are fees subject to the three percent limitation.

(5) Charges Absorbed by Lender. Charges a lender absorbs, and does not charge an owner or an owner's spouse that the owner or owner's spouse might otherwise be required to pay are unrestricted and not fees subject to the three percent limitation.

(6) Charges to Originate. Charges an owner or an owner's spouse is required to pay to originate an equity loan that are not interest under §153.1(11) of this title are fees subject to the three percent limitation.

(7) Charges Paid to Third Parties. Charges an owner or an owner's spouse is required to pay to third parties for separate and additional consideration for activities relating to originating an equity loan are fees subject to the three percent limitation. Charges those third parties absorb, and do not charge an owner or an owner's spouse that the owner or owner's spouse might otherwise be required to pay are unrestricted and not fees subject to the three percent limitation. Examples of these charges include attorneys' fees for document preparation and mortgage brokers' fees to the extent authorized by applicable law.

(8) Charges to Evaluate. Charges an owner or an owner's spouse is required to pay to evaluate the credit decision for an equity loan, that are not interest under §153.1(11) of this title, are fees subject to the three percent limitation. Examples of these charges include fees collected to cover the expenses of a credit report, survey, flood zone determination, tax certificate, title report, inspection, or appraisal. **Our Comment:** Effective for equity loans closed after January 1, 2018, SJR 60 removed certain survey, title report and appraisal fees from the fee limitation.

(9) Charges to Maintain. Charges paid by an owner or an owner's spouse to maintain an equity loan that are not interest under §153.1(11) of this title are fees subject to the three percent limitation if the charges are paid at the inception of the loan, or if the charges are customarily paid at the inception of an equity loan but are deferred for later payment after closing. **Our Comment:** This Interpretation neither gives an example of a charge "to maintain an equity loan" nor an example of what is meant by "are deferred for later payment after closing." Would this post-closing paid charge include a charge included in the loan amount? It is unclear, but we believe that it does. In the preamble to the proposed revisions to §153.5(9), published in the July 4, 2014, issue of the Texas Register, the Finance Commission stated, "[c]harges to maintain … the loan that are not customarily included at inception because they arise due to subsequent events (*e.g.*, nonsufficient funds fees, payoff statement fees, fees for an updated flood determination) would continue ***not*** to be subject to the three percent limitation under the amended text."

(10) Charges to Record. Charges an owner or an owner's spouse is required to pay for the purpose of recording equity loan documents in the official public record by public officials are fees subject to the three percent limitation.

(11) Charges to Insure an Equity Loan. Premiums an owner or an owner's spouse is required to pay to insure an equity loan are fees subject to the three percent limitation. Examples of these charges include title insurance and mortgage insurance protection. **Our Comment:** Effective for equity loans closed after January 1, 2018, SJR 60 removed certain title insurance premiums from the fee limitation.

(12) Charges to Service. Charges paid by an owner or an owner's spouse for a party to service an equity loan that are not interest under §153.1(11) of this title are fees subject to the three percent limitation if the charges are paid at the inception of the loan, or if the charges are customarily paid at the inception of an equity loan but are deferred for later payment after closing. **Our Comment:** This Interpretation neither gives an example of a charge "to service an equity loan" nor an example of what is meant by "are deferred for later payment after closing." Would this post-closing paid charge include a charge included in the loan amount? It is unclear, but we believe that it does. In the preamble to the proposed revisions to §153.5(12), published in the July 4, 2014, issue of the Texas Register, the Finance Commission stated, "[c]harges to … service the loan that are not customarily

included at inception because they arise due to subsequent events (*e.g.*, nonsufficient funds fees, payoff statement fees, fees for an updated flood determination) would continue ***not*** to be subject to the three percent limitation under the amended text."

(13) Secondary Mortgage Loans. A lender making an equity loan that is a secondary mortgage loan under Chapter 342 of the Texas Finance Code may charge only those fees permitted in Tex. Fin. Code, §§342.307, 342.308, and 342.502. A lender must comply with the provisions of Chapter 342 of the Texas Finance Code and the constitutional restrictions on fees in connection with a secondary mortgage loan made under Chapter 342 of the Texas Finance Code.

(14) Escrow Funds. A lender may provide escrow services for an equity loan. Because funds tendered by an owner or an owner's spouse into an escrow account remain the property of the owner or the owner's spouse those funds are not fees subject to the three percent limitation. Examples of escrow funds include account funds collected to pay taxes, insurance premiums, maintenance fees, or homeowner's association assessments. A lender must not contract for a right of offset against escrow funds pursuant to Section 50(a)(6)(H).

(15) Subsequent Events. The three percent limitation pertains to fees paid or contracted for by an owner or owner's spouse at the inception or at the closing of an equity loan. On the date the equity loan is closed an owner or an owner's spouse may agree to perform certain promises during the term of the equity loan. Failure to perform an obligation of an equity loan may trigger the assessment of costs to the owner or owner's spouse. The assessment of costs is a subsequent event triggered by the failure of the owner or owner's spouse to perform under the equity loan agreement and is not a fee subject to the three percent limitation. Examples of subsequent event costs include contractually permitted charges for force-placed homeowner's insurance costs, returned check fees, debt collection costs, late fees, and costs associated with foreclosure.

(16) Property Insurance Premiums. Premiums an owner or an owner's spouse is required to pay to purchase homeowner's insurance coverage are not fees subject to the three percent limitation. Examples of property insurance premiums include fire and extended coverage insurance and flood insurance. Failure to maintain this insurance is generally a default provision of the equity loan agreement and not a condition of the extension of credit. The lender may collect and escrow premiums for this insurance and include the premium in the periodic payment amount or principal amount. If the lender sells insurance to the owner, the lender must comply with applicable law concerning the sale of insurance in connection with a mortgage loan.

6. Closed End Credit

Texas Constitution Article XVI, Section 50(a)(6)(F)

(A) Commentary

An equity loan may not be an open-end account that may be debited from time to time or under which credit may be extended from time to time unless the open-end account is a home equity line of credit under Section 50(t). Section 50(t) home equity line of credit loans (HELOCS) are, generally, beyond the scope of this manual. The scope of this manual is limited to closed end home equity loans.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

None

7. Prohibition on Prepayment Penalties

Texas Constitution Article XVI, Section 50(a)(6)(G)

7 TAC 153.7

(A) Commentary

The equity loan must be "payable in advance without penalty or other charge". All or any portion of an equity loan may be paid early without being charged a penalty. Lockout provisions, (i.e., a provision in a loan agreement that prohibits a borrower from paying the loan early) are considered prepayment penalties.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.7. Prohibition on Prepayment Penalties: Section 50(a)(6)(G). An equity loan may be paid in advance without penalty or other charge.

(1) A lender may not charge a penalty to a borrower for paying all or a portion of an equity loan early.

(2) A lockout provision is not permitted in an equity loan agreement because it is considered a prepayment penalty.

8. Security of the Equity Loan

Texas Constitution Article XVI, Section 50(a)(6)(H)

7 TAC 153.8

(A) Commentary

The equity loan may not be "secured by any additional real or personal property other than the homestead". Only homestead property may secure an equity loan. The following items incidental to the homestead are not considered "additional real or personal property" securing an equity loan: escrow reserves for taxes and insurance; an undivided interest in a condominium unit or planned unit development; insurance and condemnation proceeds; fixtures; and easements for ingress and egress to and from the homestead. The following are considered "additional real or personal property" prohibited by Section 50(a)(6)(H) from securing an equity loan: a guaranty or surety of an equity loan; a contractual right of offset in an equity loan agreement; a cross-collateralization clause in an equity loan agreement; and, for an equity loan on an urban homestead that is secured by more than 10 acres, the acreage in excess of 10 acres. For rules as to rural homesteads see page 3 herein.

As to mixed use homestead properties (owner occupied living quarters and business or rental use) we recommend the following rules to our clients:

1. Single Structure - Homestead rights run with the lot and not with the improvements. Therefore, if the homestead property is improved with a single structure, there are no additional real or personal property issues with a single structure even if a portion of the structure is not used as owner-occupied living quarters. Note, HOWEVER, that Fannie Mae/Freddie Mac allow only single family homes as eligible collateral for Texas home equity loans.

2. Separate Structure – If there are separate structures on real property used as the borrower's homestead, fact issues may arise as to whether the additional structure is used separately in such a manner as to question whether it is part of the homestead. Should this occur, we advise our clients not to make an equity loan secured by the property unless: (1) the borrowers sign an affidavit that the entire property is used for homestead purposes; (2) a review of the tax certificate reflects that the entire premises is subject to a homestead exemption; (3) neither a physical inspection of the property nor the appraisal establishes that the separate structure is being used for non-homestead purpose; (4) the closing instructions to the title company provide: "Please note that there are separate structures on the property which borrower's asserts are all used in a manner consistent with homestead use; and (5) the Title company will issue a T-42 and T-42.1 endorsement without exception or deletion.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.8. Security of the Equity Loan: Section 50(a)(6)(H). An equity loan must not be secured by any additional real or personal property other than the homestead. The definition of "homestead" is found in Section 51 of Article XVI, Texas Constitution, and Chapter 41 of the Texas Property Code.

(1) A lender and an owner or an owner's spouse may enter into an agreement whereby a lender may acquire an interest in items incidental to the homestead. An equity loan secured by the following items is not considered to be secured by additional real or personal property:

(A) escrow reserves for the payment of taxes and insurance;

(B) an undivided interest in a condominium unit, a planned unit development, or the right to the use and enjoyment of certain property owned by an association;

(C) insurance proceeds related to the homestead;

(D) condemnation proceeds;

(E) fixtures; or

(F) easements necessary or beneficial to the use of the homestead, including access easements for ingress and egress.

Our Comment: The Finance Commission declined to offer an Interpretation concerning whether an easement is included in the homestead acreage limitations of Section 51, Article XVI, Texas Constitution. Therefore, until the appellate courts or the Finance Commission by future Interpretation give clarification on this issue, we recommend that all easements included in the "Equity loan agreement" property description be included in determining if homestead acreage limitations are exceeded.

(2) A guaranty or surety of an equity loan is not permitted. A guaranty or surety is considered additional property for purposes of Section 50(a)(6)(H). Prohibiting a guaranty or surety is consistent with the prohibition against personal liability in Section 50(a)(6)(C). An equity loan with a guaranty or surety would create indirect liability against the owner. The constitutional home equity lending provisions clearly provide that the homestead is the only allowable collateral for an equity loan. The constitutional home equity provisions prohibit the lender from contracting for recourse of any kind against the owner or owner's spouse, except for provisions providing for recourse against the owner or spouse when the extension of credit is obtained by actual fraud.

(3) A contractual right of offset in an equity loan agreement is prohibited.

(4) A contractual cross-collateralization clause in an equity loan agreement is prohibited.

(5) Any equity loan on an urban homestead that is secured by more than ten acres is secured by additional real property in violation of Section (50)(a)(6)(H). **Our Comment:** (1) See Our Comment to §153.8(1).

9. Acceleration

Texas Constitution Article XVI, Section 50(a)(6)(J)

7 TAC 153.9

(A) Commentary

An equity loan may not be accelerated because of a decrease in the market value of the homestead or because of the owner's default under other indebtedness not secured by a prior valid encumbrance against the homestead. This means that the equity loan may not include a crossdefault provision (i.e., a provision in the equity loan agreement that puts the borrower in default if the borrower defaults on another obligation) unless the equity loan is subordinate to a prior valid lien secured by the homestead. The equity loan may not be accelerated, however, as a result of a default occurring under a loan secured by the homestead that is subordinate to the equity loan. Also, an equity loan may contain a provision that allows acceleration of the loan if the owner defaults under the covenants of the equity loan agreement—for example, a covenant to maintain the property or not remove improvements that indirectly affects the homestead's market value.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.9. Acceleration: Section 50(a)(6)(J). An equity loan may not be accelerated because of a decrease in the market value of the homestead or because of the owner's default under other indebtedness not secured by a prior valid encumbrance against the homestead.

(1) An equity loan agreement may contain a provision that allows the lender to accelerate the loan because of a default under the covenants of the loan agreement. Examples of these provisions include a promise to maintain the property or not remove improvements to the property that indirectly affects the market value of the homestead.

(2) A contractual cross-default clause is permitted only if the lien associated with the equity loan agreement is subordinate to the lien that is referenced by the cross default clause.

10. Only One Equity Loan at a Time

Texas Constitution Article XVI, Section 50(a)(6)(K)

7 TAC 153.10

(A) Commentary

The homestead may be secured by only one equity loan at a time. Any other debt concurrently secured by the homestead must be one of the other types of permitted debts specified in Article XVI, Section 50(a)(1)-(a)(5) or (a)(8) of the Texas Constitution. An equity loan may not be secured by a homestead that also secures a HELOC (Section 50(t)) or a reverse mortgage (50(a)(7)). If, under Texas Law the property ceases to be the homestead of the owner, then as to this "one at a time Rule," the lender may treat what was previously a home equity mortgage as a non-homestead mortgage.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.10. Number of Loans: Section 50(a)(6)(K). An equity loan must be the only debt secured by the homestead at the time the extension of credit is made unless the other debt was made for a purpose described by Section 50(a)(1)-(a)(5) or (a)(8). **Our Comment:** This means that an equity loan cannot be made when an existing reverse mortgage (*i.e.*, a Section 50(a)(7) loan) will remain secured by the homestead.

(1) Number of Equity Loans. An owner may have only one equity loan at a time, regardless of the aggregate total outstanding debt against the homestead. **Our Comment:** Because the definition of a home equity loan includes a home equity line of credit under Section 50(t), this precludes a closed-

end home equity loan and a home equity line of credit existing at the same time against the same homestead.

(2) Loss of Homestead Designation. If under Texas law the property ceases to be the homestead of the owner, then the lender, for purposes of Section 50(a)(6)(K), may treat what was previously a home equity mortgage as a non-homestead mortgage.

11. Refinance of a Home Equity Loan

Texas Constitution Article XVI, Section 50(f)(1) or (f)(2))

[Note: Substantial changes were made to Section 50(f) of the Texas Constitution by Senate Joint Resolution 60 (SJR 60), effective January 1, 2018, and Interpretations by the Finance Commission have yet to be issued. SJR 60 amended Section 50(f) to also permit the refinance of a Section 50(a)(6) equity loan into a Section 50(a)(4) non-equity loan under certain conditions specified in new Section 50((f)(2).]

(A) Commentary

A refinance of debt secured by the homestead, any portion of which is a home equity loan under Section 50(a)(6), may not be secured by a valid lien against the homestead unless:

(1) the refinance is another Section 50(a)(6) equity loan or a Section 50(a)(7) reverse mortgage; or

(2) all of the following conditions are met:

(A) the refinance is not closed before the first anniversary of the date the Section 50(a)(6) equity loan was closed;

(B) the refinance does not include the advance of any additional funds other than:

(i) funds advanced to refinance a debt described by Sections 50(a)(1) through (a)(7) (*i.e.*, purchase money, taxes due, owelty of partition, refinance of prior lien including federal tax lien, homestead improvements, home equity, or reverse mortgage, respectively); or

(ii) actual costs and reserves required by the lender to refinance the debt;

(C) the refinance of the Section 50(a)(6) equity loan is of a principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the refinance of the Section 50(a)(6) equity loan is made; and

(D) the lender provides the owner the written notice ("Notice") required by and promulgated in Section 50(f)(2)(D) on a separate document not later than the third business day after the date

the owner submits the loan application to the lender and at least 12 days before the date the refinance of the Section 50(a)(6) equity loan is closed. The text of the Notice is found on page F-4 in this manual.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.41. Refinance of a Debt Secured by a Homestead: Section 50(e). A refinance of debt secured by a homestead and described by any subsection under Subsections (a)(1)-(a)(5) of Section 50 of the Texas Constitution that includes the advance of additional funds may not be secured by a valid lien against the homestead unless: (1) the refinance of the debt is an extension of credit described by Subsection (a)(6) or (a)(7) of Section 50 of the Texas Constitution; or (2) the advance of all the additional funds is for reasonable costs necessary to refinance such debt or for a purpose described by Subsection (a)(2), (a)(3), or (a)(5) of Section 50 of the Texas Constitution.

(1) Reasonableness and necessity of costs relate to the type and amount of the costs

(2) In a secondary mortgage loan, reasonable costs are those costs which are lawful in light of the governing or applicable law that authorizes the assessment of particular costs. In the context of other mortgage loans, reasonable costs are those costs which are lawful in light of other governing or applicable law. **Our Comment:** For a similar Interpretation relating to home equity loans see §153.5 (13).

(3) Reasonable and necessary costs to refinance may include reserves or impounds (escrow trust accounts) for taxes and insurance, if the reserves comply with applicable law.

12. Effect of Home Equity Loan Refinance under Section 50(f)(2)

Texas Constitution Article XVI, Section 50(f-1)

(A) Commentary

The lien securing a refinance of a Section 50(a)(6) equity loan under Section 50(f)(2) is deemed to be a Section 50(a)(4) "rate and term" refinance lien against the homestead. An affidavit by the owner or the owner's spouse acknowledging that the Section 50(f)(2) requirements have been met (see Rule 11 above) conclusively establishes that the Section 50(a)(4) "rate and term" refinance requirements have been met.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

None

13. Substantially Equal Monthly Payments
Texas Constitution Article XVI, Section 50(a)(6)(L)(i)
7 TAC 153.11

(A) Commentary

The equity loan must be “scheduled to be repaid in substantially equal successive periodic installments, not more often than every 14 days and not less often than monthly, beginning no later than two months from the date the equity loan is made”. This “substantially equal” restriction prohibits a balloon payment (defined as “an installment that is more than an amount equal to twice the average of all installments scheduled before that installment”) or a graduated payment feature on an equity loan. Further, interest only equity loans are not allowed—“some amount of principal must be reduced with each installment”. The “date the equity loan is made” is defined as the date the equity loan closes. If the owner or spouse sign on different days, or if the non-married joint owners sign on different days, the date of the last signing is the date the equity loan closes. Loans that close at month-end, but fund in the next month, must utilize an “interest credit” option in order to avoid the first installment occurring more than two months from the date the equity loan closes.

(B) Case Law

See Constitutional Provision 19 below for case law confirming that adjustable rate loans (in which payments vary based on interest adjustments) are “substantially equal.”

(C) Regulatory Interpretation and Comments

§153.11. Repayment Schedule: Section 50(a)(6)(L)(i). Unless an equity loan is a home equity line of credit under Section 50(t), the loan must be scheduled to be repaid in substantially equal successive periodic installments, not more often than every 14 days and not less often than monthly, beginning no later than two months from the date the extension of credit is made, each of which equals or exceeds the amount of accrued interest as of the date of the scheduled installment.

(1) The two month time period contained in Section 50(a)(6)(L)(i) begins on the date of closing. **Our Comment:** (1) The term “closing” is defined in §153.1(3) as “the date when each owner and the spouse of each owner signs the equity loan agreement or the act of signing the equity loan agreement by each owner and the spouse of each owner.” Note, however, that if an owner and spouse sign on different days, or if non-married owners sign on different days, the date of last signing is the date of “closing.” (2) See also the “short-pay” Our Comment to §153.1(6) under No. 34 below.

(2) For purposes of Section 50(a)(6)(L)(i), a month is the period from a date in a month to the corresponding date in the succeeding month. For example, if a home equity loan closes on March 1, the first installment must be due no later than May 1. If the succeeding month does not have a

corresponding date, the period ends on the last day of the succeeding month. For example, if a home equity loan closes on July 31, the first installment must be due no later than September 30.

(3) For a closed-end equity loan to have substantially equal successive periodic installments, some amount of principal must be reduced with each installment. This requirement prohibits balloon payments. **Our Comment:** Although not stated in this Interpretation, presumably the prohibition against balloon payments will apply to home equity line of credit loans as well. The term "balloon" is defined in §153.1(1) as "an installment that is more than an amount equal to twice the average of all installments scheduled before that installment."

(4) Section 50(a)(6)(L)(i) does not preclude a lender's recovery of payments as necessary for other amounts such as taxes, adverse liens, insurance premiums, collection costs, and similar items.

14. Closing Date

(Twelve-Day "Cooling Off" Period)

Texas Constitution Article XVI, Section 50(a)(6)(M)(i)

7 TAC 153.12

(A) Commentary

An equity loan may not be closed before the 12th calendar day after the later of the date that the owner of the homestead submits a loan application to the lender for the equity loan or the date that the lender provides the owner a copy of the disclosure required by Section 50(g) (see our discussion in 16 below regarding the disclosure). The "lender" is defined as anyone authorized under Section 50(a)(6)(P) ("authorized lender") that advances funds directly to the owner or is identified as the payee on the note. Wholesale lenders have three options - (1) close in the name of the broker that delivered the Disclosure, (2) wait 12 days from the date the wholesale lender receives the application and provides the Disclosure to the owner, or (3) appoint the broker as limited agent for purposes of delivering the Disclosure (See Clients and Friends Memorandum, page 119). In calculating the 12-day period, the next succeeding calendar day after the later of the date that the owner submits a loan application to the lender for the equity loan, or the date that the lender provides the owner a copy of the disclosure is the first day of the 12-day period. The loan may close any time on or after the 12th day.

(B) Case Law

***Cerda v. 2004-EQR1 L.L.C.*, 612 F.3d 781 (5th Cir. 2010).** In this case, the plaintiffs applied by telephone for a $344,000 loan. The court held that the 12-day waiting period is triggered by an oral application, including a telephonic application, reasoning that because the term "application" in Section 50(a)(6)(M)(i) is not restricted by the word "written," it encompasses oral applications, including telephonic applications.

(C) Regulatory Interpretation and Comments

§153.12. Closing Date: Section 50(a)(6)(M)(i). An equity loan may not be closed before the 12th calendar day after the later of the date that the owner submits an application for the loan to the lender or the date that the lender provides the owner a copy of the required consumer disclosure. One copy of the required consumer disclosure may be provided to married owners. For purposes of determining the earliest permitted closing date, the next succeeding calendar day after the later of the date that the owner submits an application for the loan to the lender or the date that the lender provides the owner a copy of the required consumer disclosure is the first day of the 12-day waiting period. The equity loan may be closed at any time on or after the 12th calendar day after the later of the date that the owner submits an application for the loan to the lender or the date that the lender provides the owner a copy of the required consumer disclosure.

(1) Submission of a loan application to an agent acting on behalf of the lender is submission to the lender.

(2) A loan application may be given orally or electronically. **Our Comment:** In *Texas Bankers Ass'n v. ACORN*, 303 S.W.3d 404 (Tex. App.—Austin, 2010), the appellate court reversed the trial court's judgment invalidating the "oral application" portion of §153.12(2). As stated in *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013), *supplemented on* January 24, 2014, in which the Texas Supreme Court affirmed in part and reversed in part the appellate court's judgment, §153.12(2) was "no longer at issue." 418 S.W.3d at 575.

15. Form of Twelve Day Disclosure

Texas Constitution Article XVI, Section 50(g)

7 TAC 153.51

(A) Commentary

Section 50(g) sets forth the specific text of the disclosure that must be provided to an owner in connection with closing an equity loan. The disclosure must be on a separate instrument. Only one copy needs to be provided to married owners. Although the Constitution does not require that the disclosure be signed or dated by the owner, we suggest adding these items to the disclosure to aid in documenting the date of an owner's receipt of the disclosure. Further, lenders should include a signature line for non-borrowing, non-titled spouses because "owner" is defined as "a person who has the right to possess, use, and convey, individually or with the joinder of another person, all or part of the homestead" (See page 81). Lenders that do not wish to require signatures and dates "may rely on an established system of verifiable procedures to evidence compliance" with this provision. If the discussions with the borrower are conducted primarily in another language, the lender must, prior to closing, provide an additional copy of the disclosure in that other language. The Spanish translation is contained on the Finance Commission's website.

(B) Case Law

***Stringer v. Cendant Mortgage Corp.,* 23 S.W.3d 353 (Tex. 2000)** held that "section 50(g)'s notice provisions do not independently establish rights or obligations for [an equity loan]." The *Stringer*

opinion also stated that "[s]ection 50(a)(6), in its totality, establishes the terms and conditions a home-equity lender must satisfy to make a valid loan." Although, the *Stringer* decision predates the 2003 constitutional amendment that corrected the Section 50(g) disclosure language the subject of the *Stringer* suit, it is still good law in instances in which notice provisions conflict with the substantive provisions of Section 50(a)(6). (*See also* a discussion of the *Stringer* decision under the Case Law section in Constitutional Provision 21 below.)

(C) Regulatory Interpretation and Comments

§153.51. Consumer Disclosure: Section 50(g). An equity loan may not be closed before the 12th day after the lender provides the owner with the consumer disclosure on a separate instrument.

(1) If a lender mails the consumer disclosure to the owner, the lender shall allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery.

(2) Certain provisions of the consumer disclosure do not contain the exact identical language concerning requirements of the equity loan that have been used to create the substantive requirements of the loan. The consumer notice is only a summary of the owner's rights, which are governed by the substantive terms of the constitution. The substantive requirements prevail regarding a lender's responsibilities in an equity loan transaction. A lender may supplement the consumer disclosure to clarify any discrepancies or inconsistencies.

(3) A lender may rely on an established system of verifiable procedures to evidence compliance with this section.

(4) A lender whose discussions with the borrower are conducted primarily in Spanish for a closed-end loan may rely on the translation of the consumer notice developed under the requirements of Texas Finance Code, §341.502. Such notice shall be made available to the public through publication on the Finance Commission's webpage. **Our Comment:** If a lender's discussions with the borrower are conducted primarily in a language other than English, the lender must provide the owner the English language consumer disclosure at least 12 days prior to closing and must, before closing, provide the owner an additional copy of the consumer disclosure translated into the written language in which the discussions were conducted.

(5) If the owner has executed a power of attorney described by §153.15(2) of this title (relating to Location of Closing: Section 50(a)(6)(N)), then the lender may provide the consumer disclosure to the attorney-in-fact instead of providing it to the owner.

16. Pre-closing Disclosure

Texas Constitution Article XVI, Section 50(a)(6)(M)(ii)

7 TAC 153.13

(A) Commentary

An equity loan may not close until one business day after the date that the owner of the homestead receives a copy of the most current version of the loan application (if not previously provided) and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing (collectively the "Pre-closing Disclosure"), or any calendar day thereafter. As a matter of practice that final itemized disclosure is typically given in the form of a Closing Disclosure (CD). If one or more of the fees, points, interest, charges and costs set forth on the CD is greater than the disclosed rate or amount on the initial CD, the Finance Commission allows a lender to reduce the fees or closing costs without postponing the date of closing. "Business Day" is defined as "all calendar days except Sunday and these federal legal public holidays: New Year's Day, the birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day and Christmas Day."

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.13. Preclosing Disclosures: Section 50(a)(6)(M)(ii). An equity loan may not be closed before one business day after the date that the owner of the homestead receives a copy of the loan application, if not previously provided, and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. If a bona fide emergency or another good cause exists and the lender obtains the written consent of the owner, the lender may provide the preclosing disclosure to the owner or the lender may modify the previously provided preclosing disclosure on the date of closing.

(1) For purposes of this section, the "preclosing disclosure" consists of a copy of the loan application, if not previously provided, and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing.

(2) The copy of the loan application submitted to the owner in satisfaction of the preclosing disclosure requirement must be the most current version at the time the document is delivered. The lender is not obligated to provide another copy of the loan application if the only difference from the version previously provided to the owner is formatting. The lender is not obligated to give another copy of the loan application if the information contained on the more recent application is the same as that contained on the application of which the owner has a copy. **Our Comment:** In the preamble published with new §153.13(2) (November 7, 2008 issue of the Texas Register), the Finance Commission states that correcting minor errors in the loan application would require the lender to provide the corrected loan application to the owner prior to closing "because such application[s] would contain different information." This means that if the information contained in the most current version of the loan application ("final application") differs by addition, deletion, change or correction from the information contained in the copy of the application previously provided to the owner, the lender must provide the owner with a copy of the final loan application prior to closing. In order not to run afoul of the preamble statement quoted above, we recommend that lenders always provide the owner a copy of the final loan application prior to closing.

(3) The lender must deliver to the owner a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing.

(A) For a closed-end equity loan, the lender may satisfy this requirement by delivering a properly completed closing disclosure under Regulation Z, 12 C.F.R. §1026.19(f) and §1026.38.

(B) For a home equity line of credit, the lender may satisfy this requirement by delivering properly completed account-opening disclosures under Regulation Z, 12 C.F.R. §1026.6(a).

(4) Bona fide emergency.

(A) An owner may consent to receive the preclosing disclosure or a modification of the preclosing disclosure on the date of closing in the case of a bona fide emergency occurring before the date of the extension of credit. An equity loan secured by a homestead in an area designated by Federal Emergency Management Agency (FEMA) as a disaster area is an example of a bona fide emergency if the homestead was damaged during FEMA's declared incident period.

(B) To document a bona fide emergency modification, the lender should obtain a written statement from the owner that:

(i) describes the emergency;

(ii) specifically states that the owner consents to receive the preclosing disclosure or a modification of the preclosing disclosure on the date of closing;

(iii) bears the signature of all of the owners entitled to receive the preclosing disclosure; and

(iv) affirms the owner has received notice of the owner's right to receive a final itemized disclosure containing all actual fees, points, costs, and charges one day prior to closing.

(5) Good cause. An owner may consent to receive the preclosing disclosure or a modification of the preclosing disclosure on the date of closing if another good cause exists.

(A) Good cause to modify the preclosing disclosure or to receive a subsequent disclosure modifying the preclosing disclosure on the date of closing may only be established by the owner.

(i) The term "good cause" as used in this section means a legitimate or justifiable reason, such as financial impact or an adverse consequence.

(ii) At the owner's election, a good cause to modify the preclosing disclosure may be established if:

(I) the modification does not create a material adverse financial consequence to the owner; or

(II) a delay in the closing would create an adverse consequence to the owner.

(iii) The term "de minimis" as used in this section means a very small or insignificant amount.

(B) At the owner's election, a de minimis good cause standard may be presumed if:

(i) the total actual disclosed fees, costs, points, and charges on the date of closing do not exceed in the aggregate more than the greater of $100 or 0.125 percent of the principal amount of the loan (e.g. 0.125 percent on a $80,000 principal loan amount equals $100) from the initial preclosing disclosure; and

(ii) no itemized fee, cost, point, or charge exceeds more than the greater of $100 or 0.125 percent of the principal amount of the loan than the amount disclosed in the initial preclosing disclosure.

Our Comment: In the preamble to the revision of §153.13, published in the June 23, 2006 issue of the Texas Register, the Finance Commission stated that revised "§153.13 would allow the lender to reduce fees or closing costs by any amount without postponing the date of closing." … "[A] reduction in fees would not trigger the need for an owner's consent to forego a delay in the closing date".

(C) To document a good cause modification of the disclosure, the lender should obtain a written statement from the owner that:

(i) describes the good cause;

(ii) specifically states that the owner consents to receive the preclosing disclosure on the date of closing;

(iii) bears the signature of all of the owners entitled to receive the preclosing disclosure; and

(iv) affirms the owner has received notice of the owner's right to receive a final itemized disclosure containing all fees, costs, points, or charges one day prior to closing.

(6) An equity loan may be closed at any time during normal business hours on the next business day following the calendar day on which the owner receives the preclosing disclosure or any calendar day thereafter.

(7) The owner maintains the right of rescission under Section 50(a)(6)(Q)(viii) even if the owner exercises an emergency or good cause modification of the preclosing disclosure.

Our Comment: Even if the owner exercises an emergency or good cause modification of the preclosing disclosure, §1026.19(f) of Regulation Z requires that the owner and the owner's spouse receive its mandated closing disclosure, absent certain circumstances specified in §1026.19(f)(1)(iv), no later than three business days before closing and also requires a new three business day waiting period under certain circumstances specified in §1026.19(f)(2)(ii).

17. <u>One-Year Prohibition</u>

Texas Constitution Article XVI, Section 50(a)(6)(M)(iii)

7 TAC 153.14

(A) Commentary

An equity loan may not be closed before the first anniversary of the closing date of any other equity loan secured by the same homestead property, except for a refinance cure under the cure provision of Section 50(a)(6)(Q)(x)(f). "Closing date" is the date the previous equity loan documentation was signed. This provision prohibits refinancing the previous equity loan before one year has elapsed since the loan's closing date or, if the previous equity loan has been paid off, closing a new equity loan on the same homestead property before one year has elapsed since the previous equity loan's closing date. Further, since an owner may have only one equity loan secured by the same homestead at any one time, then, subject to the one year prohibition, any previous equity loan would be required to be paid off or refinanced by the subsequent equity loan.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.14. One Year Prohibition: Section 50(a)(6)(M)(iii). An equity loan may not be closed before the first anniversary of the closing date of any other equity loan secured by the same homestead property.

(1) Section 50(a)(6)(M)(iii) prohibits an owner who has obtained an equity loan from:

(A) refinancing the equity loan before one year has elapsed since the loan's closing date; or

(B) obtaining a new equity loan on the same homestead property before one year has elapsed since the previous equity loan's closing date, regardless of whether the previous equity loan has been paid in full. **<u>Our Comment</u>:** There has been much confusion in the lending community regarding this requirement. In order to clarify this issue, please note that the one year prohibition is limited to the <u>same</u> homestead – it does not apply to a new homestead acquired by the consumer – and it starts from the <u>closing</u> date of the prior home equity loan, not the <u>recording</u> date of the equity loan agreement.

(2) Section 50(a)(6)(M)(iii) does not prohibit modification of an equity loan before one year has elapsed since the loan's closing date. A modification of a home equity loan occurs when one or more terms of an existing equity loan is modified, but the note is not satisfied and replaced. A home equity loan and a subsequent modification will be considered a single transaction. The home equity requirements of Section 50(a)(6) will be applied to the original loan and the subsequent modification as a single transaction.

(A) A modification of an equity loan must be agreed to in writing by the borrower and lender, unless otherwise required by law. An example of a modification that is not required to be in writing is the modification required under the Servicemembers Civil Relief Act, 50 U.S.C. app. §§501-597b.

(B) The advance of additional funds to a borrower is not permitted by modification of an equity loan.

(C) A modification of an equity loan may not provide for new terms that would not have been permitted by applicable law at the date of closing of the extension of credit.

(D) The 3% fee cap required by Section 50(a)(6)(E) applies to the original home equity loan and any subsequent modification as a single transaction. [note this provision should be read as "2%" in light of SJR 60]
Our Comment: See *Sims v. Carrington Mortg. Services, L.L.C.,* 440 S.W.3d 10, (Tex. May 16, 2014, reh'g denied Oct. 3, 2014), discussed fully under "Home Equity Modifications" of the Additional Points of Case Law section towards the end of this memo concerning the modification definition in §153.14(2) and the impermissible advance of additional funds under §153.14(2)(B).

18. Location of Closing

Texas Constitution Article XVI, Section 50(a)(6)(N)

7 TAC 153.15

(A) Commentary

An equity loan may be closed only at the permanent physical address of the office or branch office of *the* lender, *an* attorney, or *a* title company. This is to insure that the closing occurs at an authorized physical location other than the homestead. If a power of attorney is to be used on behalf of the owner or owner's spouse, the power of attorney must be signed at one of the above authorized physical locations. Before closing an equity loan under a power of attorney, check with the title company because some title companies will not insure an equity loan if a power of attorney is used for the owner or owner's spouse.

(B) Case Law

1. Definition of Title Company. *Rooms With A View, Inc. v. Private National Mortgage Association*, 7 S.W.3d 840 (Tex.App.—Austin 1999, pet. denied 2000) , cert. denied, 531 U.S. 826, 121 S.Ct. 72, 148 L.Ed.2d 36, 69 USLW 3002 (U.S. Oct. 02, 2000) (NO. 99-2048) sheds some light on where an equity loan can close. In this case, the appellate court defined the term "title company" to mean "a title insurer or an agent of a title insurer" and held that "[n]othing suggests the legislature intended 'title company' to refer to an entity performing only title abstractions." Although the *Rooms* case involved a home improvement loan under Section 50(a)(5) and not an equity loan under Section 50(a)(6), both sections use the term "title company" in limiting the offices for document execution (home improvement contracts under subsection 50(a)(5)(D)) or loan closing (equity loans under subsection 50(a)(6)(N)).

2. Power of Attorney. ***Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013), *supplemented on* January 24, 2014**, limits the locations where powers of attorney may be executed in connection with home equity loans to that of the office of the lender, an attorney, or a title company.

(C) Regulatory Interpretation and Comments

§153.15. Location of Closing: Section 50(a)(6)(N). An equity loan may be closed only at an office of the lender, an attorney at law, or a title company. The lender is anyone authorized under Section 50(a)(6)(P) that advances funds directly to the owner or is identified as the payee on the note.

(1) An equity loan must be closed at the permanent physical address of the office or branch office of the lender, attorney, or title company. The closing office must be a permanent physical address so that the closing occurs at an authorized physical location other than the homestead.

(2) Any power of attorney allowing an attorney-in-fact to execute closing documents on behalf of the owner or the owner's spouse must be signed by the owner or the owner's spouse at an office of the lender, an attorney at law, or a title company. A lender may rely on an established system of verifiable procedures to evidence compliance with this paragraph. For example, this system may include one or more of the following:

(A) a written statement in the power of attorney acknowledging the date and place at which the power of attorney was executed;

(B) an affidavit or written certification of a person who was present when the power of attorney was executed, acknowledging the date and place at which the power of attorney was executed; or

(C) a certificate of acknowledgement signed by a notary public under Chapter 121, Civil Practice and Remedies Code, acknowledging the date and place at which the power of attorney was executed.
Our Comment: The Finance Commission has informally stated that §153.15(2) does not provide the only methods through which a lender can evidence compliance. (*See* December 26, 2014, *Texas Register*.)

(3) The consent required under Section 50(a)(6)(A) must be signed by the owner and the owner's spouse, or an attorney-in-fact described by paragraph (2) of this subsection, at an office of the lender, an attorney at law, or a title company. **Our Comment:** To address a concern about executing the consent at one location and sending it to another, the Finance Commission has informally stated that "[t]he amendments [§153.15(3)] do not prohibit any party from sending documents from one place to another, as long as the documents are executed at an authorized location." (*See* July 4, 2014, *Texas Register*.)

19. Rate of Interest

Texas Constitution Article XVI, Section 50(a)(6)(O)

7 TAC 153.16

(A) Commentary

Lenders may contract for and receive any fixed or variable rate of interest authorized under statute. Equity loans must amortize and contribute to the amortization of principal. Variable rate loans, which are defined as loans in which the lender can contractually adjust the interest rate after closing in accordance with an *external index*, must have substantially equal payments between each interest rate adjustment that pay the accrued interest and a portion of the principal. Discounted variable rate loans are allowed.

(B) Case Law:

Adjustable Rate Home Equity Loans

1. *Cerda v. 2004-EQR1 L.L.C.*, 612 F.3d 781 (5th Cir. 2010) reconciled the tension between Section 50(a)(6)(L) (requires periodic payments be substantially equal in amount) and Section 50(a)(6)(O) (authorizes variable rates of interest) by turning for guidance to their informal interpretations in the Regulatory Commentary on Equity Lending Procedures and their formal interpretations in Interpretations §§153.11 and 153.16, noting that the Regulatory Commentary and these Interpretations contain essentially the same construction. The court found the Regulatory Commentary and these Interpretations persuasive authority, in that their construction gives effect to both Sections, and held that the loan, by complying with the construction contained in the Regulatory Commentary and these Interpretations, did not in that regard violate Section 50(a)(6).

2. *Pelt v. U.S. Bank Trust National Association*, 2002 WL 31006139 (N.D. Tex.—Dallas Division 2002) involved the Pelts' claim that their home equity loan violated Section 50(a)(6)(L)'s substantially equal payment requirement because they paid $12,000 in discount points at closing, which amount was not substantially equal to the $2,150 monthly installment called for in the note. The court interpreted Section 50(a)(6)(L) to apply only to repayment of a loan, not prepayments (*e.g.*, Pelts' discount points paid at closing), and, thus, Section 50(a)(6)(L) does not require discount points (which are a prepayment of interest) to be substantially equal to the scheduled periodic payments.

(C) Regulatory Interpretation and Comments

§153.16. Rate of Interest: Section 50(a)(6)(O). A lender may contract for and receive any fixed or variable rate of interest authorized under statute.

(1) An equity loan that provides for interest must comply with constitutional and applicable law. Interest rates on certain first mortgages are not limited on loans subject to the federal Depository Institutions Deregulation and Monetary Control Act of 1980 and the Alternative Mortgage Transaction Parity Act. Chapter 342 of the Texas Finance Code provides for a maximum rate on certain secondary mortgage loans. Chapter 124 of the Texas Finance Code and federal law provide for maximum rates on certain mortgage loans made by credit unions. These statutes operate in conjunction with Section 50(a) and other constitutional sections.

(2) An equity loan must amortize and contribute to amortization of principal.

(3) The lender may contract to vary the scheduled installment amount when the interest rate adjusts on a variable rate equity loan. A variable-rate loan is a mortgage in which the lender, by contract, can adjust the mortgage's interest rate after closing in accordance with an external index.

(4) The scheduled installment amounts of a variable rate equity loan must be:

(A) substantially equal between each interest rate adjustment; and

(B) sufficient to cover at least the amount of interest scheduled to accrue between each payment date and a portion of the principal.

Our Comment: See also §153.11(3) in Constitutional Provision 13 above.

(5) An equity loan agreement may contain an adjustable rate of interest that provides a maximum fixed rate of interest pursuant to a schedule of steps or tiered rates or provides a lower initial interest rate through the use of a discounted rate at the beginning of the loan. **Our Comment:** Although not stated, implicit in this Interpretation is that step-rate and discounted ARM loans also must comply with the requirements of §153.16 (1) through (4).

20. Authorized Lenders

Texas Constitution Article XVI, Section 50(a)(6)(P)

7 TAC 153.17

(A) Commentary

An equity loan must be made by one of the following authorized lenders: a bank, savings and loan association, or credit union doing business under the laws of Texas or the United States, including a subsidiary of a bank, savings and loan association, savings bank or credit union; a Federally chartered lending instrumentality; an FHA authorized lender (full eagle); a person licensed under Chapter 342 of the Texas Finance Code; a registered mortgage banker; a licensed mortgage company; a person related to the homestead property owner within the second degree of affinity or consanguinity; and a person who sold the homestead property to the current owner and provided all or part of the purchase financing.

(B) Case Law:

***In re Quigley*, 2011 WL 1045224 (Bankr. N.D. Tex. 2011).** In this adversary proceeding, the bankruptcy court held that pursuant to Section 50(a)(6)(Q)(xi) a holder of a home equity loan forfeits all principal and interest on the loan if the lender who made the loan is not a person authorized under Section 50(a)(6)(P). Moon Shadow Investments (the note holder by assignment from Quigley, the originating lender) asserted a good faith purchaser for value status as a defense against the application of Section 50(a)(6)(Q)(xi). Applying a straight forward reading of Section 50(a)(6)(Q)(xi), which reads, in pertinent part, that "**any holder** of the note … shall forfeit all principal and interest … if the [home equity loan] is made by a person other than a person described under [Section 50(a)(6)(P)],"

(emphasis added), the court held that Section 50(a)(6)(Q)(xi) applies to a note holder of a home equity loan regardless of its status as holder. In a footnote to its opinion, the court stated that Moon Shadow was not without a remedy—because Quigley endorsed the note without limiting recourse when he assigned it, Moon Shadow could recover under the note from Quigley.

(***Note:*** *This bankruptcy decision has no precedential value; was decided prior to the Texas Supreme Court's* Garofolo and Wood *decisions; and in Footnote 12 to the* Quigley *opinion, contains reasoning similar to the reasoning in the* Garofolo *opinion regarding foreclosure eligibility and the availability of forefieture.*)

<u>(C) Regulatory Interpretation and Comments</u>

[Note: This Interpretation has been partially superseded by recent changes to the Texas Constitution by Senate Joint Resolution 60 (SJR 60), effective for equity loans closing after January 1, 2018, and until a new Regulatory Interpretation is issued, should be read in light of those changes. SJR 60 amended Section 50(a)(6)(P) by (1) amending subsection (P)(i) to include a subsidiary of a bank, savings and loan association, savings bank, or credit union and (2)amending subsection (P)(vi) by substituting the terms "mortgage banker" and "mortgage company" for the term "mortgage broker" to comply with current Texas statutory terminology.]

§153.17. Authorized Lenders: Section 50(a)(6)(P). An equity loan must be made by one of the following that has not been found by a federal regulatory agency to have engaged in the practice of refusing to make loans because the applicants for the loans reside or the property proposed to secure the loans is located in a certain area: a bank, savings and loan association, savings bank, or credit union doing business under the laws of this state or the United States; a federally chartered lending instrumentality or a person approved as a mortgagee by the United States government to make federally insured loans; a person licensed to make regulated loans, as provided by statute of this state; a person who sold the homestead property to the current owner and who provided all or part of the financing for the purchase; a person who is related to the homestead owner within the second degree of affinity and consanguinity; or a person regulated by this state as a mortgage broker.

(1) An authorized lender under Texas Finance Code, Chapter 341 must meet both constitutional and statutory qualifications to make an equity loan.

(2) A HUD-approved mortgagee is a person approved as a mortgagee by the United States government to make federally insured loans for purposes of Section 50(a)(6)(P)(ii). Loan correspondents to a HUD-approved mortgagee are not authorized lenders of equity loans unless qualifying under another provision of Section 50(a)(6)(P). **<u>Our Comment</u>:** This also excludes lenders approved only to make VA loans unless they qualify under another subsection of Section 50(a)(6)(P). ***Note:*** Effective May 20, 2010, HUD no longer approves applicants as loan correspondents.

(3) A person who is licensed under Texas Finance Code, Chapter 156 is a person regulated by this state as a mortgage broker for purposes of Section 50(a)(6)(P)(vi).

(4) A person who is licensed under Texas Finance Code, Chapter 342 is a person licensed to make regulated loans for purposes of Section 50(a)(6)(P)(iii). If a person is not described by Section

50(a)(6)(P)(i), (ii), (iv), (v), or (vi), then the person must obtain a license under Texas Finance Code, Chapter 342 in order to be authorized to make an equity loan under Section 50(a)(6)(P)(iii).

21. <u>Limitation on Application of Proceeds</u>

Texas Constitution Article XVI, Section 50(a)(6)(Q)(i)

7 TAC 153.18

<u>(A) Commentary</u>

The lender may not require the owner to apply the proceeds of an equity loan to repay other debt except debt secured by the homestead or debt to another lender or creditor. For example, a lender may not make an equity loan to an owner and require that the proceeds from that loan be used to repay unsecured debt to the lender. However, a lender may require the repayment of unsecured or other debt owed to another lender or creditor.

<u>(B) Case Law:</u>

Paying Off Unsecured Debt

<u>Section</u> 50(a)(6)(Q)(i) states, "the owner of the homestead is not required to apply the proceeds of the extension of credit to repay another debt except debt secured by the homestead or debt to another lender."

1. Debt to Another Lender. Prior to the 2003 amendments to the 12-day notice in subsection 50(g), the notice stated that the home equity loan "must 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." This language difference between Section 50(a)(6)(Q)(i) and the Section 50(g) notice caused confusion regarding what unsecured debt the lender could require the owner to pay with home equity proceeds and was addressed in the two cases summarized below, in which the plaintiffs alleged that they were improperly required to use equity loan proceeds to pay third-party unsecured creditors:

•*Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353 (Tex. 2000), involved a conflict between the language in the Section 50(g) notice and the language in Section 50(a)(6)(Q)(i). In spite of this conflict, the Supreme Court held "that under the Texas Constitution, a home-equity lender may require a borrower to use loan proceeds to pay third-party debt that is not secured by the homestead." (*See also* a summary of the *Stringer* decision in Constitutional Provision No. 15 above.

•*McMahan v. Long Beach Mortgage Co.*, 235 F.3d 1340 (Table of Decisions Without Reported Opinions), 2000 WL 1672729 (5th Cir. 2000), unpublished opinion (No. 99-51001), held that the resolution of the language conflict between Sections 50(a)(6)(Q)(i) and 50(g) was controlled by the Texas Supreme Court's decision in the *Stringer* case, *supra*.

The 2003 amendments changed the 12-day notice language in Section 50(g) to read as follows: "not require you to apply the proceeds to another debt except a debt that is secured by your home or owed to another lender." This amended language finally resolved the language conflict between subsection 50(a)(6)(Q)(i) and the 12-day notice in subsection 50(g)

2. Debt to Same Lender. ***Box v. First State Bank, Bremond S.S.B.*****, 340 B.R. 782 (S.D. Tex.—Houston Division, 2006)**, involved the issue whether subsection 50(a)(6)(Q)(i) allows a borrower

voluntarily to agree to use home equity loan proceeds to repay a prior unsecured debt to the same lender if the loan would not have been made unless the borrower agreed to this restricted use. At the bank's suggestion, plaintiffs obtained a home equity loan from the bank to repay an unsecured preexisting debt owed to the bank. Plaintiffs testified they voluntarily closed the loan to maintain a good relationship with the bank, hoping to obtain future loans. The bank testified it would not have made the loan if the proceeds had not been paid to the bank. The court concluded that the bank "required" the loan proceeds to be applied to its unsecured prior debt in violation of Section 50(a)(6)(Q)(i) by conditioning approval of the loan on that basis, notwithstanding plaintiffs' voluntary consent to apply for the loan and to use the loan funds for that purpose.

Chambers v. First United Bank & Trust Co.**, 419 B.R. 652, 2009 WL 3245420 (Bankr. E.D. Tex.—Sherman Division 2009) *aff'd by* 2013 WL 5915238 (5th Cir. 2013).** The debtors were-in default on their home equity loan and on a loan they guaranteed for purchase of their personal vehicles, and were unable to cure the overdrafts on their bank account. At the lender's suggestion, who also threatened foreclosure of the home equity loan, legal action to collect the overdrafts, and repossession of the vehicles, the debtors refinanced the home equity loan with a larger home equity loan with the lender to cure the above deficiencies. The debtors alleged that their refinance home equity loan violated Section 50(a)(6)(Q)(i) (part of the loan proceeds were used to pay the bank account overdrafts) and Section 50(a)(6)(A) (their consent to the refinance home equity loan was not voluntary).

The bankruptcy court rejected the Section 50(a)(6)(Q)(i) claim, stating "the fact that the home equity loan satisfied the overdraft in the … account flowed naturally from the fact that the [debtors] used that account [personally] as well as the fact that the account was materially overdrawn when the funds were deposited. The [debtors] could have, but did not, open a [new] bank account and demand that the proceeds of the home equity loan be placed in the new account."

As for the Section 50(a)(6)(A) claim, the court relied on Texas case law that a contract may be invalid or unenforceable due to economic duress where undue or unjust advantage has been taken of [the debtors'] economic necessity or distress to coerce [the debtors] into making the [loan], but that the economic duress must be based on the acts or conduct of the [lender] and not merely on the financial circumstances of the [debtor], and held that the refinance home equity loan was not the result of coercion, fraud, or undue influence by the lender, stating "[i]f the Court were to follow the [debtors'] reasoning, no Texas homeowner would be able to refinance his current home loan if that loan was in default." *(**Note:** This bankruptcy decision has no precedential value, but is persuasive as applied to the facts of this case.)*

(C) Regulatory Interpretation and Comments

§153.18. Limitation on Application of Proceeds: Section 50(a)(6)(Q)(i). An equity loan must be made on the condition that the owner of the homestead is not required to apply the proceeds of the extension of credit to repay another debt except debt secured by the homestead or debt to another lender.

(1) The lender may not require an owner to repay a debt owed to the lender, unless it is a debt secured by the homestead. The lender may require debt secured by the homestead or debt to another lender or creditor be paid out of the proceeds of an equity loan.

(2) An owner may apply for an equity loan for any purpose. An owner is not precluded from voluntarily using the proceeds of an equity loan to pay on a debt owed to the lender making the equity loan. **Our Comment:** In this instance, assuming a lender is willing to take the risk, we recommend that: (1) the equity lender obtain a signed acknowledgment from the owner documenting this voluntary payment; (2) the non-homestead debt to the equity lender not be reflected on the Closing Disclosure; and (3) the equity loan proceeds for this voluntary payment be disbursed directly to the homestead owner and not be funded back to the equity lender by the title company closing the transaction. See also, *Box v. First State Bank, Bremond S.S.B.*, in Case Law No. 2 above.

22. No Assignment of Wages

Texas Constitution Article XVI, Section 50(a)(6)(Q)(ii)

(A) Commentary

An equity loan must be made on the condition that the owner not assign wages as security for the equity loan. Court decisions have upheld that the standard FNMA/FHLMC "home equity loan" documents do not contain any such assignment.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

None

23. No Blanks in Any Instrument

Texas Constitution Article XVI, Section 50(a)(6)(Q)(iii)

7 TAC 153.20

(A) Commentary

An equity loan must be made on the condition that the owner not sign any instrument in which blanks relating to substantive terms contained in the instrument are left to be filled in. The term "instrument" means a document that creates or alters a legal obligation of a party. This Section is intended to prohibit someone completing blanks after the owner has signed the instrument, thereby altering a party's obligation created in the instrument.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.20. No Blanks in Any Instrument: Section 50(a)(6)(Q)(iii). A home equity loan must be made on the condition that the owner of the homestead not sign any instrument in which blanks are left to be filled in.

(1) This Section of the Constitution prohibits the owner of the homestead from signing any instrument in which blanks are "left to be filled in". This Section is intended to prohibit a person other than the owner from completing one or more blanks in an instrument after the owner has signed the instrument and delivered it to the lender, thereby altering a party's obligation created in the instrument. Not all documents or records executed in connection with an equity loan are instruments, and not all blanks contained in an instrument are "blanks that are left to be filled in" as contemplated by this Section.

(2) As used in this Section, the term instrument means a document or record that creates or alters a legal obligation of a party. A disclosure required under state or federal law is not an instrument if the disclosure does not create or alter the obligation of a party.

(3) If at the time the owner signs an instrument, a blank is completed or box checked which indicates the owner's election to select one of multiple options offered (such as an election to select a fixed rate instead of an adjustable rate) and the owner therefore by implication has excluded the non-selected options, the instrument does not contain "blanks left to be filled in" when the non-selected option is left blank.

24. No Confession of Judgment or Power of Attorney
Texas Constitution Article XVI, Section 50(a)(6)(Q)(iv)

(A) Commentary

An equity loan must be made on the condition that the owner not sign a confession of judgment or power of attorney to the lender or to a third party to confess judgment or to appear for the owner in a judicial proceeding. A confession of judgment is the owner's written agreement to the entry of a judgment against the owner upon the owner's default. Courts have upheld that the standard FNMA/FHLMC "home equity loan" documents do not contain any such provisions.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

None

25. Copies of Documents

Texas Constitution Article XVI, Section 50(a)(6)(Q)(v)

7 TAC 153.22

(A) Commentary

A lender is required at closing, to provide the owner with a copy of the final loan application (usually the 1003) and all executed documents signed by the owner at closing. One copy of these documents may be provided to married owners. The lender is not required to give the owner copies of documents signed by the owner prior to or after closing.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.22. Copies of Documents: Section 50(a)(6)(Q)(v). At closing, the lender must provide the owner with a copy of the final loan application and all executed documents that are signed by the owner at closing in connection with the equity loan. One copy of these documents may be provided to married owners. This requirement does not obligate the lender to give the owner copies of documents that were signed by the owner prior to or after closing.

26. Security Instrument Disclosure

Texas Constitution Article XVI, Section 50(a)(6)(Q)(vi)

(A) Commentary

The security instrument securing the equity loan must contain a disclosure that the equity loan is an equity loan defined by Section 50(a)(6), Article XVI, Texas Constitution. "THIS SECURITY INSTRUMENT SECURES AN EXTENSION OF CREDIT THAT IS THE TYPE OF CREDIT DEFINED BY SUBSECTION (a) (6) OF SECTION 50, ARTICLE XVI OF THE TEXAS CONSTITUTION."

(B) Case Law

None

(C) Regulatory Interpretation and Comments

None

27. Release or Assignment of Lien

Texas Constitution Article XVI, Section 50(a)(6)(Q)(vii)

7 TAC 153.24

(A) Commentary

Within a "reasonable time" after payment in full of the equity loan, and without charge, the lender must either: (1) cancel and return the promissory note to the owner and give the owner a release of lien document, in recordable form, or (2) provide the owner with a copy of the note endorsement and the document assigning the lien to the new lender that is refinancing the equity loan. A "reasonable time" is 30 days. An affidavit of lost note, or equivalent, may be returned to the owner in lieu of the original note, if the original note has been lost or imaged.

(B) Case Law

***Garofolo v. Ocwen Loan Servicing, L.L.C*, 497 S.W.3d 474 (Tex. 2016)** held that the proper remedy for a lender's failure to provide a release of lien is a lawsuit for specific performance and actual damages. This case is discussed fully in Constitutional Provision 33.

(C) Regulatory Interpretation and Comments

§153.24. Release of Lien: Section 50(a)(6)(Q)(vii). The lender must cancel and return the note to the owner and give the owner a release of lien or a copy of an endorsement and assignment of the lien to another lender refinancing the loan within a reasonable time after termination and full payment of the loan. The lender or holder, at its option, may provide the owner a release of lien or an endorsement and assignment of the lien to another lender refinancing the loan.

(1) The lender will perform these services and provide the documents required in 50(a)(6)(Q)(vii) without charge.

(2) This section does not require the lender to record or pay for the recordation of the release of lien.

(3) Thirty days is a reasonable time for the lender to perform the duties required under this section.

(4) An affidavit of lost or imaged note, or equivalent, may be returned to the owner in lieu of the original note, if the original note has been lost or imaged.

28. Right of Rescission

Texas Constitution Article XVI, Section 50(a)(6)(Q)(viii)

7 TAC 153.25

(A) Commentary

The owner and/or the owner's spouse may rescind an equity loan within three days after the equity loan is made without penalty or charge. Compliance with the right of rescission provisions in the Truth-in-Lending Act and Regulation Z (which requires three "business days") satisfies this requirement if the notices required by the Truth-in-Lending Act and Regulation Z are given to all owners and to each owner's spouse.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.25. Right of Rescission: Section 50(a)(6)(Q)(viii). The owner of the homestead and any spouse of the owner may, within three days after the extension of credit is made, rescind the extension of credit without penalty or charge.

(1) This provision gives the owner's spouse, who may not be in record title or have community property ownership, the right to rescind the transaction.

(2) The owner and owner's spouse may rescind the extension of credit within three calendar days. If the third calendar day falls on a Sunday or federal legal public holiday then the right of rescission is extended to the next calendar day that is not a Sunday or federal legal public holiday.

(3) A lender must comply with the provisions of the Truth-in-Lending Act permitting the borrower three business days to rescind a mortgage loan in applicable transactions. Lender compliance with the right of rescission procedures in the Truth-in-Lending Act and Regulation Z, satisfies the requirements of this section if the notices required by Truth-in-Lending and Regulation Z are given to each owner and to each owner's spouse.

Our Comment: A state-specific rescission notice **should not be given** in addition to the federal rescission notice mandated by Regulation Z for the following reasons: (1) All Texas home equity loans are subject to the federal right of rescission required by Regulation Z (*see §§1026.23(a), (b) and (f)*). (2) The federal rescission notice mandated by Regulation Z controls notwithstanding conflicting state law (*see §1026.28(a)*). (3) The Texas rescission period is three calendar days whereas the federal rescission period is three business days. The Texas rescission period runs concurrently with the federal rescission period, and does not conflict with it (s*ee*, *Rooms With A View, Inc. v. Private National Mortgage Association*, 7 S.W.3d 840 (Tex. App.—Austin 1999, no pet.)). (4) Section 50(a)(6)(Q)(viii) does not require a rescission notice. (5) There is federal case law to

support the position that giving inconsistent rescission notices voids the required federal rescission notice and thereby allows the consumer up to three years to rescind the loan. *See*, *Williams v. Empire Funding Corp.*, 109 F.Supp.2d 352 (E.D. Pa., 2000); *Jones v. Ameriquest Mortgage Co.*, 2006 WL 273545 (N.D. Ill.—Eastern Division, 2006); and *Hamm v. Ameriquest Mortgage Co.*, 506 F.3d 525 (7th Cir. 2007), cert. denied, 552 U.S. 1280, 128 S.Ct. 1706, 170 L.Ed.2d 513, 76 USLW 3406, 76 USLW 3508, 76 USLW 3510 (U.S. Mar. 24, 2008) (NO. 07-941). (6) §153.25(3) provides that compliance with the right of rescission procedures in Regulation Z satisfies the state rescission requirements of Section 50(a)(6)(Q)(viii).

29. Fair Market Value Determination

Texas Constitution Article XVI, Section 50(a)(6)(Q)(ix)

(A) Commentary

The owner and the lender must sign a written acknowledgement as to the fair market value of the homestead on the date the equity loan is made. Typically, this is a separate form signed by the lender and the owner at closing, an example of which is set forth on page F-11 in this manual. If the written acknowledgment of fair market value is not signed at closing by the lender or borrower, this is a violation by the lender under Section 50(a)(6)(Q)(x) that must be timely corrected post-closing to make the loan valid (see Rule 32(d) below).

(B) Case Law

See ***Wells Fargo Bank, N.A. v. Leath, 425 S.W.3d 525 (Tex. App.—Dallas Jan. 6, 2014)*** under the Case Law section of Constitutional Provision 2 - "Limitation of Equity Loan Amount" above regarding appraisal safe harbor under Section 50(h).

(C) Regulatory Interpretation and Comments

None

30. Forfeiture of Principal and Interest for Lender's Failure
Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)

7 TAC 153.91 – Adequate Notice of Failure

7 TAC 153.92 – 60 Day Cure Period

7 TAC 153.93 – Methods of Notification

(A) Commentary

A lender or any holder of the equity loan note forfeits all principal and interest if the lender or holder fails to comply with the lender's or holder's obligations under the equity loan and does not correct that failure by the 60th day after the date the lender or holder is notified by the borrower of the lender's failure to comply. There is no requirement that the notice to be in writing; however, the notice must include a reasonable identification of the borrower and the loan, and a reasonable description of the alleged failure to comply. The notice is not required to state the particular provision of Section 50(a)(6) that was violated. At closing, the lender or holder may, but is not required to, make a reasonably conspicuous designation in writing of the location where the borrower may deliver a written or oral notice of a violation. For a discussion of the pros and cons regarding the borrower's method of notification and whether to provide the borrower with a specific address for such notification, see our Clients and Friends Memorandum on page 121 in this manual. The 60-day cure period is counted in calendar days. Day one of the 60-day cure period is the day after the lender or holder receives the borrower's notice. If day 60 is a Sunday or federal legal public holiday, the 60-day cure period is extended to include the next day that is not a Sunday or federal legal public holiday.

(B) Case Law

Failure to Notify. *Curry v. Bank of America, N.A.*, 232 S.W.3d 345 (Tex.App.—Dallas, 2007, review denied 2008), involved a home equity loan that closed at the Currys' place of business, which was not a location authorized by subsection 50(a)(6)(N). Prior to filing suit, the Currys notified the bank by letter that the loan did not comply with section 50(a), but did not specify the violation. The Currys filed suit and again alleged generally that the loan did not comply with the home equity provisions of the constitution but did not specify how. After the bank independently determined the loan did not close at an authorized location and offered to cure the violation by refinancing the loan pursuant to 50(a)(6)(Q)(x)(f), the Currys asserted, for the first time, specific violations—failure to close at a required location, failure to receive a copy of all documents signed by the Currys relating to the loan, the inclusion of a prepayment penalty and an improper acceleration clause in the loan documents. The appellate court determined that the Currys did not properly notify the bank of the violations because they did not describe how the loan was non-compliant. Although not controlling because it became effective after the suit was filed, the court favorably mentioned Interpretation §153.91 (*see* Regulatory Interpretation section of "30. Forfeiture of Principal and Interest for Lender's Failure" above), which provides that notice is adequate under the cure provision of Section 50(a)(6)(Q)(x) if it "include[s] a reasonable description of the alleged failure to comply."

***Wells Fargo Bank, N.A. v. Leath*, 425 S.W.3d 525 (Tex. App.—Dallas Jan. 6, 2014)**, discussed fully in Constitutional Provision 2 above involved a case where the notice satisfied the requirement of §153.91 and §153.93.

Methods of Notification. *Puig v. Citibank, N.A.*, 2012 WL 1835721 (N.D. Tex. 2012) *aff'd* 514 F. App'x 483, 2013 WL 657676 (5th Cir. 2013). Plaintiffs alleged several Section 50(a)(6) violations in the closing of their home equity loan. Defendant claimed the plaintiffs did not provide the notice of failure to comply required by Section 50(a)(6)(Q)(x); specifically, that plaintiffs failed to give notice in accordance with the terms set forth in the Deed of Trust, which required notice of noncompliance be given by first class mail to the lender's address (*§153.93(a) permits a lender, at closing, to designate in writing the location where the borrower may deliver a notice of violation*). Relying on §153.93(f), which provides that if the borrower uses another location or method of delivery "the borrower has the burden of proving that the location and method of delivery were reasonably calculated to put the lender or holder on notice of the default," the district court stated that plaintiffs had met the burden in §153.93(f) by the filing and serving of a lawsuit that described specific violations of Section 50(a)(6), but, based on the fact, ruled against the plaintiffs on the alleged Section 50(a)6) violations.

(C) Regulatory Interpretation and Comments

§153.91. Adequate Notice of Failure to Comply.
(a) A borrower notifies a lender or holder of its alleged failure to comply with an obligation by taking reasonable steps to notify the lender or holder of the alleged failure to comply. The notification must include a reasonable:

(1) identification of the borrower;

(2) identification of the loan; and

(3) description of the alleged failure to comply.

(b) A borrower is not required to cite in the notification the section of the Constitution that the lender or holder allegedly violated.

Our Comment: This Interpretation does not require the notice to be in writing nor does it expressly require the borrower to identify the loan as a home equity loan. (*See* The Finance Commission's preamble to this Interpretation in the November 5, 2004 issue of the *Texas Register*.)

§153.92. Counting the 60-Day Cure Period.
(a) For purposes of Section 50(a)(6)(Q)(x), the day after the lender or holder receives the borrower's notification is day one of the 60-day period. All calendar days thereafter are counted up to day 60. If day 60 is a Sunday or federal legal public holiday, the period is extended to include the next day that is not a Sunday or federal legal public holiday.

(b) If the borrower provides the lender or holder inadequate notice, the 60-day period does not begin to run.

§153.93. Methods of Notification.
(a) At closing, the lender or holder may make a reasonably conspicuous designation in writing of the location where the borrower may deliver a written or oral notice of a violation under 50(a)(6)(Q)(x). The designation may include a mailing address, physical address, and telephone number. In addition, the lender or holder may designate an email address or other point of contact for delivery of a notice.

(b) If the lender or holder chooses to change the designated delivery location as provided in subsection (a) of this section, the address change does not become effective until the lender or holder sends conspicuous written notice of the address change to the borrower.

(c) The borrower may always deliver written notice to the registered agent of the lender or holder even if the lender or holder has named a delivery location.

(d) If the lender or holder does not designate a location where the borrower may deliver a notice of violation the borrower may deliver the notice to any physical address or mailing address of the lender or holder.

(e) Delivery of the notice by borrower to lender or holder's designated delivery location or registered agent by certified mail return receipt or other carrier delivery receipt, signed by the lender or holder, constitutes a rebuttable presumption of receipt by the lender or holder.

(f) If the borrower opts for a location or method of delivery other than set out in subsection (e), the borrower has the burden of proving that the location and method of delivery were reasonably calculated to put the lender or holder on notice of the default.

Our Comment: (1) This Interpretation permits the borrower's notice to be oral and does not require the notice, whether written or oral, to be made at the designated location in subsection (a). If the lender has designated a delivery location, the borrower may still notify the lender by delivering written notice to the lender's registered agent or by notifying the lender in any manner at another location of lender. In this latter case, the borrower has the burden of proving that effective delivery was made.

(2) This Interpretation does not require the lender to designate a delivery location, but if the lender does not designate a delivery location at closing, it is our belief that the lender may not do so at a later time. If the lender does designate a delivery location at closing, the lender should retain a copy of the written designation signed by the borrower. All future changes in location should be sent in a manner that allows for proof of delivery.

(3) There are advantages and disadvantages to providing and not providing a designated delivery location for notice of home equity violations. If the lender designates a delivery location, it is more likely the borrower will notify the lender at that location. Also, if the borrower delivers the notice to a location other than the designated location or the lender's registered agent, the borrower has the burden of proving effective delivery. The disadvantage is that the designated delivery location must be updated and conspicuous written notification sent to the borrower each time the location changes

(for example, when the loan is sold or the lender is no longer at that location), otherwise the borrower may continue to use the existing location for notification. If the lender does not designate a delivery location, the notice will always go to a current physical or mailing address of the lender or holder. The disadvantage is that the borrower is relieved of the burden of proving effective delivery.

(4) This Interpretation is silent on the issue of whether the loan servicer's address is a "physical address or mailing address of the lender or holder" if the loan servicer is an entity different from the lender or holder.

31. Effect of Curing a Violation

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)

7 TAC 153.95

(A) Commentary

Section 50(a)(6)(Q)(x) establishes the methods for a lender or holder to cure the most common equity loan violations. If the lender or holder timely corrects a violation of Section 50(a)(6) under one or more of these methods, then the correction validates the otherwise invalid equity lien. A lender or holder who cures a violation under Section 50(a)(6)(x) before receiving the borrower's notice of the violation receives the same protection as if the lender or holder had timely cured the violation after receiving the notice.

Note, however, that even if the lender or holder fails to cure the violation, if a portion of the equity loan proceeds were used to pay off a valid lien on the homestead under subsection (a)(1) through (a)(5) of Section 50, the lender or holder will be equitably subrogated to that prior valid lien in the amount of the payoff.

(B) Case Law

1. Validation - *Doody v. Ameriquest Mortgage Co* .,49 S.W.3d 342 (Tex. 2001), discussed above in the Case Law section of Constitutional Provision 5 above, which held that Section 50(a)(6)(Q)(x) not only operates as a cure provision, but also validates the home equity lien.

2. Offer to Cure – *Fix v. Flagstar Bank, FSB*, 242 S.W.3d 147 (Tex.App.—Ft. Worth, 2007, review denied 2008), which held that the lender's offer to cure under Section 50(a)(6)(Q)(x), without borrower cooperation, satisfies the cure requirement. This case is fully discussed in the Case Law section of Constitutional Provision 33(f) below.

(C) Regulatory Interpretation and Comments

§153.95. Cure a Violation Under Section 50(a)(6)(Q)(x).

(a) If the lender or holder timely corrects a violation of Section 50(a)(6) as provided in Section 50(a)(6)(Q)(x), then the violation does not invalidate the lien.

(b) A lender or holder who complies with Section 50(a)(6)(Q)(x) to cure a violation before receiving notice of the violation from the borrower receives the same protection as if the lender had timely cured after receiving notice.

(c) A borrower's refusal to cooperate fully with an offer that complies with Section 50(a)(6)(Q)(x) to modify or refinance an equity loan does not invalidate the lender's protection for correcting a failure to comply.

Our Comment: (1) This Interpretation provides that a lender's compliance, or attempted compliance, with Section 50(a)(6)(Q)(x) without borrower cooperation will preserve the validity of the lien. (2) According to the Commissions' preamble (*see*, November 5, 2004 issue of the *Texas Register*), a lender's use of §153.95(b) does not begin the 60-day cure time period.

32. Cure Provisions

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)

Texas Supreme Court Decisions

(A) Commentary

The cure provisions under Section 50(a)(6)(Q)(x) were recently the subject of two May 20, 2016 decisions by the Texas Supreme Court—Wood v. HSBC Bank USA, N.A., 505 S.W.3d 542 and Garofolo v. Ocwen Loan Servicing, L.L.C., 497 S.W.3d 474. Wood held that equity loans that fail to comply with the requirements of Section 50(a)(6) are invalid until cured and, therefore, suits seeking to declare them invalid are not subject to any statute of limitations. Wood overrules a line of Texas and Federal court cases that held a four-year limitations period applies to a suit seeking to invalidate defective home equity liens. Thus, borrowers are no longer limited to a four-year window to bring such an action. Garofolo held that there is no constitutional right to forfeiture of all principal and interest of a home equity loan for an uncured Section 50(a)(6) violation that was able to be cured by one of the cure provisions identified in Section 50(a)(6)(Q)(x). Instead, the Court held that suits for forfeiture for these curable but uncured Section 50(a)(6) violations must be brought as breach-of-contract actions under the terms and conditions of the loan agreement. Garofolo also held that if none of the cure provisions in Section 50(a)(6)(Q)(x) will cure the violation, the borrower may only sue for specific performance and/or actual damages. Unlike actions to quiet title due to an invalid lien, these breach-of-contract actions are subject to the four-year statute of limitations. Note that these violations are distinct from the "fatal errors" discussed in Rule 33 below.

(B) Case Law

Case summaries for *Wood* and *Garofolo* are located under section (f) Refinance Cure of this Provision.

(C) Regulatory Interpretation and Comments

None

(a) **Overcharges**

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)(a)

7 TAC 153.94

(A) Commentary

If the borrower pays fees over the 2% limit, a prepayment penalty, or an interest rate not allowed by statute, this cure provision permits a lender or holder to cure the applicable violation by refunding an amount equal to (i) the overcharge of the 2% limit, (ii) the amount of the prepayment penalty or (iii) the amount of the interest that exceeds the allowable amount, as applicable, by mailing, delivering in person or by a delivery carrier the required amount to the owner or crediting that amount to the borrower's account.

(B) Case Law

Doody v. Ameriquest Mortgage Co., 49 S.W.3d 342 (Tex. 2001), discussed fully under Constitutional Provision 5 – Two Percent Fee Limitation clarified that lender can validate a loan by refunding overcharges.

(C) Regulatory Interpretation and Comments

None

(b) **Violation of 80% Rule or Additional Collateral Rule**

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)(b)

7 TAC 153.94

(A) Commentary

If an equity loan exceeds the 80% fair market value rule, when made, or is secured by "additional real or personal property" beyond the homestead, this cure provision allows a lender or holder to cure the applicable violation by sending the owner a written acknowledgement by mail, delivering in person or by a delivery carrier, that the lien is valid only in the amount that the equity loan does not exceed the 80% fair market value rule or the equity loan is not secured by the "additional real or personal property", as applicable.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

None

(c) Prohibited Other Amount, Percentage, Term or Provision

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)(c)

7 TAC 153.94

(A) Commentary

This cure provision allows a lender or holder to cure any other amount, percentage, term, or other provision prohibited by Section 50(a)(6) by sending the owner a written notice by mail, delivering in person or by a delivery carrier that modifies the prohibited amount, percentage, term, or other provision to a permitted amount, percentage, term or other provision and adjusts the account of the borrower to ensure that the borrower is not required to pay more than a permitted amount and is not subject to a prohibited term or provision.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

None

(d) Copies of Required Documents and Fair Market Value Acknowledgment

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)(d)

7 TAC 153.94

(A) Commentary

If the owner fails to receive the required copies of the final loan application and the executed documents signed by the owner at closing, this cure provision allows a lender or holder to cure this violation by delivering the required documents to the borrower by mail, delivering in person or by a delivery carrier. If the acknowledgment of fair market value of the homestead is not signed by the lender or the owner, or both, this cure provision allows a lender or holder to cure this violation by obtaining the appropriate signatures and delivering the fully executed acknowledgment to the borrower by mail, delivering in person or by a delivery carrier.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

None

(e) **More than One at a Time**

Texas Constitution Article XVI, 50(a)(6)(Q)(x)(e)

7 TAC 153.94

(A) Commentary

If a lender makes a home equity loan when there is an existing valid home equity loan secured by the same homestead, the lender or holder may cure this violation by sending the owner a written acknowledgement by mail, delivering in person or by a delivery carrier that the accrual of interest and all of the owner's obligations under the extension of credit are abated while the prior home equity loan remains secured by the homestead.

(B) Case Law

None

(C) Regulatory Interpretation and Comments

§153.94. Methods of Curing a Violation Under Section 50(a)(6)(Q)(x)(a) - (e).
(a) The lender or holder may correct a failure to comply under Section 50(a)(6)(Q)(x)(a) - (e), on or before the 60th day after the lender or holder receives the notice from an owner, if the lender or holder delivers required documents, notices, acknowledgements, or pays funds by:

(1) placing in the mail, placing with other delivery carrier, or delivering in person the required documents, notices, acknowledgements, or funds;

(2) crediting the amount to borrower's account; or

(3) using any other delivery method that the borrower agrees to in writing after the lender or holder receives the notice.

(b) The lender or holder has the burden of proving compliance with this section

Our Comment: The Finance Commission's preamble to §153.94 (*see*, November 5, 2004 issue of the *Texas Register*) states "the lender should act reasonably and use best efforts to communicate to the appropriate location of the borrower and with the appropriate number of borrowers, so that the borrower or borrowers, if more than one, have the best opportunity to receive information related to a potential violation of their home equity loan." Thus, providing a cure or delivering a cure response to the last known address of a borrower or to less than all borrowers may not be sufficient to cure a violation.

(f) **Refinance Cure**

Texas Constitution Article XVI, Section 50(a)(6)(Q)(x)(f)7 TAC 153.95

7 TAC 153.96

(A) Commentary

If a violation is unable to be cured by one of the above cure provisions, then this cure provision allows the lender or holder to cure the violation by a refund or credit to the owner of $1,000 and offering the owner the right to refinance the equity loan with the lender or holder for the remaining term of the loan at no cost to the owner on the same terms, including interest, as the original equity loan with any modifications necessary to comply with Section 50(a)(6) or on terms on which the owner and the lender or holder otherwise agree that comply with Section 50(a)(6). The lender or holder has the option to either refund the $1000 to the borrower or to credit it to the borrower's account. The lender or holder and borrower may modify the loan without completing the requirements of a refinance. If the borrower accepts the offer to modify or refinance, the lender or holder must make a good faith attempt to modify or refinance within a reasonable time not to exceed 90 days after the borrower accepts the offer. The borrower's refusal to cooperate fully with an offer that complies with this section to modify or refinance an equity loan does not invalidate the lender's protection for correcting a failure to comply.

(B) Case Law:
Home Equity Cures and Defenses

1. Failure to Comply Fully – Loan is Invalid. *Wood v. HSBC Bank USA, N.A.,* 505 S.W.3d. 542, (Tex. 2016), holds that home equity liens that fail to comply with the requirements of Section 50(a)(6) are "invalid" until such failure is cured and therefore actions seeking to invalidate such liens are not subject to any statute of limitations.

This Texas Supreme Court decision overrules a line of cases that had applied the common-law distinction of void-versus-voidable liens to those liens provided for under 50(a)(6) and had held that a four year limitations period applied to actions seeking to invalidate defective 50(a)(6) home equity liens (*see, e.g. Priester v. JP Morgan Chase Bank*, 708 F.3d 667 (5th Cir. 2013), *cert. denied*, 134 S.Ct. 196, 187 L.Ed.2d 256, 82 USLW 3001, 82 USLW 3149, 82 USLW 3189 (U.S. Oct 07, 2013) (NO. 12-1481)). Under common law, a voidable lien is presumed valid unless later invalidated, whereas a void lien is invalid and not subject to cure.

The Court, in overruling this line of cases, stated that the provisions of the Texas Constitution that govern the validity of a 50(a)(6) home equity lien should not be "shoehorned into common-law concepts when those concepts conflict with the Constitution's plain text."

Given the conflicts between the plain text of 50(a)(6) with the common law, the Court reasoned that home equity liens provided for under 50(a)(6) of the Constitution "def[y] common-law categorization" and that the void-versus-voidable framework was inapplicable. Therefore, based on the plain text of the Constitution, the Court held that constitutionally noncompliant 50(a)(6) home equity liens are invalid until cured and not subject to any statute of limitations.

2. No Constitutional Right to Forfeiture for Failure to Cure. ***Garofolo v. Ocwen Loan Servicing, L.L.C*, 497 S.W.3d 474 (Tex. 2016)**. The Texas Supreme Court, in answering "no" to two certified questions from the U.S. Fifth Circuit Court of Appeals, answered that 50(a)(6)(Q)(x) does not provide a constitutional right to forfeiture of all principal and interest of a home equity loan for violations of Section 50(a)(6). A forfeiture claim must be brought as a breach-of-contract action based on the terms and conditions in the loan agreement.

The Court additionally limited the availability of forfeiture in such breach-of-contract actions to uncured violations of 50(a)(6) that are able to be cured by one of the six identified cure provisions in 50(a)(6)(Q)(x)(a) through (f). If none of the six cure provisions are applicable, forfeiture is not an available remedy and a plaintiff may only sue for specific performance and/or actual damages. The impact of this decision may be limited, as the Court noted that "in the vast majority of cases this catch-all provision will present a fix that will actually correct the borrower's complaint." Only in a few fact patterns—such as in Garofolo, where the alleged breach was the note holder's failure to provide a cancelled promissory note and a release of lien in recordable form after the loan was paid off—will there be no applicable cure provisions.

The Court also stated that for a 50(a)(6) home equity lien to be foreclosure-eligible, the home equity loan must include the terms set forth in 50(a)(6)(A)-(P) and the conditions set forth 50(a)(6)(Q)(i)-(xi), that "[t]hese terms and conditions are not constitutional rights and obligations unto themselves[,]" and that "[t]hey only assume constitutional significance when their absence in a loan's terms is used as a shield from foreclosure."

The Court's opinion concluded with the following summary statements:

> The terms and conditions required to be included in a foreclosure-eligible home-equity loan are not substantive constitutional rights, nor does a constitutional forfeiture remedy exist to enforce them. The constitution guarantees freedom from forced sale of a homestead to satisfy the debt on a home-equity loan that does not include the required terms and provisions—nothing more. Ocwen therefore did not violate the constitution through its post-origination failure to deliver a release of lien to Garofolo. A borrower may seek forfeiture through a breach-of-contract claim when the constitutional forfeiture provision is incorporated into the terms of a home-equity loan, but forfeiture is available only if one of the six specific constitutional corrective measures would actually correct the lender's failure to comply with its obligations under the terms of the loan, and the lender nonetheless fails to timely perform the corrective measure following proper notice from the borrower. If performance of none of the corrective measures would actually correct the underlying deficiency, forfeiture is unavailable to remedy a lender's failure to comply with the loan obligation at issue.

3. Statute of Limitation. ***Kyle v. Strasburger*, 522 S.W.3d 461 (Tex. 2017)**. The Texas Supreme Court confirmed *Wood* that there is no statute of limitation on a suit by a borrower to quiet title because of an invalid home equity lien. The Court also affirmed *Garofolo* in holding that petitioner Kyle had no constitutional remedy to sue for forfeiture of principal and interest, stating "[a]s we explained in that case, while forfeiture may be an appropriate contractual remedy for a lender's failure to comply with its home-equity loan obligations, forfeiture is not an independent cause of action

under the Texas Constitution." The court remanded to the court of appeals on Kyle's claim for a breach of contract remedy.

***Alexander v. Wells Fargo Bank, N.A.*, 867 F.3d 593 (5th Cir. 2017)**. In another post-*Wood* and *Garofolo* case, the Fifth Circuit held that a four-year statute of limitation does apply for a borrower to sue to for forfeiture of principal and interest due to a lender's breach of contractual provisions.

4. Accrual. The *Alexander* court also held that a claim accrues at the time of the breach, which in most home equity situations would be the date of closing. Appellee had argued unsuccessfully that accrual should begin after the 60-day cure period has expired. The Court did note that in certain circumstances the discovery rule may delay accrual.

5. Accrual; Judicial Estoppel. *Feuerbacher v. Wells Fargo Bank*, 2016 WL 3669744 (E.D. Tex.—Sherman Division 2016, *aff'd* 2017 WL 2713433 (5th Cir. 2017*)*. In this case the married plaintiffs had closed on a home equity loan in 2006. In 2009, the wife-plaintiff filed for Chapter 7 bankruptcy and had a 2010 discharge. In December 2013, the plaintiffs notified defendants of alleged breaches of the provisions governing home equity lending and subsequently filed suit. However, the potential claims were not disclosed as assets in the Chapter 7 filing. The district court held the alleged breaches accrued at the time of closing and that plaintiffs were judicially estopped from filing the claim after the bankruptcy discharge as the claims were not declared as potential assets. As in *Alexander*, plaintiffs unsuccessfully argued that accrual should begin after the expiration of the 60-day cure period.

6. Specific Cure Provisions - Retroactive Effect. *Fix v. Flagstar Bank*, *FSB*, 242 S.W.3d 147 (Tex. App.—Ft. Worth, 2007, review denied 2008), involved the bank's January 2003 conventional refinance of the Fixes' home equity loan. At that time, Section 50(a)(6)(Q)(x) did not contain specific cure provisions for curing a home equity loan defect or set a time limit on when a cure must be tendered. In February 2004, the Fixes notified the bank by letter that the refinance loan violated Section 50(a)(6) because it was closed within one year of the closing of the home equity loan and allowed for personal liability and non-judicial foreclosure. Within 21 days of receipt of the letter, the bank sent the Fixes a written offer to cure these violations with a refinance home equity loan in accordance with the specific cure requirements of Section 50(a)(6)(Q)(x)(f). The Fixes refused the offer and sued to compel forfeiture of all principal and interest under the loan. In September 2003, Section 50(a)(6)(Q)(x) was amended to provide for specific cure provisions by adding subsections (Q)(x)(a)-(f)) and change the "reasonable time" to cure to a 60-day time period. The central question in the case was whether the 2003 amendment to Section 50(a)(6)(Q)(x) retroactively applied to the bank's refinance offer to cure the constitutional defects in the January 2003 refinance loan.. The court declined to retroactively apply the 2003 amendment to Section 50(a)(6)(Q)(x) and, instead, applied the pre-2003 amendment version of Section 50(a)(6)(Q)(x). Relying upon the Texas Supreme Court's *Doody v. Ameriquest Mortgage Co.* decision and also citing *Adams v. Ameriquest Mortgage Co.*, 307 B.R. 549 (Bankr. N.D. Tex. 2004),-the court held that the offer to cure occurred "within a reasonable time" as stated in the pre-2003 amendment version of Section 50(a)(6)(Q)(x) and also held that under the pre-2003 amendment version of Section 50(a)(6)(Q)(x) the bank's offer to cure constituted a sufficient offer to cure the constitutional defects in the refinance loan.

***Summers v. Ameriquest Mortgage Co.*, 2008 WL 123903 (Tex.App.—Houston [14 Dist.] 2008)** applies the *Doody* decision to the issue of whether a temporal violation under Section 50(a)(6) can

be cured by the pre-2003 amendment version of the cure provision in Section 50(a)(6) (Q)(x). In this case a March 2003 home equity loan closed less than one year after a prior home equity loan closed. Defendant offered to cure the violation by crediting plaintiff's account with $1000 and offering her the right to refinance the loan under the same terms, modified as necessary to comply with Section 50(a)(6), but plaintiff rejected the offer. Citing the *Doody* and *Adams* decisions the court stated, "[t]he *Doody* court's pronouncement that the cure provision applies to all of Section 50(a)(6) would necessarily include [section 50(a)(6)(M)(iii)'s] requirement that two home equity loans must not close within one year. Thus, [plaintiff's] argument that the temporal defect could never be cured must fail." Although Section 50(a)(6)(Q)(x)(f)'s amendment (eff. Sept. 2003) to Section 50(a)(6)(Q)(x) occurred after the time of the offer and, thus, was not applicable in this case, the court agreed with the prior decisions in *Adams* and in *Fix* that the amendment clarified already existing rights under the pre-2003 amendment version of Section 50(a)(6)((Q)(x), stating that this conclusion is consistent with the Supreme Court's holding in *Doody* that Section 50(a)(6)(Q)(x)'s "cure provision applies to all the lender's obligations under the extension of credit."

***Adams v. Ameriquest Mortgage Co.*, 307 B.R. 549 (Bankr. N.D. Tex. 2004)**, is a pre-2003 amendment case in which the lender refinanced a home equity loan with a loan not documented as a home equity loan because the lender did not intend to close the refinance loan as a home equity loan. Section 50(f) requires that a refinance of a home equity loan must also be a home equity loan. The lender wanted to cure the home equity defects in the refinance loan pursuant to the specific cure provisions of Section 50(a)(6)(Q)(x) added by the 2003 amendment. Among the defects to be cured were violations of the following Section 50(a)(6) requirements: (1) 80% fair market value limitation; (2) no personal liability; (3) foreclosure by court order; (4) required notices; (5) home equity disclosure in security instrument; and (6) fair market value acknowledgment. Relying on the holding in the *Doody* decision, the court held that Section 50(a)(6)(Q)(x) could be used to cure all the home equity defects in the refinance loan by the lender offering to redo the transaction. The court stated that the expanded cure provision in the 2003 amendment to subsection 50(a)(6)(Q)(x) was a clarification of already existing lender cure rights and is consistent with the holding in *Doody*. The court further stated, "[t]he borrower may not refuse to comply with a reasonable offer to cure by the lender. Such a holding would allow the borrower to effectively block the lender's power to cure in many instances."

*(**Note:** This bankruptcy decision has no precedential value, but it is persuasive on the issue of the lender's right to cure under pre– and post-2003 amended subsection 50(a)(6)(Q)(x) without the borrower's compliance, particularly the "refinance cure" in subsection 50(a)(6)(Q)(x)(f) that allows a lender to cure defects in home equity loans, even timing requirement defects, that are not curable any other way.)*

(C) Regulatory Interpretation and Comments

§153.95. Cure a Violation Under Section 50(a)(6)(Q)(x).

(a) If the lender or holder timely corrects a violation of Section 50(a)(6) as provided in Section 50(a)(6)(Q)(x), then the violation does not invalidate the lien.

(b) A lender or holder who complies with Section 50(a)(6)(Q)(x) to cure a violation before receiving notice of the violation from the borrower receives the same protection as if the lender had timely cured after receiving notice.

(c) A borrower's refusal to cooperate fully with an offer that complies with Section 50(a)(6)(Q)(x) to modify or refinance an equity loan does not invalidate the lender's protection for correcting a failure to comply.

Our Comment: (1) This Interpretation provides that a lender's compliance, or attempted compliance, with Section 50(a)(6)(Q)(x) without borrower cooperation will preserve the validity of the lien. (2) According to the Commissions' preamble (*see*, November 5, 2004 issue of the *Texas Register*), a lender's use of §153.95(b) does not begin the 60-day cure time period.

§153.96. Correcting Failures Under Section 50(a)(6)(Q)(x)(f).
(a) To correct a failure to comply under Section 50(a)(6)(Q)(x)(f), on or before the 60th day after the lender or holder receives the notice from the borrower the lender or holder may:

(1) refund or credit the $1,000 to the account of the borrower; and

(2) make an offer to modify or an offer to refinance the extension of credit on the terms provided in Section 50(a)(6)(Q)(x)(f) by placing the offer in the mail, other delivery carrier, or delivering the offer in person to the owner.

(b) To correct a failure to comply under Section 50(a)(6)(Q)(x)(f):

(1) the lender or holder has the option to either refund or credit $1,000; and

(2) the lender or holder and borrower may:

(A) modify the equity loan without completing the requirements of a refinance; or

(B) refinance with an extension of credit that complies with Section 50(a)(6).

(c) The lender or holder has the burden of proving compliance with this section.

(d) After the borrower accepts an offer to modify or refinance, the lender must make a good faith attempt to modify or refinance within a reasonable time not to exceed 90 days.

33. Fatal Errors

Texas Constitution Article XVI, Section 50(a)(6)(a)(xi)

(A) Commentary

This Section states that the lender or holder of the equity loan note shall forfeit all principal and interest of the equity loan if it is made by a person other than an authorized lender (see Rule 20 above)

or "if the lien was not created under a written agreement with the consent of each owner and each owner's spouse, unless each owner and each owner's spouse who did not initially consent subsequently consents." The first violation is not curable under the cure provisions in Section 50(a)(6)(a)(x) because they do not apply to a violation under Section 50(a)(6)(a)(xi). The second violation, while legally curable, is highly unlikely given that the cure requires the subsequent consent of the owner and/or owner's spouse.

(B) Case Law

***Kyle v. Strasburger*, 522 S.W.3d 461 (Tex. 2017)** involves a violation of Section 50(a)(6)(Q)(xi). *Kyle* claimed her signature was forged on the home equity loan documents and that she did not consent to the lien on her homestead, either at the time of its creation or after the fact. She sued the lender and her ex-husband seeking, among other relief, declarations that the deed of trust was void. Citing its previous decision in *Wood v. HSBC Bank USA, N.A.*, the court held that a home equity loan secured by a lien that was not created with the consent of each owner and each owner's spouse is invalid unless and until such consent is obtained and the statute of limitations does not bar Kyle's claim to declare the lien invalid.

(C) Regulatory Interpretation and Comments

None

34. Home Equity Loan Definitions

7 TAC 153.1

§153.1. Definitions. Any reference to Section 50 in this interpretation refers to Article XVI, Texas Constitution, unless otherwise noted. These words and terms have the following meanings when used in this chapter, unless the context indicates otherwise:

Our Comment: Revised Interpretation §153.1 effective January 1, 2015, replaces the word "section" with the word "chapter" in the second sentence to clarify that the definitions in §153.1 apply to all of Chapter 153.

(1) Balloon – an installment that is more than an amount equal to twice the average of all installments scheduled before that installment.

(2) Business Day – All calendar days except Sundays and these federal legal public holidays: New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(3) Closed or closing – the date when each owner and the spouse of each owner signs the equity loan agreement or the act of signing the equity loan agreement by each owner and the spouse of each owner. **Our Comment:** If the owner and spouse sign on different days, the date of last signing is the "closing" date.

(4) Consumer Disclosure – The written notice contained in Section 50(g) that must be provided to the owner at least 12 days before the date the extension of credit is made.

(5) Cross-default provision – a provision in a loan agreement that puts the borrower in default if the borrower defaults on another obligation.

(6) Date the extension of credit is made – the date on which the closing of the equity loan occurs. **Our Comment:** Subsection 50(a)(6)(L) requires the first periodic installment to be no later than "two months from the date the extension of credit is made." Revised Interpretation §153.11 interprets the "two months" of Subsection 50(a)(6)(L) to begin on the date of "closing." This means you cannot avoid a short-pay situation by scheduling the first installment date of the note to be the first day of the second month after the month of funding if funding occurs in the next month after the month of "closing."

(7) Equity loan – An extension of credit as defined and authorized under the provisions of Section 50(a)(6). **Our Comment:** Subsection 50(a)(6)(F) states that an equity loan "is not a form of open-end account … unless the open-end account is a home equity line of credit". Thus, the definition of equity loan in §153.1(7) includes a home equity line of credit under Section 50(t), and the Interpretations will apply to home equity line of credit loans as well. In their preamble to the Interpretations, published in the January 2, 2004 issue of the *Texas Register*, the Commissions state "[t]he term 'equity loan' in Chapter 153 includes home equity lines of credit, unless specifically excluded."

(8) Equity loan agreement – the documents evidencing the agreement between the parties of an equity loan.

(9) Fair Market Value – the fair market value of the homestead as determined on the date that the loan is closed.

(10) Force-placed insurance – insurance purchased by the lender on the homestead when required insurance on the homestead is not maintained in accordance with the equity loan agreement.

(11) Interest – As used in Section 50(a)(6)(E), "interest" means the amount determined by multiplying the loan principal by the interest rate over a period of time. **Our Comment:** (1) In ***Texas Bankers Ass'n v. ACORN*, 303 S.W.3d 404 (Tex. App.—Austin, 2010**), the appellate court affirmed the trial court's judgment invalidating then existing §153.1(11). In ***Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013), s*upplemented on* January 24, 2014**, the Texas Supreme Court affirmed this part of the appellate court's judgment and defined interest as used in Section 50(a)(6)(E) as "the amount determined by multiplying the loan principal by the interest rate … over a period of time." 418 S.W.3d at 588 and 596. Revised §153.1(11) replaces the previous definition of "interest" in §153.1(11) held invalid with the definition in the *Norwood* decision and limits the new definition to Section 50(a)(6)(E) purposes. (2) In the preamble to the proposed revision of §153.1(11), published in the July 4, 2014, issue of the *Texas Register*, the Commissions stated, "[t]he precise mathematical formulation of interest and the exact nature of the applicable time period will be described in the loan contract[,]" and "[b]ecause different [loan] contracts will describe different methods for calculating interest, it is unnecessary for the amendments to specify a precise method[;]

[t]he purpose of the amendment is to describe how an amount already calculated under the [loan] contract will be excluded from the three percent limitation."

(12) Lockout provision – a provision in a loan agreement that prohibits a borrower from paying the loan early.

(13) Owner – A person who has the right to possess, use, and convey, individually or with the joinder of another person, all or part of the homestead. **<u>Our Comment</u>:** We believe this definition makes a non-borrower non-titled spouse an "owner" for all purposes under Section 50(a)(6). Section 50(b), Article XVI, Texas Constitution, Section 5.001 of the Texas Family Code, Section 102.005 of the Texas Estates Code, and Texas case law (see, for example, *Wilcox v. Marriott,* 103 S.W.3d 469, 474 at footnote 3 (Tex.App. —San Antonio 2003)) give the spouse (whether or not in title and whether or not the homestead is community or separate property) all the rights contained in this definition. We believe this means that the non-borrower non-titled spouse, as a defined "owner" under §153.1(13), must: (i) join in the submission of the loan application referred to in subsection 50(a)(6)(M)(i); (ii) receive the *Consumer Disclosure* required by Section 50(g) and the *Preclosing Disclosure* and a copy of the loan application required by subsection 50(a)(6)(M)(ii); and, (iii) sign the written acknowledgment as to the fair market value of the homestead property required by subsection 50(a)(6)(Q)(ix). Contrary to this definition, we do not believe the intent of Section 50(a)(6) is to make the term "owner" synonymous with "owner and spouse" (*compare* 50(a)(6) subsections (J); (M); (P)(iv)-(v); (Q)(i)-(v), (vii), (ix), (x)(a)-(c), (e)-(f), in which only "owner" is used, to subsections (A); (C); (E); (Q)(viii) and (xi), in which the spouse of the "owner" is included). *See also* Section IV.D. "Non-Titled Spouse" for further explanations and case authority.

(14) Preclosing Disclosure – The written itemized disclosure required by Section 50(a)(6)(M)(ii).

(15) Three percent limitation – the limitation on fees in Section 50(a)(6)(E).

<u>Additional Points of Case Law</u>

Acceleration

Under Texas law, a suit to foreclose a real property lien or a sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues, and on the expiration of the four-year limitations period, the real property lien and a power of sale to enforce the lien become void (§16.035 (a), (b) and (d), respectively, of the Texas Civil Practices and Remedies Code). The cause of action does not begin to accrue until the maturity date of the last note, obligation, or installment (Id. §16.035(e)). However, where the note or deed of trust contains an optional acceleration clause, the cause of action accrues when the holder actually exercises its option to accelerate (if acceleration occurs before four years after the maturity date). **See *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, (Tex. 2001)** and cases cited therein.

Two general points apply to the exercise of an optional acceleration clause. First, a lender retains the option to unilaterally abandon the acceleration during the four-year limitation period and reinstate the loan, thus restarting the limitations period. **See *Boren v. U.S. Nat. Bank Ass'n*, 2014 WL 5486100 (S.D. Tex.—Houston Division Oct. 29, 2014), *adopting in part* memorandum and**

recommendation in *Boren*, 2014 WL 6892553, affirmed by 5th Cir. 807 F.3d. 99 (2015). However, if a borrower detrimentally relies on the lender's acceleration, lender may be estopped from abandoning the acceleration. **See *Callan v. Deutsche Bank Trust Co. Americas*, 11 F.Supp.3d 761 (S.D. Tex.—Houston Division Mar. 27, 2014); *lender's motion to alter or amend Judgment granted*, 93 F.Supp.3d 725 (Mar. 21, 2015)** holding: (1) under Texas law, mortgagor's filing state court action against mortgagee was insufficient to show that she objected to mortgagee's notice of rescission of acceleration of the debt, and (2) under Texas law, mortgagor's mere filing for bankruptcy as a result of mortgagee's acceleration of her loan failed to show she detrimentally relied on acceleration.
*(**Note:** Although the above cases involve home equity loans, they are also good authority for non-home equity loans when these circumstances apply.)*

Additional Funds

1. *In re Harmon*, 444 B.R. 696 (Bankr. S.D. Tex. 2011) *on reconsideration* 2011 WL 1457236 (Bankr. S.D. Tex. Apr. 14, 2011). In this adversary proceeding, Harmon originally requested a home equity loan, which the lender could not provide as it was not licensed to make home equity loans in Texas. The loan was closed as a non-home equity refinance transaction in which the lender out of the loan proceeds (i) paid off a pre-existing non-home equity loan secured by Harmon's homestead, and (ii) retained $177,715 in interest prepayments, which constituted a prepayment of the interest due each month during the 12-month term of the loan, (the loan was structured as a 12-month interest only balloon loan, with the principal balance due with the final payment). After default and attempted foreclosure, Harmon filed for bankruptcy and asserted in this adversary proceeding that the loan was an illegal home equity loan void under Section 50(a)(6). The court held:

(1) the loan was not a home equity loan under Section 50(a)(6) but was a refinance of debt under Section 50(a)(4);

(2) the lender's lien on Harmon's homestead was invalid because the loan did not satisfy Section 50(e)(2), which requires, for the lien to be valid, that the advance of all additional funds in connection with the refinance of debt secured by the homestead be for "*reasonable* costs *necessary* to refinance such debt"; and

(3) the lender is equitably subrogated to the lien securing the prior loan it paid off in the amount of the payoff amount plus 6% interest from the date of closing.

In order to correctly apply Section 50(e)(2), the court first evaluated the meaning of the term "necessary." Finding little authority on the meaning of "necessary" as used in Section 50(e)(2), the court ultimately concluded that "necessary" means "an action that must occur or a cost that must be incurred to achieve a desired result." Using this definition, the court found that the retained $177,715 in interest prepayments was not a necessary cost for the refinance transaction. Because there was testimony that Harmon requested this arrangement, and there was no evidence that the lender forced Harmon to borrow the $177,715 as a necessary condition to obtain the loan, the court concluded that this was not a "necessary" cost. The court further explained that even if the lender had forced Harmon to borrow the $177,715 as a condition to obtain the loan, if other lenders would not have made this a condition of the loan, then it still would not have been a "necessary" cost. Additionally, the court

noted that $88,801 of the $177,715 was refunded to Harmon less than three months after the loan closed. Because this amount was refunded, this provided further evidence that it was not a necessary cost. Next, the court evaluated the meaning of the term "reasonable" and found that the $177,715 was an unreasonable cost under subsection 50(e)(2), basing its conclusion on Regulatory Interpretation §153.41 ("reasonable costs are those costs which are lawful in light of other governing or applicable law"). The court found that the loan was subject to §1639(g) of the Truth in Lending Act (15 U.S.C. §1639(g)), which constituted "other governing or applicable law" for the purposes of §153.41, and was in violation of §1639(g) because "more than 2 periodic payments required under the loan [were] consolidated and paid in advance from the loan proceeds provided to the consumer."

Finally, the court held that the lender was entitled to equitable subrogation to the extent the proceeds of the loan were used to pay off the balance of the preexisting debt secured by Harmon's homestead, relying on various Texas cases as authority, including the Texas Supreme Court *LaSalle* decision (See No. 2 in **Equitable Subrogation** section below).

*(**Note:** This bankruptcy decision has no precedential value, but, in our opinion, it is persuasive as applied to the facts of this case.)*

2. *Meador v. EMC Mortg. Corp.*, 236 S.W.3d 451 (Tex.App.—Amarillo, 2007, review denied 2008), involved a homestead refinance loan and an unsecured loan made contemporaneously to the plaintiffs by the same lender. As a condition for making the unsecured loan, the lender required the plaintiffs to refinance their home mortgage. It was undisputed that the two loans were independent from one another - two loan applications were completed, a default on one did not constitute a default on the other, and the homestead refinance loan did not cover repayment of the unsecured loan. Further, after the loans were closed, only the unsecured loan was sold to the defendant, EMC. The plaintiffs asserted the unsecured loan violated Section 50(e) because the unsecured loan represented "the advance of additional funds" that did not satisfy Section 50(e) requirements. Section 50(e) provides that a refinance loan that includes "the advance of additional funds" is invalid against the homestead unless the loan is a home equity loan or the advance of all the "additional funds" is for reasonable and necessary refinancing costs or for another valid homestead purpose. The court concluded that the lender's requirement that both loans be obtained from it did not render the two loans inseparable and that the phrase "advance of additional funds" only applies to additional funds that are secured by the homestead. We included this non-home equity case because it is possible the plaintiffs' rationale could be used in a similar situation involving a home equity loan and an unsecured loan.

Cure Letter Failure

***Agredano v. Wells Fargo Financial Texas, Inc.* (Bankr. W.D. Tex.—San Antonio Div., 2003)**, was a bankruptcy adversary proceeding involving the pre-2003 cure provisions of subsection 50(a)(6)(Q)(x). The plaintiffs notified Wells Fargo that their home equity loan was not in compliance with subsection 50(a)(6) because the loan documents provided for personal liability and non-judicial foreclosure without court order. Although the note stated that the loan was "the type of credit defined by section 50(a)(6)" and also quoted the home equity conditions of subsection 50(a)(6)(Q), it did not contain the non-recourse and court order foreclosure restrictions of subsections 50(a)(6)(C) and (D). In fact, the note stated that "each person is fully and personally obligated … to pay in full the amount owed." The deed of trust did contain the subsection 50(a)(6)(Q)(vi) disclosure that the loan is the

type of credit defined by subsection 50(a)(6), but it provided for a non-judicial power of sale and no subsection 50(a)(6) restrictions were stated. Wells Fargo's reply letter to the plaintiffs stated that (i) the promissory note states that the loan was *the type of credit defined by section 50(a)(6), Article XVI of the Texas Constitution*; (ii) this section of the Constitution provides that the loan is without recourse for personal liability and can only be foreclosed by judicial foreclosure; and (iii) the loan was subject to the restrictions mentioned in their [Wells Fargo] letter. The essential question was whether Wells Fargo's letter cured the defects noted in the plaintiffs' letter within the meaning of the pre-2003 cure provisions of subsection 50(a)(6)(Q)(x). In a Memorandum Decision, the bankruptcy court found that: (1) Wells Fargo's lien was invalid from its inception because the note and deed of trust contained personal recourse and nonjudicial foreclosure provisions in violation of subsections 50(a)(6)(C) and (D); (2) the disclosures in the note and the deed of trust that the loan was the type of credit defined by subsection 50(a)(6) conflict with these express personal liability and nonjudicial foreclosure provisions; (3) Wells Fargo's response letter failed to cure these defects within the meaning of subsection 50(a)(6)(Q)(x) because it failed to expressly repudiate or remove these impermissible provisions; and (4) because of lien invalidity and the failure to cure, Wells Fargo is not entitled to equitable subrogation for that part of the loan proceeds used to pay off first lien indebtedness against the homestead. The court noted that Wells Fargo's letter could have *clearly and unequivocally* cured the defects by stating that the offending note and deed of trust provisions were of no further force and effect.

The court later dismissed the adversary proceeding with prejudice, withdrew its prior Memorandum Decision, and granted a compromise application filed by the parties pursuant to a confidential settlement agreement filed with the court. While this case does not establish legal precedent, it does point out the danger of "cure" letters that do not *clearly and unequivocally* cure the defect.

See also, In re Erickson, 2012 WL 4434740 (W.D. Tex. 2012) in which the court held the lender cured the violation in accordance with Section 50(a)(6)(Q)(x) by providing Erickson with timely written notice that it waived and renounced any right or claim to pursue personal recourse against him.

Equitable Subrogation

1. *Langston v. GMAC Mortgage Corp.*, 183 S.W.3d 479 (Tex.App.—Eastland, 2005, no pet.), involved a divorce proceeding in which the court applied the doctrine of equitable subrogation to preserve what would have been an invalid home equity lien. Prior to the divorce, Langston and his wife closed on a home equity loan secured by Langston's separate real property. In the divorce, the trial court improperly awarded Langston's separate property to the wife. The wife then refinanced the home equity loan with a home equity loan from GMAC. The appellate court reversed the property award to the wife and reinstated Langston in title. GMAC sought a declaration that its lien was enforceable against the property under the doctrine of equitable subrogation even though Langston did not execute a security instrument in favor of GMAC. Under the doctrine of equitable subrogation, a third party who pays a debt at the request of the debtor may be subrogated to the prior creditor's security interest for the debt that has been discharged. The doctrine's purpose is to prevent unjust enrichment of the debtor who owed the debt that is paid. The doctrine requires that the third party payor not be a volunteer but be required to make payment either under a legal obligation, an

agreement for subrogation, or to protect its rights or property. The appellate court held that because GMAC paid off the prior home equity loan at the request of one of the debtors (the wife) and Langston benefited from GMAC's loan (it extinguished a prior lien on his separate property) GMAC was not a volunteer.

2. *LaSalle Bank Nat'l Ass'n. v. White*, 246 S.W.3d 616 (Tex. 2007, reh'g denied 2008), involved a home equity loan secured by a lien against a 10-acre homestead that was designated for agricultural use. At that time, Section 50(a)(6)(I) (removed by 2017 constitutional amendment in SJR 60) prohibited agricultural use designated homestead from being used as security for a home equity loan. Portions of the home equity loan proceeds were used to pay off a purchase money lien and outstanding property taxes against the tract. Plaintiff received the remaining balance (less closing costs) as equity proceeds. The Texas Supreme Court held the lender was equitably subrogated to the prior lienholders' purchase money and tax liens, based on the applicability of section 50(e), which states:

> A refinance of debt secured by a homestead and described by any subsection under Subsections (a)(1)–(a)(5) that includes the advance of additional funds may not be secured by a valid lien against the homestead unless: (1) the refinance of the debt is an extension of credit described by Subsection (a)(6) of this section; or (2) the advance of all the additional funds is for reasonable costs necessary to refinance such debt or for a purpose described by Subsection (a)(2), (a)(3), or (a)(5) of this section.

Citing a long history of judicial decisions, the Court stated, "Texas has long recognized a lienholder's common law right to equitable subrogation. … [t]he doctrine allows a third party who discharges a lien upon the property of another to step into the original lienholder's shoes and assume the lienholder's right to the security interest against the debtor … [and] … has been repeatedly applied to preserve lien rights on homestead property."

The Court further stated, "Section 50(e) contains no language that would indicate displacement of equitable common law remedies was intended, and we decline to engraft such a prohibition onto the constitutional language. LaSalle's equitable subrogation claim does not derive from its contractually refinanced debt and accompanying lien, for which section 50(e) mandates forfeiture. Instead, LaSalle's claim arises in equity from its prior discharge of constitutionally valid purchase-money and tax liens. By definition, equitable remedies apply only when there is no remedy at law, and the legal forfeiture that article 50(e) imposes does not destroy the well-established principle of equitable subrogation." Citing its decision in *Benchmark Bank. v. Crowder,* 919 S.W.2d 657 (Tex. 1996), the court further stated, "[o]nce valid, the lien does not become invalid against the homestead simply because the original debt has been refinanced."

One interesting aspect of this case is that the court went all the way back to 1890 to find an invalid home equity case (home equity loans were not permitted in Texas until 1998) upholding equitable subrogation to the extent of the prior valid purchase money lien that the invalid home equity loan had paid off. See, *Texas Land & Loan Co. v. Blalock*, 13 S.W. 12 (Tex. 1890).

In summary, a void home equity loan that refinances valid homestead debt will benefit from equitable subrogation to preserve the lien and debt as to those funds advanced to pay off preexisting valid

homestead debt. But, equitable subrogation will not validate the home equity proceeds (*i.e*., that portion of the loan proceeds not used to refinance prior valid liens).

See also, citing the Texas Supreme Court *LaSalle* case as authority: *Johnson v. National City Mortgage Co.*, 2009 WL 2982783, 62 Collier Bankr.Cas.2d 1380 (Bankr. E.D.Tex.—Sherman Division 2009) in which the court applied the doctrine of equitable subrogation to an invalidly made home equity loan that had paid off a pre-existing valid purchase money loan; *In re Harmon*, 444 B.R. 696 (Bankr. S.D.Tex. 2011).

3. *AMC Mortgage Services, Inc. v. Watts*, 260 S.W.3d 582 (Tex.App.—Dallas, 2008, no pet.), involved a superiority of lien and title dispute. The court denied Ameriquest Mortgage Company's ("Ameriquest") equitable subrogation to the first lien purchase money loan paid off with the proceeds of Ameriquest's home equity loan because the home equity loan documents did not specifically mention that the home equity loan proceeds paid off the prior lien. The following sequence of events is important in understanding this case:

(1) In 1996 Gonzalez purchased the property with a first lien purchase money loan from Long Beach Mortgage and a second lien purchase money loan from Smith (the seller), which provided that it was subordinate to the Long Beach loan.

(2) In 1999 Gonzalez refinanced the Long Beach loan with a loan from Ameriquest that contained renewal and extension language for the Long Beach loan. Ameriquest filed a release of lien for the Long Beach loan.

(3) In 2000 and, again, in 2003, Gonzalez obtained a home equity loan from Ameriquest. The 2000 home equity loan paid off Ameriquest's 1999 renewal and extension loan, but did not contain renewal and extension language for the 1999 loan. Ameriquest filed a release of lien for the 1999 renewal and extension loan. Ameriquest's 2003 home equity loan paid off the 2000 home equity loan for which Ameriquest filed a release of lien. The 2003 home equity loan did not contain any renewal and extension language for the 2000 home equity loan that was paid off.

(4) Both the 2000 and the 2003 home equity deeds of trust contained a subrogation provision subrogating the lender to all prior rights, superior title, and liens regardless whether they were assigned to the lender or released.

(5) In 2004 Gonzalez defaulted on the Smith loan, and the property was foreclosed and sold to the foreclosing lender.

(6) In May 2005 Watts purchased the property with a loan from Argent Mortgage. In December 2005 Ameriquest foreclosed on its 2003 home equity loan.

Watts asserted that the 1996 Smith deed of trust (under which Watts took title after foreclosure) was superior to the 2003 home equity deed of trust, while Ameriquest asserted that both the 2000 and 2003 deeds of trust (although later in time) are superior under the doctrine of equitable subrogation because the 2000 and 2003 home equity loans paid off and, thus, were subrogated to the 1996 first lien Long Beach loan.

Citing prior case authority that (i) a good faith purchaser will prevail over the holder of a prior equitable title and (ii) a party claiming title through equitable principles has the burden of proving that a subsequent legal titleholder is not a good faith purchaser, the court held that even if the 2003 loan was equitably subrogated to the Long Beach loan, it will not prevail against Watts' title because Watts is a good faith purchaser of the property. According to the court and the prior case authority on which it relied, a good faith purchaser is a person who demonstrates "that the purchase was made (1) in good faith, (2) for valuable consideration, and (3) without actual or constructive knowledge of any outstanding claims of a third party." Watts is a good faith purchaser, in part, said the court because Watts had no actual or constructive knowledge of the 2003 loan's superior claim as nothing in the documents filed in the real estate records indicated that the Long Beach loan was paid with the proceeds of the 2000 and 2003 loans. On the contrary, the records reflect that the Long Beach loan was released. Thus, the 1996 Smith deed of trust appeared to become the superior lien because the 2000 and 2003 deeds of trust were later in time and as they did not appear from the records to relate to the 1999 Ameriquest refinance deed of trust, but appeared to be inferior to the Smith deed of trust, when the Smith deed of trust was foreclosed, the apparently inferior, later in time, 2003 deed of trust appeared to be extinguished; thus, nothing in the records gave Watts actual or constructive notice that the 2003 deed of trust was not extinguished by the foreclosure of the Smith deed of trust or that equitable subrogation made the 2003 deed of trust superior to the Smith deed of trust.

This case highlights the importance of obtaining a subordination of an inferior lien when the equity loan will discharge a loan of higher lien priority and, if possible, a transfer of the prior lien securing the loan being paid off.

4. *In re Gulley*, 436 B.R. 878 (Bankr. N.D.Tex. 2010). In this adversary proceeding, the bankruptcy court held that the lender must forfeit all principal and interest under the home equity loan, in addition to not having a valid lien, because the non-borrowing spouse did not consent to the home equity loan at closing, in accordance with subsection 50(a)(6)(A), or subsequent to closing, in accordance with the cure provision of subsection 50(a)(6)(Q)(xi), which states, in pertinent part, that "the lender or any holder of the note … shall forfeit all principal and interest … if … the [home equity] lien was not created under a written agreement with the consent of each owner and each owner's spouse, unless each owner and each owner's spouse who did not initially consent subsequently consents[.]"

But, under the theory of equitable subrogation, the court also held that the lender was entitled to a secured claim secured by a lien against the homestead to the extent it had paid the ad valorem property taxes on the homestead, citing the Texas Supreme Court *LaSalle* decision in No.2. above as authority that the lender was equitably subrogated to these tax liens.

*(**Note:** This bankruptcy decision has no precedential value, but it correctly applies the Texas Supreme Court's LaSalle equitable subrogation decision.)*

Estoppel

1. *Sosa v. Long Beach Mortgage Co.*, 2007 WL 1711788 (Tex.App.—Austin, 2007), is an appeal to overturn a foreclosure of a home equity lien on the basis that only a portion of the property foreclosed on was Sosas' homestead (there appeared to be some limited evidence that one of the houses was leased to a third party, but the timing was unclear) and, thus, the loan violated Section 50(a)(6)(H), which prohibits a home equity loan from being secured by additional collateral. The

Sosas owed a lot containing two houses and claimed a homestead exemption on the entire lot for the tax years 1995 through 2002. In 2001, the Sosas obtained a home equity loan from Long Beach evidenced by a security instrument granting a lien on the entire lot and other loan documents that reflected the entire lot was designated as their homestead. When the Sosas defaulted, Long Beach foreclosed on the property and the Sosas sued for wrongful foreclosure. Long Beach asserted that because the Sosas claimed the entire lot as their homestead with the tax authority as well as in the home equity loan documents, the Sosas are estopped from taking a contrary position. One who asserts the affirmative defense of estoppel must conclusively prove: (1) a false representation or concealment of material facts; (2) made with the knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; and (5) who detrimentally relies on the representations. The Sosas (i) represented to Long Beach that the entire property was their homestead, and (ii) claimed a homestead exemption on the entire property in loan instruments and to tax authorities, and (iii) Long Beach relied on the Sosas' representations and sworn affidavits to make the home equity loan secured by the purported homestead (*i.e.*, entire lot), the appellate court concluded the Sosas were estopped from claiming that the loan violated Section 50(a)(6)(H).

2. *In re Cadengo*, 370 B.R. 681 (Bankr. S.D.Tex. 2007). This adversary proceeding involved a home equity loan disguised as a sale transaction. The court held that the debtor had equitable title when the loan was closed because her parents' divorce decree required them to convey the homestead property to the debtor once she reached 18 years of age, which the parents failed to do. At the time of closing in December 2004 the debtor was 19 years old and had permanently and continuously resided at the homestead property since 1993.The court found that because the debtor had an equitable title on the date of closing (the court ruled the divorce decree gave her equitable title once she was 18 years old), she was entitled to homestead protection despite the fact that she signed documents at the closing falsely stating that the property was not her homestead and that she resided elsewhere. The court found that the lender was not entitled to the protection afforded by Section 50(d) ("… lender for value without actual knowledge may conclusively rely on an affidavit that designates other property as the homestead of the affiant and that states that the property to be … encumbered is not the homestead of the affiant.") because (i) the lender had actual knowledge the debtor resided at the property and was aware of the terms of the divorce decree; and (ii) even if the lender was without actual knowledge, the debtor's actual use and possession of the property imputed such actual knowledge to the lender. The court held that under Section 50(d) "a lender may rely upon a non-homestead affidavit only if it is without knowledge of the borrower's right to claim a homestead and the borrower is not in actual use and possession of the property."

Looking to the intent of the parties in making its determination, the court found that the transaction was a home equity loan notwithstanding the fact that the closing documents were structured as a sale. The court also found that the home equity loan violated several sections of the Texas Constitution and that the Defendants must forfeit the entire principal and interest of the loan.

*(**Note:** This bankruptcy decision has no precedential value, but it is persuasive on the homestead issues addressed)*

3. *Summers v. PennyMac Corp.*, 2012 WL 5944943 (N.D. Tex. 2012). In this suit plaintiffs alleged that the principal amount of the note exceeded 80 percent of the fair market value of the homestead

on the date of the note in violation of subsection 50(a)(6)(B). The court held that the plaintiffs' allegation failed as a matter of law because at closing plaintiffs had signed a Home Equity Affidavit, incorporated in their pleadings by reference, swearing under oath that the principal amount of the note did not exceed 80 percent of the fair market value of the homestead on the date of the note.

Home Equity Loan Modifications

1. *Pennington v. HSBC Bank USA, N.A.*, 493 F. App'x 548, 2012 WL 4513333 (5th Cir. 2012), c*ert. denied*, 133 S.Ct. 1272, 81 USLW 3369, 81 USLW 3445, 81 USLW 3452 (U.S. Feb. 19, 2013) (NO. 12-768), holds that a Trial Period Plan ("TPP") under the federal Home Affordable Modification Program ("HAMP") in connection with plaintiffs' request for a modification of their home equity loan is not a modification when the plaintiffs fail to meet the conditions the TPP specifies are necessary to obtain a modification. As one of the conditions to obtaining a loan modification, the TPP established a schedule of payments, which were less than the payments required to cover all the principal and interest owed on the home equity loan with each installment. After paying ten trial payments under the TPP, plaintiffs were denied a modification by defendant. The Fifth Circuit court affirmed the district court's dismissal of plaintiffs' claims. See, *Pennington v. HSBC Bank USA, Nat. Ass'n*, 2011 WL 6739609 (W.D. Tex. 2011) ("Nor does the fact that the Defendants accepted partial payments during the TPP trial mean that they violated the Texas Constitution. Although the partial payments constituted less than the accrued interest and paid off no principal, these were plainly temporary payments to stave off foreclosure, and were not themselves an extension of credit contemplated by Section 50(a)(6)(L). … The scheduled loan payments were not changed by the TPP, which provides that [the bank] will 'hold the payments received during the Trial Period in a non-interest bearing account until they total an amount that is enough to pay my oldest delinquent monthly payment on my loan in full.'")
Note: The Fifth Circuit has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

2. *Sims v. Carrington Mortg. Services, LLC*, 889 F.Supp.2d 883 (N.D. Tex. 2012), *aff'd in part and questions certified to Texas Supreme Court by* 538 F. App'x 537 (5th Cir. 2013), *aff'd* (in full) by 583 F. App'x 344 (5th Cir. 2014). In this putative class action, the plaintiffs alleged that the 2009 and 2011 modifications of their delinquent 2003 home equity loan violated various requirements of Section 50(a)(6) and other requirements in Section 50 relating to home equity lending, based on the fact that the modifications capitalized and added past due interest to the principal of the loan. The court dismissed with prejudice all claims and causes of action brought by the plaintiffs, as summarized below:

• *Refinance vs. Modification:* The plaintiffs asserted that the modifications were, in effect, refinances and not modifications. The definition of "modification" in Regulatory Interpretation §153.14(2) states that "[a] modification of a home equity loan occurs when one or more terms of an existing equity loan is modified, but the note is not satisfied and replaced." The court held that the plain language of the modification documents showed no intention to satisfy and replace the original note, which caused these transactions to fall within the §153.14(2) definition of "modification."

• *Capitalized Past Due Interest:* The plaintiffs asserted that capitalizing past due interest and adding that amount to the loan's principal was the advancement of additional funds prohibited in the modification of a home equity loan by Interpretation §153.14(2)(B). ("The advance of additional funds to a borrower is not permitted by modification of an equity loan"). The court interpreted the additional funds prohibition of §153.14(2)(B) as contemplating money provided by the lender to the borrower over and above the amount already loaned, which the borrower could use for other purposes at the borrower's discretion. Plaintiffs also relied on the Texas financial agencies April 2009 Home Equity Modification Advisory Bulletin, *click here*, which they claimed "endorsed" certain methods for modifying home equity loans. The court stated that while the Bulletin (which applies the repayment schedule requirements of subsection 50(a)(6)(L) to a permissible modification) may have persuasive value, it does not bear the weight of the home equity Interpretations and does not prohibit the use of any other lawful modification method, including the capitalized-past-due-interest method used by the defendant in the modification of plaintiffs' loan.

• *80 Percent Fair Market Value:* The plaintiffs asserted that the modifications violated the 80 percent fair market value limit of Section 50(a)(6)(B) because the loan amount in each modification exceeded this 80 percent limit due to the capitalized interest. Plaintiffs contented that defendant was required to abide by the 80 percent limit for each modification. The court held that the 80 percent fair market value limit applies only on the date on which the borrower obtained the original home equity loan. In reaching this holding, the court interpreted the phrase "on the date the extension of credit is made" in Section 50(a)(6)(B) and its accompanying Regulatory Interpretation §153.3 to refer only to the date of the original home equity loan and not the date of each subsequent modification, and that the defendant was required to consider the 80 percent fair market value limit only on the date the plaintiffs obtained the original home equity loan. As additional support for its holding, the court also interpreted the parenthetical exception in §153.3(3) to what is not included in the principal amount of a home equity loan— *i.e.*, "(other than any interest capitalized and added to the principal balance on the date the extension of credit is made)"—to apply only when interest that will accrue after the date of closing is capitalized and added to the principal on the date of closing.

• *Impermissible Open-End Account:* The plaintiffs asserted that the modifications were "a form of open-end account" in violation of Section 50(a)(6)(F), which prohibits "a form of open-end account … unless the open-end account is a home equity line of credit [subsection 50(t)][.]" The court held that the modifications by their express terms did not create an open-end account in violation of Section 50(a)(6)(F).

3. *Sims v. Carrington Mortg. Services, L.L.C.*, 538 F. App'x 537 (5th Cir.2013) affirmed the *Sims* district court's denials of plaintiffs' motion for leave to amend their complaint and plaintiffs' motion for reconsideration and certified four questions to the Texas Supreme Court pertaining to the remaining legal issues decided by the *Sims* district court in connection with the appeal from the *Sims* district court's judgment.

Questions Certified

> 1. After an initial extension of credit, if a home equity lender enters into a new agreement with the borrower that capitalizes past-due interest, fees, property taxes, or insurance premiums into the principal of the loan but neither satisfies nor replaces the

original note, is the transaction a modification or a refinance for purposes of section 50 of Article XVI of the Texas Constitution?

If the transaction is a modification rather than a refinance, the following questions also arise:

2. Does the capitalization of past-due interest, fees, property taxes, or insurance premiums constitute an impermissible "advance of additional funds" under section 153.14(2)(B) of the Texas Administrative Code?

3. Must such a modification comply with the requirements of section 50(a)(6), including subsection (B), which mandates that a home equity loan have a maximum loan-to-value ratio of 80%?

4. Do repeated modifications like those in this case convert a home equity loan into an open-end account that must comply with section 50(t)?

Note: The Texas Supreme Court answered the certified questions from the Fifth Circuit in *Sims v. Carrington Mortg. Services, L.L.C.*, 440 S.W.3d 10, (Tex. May 16, 2014), discussed *below* in No. 4. In view of the Texas Supreme Court's answers to the certified questions, the Fifth Circuit in *Sims v. Carrington Mortg. Services, L.L.C.*, 583 F. App'x 344 (5th Cir. Oct. 22, 2014) affirmed the district court judgment.

4. *Sims v. Carrington Mortg. Services, L.L.C.*, 440 S.W.3d 10, (Tex. May 16, 2014, *reh'g denied* Oct. 3, 2014), in answer to the questions certified to it by the Fifth Circuit in *Sims v. Carrington Mortg. Services, L.L.C.*, *above* in No. 2, held that as long as the original note is not satisfied and replaced, and there is no additional extension of credit (as the Texas Supreme Court defines it), the restructuring of a home equity loan is valid and need not meet the constitutional requirements for a new home equity loan.

First Certified Question

After an initial extension of credit, if a home equity lender enters into a new agreement with the borrower that capitalizes past-due interest, fees, property taxes, or insurance premiums into the principal of the loan but neither satisfies nor replaces the original note, is the transaction a modification or a refinance for purposes of section 50 of Article XVI of the Texas Constitution?

- Capitalizing Past Due Amounts into Loan Principal – Extension of New Credit?

The Sims note obligated Sims to pay principal, interest and late charges. The Security Instrument executed by Sims to secure the note obligated Sims to make escrow payments for taxes, assessments and insurance premiums, authorized the lender to make those payments in the event Sims failed to do so and provided that any escrow payments made by the lender became additional debt of Sims secured by the Security Instrument. The two modification agreements executed by Sims provided that their obligations and all the loan documents remained unchanged.

Before answering the first certified question, the Texas Supreme Court first determined that the applicability of Section 50(a)(6) did not depend on whether the restructuring of the Sims loan by the two modification agreements was a modification or a refinance but on whether it was an extension of credit, stating, "[i]f the restructuring of a home equity loan does not involve a <u>new</u> extension of credit, the requirements of Section 50(a)(6) do not apply." (emphasis added) In line with that determination, the court restated the first certified question - by replacing the words "a modification or a refinance" with the words "*a new extension of credit*," - so that it reads: *After an initial extension of credit, if a home equity lender enters into a new agreement with the borrower that capitalizes past-due interest, fees, property taxes, or insurance premiums into the principal of the loan but neither satisfies nor replaces the original note, is the transaction a new extension of credit for purposes of section 50 of Article XVI of the Texas Constitution?* Next, finding that neither the Texas Constitution nor the Regulatory Interpretations define "extension of credit," the court, nevertheless, found its meaning clear, stating, "[c]redit is simply the ability to assume a debt repayable over time, and an extension of credit affords the right to do so in a particular situation." The court based that meaning on cited references to various definitions of "credit" and "extension of credit" in the Texas Finance Code and Texas Administrative Code.

The Court rejected Sims' first argument that "any increase in the principal amount of a loan is a new extension of credit within the meaning of Section 50(a)(6)," stating: "The extension of credit for purposes of Section 50(a)(6) consists not merely of the creation of a principal debt but includes all the terms of the loan transaction. Terms requiring the borrower to pay taxes, insurance premiums, and other such expenses when due protect the lender's security and are as much a part of the extension of credit as terms requiring timely payments of principal and interest." In rejecting Sims' second argument that restructuring a loan to capitalize past due amounts is an advance of additional funds that constitutes a new extension of credit, the court stated that "the borrower's obligation for such amounts, and the lender's right to pay them to protect its security, were all terms of the original extension of credit." The court also rejected Sims' third argument that "requiring interest on capitalized past-due amounts is a new loan," stating, "it is simply a mechanism for deferring payment of obligations already owed in a way that allows the borrower to retain his home."

- Changing the Amount of Periodic Payments - Violation of Section 50(a)(6)(L)(i)?

Sims' argued that changing the periodic payment amounts violates the requirement of Section 50(a)(6)(L)(i) that a home equity loan be "scheduled to be repaid … in substantially equal successive periodic installments …." The court countered this argument with two instances in which the initial schedule is altered – *i.e.*, when a payment is missed and when the loan is prepaid - and then stated, "[s]ection 50(a)(6) does not forbid a revision of the initial repayment schedule that merely adjusts the regular installment amount." ***Note:*** This statement is not as all-encompassing as it reads as it must be read in the context of the case.

- Answer to First Certified Question:

To the first certified question, the court answered: "the restructuring of a home equity loan that, as in the context from which the question arises, involves capitalization of past-due amounts owed under the terms of the initial loan and a lowering of the interest rate and the amount of installment payments, but does not involve the satisfaction or replacement of the original note, an advancement of new funds, or an increase in the obligations created by the original note, is not a new extension of

credit that must meet the requirements of Section 50." ***Note:*** This answer has six limiting factors that should be adhered to, in addition to the requirements of Regulatory Interpretation §153.14(2) when "modifying" a home equity loan.

Second Certified Question

Does the capitalization of past-due interest, fees, property taxes, or insurance premiums constitute an impermissible "advance of additional funds" under section 153.14(2)(B) of the Texas Administrative Code?

To the second certified question, the court answered "[n]o, if those amounts were among the obligations assumed by the borrower under the terms of the original loan. … [S]uch capitalization is not a new extension of credit under Section 50(a)(6)."

Third Certified Question

Must such a modification comply with the requirements of section 50(a)(6), including subsection (B), which mandates that a home equity loan have a maximum loan-to-value ratio of 80%?

To the third certified question, the court answered "[n]o, because it does not involve a new extension of credit, for the reasons we have explained [in the court's published opinion]."

Fourth Certified Question

Do repeated modifications like those in this case convert a home equity loan into an open-end account that must comply with section 50(t)?

In answering this question, the court quoted the definition of a home equity line of credit in section 50(t) and the definition of an open-end account in §301.002(a)(14)(A) of the Texas Finance Code, stating, "[t]his description does not remotely resemble a loan with a stated principal that is to be prepaid as scheduled from the outset but must be restructured to avoid foreclosure." To paraphrase, the court answered "no" to the fourth certified question.

Note: If the opinion had ended after the answer to the fourth certified question, the court's decision would have been much clearer. But the opinion closed with the following statements: "The Constitution does not prohibit the restructuring of a home equity loan that already meets its requirements in order to avoid foreclosure while maintaining the terms of the original extension of credit. We answer the certified questions accordingly." We take the position that these last two statements are mere dicta and have no bearing on the court's specific answers to the certified questions.

Non-forfeiture

***Vincent v. Bank of America, N.A.*, 109 S.W.3d 856 (Tex.App.—Dallas, 2003, review denied 2004)**, involved a post-closing dispute regarding the bank's allocation of the loan payments between principal and interest. The plaintiffs sought forfeiture of all principal and interest on the loan pursuant to the pre-2003 cure provisions of Section 50(a)(6)(Q)(x). Citing the *Stringer* decision as authority, the court held:

> [F]orfeiture is only available for violations of constitutionally mandated provisions of the loan documents. Violation of any other provision of the loan documents may result in traditional breach of contract causes of action only, with traditional breach of contract remedies. Therefore, the Vincents were only entitled to forfeiture if the Bank breached a provision of the Loan Agreement that was constitutionally mandated. … Because [the Loan Agreement paragraph complained of by the Vincents] is not constitutionally mandated, its breach will not support forfeiture.

Although, in our opinion, the court's premise is correct, the troubling part of this decision is that the facts stated in the court's opinion show that the bank did breach a constitutionally mandated provision of the Loan Agreement (*i.e.*, the requirement of Section 50(a)(6)(L) that each monthly payment equal or exceed the amount of accrued interest). According to the opinion, the way in which the bank allocated the monthly payments resulted in interest accruing for several months in excess of the scheduled monthly payment called for in the loan documents.

Accord, citing the *Vincent* case as authority: *Chambers v. First United Bank & Trust Co.,* 419 B.R. 652, 2009 WL 3245420 (Bankr. E.D. Tex.—Sherman Division 2009) aff'd by 2013 WL 5915238 (5th Cir. 2013); *Modelist v. Deutsche Bank Nat. Trust Co*., 2006 WL 2792196 (S.D. Tex. Aug. 2006) (The court can find no case law in support of Plaintiff's theory that a violation of any law [other than breach of home equity requirements] triggers the forfeiture provision of Article XVI, Section 50(a)(6), of the Texas Constitution.), Magistrate's Memorandum and Recommendation adopted in part by *Modelist v. Vestal* [same case], 2006 WL 2792197 (S.D.Tex. Sept. 2006).

Savings Clause

***Foster v. Bank One Texas N.A.*, 54 F. App'x 592, 2002 WL 31730405 (5th Cir. 2002)** involved a 1998 home equity loan secured by plaintiff's Austin residence comprising 1.75 acres (*in 1998 the Texas Constitution limited urban homesteads to one acre*) and certain personal property situated thereon. The plaintiff asserted the loan violated subsection 50(a)(6)(H) (*which prohibits equity loans being secured by any real or personal property other than the borrower's homestead*). While acknowledging that this additional collateral would constitute a violation of subsection 50(a)(6)(H), the Fifth Circuit court used the savings clause in the home equity security instrument to affirm the trial court's judgment denying plaintiff's claim. The savings clause stated, in pertinent part, "notwithstanding any provision of this Homestead Lien Contract to the contrary in no event shall this Homestead Lien Contract require or permit any action which would be prohibited by Section 50(a)(6), Art. XVI, Texas Constitution, and all provisions of this Homestead Lien Contract shall be modified to comply fully with Section 50(a)(6), Art. XVI, Texas Constitution." The court stated that this savings clause automatically cured any defect under subsection 50(a)(6)(H).

The 1998 loan was subsequently renewed in 2000 and 2001, which loans omitted the personal property security provision that was in the 1998 loan. Also, in 1999 the Texas Constitution was amended to increase the urban homestead to ten acres. For these reasons, the Fifth Circuit court stated in regard to these two loans "when the 2000 lien and promissory note renewed and extended the 1998 loan, any defect in the 1998 lien was remedied. *See Thompson v. Chrysler First Bus. Credit Corp.,* 840 S.W.2d 25, 29 (Tex.App.Dallas 1992, no writ) ('In Texas, the execution of an 'extension agreement' pertaining to an outstanding debt is generally treated as a new contract evidencing the existing debt.')."

Note: The Fifth Circuit has determined that the *Foster* opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

Subordinate Lien Home Equity Loan Paid from Excess Proceeds of Prior Lien Foreclosure

***Patton v. Porterfield*, 411 S.W.3d 147 (Tex. App.—Dallas 2013, pet. denied)** involves the payoff of a second lien home equity loan from excess proceeds of the foreclosure sale of a valid first lien purchase money loan secured by the homestead. The first lien purchase money deed of trust specifically directed the trustee to apply foreclosure sale proceeds in the following order: first, to the expenses of sale, second, to all sums secured by the first lien deed of trust, and third, "any excess to the person or persons legally entitled to it." Porterfield claimed that paying the home equity loan from the prior lien's excess foreclosure sale proceeds violated Sections 50(a)(6)(C) (home equity loan is nonrecourse), (D) (home equity loan may be foreclosed only by court order) and (H) (home equity loan may not be secured by additional collateral). In addressing the legal issue as to how cash proceeds from the foreclosure of a prior purchase money deed of trust on a homestead should be distributed as between the senior lienholder, the junior home equity lienholder, and the homeowner, the appellate court held:

- Common law governing foreclosure sales and the use of excess proceeds to satisfy junior secured obligations applies to Article XVI, section 50(a)(6), of the Texas Constitution.
- Junior home equity lienholder was not required to obtain court order pursuant to Section 50(a)(6)(D) and Rules 735 and 736 of the Texas Rules of Civil Procedure in order to receive excess proceeds from foreclosure of the senior, purchase money deed of trust.
- The nonrecourse language of Section 50(a)(6)(C) did not prohibit the excess proceeds from the foreclosure of the senior, purchase money deed of trust from being used to satisfy the junior home equity loan.
- Cash proceeds from the sale of a homestead retain the character of a homestead for purposes of satisfying a home equity lien. Thus, payment of a junior home equity loan from excess proceeds of the foreclosure of a senior deed of trust does not violate the Section 50(a)(6)(H) requirement that a home equity loan be secured by only the homestead.

Based on the above holdings, the appellate court reversed the trial court's judgment and rendered a take-nothing judgment against Porterfield.

Constitution/Legislation

1. Urban Homestead – 10 Acres Rule. Article XVI, Section 51, of the Texas Constitution and Section 41.002(a) of the Texas Property Code provide that an urban homestead consists of a lot or contiguous lots of not more than 10 acres of land together with any improvements thereon. Section 41.005(b) of the Texas Property Code provides that if the urban homestead is part of one or more contiguous lots containing more than 10 acres, then up to 10 acres of the property may be voluntarily designated as the urban homestead.

2. Definition of Urban Homestead. Section 41.002(c) of the Texas Property Code defines the urban homestead. Under Section 41.002(c), a homestead is considered urban if located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision, and serviced by police protection, paid or volunteer fire protection, and if at least three of the following services are provided by a municipality or under contract to a municipality: (a) electric; (b) natural gas; (c) sewer; (d) storm sewer; and (e) water. The Fifth Circuit case *In Re Bouchie*, 324 F.3d 780 (5th Cir. 2003), upheld this statutory definition of urban homestead as the exclusive test for classifying Texas homesteads as urban or rural, thereby displacing prior case law on this issue.

3. Rural Homestead – 100/200 Acre Rule. Article XVI, Section 51, of the Texas Constitution provides that a homestead, not in a town or city, shall consist of not more than 200 acres of land, which may be in one or more parcels, with the improvements thereon. Section 41.005(a) of the Texas Property Code provides that the head of a family may designate one or more parcels of land that add up to a maximum of 200 acres as a rural homestead and that a single individual may only designate one or more parcels of land totaling up to 100 acres as a rural homestead.

4. Definition of Rural Homestead. The Texas Constitution and Property Code provide for rural and urban homesteads but neither defines a rural homestead, other than the prohibition that it not be located in a town or city. Therefore, to determine if a homestead is a rural homestead, it must fail to satisfy the criteria set forth in Section 41.002(c) of the Property Code for an urban homestead. If the homestead fails to satisfy those criteria then, by default, the homestead is rural homestead to the extent it does not exceed the applicable acreage limitations set out in the Constitution and Property Code.

5. Permitted Encumbrances – Texas Property Code. Section 41.001(b) of the Texas Property Code is the statutory equivalent to Article XVI, Section 50, of the Texas Constitution in enumerating the permitted encumbrances on Texas homesteads.

6. Home Equity Agency Interpretation and Safe Harbor Provisions. Article XVI, Section 50(u), of the Texas Constitution creates a safe harbor by providing that an act or omission does not violate a provision included in Section 50(a)(6) if the act or omission conforms to an Regulatory Interpretation of the provision that is: (1) in effect at the time of the act or omission; and (2) made by the Finance Commission or by an appellate court of this state or the United States.

Home Equity Loan Title Policy Endorsements

1. Equity Loan Mortgage Endorsement T-42. The T-42 Endorsement (and its related procedural rule P-44) insures lenders that:

a. all owners and spouses voluntarily signed or consented to the loan instruments creating the equity lien;

b. the homestead property is not designated for agriculture use under statues governing property tax; ***(Note:** For home equity loans closed after January 1, 2018, SJR 60 has removed the agriculture use prohibition)*

c. no other equity loan is secured on the homestead property;

d. no other equity loan has been secured on the homestead property within the past twelve months (except for a "cure refinance" under subsection 50(a)(6)(Q)(x)(f));

e. the security instrument contains a disclosure that the loan is a home equity loan;

f. the closing occurred at the office of the title company; and

g. for HELOCs, subsequent disbursements and accrued interest shall have the same priority as advances made as of the policy date, except for bankruptcies prior to the disbursement and statutory liens in favor of the government arising or recorded subsequent to the policy date.

2. Supplemental Coverage Equity Loan Mortgage Endorsement T-42.1. The T-42.1 Endorsement (and its related procedural rule P-47) provides coverage against:

a. the insurer or its agent closing on the equity loan before the specific calendar date stated in the lender's written closing instructions;

b. the insurer or its agent dispersing any loan proceeds sooner than the fourth calendar day after closing;

c. the insurer or its agent permitting the homeowner or spouse to sign a confirmation of non-cancellation of loan on or before the date of closing;

d. the insurer or its agent failing to provide the homeowner on the date of closing with a copy of all documents related to the loan that were executed by the owner at the title company office;

e. the insurer or its agent collecting or dispersing any fees not shown on the final settlement statement provided to the lender prior to closing;

f. blanks, other than lender signature lines, in the following instruments left to be filled in when executed by homeowner at the office of the title company or its agent: the acknowledgment of fair market value, the insured mortgage and promissory note, affidavits of subsection 50(a)(6) compliance, and other documents if the documents are prepared by the insurer or its agents;

g. failure of the written acknowledgment of fair market value to be executed by the owner on the date of closing;

h. part of the land described in Schedule A of the title policy not being the homestead of the homeowner;

i. title to other land in the same county held in the name of the homeowner-borrower being currently subject to a subsection 50(a)(6) home equity loan;

j. title to other land in the same county held in the name of the homeowner-borrower being subject to a subsection 50(a)(6) home equity loan made within one year of the date of the policy; and

k. failure of the insurer or its agent to provide the owner the preclosing itemized disclosure at least one calendar day before the business day or subsequent calendar day of closing.

Potential Problem Areas

1. Copy of All Documents. Current Section 50(a)(6)(Q)(v) and Regulatory Interpretation §153.22 have resolved most of the issues raised by the previous version of Section 50(a)(6)(Q)(v). However, one old question remains and two new ones are raised:

- Does providing one copy of the documents to non-married homestead owner(s) suffice, or must each non-married homestead owner be given a copy?
- Do the copies have to be copies after the documents are executed or may they be copies of the documents before execution?
- What is meant by "final loan application"?

In answer to these questions, we recommend:

- Non-married owners each receive a copy of the documents. Note that §153.22 provides that one copy of the documents may be provided to married owners, the implication for non-married owners being that each non-married owner must receive his or her own copy.
- The copies provided must be copies of the documents only after they are signed by the owner(s) at closing.
- The final loan application usually is the version prepared by the lender and submitted at closing for the borrower to sign. In any event, it should always be the loan application relied upon by the lender and/or investor.

2. Non-Titled Spouse. Is a non-titled spouse an "owner" of the homestead for home equity purposes? Under Texas law, "[h]omestead rights vest in both spouses regardless of whether the property is owned by both spouses, by one spouse separately, or even by a third party." *Rooms With A View, Inc. v. Private National Mortgage Association*, 7 S.W.3d 840 (Tex.App.—Austin 1999, pet. denied 2000), cert. denied, 531 U.S. 826, 121 S.Ct. 72, 148 L.Ed.2d 36, 69 USLW 3002 (U.S. Oct. 02, 2000) (No. 99-2048), and cases cited therein; *Geldard v. Watson*, 214 S.W.3d 202 (Tex. App.—Texarkana, 2007). In Texas, the "homestead right constitutes an estate in land." *Laster v. First Huntsville Properties Co.*, 826 S.W.2d 125 (Tex. 1991); *Geldard v. Watson*, 214 S.W.3d 202 (Tex. App.—Texarkana 2007). The homestead right of a surviving spouse has been held to be "one in the nature of a legal life estate…created by operation of law." *Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978). Regulatory Interpretation §153.1(13) defines "owner" as "[a] person who has the right to possess, use, and convey, individually or with the joinder of another person, all or part of the homestead." Under Texas homestead law, a non-titled spouse has these rights. Thus, if the definition of "owner" in §153.1(13) remains unchanged, we recommend that a non-titled spouse be treated the same as the titled owner for home equity purposes. For example, under Section 50(a)(6) an "owner" is not only entitled to receive the 12-day notice required by Section 50(g) but also a copy of the loan application and preclosing HUD-1 or Closing Disclosure, as applicable, required by Section 50(a)(6)(M)(ii) and must sign the acknowledgment of fair market value required by Section 50(a)(6)(Q)(ix). In addition, we recommend that the non-borrowing spouse sign the loan application, in the capacity of "non-borrowing spouse," in order to comply with the loan application submission requirement of Section 50(a)(6)(M)(i). And the non-titled spouse (whether considered an owner or not) must sign the security instrument encumbering the homestead, the same as for any other loan secured by the homestead. See Article XVI, Section 50(c), Texas Constitution; Section 5.001, Texas Family Code; *Geldard* Id., and cases cited therein.

3. Voluntary Payment of Non-Homestead Debt. Section 50(a)(6)(Q)(i) and Regulatory Interpretation §153.18(1) provide that an equity loan cannot be conditioned upon the requirement that the homestead owner repay from the equity loan proceeds non-homestead debt owed to the equity lender. Instances have arisen, however, where the homestead owner has voluntarily requested that those debts be paid. Interpretation §153.18(2) states, "[a]n owner is not precluded from voluntarily using the proceeds of an equity loan to pay on a debt owed to the lender making the equity loan." In this instance, we recommend that: (1) the equity lender obtain a signed acknowledgment from the owner documenting this voluntary payment; (2) the non-homestead debt to the equity lender not be reflected on the Closing Disclosure; and (3) the equity loan proceeds for this voluntary payment be disbursed directly to the homestead owner and not be funded back to the equity lender by the title

company closing the transaction. See also, *Box v. First State Bank, Bremond S.S.B.* under the Case Law section of No. 22 above.

4. Acknowledgment of Fair Market Value. Section 50(a)(6)(Q)(ix) requires that the owner of the homestead and the lender sign a written acknowledgment as to the fair market value of the homestead property on the date the extension of credit is made. If the lender fails to sign the acknowledgment at or prior to closing, it is conceivable that a court could decide that the lender's signature is a requirement for consummation of the loan under federal rescission law (see, §1026.23(a)(3) of Regulation Z), thus extending the owner's federal right to cancel on the basis that consummation has not occurred until the lender signs the acknowledgment because a fully executed acknowledgment is required for loan validity under Section 50(a)(6)(Q)(ix). The more immediate and real danger, however, is that if the lender fails to sign the acknowledgment at or prior to closing, the lender may fail to sign the acknowledgment after closing. In that event, under the *Wood* and *Garofolo* decisions by the Texas Supreme Court (see Case Law section in No. 33 above), the loan is void until cured. And, if the owner notifies the lender of this failure and the lender does not take the appropriate action within 60 days, either because the lender does not know it received the notice or, if the loan has been sold, the originating lender cannot be contacted, the failure could subject the loan to the forfeiture penalties of Section 50(a)(6)(Q)(x). Although it may be operationally difficult, in order to avoid these problems, we recommend that the lender sign the acknowledgment of fair market value on or immediately prior to the closing of the equity loan.

5. Contiguous Lots – Urban Homestead. The constitutional and statutory changes enlarging the urban homestead to 10 acres (see Constitution/Legislation section above) added the requirement that if the urban homestead consists of more than one lot, the lots must be "contiguous." Prior to this change, the parcels of property comprising an urban homestead could be separated by distance, as long as they were in the same urban area. Does the word "contiguous" require touching in the sense of contact at some point no matter how small or on all or most of one side? The issue is whether physical contact is required and, if so, how much. From the following Texas Supreme Court cases, it appears that the Texas Supreme Court defines "contiguous" as requiring physical contact. See, *Ford v. Aetna Ins. Co.*, 424 S.W.2d 612 (Tex. 1968), a non-contiguous lots as business homestead case in which the court stated that the two lots in question were not contiguous because they were separated by an alley and also separated laterally by a distance of 25 feet; *Railroad Commission of Texas v. Lone Star Gas Co.*, 587 S.W.2d 110 (Tex. 1979), a gas well spacing case under Railroad Commission rules in which the court held three tracts "contiguous" because the two outside tracts border on the middle tract; *City of Waco v. City of McGregor*, 523 S.W.2d 649 (Tex. 1975), a municipal annexation case in which the court found that "the entire area of the attempted annexation is contiguous to McGregor since it is touching [the city] in a geographical sense"; and *State ex rel. Pan Am. Production Co. v. Texas City*, 303 S.W.2d 780 (Tex. 1957), a municipal annexation case in which the court held that the annexed land was "contiguous" with the city because they shared a common boundary line. The *Pan Am* court also stated that the term "adjacent" does not have a fixed or definite meaning and that "the authorities are almost unanimous in according to that term the meaning of 'neighboring or close by' or 'in the vicinity of and not necessarily contiguous or touching upon'." Based on these cases, we believe the term "contiguous" for urban homestead purposes means the lots must physically touch one another.

6. Place Of Closing. The *Rooms With A View, Inc.* decision (herein "Rooms")—see the Case Law section in Constitutional Provision 18 above—defined the term "title company" to mean "a title

insurer or an agent of a title insurer" and held that "[n]othing suggests the legislature intended 'title company' to refer to an entity performing only title abstractions." Although the *Rooms* case involved a home improvement loan under subsection 50(a)(5) and not an equity loan under subsection 50(a)(6), both subsections use the term "title company" in limiting the offices for document execution (home improvement contracts under subsection 50(a)(5)(D)) or loan closing (equity loans under subsection 50(a)(6)(N)). If an equity loan is not closing at a title company, as defined by the *Rooms* decision, we advise that the loan close only at the office of the lender funding the loan (not the broker) or a Texas licensed attorney at law. Regulatory Interpretations §153.15(1), (2) and (3) also require that an equity loan closing, signing an equity loan power of attorney and the consent to the equity loan required by Section 50(a)(6)(A), respectively, must occur at the permanent physical address of the office or branch office of the title company, lender, or attorney.

Title 7. Banking and Securities
Part 8. Joint Financial Regulatory Agencies
Chapter 153. Home Equity Lending

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") propose amendments to the following home equity lending interpretations: §§153.1, 153.5, 153.14, 153.17, 153.84, and 153.86; propose new §153.45; and propose the repeal of §153.87, in 7 TAC, Chapter 153, concerning Home Equity Lending.

The proposal applies the administrative interpretation of the home equity lending provisions of Article XVI, Section 50 of the Texas Constitution ("Section 50") allowed by Section 50(u) and Texas Finance Code, §11.308 and §15.413.

The main purpose of the proposal is to implement SJR 60, passed by the Texas Legislature in 2017. SJR 60 amends Section 50 and applies to home equity loans entered on or after January 1, 2018.

SJR 60's constitutional amendments relate primarily to six issues. First, SJR 60 amends Section 50(a)(6)(E) by replacing the current three percent fee limitation with a two percent limitation, and specifying that four types of fees are not included in the limitation: an appraisal fee, a property survey fee, a mortgagee title insurance premium, and a title report fee. Second, SJR 60 amends Section 50(a)(6)(I) by removing the current prohibition on a home equity loan for agricultural property. Third, SJR 60 amends Section 50(a)(6)(P) by adding certain subsidiaries of depository institutions to the list of lenders authorized to make home equity loans, and replacing a reference to a "mortgage broker" with "mortgage banker or mortgage company." Fourth, SJR 60 amends Section 50(f) by allowing a home equity loan to be refinanced as a non-home-equity loan if four conditions are met: a one-year timing limitation, a limitation on advance of additional funds, an 80% loan- to-value limitation, and a required disclosure to the property owner. Fifth, SJR 60 amends Section 50(g) to make conforming changes to the required 12-day consumer disclosure. Sixth, SJR 60 amends Section 50(t)(6) by removing the 50% limitation on additional debits or advances for a home equity line of credit.

After the legislature passed SJR 60, the Texas Department of Banking, the Texas Department of Savings and Mortgage Lending, the Office of Consumer Credit Commissioner, and the Texas Credit Union Department ("agencies") circulated an initial precomment draft of proposed changes to interested stakeholders. The agencies then held a stakeholder meeting where attendees provided oral precomments. In addition, the agencies received four informal written precomments from stakeholders. Certain concepts recommended by the precommenters have been incorporated into this proposal, and the agencies appreciate the thoughtful input provided by stakeholders.

The individual purposes of the amendments, new section, and repeal are provided in the following paragraphs.

The proposed amendments to §§153.1, 153.5, and 153.14 implement SJR 60's amendments to Section 50(a)(6)(E). As discussed previously, SJR 60 amends Section 50(a)(6)(E) by replacing the current

three percent fee limitation with a two percent limitation, and specifying that certain types of fees are not included in the limitation.

A proposed amendment to §153.1(15) replaces the phrase "three percent limitation" with "two percent limitation."

In §153.5, proposed amendments to the introductory paragraph reflect SJR 60's amendments to Section 50(a)(6)(E). Throughout §153.5, proposed amendments replace the phrase "three percent limitation" with "two percent limitation." Proposed amendments to paragraph (3)(B) in §153.5 replace the phrase "legitimate discount points" with "bona fide discount points," reflecting SJR 60's exclusion of bona fide discount points from the two percent limitation. In paragraph (7), regarding third-party charges, a proposed amendment moves a sentence providing an example of a third-party charge in order to provide better clarity. The amendment also removes the phrase "mortgage brokers' fees" from paragraph (7), reflecting SJR 60's removal of the phrase "mortgage broker" from Section 50. This amendment also responds to precomments stating that the phrase "mortgage brokers' fees" is no longer necessary. Proposed amendments to paragraph (8), regarding charges to evaluate, conform to SJR 60's amendments on fees for appraisals, surveys, and title reports.

Proposed new paragraphs (13)-(16) in §153.5 identify the four types of fees that may be excluded from the two percent limitation under SJR 60's amendments to Section 50(a)(6)(E): an appraisal fee, a property survey fee, a mortgagee title insurance premium, and a title report fee.

Proposed §153.5(13) states that an appraisal must be performed by a person who is not an employee of the lender, and that the excludable appraisal fee is limited to the fee paid to the appraiser for completion of the appraisal, not the fee for appraisal management services. This paragraph is based on Section 50(a)(6)(E)(i) of SJR 60, which states that the two percent limitation excludes a fee for "an appraisal performed by a third party appraiser." Under Texas Occupations Code, §1104.158(a), an appraisal management company must "separately state the fees: (1) paid to an appraiser for the completion of an appraisal; and (2) charged by the company for appraisal management services" in reporting to a client. Proposed paragraph (13) specifies that only the first of these two fees, the fee paid to the appraiser for the completion of the appraisal, may be excluded from the two percent limitation. At the stakeholder meeting, one attendee asked whether a fee for an evaluation that is not an appraisal may be excluded. This fee would be subject to the two percent limitation under proposed §153.5(8), which provides that charges to evaluate are generally subject to the two percent limitation, and would not be excludable under proposed §153.5(13), which provides an exception to this general requirement for certain appraisal fees.

Proposed §153.5(14) states that a fee for a property survey performed by a state registered or licensed surveyor is not a fee subject to the two percent limitation, and that the property survey must be performed by a person who is licensed or registered under Texas Occupations Code, Chapter 1071. This paragraph is based on Section 50(a)(6)(E)(ii) of SJR 60, which states that the two percent limitation excludes a fee for "a property survey performed by a state registered or licensed surveyor."

Proposed §153.5(15) states that an excludable premium for title insurance is limited to the applicable basic premium rate for title insurance published by the Texas Department of Insurance (TDI), plus authorized premiums for applicable endorsements, and that rules adopted by the TDI govern the applicability of endorsements and the authorized amount for each premium. This paragraph is based on Section 50(a)(6)(E)(iii) of SJR 60, which states that the two percent limitation excludes a fee for "a state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law."

One precommenter recommends removing the applicability requirement in §153.5(15)(C), which states that any endorsements must be applicable to the mortgagee policy for the equity loan. TDI has identified various endorsements that may be used to modify a title insurance policy, and has established premiums for each type of endorsement. The endorsements are described in TDI's Title Insurance Basic Manual. The authorized endorsements include Form T-42 (insuring against loss due to failure to comply with Section 50's requirements for home equity loans), as well as endorsements relating to minerals, condominiums, balloon mortgages, and other issues. The applicability requirement in proposed §153.5(15)(C) is intended to capture the concept that a lender should not charge the property owner a premium for an endorsement that does not apply to the transaction. For example, if the property is not a manufactured home, then the property owner should not be required to pay a premium for a manufactured housing endorsement, Form T-31. Similarly, if the loan is not a home equity line of credit, then the property owner should not be required to pay a premium for a future advance or revolving credit endorsement, Form T-35. As stated in paragraph (15), TDI's rules govern the applicability of endorsements.

At the stakeholder meeting, one attendee explained that some lenders might make amendments to title insurance policies, and that these "amendments" are not necessarily endorsements for which TDI's rules authorize a premium. The commissions believe that proposed §153.5(15) appropriately defers to TDI's rules regarding the applicability of endorsements and authorized amount of the premium. TDI's rules, not the labels used by the parties, will determine whether the endorsement is authorized.

Proposed §153.5(16) states that an excludable fee for a title report must be less than the applicable basic premium rate for title insurance, and that the title report fee may not be excluded if the equity loan is covered by a mortgagee policy of title insurance. This paragraph is based on Section 50(a)(6)(E)(iv) of SJR 60, which states that the two percent limitation excludes a fee for "a title examination report if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law." The agencies understand that this fee is intended to be excluded in transactions where the lender obtains a title report instead of a mortgagee policy of title insurance. In addition, proposed §153.5(16)(C) explains that the fee must comply with applicable law, including Texas Finance Code, §342.308(a)(1), which limits title examination fees for certain secondary mortgages.

One precommenter makes the following recommendation regarding paragraph (16): "Rather than require that such report fee be less than the state base premium without endorsements, it would be more appropriate to provide that it cannot exceed the state base premium for a mortgagee policy with endorsements." The commissions disagree with this recommendation. Section 50(a)(6)(E)(iv) of SJR 60 states that the two percent limitation excludes a fee for "a title examination report if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law." The plain language of this provision requires the title report fee to be less than the state base premium for title insurance without endorsements.

In the initial precomment draft sent to stakeholders, paragraphs (13), (14), (15), and (16) each included a statement that the relevant fee "must comply with applicable law." This phrase was based on existing interpretations in current §153.5, which state that certain fees may be charged "to the extent authorized by applicable law" or that the lender "must comply with applicable law." Two precommenters recommended removing or amending this phrase, arguing that it is unnecessary or could create confusion. At the stakeholder meeting, one attendee recommended removing the phrase "must comply with applicable law" in paragraphs (14) and (15), while acknowledging that it is appropriate to state that a surveyor must be licensed under the Texas Occupations Code. The attendee recommended a provision-by-provision approach to using the phrase. In response to these precomments, proposed §153.5 does not include the phrase "must comply with applicable law" in paragraphs (13), (14), and (15), which relate to services performed by third parties, but includes the phrase in paragraph (16) regarding the title report, where the commissions believe that the phrase is appropriate.

A proposed amendment to §153.14(2)(D) replaces the phrase "3% fee cap" with "two percent limitation."

In §153.17, regarding lenders that are authorized to make home equity loans, proposed amendments to the introductory paragraph reflect SJR 60's amendments to Section 50(a)(6)(P). Proposed amendments to §153.17(3) remove a reference to a "mortgage broker" and specify that a person licensed under Texas Finance Code, Chapter 157 is a person regulated as a mortgage banker for purposes of Section 50(a)(6)(P)(vi).

Proposed new §153.45 describes the permissible ways in which a home equity loan can be refinanced, in accordance with Section 50(f) as amended by SJR 60. Paragraphs (1)-(4) of the new section describe the four conditions that must be met to refinance a home equity loan as a non-home-equity loan under Section 50(f)(2) of SJR 60.

Proposed §153.45(1) explains that the refinance may not be closed before the first anniversary of the closing date of the home equity loan, and that the closing date of the refinance is the date on which the owner signs the loan agreement for the refinance. This paragraph is based on Section 50(f)(2)(A) of SJR 60, which provides the following condition that must be met to refinance a home equity loan as a non- home-equity loan: "the refinance is not closed before the first anniversary of the date the extension of credit was closed." The statement regarding the closing date of the

refinance is based on the definition of "closing" in current §153.1(3).

Proposed §153.45(2) describes the limitation on the advance of additional funds for the refinance. This paragraph is based on Section 50(f)(2)(B) of SJR 60, which provides the following condition that must be met to refinance a home equity loan as a non-home-equity loan: "the refinanced extension of credit does not include the advance of any additional funds other than: (i) funds advanced to refinance a debt described by Subsections (a)(1) through (a)(7) of this section; or (ii) actual costs and reserves required by the lender to refinance the debt." Proposed §153.45(2)(A) explains that actual costs must be identifiable, must be actually incurred by the lender, and must comply with any applicable limitations on costs. Proposed §153.45(2)(B) explains that reserves (e.g., an escrow account for taxes and insurance) must be actually required by the lender to refinance the debt, and must comply with applicable law. The commissions believe that the statement that the reserves "must comply with applicable law" is appropriate in this provision to ensure that the lender complies with any laws governing reserve accounts, such as the escrow requirements in Regulation X, 12 C.F.R. §1024.17, and Regulation Z, 12 C.F.R. §1026.35(b).

One precommenter recommends that paragraph (2)(A) state that costs must be "actually incurred by an owner or an owner's spouse." The precommenter states that this recommendation would "conform to an exclusion for charges absorbed by a lender or a third party in §153.5(5) and (7), respectively." The commissions disagree with this recommendation. It appears that the legislature intended the phrase "actual costs" to refer to costs that the lender actually incurs and requires the owner to pay back along with other advanced amounts. If the commissions used the precommenter's recommended language, this would suggest that there is no limitation on actual costs advanced in connection with the refinance, because all costs that the lender charges are incurred by the owner. In addition, specifying that actual costs exclude costs absorbed by the lender is unnecessary, because the lender does not advance these amounts.

Proposed §153.45(3) describes the 80% loan-to-value limitation for the refinance. This paragraph is based on Section 50(f)(2)(C) of SJR 60, which provides the following condition that must be met to refinance a home equity loan as a non- home-equity loan: "the refinance of the extension of credit is of a principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the refinance of the extension of credit is made." Subparagraphs (A), (B), and (C) in proposed §153.45(3) describe the method of calculating the principal amount of the refinance and the principal balance of other outstanding debt. These subparagraphs are based on current §153.3, which describes the 80% loan-to-value limitation for home equity loans.

One precommenter recommends adding the following subparagraph (D) in proposed §153.45(3): "On a closed-end multiple advance refinance, the principal balance also includes contractually obligated future advances not yet disbursed." The commissions disagree with this recommendation. Section 50(f)(2)(B) of SJR

60 limits the advance of funds to the amount refinanced, actual costs, and required reserves. It does not appear that the legislature intended for the Section 50(f)(2) refinance to include multiple future advances.

Proposed §153.45(4) describes the requirement to provide a disclosure to the owner in connection with the refinance. This paragraph is based on Section 50(f)(2)(D) of SJR 60, which provides the following condition that must be met to refinance a home equity loan as a non-home-equity loan: "the lender provides the owner the following written notice on a separate document not later than the third business day after the date the owner submits the loan application to the lender and at least 12 days before the date the refinance of the extension of credit is closed . . . ." Section 50(f)(2)(D) then includes the text of the required refinance disclosure, which provides important information about the consumer protections that a borrower loses by agreeing to refinance a home equity loan into a non-home-equity loan.

Subparagraphs (A)-(C) in proposed §153.45(4) provide guidance to lenders in calculating the three-day and 12-day periods under Section 50(f)(2)(D). These requirements are based on interpretations relating to the closing date and the required 12-day consumer disclosure for home equity loans in current §153.12 and §153.51. In particular, proposed §153.45(4)(C) states that if a lender mails the refinance disclosure to the owner, the lender must allow a reasonable period of time for delivery, and that a period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery. This subparagraph is nearly identical to current §153.51(1), which provides the same requirement and rebuttable presumption for the 12-day consumer disclosure under Section 50(g). The Texas Supreme Court upheld §153.51(1) in *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566, 589 (Tex. 2013). The three-day rebuttable presumption is also consistent with similar presumptions for mailed notices, such as Rule 21a(c)-(e) of the Texas Rules of Civil Procedure. Proposed §153.45(4)(C) helps ensure that the borrower receives the important information in the refinance disclosure promptly after filing a loan application, and that the borrower has a full 12 days to consider this information before closing the refinance.

Two stakeholders suggested alternative language for the three-day requirement in §153.45(4)(C). At the stakeholder meeting, one attendee noted that in order to benefit from the rebuttable presumption in §153.45(4)(C), a lender would have to mail the refinance disclosure on the same day it receives the loan application. This is a result of reading the three-day presumption in §153.45(4)(C) together with the requirement to provide the disclosure within three days of the application under Section 50(f)(2)(D). The attendee expressed a concern that it would not be possible for lenders to send the refinance disclosure on the same day they receive the loan application. As an alternative, the attendee suggested a distinction between compliance with the three-day period (which would end when the lender deposits the disclosure in the mail) and compliance with the 12-day period (which would begin running when the borrower receives the disclosure). In an informal precomment, another stakeholder recommends addressing this issue by adding the following definition of "provide" in

§153.1: "deliver or place in the mail to the owner the disclosures required by Subsection 50(f)(2)(D) and Section 50(g)."

The commissions disagree with these recommendations, and believe that proposed §153.45(4)(C) appropriately requires a reasonable period for delivery of a mailed disclosure, for three reasons.

First, the requirement to allow a reasonable period for delivery is consistent with the plain meaning of the word "provide." *See, e.g.*, Webster's New Collegiate Dictionary (11th ed. 2003) (defining "provide" as "to supply or make available"). A mailed disclosure is supplied or made available to the borrower (i.e., provided) when it is delivered to the borrower. In *Norwood*, the Texas Supreme Court assumed that the 12-day disclosure is provided when the borrower receives it. *See Norwood*, 418 S.W.3d at 589 ("In giving meaning to 'provides', the Commissions have determined there is a rebuttable presumption that notice is received three days after it is mailed."). By contrast, the stakeholders' recommended changes would suggest that the disclosure is provided when it is placed in the mailbox. A disclosure is not supplied or made available to the borrower when the lender places it in a mailbox. This is why §153.45(4)(C) appropriately requires the lender to allow a reasonable period for delivery.

Second, if the commissions follow the stakeholders' recommended changes, then it is unclear whether the owner would be able to challenge the three-day presumption of delivery. The Texas Supreme Court upheld §153.51(1) because it gives homeowners an opportunity to challenge receipt and show that the consumer disclosure was not delivered in a timely manner. *See Norwood*, 418 S.W.3d at 589. Under the stakeholders' recommended changes, if an owner received the refinance disclosure weeks after submitting a loan application, it is unclear how the owner could challenge the lender's compliance with three-day requirement in Section 50(f)(2)(D).

Third, the commissions believe that adequate alternatives are available to lenders if they cannot mail the refinance disclosure on the same day they receive a loan application. Proposed §153.45 does not prohibit other methods of providing the refinance disclosure. For example, lenders may provide the disclosure electronically by e-mail or on a website in compliance with the E-Sign Act, 15 U.S.C. §§7001-7006, or they may deliver the disclosure in person. In addition, overnight U.S. mail or two-day commercial mailing might rebut the normal three-day presumption for delivery. Any of these alternatives could help the lender ensure that the refinance disclosure is provided to the owner "not later than the third business day after the date the owner submits the loan application to the lender," as required by Section 50(f)(2)(D).

In response to a precomment, proposed §153.45(4)(D) provides that one copy of the refinance disclosure may be provided to married owners. Proposed §153.45(4)(E) explains that the refinance disclosure is only a summary of substantive rights governed by the constitution. Proposed §153.45(4)(F) explains that a lender may rely on an established system of verifiable procedures to evidence compliance with paragraph (4). Proposed §153.45(4)(G) explains that lenders may use a Spanish translation of the refinance disclosure that will be posted on the Finance Commission's webpage. These provisions are based on interpretations for the 12-day consumer disclosure in current

§153.12 and §153.51. The agencies have circulated an initial draft Spanish translation of the refinance disclosure to stakeholders, and intend to post a final version to the Finance Commission's webpage once it is finalized.

One precommenter suggested specifying that a home equity line of credit may be refinanced as a non-home-equity loan under Section 50(f)(2). The commissions believe that this addition is unnecessary. Home equity lines of credit are a type of home equity loan under Section 50, and are subject to the same requirements as other home equity loans unless the constitution specifies otherwise. Adding the precommenter's suggested language could raise other questions about whether home equity lines of credit are subject to general requirements for home equity loans.

In addition to the amendments discussed previously, SJR 60 adds Section 50(f-1), stating: "An affidavit executed by the owner or the owner's spouse acknowledging that the requirements of Subsection (f)(2) of this section have been met conclusively establishes that the requirements of Subsection (a)(4) of this section have been met." When the agencies circulated the initial precomment draft of the amendments, the agencies asked whether an interpretation is needed regarding the content of the affidavit and the manner of its execution. The agencies received mixed responses on this issue. One precommenter recommends an interpretation on what would satisfy the affidavit provision. Another precommenter states that the commissions should not adopt an interpretation on this issue "because an affidavit is defined by §312.011(1), Chapter 312, Government Code, and the manner of its execution is subject to subsection 50(a)(6)(N)." This same precommenter recommends "that the Commissions propose an Interpretation to address the cure of a defective (f)(2) refinance pursuant to their authority under Subsection (u) to interpret Subsections (a)(6) and (f)," but the precommenter does not identify the constitutional basis for the cure or what the cure should entail. At the stakeholder meeting, one attendee stated that the commissions did not necessarily need to promulgate the affidavit, but the attendee believed it would be helpful to have a title for the affidavit. The agencies intend to monitor this issue to determine whether an interpretation is appropriate.

The proposed amendments to §153.84 and §153.86, together with the repeal of §153.87, implement SJR 60's amendments to Section 50(t)(6). As discussed previously, SJR 60 amends Section 50(t)(6) by removing the 50% limitation on additional debits or advances for a home equity line of credit. Proposed amendments to §153.84 and §153.86 remove references to the 50% limitation in Section 50(t)(6) while maintaining references to the overall 80% loan-to-value limitation in Sections 50(a)(6)(B) and 50(t)(5), which SJR 60 did not amend. Section 153.87 is proposed for repeal because it relates solely to the 50% limitation that SJR 60 removes.

One precommenter recommends that the commissions issue an interpretation of SJR 60's temporary provision, which states that SJR 60's changes apply to a home equity loan made on or after January 1, 2018, and that the temporary provision expires January 1, 2019. The precommenter recommends an interpretation specifying that the changes made by SJR 60 continue after January 1, 2019. The commissions believe that this interpretation is

unnecessary. The legislature clearly intended for the amendments in SJR 60 to continue in effect beyond December 31, 2018, and would have made a clearer statement if it intended for all of the amendments in SJR 60 to expire on December 31, 2018.

Harold Feeney, Credit Union Commissioner, on behalf of the Texas Credit Union Commission and Leslie L. Pettijohn, Consumer Credit Commissioner, on behalf of the Finance Commission of Texas have determined that for the first five- year period the amendments, new rule, and repeal are in effect there will be no fiscal implications for state or local government as a result of administering the interpretations.

Commissioner Feeney and Commissioner Pettijohn have also determined that for each year of the first five years the proposal is in effect, the public benefits anticipated as a result of the proposal will be to create standards and guidelines for both lenders and borrowers, fostering a stable environment for the extension of home equity loans.

There is no anticipated cost to persons who are required to comply with the proposal. Any costs are imposed by SJR 60's amendments to the constitution, and are not imposed by the proposal. There will be no effect on individuals required to comply with the proposal.

The commissions are not aware of any adverse economic effect on small businesses, micro-businesses, or rural communities resulting from this proposal. But in order to obtain more complete information concerning the economic effect of the proposal, the commissions invite comments from interested stakeholders and the public on any economic impacts on small businesses, micro-businesses, or rural communities, as well as any alternative methods of achieving the purpose of the proposal while minimizing adverse impacts on small businesses, micro-businesses, or rural communities.

During the first five years the proposal will be in effect, the proposal will not create or eliminate a government program. Implementation of the proposal will not require the creation of new employee positions or the elimination of existing employee positions. The proposal does not require an increase or decrease in fees paid to the agencies or the commissions. The proposal creates a new interpretation at §153.45, regarding the refinance disclosure. The proposal amends §§153.1, 153.5, 153.14, 153.17, 153.84, and 153.86, resulting in certain requirements that are expanded and certain requirements that are limited, as discussed previously in this proposal. The proposal repeals the current interpretation at §153.87. The proposal does not increase or decrease the number of individuals subject to the home equity interpretations in Chapter 153. To the extent that there is any change in the number of individuals subject to the interpretations, the change is a result of SJR 60's amendments to Section 50(a)(6)(P), and does not result from the proposal. The commissions do not anticipate that the proposal will have an effect on the state's economy. The commissions anticipate that any effect on the state's economy will be a result of SJR 60's amendments to the constitution, and will not result from the proposal.

Comments on the proposal may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601

North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.texas.gov. To be considered, a written comment must be received on or before 5:00 p.m. central time on the 31st day after the date the proposal is published in the *Texas Register*. At the conclusion of business on the 31st day after the proposal is published in the Texas Register, no further written comments will be considered or accepted by the commissions.

The amendments, new section, and repeal are proposed under Article XVI, Section 50(u) of the Texas Constitution and Texas Finance Code, §11.308 and §15.413, which authorize the commissions to adopt interpretations of Article XVI, Section 50(a)(5)-(7), (e)-(p), (t), and (u) of the Texas Constitution.

The constitutional provisions affected by the proposed amendments, new section, and repeal are contained in Article XVI, Section 50 of the Texas Constitution.

§153.1. Definitions.

Any reference to Section 50 in this interpretation refers to Article XVI, Texas Constitution, unless otherwise noted. These words and terms have the following meanings when used in this chapter, unless the context indicates otherwise:

(1) - (14) (No change.)

(15) Two [~~Three~~] percent limitation--the limitation on fees in Section 50(a)(6)(E).

§153.5. Two [~~Three~~] percent fee limitation: Section 50(a)(6)(E).

An equity loan must not require the owner or the owner's spouse to pay, in addition to any interest or any bona fide discount points used to buy down the interest rate, any fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, two [~~three~~] percent of the original principal amount of the extension of credit, excluding fees for an appraisal performed by a third party appraiser, a property survey performed by a state registered or licensed surveyor, a state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law, or a title examination report if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law.

(1) Optional Charges. Charges paid by an owner or an owner's spouse at their sole discretion are not fees subject to the two [~~three~~] percent [~~fee~~] limitation. Charges that are not imposed or required by the lender, but that are optional, are not fees subject to the two [~~three~~] percent limitation. The use of the word "require" in Section 50(a)(6)(E) means that optional charges are not fees subject to the two [~~three~~] percent limitation.

(2) Optional Insurance. Insurance coverage premiums paid by an owner or an owner's spouse that are at their sole discretion are not fees subject to the two [~~three~~] percent limitation. Examples of these charges may include credit life and credit accident and health insurance that are voluntarily purchased by the owner or the owner's spouse.

(3) Charges that are Interest. Charges an owner or an owner's spouse is required to pay that constitute interest under §153.1(11) of this title (relating to Definitions) are not fees subject to the two [~~three~~] percent limitation.

(A) Per diem interest is interest and is not subject to the two [~~three~~] percent limitation.

(B) Bona fide [~~Legitimate~~] discount points are interest and are not subject to the two [~~three~~] percent limitation. Discount points are bona fide [~~legitimate~~] if the discount points truly correspond to a reduced interest rate and are not necessary to originate, evaluate, maintain, record, insure, or service the equity loan. A lender may rely on an established system of verifiable procedures to evidence that the discount points it offers are bona fide [~~legitimate~~]. This system may include documentation of options that the owner is offered in the course of negotiation, including a contract rate without discount points and a lower contract rate based on discount points.

(4) Charges that are not Interest. Charges an owner or an owner's spouse is required to pay that are not interest under §153.1(11) of this title are fees subject to the two [~~three~~] percent limitation.

(5) Charges Absorbed by Lender. Charges a lender absorbs, and does not charge an owner or an owner's spouse that the owner or owner's spouse might otherwise be required to pay are unrestricted and not fees subject to the two [~~three~~] percent limitation.

(6) Charges to Originate. Charges an owner or an owner's spouse is required to pay to originate an equity loan that are not interest under §153.1(11) of this title are fees subject to the two [~~three~~] percent limitation.

(7) Charges Paid to Third Parties. Charges an owner or an owner's spouse is required to pay to third parties for separate and additional consideration for activities relating to originating an equity loan are fees subject to the two [~~three~~] percent limitation. For example, these charges include attorneys' fees for document preparation to the extent authorized by applicable law. Charges that [~~those~~] third parties absorb, and do not charge an owner or an owner's spouse that the owner or owner's spouse might otherwise be required to pay are unrestricted and not fees subject to the two [~~three~~] percent limitation. [~~Examples of these charges include attorneys' fees for document preparation and mortgage brokers' fees to the extent authorized by applicable law.~~]

(8) Charges to Evaluate. Charges an owner or an owner's spouse is required to pay to evaluate the credit decision for an equity loan, that are not interest under §153.1(11) of this title, are fees subject to the two [~~three~~] percent limitation. Examples of these charges include fees collected to cover the expenses of a credit report, [~~survey,~~] flood zone determination, tax certificate, [~~title report,~~] inspection, or appraisal managementservices.

(9) Charges to Maintain. Charges paid by an owner or an owner's spouse to maintain an equity loan that are not interest under §153.1(11) of this title are fees subject to the two [~~three~~] percent limitation if the charges are paid at the inception of the loan, or if the charges are customarily paid at the inception of an equity loan but are deferred for later payment after closing.

(10) Charges to Record. Charges an owner or an owner's spouse is required to pay for the purpose of recording equity loan documents in the official public record by public officials are fees subject to the two [~~three~~] percent limitation.

(11) Charges to Insure an Equity Loan. Premiums an owner or an owner's spouse is required to pay to insure an equity loan are fees subject to the two [~~three~~] percent limitation. Examples of these charges include title insurance and mortgage insurance protection, unless the premiums are otherwise excluded under paragraph (15) of this section.

(12) Charges to Service. Charges paid by an owner or an owner's spouse for a party to service an equity loan that are not interest under §153.1(11) of this title are fees subject to the two [~~three~~] percent limitation if the charges are paid at the inception of the loan, or if the charges are customarily paid at the inception of an equity loan but are deferred for later payment after closing.

(13) Exclusion for Appraisal Fee. A fee for an appraisal performed by a third party appraiser is not a fee subject to the two percent limitation. The appraisal must be performed by a person who is not an employee of the lender. The excludable appraisal fee is limited to the amount paid to the appraiser for the completion of the appraisal, and does not include an appraisal management services fee described by Texas Occupations Code, §1104.158(a)(2).

(14) Exclusion for Property Survey Fee. A fee for a property survey performed by a state registered or licensed surveyor is not a fee subject to the two percent limitation. The property survey must be performed by a person who is licensed or registered under Texas Occupations Code, Chapter 1071.

(15) Exclusion for Title Insurance Premium. A state base premium for a mortgagee policy of title insurance with endorsements established in accordance with state law is not a fee subject to the two percent limitation.

(A) The excludable premium is limited to the applicable basic premium rate for title insurance published by the Texas Department of Insurance, plus authorized premiums for applicable endorsements.

(B) Any mortgagee policy for the equity loan must be provided by a company authorized to do business in this state.

(C) If additional premiums for endorsements are charged, the endorsements must be applicable to the mortgagee policy for the equity loan. Rules adopted by the Texas Department of Insurance govern the applicability of endorsements and the authorized amount of the premium for each endorsement.

(16) Exclusion for Title Examination Report Fee. A fee for a title examination report is not a fee subject to the two percent limitation if its cost is less than the state base premium for a mortgagee policy of title insurance without endorsements established in accordance with state law.

(A) The excludable fee must be less than the applicable basic premium rate for title insurance published by the Texas Department of Insurance, not

including any additional premiums for endorsements.

(B)The fee for a title examination report may not be excluded from the two percent limitation if the equity loan is covered by a mortgagee policy of title insurance.

(C)The fee must comply with applicable law. If the equity loan is a secondary mortgage loan under Texas Finance Code, Chapter 342, then the fee is limited to a reasonable fee for a title examination and preparation of an abstract of title by an attorney who is not an employee of the lender, or a title company or propertysearch companyauthorized to do business in this state, as provided by Texas Finance Code, §342.308(a)(1).

(17) [(13)] Secondary Mortgage Loans. A lender making an equity loan that is a secondary mortgage loan under Texas Finance Code, Chapter 342 [of the Texas Finance Code] may charge only those fees permitted in Texas Finance Code, [TEX. FIN. CODE,] §§342.307, 342.308, and 342.502. A lender must comply with the provisions of Texas Finance Code, Chapter 342 [of the Texas Finance Code] and the constitutional restrictions on fees in connection with a secondary mortgage loan made under Texas Finance Code, Chapter 342 [oftheTexasFinanceCode].

(18) [(14)] Escrow Funds. A lender may provide escrow services for an equity loan. Because funds tendered by an owner or an owner's spouse into an escrow account remain the property of the owner or the owner's spouse those funds are not fees subject to the two [three] percent limitation. Examples of escrow funds include account funds collected to pay taxes, insurance premiums, maintenance fees, or homeowner's association assessments. A lender must not contract for a right of offset against escrow funds pursuant to Section 50(a)(6)(H).

(19) [(15)] Subsequent Events. The two [three] percent limitation pertains to fees paid or contracted for by an owner or owner's spouse at the inception or at the closing of an equity loan. On the date the equity loan is closed an owner or an owner's spouse may agree to perform certain promises during the term of the equity loan. Failure to perform an obligation of an equity loan may trigger the assessment of costs to the owner or owner's spouse. The assessment of costs is a subsequent event triggered by the failure of the owner's or owner's spouse to perform under the equity loan agreement and is not a fee subject to the two [three] percent limitation. Examples of subsequent event costs include contractually permitted charges for force-placed homeowner's insurance costs, returned check fees, debt collection costs, late fees, and costs associated with foreclosure.

(20) [(16)] Property Insurance Premiums. Premiums an owner or an owner's spouse is required to pay to purchase homeowner's insurance coverage are not fees subject to the two [three] percent limitation. Examples of property insurance premiums include fire and extended coverage insurance and flood insurance. Failure to maintain this insurance is generally a default provision of the equity loan agreement and not a condition of the extension of credit. The lender may collect and escrow premiums for this insurance and include the premium in the periodic payment amount or principal amount. If the lender sells insurance to the owner, the lender must

comply with applicable law concerning the sale of insurance in connection with a mortgage loan.

§153.14. One Year Prohibition: Section 50(a)(6)(M)(iii).

An equity loan may not be closed before the first anniversary of the closing date of any other equity loan secured by the same homestead property.

(1) (No change.)

(2) Section 50(a)(6)(M)(iii) does not prohibit modification of an equity loan before one year has elapsed since the loan's closing date. A modification of a home equity loan occurs when one or more terms of an existing equity loan is modified, but the note is not satisfied and replaced. A home equity loan and a subsequent modification will be considered a single transaction. The home equity requirements of Section 50(a)(6) will be applied to the original loan and the subsequent modification as a single transaction.

(A) - (C) (No change.)

(D) The two percent limitation [~~3%feecap~~] required by Section 50(a)(6)(E) applies to the original home equity loan and any subsequent modification as a single transaction.

§153.17. Authorized Lenders: Section 50(a)(6)(P).

An equity loan must be made by one of the following that has not been found by a federal regulatory agency to have engaged in the practice of refusing to make loans because the applicants for the loans reside or the property proposed to secure the loans is located in a certain area: a bank, savings and loan association, savings bank, or credit union doing business under the laws of this state or the United States, including a subsidiary of a bank, savings and loan association, savings bank, or credit union described by this section; a federally chartered lending instrumentality or a person approved as a mortgagee by the United States government to make federally insured loans; a person licensed to make regulated loans, as provided by statute of this state; a person who sold the homestead property to the current owner and who provided all or part of the financing for the purchase; a person who is related to the homestead owner within the second degree of affinity and consanguinity; or a person regulated by this state as a mortgage banker or mortgage company [~~broker~~].

(1) - (2) (No change.)

(3) A person who is licensed under Texas Finance Code, Chapter 156 is a person regulated by this state as a mortgage company [~~broker~~] for purposes of Section 50(a)(6)(P)(vi). A person who is registered under Texas Finance Code, Chapter 157 is a person regulated by this state as a mortgage banker for purposes of Section 50(a)(6)(P)(vi).

(4) (No change.)

§153.45. Refinance of an Equity Loan: Section 50(f).

A refinance of debt secured by the homestead, any portion of which is an extension of credit described by Subsection (a)(6) of Section 50, may not be secured by a valid lien against the homestead unless either the refinance of the debt is an extension of credit described by Subsection

(a)(6) or (a)(7) of Section 50, or all of the conditions in Section 50(f)(2) are met.

(1) One Year Prohibition. To meet the condition in Section 50(f)(2)(A), the refinance may not be closed before the first anniversary of the closing date of the equity loan. For purposes of this section, the closing date of the refinance is the date on which the owner signs the loan agreement for the refinance.

(2) Advance of Additional Funds. To meet the condition in Section 50(f)(2)(B), the refinanced extension of credit may not include the advance of any additional funds other than funds advanced to refinance a debt described by Subsections (a)(1) through (a)(7) of Section 50, or actual costs and reserves required by the lender to refinance the debt.

(A) Actual costs must be identifiable, must be actually incurred by the lender, and must comply with any applicable limitations on costs.

(B) Reserves (e.g., an escrow account for taxes and insurance) must be actually required by the lender to refinance the debt, and must comply with applicable law.

(3) 80 Percent Limitation on Loan Amount. To meet the condition in Section 50(f)(2)(C), the refinance of the extension of credit must be of a principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the refinance of the extension of credit is made.

(A) The principal amount of the refinance is the sum of the amount advanced and any charges at the inception of the refinance, to the extent these charges are financed in the principal amount of the refinance.

(B) The principal balance of all outstanding debt secured by the homestead on the date the refinance is made determines the maximum principal amount of the refinance.

(C) The principal amount of the refinance does not include interest accrued after the date the refinance is made (other than any interest capitalized and added to the principal balance on the date the refinance is made), or other amounts advanced by the lender after closing as a result of default, including for example, ad valorem taxes, hazard insurance premiums, and authorized collection costs, including reasonable attorney's fees.

(4) Refinance Disclosure. To meet the condition in Section 50(f)(2)(D), the lender must provide the refinance disclosure described in Section 50(f)(2)(D) to the owner on a separate document not later than the third business day after the date the owner submits the loan application to the lender and at least 12 days before the date the refinance of the extension of credit is closed.

(A) Submission of a loan application to an agent acting on behalf of the lender is submission to the lender. A loan application may be given orally or electronically.

(B) For purposes of determining the earliest permitted closing date, the next succeeding calendar day after

the date that the lender provides the owner a copy of the required refinance disclosure is the first day of the 12-day waiting period. The refinance may be closed at any time on or after the 12th calendar day after the lender provides the owner a copy of the required refinance disclosure.

(C) If a lender mails the refinance disclosure to the owner, the lender must allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery.

(D) One copy of the required refinance disclosure may be provided to married owners.

(E) The refinance disclosure is only a summary of the owner's rights, which are governed by the substantive terms of the constitution. The substantive requirements prevail regarding a lender's responsibilities in an equity loan or refinance. A lender may supplement the refinance disclosure to clarify any discrepancies or inconsistencies.

(F) A lender may rely on an established system of verifiable procedures to evidence compliance with this paragraph.

(G) A lender whose discussions with the borrower are conducted primarily in Spanish for a closed-end loan may rely on the translation of the refinance disclosure developed under the requirements of Texas Finance Code, §341.502. Such notice shall be made available to the public through publication on the Finance Commission's webpage.

§153.84. Restrictions on Devices and Methods to Obtain a HELOC Advance: Section 50(t)(3).

A HELOC is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which an owner is prohibited from using a credit card, debit card, or similar device, or preprinted check unsolicited by the borrower to obtain a HELOC advance.

(1) A lender may offer one or more non-prohibited devices or methods for use by the owner to request an advance. Permissible methods include contacting the lender directly for an advance, telephonic fund transfers, and electronic fund transfers. Examples of devices that are not prohibited include prearranged drafts, preprinted checks requested by the borrower, or written transfer instructions. Regardless of the permissible method or device used to obtain a HELOC advance, the amount of the advance must comply with:

(A) the advance requirements in Section 50(t)(2); and

(B) the loan to value limits in Section 50(t)(5). [~~; and~~]

[~~(C) the debit or advance limits in Section 50(t)(6).~~]

(2) - (3) (No change.)

§153.86. Maximum Principal Amount Extended under a HELOC: Section 50(t)(5).

A HELOC is a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which the

maximum principal amount that may be extended under the account, when added to the aggregated total of the outstanding principal balances of all indebtedness secured by the homestead on the date the extension of credit is established, cannot exceed 80 percent of the fair market value of the homestead on the date the extension of credit is made.

(1) - (3) (No change.)

(4) For purposes of calculating the maximum principal balance [limits and thresholds] under Section 50(t)(5) [and (6)], the outstanding principal balance of all other debts secured by the homestead is the principal balance outstanding of all other debts secured by the homestead on the date of the closing of the HELOC.

§153.87. Maximum Principal Amount of Additional Advances under a HELOC: Section 50(t)(6). {{Section 153.87 will be repealed.}}

Certification

The agencies hereby certify that the proposal has been reviewed by legal counsel and found to be within the commissions' legal authority to adopt.

Issued in Austin, Texas on October 20, 2017.

Leslie Pettijohn
Consumer Credit Commissioner Joint Financial Regulatory Agencies

TEXAS CONSTITUTION

Article XVI Section 50(a)

See: www.bmandg.com

Laws and Regulations Article XVI Section 50(a)

To: Clients and Friends

From: Thomas E. Black

Date: May 10, 2004

Re: Texas 50 (a)(6) Loans Originating on a Wholesale Basis Closed in Wholesaler's Name through Mortgage Broker (12-Day Notice)

Article XVI Section 50 (a)(6)(M) of the Texas Constitution relating to Cash-Out Refinances on homestead property requires that the loan not be closed before "the 12th day after the later of the date that the owner of the homestead submits an application to the lender for the extension of credit or the date that the lender provides the owner a copy of the notice prescribed by Subsection (g) of this section [Article XVI Section 50(a)(6)]" (emphasis supplied). The lender is the named payee on the note.

Section 153.12 of the Commissions' administrative Interpretations provides "[s]ubmission of a loan application to an agent acting on behalf of the lender is submission to the lender". When the Interpretations were in proposed form, our firm suggested that the requirement that an agency relationship be dropped and that a traditional mortgage broker be authorized to provide the disclosure on behalf of the wholesaler. The Commissions opined, "Two commentators expressed concern over the restriction that, for the purposes of delivery of the twelve day notice by a broker, the broker must be an agent of the lender. The Commissions believe that the broker must be an agent of a lender to give the twelve-day notice the effect intended in the Constitution. This does not prohibit a lender from meeting the twelve day notice requirement by sending the notice to the borrower by delivering it to the borrower's broker."

We suggest there are 3 methods by which wholesalers may provide the required notice:

1. Loans may be closed in the broker's name. Since the broker is the lender, the responsibility of providing the 12-Day Notice falls on the broker.

2. Wholesalers may provide the 12-Day Notice at the time wholesaler receives the application from the broker. The downside is that the borrower must wait 12 days from the borrower's receipt of the wholesaler provided disclosure before he/she can close.

3. Some wholesalers are amending their broker agreements to appoint the broker the limited agent for the purpose of taking the application and providing the 12-Day Notice.

The problem with alternatives 1 and 3 relates to the impact they have on the timing of the initial Truth in Lending disclosures. Clearly, under alternative 1, the broker, as the named lender on the note, must provide those disclosures within the required time periods. Under alternative 2, assuming the broker is the limited agent of the lender for accepting the application and providing the 12-Day Notice, would such an appointment accelerate the wholesaler's timing on the delivery of the TIL Disclosure?

Official staff commentary to §226.19(a)(1)(3) provides in pertinent part that an application is received when it reaches the creditor in any one of the ways applications are normally transmitted – by mail, hand delivery or through an intermediary agent or broker.

If an application reaches the creditor through an intermediary agent or broker, the application is received when it reaches the creditor rather than when it reaches the agent or broker. Official staff commentary to §226.19(b)(3) defines "intermediary agent or broker", but also provides that "A creditor may not delay providing disclosures in transactions involving either a legal agent (as determined by applicable law) or any other third party that is not an intermediary agent or broker". [*emphasis added*]

In determining whether or not the transaction involves an “intermediary agent or broker” the following factors are considered:

1. The number of applications submitted by the broker to the creditor as compared to the total number of applications received by the creditor. The greater the percentage of total loan applications submitted by the broker in any given period of time, the less likely it is that the broker is an “intermediary agent or broker” during the next period.

2. The number of applications submitted by the broker to the creditor as compared to the total number of applications received by the broker. (This factor is applicable only if the creditor has such information.) The greater the percentage of the total loan applications received by the broker that is submitted to a creditor in any given period of time, the less likely it is the broker is an “intermediary agent or broker” of the creditor during the next period.

3. The amount of work (such as document preparation) the creditor expects to be done by the broker on an application based on the creditor’s prior dealings with the broker and on the creditor’s requirements for accepting applications, taking into consideration the customary practice of brokers in a particular area. The more work that a creditor expects the broker to do on an application, in excess of what is usually expected of a broker in that area, the less likely it is that the broker is an “intermediary agent or broker” of the creditor.

An example of an “intermediary agent or broker” is a broker who, customarily within a brief period of time after receiving an application, inquires about the credit terms of several creditors with whom the broker does business and submits the application to one of them. The broker is responsible for only a small percentage of the applications received by the creditor. During the time the broker has the application, the broker might request a credit report and an appraisal (or even prepare an entire loan package if customary in that area).

Does the limited appointment of a broker as "agent" for the purposes of delivery of the 12-day Notice and acceptance of the 50(a)(6) application only for the purpose of starting the twelve day cooling off period disqualify the broker from the definition of "intermediary agent or broker" for truth in lending timing purposes? This depends on whether Texas principal-agency law will allow, under a proper set of facts, a limited agency for this home equity requirement only and whether the Federal Reserve Board will agree for TILA disclosure timing requirements. There is no bright-line answer to this issue, either by federal appellate court decisions or by official commentary under Regulation Z, and since the language used to create the 50(a)(6) limited agency relationship will be paramount, wholesalers should be cautious in applying this limited agency rationale. If this rationale is adopted, the lender should be aware that to avoid the TILA early timing problem, the broker must be the intermediary agent or broker of the lender.

To: Clients and Friends

From: David F. Dulock

Date: February 25, 2005

Subject: Borrower Notification to Lender of Home Equity Violation — New Official Interpretation §153.93

A new official interpretation concerning the methods of borrower notification provided by Section 50(a)(6)(Q)(x), Article XVI, Texas Constitution, for lender's failure to comply with its obligations under a home equity loan were adopted by the Texas Finance Commission and the Texas Credit Union Commission at a joint meeting held February 11, 2005. The interpretation is published in the February 25, 2005 issue of the Texas Register (Vol. 30 No. 8) and will become effective March 3, 2005. The interpretation addresses the methods by which a borrower may inform a lender of an alleged failure to comply and the manner of delivery and receipt of notices. However, it does not prohibit other methods of delivery and receipt.

This interpretation, codified in Chapter 153 of the Texas Administrative Code as 7 TAC §153.93, as well as its companion interpretations codified as 7 TAC §§153.91, 153.92, and 153.94 – 153.96 (which were approved and effective last November) apply both to closed-end home equity loans made under Section 50(a)(6) and open-end home equity loans (HELOCS) made under Section 50(t), Article XVI, Texas Constitution. The full text of §153.93 is printed below along with our comments contained in the **Our Comments** at the end of the interpretation.

§153.93. Methods of Notification.

(a) At closing, the lender or holder may make a reasonably conspicuous designation in writing of the location where the borrower may deliver a written or oral notice of a violation under 50(a)(6)(Q)(x). The designation may include a mailing address, physical address, and telephone number. In addition, the lender or holder may designate an email address or other point of contact for delivery of a notice.

(b) If the lender or holder chooses to change the designated delivery location as provided in subsection (a) of this section, the address change does not become effective until the lender or holder sends conspicuous written notice of the address change to the borrower.

(c) The borrower may always deliver written notice to the registered agent of the lender or holder even if the lender or holder has named a delivery location.

(d) If the lender or holder does not designate a location where the borrower may deliver a notice of violation the borrower may deliver the notice to any physical address or mailing address of the lender or holder.

(e) Delivery of the notice by borrower to lender or holder's designated delivery location or registered agent by certified mail return receipt or other carrier delivery receipt, signed by the lender or holder, constitutes a rebuttable presumption of receipt by the lender or holder.

(f) If the borrower opts for a location or method of delivery other than set out in subsection (e), the borrower has the burden of proving that the location and method of delivery were reasonably calculated to put the lender or holder on notice of the default.

Our Comments: The interpretation allows the borrower's notice to be oral and does not require the notice, whether written or oral, to be made at the designated location in subsection (a). If the lender has designated a delivery location, the borrower may still notify the lender by delivering written notice to the lender's registered agent or by notifying the lender in any manner at another location of lender. In this latter case, the borrower has the burden of proving that effective delivery was made.

The interpretation does not require the lender to designate a delivery location, but if the lender does not designate a delivery location at closing, the lender is prohibited from doing so at a later time. If the lender does designate a delivery location at closing, the lender should retain a copy of the written designation signed by the borrower. All future changes in location should be sent in a manner that allows for proof of delivery.

There are advantages and disadvantages to providing and not providing a designated delivery location for notice of home equity violations. If the lender designates a delivery location, it is more likely the borrower will notify the lender at that location. Also, if the borrower delivers the notice to a location other than the designated location or the lender's registered agent, the borrower has the burden of proving effective delivery. The disadvantage is that the designated delivery location must be updated and conspicuous written notification be sent to the borrower each time the location changes (for example, when the loan is sold or the lender is no longer at that location), otherwise the borrower may continue to use the existing location for notification. If the lender does not designate a delivery location, the notice will always go to a current physical or mailing address of the lender or holder. The disadvantage is that the borrower is relieved of the burden of proving effective delivery.

The interpretation is silent on the issue of whether the loan servicer's address is a "physical address or mailing address of the lender or holder" if the loan servicer is an entity different from the lender or holder.

To: Clients and Friends

From: David F. Dulock

Subject: Equitable Subrogation Revives Invalid Texas Home Equity Loans

In a huge victory for Texas lenders, the Texas Supreme Court on December 21, 2007, issued its decision in LaSalle Bank National Assoc. v. White, No. 06-1016, in which the court held the lender was equitably subrogated to the prior lienholders' purchase money and tax liens, thereby reversing, in part, the San Antonio court of appeals 2006 decision in LaSalle Bank National Assoc. v. White, 217 S.W.3d 573, (Tex.App. - San Antonio).

On March 24, 1999, White consummated a $260,000 home equity loan (subsequently assigned to LaSalle Bank) secured by a lien against a 10-acre tract. A portion of the home equity loan proceeds were used to pay off a $185,010.51 purchase money lien and $9,410.96 in outstanding property taxes against the tract. White received the remaining $57,518.50 balance (less closing costs) as equity proceeds. The trial court found that the property was designated for agricultural use and, therefore, Article XVI, Section 50(a)(6)(I), of the Texas Constitution prohibited it from being used as security for a home equity loan. Section 50(a)(6)(I) prohibits "homestead property designated for agricultural use [except if used primarily for the production of milk] as provided by statutes governing property tax" from being pledged to secure a home equity loan. White did not use her property for the production of milk.

The key legal issue raised, and upon which the trial, appellate and supreme court decisions were based, is the applicability of Article XVI, Section 50(e), of the Texas Constitution, which states:

> A refinance of debt secured by a homestead and described by any subsection under Subsections (a)(1)–(a)(5) that includes the advance of additional funds may not be secured by a valid lien against the homestead unless:
>
> (1) the refinance of the debt is an extension of credit described by Subsection (a)(6) of this section; or
>
> (2) the advance of all the additional funds is for reasonable costs necessary to refinance such debt or for a purpose described by Subsection (a)(2), (a)(3), or (a)(5) of this section.

LaSalle Bank argued that if its loan failed to comply with constitutional requirements, it was equitably subrogated to the liens held by the third parties who were paid the balance of the existing purchase money and ad valorem tax debts. The trial court agreed with White's contention that Section 50(e) precludes using equitable subrogation to revive a portion of an invalid home equity loan, concluding that Section 50(e) bars any lien based upon equitable subrogation. In affirming the trial court's judgment, the appellate court agreed with the trial court that equitable subrogation is eliminated by Section 50(e).

However, on petition for review, the Texas Supreme Court disagreed with the lower courts on this issue and, in a per curiam opinion (citing a long history of judicial decisions), stated, “Texas has long recognized a lienholder’s common law right to equitable subrogation. … [t]he doctrine allows a third party who discharges a lien upon the property of another to step into the original lienholder’s shoes and assume the lienholder’s right to the security interest against the debtor … [and] … has been repeatedly applied to preserve lien rights on homestead property.”

As an added benefit, it appears the court also judicially clarified the wording of Section 50(e) for the benefit of rate and term refinance loans. The court stated, “Section 50(e) contains no language that would indicate displacement of equitable common law remedies was intended, and we decline to engraft such a prohibition onto the constitutional language. LaSalle’s equitable subrogation claim does not derive from its contractually refinanced debt and accompanying lien, for which section 50(e) mandates forfeiture. Instead, LaSalle’s claim arises in equity from its prior discharge of constitutionally valid purchase-money and tax liens. By definition, equitable remedies apply only when there is no remedy at law, and the legal forfeiture that article [section] 50(e) imposes does not destroy the well-established principle of equitable subrogation.” And, citing its decision in Benchmark Bank. v. Crowder, 919 S.W.2d 657 (Tex. 1996), the court further stated, “[o]nce valid, the lien does not become invalid against the homestead simply because the original debt has been refinanced.”

Another interesting point in this case, is that the court went all the way back to 1890 to find a home- equity case upholding equitable subrogation to the extent of the prior valid purchase money lien that the invalid home equity loan had paid off (Texas Land & Loan Co. v. Blalock, 13 S.W. 12 (Tex. 1890)). Although home equity loans were not permitted in Texas until 1998, it appears Texas courts have been dealing with this issue for over 100 years.

SUMMARY

1. A void home equity loan that refinances valid homestead debt will benefit from equitable subrogation to preserve the lien and debt as to those funds advanced to pay off preexisting valid homestead debt. But, equitable subrogation will not validate the home equity proceeds (i.e., that portion of the loan proceeds not used to refinance prior valid liens).

2. It is not clear to us whether a void home equity loan that only pays off a preexisting valid home equity loan will benefit from equitable subrogation.

3. For a rate and term refinance loan, Section 50(e) will not invalidate the total lien if all or a portion of the new funds advanced is not for a purpose set out in subsections 50(e)(1) or (2).

This Memorandum is provided for the general information of the clients and friends of our firm only and is not intended as specific legal advice. You should not place reliance on this general information alone but should consult legal counsel regarding the application of the information discussed in this Memorandum to your specific case or circumstances.

BLACK, MANN & GRAHAM, L.L.P.

TEXAS HOME EQUITY LOANS – VARIOUS QUESTIONS AND ANSWERS

1. Is FNMA currently purchasing a6 loans secured by duplexes, triplexes, etc?

No. FNMA currently only purchases a6 loans secured by one-family properties. Consistent with Article 16, Section 51 of the Texas Constitution, the Texas Supreme Court case of Forsgard v. Ford held that the homestead exemption is placed upon the lot and not the improvements. Under this reasoning, Texas law permits an a6 loan secured by a multi-family structure, notwithstanding that the owner of the homestead only occupies one of the units. Confirm the title insurance underwriter will insure (including endorsements T-42 and T-42.1) without exception and the investor will accept for purchase with the collateral as so improved.

2. In calculation of the acreage permitted to be pledged as security for an a6 loan (10 acres urban, 100 acres rural – single person, 200 acres rural – married couple), should access easements necessary or beneficial to the homestead be included in determining if homestead acreage limits are exceeded?

Although the Commissions (Texas Finance Commission and Credit Union Commission) have not opined directly on this issue, given their position set forth in TAC 153.8 with respect to access easements not being part of the homestead as concerns the "additional collateral" rule, access easements over lands owned by third parties can arguably be excluded from the property description for the homestead limits calculation.

3. Can the proceeds from an a6 first mortgage loan be used to acquire or improve the homestead if a mortgage for that purpose could have been made under authority of Article XVI, Sections 50(a)(1) through (5) of the Texas Constitution?

Yes under Texas law, however, per the FNMA Selling Guide an a6 loan may not be originated when an a1 through an a5 loan could have served such purposes.

4. FNMA originally required presentment of the pre-closing CD two days before closing an a6 loan, on the theory that 24 hour advanced notice was required. Is this still their position with respect to the CD?

No. The formal interpretations by the Commissions have clarified that presentment of the pre-closing CD one day before closing is sufficient.

5. May the pre-closing CD be presented on a federal holiday?

Yes, it may be presented on any calendar day. The interpretations have sanctioned the practice as long as the a6 loan is closed on the next business day or any calendar day thereafter.

6. May an a6 loan close on a federal holiday?

Yes. As long as there is a business day between the day the pre-closing CD disclosure is given and the federal holiday and the closing is during that office's normal business hours on such federal holiday.

7. May an a6 loan close when title is vested in a trust?

As rendered in the Cordova case and others, under certain circumstances an equitable interest will support a homestead claim when the equitable holder does not have record title. Texas law permits homestead property to be titled in a trust. If certain conditions are met, FNMA permits loans secured by owner-occupied real property vested in an inter vivos revocable trust. However, if trust assets other than the homestead are pledged as security for the loan, such assets would constitute "additional collateral" and are prohibited by the Constitution. Confirm with the title company that the Loan Policy of Title Insurance will be issued without exception for the trust and if not a portfolio loan confirm the investor will purchase a Texas home equity loan secured by collateral titled in a trust.

8. If an a6 loan application is conducted primarily in a language other than English, must the 12 day Notice Concerning Extensions of Credit be furnished in English and in that language in which the application was conducted?

Yes. The 12 day notice must be furnished to the owners in English and such foreign language in which the application was conducted. Spanish and English are on the website of the Office of Consumer Credit at www.occc.state.tx.us. Note the forms on the website have no provision for dating and signing, which we recommend for validating the notices were received, as evidenced by the signature of the owner on a particular date. Due to a quirk in the wording of the constitutional section on point, while the English version must be presented 12 days before closing, the non-English version (when required) may be presented at any point in time before closing. The language notwithstanding, we feel this was not the intent of the Legislature and strongly recommend tendering both the English version and if applicable the non-English version, at least 12 days before closing.

9. May an a6 loan close under a power of attorney?

The Texas Supreme Court decision in *Finance Commission of Texas v. Norwood*, 2013 WL 311948 (Tex. June 21, 2012) limits the locations where powers of attorney may be executed in connection with home equity loans authorized by Article XVI, Section 50(a)(6) of the Texas Constitution. The Norwood decision permits the use of a properly executed power of attorney authorizing the agent to execute documents on behalf of the principal if the principal has executed the power of attorney at the permanent physical address of the office or branch office of the lender, an attorney or a title company. Various title companies are requiring the power be executed only at one of their offices and requiring proof to such effect to be presented before closing. Some investors are refusing to purchase Texas home equity loans where a power of attorney is utilized. Confirm the title company will issue the policy with the T-42 and T-42.1 equity endorsements without exception and confirm the investor will accept execution of an equity loan under a power of attorney.

10. A borrower has a first lien purchase money loan and a second lien a6 loan. Can the borrower refinance the first lien, leave the a6 home equity loan undisturbed, without complying with the a6 lending restrictions?

Yes. The 2% fee cap ceiling, 80 loan-to-value restrictions and other a6 limitations only apply to an a6 loan. The refinance of a pure purchase money loan with no new money advanced to the consumer is a "rate and term" refinance loan under a4 and not subject to the a6 limitations. Loan-by-loan due diligence must be performed to determine if the pre-existing a6 lien will have to be subordinated to the new lien to receive the mortgagee title policy insuring the full amount of the new lien as a first lien and to meet each investor's requirements.

11. Must you wait one year to impress a lien against property that was formerly the homestead of the owner and has an a6 lien against such property that was created 6 months prior to the new cash advance loan?

No. Section 50(f) of the constitutional amendment provides that a loan which refinances an equity loan may not be secured by a valid lien against the homestead unless the refinance loan is also an equity loan. However, if under Texas law the property ceases to be the homestead of the owner, then the lender may treat what was previously a home equity mortgage as a non-homestead mortgage. Confirm the title insurance company is willing to insure the lien as a non-a6 loan.

12. May an a6 loan provide for interest only payments or have a balloon feature?

No. The Commissions have confirmed at Section 153.11 of the Interpretations that an equity loan must be scheduled to be repaid in substantially equal successive periodic installments, not more often than every 14 days and not less often than monthly, each of which equals or exceeds the amount of accrued interest as of the date of the scheduled installment. For a closed-end equity loan to have substantially equal successive periodic installments, some amount of principal must be reduced with each installment. Section 153.16 provides that the lender may contract to vary the scheduled installment amount when by contract the interest rate adjusts on a variable rate loan in accordance with an external index.

13. May an a6 loan have a first payment date more than 2 months from the date of closing (the settlement date)?

No. An a6 loan must have the first payment begin "no later than two months from the date the extension of credit is made." The interpretation by the Commissions provides that "the date the extension of credit is made" is the execution date, not the funding date. Therefore, as an example, an a6 loan closing January 29 cannot have a first payment date of April 1.

14. Are delinquent maintenance fees included in the 2% fee cap on an a6 loan?

No. Delinquent maintenance fees would be viewed the same as delinquent ad valorem property taxes and excluded from the 2% fee cap. Note however, a fee charged by the homeowners association and paid by the consumers to subordinate the HOA lien or to verify that the maintenance fees have been paid current are a consequence of the a6 loan and would be included in the 2% fee cap calculation.

15. The appraisal indicates the property is located in a suburban area, is the property urban or rural for acreage limitation calculation purposes?

Under Texas law property is either "urban" or "rural". Rural property is that which is not urban. Under Section 41.002(c) of the Texas Property Code property is considered "urban" if the property is (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision, and (2) serviced by police protection, paid or volunteer fire protection, and if at least three of the following services are provided by a municipality or under contract to a municipality: (a) electric, (b) natural gas, (c) sewer, (d) storm sewer, and (e) water.

16. Under Texas Department of Insurance rules a loan policy of title insurance issued on a rate and term refinance, may typically be issued a credit on the premium for the new policy. Does the credit also apply to a6 home equity loans?

Yes. The R-8 credit applies to a6 loans.

17. The constitutional amendment, at 50(a)(6)(M)(i), requires the owner to submit the loan application 12 days before closing. Does this require the non-borrowing spouse to execute the application?

The extension of credit on the homestead must be "secured by a voluntary lien…created under a written agreement with the consent of each owner and each owner's spouse". The consent of the spouse to the lien is required for the loan regardless of whether the spouse has a community property interest or other interest in the homestead. Consent to the lien is indicated by signing a written consent to the deed of trust. The lender may, at its option also require owner's spouse to consent to the equity loan (in addition to the lien).

18. Federal law requires a 3 federal day rescission notice period. Texas law requires a 3 day rescission notice period. Should we give two separate notices to each consumer?

No. All a6 loans are subject to the federal right of rescission required by Regulation Z, Section 1026.23(a), (b) and (f). The federal rescission notice mandated by Regulation Z controls notwithstanding conflicting state law, as indicated by Section 1026.28(a). The Texas rescission period is inconsistent with the federal rescission period because the Texas rescission period is 3 calendar days, not 3 business days. Chapter 153 of the Texas Administrative Code contains the official interpretations of home equity law; the Commissions have opined that compliance with the right of rescission procedures in Regulation Z satisfies the state requirements of 50(a)(6)(Q)(viii). There is federal case law to support the position that giving inconsistent rescission notices voids the required federal rescission notice and allows the consumers up to 3 years to rescind the loan. Among other cases, see Williams v. Empire Funding Corp. 109 F.Supp.2d 352.

19. If all fees to be paid by the consumer are being decreased or will be less than indicated on the pre-closing CD, must the consumer consent to such change or the closing postponed in order to present another pre-closing CD to reflect the lower fees?

No. The revised interpretations (153.13) removed the requirement for the owner to consent to a decrease in fees as reflected on the settlement statement; therefore, consent in such fact situation is no longer required. See preamble of the 2006 amendments which suggest "self-evident from the language of the interpretations". This change notwithstanding, verify the investor does not require

the owner to execute an affidavit identifying the specific fees being decreased and identifying the existence of "good cause" for presentment of the pre-closing CD on the day of settlement.

20. A father, mother and daughter are in title to the collateral. The daughter occupies the collateral as her homestead and lives alone. The daughter is the sole party borrowing money under an a6 loan. May the parents remain in title?

No. The parents' interest in the property is viewed as "additional collateral" under 50(a)(6)(H) of the Constitution and they must convey their interest to the daughter to remove the issue. Full disclosure must be made to the title insurance company and its underwriter to verify they will recognize the conveyance.

21. A husband and wife are in title to the collateral. The wife acting alone has applied for the extension of a6 credit. Must the husband convey out of title?

No. Unlike the example at 20 above with the mother and father, under Texas law a husband and wife are viewed together as one, having one homestead. The non-borrowing spouse perfects the mortgagee's lien by encumbering his/her interest in the property by execution of the security instrument.

22. If the lender gives a notice to the consumer at settlement identifying to whom and where the consumer may send a notice of violation or alleged violation by the lender, must the consumer strictly comply with the notices provisions?

No. The lender may provide at closing a conspicuous designation in writing where the borrower may deliver an oral or written notice of a violation under 50(a)(6)(Q)(x). The notice may include a mailing address, physical address, and telephone number. In addition, the lender or holder may designate an email address or other point of contact for delivery of a notice. The borrower may always deliver a written notice to the registered agent of the lender or holder even if the lender or holder has named a delivery location. If the borrower opts for an alternative location or method of delivery, that is, other than the lender's designated location or its registered agent, the borrower has the burden of proving that the location and method of delivery were reasonably calculated to put the lender or holder on notice of the default. If the lender wishes to designate a delivery location it must do so at settlement and not afterwards and the borrower may in any event notify the lender in any manner at another location of lender.

23. May a home equity loan be modified to reduce the interest rate?

Yes. The Commissions have clarified that a lender may under certain circumstances modify a home equity loan. Their interpretation opined that any such modification may not be contrary to any of the express requirements of the Constitution as they existed on the day of settlement of the a6 loan. A reduction in the interest rate and payment amount would be an example of a benefit to the consumer that is not contrary to the constitutional requirements and would be suitable for modification. As a prohibited example, an a6 loan may not be modified to give the lender recourse for personal liability against any owner or the spouse of any owner. A modification to increase the principal amount advanced would be prohibited. Although arguably a subsequent event, since the modification is still a part of the original loan and the fees charged in connection with the a6 loan have already been disclosed as required on the CD presented at settlement, we recommend no fees

be charged the consumer in connection with an a6 modification. The lender and borrower/owner may agree to a modification at any time, even if it is within one year of the date of closing the a6 loan that is the subject of the modification.

24. In an instance where an owner was furnished the 12 day Notice Concerning Extensions of Credit by the lender in a timely manner but neglected to date and execute the notice where indicated on the form, may an affidavit be presented the owner to confirm receipt of the notice and resolve the question of its receipt?

Yes. Assuming the owner actually received the notice in a timely manner and the investor has no objection, the owner may execute an Affidavit confirming receipt. The Texas Constitution (50(a)(6)(M)(i)) does not require that the notice be signed by the owner, rather, that the lender provides the owner a copy of the notice prescribed by subsection (g). The document we have created for this purpose is identified as "Affidavit Confirming Receipt of Notice Concerning Extensions of Credit Defined by Section 50(a)(6), Article XVI, Texas Constitution." The 12 day notice forms provided by the Firm contain date and signature lines for the owners.

25. If the lender collects fees in excess of the 2% of the loan amount from the consumer and the loan has funded, can a revised CD be presented the consumer?

No. The Texas Constitution specifies a method for a lender to cure this type of problem and preserve the validity of the lien. If a borrower is charged fees in excess of 2% percent of the loan amount, Section 50(a)(6)(Q)(x)(a) provides that a lender can cure by "paying to the owner an amount equal to any overcharge paid by the owner under or related to the extension of credit if the owner has paid an amount that exceeds an [allowable] amount." The lender must correct the failure not later than the 60th day after the date the lender or holder is notified by the borrower of the failure. If the lender discovers the error on its own motion, whether by routine audit or otherwise, we recommend the lender initiate its cure protocol regardless whether the lender has been notified by the consumer. The lender would send a cure explanation letter (we maintain a form for such purpose on system) and a check for the amount in excess of the 2% of the loan amount.

26. Is the documentation that the non-borrowing spouse will execute at closing limited to the deed of trust or security instrument?

No. The Constitution requires various notifications and presentments to owners of real property offered as collateral for a6 loans. The Constitution does not expressly limit "owner" to the person in record title and signing the note or debt obligation. The right of a spouse to occupy the homestead is a present real property interest which cannot be waived, only encumbered. As representative examples, the documents the non-borrowing spouse will execute, whether or not such spouse is in record title, include the following:

a. 12 Day Notice Concerning Extensions of Credit
b. Notice of Presentment of CD One Day Before Closing
c. Deed of Trust and its Riders
d. Acknowledgment as to Fair Market Value of Homestead Property
e. Notice of Right to Cancel
f. Truth in Lending Statement
g. Texas Home Equity Affidavit and Agreement

h. Owner's Affidavit of Compliance
i. The pre-closing CD Settlement Statement
j. The CD Settlement Statement
k. Receipt of Copies of Documents
l. Certificate of Non-Cancellation of Loan.

27. Must Discount Points and Per Diem Interest paid by the consumer be included in the 2% fee cap calculation required by the Texas Constitution?

Discount points are interest rate yield adjustments paid at closing to buy the rate down from the par quote to the consumer. Case law had held that "legitimate" discount points were interest and excluded from the fee cap calculation. One of the provisions of the January 1, 2018 amendment to the Texas Constitution (50(a)(6)(E)) codified this point of case law and stated that "bona fide" discount points used to buy down the interest rate are excludable from the 2% cap.

Per diem interest is the interest charged on a loan for one or more days, in other words, the amount of interest that is due for one day that a loan is outstanding. Embracing the definition of interest stated in the Court's original opinion, the Supplemental Opinion clarified that per diem interest is still interest, though prepaid, therefore, the Court has validated our firm's continuous position that per diem interest is excluded from the 2% fee cap calculation.

As always, confirm any investor overlay with respect to what is included in the 2% fee cap calculation. See list on Page 19 of this training manual for guidance.

28. May a lender who is owned by and a subsidiary of a state or national bank originate a6 loans, by virtue of its ownership by a regulated lender?

Yes. One of the updated provisions in the new January 1, 2018 amendment to the Texas Constitution (50(a)(6)(P)(i)) now authorizes a subsidiary of a bank, savings and loan association, savings bank, or credit union doing business under the laws of Texas or the United States to originate home equity loans.

29. Can a lender's contract with the consumer on an a6 loan contain provisions for mandatory dispute resolution provisions such as arbitration agreements, with provision that the cost of arbitration be borne by the consumer?

An arbitration agreement may conflict with the rights and obligations under the cure provisions of 50(a)(6)(Q)(x) of Article XVI of the Texas Constitution. A court waiver provision in an arbitration agreement probably cannot be reconciled with the court ordered foreclosure requirements of 50(a)(6)(D) and 50(r) of the Constitution. The consumer-paid expense of the arbitration may conflict with the nonrecourse provisions of 50(a)(6)(C) and depending whether the 2% fee cap ceiling has been reached, may violate the 50(a)(6)(E) fee cap. FNMA issued Announcement 04-04 on 9\28\04 and in doing so stated its standard security documents do not include arbitration language and authorized changes to its security instruments do not permit the addition of arbitration language. The FNMA Selling Guide further states that a mortgage subject to arbitration is not acceptable under FNMA's standard terms and as a consequence such mortgage loans are ineligible for sale to, or securitization by, FNMA, if such a clause survives the transfer or sale of the mortgage loan or an interest in it to FNMA.

30. The consumer applied for and was approved for a 15 year fixed rate a6 loan. By mistake the loan documents were ordered as a 30 year fixed rate a6 loan. The transaction closed and funded with a 30 year loan term, in violation of the agreement with the borrower. The borrower and lender have mutually agreed to modify the loan to a 15 year term. May they do so without following one of the cure provisions under the Constitution?

Yes. The contractual term that was mistakenly breached by the lender is not one of the requirements or prohibitions under the Constitution, so the home equity violation cure provisions under Section 50(a)(6)(Q)(x)(a)-(f) do not apply. See Vincent v. Bank of America 109 SW2d 856 (CivApp-2003).

31. 2% vs. 3% test - which test are we subject to if a loan is applied for in 2017 but closes in 2018?

The constitutional amendment applies only to a home equity loan made on or after the effective date. 7 TAC 153.1 (6) provides the date the extension of credit is made is the date the closing occurs. 7 TAC 153.1 (3) provides the closing is the date each owner and their spouse sign the note and deed of trust. If the application is signed in 2017- the lender will have to wait until January 1 2018, provide the new form of 12 day disclosure and wait the 12 days then close in order to be under the 2% test.

32. What fees are excluded from the 2% fee cap?

The newly excludable fees are an appraisal performed by a third-party appraisal (note, only the appraisal, fees such as “appraisal management fees” are not excludable), a property survey done by a state-registered or state-licensed surveyor, and either the title insurance premium with relevant endorsements or a title examination fee if title insurance is not issued (this fee may not be higher than the base title premium). Other excludable fees include bona fide discount points, per diem interest, flood insurance, hazard insurance, HOA maintenance fees, late charges, and property taxes.

33. Old 12-day vs. New 12-day notice (or both) - which notice are we subject to if a loan is applied for in 2017 but closes in 2018?

If the application is signed in 2017- the lender will have to wait until January 1 2018, provide the new form of 12 day disclosure and wait the 12 days to close.

34. If a loan is a6, but a subsequent rate/term refi is non-a6, can a borrower then do a cash-out refinance of the non-a6 and switch it to a6 again?

If the refinance of the a6 loan meets the new 50 (f)(2) requirements the 50(f)(2) refinance loan is considered to be a refinance under 50(a)(4). Section 50(a)(4) does not contain provisions that would affect your ability to later make an a6 loan to pay off the 50(a)(4) loan and to take “cash out” under the new a6 loan, capped of course by the 80% limit in 50(a)(6)(B).

35. After the a6 loan has been properly refinanced as an a4 loan, may a HELOC be taken out on the property?

Yes, once the a6 loan has been properly refinanced to an a4 loan, a borrower may take out a HELOC or a closed-end, junior a6 loan provided all a6 requirements are met (including the 80% FMV limit).

36. What if we accidently use the old 12 day disclosure after January 1, 2018?

If loan has not closed, then issue the new 12 day disclosure and wait the 12 days to close. If loan has closed, then lender must cure via the "catch-all" cure provision in Article XVI, Section 50(a)(6)(Q)(x)(f) of the Texas Constitution to validate the lien. This is a $1,000 refund or credit to the borrower and an offer to refinance the loan at same terms at no cost.

37. If a loan is A6, but a subsequent rate/term refi is a non-a6 that meets the new 50(f)(2) requirements, are we subject to the 12-month seasoning requirements for future non-A6 loans?

No, Section 50 (a)(4) does not contain provisions that would require another 12 month seasoning.

38. If the 12-day notice is delivered via USPS mail, should a three-day waiting period be added to the 12-day waiting period?

Yes, three *business* days. 7 TAC Section 153.51 states that "[i]f a lender mails the consumer disclosure [12-day notice] to the owner, the lender shall allow a reasonable period of time for delivery. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery." So three business days should be added to the twelve calendar days if lender is relying on mail delivery (note: we recommend having the borrower sign, date, and return the 12-day notice to the lender as the "best practice").

39. We have applications for no-cash-out refinances of existing a6 loans in the pipeline and want to give consumers the option of structuring the deal under the new 50(f)(2) option. Do we have to restart the application process?

Yes. S.J.R. 60 states in 50(f)(2)(D) that lender must provide the (f)(2) notice not later than the third business day after receipt of the loan application and at least 12 days before closing. It appears that a new 50(f)(2) application would have to be submitted on or after January 1, 2018 for a transition of a non-cash-out 50(a)(6) loan currently in the pipeline to a 50(f)(2) loan.

FORMS

NOTICE CONCERNING EXTENSIONS OF CREDIT DEFINED BY SECTION 50(a)(6), ARTICLE XVI, TEXAS CONSTITUTION:

SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION ALLOWS CERTAIN LOANS TO BE SECURED AGAINST THE EQUITY IN YOUR HOME. SUCH LOANS ARE COMMONLY KNOWN AS EQUITY LOANS. IF YOU DO NOT REPAY THE LOAN OR IF YOU FAIL TO MEET THE TERMS OF THE LOAN, THE LENDER MAY FORECLOSE AND SELL YOUR HOME. THE CONSTITUTION PROVIDES THAT:

(A) THE LOAN MUST BE VOLUNTARILY CREATED WITH THE CONSENT OF EACH OWNER OF YOUR HOME AND EACH OWNER'S SPOUSE;

(B) THE PRINCIPAL LOAN AMOUNT AT THE TIME THE LOAN IS MADE MUST NOT EXCEED AN AMOUNT THAT, WHEN ADDED TO THE PRINCIPAL BALANCES OF ALL OTHER LIENS AGAINST YOUR HOME, IS MORE THAN 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME;

(C) THE LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE UNLESS YOU OR YOUR SPOUSE OBTAINED THIS EXTENSION OF CREDIT BY ACTUAL FRAUD;

(D) THE LIEN SECURING THE LOAN MAY BE FORECLOSED UPON ONLY WITH A COURT ORDER;

(E) FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 2 PERCENT OF THE LOAN AMOUNT, EXCEPT FOR A FEE OR CHARGE FOR AN APPRAISAL PERFORMED BY A THIRD PARTY APPRAISER, A PROPERTY SURVEY PERFORMED BY A STATE REGISTERED OR LICENSED SURVEYOR, A STATE BASE PREMIUM FOR A MORTGAGEE POLICY OF TITLE INSURANCE WITH ENDORSEMENTS, OR A TITLE EXAMINATION REPORT;

(F) THE LOAN MAY NOT BE AN OPEN-END ACCOUNT THAT MAY BE DEBITED FROM TIME TO TIME OR UNDER WHICH CREDIT MAY BE EXTENDED FROM TIME TO TIME UNLESS IT IS A HOME EQUITY LINE OF CREDIT;

(G) YOU MAY PREPAY THE LOAN WITHOUT PENALTY OR CHARGE;

(H) NO ADDITIONAL COLLATERAL MAY BE SECURITY FOR THE LOAN;

(I) (repealed);

(J) YOU ARE NOT REQUIRED TO REPAY THE LOAN EARLIER THAN AGREED SOLELY BECAUSE THE FAIR MARKET VALUE OF YOUR HOME DECREASES OR BECAUSE YOU DEFAULT ON ANOTHER LOAN THAT IS NOT SECURED BY YOUR HOME;

(K) ONLY ONE LOAN DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MAY BE SECURED WITH YOUR HOME AT ANY GIVEN TIME;

(L) THE LOAN MUST BE SCHEDULED TO BE REPAID IN PAYMENTS THAT EQUAL OR EXCEED THE AMOUNT OF ACCRUED INTEREST FOR EACH PAYMENT PERIOD;

(M) THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A LOAN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE

IS LATER; AND MAY NOT WITHOUT YOUR CONSENT CLOSE BEFORE ONE BUSINESS DAY AFTER THE DATE ON WHICH YOU RECEIVE A COPY OF YOUR LOAN APPLICATION IF NOT PREVIOUSLY PROVIDED AND A FINAL ITEMIZED DISCLOSURE OF THE ACTUAL FEES, POINTS, INTEREST, COSTS, AND CHARGES THAT WILL BE CHARGED AT CLOSING; AND IF YOUR HOME WAS SECURITY FOR THE SAME TYPE OF LOAN WITHIN THE PAST YEAR, A NEW LOAN SECURED BY THE SAME PROPERTY MAY NOT CLOSE BEFORE ONE YEAR HAS PASSED FROM THE CLOSING DATE OF THE OTHER LOAN, UNLESS ON OATH YOU REQUEST AN EARLIER CLOSING DUE TO A DECLARED STATE OF EMERGENCY;

(N) THE LOAN MAY CLOSE ONLY AT THE OFFICE OF THE LENDER, TITLE COMPANY, OR AN ATTORNEY AT LAW;

(O) THE LENDER MAY CHARGE ANY FIXED OR VARIABLE RATE OF INTEREST AUTHORIZED BY STATUTE;

(P) ONLY A LAWFULLY AUTHORIZED LENDER MAY MAKE LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(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 EXCEPT A DEBT THAT IS SECURED BY YOUR HOME OR OWED TO ANOTHER LENDER;

(2) NOT REQUIRE THAT YOU ASSIGN WAGES AS SECURITY;

(3) NOT REQUIRE THAT YOU EXECUTE INSTRUMENTS WHICH HAVE BLANKS FOR SUBSTANTIVE TERMS OF AGREEMENT LEFT TO BE FILLED IN;

(4) NOT REQUIRE THAT YOU SIGN A CONFESSION OF JUDGMENT OR POWER OF ATTORNEY TO ANOTHER PERSON TO CONFESS JUDGMENT OR APPEAR IN A LEGAL PROCEEDING ON YOUR BEHALF;

(5) PROVIDE THAT YOU RECEIVE A COPY OF YOUR FINAL LOAN APPLICATION AND ALL EXECUTED DOCUMENTS YOU SIGN AT CLOSING;

(6) PROVIDE THAT THE SECURITY INSTRUMENTS CONTAIN A DISCLOSURE THAT THIS LOAN IS A LOAN DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(7) PROVIDE THAT WHEN THE LOAN IS PAID IN FULL, THE LENDER WILL SIGN AND GIVE YOU A RELEASE OF LIEN OR AN ASSIGNMENT OF THE LIEN, WHICHEVER IS APPROPRIATE;

(8) PROVIDE THAT YOU MAY, WITHIN 3 DAYS AFTER CLOSING, RESCIND THE LOAN WITHOUT PENALTY OR CHARGE;

(9) PROVIDE THAT YOU AND THE LENDER ACKNOWLEDGE THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LOAN CLOSES; AND

(10) PROVIDE THAT THE LENDER WILL FORFEIT ALL PRINCIPAL AND INTEREST IF THE LENDER FAILS TO COMPLY WITH THE LENDER'S OBLIGATIONS UNLESS THE LENDER

CURES THE FAILURE TO COMPLY AS PROVIDED BY SECTION 50(a)(6)(Q)(x), ARTICLE XVI, OF THE TEXAS CONSTITUTION; AND

(R) IF THE LOAN IS A HOME EQUITY LINE OF CREDIT:

(1) YOU MAY REQUEST ADVANCES, REPAY MONEY, AND REBORROW MONEY UNDER THE LINE OF CREDIT;

(2) EACH ADVANCE UNDER THE LINE OF CREDIT MUST BE IN AN AMOUNT OF AT LEAST $4,000;

(3) YOU MAY NOT USE A CREDIT CARD, DEBIT CARD, OR SIMILAR DEVICE, OR PREPRINTED CHECK THAT YOU DID NOT SOLICIT, TO OBTAIN ADVANCES UNDER THE LINE OF CREDIT;

(4) ANY FEES THE LENDER CHARGES MAY BE CHARGED AND COLLECTED ONLY AT THE TIME THE LINE OF CREDIT IS ESTABLISHED AND THE LENDER MAY NOT CHARGE A FEE IN CONNECTION WITH ANY ADVANCE;

(5) THE MAXIMUM PRINCIPAL AMOUNT THAT MAY BE EXTENDED, WHEN ADDED TO ALL OTHER DEBTS SECURED BY YOUR HOME, MAY NOT EXCEED 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LINE OF CREDIT IS ESTABLISHED;

(6) IF THE PRINCIPAL BALANCE UNDER THE LINE OF CREDIT AT ANY TIME EXCEEDS 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME, AS DETERMINED ON THE DATE THE LINE OF CREDIT IS ESTABLISHED, YOU MAY NOT CONTINUE TO REQUEST ADVANCES UNDER THE LINE OF CREDIT UNTIL THE BALANCE IS LESS THAN 80 PERCENT OF THE FAIR MARKET VALUE; AND

(7) THE LENDER MAY NOT UNILATERALLY AMEND THE TERMS OF THE LINE OF CREDIT.

THIS NOTICE IS ONLY A SUMMARY OF YOUR RIGHTS UNDER THE TEXAS CONSTITUTION. YOUR RIGHTS ARE GOVERNED BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE.

______________________________ ______________________________

Owner/Spouse Date Owner/Spouse Date

NOTICE OF REFINANCE OF A TEXAS HOME EQUITY LOAN PURSUANT TO SUBSECTION (f)(2) OF ARTICLE XVI, SECTION 50 OF THE TEXAS CONSTITUTION

YOUR EXISTING LOAN THAT YOU DESIRE TO REFINANCE IS A HOME EQUITY LOAN. YOU MAY HAVE THE OPTION TO REFINANCE YOUR HOME EQUITY LOAN AS EITHER A HOME EQUITY LOAN OR AS A NON-HOME EQUITY LOAN, IF OFFERED BY YOUR LENDER.

HOME EQUITY LOANS HAVE IMPORTANT CONSUMER PROTECTIONS. A LENDER MAY ONLY FORECLOSE A HOME EQUITY LOAN BASED ON A COURT ORDER. A HOME EQUITY LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE.

IF YOU HAVE APPLIED TO REFINANCE YOUR EXISTING HOME EQUITY LOAN AS A NON-HOME EQUITY LOAN, YOU WILL LOSE CERTAIN CONSUMER PROTECTIONS. A NON-HOME EQUITY REFINANCED LOAN:

(1) WILL PERMIT THE LENDER TO FORECLOSE WITHOUT A COURT ORDER;

(2) WILL BE WITH RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE; AND

(3) MAY ALSO CONTAIN OTHER TERMS OR CONDITIONS THAT MAY NOT BE PERMITTED IN A TRADITIONAL HOME EQUITY LOAN.

BEFORE YOU REFINANCE YOUR EXISTING HOME EQUITY LOAN TO MAKE IT A NON-HOME EQUITY LOAN, YOU SHOULD MAKE SURE YOU UNDERSTAND THAT YOU ARE WAIVING IMPORTANT PROTECTIONS THAT HOME EQUITY LOANS PROVIDE UNDER THE LAW AND SHOULD CONSIDER CONSULTING WITH AN ATTORNEY OF YOUR CHOOSING REGARDING THESE PROTECTIONS.

YOU MAY WISH TO ASK YOUR LENDER TO REFINANCE YOUR LOAN AS A HOME EQUITY LOAN. HOWEVER, A HOME EQUITY LOAN MAY HAVE A HIGHER INTEREST RATE AND CLOSING COSTS THAN A NON-HOME EQUITY LOAN.

________________________________ ________________________________

Owner/Spouse Date Owner/Spouse Date

AFFIDAVIT MADE PURSUANT TO SUBSECTION (f-1) OF ARTICLE XVI, SECTION 50 OF THE TEXAS CONSTITUTION

LENDER: [LENDER]
LOAN NUMBER: [LOAN NUMBER]

Before me, the undersigned notary, on this day personally appeared [OWNER AND OWNER'S SPOUSE]. After I administered an oath to her/him, upon her/his oath, she/he said:

1. "My name is [OWNER AND OWNER'S SPOUSE]. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am the owner or married to the owner of the real property commonly known as [PROPERTY ADDRESS]. This property is my/our homestead under Texas law. The legal description of this property is:

[LEGAL DESCRIPTION]

3. I am making this affidavit in relation to a refinance transaction of debts incurred against my homestead. In this transaction, [LENDER] agreed to advance funds to refinance a current valid debt or debts described by Subsections (a)(1) through (a)(7) of Article XVI, Section 50 of the Texas Constitution, including an extension of credit made pursuant to Subsection (a)(6) of Article XVI, Section 50 of the Texas Constitution.

4. The refinance was not closed before the first anniversary of the date that the extension of credit made pursuant to Subsection (a)(6) of Article XVI, Section 50 of the Texas Constitution was closed.

5. No funds were advanced in this the refinance other than the funds advanced to refinance the debt or debts described by Subsections (a)(1) through (a)(7) of Article XVI, Section 50 of the Texas Constitution or actual costs and reserves required by [LENDER] to refinance the debt or debts.

6. The principal amount of this refinance transaction when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against my/our homestead property did not exceed 80% of the fair market value of my/our homestead as of the closing date.

7. [LENDER] provided me/us the following written notice on a separate document not later than the third business day after the date that I/we submitted the loan application for the refinance transaction and at least 12 days before the refinance transaction closed. The text of this notice was:

> "YOUR EXISTING LOAN THAT YOU DESIRE TO REFINANCE IS A HOME EQUITY LOAN. YOU MAY HAVE THE OPTION TO REFINANCE YOUR HOME EQUITY LOAN AS EITHER A HOME EQUITY LOAN OR AS A NON-HOME EQUITY LOAN, IF OFFERED BY YOUR LENDER.
>
> "HOME EQUITY LOANS HAVE IMPORTANT CONSUMER PROTECTIONS. A LENDER MAY ONLY FORECLOSE A HOME EQUITY LOAN BASED ON A COURT ORDER. A HOME EQUITY LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE.
>
> "IF YOU HAVE APPLIED TO REFINANCE YOUR EXISTING HOME EQUITY LOAN AS A NON-HOME EQUITY LOAN, YOU WILL LOSE CERTAIN CONSUMER PROTECTIONS. A NON-HOME EQUITY REFINANCED LOAN:
>
> "(1) WILL PERMIT THE LENDER TO FORECLOSE WITHOUT A COURT ORDER;
>
> "(2) WILL BE WITH RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE; AND
>
> "(3) MAY ALSO CONTAIN OTHER TERMS OR CONDITIONS THAT MAY NOT BE PERMITTED IN A TRADITIONAL HOME EQUITY LOAN.
>
> "BEFORE YOU REFINANCE YOUR EXISTING HOME EQUITY LOAN TO MAKE IT A NON-HOME EQUITY LOAN, YOU SHOULD MAKE SURE YOU UNDERSTAND THAT YOU ARE WAIVING IMPORTANT PROTECTIONS THAT HOME EQUITY LOANS PROVIDE UNDER THE LAW AND SHOULD CONSIDER CONSULTING WITH AN ATTORNEY OF YOUR CHOOSING REGARDING THESE PROTECTIONS.
>
> "YOU MAY WISH TO ASK YOUR LENDER TO REFINANCE YOUR LOAN AS A HOME EQUITY LOAN. HOWEVER, A HOME EQUITY LOAN MAY HAVE A HIGHER INTEREST RATE AND CLOSING COSTS THAN A NON-HOME EQUITY LOAN."

8. I/we understand that pursuant to Subsection (f-1) of Article XVI, Section 50 of the Texas Constitution that my statements above have affirmed and acknowledged that all of the requirements of Subsection (f)(2) of Article XVI, Section 50 of the Texas Constitution have been

met and this affidavit conclusively establishes that the requirements of Subsection (a)(4) of Article XVI, Section 50 of the Texas Constitution have been met."

Executed on _____________ (Month) , _____(Day), 20___ (Year)

____
Name: [OWNER]

____
Name: [OWNER'S SPOUSE]

STATE OF)
) SS.
COUNTY OF)

SUBSCRIBED AND SWORN TO BEFORE ME by [OWNER] and [OWNER'S SPOUSE] on this ____ day of _________(Month), 20___ to certify which witness my hand and seal of office.

WITNESS my hand and official seal.

Signature ____________________________
NOTARY PUBLIC

(this area for Notary Seal)

TEXAS HOME EQUITY LOAN/HELOC
CLOSING INSTRUCTIONS ADDENDUM

This Texas Home Equity Loan closing Instructions Addendum ("Addendum") supplements and amends the Closing Instructions for Lender and Supplemental Instructions to the Settlement Agent ("Closing Instructions") attached hereto. In the event of a conflict, the instructions contained in this Addendum control. "Owner" or "Owner of the homestead" means all record title holders of the secured property and their spouses regardless of whether the spouses are borrowers obligated to sign the promissory note evidencing the loan or are record title holders of the homestead property.

(1) THE FOLLOWING DOCUMENTS MUST BE EXECUTED IN COMPLIANCE WITH THE BELOW INSTRUCTIONS:

A. **Acknowledgement as to Fair Market Value of Homestead Property**- Each owner of the homestead must execute. Return originals to Lender. Give each owner a copy.

B. **Owner's Affidavit of Compliance** – Obtain all owner signatures. If any owner cannot swear to each of the matters stated therein, do not proceed with the closing and immediately advise Lender. No documentation can be executed until all of the owner concerns regarding the accuracy of the Affidavit have been addressed. If all owners can swear to each of the matters therein, obtain their signatures under jurat. Return original and two (2) certified copies to Lender. Give each owner a copy.

C. **Notice of Right to Cancel** – All owners must sign. Return signed original to Lender. Give each owner 2 copies.

D. **Texas Home Equity Election Not to Rescind and Certificate of Non-Cancellation of Loan** – All indicated owners must sign, but only after three (3) business days have expired. On the fourth (4th) business day after closing, the owners, if they have elected not to rescind/cancel under either their federal Right to Cancel or their state Right to Rescind should return these two forms to the Settlement Agent. The original may be returned or faxed to the Settlement Agent.

E. **Texas Home Equity Note/Line of Credit Agreement** – All indicated owners must sign. Return original and two (2) certified copies to Lender. Give each owner a copy after signature.

F. **Texas Home Equity Security Instrument** – All indicated owners must sign. File original in local Real Property records. Return two (2) certified copies to Lender. Give each owner a copy after signature.

G. **Discount Point Acknowledgement** – If applicable, all indicated owners must sign. Return original to Lender. Give each owner a copy after signature.

H. **Owner's Affidavit Acknowledging Lender's Compliance with Constitutional Requirements to Provide Owner Early Final Itemized Disclosure of Actual Fees and Charges.** Blanks must be properly completed. Complete the date in paragraph 3 with the closing date. Owners of the homestead must execute the Affidavit and swear to the accuracy of the statements therein. Return original to Lender. Give each owner a copy after signature.

I. **Texas Home Equity Affidavit and Agreement.** All indicated owners must sign. File original in local Real Property records. Return two (2) certified copies to Lender. Give each owner a copy after signature.

J. **Owner's Affidavit Acknowledging Lender's Compliance with Constitutional Requirement to Provide Owner Early Copy of Loan Application.** Owners of the homestead must execute the Affidavit and swear to the accuracy of the statements therein. Return original to Lender. Give each owner a copy after signature.

K. **Owner's Affidavit Consenting To Changes In Itemized Disclosure Of Actual Fees, Points, Interest, Costs, And Charges.** If the final itemized disclosure at a closing contains an increase in fees, points, costs or charges from the final itemized disclosure provided to owner prior to closing, contact the Lender prior to closing. If Lender approves the change(s) in writing ***(see instruction 3 below)*** AND the tolerance Instructions in the box at the top of the Affidavit are complied with, complete the blanks with the correct information and have Owners of the homestead execute the Affidavit and swear to the accuracy of the statements therein **prior to execution of the loan documents**. Return original to Lender. Give each owner a copy after signature.

(2) ALL BLANKS RELATED TO THE SUBSTANTIVE TERMS CONTAINED IN SUCH DOCUMENTS MUST BE COMPLETED AT SETTLEMENT BEFORE OWNER'S EXECUTION. DO NOT ALLOW ANY OWNER TO EXECUTE ANY LOAN DOCUMENT BEFORE THE DATE INDICATED ON THE LOAN DOCUMENT. REFLECTED ON THE FINAL ITEMIZED DISCLOSURE. THE FINAL ITEMIZED DISCLOSURE MUST BE FAXED TO LENDER FOR APPROVAL PRIOR TO CLOSING. AFTER LENDER APPROVAL, NO CHARGES, FEES, COSTS, POINTS, INTEREST, OR OTHER AMOUNTS CAN BE CHANGED, ADDED TO, OR REMOVED FROM THE FINAL ITEMIZED DISCLOSURE WITHOUT LENDER'S PRIOR WRITTEN APPROVAL.

(3) ALL OWNERS MUST BE GIVEN A COPY OF THE FINAL LOAN APPLICATION AND COPIES OF ALL DOCUMENTS EXECUTED AT CLOSING AFTER ALL OWNERS SIGN SAME AND BEFORE OWNER LEAVES THE CLOSING. ALL OWNERS MUST BE GIVEN COPIES OF ANY DOCUMENT EXECUTED BY THE OWNERS AFTER CLOSING (SUCH AS NOTIFICATION OF ELECTION NOT TO RESCIND) WITHIN THREE BUSINESS DAYS AFTER EXECUTION. ALL FEES, COSTS, POINTS, INTEREST, AND CHARGES MUST BE

REFLECTED ON THE FINAL ITEMIZED DISCLOSURE. THE FINAL ITEMIZED DISCLOSURE MUST BE FAXED TO LENDER FOR APPROVAL PRIOR TO CLOSING. AFTER LENDER APPROVAL, NO CHARGES, FEES, COSTS, POINTS, INTEREST, OR OTHER AMOUNTS CAN BE CHANGED, ADDED TO, OR REMOVED FROM THE FINAL ITEMIZED DISCLOSURE WITHOUT LENDER'S PRIOR WRITTEN APPROVAL.

(1) **Survey** – Determine that no other property other than the Homestead Property of the owner is included in the Survey. Ensure that the description matches the Property description used in the loan documents**. If the Property is an urban Homestead and exceeds ten (10) acres, do not proceed with this closing.** If the Property is a rural homestead and exceeds the applicable acreage limitation, do not proceed with this closing.

(2) **Appraisal** – If an appraisal is provided, attach a complete copy of the appraisal to the Acknowledgement as to Fair Market Value of Homestead Property before execution. Give owner a copy of the Acknowledgment and a copy of the appraisal.

(3) **Title Insurance** – According to Procedural Rules P-44 and P-47, add Equity Loan Mortgage Endorsements (T-42 & T-42.1) to the Mortgagee Policy. Make no deletions thereto. Add subparagraph (f) of paragraph 2 to the T-42 Equity Loan Mortgage Endorsement as allowed by Procedural Rule P-44.

(4) **Insured Closing Letter** – Prior to closing, provide Insured Closing Letter to Lender according to Texas Title Insurance Procedural Rules.

(5) Without the Lender's prior written approval, you are not authorized to close this loan before the next business day (or any calendar day thereafter) following the later of: (i) the calendar day on which the owner receives a copy of the loan application; or (ii) the calendar day on which the owner receives the final itemized disclosure to be used at closing.

(6) No changes in the type or amount of any item or in the total amount reflected on the final itemized disclosure in No. (8) above may be made without the prior written approval of the lender and execution of the Affidavit in Paragraph K. above.

(7) If the fees, points, costs or charges reflected on the final itemized disclosure increase, a revised final itemized disclosure reflecting this change must be delivered to each owner of the homestead and the closing rescheduled for no earlier than the next business day (or any calendar day thereafter) following the calendar day on which the owner receives the revised final itemized disclosure, unless the change is approved by the Lender, is within tolerance, and the Affidavit in Paragraph K. above is properly and timely executed.

(8) Each owner of the homestead must acknowledge in writing at closing that the owner of the homestead has received a copy of the loan application and the final itemized disclosure at least one day prior to the date of closing as determined in No. 8 above.

(9) Except as provided herein, you are not authorized to accept a written consent from the owner of the homestead to close the loan any earlier than the next business day following the later of: (i) the calendar day on which the owner receives a copy of the loan application; or (ii) the calendar day on which the owner of the homestead received the final itemized disclosure in No. (8) above, whether based upon a bona fide emergency or other reason offered by the owner of the homestead.

STATEMENT BY SETTLEMENT AGENT

Settlement Agent acknowledges receipt of the closing instructions and states that all of the terms and conditions contained in these Closing Instructions, have been complied with prior to the request for loan funding.

SETTLEMENT AGENT:

By: ______________________________________

Its: ______________________________________

ACKNOWLEDGMENT AS TO FAIR MARKET VALUE OF HOMESTEAD PROPERTY
(Pursuant to Section 50(a)(6)(Q)(ix), Article XVI, Texas Constitution)

Borrower(s): **All Borrowers Combined w/ NPS**

Lender: **Company Name**

Property Address: **Full Property Address**

Loan No. **Loan Number**

We, the undersigned homestead owners acknowledge that we are all the owners, or all of the owners and spouses of owners, (collectively, the "Owner/Borrower(s)", whether one or more) of the referenced Property who occupy the Property as our homestead (the "Homestead Property"); and, that we, or one or more of us, have made application with the Lender for an extension of credit commonly known as an "equity loan," as authorized by Section 50(a)(6), Article XVI, Texas Constitution, which will be secured by the Homestead Property;

We, the undersigned Owner/Borrower(s) and Lender further acknowledge that Lender is making such an extension of credit to Owner/Borrower(s) secured by the Homestead Property on **Close Date - MMMM, DD, YYYY**; that the extension of credit is being closed on this date at the office of **Title Company Name**; and that on this date the fair market value of the Homestead Property is **Appraised Value - # w/ $**; and

We, the undersigned Owner/Borrower(s) and Lender further acknowledge that Lender is relying on this written acknowledgment by Owner/Borrower(s) as to the fair market value of the Homestead Property as a condition of making the extension of credit and has no knowledge, or reason to believe, that the fair market value of the Homestead property stated in this written acknowledgment is incorrect.

When this Acknowledgment is executed by only one person as Owner/Borrower(s), the instrument shall read as if pertinent verbs, nouns, and pronouns were changed correspondingly, and reference to any gender shall include either gender, all as the case may be.

EXECUTED this **Close Date - Day w/ Suffix** day of **Close Date - MMMM, YYYY**.

Company Name

By: ______________________________

Its: ______________________________

____
-Owner/Borrower

____
-Owner/Borrower

____
-Owner/Borrower

____
-Owner/Borrower

NOTICE OF RIGHT TO CANCEL

LENDER: **Company Name**

DATE: **Close Date - MMMM, DD, YYYY**

BORROWERS: **All Borrowers Combined w/ NPS**

LOAN NO.: **Loan Number**
TYPE: **Loan Type (Conv, FHA, VA)**

ADDRESS: **Property Address**
CITY/STATE/ZIP: **Property City, State Zip**

You are entering into a transaction that will result in a security interest on your home. You have a legal right under federal law to cancel this transaction, without cost, within **THREE BUSINESS DAYS** from whichever of the following events occurs last:

(1) The date of the transaction, which is **Close Date - MMMM, DD, YYYY**, or
(2) The date you received your Truth in Lending disclosures; or
(3) The date you received this notice of your right to cancel.

If you cancel this transaction, the security interest is also canceled. Within 20 CALENDAR DAYS after we receive your notice, we must take the steps necessary to reflect the fact that the mortgage on your home has been canceled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 CALENDAR DAYS of your offer, you may keep it without further obligation.

HOW TO CANCEL

If you decide to cancel this transaction, you may do so by notifying us in writing, at:

Company Name
Company Address, **Company City, State Zip**

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of **Recission Date - MMMM, DD, YYYY** (or MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above.) If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time. I WISH TO CANCEL

____________________________ ____________________

SIGNATURE DATE

The undersigned each acknowledge receipt of two copies of NOTICE of RIGHT TO CANCEL and one copy of the Federal Truth in Lending disclosures.

____________________________ ____________________________

Date

____________________________ ____________________________

Date

Loan Number: **Loan Number**

CERTIFICATE OF NON-CANCELLATION OF LOAN

Lender: **Company Name**

Borrower(s): **All Borrowers Combined w/ NPS**

Property Address: **Full Property Address**

NOTICE TO THE PARTIES SHOWN IN THE SIGNATURE BLOCKS BELOW: YOU HAVE A LEGAL RIGHT UNDER EXISTING LAW TO CANCEL THIS TRANSACTION PRIOR TO **MIDNIGHT** OF **Recission Date - MMMM, DD, YYYY**.

YOU MUST NOT SIGN THIS FORM OR DATE IT PRIOR TO MIDNIGHT OF Recission Date - MMMM, DD, YYYY. DOING SO WILL JEOPARDIZE YOUR RECEIPT OF YOUR LOAN CHECK.

*The check for your loan proceeds will **not** be mailed to you **unless** Lender receives this certificate signed by all parties listed below on the day after the date shown above. **Don't** sign this form or fax it (or deliver it) to Lender until after Midnight on the date shown above.*

If Lender receives this form, properly signed and properly dated, any time after Midnight on the date shown above, your check will be mailed to you the same day. If Lender receives this form prior to Midnight or if it is dated on or before **Recission Date - MMMM, DD, YYYY***, your check will not be sent to you.*

This form may be **delivered** to: **Company Name**
Company Address
Company City, State Zip

Please read carefully before signing:

By signing below, the undersigned certify that they are the only persons with an ownership interest in the principal dwelling securing this transaction (or the spouse of such a person), who occupy the dwelling as their principal residence; that more than three business days have elapsed since consummation of this transaction and receipt by each of them of two copies of the Notice of Right to Cancel and one copy of the Truth in Lending disclosures related to this transaction; that none of the undersigned has rescinded or desires to rescind this transaction; and that, the rescission period having expired, each of them desires for the lender to now disburse funds and otherwise proceed with full performance of this transaction.

Dated the_____________day of
________________. (*Must be dated after the date shown above)*

_____________________________________ _____________________________________

DON’T SIGN THIS DOCUMENT AT CLOSING!

TEXAS HOME EQUITY
ELECTION NOT TO RESCIND

Loan No.: **Loan Number**

I/We Do Not Wish to Rescind: (Do not sign this document until after time for rescission has expired). The undersigned hereby certifies that more than three (3) business days have elapsed since the extension of credit has been made. I/We acknowledge receiving copies of all documents signed by me/us related to the extension of credit from the lender (or a settlement agent on behalf of lender), at the time the extension of credit was made.

The undersigned has not exercised his/her right to rescind or cancel the transaction under state or federal law.

[DO NOT SIGN THIS UNTIL AFTER THREE (3) BUSINESS DAYS HAVE ELAPSED SINCE YOU SIGNED YOUR OTHER LOAN DOCUMENTS. AT THE END OF THAT PERIOD, PLEASE SIGN AND FAX, COURIER, OR TAKE TO THE PLACE WHERE SETTLEMENT OCCURRED.]

______________________ Date	______________________ Date
______________________ Date	______________________ Date
______________________ Date	______________________ Date

TEXAS HOME EQUITY RECEIPT OF COPIES

Loan No.: **Loan Number**

Lender: **Company Name**

Borrower: **All Borrowers Combined w/ NPS**

Property: **Full Property Address**

I/We each acknowledge that at the time the above referenced loan was made, the owner of the Property received a copy of the final loan application and all executed documents signed by the owner at closing related to the loan including, but not limited to, the following:

1) Texas Home Equity Note

2) Texas Home Equity Security Instrument (and any attached Riders)

3) Texas Home Equity Affidavit and Agreement

4) Acknowledgement as to Fair Market Value of Homestead Property

5) Owner's Affidavit of Compliance

6) Notice of Right to Cancel (2 copies for each owner/owner's spouse)

7) Final Loan Application

8) All other documents required by Lender, settlement agent, and others and executed by the undersigned.

YOU MUST RECEIVE A COPY OF THIS DOCUMENT AFTER YOU HAVE SIGNED IT.

_______________________ Date	_______________________ Date
_______________________ Date	_______________________ Date
_______________________ Date	_______________________ Date

ELECTION TO PROCEED WITH AN APPLICATION FOR A REFINANCE OF A TEXAS HOME EQUITY LOAN

Lender:

Loan Number:

I/we, the undersigned, have applied for a refinance of our existing Texas Home Equity Loan, which was made under Subsection (a)(6) of Article XVI, Section 50 of Texas Constitution. I/we acknowledge that:

1) Lender has provided the mandated 12-day disclosure under Subsection (f)(2) of Article XVI Section 50 of the Texas Constitution within three business days of our application.

2) I/we understand that by electing to refinance our Texas Home Equity Loan to make it a Non-Home Equity Loan that we will lose important consumer protections. These include, but are not limited to:

    a) Non-Home Equity Loans may be foreclosed under a power of sale. My/Our existing Texas Home Equity Loan may only be foreclosed on court order.

    b) Non-Home Equity Loans may be made with recourse for personal liability against the borrower(s). My/Our existing Texas Home Equity Loan is non-recourse unless I/we had obtained it with actual fraud.

3) I/we understand that we have the option to ask our lender to refinance our existing Texas Home Loan as a new Texas Home Equity Loan, which will retain my/our above-listed consumer protections.

4) I/we understand that we have the option to consult an attorney of our choosing in regard to the decision to refinance my/our existing Texas Home Equity Loan as a Non-Home Equity Loan.

5) After making these acknowledgments, I/we elect to proceed with our application for a refinance of the existing Texas Home Equity Loan to a Non-Home Equity Loan.

____
John Doe Date

____
Jane Doe Date

After recording please mail to:

____
[Company Name]

____
[Name of Natural Person]

____
[Street Address]

____
[City, State, Zip Code]

______________________**[Space Above This Line for Recording Data]**___________________

THIS SECURITY INSTRUMENT SECURES AN EXTENSION OF CREDIT THAT IS THE TYPE OF CREDIT DEFINED BY SUBSECTION (a)(6) OF SECTION 50, ARTICLE XVI OF THE TEXAS CONSTITUTION.

TEXAS HOME EQUITY SECURITY INSTRUMENT (First Lien)

This Security Instrument is not intended to finance Borrower's acquisition of the Property.

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 10, 12, 17, 19, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 15.

(A) **"Security Instrument"** means this document, which is dated ______________________________, ________________, together with all Riders to this document.
(B) **"Borrower"** is ____ ________________. Borrower is the grantor under this Security Instrument.
(C) **"Lender"** is ____
____. Lender is a _______________________ organized and existing under the laws of __________________. Lender's address is ________________ ____. Lender includes any holder of the Note who is entitled to receive payments under the Note. Lender is the beneficiary under this Security Instrument.
(D) **"Trustee"** is ____. Trustee's address is ____.
(E) **"Note"** means the promissory note signed by Borrower and dated __________________________, ________________. The Note states that Borrower owes Lender ________________________________ Dollars (U.S. $___________________) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than ______________________________________.
(F) **"Property"** means the property that is described below under the heading "Transfer of Rights in the Property."

(G) "Extension of Credit" means the debt evidenced by the Note, as defined by Section 50(a)(6), Article XVI of the Texas Constitution and all the documents executed in connection with the debt.

(H) "Riders" means all riders to this Security Instrument that are executed by Borrower. The following riders are to be executed by Borrower *[check box as applicable]*:

☐ Texas Home Equity Condominium Rider ☐ Other: ___________________
☐ Texas Home Equity Planned Unit Development Rider

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. § 2601 et seq.) and its implementing regulation, Regulation X (12 C.F.R. Part 1024), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Extension of Credit does not qualify as a "federally related mortgage loan" under RESPA.

(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Extension of Credit, and all extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described Property located in the ____________________________
[Type of Recording Jurisdiction]

of ____:
[Name of Recording Jurisdiction]

which currently has the address of ____
[Street]
_______________________________, Texas ____________________ ("Property Address"):
[City] *[Zip Code]*

TOGETHER WITH all the improvements now or hereafter erected on the Property, and all easements, appurtenances, and fixtures now or hereafter a part of the Property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property"; provided however, that if the Property includes both homestead property and property that is not homestead property, the Property is limited solely to homestead property in accordance with Section 50(a)(6)(H), Article XVI of the Texas Constitution. If no part of the Property is homestead property, the homestead protections of Section 50, Article XVI of the Texas Constitution are not applicable to this Extension of Credit.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 14. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Extension of Credit current. Lender may accept any payment or partial payment insufficient to bring the Extension of Credit current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payment in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Extension of Credit current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied or returned to Borrower earlier, such funds may be applied to the outstanding principal balance under the Note immediately prior to foreclosure without abandoning any acceleration of the Note. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; and (c) premiums for any and all insurance required by Lender under Section 5. These items are called "Escrow Items." At origination or at any time during the term of the Extension of Credit, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 14 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured)

or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than twelve monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than twelve monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Extension of Credit.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Extension of Credit. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Extension of Credit, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar

changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 21 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the

Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower now occupies and uses the Property as Borrower's Texas homestead and shall continue to occupy the Property as Borrower's Texas homestead for at least one year after the date of this Security Instrument, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower's actions shall constitute actual fraud under Section 50(a)(6)(c), Article XVI of the Texas Constitution and Borrower shall be in default and may be held personally liable for the debt evidenced by the Note and this Security Instrument if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan or any other action or inaction that is determined to be actual fraud. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as a Texas homestead, the representations and warranties contained in the Texas Home Equity Affidavit and Agreement, and the execution of an acknowledgment of fair market value of the property as described in Section 27.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy

proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9. No powers are granted by Borrower to Lender or Trustee that would violate provisions of the Texas Constitution applicable to Extensions of Credit as defined by Section 50(a)(6), Article XVI of the Texas Constitution or other Applicable Law.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding which is not commenced as a result of Borrower's default under other indebtedness not secured by a prior valid encumbrance against the homestead, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 18, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

11. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

12. Joint and Several Liability; Security Instrument Execution; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any person who signs this Security Instrument, but does not execute the Note: (a) is signing this Security Instrument only to mortgage, grant and convey the person's interest in the Property under the terms of this Security Instrument and to comply with the requirements of Section 50(a)(6)(A), Article XVI of the Texas Constitution; (b) is not obligated to pay the sums secured by this Security Instrument and is not to be considered a guarantor or surety; (c) agrees that this Security Instrument establishes a voluntary lien on the homestead and constitutes a written agreement evidencing the person's consent to such lien; and (d) agrees that Lender and Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of the Note. Borrower further represents, covenants, and agrees that each owner of the Property and each owner's spouse has consented to the voluntary lien on the homestead that is being established by this Security Instrument.

Subject to the provisions of Section 17, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender

agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 19) and benefit the successors and assigns of Lender.

13. Extension of Credit Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Extension of Credit is subject to a law which sets a limit on the amount of Extension of Credit charges, then all agreements between Lender and Borrower are expressly limited so that any Extension of Credit charges collected or to be collected (other than interest, bona fide discount points used to buy down the interest rate, and any excluded charges listed in Section 50(a)(6)(E)(i)-(iv) of the Texas Constitution) from Borrower, the owner of the Property, or the owner's spouse in connection with the origination, evaluation, maintenance, recording, insuring or servicing of the Extension of Credit are hereby amended so that such charges do not exceed, in the aggregate, the highest amount allowed by Applicable Law. If it is finally adjudicated by a court of last resort that the amount of such Extension of Credit charges exceeds the permitted limit, then: (a) any sums already collected from Borrower which exceeded the permitted limit will be refunded to Borrower; and (b) any sums yet to be collected from Borrower which exceed the permitted limit are hereby waived by Lender. Lender will make any refund required by this section by either making a payment to Borrower or by crediting the refund amount to the balance due on the Extension of Credit. Borrower acknowledges that there may be a bona fide dispute with regard to whether such Extension of Credit charges exceed in the aggregate a permitted limit and agrees that Lender will not have received adequate notice that such Extension of Credit charges exceed the permitted limit, and will have no obligation to refund any excess, unless and until that fact has been finally adjudicated by a court of last resort. **The Lender's payment or credit of any such refund will extinguish any right of action or defense to foreclosure Borrower might have arising out of such overcharge.**

This Section 13 will supersede any inconsistent provision of the Note or this Security Instrument.

14. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail (but, by certified mail if the notice is given pursuant to Section 19) to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

15. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the laws of Texas. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

16. Borrower's Copies. At the time the Extension of Credit is made, Borrower shall receive a copy of the final loan application and all executed documents signed by Borrower at closing related to the Extension of Credit.

17. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 17, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 14 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

18. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses, insofar as allowed by Section 50(a)(6), Article XVI of the Texas Constitution, incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose

deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 17.

19. Sale of Note; Change of Loan Servicer; Notice of Grievance; Lender's Right-to-Comply. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Extension of Credit is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 14) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. For example, Section 50(a)(6)(Q)(x), Article XVI of the Texas Constitution, generally provides that a lender has 60 days to comply with its obligations under the extension of credit after being notified by a borrower of a failure to comply with any such obligation. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 21 and the notice of acceleration given to Borrower pursuant to Section 17 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 19.

It is Lender's and Borrower's intention to conform strictly to provisions of the Texas Constitution applicable to Extensions of Credit as defined by Section 50(a)(6), Article XVI of the Texas Constitution.

All agreements between Lender and Borrower are hereby expressly limited so that in no event shall any agreement between Lender and Borrower, or between either of them and any third party, be construed to limit Lender's right or time period to correct any failure to comply with the provisions of Section 50(a)(6), Article XVI of the Texas Constitution to the fullest extent allowed by Applicable Law. As a precondition to taking any action premised on a failure of Lender to comply with its obligations under the Extension of Credit, Borrower will advise Lender of the noncompliance by a notice given as required by Section 14, and will give Lender at least 60 days after such notice has been received by Lender to comply. Except as otherwise required by Applicable Law, Lender shall forfeit all principal and interest of the Extension of Credit only if: (a) Lender receives said notice, the failure to comply may be corrected by one of the methods set forth in Section 50(a)(6)(Q)(x), Article XVI of the Texas Constitution, and Lender fails to correct the failure to comply within sixty (60) days after it receives said notice; (b) the Extension of Credit is made by a person other than a person described under Section 50(a)(6)(P), Article XVI of the Texas Constitution; or (c) each owner

of the Property and each owner's spouse has not consented to the lien established by this Security Instrument and each owner and each owner's spouse who did not initially consent does not subsequently consent. Borrower will cooperate in reasonable efforts to correct any failure by Lender to comply with Section 50(a)(6), Article XVI of the Texas Constitution, including in reasonable efforts to obtain the subsequent consent of any owner or owner's spouse who does not initially consent to the lien established by this Security Instrument.

In the event that, for any reason whatsoever, any obligation of Borrower or of Lender pursuant to the terms or requirements hereof or of any other loan document shall be construed to violate any of the provisions of the Texas Constitution applicable to Extensions of Credit as defined by Section 50(a)(6), Article XVI of the Texas Constitution, then any such obligation shall be subject to the provisions of this Section 19, and the document may be reformed, by written notice or written acknowledgment from Lender, without the necessity of the execution of any amendment or new document by Borrower, so that Borrower's or Lender's obligation shall be modified to conform to the Texas Constitution, and in no event shall Borrower or Lender be obligated to perform any act, or be bound by any requirement which would conflict therewith.

It is the express intention of Lender and Borrower to structure this Extension of Credit to conform to Applicable Law and, specifically, to the provisions of the Texas Constitution applicable to Extensions of Credit as defined by Section 50(a)(6), Article XVI of the Texas Constitution. If, from any circumstance whatsoever, any promise, payment, obligation or provision of the Note, this Security Instrument or any other loan document involving this Extension of Credit transcends the limit of validity prescribed by Applicable Law or does not comply with Section 50(a)(6), Article XVI of the Texas Constitution, then any such promise, payment, obligation or provision is hereby reduced to the limit of such validity, eliminated as a requirement if necessary for compliance with such law, or reformed if necessary to comply with such law without the necessity of the execution of any amendment or the delivery of any other document by Borrower or Lender.

Lender's right-to-comply as provided in this Section 19 shall survive the payoff of the Extension of Credit. The provision of this Section 19 will supersede any inconsistent provision of the Note or this Security Instrument.

20. Hazardous Substances. As used in this Section 20: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

21. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 17 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice will result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Insofar as allowed by Section 50(a)(6), Article XVI of the Texas Constitution, Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 21, including, but not limited to, court costs, reasonable attorneys' fees and costs of title evidence.

The lien evidenced by this Security Instrument may be foreclosed upon only by a court order. Lender may, at its option, follow any rules of civil procedure promulgated by the Texas Supreme Court for expedited foreclosure proceedings related to the foreclosure of liens under Section 50(a)(6), Article XVI of the Texas Constitution ("Rules"), as amended from time to time, which are hereby incorporated by reference. The power of sale granted herein shall be exercised pursuant to such Rules, and Borrower understands that such power of sale is not a confession of judgment or a power of attorney to confess judgment or to appear for Borrower in a judicial proceeding.

22. Power of Sale. It is the express intention of Lender and Borrower that Lender shall have a fully enforceable lien on the Property. It is also the express intention of Lender and Borrower that Lender's default remedies shall include the most expeditious means of foreclosure available by law. Accordingly, Lender and Trustee shall have all the powers provided herein except insofar as may be limited by the Texas Supreme Court. To the extent the Rules do not specify a procedure for the exercise of a power of sale, the following provisions of this Section 22 shall apply, if Lender invokes the power of sale. Lender, its designee, or Trustee shall give notice of the date, time, place and terms of sale by posting and filing the notice as provided by Applicable Law. Lender or its designee shall mail a copy of the notice of sale to Borrower in the manner prescribed by Applicable Law. Sale shall be public occurring between the hours of 10 a.m. and 4 p.m. on a date and at a location permitted by Applicable Law. The time of sale must begin at the time stated in the notice of sale or not later than three hours after the stated time. Borrower authorizes Trustee to sell the

Property to the highest bidder for cash in one or more parcels and in any order Trustee determines. Lender or its designee may purchase the Property at any sale. In the event of any conflict between such procedure and the Rules, the Rules shall prevail, and this provision shall automatically be reformed to the extent necessary to comply.

Trustee shall deliver to the purchaser who acquires title to the Property pursuant to the foreclosure of the lien a Trustee's deed conveying indefeasible title to the Property with covenants of general warranty from Borrower. Borrower covenants and agrees to defend generally the purchaser's title to the Property against all claims and demands. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, court costs and reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

If the Property is sold pursuant to this Section 22, Borrower or any person holding possession of the Property through Borrower shall immediately surrender possession of the Property to the purchaser at that sale. If possession is not surrendered, Borrower or such person shall be a tenant at sufferance and may be removed by writ of possession or other court proceeding.

23. Release. Within a reasonable time after termination and full payment of the Extension of Credit, Lender shall cancel and return the Note to the owner of the Property and give the owner, in recordable form, a release of the lien securing the Extension of Credit or a copy of an endorsement of the Note and assignment of the lien to a lender that is refinancing the Extension of Credit. Owner shall pay only recordation costs. **OWNER'S ACCEPTANCE OF SUCH RELEASE, OR ENDORSEMENT AND ASSIGNMENT, SHALL EXTINGUISH ALL OF LENDER'S OBLIGATIONS UNDER SECTION 50(a)(6), ARTICLE XVI OF THE TEXAS CONSTITUTION.**

24. Non-Recourse Liability. Lender shall be subrogated to any and all rights, superior title, liens and equities owned or claimed by any owner or holder of any liens and debts outstanding immediately prior to execution hereof, regardless of whether said liens or debts are acquired by Lender by assignment or are released by the holder thereof upon payment, and regardless of whether the lien established by this Security Instrument is held to be invalid. Borrower agrees that any statute of limitations related to a cause of action or right to foreclose based on such subrogated rights, superior title, liens, and equities are hereby tolled to the extent necessary until, at the earliest, a final adjudication by a court of last resort that the lien established by this Security Instrument is invalid. Borrower further agrees that Lender shall have the same rights and powers provided in Sections 21 and 22 of this Security Instrument in connection with any such subrogated rights, superior title, liens, and equities as Lender has in connection with the lien established by this Security Instrument.

Subject to the limitation of personal liability described below, each person who signs this Security Instrument is responsible for ensuring that all of Borrower's promises and obligations in the Note and this Security Instrument are performed.

Borrower understands that Section 50(a)(6)(C), Article XVI of the Texas Constitution provides that the Note is given without personal liability against each owner of the Property and against the spouse of each owner unless the owner or spouse obtained this Extension of Credit by actual fraud. This means that, absent such actual fraud, Lender can enforce its rights under this Security Instrument solely against the Property and not personally against the owner of the Property or the spouse of an owner.

If this Extension of Credit is obtained by such actual fraud, then, subject to Section 12, Borrower will be personally liable for the payment of any amounts due under the Note or this Security Instrument. This means that a personal judgment could be obtained against Borrower, if Borrower

fails to perform Borrower's responsibilities under the Note or this Security Instrument, including a judgment for any deficiency that results from Lender's sale of the Property for an amount less than is owing under the Note, thereby subjecting Borrower's other assets to satisfaction of the debt.

If not prohibited by Section 50(a)(6)(C), Article XVI of the Texas Constitution, this Section 24 shall not impair in any way the lien of this Security Instrument or the right of Lender to collect all sums due under the Note and this Security Instrument or prejudice the right of Lender as to any covenants or conditions of the Note and this Security Instrument.

25. Proceeds. The owner of the Property shall not be required to apply the proceeds of the Extension of Credit to repay another debt, unless such debt, if any, is a debt secured by the Property or a debt to another lender. If proceeds of the Extension of Credit are being applied to a debt due to Lender and not secured by the Property, it is being done voluntarily by the owner of the Property and at the owner's request. Lender would make the Extension of Credit regardless of whether any proceeds are being applied to a debt due to Lender and not secured by the Property.

26. No Assignment of Wages. The owner of the Property is not assigning wages, and shall not be required to assign wages, as security for the Extension of Credit.

27. Acknowledgment of Fair Market Value. Lender and Borrower have executed a written acknowledgment as to the fair market value of Borrower's Property on the date the Extension of Credit is made. The fair market value stated in the written acknowledgment is correct and is the value estimate in an appraisal or evaluation of the Property that was prepared in accordance with a state or federal requirement applicable to an extension of credit under Section 50(a)(6), Article XVI, Texas Constitution. The principal amount of the Extension of Credit, when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the Property, does not exceed eighty percent (80%) of the value stated in the executed acknowledgment. Borrower understands and agrees that Lender and its successors and assigns are relying upon Borrower's representations regarding the fair market value of the Property as additional consideration for making or purchasing the Extension of Credit, and that such representations are material. Borrower represents, warrants, and agrees that such representations are being made on all information known to Borrower and Lender at this time, and that Borrower may not later assert a different fair market value of the Property, even if such assertion is based on information discovered by Borrower after the Extension of Credit is made.

28. Substitute Trustee; Trustee Liability. All rights, remedies and duties of Trustee under this Security Instrument may be exercised or performed by one or more trustees acting alone or together. Lender, at its option and with or without cause, may from time to time, by power of attorney or otherwise, remove or substitute any trustee, add one or more trustees, or appoint a successor trustee to any Trustee without the necessity of any formality other than a designation by Lender in writing. Without any further act or conveyance of the Property the substitute, additional or successor trustee shall become vested with the title, rights, remedies, powers and duties conferred upon Trustee herein and by Applicable Law.

Trustee shall not be liable if acting upon any notice, request, consent, demand, statement or other document believed by Trustee to be correct. Trustee shall not be liable for any act or omission unless such act or omission is willful.

29. Acknowledgment of Waiver by Lender of Additional Collateral. Borrower acknowledges that Lender waives all terms in any of Lender's loan documentation (whether existing now or created in the future) which (a) create cross default; (b) provide for additional collateral; (c) create personal liability for any Borrower (except in the event of actual fraud), for the Extension of Credit; and/or (d) allow the Extension of Credit to be accelerated because of a decrease in the market value of the Property or because of a default under other indebtedness not secured by a prior valid

encumbrance against the Property. This waiver includes, but is not limited to, any (a) guaranty; (b) cross collateralization; (c) future indebtedness; (d) cross default; and/or (e) dragnet provisions in any loan documentation with Lender.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

[DO NOT SIGN IF THERE ARE BLANKS LEFT TO BE COMPLETED IN THIS DOCUMENT. THIS DOCUMENT MUST BE EXECUTED AT THE OFFICE OF LENDER, AN ATTORNEY AT LAW OR A TITLE COMPANY. YOU MUST RECEIVE A COPY OF THIS DOCUMENT AFTER YOU HAVE SIGNED IT.]

YOU MAY, WITHIN 3 DAYS AFTER CLOSING, RESCIND THIS EXTENSION OF CREDIT WITHOUT PENALTY OR CHARGE.

______________________________ ______________________________ - Borrower

Printed Name: ______________________
[Please Complete]

______________________________ ______________________________ - Borrower

Printed Name: ______________________
[Please Complete]

______________________________ - Borrower

______________________________ - Borrower

____________________**[Space Below This Line for Acknowledgment]**____________________

State of Texas §
County of §

This instrument was acknowledged before me on ____________________________, _________ (date) by

____

____

____ ____(name or names of person or persons acknowledging).

____

Signature of Officer

(Personalized Seal)

____

Title of Officer

My Commission Expires: ________________________

After Recording Please Return To:

____
[Company Name]

____
[Name of Natural Person]

____
[Street Address]

____
[City, State, Zip Code]

_________[To Be Recorded With Security Instrument. Space Above This Line for Recording Data]______

THIS SECURITY INSTRUMENT SECURES AN EXTENSION OF CREDIT THAT IS THE TYPE OF CREDIT DEFINED BY SUBSECTION (a)(6) OF SECTION 50, ARTICLE XVI OF THE TEXAS CONSTITUTION.

TEXAS HOME EQUITY

AFFIDAVIT AND AGREEMENT

(First Lien)

(Do not sign this Texas Home Equity Affidavit and Agreement until you have executed an Acknowledgment Regarding Fair Market Value, and received and reviewed the Texas Home Equity Note and the Texas Home Equity Security Instrument.)

State of **TEXAS**

Before me, the undersigned authority, a Notary Public in and for the State of Texas, on this day personally appeared
____
____
__
____
and on oath such individual, or each of them, swears that the following statements are true:

I. REPRESENTATIONS AND WARRANTIES:

A. I am a borrower named in the Texas Home Equity Note (the "Note") or the owner or spouse of an owner of the property described in the Texas Home Equity Security Instrument (the "Security Instrument" which term includes any riders to the Texas Home Equity Security Instrument), both bearing date of _______________, ____________, evidencing and securing an extension of credit as defined by Section 50(a)(6), Article XVI of the Texas Constitution (the "Extension of Credit") and providing for a lien on the

following described property (the "Property") located in ____ County, Texas:

[Legal Description]

which has the address of:
____
[Street]
____, Texas __________________ ("Property Address").
[City] *[Zip Code]*

The Property includes all incidental rights in and to the Property including all improvements now or hereafter erected on the Property, and all easements, appurtenances, and fixtures now or hereafter a part of the Property. All replacements and additions are included as well as any interest in a planned unit development, condominium project, homeowners' association or equivalent entity owning or managing common areas or facilities associated with the Property. All of the foregoing is referred to herein as the Property, provided however that if the Property includes both homestead property and property that is not homestead property, the Property is limited solely to homestead property in accordance with Section 50(a)(6)(H), Article XVI of the Texas Constitution. If no part of the Property is homestead property, the homestead protections of Section 50, Article XVI of the Texas Constitution are not applicable to this Extension of Credit.

The Property does not include any additional real or personal property not included within the definition of homestead in accordance with applicable law including but not limited to Sections 41.002(a), (b), and (c) of the Texas Property Code which provide:

§ 41.002 Definition of Homestead

(a) If used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon.

(b) If used for the purposes of a rural home, the homestead shall consist of:

(1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or

(2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.

(c) A homestead is considered to be urban if, at the time the designation is made, the property is:

(1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and

(2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality: (A) electric; (B) natural gas; (C) sewer; (D) storm sewer; and (E) water.

B. I understand that the lender making the Extension of Credit is ____________________________ ____(the "Lender").

C. The undersigned includes all owners and spouses of owners of the Property and all borrowers named in the Note.

D. The Extension of Credit is secured by a voluntary lien on the Property created under a written agreement with the consent of all owners and all spouses of owners, and execution of this Texas Home Equity Affidavit and Agreement is deemed evidence of such consent.

E. The Extension of Credit is of a principal amount that, when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the Property, does not exceed eighty percent (80%) of the fair market value of the Property on the date the Extension of Credit is made.

F. I have not paid any fee or charge that is not disclosed in the final itemized disclosure provided at closing.

G. Neither the Lender nor any other party has required any additional collateral (real or personal property), other than the Property described in the Security Instrument, to secure the Extension of Credit.

H. The Extension of Credit is the only loan made pursuant to Section 50(a)(6), Article XVI of the Texas Constitution that will be secured by the Property at the time the Extension of Credit is funded.

I. At least twelve (12) days before the date on which the Note and Security Instrument are being signed, the owner of the Property submitted a loan application to the Lender, or the Lender's representative, for the Extension of Credit, and the Lender, or the Lender's representative, provided the owner with a copy of the Notice Concerning Extensions of Credit described by Section 50(g), Article XVI of the Texas Constitution (the "Notice").

J. The owner of the Property either (a) received a copy of the loan application if not previously provided and a final itemized disclosure of the actual fees, points, interest, costs, and charges that would be charged at closing at least one (1) business day before the date of the signing of the Note and Security Instrument, or (b) a bona fide emergency or other good cause exists in the area where the Property is located and the owner of the Property hereby consents to the Lender providing a copy of the loan application and providing or modifying such final itemized disclosure on the date of the signing of the Note and Security Instrument.

K. If I am an owner of the Property, I received the Notice in English. If the discussions with the borrowers named in the Note were conducted primarily in a language other than English, the borrowers named in the Note received from Lender, or Lender's representative, before closing, an additional copy of the Notice translated into the written language in which the discussions were conducted.

L. The Extension of Credit is being closed, that is I am signing the loan documents, at the office of the Lender, an attorney at law, or a title company.

M. It has been at least one year since the closing date of any other extension of credit made pursuant to Section 50(a)(6), Article XVI of the Texas Constitution secured by the Property, unless (i) this Extension of Credit is a refinance of a prior extension of credit pursuant to Section 50(a)(6), Article XVI of the Texas Constitution, and is being made to cure the failure of any lender or holder of the prior extension of credit to comply with its obligations under the prior extension of credit (referred to here as a cure refinance); (ii) the prior extension of credit was a cure refinance, in which case it has been at least one year since the closing date of the most recent extension of credit prior to a cure refinance; or (iii) I, on my oath, requested an earlier closing due to a declared state of emergency.

N. The Extension of Credit is being made on the following conditions, and each such condition has been satisfied:

i. The owner of the Property is not being required to apply the proceeds of this Extension of Credit to repay another debt, unless such other debt, if any, is a debt secured by the Property or is a debt to another lender. If any loan proceeds are being applied to a debt that is due to the Lender and is not secured by the Property, it is being done voluntarily by the owner of the Property and at the owner's request. The Lender would make the Extension of Credit regardless of whether any loan proceeds are being applied to such debt.

ii. The owner of the Property is not assigning wages as security for the Extension of Credit, and the Security Instrument shall prohibit any requirement that the owner assign wages in the future as security for the Extension of Credit.

iii. The owner of the Property is not signing any instrument in which blanks relating to substantive terms of agreement are left to be filled in. I have carefully read the Note, the Security Instrument, and this Texas Home Equity Affidavit and Agreement, and I attest that there are no blanks relating to substantive terms of agreement in those instruments.
iv. The owner of the Property is not signing a confession of judgment or power of attorney to the Lender or to a third person to confess judgment or to appear for the owner in a judicial proceeding.
v. The owner of the Property has received a copy of the final loan application and all executed documents signed by the owner at closing related to the Extension of Credit.
vi. The Security Instrument contains the disclosure required by Section 50(a)(6)(Q)(vi), Article XVI of the Texas Constitution that the Extension of Credit is the type of credit defined by Subsection (a)(6) of Section 50, Article XVI of the Texas Constitution.
vii. The Security Instrument provides that within a reasonable time after termination and full payment of the Extension of Credit, the Lender will cancel and return the Note to the owner of the Property and give the owner, in recordable form, a release of the lien securing the Extension of Credit or a copy of an endorsement and assignment of the lien to a lender that is refinancing the Extension of Credit.
viii. The owner of the Property and any spouse of the owner may, within three (3) days after the Extension of Credit is made, rescind the Extension of Credit without penalty or charge.
ix. The owner of the Property and the Lender have signed a written acknowledgment as to the fair market value of the Property on the date the Extension of Credit is made.
x. Except as provided by Section 50(a)(6)(Q)(xi), Article XVI of the Texas Constitution, 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 sixtieth (60th) day after the date the Lender or holder is notified by the borrower of the Lender's failure to comply by one of the methods set forth in Section 50(a)(6)(Q)(x), Article XVI of the Texas Constitution.
xi. 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 Extension of Credit is made by a person other than a person described under Section 50(a)(6)(P), Article XVI of the Texas Constitution or if the lien was not created under a written agreement with the consent of each owner of the Property and each owner's spouse, unless each owner and each owner's spouse who did not initially consent subsequently consents.

O. The fair market value stated in the written acknowledgment that has been signed by the owner of the Property is correct and is the value estimate in an appraisal or evaluation of the Property that was prepared in accordance with a state or federal requirement applicable to an extension of credit under Section 50(a)(6), Article XVI of the Texas Constitution.

P. I have not provided the Lender with any information and I have no knowledge of any information that would cause the Lender to have actual knowledge that the fair market value stated in the written acknowledgment that has been signed by the owner of the Property is incorrect.

Q. The Property is not being purchased with any part of the proceeds of the Extension of Credit.

R. Unless Lender otherwise agrees in writing, all borrowers named in the Note shall occupy the Property as their homestead pursuant to the terms of the Security Instrument.

S. I understand that the Extension of Credit is not a form of open-end account that may be debited from time to time or under which credit may be extended from time to time. Lender, at its option, may make monetary advances to protect the Property (i.e. pay real estate taxes, hazard insurance payments, etc.) in accordance with the Security Instrument.

T. I understand that the Note, Security Instrument, and this Texas Home Equity Affidavit and Agreement define the terms of the Extension of Credit and are to be construed as an entirety.

II. AGREEMENT PROVISIONS:

A. No Personal Liability in the Absence of Actual Fraud. I understand that pursuant to Section 50(a)(6)(C), Article XVI of the Texas Constitution the Extension of Credit is without recourse for personal liability against each owner of the Property and the spouse of each owner and that Lender and its successors and assigns can enforce the promises and obligations in the Note and the Security Instrument solely against the Property, unless an owner or spouse of an owner obtains the Extension of Credit by actual fraud.

B. Inducement and Reliance. I understand that my execution of this Texas Home Equity Affidavit and Agreement is made to induce Lender and its successors and assigns to make or purchase the Extension of Credit, and that Lender and its assigns will rely on it as additional consideration for making or purchasing the Extension of Credit. I also understand that each of the statements made in the Representations and Warranties Section is material and will be acted upon by the Lender and its assigns, and that if such statement is false or made without knowledge of the truth, the Lender and its assigns will suffer injury.

C. Remedies in the Event of Actual Fraud. If any owner of the Property, or the spouse of an owner, obtains the Extension of Credit by actual fraud, then each owner, spouse of each owner and all borrowers named in the Note agree to indemnify and save Lender and its successors and assigns harmless against any loss, costs, damages, attorneys' fees, expenses and liabilities which Lender may incur or sustain in connection with such actual fraud and any court action arising therefrom and will pay the same upon demand. In addition, the borrowers named in the Note may become personally liable for repayment of the Extension of Credit.

D. Opportunity for Lender to Comply. It is agreed that, except as required by law, the Lender or any holder of the Note for the Extension of Credit shall not forfeit any principal or interest on the Extension of Credit by reason of failure by Lender or holder to comply with its obligations under the Extension of Credit, unless the Lender or holder of the Note fails to correct the failure to comply not later than the 60th day after the borrower notifies the Lender or holder of the Note of its failure to comply.

E. Tax Advice. It is agreed that it is the borrower's responsibility to determine any and all aspects of tax considerations related to the Extension of Credit. I have not relied on any tax advice provided by Lender or Lender's representatives. It is my responsibility to seek and obtain independent tax advice.

III. STATEMENT UNDER OATH

I hereby swear under oath that the representations and warranties referred to and set forth in Section I above are true and correct. I understand that this Texas Home Equity Affidavit and Agreement is part of the Extension of Credit documentation.

[DO NOT SIGN IF THERE ARE BLANKS LEFT TO BE COMPLETED IN THIS DOCUMENT. THIS TEXAS HOME EQUITY AFFIDAVIT AND AGREEMENT MUST BE EXECUTED AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW, OR A TITLE COMPANY BY ALL OWNERS OF THE PROPERTY, SPOUSES OF OWNERS, AND BORROWERS NAMED IN THE NOTE. YOU MUST RECEIVE A COPY OF THIS DOCUMENT AFTER YOU HAVE SIGNED IT.]

______________________________	______________________________
(Borrower or Owner or Spouse of Owner)	(Borrower or Owner or Spouse of Owner)
______________________________	______________________________
(Borrower or Owner or Spouse of Owner)	(Borrower or Owner or Spouse of Owner)

SWORN TO AND SUBSCRIBED before me on this ________ day of ______________________,
____________.

____
Notary Public

[PERSONALIZED SEAL]

____
Printed Name of Notary

My Commission Expires:_________________________

ADVISORY NOTICE

ALL STATEMENTS IN THE FOREGOING TEXAS HOME EQUITY AFFIDAVIT AND AGREEMENT ARE MADE UNDER OATH. IF ANY SUCH STATEMENT IS MADE WITH KNOWLEDGE THAT SUCH STATEMENT IS FALSE, THE PERSON MAKING SUCH FALSE STATEMENT MAY BE SUBJECT TO CIVIL AND CRIMINAL PENALTIES UNDER APPLICABLE LAW, MAY BE PERSONALLY LIABLE ON THE NOTE AND MAY CAUSE ALL OTHER BORROWERS NAMED IN THE NOTE TO BE PERSONALLY LIABLE ON THE NOTE.

THIS IS AN EXTENSION OF CREDIT THAT IS THE TYPE OF CREDIT DEFINED BY SUBSECTION (a)(6) OF SECTION 50, ARTICLE XVI OF THE TEXAS CONSTITUTION

TEXAS HOME EQUITY NOTE
(Fixed Rate - First Lien)

____________________, _________ _________________________ _____________________________
[Date] [City] [State]

____
[Property Address]

1. BORROWER'S PROMISE TO PAY

This is an extension of credit as defined by Section 50(a)(6), Article XVI of the Texas Constitution (the "Extension of Credit"). In return for the Extension of Credit that I have received evidenced by this Note, I promise to pay U.S. $_____________________ (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is _________________________ ___________ I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

I understand that this is not an open-end account that may be debited from time to time or under which credit may be extended from time to time.

The property described above by the Property Address is subject to the lien of the Security Instrument executed concurrently herewith (the "Security Instrument").

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of _______________%. It is agreed that the total of all interest and other charges that constitute interest under applicable law shall not exceed the maximum amount of interest permitted by applicable law. Nothing in this Note or the Security Instrument shall entitle the Note Holder upon any contingency or event whatsoever, including by reason of acceleration of the maturity or Prepayment of the Extension of Credit, to receive or collect interest or other charges that constitute interest in excess of the highest rate allowed by applicable law on the Principal or on a monetary obligation incurred to protect the property described above authorized by the Security Instrument, and in no event shall I be obligated to pay interest in excess of such rate

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the _______ day of each month beginning _____________, _______. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on ______________________, __________, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at ____ ____ or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. $__________________________________.

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes. Should the Note Holder agree in writing to such changes, my payments thereafter will be payable in substantially equal successive monthly installments.

5. LOAN CHARGES

All agreements between Note Holder and me are expressly limited so that any interest, loan charges, or fees (other than interest) collected or to be collected from me, any owner or the spouse of any owner of the property described above in connection with the origination, evaluation, maintenance, recording, insuring or servicing of the Extension of Credit shall not exceed, in the aggregate, the highest amount allowed by applicable law.

If a law, which applies to this Extension of Credit and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this Extension of Credit exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder will make this refund by making a payment to me. **The Note Holder's payment of any such refund will extinguish any right of action I might have arising out of such overcharge.**

It is the express intention of the Note Holder and me to structure this Extension of Credit to conform to the provisions of the Texas Constitution applicable to extensions of credit as defined by Section 50(a)(6), Article XVI of the Texas Constitution. If, from any circumstance whatsoever, any promise, payment, obligation or provision of this Note, the Security Instrument or any other loan document involving this Extension of Credit transcends the limit of validity prescribed by applicable law, then such promise, payment, obligation or provision shall be reduced to the limit of such validity, or eliminated as a requirement, if necessary for compliance with such law, and such document may be reformed by written notice from the Note Holder without the necessity of the execution of any new amendment or new document by me.

The provisions of this Section 5 shall supersede any inconsistent provision of this Note or the Security Instrument.

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of _____ calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be _____ % of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means. This Note may not be accelerated because of a decrease in the market value of the property described above or because of the property owner's default under any indebtedness not evidenced by this Note or the Security Instrument.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law, including Section 50(a)(6) Article XVI of the Texas Constitution. Those expenses include, for example, reasonable attorneys' fees. I understand that these expenses are not contemplated as fees to be incurred in connection with maintaining or servicing this Extension of Credit.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address. However, if the purpose of the notice is to notify Note Holder of failure to comply with Note Holder's obligations under this Extension of Credit, or noncompliance with any provisions of the Texas Constitution applicable to extensions of credit as defined by Section 50(a)(6), Article XVI of the Texas Constitution, then notice by certified mail is required.

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

Subject to the limitation of personal liability described below, each person who signs this Note is responsible for ensuring that all of my promises and obligations in this Note are performed, including the payment of the full amount owed. Any person who takes over these obligations is also so responsible.

I understand that Section 50(a)(6)(C), Article XVI of the Texas Constitution provides that this Note is given without personal liability against each owner of the property described above and against the spouse of each owner unless the owner or spouse obtained this Extension of Credit by actual fraud. This means that, absent such actual fraud, the Note Holder can enforce its rights under this Note solely against the property described above and not personally against any owner of such property or the spouse of an owner.

If this Extension of Credit is obtained by such actual fraud, I will be personally liable for the payment of any amounts due under this Note. This means that a personal judgment could be obtained against me if I fail to perform my responsibilities under this Note, including a judgment for any deficiency that results from Note Holder's sale of the property described above for an amount less than is owing under this Note.

If not prohibited by Section 50(a)(6)(C), Article XVI of the Texas Constitution, this Section 8 shall not impair in any way the right of the Note Holder to collect all sums due under this Note or prejudice the right of the Note Holder as to any promises or conditions of this Note.

9. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

10. SECURED NOTE

In addition to the protections given to the Note Holder under this Note, the Security Instrument, dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

> If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.
>
> If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 14 within which Borrower must pay all sums secured by this Security Instrument. If

Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

11. APPLICABLE LAW

This Note shall be governed by the law of Texas and any applicable federal law. In the event of any conflict between the Texas Constitution and other applicable law, it is the intent that the provisions of the Texas Constitution shall be applied to resolve the conflict. In the event of a conflict between any provision of this Note and applicable law, the applicable law shall control to the extent of such conflict and the conflicting provisions contained in this Note shall be modified to the extent necessary to comply with applicable law. All other provisions in this Note will remain fully effective and enforceable.

12. NO ORAL AGREEMENTS

THIS NOTE CONSTITUTES A "WRITTEN LOAN AGREEMENT" PURSUANT TO SECTION 26.02 OF THE TEXAS BUSINESS AND COMMERCE CODE, IF SUCH SECTION APPLIES. THIS WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

[DO NOT SIGN IF THERE ARE BLANKS LEFT TO BE COMPLETED IN THIS DOCUMENT. THIS DOCUMENT MUST BE EXECUTED AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW OR A TITLE COMPANY. YOU MUST RECEIVE A COPY OF THIS DOCUMENT AFTER YOU HAVE SIGNED IT.]

____
(Seal)
-Borrower

____
(Seal)
-Borrower

____
(Seal)
-Borrower

[Sign Original Only]

AVISO SOBRE EL CRÉDITO QUE SE CONCEDE:

DEFINIDO POR LA SECCIÓN 50(A) (6), ARTICULO XVI, CONSTITUCIÓN DE TEXAS:

SECCIÓN 50(A) (6), ARTÍCULO XVI, DE LA CONSTITUCIÓN DE TEXAS PERMITE QUE CIERTOS PRÉSTAMOS SE PUEDAN GARANTIZAR POR EL VALOR LIQUIDO DE SU HOGAR. TALES PRÉSTAMOS GENERALMENTE SE CONOCEN COMO PRÉSTAMOS SOBRE VALOR LÍQUIDO. SI USTED NO PAGA EL PRÉSTAMO O SI USTED NO CUMPLE CON LAS CONDICIONES DEL PRÉSTAMO, EL PRESTAMISTA PUEDE EJECUTAR UN JUICIO HIPOTECARIO Y VENDER SU HOGAR. LA CONSTITUCIÓN DISPONE QUE:

(A) EL PRÉSTAMO DEBE SER INICIADO VOLUNTARIAMENTE CON EL CONSENTIMIENTO DE CADA PROPIETARIO DE SU HOGAR, Y DE CADA CÓNYUGE DE CADA PROPIETARIO:

(B) LA CANTIDAD DEL PRINCIPAL DEL PRÉSTAMO AL HACERSE EL PRÉSTAMO NO DEBE EXCEDER UNA CANTIDAD QUE, AGREGÁNDOSE AL BALANCE DEL PRINC IPAL DE TODOS LOS OTROS EMBARGOS SOBRE SU HOGAR, SEA MÁS DEL 80 POR CIENTO DEL VALOR JUSTO DE VENTA DE SU HOGAR;

(C) EL PRÉSTAMO DEBE SER SIN REMEDIO DE RESPONSABILIDAD PERSONAL CONTRA USTED Y SU CÓNYUGE A NO SER QUE USTED O SU CÓNYUGE CONSIGUIÓ QUE SE LE CONCEDIERA EL CRÉDITO POR FRAUDE;

(D) EL DERECHO PRENDARIO (LIEN) QUE GARANTIZA EL PRÉSTAMO SE PUEDE EJECUTAR SOLO CON ORDEN JUDICIAL;

(E) LOS HONORARIOS Y EL COSTO DE HACER EL PRÉSTAMO NO DEBEN EXCEDER EL 2 POR CIENTO DE LA CANTIDAD DEL PRÉSTAMO, EXCEPTO CUANDO SEA UN CARGO O COSTO POR UNA TASACIÓN EFECTUADA POR UN TASADOR DE TERCEROS, UNA ENCUESTA DE PROPIEDAD REALIZADA POR UN TOPÓGRAFO REGISTRADO O LICENCIADO POR EL ESTADO, UNA PRIMA DE BASE ESTATAL PARA UNA POLIZA HIPOTECARIA DEL SEGURO DE TÍTULO CON ENDOSOS A BENIFICIO DEL ACREEDOR HIPOTECARIO, O UN INFORME DE EXAMEN DE TÍTULO;

(F) EL PRÉSTAMO NO DEBE SER CUENTA ABIERTA EN LA CUAL SE PUEDE CARGAR DE VEZ EN CUANDO O EN LA CUAL SE PUEDE EXTENDER CRÉDITO DE VEZ EN CUANDO; A MENOS QUE SEA UNA LÍNEA DE CRÉDITO SOBRE EL VALOR LÍQUIDO.

(G) PUEDE USTED PAGAR EL PRÉSTAMO ANTES DE SU VENCIMIENTO SIN CARGOS (MULTAS) NI COSTO;

(H) NO DEBE HABER SEGURIDAD COLATERAL ADICIONAL PARA EL PRÉSTAMO;

(I) (revocado);

(J) NO ES REQUISIDO QUE USTED PAGUE EL PRÉSTAMO ANTES DE LA FECHA DE VENCIMIENTO ACORDADA, SIMPLEMENTE PORQUE EL VALOR JUSTO DE MERCADO DE SU HOGAR HA DECAÍDO O PORQUE USTED ESTÁ EN INCUMPLIMIENTO DE OTRO PRÉSTAMO QUE NO ESTÁ GARANTIZADO POR SU HOGAR;

(K) DE ACUERDO CON LA SECCIÓN 50(A)(6), ARTÍCULO XVI DE LA CONSTITUCIÓN DE TEXAS SU HOGAR SE PUEDE USAR COMO GARANTÍA SOLO EN UN PRÉSTAMO A LA VEZ;

(L) EL PRÉSTAMO DEBE ESTAR PREVISTO PARA PAGARSE EN PAGOS QUE EQUIVALEN AL INTERÉS O QUE EXCEDEN LA CANTIDAD DE INTERÉS ACUMULADO EN CADA PERÍODO DE PAGO;

(M) LA CONCLUSIÓN DEL TRÁMITE DEL PRÉSTAMO NO PUEDE SER ANTES DE HABERSE CUMPLIDO 12 DÍAS DE CUANDO USTED SOMETE LA SOLICITUD PRESTAMISTA O ANTES DE HABERSE CUMPLIDO 12 DÍAS DESPUÉS DE HABER RECIBIDO USTED ESTE AVISO, DEPENDIENDO DE CUAL FECHA SEA DESPUÉS; Y NO SE PUEDE CONCLUIR TRÁMITES DEL PRÉSTAMO SIN SU PERMISO ANTES DE HABERSE CUMPLIDO UN DÍA DE NEGOCIO DEPUÉS DE LA FECHA CUANDO SE RECIBE UNA COPIA DE LA SOLICITUD DE PRÉSTAMO, SI NO ERA RECIBIDO ANTES Y UNA DIVULGACIÓN DETALLADA Y FINAL DE LAS CUOTAS ACTUALES, PUNTOS DE DESCUENTO, INTERÉS, COSTOS, Y CARGAS DE CIERRE; Y SI SU HOGAR SE USA PARA GARANTIZAR EL MISMO TIPO DE PRÉSTAMO EN EL ULTIMO AÑO, NO SE PUEDE CONCLUIR TRÁMITES DE UN PRÉSTAMO NUEVO GARANTIZADO POR LA MISMA PROPIEDAD ANTES DE HABER PASADO UN AÑO DE LA FECHA DE CONCLUSIÓN DE TRÁMITES DEL OTRO PRÉSTAMO, A AUNQUE SE PIDE BAJO JURAMENTO UN CONCLUSIÓN DEL TRÁMITE TEMPRANO DEBIDO DE UN ESTADO DE EMERGENCIA DECLARADO;

(N) LA CONCLUSIÓN DE TRÁMITES DEL PRÉSTAMO SOLO DEBE HACERSE EN EL DESPACHO DEL PRESTAMISTA, EN LA COMPAÑÍA DE TÍTULOS, O EN EL DESPACHO DE ALGÚN ABOGADO;

(O) EL PRESTAMISTA PUEDE COBRAR CUALQUIER ÍNDICE DE INTERÉS FIJO O VARIABLE AUTORIZADO POR LOS ESTATUTOS;

(P) SOLO UN PRESTAMISTA LEGALMENTE AUTORIZADO PUEDE HACER PRESTAMOS DE ACUERDO CON LA SECCIÓN 50(A) (6), ARTÍCULO XVI, DE LA CONSTITUCIÓN DE TEXAS;

(Q) PRÉSTAMOS INDICADOS EN LA SECCIÓN 50(A) (6), ARTÍCULO XVI, DE LA CONSTITUCIÓN DE TEXAS DEBEN:

(1) NO REQUERIR QUE USTED USE EL DINERO DEL PRÉSTAMO PARA OTRA DEUDA EXCEPTO UNA DEUDA QUE ESTÉ GARANTIZADA POR SU HOGAR O QUE LE DEBA A OTRO PRESTAMISTA;

(2) NO REQUERIR QUE USTED CEDA SU SALARIO COMO GARANTÍA;

(3) NO REQUERIR QUE USTED EJECUTE DOCUMENTOS QUE TENGAN ESPACIOS EN BLANCO PARA LOS TÉRMINOS DE ACUERDO SUBSTANTIVOS PARA QUE OTROS LOS LLENEN;

(4) NO REQUERIR QUE USTED FIRME UNA ADMISIÓN DE SENTENCIA O PODER A OTRA PERSONA PARA QUE ESA PERSONA HAGA LA ADMISIÓN DE SENTENCIA O PARA QUE SE PRESENTE EN ALGÚN PROCESO LEGAL EN SU NOMBRE;

(5) DISPONER QUE USTED RECIBA COPIA DE LA SOLICITUD FINAL Y TODOS LOS DOCUMENTOS EJECUTIDOS QUE FIRME AL CONCLUIR EL TRÁMITE;

(6) DISPONER QUE LOS DOCUMENTOS DE GARANTÍA INCLUYAN LA DECLARACIÓN QUE ESTE PRÉSTAMO ES PRÉSTAMO DEFINIDO POR LA SECCIÓN 50(A) (6), ARTÍCULO XVI, DE LA CONSTITUCIÓN DE TEXAS;

(7) DISPONER QUE CUANDO EL PRÉSTAMO SE PAGUE TOTALMENTE, EL PRESTAMISTA FIRMARÁ Y LE DARÁ LA LIBERACIÓN DEL DERECHO PRENDARIO O LA CESIÓN DEL DERECHO PRENDARIO, CUALQUIERA DE LOS DOS QUE SEA APROPIADO AL CASO;

(8) DISPONER QUE USTED PUEDA, DURANTE EL PLAZO DE 3 DÍAS DESPUÉS DE CONCLUIR EL TRÁMITE, DESHACER EL PRÉSTAMO SIN PAGAR CARGOS (MULTAS) NI COSTO ALGUNO;

(9) DISPONER QUE USTED Y EL PRESTAMISTA RECONOCEN EL VALOR JUSTO DE MERCADO DE SU HOGAR EN LA FECHA DE CONCLUIR EL TRÁMITE DEL PRÉSTAMO;

(10) DISPONER QUE EL PRESTAMISTA PERDERÁ TODO PRINCIPAL E INTERÉS SI EL PRESTAMISTA NO CUMPLE CON SUS OBLICACIONES SALVO QUE EL PRESTAMISTA CORRIJE SU INCUMPLIMIENTO SEGÚN LO DISPUESTO EN LA SECCIÓN 50(A) (6) (Q) (X), ARTÍCULO XVI, DE LA CONSTITUCIÓN DE TEXAS; Y

(R) SI EL PRÉSTAMO ES UNA LÍNEA DE CRÉDITO SOBRE EL VALOR LIQUIDO:

(1) PODRÁ SOLICITAR ADELANTOS, LIQUIDAR DEUDA O VOLVER A PEDIR CRÉDITO DE CONFORMIDAD CON LA LÍNEA DE CRÉDITO;

(2) CADA ADELANTO DE ACUERDO CON LA LÍNEA DE CRÉDITO NO PODRÁ SER INFERIOR A UN MONTO DE $4,000;

(3) NO PODRÁ UTILIZAR UNA TARJETA DE CRÉDITO, TARJETA DE DÉBITO NI NINGÚN OTRO MÉTODO SIMILAR, O UN CHEQUE PREGRABADO QUE NO SE SOLÍCITA, PARA OBTENER ADELANTOS EN VIRTUD DE LA LÍNEA DE CRÉDITO;

(4) EL PRESTAMISTA SÓLO PODRÁ CARGAR Y COBRAR CUOTAS EN EL MOMENTO EN QUE SE CONCEDA LA LÍNEA DE CRÉDITO Y NO PODRÁ IMPONER CUOTA ALGUNA EN RELACIÓN CON NINGÚN ADELANTO;

(5) EL PRINCIPAL MÁXIMO QUE PUEDE CONCEDERSE, UNA VEZ SUMADO AL RESTO DE DEUDAS AVALADAS POR SU HOGAR, NO PODRÁ SOBREPASAR EL 80 POR CIENTO DEL VALOR EN EL MERCADO DE SU HOGAR EN LA FECHA DE CONCESIÓN DE LA LÍNEA DE CRÉDITO;

(6) SI EL MONTO DEL PRINCIPAL DE LA LÍNEA DE CRÉDITO SOBREPASA, EN CUALQUIER MOMENTO, EL 80 POR CIENTO DEL VALOR EN EL MERCADO DE SU HOGAR EN LA FECHA DE LA CONCESIÓN DE LA LÍNEA DE CRÉDITO, NO PODRÁ CONTINUAR SOLICITANDO ADELANTOS DE LA LÍNEA DE CRÉDITO HASTA QUE DICHO MONTO SEA INFERIOR AL 80 POR CIENTO DEL VALOR DE MERCADO DE SU HOGAR; Y

(7) EL PRESTAMISTA NO PODRÁ MODIFICAR DE UNILATERALMENTE LAS CONDICIONES DE LA LÍNEA DE CRÉDITO.

ESTE ES SÓLO UN RESUMEN DE LOS DERECHOS QUE LE ASISTEN SEGÚN LA CONSTITUCIÓN DEL ESTADO DE TEXAS. SUS DERECHOS SE RIGEN POR LA SECCIÓN 50, ARTÍCULO XVI, DE LA CONSTITUCIÓN DEL ESTADO DE TEXAS Y NO POR ESTE AVISO.

AVISO SOBRE LA REFINANCIACIÓN DE SU PRÉSTAMO EXISTENTE SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA A UN PRÉSTAMO QUE NO-SEA SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA DEFINIDO POR LA SECCIÓN 50(f)(2), ARTICULO XVI, CONSTITUCIÓN DE TEXAS:

SU PRÉSTAMO EXISTENTE QUE USTED DESEA REFINANCIAR ES UN PRÉSTAMO SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA. USTED QUIZAS TENGA LA OPCIÓN DE REFINANCIAR SU PRÉSTAMO SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA COMO UN PRÉSTAMO SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA O UN PRÉSTAMO QUE NO-SEA SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA, SI ES OFRECIDO POR SU PRESTAMISTA.

PRÉSTAMOS SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA TIENEN PROTECCIONES IMPORTANTES PARA EL CONSUMIDOR. UN PRESTAMISTA QUIZAS PUEDA HACER UNA EJECUCION HIPOTECARIA DE SU PRÉSTAMO SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA BASADO SOBRE UNA ORDEN DE LA CORTE. UN PRÉSTAMO SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA DEBE SER SIN REMEDIO DE RESPONSABILIDAD PERSONAL CONTRA USTED Y SU CÓNYUGE.

SI USTED APLICO PARA REFINANCIAR SU PRÉSTAMO SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA A UN PRÉSTAMO QUE NO-SEA SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA, USTED PERDERÁ CIERTAS PROTECCIONES AL CONSUMIDOR. UN PRÉSTAMO QUE NO-SEA SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA:

(1) LE PERMITIRÁ AL PRESTAMISTA HACER LA EJECUCIÓN DE HIPOTECA SIN UNA ORDEN DE LA CORTE;

(2) SERA CON REMEDIO DE RESPONSABILIDAD PERSONAL CONTRA USTED Y SU CÓNYUGE; Y

(3) PUEDE TAMBIÉN INCLUIR OTROS TÉRMINOS Y CONDICIONES QUE QUIZAS NO SEAN PERMITIDOS EN UN PRÉSTAMO SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA.

ANTES DE REFINANCIAR SU PRÉSTAMO EXISTENTE SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA PARA HACERLO UN PRÉSTAMO QUE NO-SEA SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA, USTED DEBE ASEGURARSE DE QUE ENTIENDE QUE USTED ESTA RENUNCIANDO A LAS PROTECCIONES IMPORTANTES PROPORCIONADAS BAJO LA LEY A PRÉSTAMOS SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA Y DEBA CONSIDERAR CONSULTAR CON UN ABOGADO DE SU ELECCIÓN REFERENTE A ESTAS PROTECCIONES.

USTED QUIZAS QUIERA PEDIRLE AL PRESTAMISTA QUE REFINANCIE SU PRÉSTAMO COMO UN PRÉSTAMO SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA. PERO, UN PRÉSTAMO SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA QUIZAS TENGA UNA TASA DE INTERÉS MAYOR Y COSTOS DE CIERRE QUE UN PRÉSTAMO QUE NO-SEA SOBRE EL VALOR LÍQUIDO DE LA VIVIENDA.