

Recent Changes to Federal and Texas Foreclosure Laws

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Recently, the 111th United States Congress and the 81st Texas Congress enacted laws which directly impact foreclosures. New protections have been given to occupants of homes all around the country and changes have been made to the foreclosure processes in Texas. This update provides a brief review and summary of the recent changes affecting foreclosures in Texas.

New Federal Law Protecting Tenants from Foreclosure Sales

On May 20, 2009, President Obama signed into law the Helping Families Save Their Homes Act of 2009 (the "Act"), which includes significant foreclosure protections for residential real property tenants and tenants of real property encumbered by a federally-related mortgage loan. The Act provides that the new owner after any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property assumes its interest subject to: (1) a requirement that such owner provide any bona fide tenant at least 90 days notice to vacate; and (2) the right of any bona fide tenant under a lease entered into prior to the notice of foreclosure sale to occupy the premises until the end of the remaining term of the lease. However, if there is no lease, if the lease is terminable at will under applicable state law, or if the new owner will occupy the foreclosed property as a primary residence, the tenant is only entitled to the 90-day notice set forth in (1) above and not the right to occupy the premises until the end of the remaining term. Additionally, the Act appears to apply to any residential property, including multifamily property, but does not appear to apply to commercial property. The provisions of this law are effective immediately but scheduled to terminate on December 31, 2012.

For purpose of the Act, the term "bona fide tenant" is limited to a lease or tenancy where (1) the borrower is not the tenant, (2) the lease or tenancy was the result of an arms-length transaction, or (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property. The term "federally-related mortgage loan" has the same meaning as in Section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602), and as such is limited to certain federal loans on residential real property designed principally for the occupancy of from one to four families.

New Laws Passed by the 81st Congress of Texas Affecting Foreclosures

Bid price payment at a foreclosure sale

House Bill 655 amends Section 51.0075(f) of the Texas Property Code by requiring the foreclosure bid price to be paid "without delay" as opposed to "immediately" as required under current law. The bill further provides that the foreclosure bid price may also be paid within such reasonable time as the purchaser and trustee agree upon, if the purchaser makes such request for additional time to deliver the purchase price. The impact of these changes may lead to disputes over how much time is allowed for a purchaser to pay the bid price, with the likelihood that trustees will revert to the established process of suspending a foreclosure sale until the time that is 15 minutes prior to the close of their chosen three hour foreclosure sale time window to permit the purchaser to produce good funds to pay the bid price. This bill is effective September 1, 2009.

Foreclosing on property owned by active duty military member

House Bill 3857 adds a new Section 51.015 to the Texas Property Code providing rights to certain servicemembers of the United States military which are similar to rights provided under the federal Servicemember's Civil Relief Act. This new section applies only to an obligation secured by a deed of trust or other contract lien on a "dwelling" owned by a servicemember that was originated before the date on which the servicemember went on active duty. A sale, foreclosure, or seizure of property under a deed of trust or other contract lien may not be conducted during the servicemember's period of active duty military service or during the nine months after the date on which that service concludes. Furthermore, an active duty servicemember (and non-active duty servicemembers during the nine months after the date on which their service concluded) has the right to either stay foreclosure proceedings or adjust the servicemember's

obligations under the contract. The servicemember is not released from all mortgage and contractual obligations, but is given an opportunity to fulfill such obligations on a timeline that is better suited to the servicemember's particular situation. However, a foreclosure sale may still be conducted pursuant to a court order issued before the sale or pursuant to a separate waiver agreement (in at least 12-point type) which was signed by the servicemember during or after the servicemember's period of active duty military service. Violation of a servicemember's rights is a Class A misdemeanor. A dependent of the servicemember is entitled to the same protections as the servicemember if such dependent's ability to comply with an obligation is materially affected by the servicemember's military service. This bill became effective immediately on June 19, 2009.

For purposes of this section, the term "dwelling" has been defined as a residential structure or manufactured home that contains one to four family housing units.

Lienholder rights in a property owners association foreclosure

House Bill 3479 amends Section 209.010 of the Texas Property Code by requiring a property owners' association conducting a foreclosure sale of an owner's lot to send notice, not later than 30 days after a foreclosure sale, to each lienholder of record informing the lienholders of their right to redeem the property. The notice must be sent to the address of each holder of a lien which is listed in the most recent deed of trust filed of record and to any transferee or assignee of a deed of trust that has provided notice to the property owners' association of the transfer or assignment. Section 209.011 of the Texas Property Code was also amended to allow a lienholder of record to redeem, within 180 days after the date the notice required by Section 209.010 is mailed to the lienholder, property from any purchaser at a sale foreclosing a property owners' association assessment lien. However, the lienholder may not redeem the property before the date that is 90 days after the date the notice required by Section 209.010 is mailed to the lienholders, and may redeem only if the lot owner has not previously redeemed the property. If a redemption occurs, even if redeemed by the lienholder, the property shall be deeded to the lot owner. This bill is effective September 1, 2009.

Transferee's rights in a tax lien

House Bill 1465 amends Section 32.06(i) of the Texas Tax Code and adds a new Section 33.445 requiring a taxing unit filing suit to foreclose a tax lien on real property to join each transferee (defined as a person authorized to pay the taxes of another) of a tax lien that may appear of record. After the joinder, the transferee may file its claim and seek foreclosure in the suit for all amounts owed the transferee that are secured by the transferred tax lien. Alternatively, the transferee may pay all taxes and other costs and fees owed to the taxing unit in consideration for the taxing unit transferring its tax lien to the transferee. On transfer of all applicable tax liens, the transferee may seek to foreclose the tax liens. This bill is effective September 1, 2009.

Proceeds of sale on a foreclosure tax lien

House Bill 406 adds a new Section 34.021 to the Texas Tax Code requiring that, within 10 days of a foreclosure sale on a tax lien conducted pursuant to an expedited trial under Rule 736 of the Texas Rules of Civil Procedure, the person conducting such sale must pay any excess proceeds to the clerk of the court after all amounts have been paid to participants in the sale. This bill is effective September 1, 2009.

Market appraisals may not exclude foreclosed properties

House Bill 1038 adds a new Section 23.01 to the Texas Tax Code requiring a chief appraiser, in determining the market value of a residence homestead, to not exclude from consideration the value of other residential property in the same neighborhood that would otherwise be considered in appraising the residence homestead because the other residential property was sold at a foreclosure sale conducted in any of the three years preceding the tax year in which the residence homestead is being appraised. This bill is effective January 1, 2010.

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