



## ***Texas Legislative Update***

March 11, 2016

### **New Statutes Improve Foreclosure Process, Limit Litigation Risk and Costs**

The 84th Texas legislative session passed three important bills that will limit risks, litigation, and costs while making the Texas non-judicial foreclosure process even more efficient and transparent. Bills relating to surviving spouses, foreclosures of mineral leases, eviction appeals, and transfer on death deeds may also affect servicers. All bills passed during the session have now taken effect, and servicers and their attorneys have begun developing processes to take advantage of these new laws.

### **PASSED INTO LAW**

#### **[HB 2067](#)**

##### **Acceleration Waivers**

- Simple, unilateral letter waives acceleration.
- Stops limitations from running without waiving defaults.
- Validates waiver letters predating passage.

#### **[HB 2066](#)**

##### **Sale Rescissions**

- Simple, unilateral procedure to reverse void sales without suit.
- Limits purchaser remedies to curb “ransom” demands.
- Expedites quick resolution by limiting right to challenge rescission

#### **[HB 2063](#)**

##### **Appointment by Sale Notice**

- Limits need for a separate appointment
- Always effective before first legal
- Recorded with STD without notary acknowledgment
- Reduces confusion, costs and litigation

Read on for more details about these and other bills. Click the links for the text of the new laws.

# Un-acceleration—Solving the Statute of Limitations

**HB 2067. Effective June 17, 2015.** Under Texas Law, lenders must foreclose or file suit within 4 years of maturity, and courts have held that when a lender accelerates the loan, it is considered matured for purposes of the statute of limitations. There was a recent split of opinion as to whether a lender could unilaterally waive acceleration. New Civil Practice and Remedies Code section 16.038 resolves this split of opinion by authorizing lenders to unilaterally waive an acceleration notice by sending a notice of rescission by First Class or Certified U.S. Mail to each debtor's last known address before the limitations period expires. The waiver is effective when the notice is deposited in the mail.

The acceleration waiver effectively restores an accelerated loan to its unmatured status without waiving the underlying defaults. In Texas, this means that the lien enforcement action will not accrue until the maturity date stated in the loan documents or the loan is accelerated again.

HB 2067 does not limit waiver of acceleration to its formal notice requirements. HB 2067 still allows waiver of acceleration to occur through the actions of the parties authorized under common law. Courts have held that accepting payments, sending new notices of default, or dismissing a home equity foreclosure application can constitute waiver. HB 2067 provides a simple mechanism to remove doubt about acceleration waivers and avoid the risks that *post-hoc* fact-intensive litigation will generate an unwelcome answer.

Previously, when a limitations deadline was approaching, a lender would be forced to file a judicial foreclosure if it did not believe it could complete the non-judicial foreclosure timely. The bill averts the need to file a judicial foreclosure; rather, a lender can simply abandon the acceleration. This will be particularly helpful in the home equity area where delays can be protracted, and lenders have little control of the process. Removing the urgency of a looming time bar may facilitate loss mitigation in programs where long delays seem to be the rule. Reducing lien litigation overall benefits borrowers and lenders alike.

## *HB 2067 Features*

- *Unilateral—Rescission effective on mailing*
- *Simple—Does not depend on conduct*
- *Certain—Eliminates unpredictability of fact-intensive litigation*
- *Retroactive—validates waiver letters sent in the past*
- *Cost-Effective—should reduce suits and risk*

[Go to HB 2067](#)

# Rescinding a Sale Made By Mistake

**HB 2066. Effective September 1, 2015.** Despite the best efforts of lenders and firms and improved technology, sales occasionally occur in error due to communication delays or unknown events such as last-minute bankruptcies, home equity stays, borrower deaths, and last minute cures. Even though a sale may be void, sale purchasers sometimes require payment to cooperate in the rescission and avoid expensive litigation.

HB 2066 provides a simple method to rescind without litigation, but only when accomplished within 15 calendar days after the sale and only for the following specified reasons:

1. The statutory requirements for the sale were not satisfied;
2. The default leading to the sale was cured before the sale;
3. A receivership or dependent probate administration involving the property was pending at the time of sale;
4. A specified condition of sale announced before the sale was not met;
5. The mortgagee or mortgage servicer and the debtor made an enforceable written agreement before sale to cure the default; or
6. At the time of the sale, a court-ordered or automatic stay of the sale imposed in a bankruptcy case filed by a person with an interest in the property was in effect.

The statute requires the lender to serve a notice of rescission on the borrower(s) and any third-party purchaser via certified mail **and** record the notice in the appropriate real property records within 15 calendar days after the sale. Service is deemed complete when deposited postage prepaid to the purchaser and borrower at their last known address.

The purchase price must be returned to the buyer within 5 days of sending the notice of rescission, and an affidavit stating the funds have been returned must be recorded in the real property records. If the sale is being reviewed for a rescission, it is best that the law firm hold the purchaser's funds at its office to ensure there are no delays in returning the funds once the decision to rescind is made.

A purchaser's recourse is limited to return of the purchase price plus interest and must challenge the rescission within 30 days or not at all. These features should reduce the frequency and expense of post-sale litigation and facilitate the REO process. This law does not prohibit prior methods of rescission such as by suit or agreement of all parties.

## *HB 2066 Features*

- **Simple**—Accomplished unilaterally where it applies by serving and recording a notice
- **Limited**—Can only be used within 15 days of the foreclosure sale
- **Aids Finality**—Cuts off “ransom suits” and fairly limits purchaser’s remedy
- **Efficient**—Facilitates title curative and return of properties to REO

[Go to HB 2066](#)

# Appoint Substitute Trustees by Notice of Sale; Record it Later, Notarization Not Required

[HB 2063](#). **Effective September 1, 2015.** HB 2063 amends Texas Property Code Chapters 12 and 51 and creates a new method for appointing substitute trustees that can reduce frivolous suits over non-material issues in the appointment, reduce other servicing costs and shorten foreclosure timelines.

Current law and deeds of trust authorize mortgage servicers and their attorneys to appoint substitute trustees by written instrument without any particular formality. Traditionally lenders have executed separate notarized appointments which are recorded in the real property records to provide notice of the appointment. Debtors attorneys often file expensive and time consuming litigation over the form, timing, notarization, and recording of the appointment even though these issues are generally not relevant under Texas Law.

HB 2063 resolves these issues by allowing a notice of sale in a Texas non-judicial foreclosure to serve as the appointment when it: (1) complies with current law, (2) is signed by the mortgagee or mortgage servicer's attorney or agent, and (3) contains a specified statutory borrower notice. An appointment using this device is effective as of the date of the notice. The bill authorizes a compliant notice of sale to be recorded later with the substitute trustee's deed and without notarization.

For servicers who authorize their attorneys to make appointments, the same statutory notice that initiates the non-judicial foreclosure legal process can also be the appointment, be recorded only once when there is a sale and without notarization. This reduces the recording costs and document execution requirements on servicers. It also reduces delays in meeting first legal pending execution of the appointment by the servicers or mortgagee. The bill is not a mandate. Traditional appointment and recording methods are still effective.

## *HB 2063 Features*

- *Certain—The first foreclosure document served is the appointment*
- *Clear—Reduces confusion from extraneous instruments in real property records*
- *Efficient—No need to create and record a separate instrument*
- *Cost Saving—Can reduce recording costs and interest curtailment risk*
- *Risk Reducing—Should reduce suits over timing, form and notarization of appointments*
- *Discretionary—Not a mandate*

[Go to HB 2063](#)

# Other New Laws That May Affect Mortgage Servicers

**HB 831. Surviving Spouses.** New Texas Finance Code section 343.103 allows a non-obligor surviving spouse on written request to obtain documentation regarding the home loan promissory note, loan balance, and other information.

The request must include a death certificate, an affidavit of heirship (including language that the survivor was married to the mortgagor when the mortgagor died, an affidavit of the surviving spouse that he or she currently resides in the mortgaged property as a principal residence, and a conspicuous notice prescribed by statute:

Mortgage servicers that provide the required information are not liable mortgagor's estate, heirs or beneficiaries as a result of providing information to the surviving spouse. The bill takes effect September 1, 2015.

**HB 2207. Foreclosures Affecting Mineral Leases.** HB 2207 prevents a foreclosure sale from extinguishing an oil and gas lease effective under its terms at the time of regardless when the lease was made. This alters the accepted common law "first in time, first in right" property law rule under which a foreclosure sale would terminate a lease executed after a mortgage lien attached.

Foreclosing a preexisting mortgage terminates a lessee's surface use rights granted in the lease to the extent inferior to the security interest.

The statute does not invalidate subordination and other agreements between lessees and mortgagees or foreclosure purchasers, but does not allow agreements that would modify a lessee's right without the lessee's agreement. The bill only operates prospectively and takes effect January 1, 2016.

**HB 3316. Time to record durable power of attorney related to realty conveyances.** Amended Estates Code § 751.151, makes *voidable* a real property transaction made under a durable power if the power of attorney is not filed for recording within 30 days after the real property conveyance instrument is recorded. The bill operates prospectively after taking effect September 1, 2015.

**HB 3364. Appealing Eviction Suit Judgments.** Amended Property Code § 24.007 prohibits appeals of county court judgments in eviction suits on the issue of possession unless the premises in question is being used for residential purposes only. The bill applies to judgments rendered on or after January 1, 2016.

**SB 462. Transfer on Death ("TOD") Deed.** New Estates Code Chapter 114 enacts the Texas Real Property Transfer on Death Act based upon a 2009 uniform act.

Now, a real property owner can designate a beneficiary of a revocable TOD deed to automatically receive the property upon the owner's death without probate. The TOD deed is non-testamentary and revocable; the beneficiary has no interest while the owner is alive.

The TOD must be recorded in the appropriate deed records. An owner retains full power to encumber or convey the TOD property while alive; such a conveyance voids the TOD. An attorney-in-fact cannot create a TOD. The bill operates prospectively after taking effect September 1, 2015.



## Offices

### **BARRETT DAFFIN FRAPPIER TURNER & ENGEL, LLP**

<b>Austin, TX</b>	<b>Addison, TX (Main)</b>	<b>Houston, TX</b>
610 West 5th Street Suite 602 Austin, Texas 78701	15000 Surveyor Blvd. Addison, Texas 75001 (972) 386-5040	1900 St. James Place Suite 500 Houston, Texas 77056

### **BARRETT DAFFIN FRAPPIER TREDER & WEISS, LLP**

**Diamond Bar, CA**  
  
20955 Pathfinder Road  
Suite 300  
Diamond Bar, California 91765

**Phoenix, AZ**  
  
5080 North 40th Street  
Suite 100  
Phoenix, Arizona 85018

### **BARRETT DAFFIN FRAPPIER LEVINE & BLOCK, LLP**

Centrum at Glenridge  
780 Johnson Ferry Road  
Suite 240  
Atlanta, Georgia 30342

### **BARRETT FRAPPIER & WEISSERMAN, LLP**

1199 Bannock Street  
Denver Colorado, 80204