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SUPREME COURT OF TEXAS
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Case No. 21–0941

IN THE SUPREME COURT OF TEXAS

PNC MORTGAGE, A DIVISION OF PNC BANK, N.A. SUCCESSOR TO NATIONAL CITY BANK AND NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK OF INDIANA,
Petitioner,

v.

JOHN HOWARD AND AMY HOWARD,
Respondents.

On Petition for Review from the
Fifth Court of Appeals at Dallas, Texas
No. 05-17-01484-CV

PETITIONER'S BRIEF ON THE MERITS

Mark D. Hopkins
Texas State Bar No. 00793975
Shelley L. Hopkins
Texas State Bar No. 24036497
HOPKINS LAW, PLLC
3 Lakeway Centre, Ct. Suite 110
Austin, Texas 78734
(512) 600-4320 – Telephone
mark@hopkinslawtexas.com
shelley@hopkinslawtexas.com

Matthew H. Lembke
Pro Hac Vice
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, Alabama 35233
Telephone: (205) 521-8560
mlembke@bradley.com

COUNSEL FOR PETITIONER

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 55.2, Petitioner certifies that the following is a complete list of all parties and counsel:

1. **Petitioner:** PNC Mortgage, a Division of PNC Bank, N.A., Successor to National City Bank and National City Mortgage, a Division of National City Bank of Indiana

Counsel for Petitioner:

Mark D. Hopkins
Texas State Bar No. 00793975
mark@hopkinslawtexas.com
Shelley L. Hopkins
shelley@hopkinslawtexas.com
Texas State Bar No. 24036497
HOPKINS LAW, PLLC
3 Lakeway Centre Ct., Suite 110
Austin, Texas 78734
Telephone: (512) 600-4320

Matthew H. Lembke
mlembke@bradley.com
Pro Hac Vice
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, Alabama 35203
Telephone: (205) 521-8560

2. **Respondents:** John Howard and Amy Howard

Counsel for Respondents:

Julia F. Pendery
Texas State Bar No. 15744050
COWLES & THOMPSON, P.C.
901 Main Street, Suite 3900
Dallas, Texas 75202
jpendery@cowlesthompson.com
(214) 672-2143

J. Neal Prevost
Texas State Bar No. 00788222
PREVOST, SHAFF, MASON & CARNES, PLLC
5560 Tennyson Pkwy., Suite 260
Plano, Texas 75024
(972)-239-6200

3. **Trial Court:** Hon. Angela Tucker
199th Judicial District Court
Collin County, Texas

4. **Court of Appeals:** Fifth District of Texas at Dallas
Panel: Justices Molberg, Reichek and Garcia

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

Nature of the case	**Foreclosure through equitable subrogation.** Petitioner holds a note for a refinance loan, $888,286.25 of which was used to discharge two prior mortgages on the respondents' property. Petitioner claims a right to foreclose on the property through equitable subrogation. This appeal arises from the Court of Appeals' ruling that petitioner's equitable subrogation claim is time-barred.
Trial Court	Hon. Angela Tucker, 199th District Court of Dallas County, Texas.
Trial Court Disposition	The trial court denied petitioner's right to equitable subrogation based on petitioner's negligence.
Parties on appeal	Petitioner: PNC Mortgage, a division of PNC Bank, N.A. Respondents: John Howard and Amy Howard
Court of Appeals	Court of Appeals for the Fifth Court of Appeals at Dallas, Texas.
Participating Justices	Panel: Justices Molberg, Reichek, and Garcia Opinion: Justice Reichek
Court of Appeals Disposition	Initially, the court of appeals affirmed denial of equitable subrogation based on petitioner's negligence. *See PNC Mortg. v. Howard* (*Howard I*), 618 S.W.3d 75 (Tex. App.—Dallas 2019). This Court reversed that decision. *See PNC Mortg. v. Howard* (*Howard II*), 616 S.W.3d 581 (Tex. 2021). On remand from this Court, the court of appeals affirmed the trial court's judgment, denying PNC equitable subrogation based on expiration of the statute of limitations. *See PNC Mortg. v. Howard* (*Howard III*),— S.W.3d—, No. 05-17-01484, 2021 WL 4236873 (Tex. App.—Dallas Sept. 17, 2021).

STATEMENT OF JURISDICTION

This Court has importance jurisdiction. Tex. Gov't Code § 22.001(a).

ISSUE PRESENTED

Accrual date of equitable subrogation claim. The court of appeals erred in determining that a claim for equitable subrogation accrues upon the maturity date of the new refinance debt, rather than the maturity date of the original debt that gave rise to the right of equitable subrogation.

A. The court of appeals' decision contravenes the foundational legal principle underlying this Court's equitable subrogation jurisprudence.

B. The court of appeals' holding effectively nullifies this Court's prior decision in *Howard II*.

C. The court of appeals' practical concerns over tying accrual to the original maturity date are unfounded.

INTRODUCTION

The Dallas court of appeals' opinion is irreconcilable with this Court's equitable subrogation jurisprudence. The court of appeals erroneously held that when a refinance lender forecloses through equitable subrogation, its claim accrues upon the maturity date of the refinance debt, rather than the maturity date of the original debt that was discharged in the refinance. *See PNC Mortg. v. Howard (Howard III)*, — S.W.3d —, No. 05-17-01484, 2021 WL 4236873, at *4 (Tex. App.—Dallas Sept. 17, 2021, pet. filed). That holding is not only at odds with all of the recent decisions addressing the question under Texas law,[1] but it also contravenes the very purpose of equitable subrogation.

Equitable subrogation long has been a critical driver of refinance mortgage lending in Texas. Equitable subrogation arises when a loan extended by a refinance lender is used to extinguish a debt held by a previous lender. *See, e.g.*, *LaSalle Bank Nat. Ass'n v. White*, 246 S.W.3d 616, 619 (Tex. 2007). Because the refinance lender provides the money used to pay the borrower's debt to the original lender, the

[1] *See Gillespie v. Ocwen Loan Serv'g LLC*, No. 4:14-CV-00279, 2015 WL 12582796, at *4 (S.D. Tex. Oct. 25, 2015) (holding that equitable subrogation claim accrues upon maturity of original debt); *Priester v. Long Beach Mortg. Co.*, No. 4:16-CV- 00449, 2018 WL 1081248, at *4 (E.D. Tex. Feb. 28, 2018) (same); *De La Cruz v. Bank of New York*, No. A-17-CV-00163-SS, 2018 WL 3018179, at *6 (W.D. Tex. June 15, 2018) (same); *Zepeda v. Fed. Home Loan Mortg. Corp.*, No. 4:16-CV-3121, 2018 WL 781666, at *5 (S.D. Tex. Feb. 8, 2018) (same), *rev'd on other grounds*, 967 F.3d 456 (5th Cir. 2020). Indeed, the Dallas court of appeals acknowledged in its opinion that it was "reaching the opposite conclusion" from the federal decisions. *See Howard III*, 2021 WL 4236873, at* 3.

refinance lender is subrogated to any liens that the original lender held against the borrower's property. *Id.* This Court has stated that equitable subrogation's purpose is to serve as a hedge against the risk a refinance lender takes in extending a refinance loan, and to prevent the unjust enrichment of debtors. *See PNC Mortg. v. Howard* (*Howard II*), 616 S.W.3d 581, 585 (Tex. 2021); *First Nat. Bank of Kerrville v. O'Dell*, 856 S.W.2d 410, 415 (Tex. 1993). Equitable subrogation serves this purpose by demanding parity between the refinance lender and the original lender. *See, e.g.*, *Howard II*, 616 S.W.3d at 585 ("Subrogation permits a [refinance lender] to assert rights under a lien [held by the original lender] . . . . Such rights . . . necessarily are limited by the conditions of the [original] lien."); *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007) (holding that subrogee "obtain[s] only those rights held by the [subrogor]").

This Court repeatedly has described the right of equitable subrogation as essential to a functional refinance lending market. *See, e.g.*, *LaSalle,* 246 S.W.3d at 620. This case implicates the fundamental purpose of equitable subrogation and, with it, the future of refinance lending in Texas.

This Court's consistent approach to equitable subrogation demands that the court of appeals be reversed. Equitable subrogation puts the refinance lender (subrogee) into the shoes of the original lender (subrogor). *See, e.g., Fed. Home Loan Mortg. Corp. v. Zepeda*, 601 S.W.3d 763, 766 (Tex. 2020). Yet, the court of

appeals' holding applies a different limitations period to the subrogee than would apply to the subrogor, thereby undermining the fundamental principle of parity underpinning equitable subrogation.

The court of appeals' aberrant decision threatens to destabilize the refinance market, especially in light of consistently conflicting rulings from federal courts. Refinance lenders will now be unsure of when limitations will run on their loans and, accordingly, be hesitant to extend loans at all. To quell the uncertainty in Texas law created by the court of appeals' decision, and to reaffirm basic principles of equitable subrogation, this Court should reverse the court of appeals' holding on the accrual point of an equitable subrogation claim.

STATEMENT OF FACTS

John and Amy Howard (the "Howards") have not made mortgage payments or paid property taxes in over a decade for the home in which they reside. (CR 801; R.R. Vol. 3. at 35:25–36:2, 40:22–24, 44:17–45:3). From 2008 to present, PNC[2] has gone without payment on the nearly million dollars the Howards owe on their mortgage, all while PNC paid the property taxes. (CR 799–801; R.R. Vol. 3. at 357–74, Def.'s Ex. 29).

[2] PNC Mortgage, a Division of PNC Bank, Successor to National City Bank ("PNC") and National City Mortgage, a Division of National City Bank of Indiana ("National City") (collectively as "Petitioners" or "PNC").

Originally, the Howards took out two mortgages on their property in 2003. (CR 799). The Howards refinanced those mortgages in 2005. (CR 799). The Howards used $888,286.25 from the 2005 refinance to discharge the prior debts and associated liens from 2003. (CR 799–800). PNC holds the refinance note and is the beneficiary of the deed of trust pledging the Howards' property as collateral. (CR 802). PNC is equitably subrogated to the original 2003 deeds of trust through the refinance debt. *See Howard II*, 616 S.W.3d 581 (deciding PNC is entitled to equitable subrogation in this case).

First Franklin Financial Corporation was the beneficiary of the original 2003 deeds of trust. (CR 799). National City Bank of Indiana ("Bank of Indiana") was the lender on the 2005 refinance note and beneficiary of the corresponding deed of trust. (CR 799–800). In March of 2008, Bank of Indiana assigned its interests in the refinance note and deed of trust to National City Mortgage Co. ("National City Mortgage"). (CR 800); (RR vol. 3 at 220–22, Def.'s Ex. 10).

In November of 2008, the Howards stopped making payments on their refinance note. (CR 801). On June 19, 2009, National City Mortgage elected to accelerate the refinance note. (CR 1220). National City Mortgage later merged with PNC, at which point PNC was the holder of the refinance note and the beneficiary of the deed of trust by way of assignment. (CR 986, 1074–75).

On August 31, 2009, Amy Howard filed for Chapter 13 bankruptcy. (CR 801). During the pendency of the bankruptcy, PNC agreed to abandon the 2009 acceleration in exchange for a scheduled repayment of $25,727.56.[3] (RR vol. 3 at 351, Def.'s Ex. 26). The bankruptcy court entered a consent order memorializing this agreement in December 2009. (RR vol. 3 at 349–55, Def.'s Ex. 26); *In re Howard*, No. 10-40230-13 (Bankr. E.D. Tex. 2009), ECF 51, 55. The Howards later defaulted on this repayment agreement. (RR vol. 3 at 307, Def.'s Ex. 20).[4]

Amy Howard's bankruptcy was dismissed in February 2010, and the Howards remained delinquent on the refinance note. (RR vol. 3 at 303, Def.'s Ex. 19). In March 2010, Bank of Indiana, despite having already transferred away its interest in the note and deed of trust, purported to accelerate the refinance note again. (CR 802–03); (RR vol. 3 at 309–19, Def.'s Ex. 21). A substitute trustee appointed by Bank of Indiana then sold the Howards' property in an April 2010 foreclosure sale for the benefit of Bank of Indiana. (CR 803). In response, the Howards filed this wrongful foreclosure action against the Bank of Indiana, asserting that the Bank of Indiana no

[3] The court of appeals incorrectly did not account for this fact in its most recent decision, despite PNC clarifying in its initial brief to that court that the 2009 acceleration was abandoned. *See* Blue Br. at 30 n.12, *Howard I*, 618 S.W.3d 75.

[4] The Petition for Review mistakenly states that the Howards paid $1,012.50 towards this agreement before defaulting on it—instead, the Howards defaulted on this court-sanctioned agreement without ever making a payment. *Compare* Petition at 5, *with* RR vol. 3 at 84:3–84:5; 88:4–20. The $1,012.50 was paid towards a different debt. RR vol. 3 at 307, Def.'s Ex. 20.

longer had authority to foreclose after assigning its interests in the refinance note. (CR 22–28, 803). The Howards named PNC in the action as the mortgage servicer on the loan. (CR 22–28, 803). The trial court granted, and the court of appeals affirmed, partial summary judgment against Bank of Indiana, deeming the 2010 re-acceleration and foreclosure to be legally ineffective because PNC was the holder of the note and beneficiary of the deed of trust at the time, not Bank of Indiana. (CR 518–520); *PNC Mortg. v. Howard* (*Howard I*), 618 S.W.3d 75, 83 (Tex. App.—Dallas 2019). PNC does not challenge this holding.

PNC asserted its right to equitable subrogation as a counterclaim in this wrongful foreclosure suit on January 8, 2015. (CR 152, 159, 804). The Howards asserted the affirmative defense of limitations in response to all of PNC's foreclosure claims.[5] (CR 782). The denial of PNC's equitable subrogation claim is what gives rise to this appeal. PNC's right to assert an equitable subrogation claim was denied by the court of appeals, then recognized by this Court, then denied again by the court of appeals on remand, this time on different grounds. *Howard I*, 618 S.W.3d at 85; *Howard II*, 616 S.W.3d at 584–85; *Howard III*, 2021 WL4236873 at *5.

[5] Because limitations is an affirmative defense, the Howards "b[ore] the initial burden to plead, prove, and secure findings to sustain [their] plea of limitations." *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988); *accord Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 220 (Tex. 2003) (holding that party asserting limitations defense must "conclusively establish[] the applicability of the statute of limitations, including the date on which the limitations commenced.").

In its first opinion, the court of appeals determined that PNC was not entitled to equitable subrogation because PNC negligently failed to assert its right to foreclosure on its contractual lien until five years after the defective foreclosure by Bank of Indiana. *Howard I*, 618 S.W.3d at 83–85. This Court reversed that decision, ruling that negligence on the part of a refinance lender in enforcing its contractual rights does not vitiate the lender's equitable right to subrogation. *Howard II*, 616 S.W.3d at 584–85. This Court then remanded the case back to the court of appeals for further proceedings. *Id.* at 585.

On remand, the court of appeals determined that PNC's equitable subrogation claim was barred by the four-year statute of limitations applicable to contractual lien foreclosures. *Howard III*, 2021 WL4236873 at *5 (citing Tex. Civ. Prac. & Rem. Code § 16.035). The remand decision reasoned that (1) the accrual point of an equitable subrogation claim is the maturity date of the refinance loan, (2) the maturity date of that refinance loan was accelerated in 2009, (3) PNC did not assert its equitable subrogation claim until 2015, and, therefore, (4) PNC's claim was time-barred. *Id.* In deciding the accrual point, the court of appeals rejected the modern approach of courts applying Texas law, instead citing two court of appeals cases from 1928 and 1936 that it read as consistent with its decision. *Id.* at *2–4.

SUMMARY OF THE ARGUMENT

The court of appeals' holding on the accrual point for an equitable subrogation claim cannot be squared with controlling Texas law concerning the purpose of equitable subordination. Repeatedly, this Court has explained that equitable subrogation puts refinance lenders into the shoes of the original lender. Doing so logically requires that the same accrual point for statute-of-limitations purposes that would have applied to the original lender equally applies to the refinance lender's equitable subrogation claim. This is the only logical approach because the refinance lender takes the same lien through subrogation that the original lender held.

Indeed, in *this* case, this Court has held that allowing the limitations period to lapse on the enforcement of the refinance lien does not foreclose PNC's equitable subrogation claim. For the Court's prior ruling to have any meaning, the limitations period applicable to a claim based on the refinance lien *must* be different than the limitations period applicable to a claim based on the equitable subrogation lien. Equitable subrogation principles dictate that the limitations period accrues on the refinance lien upon maturity of the refinance debt, while the limitations period accrues on the equitable subrogation lien upon maturity of the original debt.

In reaching its erroneous holding, the court of appeals incorrectly analyzed certain theoretical concerns about the effect of ruling that the original lender's accrual point applies to the refinance lender's equitable subordination claim. The

court of appeals partly justified its ruling by considering the practical impacts that would result if the original debt's maturity date differed greatly from the refinance debt's maturity date. The court of appeals fails to realize, however, that the results it views as problematic are entirely consistent with the very purpose of equitable subrogation.

For the above reasons, explained more fully below, this Court should reverse the court of appeals' and hold that the accrual point for an equitable subrogation claim is the maturity date of the original debt.

ARGUMENT

Issue Presented: Accrual date of equitable subrogation claim. The court of appeals erred in determining that a claim for equitable subrogation accrues upon the maturity date of the new refinance debt, rather than the maturity date of the original debt that gave rise to the right of equitable subrogation.

The principles underlying equitable subrogation compel the conclusion that a refinance lender's equitable subrogation claim accrues at the maturity date of the original debt, not the refinance debt. For "over a century . . . 'the courts of no state have gone further' than Texas 'in applying the doctrine of subrogation.'" *Frymire Eng'g Co., Inc. ex rel. Liberty Mut. Ins. Co. v. Jomar Int'l., Ltd.*, 259 S.W.3d 140, 141 (Tex. 2008) (citation omitted). Equitable subrogation is available anytime a third

party involuntarily pays the debt of another owed to a prior lender.[6] *See, e.g.*, *Mid-Continent Ins. Co.*, 236 S.W.3d 774 (citing *Argonaut Ins. Co. v. Allstate Ins. Co*., 869 S.W.2d 537, 542 (Tex. App.—Corpus Christi 1993, writ denied). The century-old doctrine recognizes that, in equity, it is the debtor who should be responsible for the original debt that was legally repaid by the new lender. *Id.* The new lender, in discharging the original debt, is considered substituted to the rights that the original lender held against the debtor. *See Murray v. Cadle Co.*, 257 S.W.3d 291, 299 (Tex. App.—Dallas 2008, pet. denied) (quoting *First Nat. Bank of Houston v. Ackerman,* 8 S.W. 45, 47 (Tex. 1888)). Thus, when the Howards used the proceeds of PNC's refinance loan to pay off the purchase-money debt they owed to the original lender, PNC was equitably subrogated to the original lender's liens. *See Howard II*, 616 S.W.3d 581.

In the refinance context, equitable subrogation serves primarily as a "hedge against the risk of refinancing the outstanding amount of an existing loan." *Howard II*, 616 S.W.3d at 585. Equitable subrogation prevents the "unjust enrichment of the debtor" by ensuring that he is still held to account on the original loan, even when

[6] Refinance lenders are treated as having "involuntarily" paid the debt of the borrower to the original lender for equitable subrogation purposes. *See, e.g.*, *Zepeda*, 601 S.W.3d 763 (Tex. 2020) (applying equitable subrogation to refinance lender); *LaSalle*, 246 S.W.3d 616 (Tex. 2007) (same).

the refinance lender pays the original loan on the debtor's behalf.[7] *See O'Dell*, 856 S.W.2d at 415. Although this hedge is designed to benefit lenders, it also incentivizes more liberal lending through added security, thus "opening [the refinance] credit market to borrowers." *See Howard II*, 616 S.W.3d at 585.

Recent federal decisions uniformly have recognized that protecting this hedge requires that the accrual point for a claim to foreclose an equitable-subrogation lien is the maturity date of the original debt. *See Gillespie, v. Ocwen Loan Serv'g LLC*, No. 4:14-CV-00279, 2015 WL 12582796, at *4 (S.D. Tex. Oct. 25, 2015) (holding that equitable subrogation claim accrues upon maturity of original debt); *Priester v. Long Beach Mortg. Co.*, No. 4:16-CV- 00449, 2018 WL 1081248, at *4 (E.D. Tex. Feb. 28, 2018) (same); *De La Cruz v. Bank of New York*, No. A-17-CV-00163-SS, 2018 WL 3018179, at *6 (W.D. Tex. June 15, 2018) (same); *Zepeda v. Fed. Home Loan Mortg. Corp.*, No. 4:16-CV-3121, 2018 WL 781666, at *5 (S.D. Tex. Feb. 8, 2018) (same), *rev'd on other grounds*, 967 F.3d 456 (5th Cir. 2020); *see also Lusk v. Parmer*, 114 S.W.2d 677, 681 (Tex. Civ. App.—Amarillo 1938, writ dism'd) (same).

[7] As an example of unjust enrichment, the Howards have gone over a decade without paying the mortgage, or the taxes, for the house they possess. (CR 801; R.R. Vol. 3. at 35:25–36:2). Indeed, PNC has paid hundreds of thousands in property taxes on the Howards' behalf during the pendency of this litigation. (R.R. Vol. 3 at 40:22–24, 44:17–45:3, 357–74, Def.'s Ex. 29).

The court of appeals' contrary holding undermines the security afforded to refinance lenders through equitable subrogation by construing the rights of the subrogee differently than the rights of the subrogor. As such, the court of appeals' opinion is inconsistent with (1) the concept of parity between subrogor and subrogee, (2) this Court's prior holding in this case, and (3) the practical result of equitable subrogation for refinance lenders.

A. The court of appeals' decision contravenes the foundational legal principle underlying this Court's equitable subrogation jurisprudence.

The court of appeals' opinion is at odds with the basic notion that a refinance lender receives, through subrogation, the *same* rights that the original lender held. *See Zepeda*, 601 S.W.3d at 766. Equitable subrogation "[i]n the mortgage context... allows a lender who discharges a valid lien on the property of another to step into the prior lienholder's shoes and assume that lienholder's security interest in the property. . . ." *Zepeda*, 601 S.W.3d at 766. The rights assumed by the new lender are "only those rights held by the [old lender] against [the debtor]," leaving the borrower in no different position than he was vis-à-vis the original lender. *See Mid-Continent Ins. Co.*, 236 S.W.3d at 775 (citing *Interstate Fire Ins. Co. v. First Tape, Inc.*, 817 S.W.2d 142, 145 (Tex. App.—Houston [1st Dist.] 1991, writ denied)).

In *LaSalle* and *Zepeda,* this Court fleshed out the concept of putting an equitable subrogee "into the shoes" of the equitable subrogor. In both cases,

equitable subrogation permitted the subrogee to foreclose on the original lender's lien, even where the terms of the new debt extended by the subrogee violated the Texas Constitution. *See LaSalle*, 246 S.W.3d at 616; *Zepeda*, 601 S.W.3d 767–68. In *LaSalle*, this Court held that a lender whose home-equity loan violated then-Article XVI, Section 50(a)(5)(l) of the Texas Constitution could still foreclose on the debtor's property because it was equitably subrogated to a debt discharged with the proceeds of the illegal loan.[8] 246 S.W.3d at 619–20 ("[An] equitable subrogation claim does not derive from [the] contractually refinanced debt and accompanying lien. . . . Instead, [the refinance lender]'s claim arises in equity from its prior discharge of constitutionally valid . . . liens"). In *Zepeda*, this Court prescribed the same result where a lender negligently failed to correct a constitutional infirmity in the new debt, the proceeds from which were used to discharge a constitutionally valid prior debt. 601 S.W.3d at 769. In both circumstances, the position that the subrogee enjoyed by virtue of the *new loan* was wholly irrelevant. What mattered was the position that the *prior* lender, whose debt was discharged by the subrogee, enjoyed by virtue of the *prior* loan.

[8] *LaSalle* further explained that "[b]y definition, equitable remedies apply only when there is no remedy at law[.]" 256 S.W.3d at 619. Indeed, any refinance lender seeking equitable subrogation is not relying on its refinance contract with the lender—a subrogee only pursues equitable subrogation after its legal remedies have failed. Thus, there is no reason to look to the document underpinning the failed legal claim—the refinance note—in determining the scope of the lender's equitable remedy.

By the same logic, because the maturity date of the original debt would have been the accrual point for the limitations period applicable to any claim the original lender could have brought to enforce its lien, that same accrual point must apply to a claim by the subrogee to enforce the equitable subrogation lien.

The parity principle also drove this Court's decision in *Benchmark Bank v. Crowder*, where it similarly determined that the equitable lien arising in favor of the new lender is the exact same lien previously held by the original lender. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 662 (Tex. 1996) (confirming that equitable subrogation preserves and extends the preexisting lien and transfers it to new lender rather than creating an entirely new lien). In the priority-dispute context, this means that a subrogee who discharges a first-priority lien on a property acquires via equitable subrogation the same first-priority lien that was discharged, thus maintaining superiority to other junior liens on the property. *Providence Inst. for Sav. v. Sims*, 441 S.W.2d 516, 520–21 (Tex. 1969) (ruling that lender who was properly subrogated to first-priority lien held superiority over mechanic's lien that arose after creation of first-priority lien but before subrogation of that lien). This result follows because the "[second lender] occup[ies] the same position as the [original lender] with respect to [the original] lien" and the second lender's "deed of trust d[oes] not create an entirely new lien but preserve[s] the existing lien. . . ." *Id.* at 520.

If an equitable subrogation lien's creation date is the same as the creation date of the original lien for priority purposes, so too should the maturity date for limitations-accrual purposes be the same as the original loan's maturity date. In short, when dates are determinative with respect to an equitable subrogation claim, the inquiry starts and ends with the dates that are relevant to the original discharged debt.

In this case, PNC was equitably subrogated to the foreclosure rights of the original lender by virtue of having discharged the original lender's note and deed of trust liens in 2005. *Howard II*, 616 S.W.3d at 585 (affirming PNC was entitled to equitable subrogation). A foreclosure action on a contractual deed-of-trust lien accrues upon the maturity date of the note secured by the deed of trust. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). From the point of accrual, a lienholder has four years to foreclose on the property which secures the debt. Tex. Civ. Prac. & Rem. Code § 16.035. Had the original lender sought to foreclose on its deed of trust liens, limitations would have begun to run upon the maturity date of the original debt. The "into-the-shoes" principle underlying equitable subrogation demands the same be true for PNC.[9]

[9] At least one other state, California, has concluded that a claim for equitable subrogation accrues based on the original debt instruments of the subrogor, not any subsequent debt instruments of the subrogee. *See Howell v. Dowling*, 126 P.2d 630, 636 (Cal. App. 3d Dist. 1942) ("[E]quity will enforce subrogation only when the action is brought *within the time in which an action could have been brought to enforce the original obligation to which the right of subrogation is sought*."

Because the court of appeals' decision about the accrual point cannot be reconciled with settled Texas law concerning equitable subrogation, the decision should be reversed.[10]

B. The court of appeals' holding effectively nullifies this Court's prior decision in *Howard II*.

The court of appeals' decision not only conflicts with well-established principles of equitable subrogation, but it is also incompatible with this Court's prior ruling in *this* case. *See Howard II*, 616 S.W.3d at 585.

In *Howard II*, this Court ruled that a lapse of the limitations period for enforcement of a contractual lien claim does not foreclose equitable subrogation. *See Id*. The Court concluded that "PNC's failure to take timely action on its [contractual] lien" does not "bar[] subrogation." *Id.; see also U.S. Bank Nat'l Ass'n as trustee for CSMC Mortgage-Backed Tr. 2007-3 v. Lamell*, No. 21-20326, 2022 WL 1044055,

(emphasis added) (internal citation omitted)). For "over a century . . . 'the courts of no state have gone further' than Texas 'in applying the doctrine of subrogation.'" *Frymire*, 259 S.W.3d at 141. In accordance with Texas's robust respect for equitable subrogation, this Court should go at least as far as California and declare that a refinance lender's equitable subrogation claim accrues upon the maturity date of the original debt.

[10] The court of appeals purported to find support for its opinion in two intermediate court decisions from 1927 and 1936, but those decisions were issued decades before this Court fully explained the nature of equitable subrogation for refinance lenders in *Crowder*, *LaSalle*, *Zepeda*, and *Howard II*. *See Howard III*, 2021 WL 4236873, at *2–4 (discussing *Kone v. Harper*, 297 S.W. 294 (Tex. Civ. App.—Waco 1927), *aff'd sub nom. Ward-Harrison Co. v. Kone*, 1 S.W.2d 857 (Tex. Comm'n App. 1928) and *Hays v. Spangenberg*, 94 S.W.2d 899 (Tex. Civ. App.—Austin 1936, no writ)). Moreover, even the decisions of that period do not uniformly support the court of appeals' holding. *See Lusk*, 114 S.W.2d at 681 (running limitations from maturity of original debt).

at *3 (5th Cir. Apr. 7, 2022) (citing *Howard II* for proposition that "[e]quitable subrogation protects [the lender's] right to foreclose, even if the four-year statute of limitations [on the lender's contractual claim] has expired."). For this Court's ruling in *Howard II*—that the lapse of a limitations period on a contractual lien does not affect subrogation rights—to have any practical effect, the limitations period for a subrogee's contractual lien claim and its equitable subrogation lien claim *must* be different. Yet, the court of appeals determined that the limitations period is the same for both claims—four years from the maturity of the refinance debt. If that were true, expiration of limitations on the contractual lien claim would necessarily mean expiration of limitations on the subrogation claim, contrary to this Court's *Howard II* holding. *Howard II*, 616 S.W.3d at 585.

C. The court of appeals' practical concerns over tying accrual to the original maturity date are unfounded.

Although the court of appeals expressed concern over "problematic" scenarios that would arise if accrual were tied to the maturity date of the original debt, these concerns are misplaced. *See Howard III*, 2021 WL 4236873, at *4.

First, the court of appeals noted that if the maturity date of the refinance debt is at least four years later than the maturity date of the original debt, then the refinance lender may not have a claim based on equitable subrogation for the full term of the refinance loan. But, as explained above, the aim of equitable subrogation

under Texas law is to place the refinance lender into the shoes of the original lender. If the original lender would have had a viable claim based on its lien for only a certain time period, then a refinance lender should not expect to have an equitable subrogation claim available for a longer time period. *See Howard II*, 616 S.W.3d at 585 ("[Equitable subrogation] rights . . . necessarily are limited by the conditions of the discharged lien").

The implicit premise of the court of appeals—that an equitable subrogation claim should always be available for the same period as a claim on the refinance debt—misunderstands the doctrinal underpinnings of equitable subrogation. A claim for equitable subrogation exists in favor of the refinance lender for only so long as the original debt remains unpaid by the debtor. Once the original debt is repaid, but a portion of the refinance debt remains, equitable subrogation is no longer needed as a hedge against risk of non-payment on the original secured debt. *See, e.g.*, *LaSalle*, 246 S.W.3d at 620 (noting that equitable subrogation protects only the portion of the refinance debt that was used to extinguish the outstanding balance of the original debt at the time of refinance).

Second, the court of appeals expressed a concern about the opposite scenario—where the maturity date of the original loan is well beyond the maturity date of refinance loan, such that "the borrower could arguably be subjected to a subrogation claim many years after the [refinance] loan became due." *Howard III*,

2021 WL 4236873, at *4. But, again, that is the inevitable result of the equitable subrogation doctrine. If the original lender would have had that length of time to bring a claim, so too must the refinance lender have that length of time. Furthermore, the scenario envisioned by the court of appeals would only apply where the debtor is in default at the end of the refinance loan's term—the refinance lender's right of equitable subrogation would be extinguished if the debt were repaid in full. *See, e.g., Daughters of Charity Health Servs. of Waco v. Linnstaedter,* 226 S.W.3d 409, 411 n. 10 (Tex. 2007) ("[L]iens are incidents of and inseparable from the debt" (internal quotation marks and citation omitted)); *Hunker v. Estes,* 159 S.W. 470, 473 (Tex. Civ. App.—Amarillo 1913, writ dism'd w.o.j.) ("Our courts frequently say . . . the payment of the debt extinguishes the lien"); *Wiley v. Deutsche Bank Nat. Tr. Co.*, 539 Fed. App'x 533, 536 (5th Cir. 2013) (same). If the borrower were in default, it is true that the lender could foreclose through equitable subrogation until four years after the maturity date of the original debt, even if that date is beyond the maturity date of the refinance debt. But this results in no prejudice to the debtor—he occupies the same position that he held vis-à-vis the original lender at the time he obtained the original loan.[11] *See Farm Credit Bank of Tex. v. Ogden*, 886 S.W.2d 305, 311

[11] Even if debtors were prejudiced by granting the refinance lender a subrogation right for the entire life of the original loan, equitable subrogation is not designed to protect borrowers. To the contrary, it is designed to prevent the "unjust enrichment of the debtor" by protecting the refinance lender. *O'Dell,* 856 S.W.2d at 415.

(Tex. App.—Houston [1st Dist.] 1994, no writ) (holding that subrogation does not cause prejudice where parties are in same position before and after subrogation); *In re Rubarts*, 896 F.2d 107, 115 (5th Cir. 1990) (rejecting argument that lender's "unclean hands" precluded subrogation because lender only gained rights to preexisting lien); *see also Mid-Continent Ins. Co.*, 236 S.W.3d at 775 (holding that the subrogee "obtain[s] only those rights held by the [subrogor]"). This result does not "render the limitations period practically meaningless," as the court of appeals suggests. *Howard III*, 2021 WL 4236873, at *4. Instead, the same four-year limitations period exists, it merely runs from the maturity date of the original debt,[12] as it would have run for the subrogor.[13]

[12] In their Response to the Petition for Review, the Howards incorrectly suggest that, for purposes of an equitable subrogation claim, the claim accrues at the time that the original debt is paid off with the proceeds of the refinance loan. *See* Response to Petition for Review at 21. That is not the law. The Dallas Court of Appeals correctly ruled that equitable subrogation claims do not accrue at the time the original loan is paid off, and PNC does not challenge that ruling. *See Howard II*, 2021 WL 4236873, *3. In fact, an equitable subrogation claim accrues upon the date that the original loan *would have* matured had it not been paid off. Indeed, the basis of equitable subrogation is the "legal fiction" that "an obligation [already] extinguished . . . is treated as still subsisting for the benefit of [the subrogee]." *Bank of America v. Babu*, 340 S.W. 3d 917, 924 (Tex. App.—Dallas 2011, pet. denied) (citing *First Nat. Bank of Houston v. Ackerman*, 8 S.W. 45, 47 (Tex. 1888)).

[13] In addition, the applicable statute of limitations still lapses on enforcement of the *contractual* refinance lien four years from the maturity date of the refinance debt, thus barring foreclosure for any amount of the refinance debt in excess of the original debt at that time. It is only the lien on the portion of the refinance debt used to extinguish the original debt that is kept alive through equitable subrogation until four years from the maturity of the original debt. *See, e.g. LaSalle*, 246 S.W.3d at 620 (equitable subrogation protects portion of refinance debt used to extinguish original debt).

In short, a rule providing that the statute of limitations for an equitable subrogation claim in this context accrues upon the maturity date of the original debt – regardless of whether that occurs before or after the maturity date of the refinance debt – comports with the long-recognized purposes of equitable subrogation.

PRAYER

This Court should grant PNC's petition for review and reverse the court of appeals' judgment on the correct accrual point of PNC's claim for equitable subrogation.

Respectfully Submitted,

By: */s/ Mark D. Hopkins*
Mark D. Hopkins
Texas State Bar No. 00793975
mark@hopkinslawtexas.com
Shelley L. Hopkins
Texas State Bar No. 24036497
shelley@hopkinslawtexas.com
HOPKINS LAW, PLLC
3 Lakeway Centre Ct., Suite 110
Austin, Texas 78734
Telephone: (512) 600-4320

Matthew Lembke
Pro Hac Vice Motion Granted
Alabama State Bar No. 5537E41M
mlembke@bradley.com
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, Alabama 35203
Telephone: (205) 521-8560

CERTIFICATE OF COMPLIANCE

Petitioner certifies that this Brief on the Merits contains 5,521 words, when excluding the portions of the brief exempt from the word count pursuant to the Texas Rules of Appellate Procedure.

/s/ Mark D. Hopkins
Mark D. Hopkins

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2022, a true and correct copy of the foregoing Petitioner's Brief on the Merits was forwarded to all counsel of record by Electronic Filing Service Provider, as follows:

Julia F. Pendery
COWLES & THOMPSON, P.C.
901 Main Street, Suite 3900
Dallas, Texas 75202
jpendery@cowlesthompson.com

J. Neal Prevost
PREVOST, SHAFF, MASON & CARNES, PLLC
5560 Tennyson Pkwy., Suite 260
Plano, Texas 75024
sonya@psmclaw.com

COUNSEL FOR RESPONDENTS

/s/ Mark D. Hopkins
Mark D. Hopkins

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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Mark DHopkins		mark@hopkinslawtexas.com	5/16/2022 12:10:23 PM	SENT
Jon Neal Prevost	788222	neal@psmclaw.com	5/16/2022 12:10:23 PM	SENT
Julia Fields Pendery	15744050	jpendery@cowlesthompson.com	5/16/2022 12:10:23 PM	SENT
Shelley Hopkins		shelley@hopkinslawtexas.com	5/16/2022 12:10:23 PM	SENT
Matthew Lembke		mlembke@bradley.com	5/16/2022 12:10:23 PM	SENT
Sonya Clements		sonya@psmclaw.com	5/16/2022 12:10:23 PM	SENT
Gutierrez Lupe		lgutierrez@cowlesthompson.com	5/16/2022 12:10:23 PM	SENT