

TEXAS REAL ESTATE TEACHER'S ASSOCIATION

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I. AD VALOREM TAXATION

In response to a number of complaints about the ad valorem taxation and tax protest procedures, the 2009 legislature passed the following changes:

A. Appeal to State Office of Administrative Hearings

The state office of Administrative Hearings shall provide a pilot program not later than January 1, 2010, from which an owner may appeal the appraisal review board order determining the protest of the appraisal for market value of property. The property must have an appraisal or market value in excess of \$1,000,000, and the program is only being implemented in Bexar, Cameron, El Paso, Harris, Tarrant, and Travis counties. Similar to other tax protest procedures, the property owner is required to pay the taxes that are not in contest during the appeal period. See Government Code, Section 2003.901.

B. Burden of Proof and Valuation

This statute provides that after a successful protest, the party that protested their taxes and received the tax lowered for the given tax year, the chief appraiser may not increase the appraised value of the property for the following tax year unless the increase is supported by substantial evidence, when all of the reliable and probated evidence is considered as a whole. The burden of proof is on the chief appraiser to support an increase in the appraised value. See Tax Code Section 23.01.

In considering comparable sales, the sale is not considered to be a comparable sale unless it occurred within the last 24 months. Whether or not a property is comparable is based on similarities with regard to location, square footage of the lot and improvements, property age, property condition, property access, amenities, views, income, operating expenses, occupancy, and the existence of easements, deed restrictions, or other legal improvements. See Section 23.013, Tax Code.

In determining the value of a residence

homestead, the chief appraiser may not exclude from consideration the value of other residential property in the same neighborhood, because that other property: was sold at a foreclosure sale conducted within three years of the preceding tax year; or that the market value has declined because of the declining economy. This clearly allows that the lower appraised foreclosed values, plus the value of the foreclosed property must be considered by the chief appraiser, rather than just relying on the higher property values.

C. Tax Exemptions

A disabled veteran who receives 100 percent disability compensation due to a service-connected disability is entitled to exempt the total appraised value of the veteran's residence homestead. See Tax Code Section 11.131.

The market value of a residence homestead should be determined solely on the basis of the property's value as a residence homestead, not the highest and best use of the property. See Tax Code Section 23.01.

II. ADVERSE POSSESSION

There have always been issues, particularly in fence disputes, as to what constitutes adverse possession. A number of spurious claims are filed regularly alleging claims of ownership of nine inches to two feet on cosmetic fence locations which typically fail, as ownership of that small piece of property is usually not "open, notorious, and hostile" enough to put the parties on notice as required by the adverse possession statute.

The new statute provides that if one is a prevailing party to an adverse possession statute claim that was groundless or made in bad faith, the court may award costs and reasonable attorneys fees to the prevailing party. See Section 16.034(a), Civil Practice and Remedies Code.

III. CONDEMNATION

Several years ago, the U. S. Supreme Court confirmed the right of a governmental entity to take property for private use to enhance the redevelopment of blighted areas. The reasoning

for this power is to allow governmental entities to declare areas blighted and allow a private developer to redevelop them. The result is a much higher more stable tax base (both ad valorem tax and sales tax). All governments must have a tax base in order to function.

The contrary argument to this, of course, is that the government is taking public property for private use and to benefit a private landowner by taking someone else's private property. Many states have responded to the *Kelo* decision in varying degrees.

In an obvious response to the *Kelo* case, the Texas legislature has proposed a new amendment to the Texas Constitution which specifies that "public use" does include the taking of property for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenue.

How can a city or a county redevelop without these incentives? That is another question that we will have to deal with in the future. See Tex. Const., Art. I, Sec. 17.

IV. CRIMINAL PENALTIES FOR APPRAISERS

The 2009 amended the Texas Penal Code to provide that a person who commits an offense intentionally or knowingly by making a materially false or misleading statement in providing an appraisal for a property for compensation, may be guilty of a criminal offense. See Section 32.32 (B-1). If the value of the property or the credit is \$200,000 or more, it is a first degree felony.

V. EMINENT DOMAIN; INVERSE CONDEMNATION

In *Southwestern Bell Telephone, L.P. v. Harris County Toll Road Authority*, ____ S. W. 3d ____ (Tex. 2009), Southwestern Bell Telephone, LP ("SBC"), which provides local telephone service throughout Texas, maintains underground telecommunications facilities in a public right-of-way along Westpark Tollway as permitted by and in accordance with certain Texas statutes. When Harris County Toll Road Authority

and Harris County (collectively, the "County") began construction of the Tollway in 2001, it required SBC to relocate its facilities in the right-of-way. SBC did so and then billed the County for its costs. When the County failed to pay, SBC sued, asserting a statutory claim for reimbursement and a constitutional claim for inverse condemnation. The trial court granted SBC's motion for summary judgment, and the court of appeals reversed on the grounds that the County was immune from suit on the statutory claim and that SBC had no vested property interest in the right-of way for purposes of the constitutional claim. SBC appealed to the Texas Supreme Court.

On appeal with respect to the constitutional takings claim, SBC argued it was entitled to compensation for its relocation expenses under the takings clause of the Texas Constitution. Specifically, the issue was whether the County's actions resulted in a "taking" of property. The Texas Supreme Court began with a reference to a 1905 U.S. Supreme Court case in which the Court rejected a taking claim brought by a gas company forced to relocate pipes to accommodate improvements to a city's drainage system and held that "a utility forced to relocate from a public right-of-way must do so at its own expense," in the absence of an agreement or statute to the contrary. SBC argued that notwithstanding this general rule, the statutory authority given to it to "install a facility ... in a manner that does not inconvenience the public in the use of the road, street, or water" granted it a property interest on which a taking claim may be based, and that the statute granted telephone companies "[i]n effect, ... a private easement."

When addressing SBC's argument the court first cited a noted treatise which recognizes that:

"The authorization to maintain rails, etc., in a particular part of the highway is not an easement or an other estate or interest in the land so occupied, [but is] merely a license to share in the public easement, and consequently a corporation maintaining rails, pipes, and wires in a public highway is not entitled to compensation for an invasion under legislative authority of the

portion of the highway occupied by its structures ... *[W]hen the continued undisturbed existence of the licensed structure interfere[s] with some other public need, the disturbance or removal of the structures or an alteration of their location is not a taking or even a damaging of property.* The permission to use the highway or such structures has then granted upon an implied condition that the structures shall not interfere, either at the time that they are placed in position or thereafter, with any other public use to which the legislature sees fit to devote the way.”

In addition, the court cited a 1970 Texas Court of Appeals case in which the court rejected a telegraph company’s taking claim, despite the fact that lines had been installed forty-three years earlier pursuant to [the subject statute] predecessor; right to use the streets was a ‘permissive right’ not a ‘vested’ one, and utility had to bear its own relocation costs.”

Despite this case law, SBC argued telephone companies are different from other utilities, particularly since the statute is silent on relocation costs when other statutes explicitly require utilities to pay relocation costs in other circumstances. To this argument, the court held that “the statute’s silence on relocation costs would mean that the common law rule applied, not that the county was responsible for relocation costs.” Because no Texas has concluded that utilities have a right in the public roads that is compensable under the Texas Constitution, the court here concluded that SBC would be required to bear its own relocation costs.

VI. FINANCING – TREC FORM

In *Nguyen vs. Woodley*, 273 S.W. 3rd 891 (Tex.App.-Houston [14th Dist.], 2008, the case focused on the automatic termination provision in this addendum. The seller informed the buyer that he couldn’t get his loan approved and asked for an extension. The Appeals Court, citing this form, held that if the buyer could not obtain financing approval within the time specified, the contract

will terminate and the earnest money returned to the buyer. See the attached form.

VII. FORECLOSURES

A. Changes in Procedures in the Foreclosure Sale

The most recent change in the foreclosure statute involves a requirement that the purchaser at a foreclosure sale pay funds immediately to the trustee. There were a lot of concerns over large amounts of cash and cashier’s checks at foreclosure sales and the ability of the trustee to accept same. This new change provides that a purchaser at the trustee sale and the trustee can agree for a reasonable time to produce the purchase price. This will allow the trustee and the purchaser to agree to adjourn the foreclosure sale to the bank or allow the purchaser to go to the bank independently to get the cashier’s check and bring it back to the trustee when finalizing the sale.

What if the purchaser who wins the bid goes to the bank and never returns? See Property Code, Sec. 51.0075(f).

B. Armed Service Members Protection

Another significant change in the foreclosure procedure affects members of the military. If a homeowner is on “active duty military service” as a member of the United States or the International Guard and that service member’s ability to comply with the obligations of their contract is materially affected by his or her military service, they are entitled to stay any foreclosure proceedings for a period of time as justice and equity require, or can adjust the obligations of the contract to preserve the interest of all of the parties. He or she merely has to submit to a court hearing.

In order for the adjustments to be made, there are requirements providing that it be:

1. in writing, in at least 12 point type,
2. executed as a separate agreement, and

3. made under a written agreement executed during or after the service member's period of active duty military service, and specifying the reason for the adjustment.

This new statute attempts to give the Texas service members the same protection as the Service Members Civil Relief Act.

VIII. HOMESTEADS-QUALIFYING TRUSTS

In general terms, homestead rights vest in individuals, not in business entities. An exception to this was made in the 2009 legislature wherein they provided that a person could convey a title to a "qualifying trust" as defined in the statute, and not lose the homestead protection as provided under the Texas Constitution. The statute is prospective only, and is not retroactive to conveyances into trusts prior to the effective date of the statute (September 1, 2009). When conveying into a trust, the grantor must exercise all of the formalities of transfer of a homestead generally. This will enable people to put their homes into an inter vivos trust for estate planning and not run the risk of losing their homestead protection. It should also be noted that it does not affect the title insurance on the property. The trust is considered to be an insured under the title policy, even though it may not be named so in the policy. See Property Code, Section 41.0021.

IX. LANDLORD AND TENANT

A. Trade Fixtures

In *C.W. 100 Louis Henna, Ltd., v. El Chico Restaurants of Texas, L.P.*, 2009 WL 2902735 (Tex. Ct. App. Aug 27, 2009), El Chico entered into ground lease with Boardwalk Center in September of 1996. Boardwalk assigned its interest to Henna in April 2006. Pursuant to the lease, El Chico agreed to construct a restaurant building on the leased property. The ground lease obligated El Chico to construct the Improvements according to plans and specifications approved by the landlord, Boardwalk. The lease defined Improvements to include building and other improvements and appurtenances that may hereafter be erected." The lease described the use:

restaurant, a related cocktail lounge, and such other uses as are incidental to the operation thereof and for any other purpose..."

The ground lease was to run for a ten year term, and gave El Chico the ability to renew for four successive five year periods.

According to the lease, El Chico did not have the right to remove or demolish the structure it agreed to build, and was required to carry insurance on the Improvements. El Chico was required to return the property to the landlord at the end of the Term "in good repair and condition, loss by fire or other casualty, condemnation, act of God, ordinary wear and tear excepted." At the end of the Term, the Improvements were to become property of the landlord.

At about the time that Boardwalk assigned its interests as landlord to Henna, El Chico ceased operating a business in the premises. El Chico informed Henna that it had ceased business at the site and further, that it would not exercise its option to renew at the end of the term. To make things easy on Henna, El Chico stated in its letter to Henna that it would not interfere with the marketing or showing of the property and would execute a termination agreement prior to the expiration date of the lease if Henna found a new tenant or sold the property.

Henna purchased all of El Chico's "furniture, fixtures and equipment" in June 2006. Henna's purchase agreement stated that it acquired this material "AS IS." Henna assumed responsibility for utilities, security and other carrying costs for the property. El Chico continued to make base rent payments.

Then the inevitable problem arose.

In January of 2007, prior to the end of the term at the lease, Henna learned that the rooftop air conditioning units on the building constructed by El Chico had been vandalized. Apparently "copper thieves" snipped the units of valuable wiring and conduit. In addition! the units had been damaged by hail. The damage was estimated to equal \$38,496.

Henna argued El Chico was obligated to repair or keep insured the HVAC units and that therefore El Chico breached the lease contract. El Chico responded that the HVAC units were fixtures that Henna purchased “as-is.” The trial court agreed with El Chico, and the Texas Court of Appeals affirmed.

The lease apparently used the word “fixtures” without defining it. According to the court, the failure to specify what fixtures meant for this particular lease transaction indicated the parties’ intent to incorporate the conventional understanding of the term. Paragraph 12 of the lease permitted the tenant to take “removable fixtures” at the end of the term as well as personal property “provided that Tenant repairs all damage to the Improvements caused by such removal.” This, according to the court, is consistent with the common meaning of trade fixtures in Texas law, “trade or business fixtures” under the lease are considered to be removable personal property.” The same provision of the lease excluded fixtures from the definition of Improvements.

As noted, the lease required El Chico to return the Premises and Improvements at the end of the term in good repair and condition. Furthermore, Tenant was required to maintain the Improvements.

El Chico’s lawyers did a good job of conveying their view of facts of the case. According to the opinion, although rooftop HVAC units had a 45 ton air conditioning capacity, and made the restaurant use of the Premises possible. “The units were not attached to the building ... so that they could be removed and replaced without injury to the building.” Furthermore, according to the opinion, the HVAC units provided “many times greater than that needed if the building were to be used for other retail or office use.” The inference is that El Chico could legally remove the HVAC units, and that the landlord, or the next tenant, would install replacement rooftop units more suited to the subsequent use.

Texas courts have defined trade fixture to mean such articles as may be annexed to the realty by the tenant to enable him properly or efficiently to carry on the trade, profession or enterprise contemplated by the tenancy contract or in which

he is engaged while occupying the premises and which can be removed without material or permanent injury to the freehold.” *Boytt v. Boegner*, 746 SW. 2d 25 (Tex. Ct. App. 1998).

The court stated “several Texas courts addressing similar facts, have held that air-conditioning units are trade fixtures as a matter of law” Nevertheless, the court agreed with Henna that there “is no rule or presumption in Texas law that air conditioning units are always trade fixtures The issue, rather turns on the parties intent, which here we ascertain from the lease.”

Henna argued that improvements for purpose of the ease included the HVAC units because these were described and depicted in the plans and Specifications for Improvements that landlord approved pursuant to the terms of the lease The plans and specifications included a drawing of a four unit 45 ton HVAC unit on the rooftop, similar to the one El Chico ultimately installed

The court was not persuaded by Henna’s arguments. The court read the language of the lease (against the drafter) very carefully According to the court, paragraph 5 of the lease — detailing construction of the Improvements — “does not purport to incorporate into the lease’s “Improvements” whatever property might have been depicted in the plans and specifications.” Rather this provision only required that the Improvements would be constructed in conformity” to the plans and specifications.

Henna pointed out also that the lease Specifically described El Chico’s use as the operation of a restaurant ... and for any other lawful purpose.” Taken together, Henna argued that Improvements under the lease included HVAC, and that given the stated use, this must have been both parties intent.

Henna attempted to distinguish prior Texas case law. Those cases held that HVAC units were fixtures, but invoked instances in which tenants installed units in pre-existing buildings; El Chico constructed the building on which it then installed rooftop units. The court considered this a distinction without a difference: “The critical issue rather is whether the parties intended the air

conditioning units to be permanent additions to the building or temporary additions to aid the Tenant, El Chico, while it was operating a restaurant in the building.” The court held that the latter was true.

Henna then asserted that, when it purchased El Chico’s fixtures, the bill of sale of the HVAC units. The court dismissed this argument quickly pointing out a catch all phrase in covering “all furniture fixtures and equipment.” More importantly the court stated that the intent of the parties at the time they executed the ground lease is what matters - not what the parties “may or may not have said in the bill of sale. This intent and not the bill of sale define the meaning of “Improvements,” and of “fixtures.”

B. Right to Vacate for Sex Offenses

A new section was enacted under 92.0161(b) and provides that a tenant may terminate tenant’s rights and obligations under a lease and may vacate the dwelling and avoid liability for future rent and any other sums due under the lease before the end of the lease term if the tenant is the victim of sexual assault or a parent or guardian of a victim of sexual assault, aggravated sexual assault, or continual sexual abuse of a child that takes place during the preceding six-month period on the premises or in any dwelling on the premises. In order to avoid liability, this tenant must provide the landlord or the landlord’s agent a copy of the assault or abuse of the victim from a licensed health care services provider who examined the victim, documentation of the assault or abuse of the victim from the licensed mental health services provider, or documentation of a protective order. A tenant may not waive this right.

C. Hearing Impaired Tenants

If a request by a tenant, as an accommodation for a person with a hearing impaired disability, a smoke detector must be installed by the landlord that is capable of alerting a hearing-impaired person in the bedroom it serves. See Sec. 92.254(a-1).

D. Repairs

A justice court may order the repair in the tenant’s premises in an amount not to exceed \$10,000, excluding interest and costs of court.

X. MORTGAGELICENSING ACT OF 2009

This is a 52-page bill that portends to bring Texas into 100 percent compliance with the Federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008. Fundamentally, it requires everyone who is a mortgage loan originator to be licensed under the Finance Code by July 31, 2010. Individuals authorized to engage in residential loan activities as of July 31, 2009, must comply by July 31, 2011. A residential mortgage loan originator is defined as an individual who, for compensation or gain or any expectation of compensation or gain, takes a residential mortgage loan application or offers or negotiates the terms of a residential mortgage loan. It does not include:

- (1) an individual who performs solely administrative or clerical tasks on behalf of the residential loan originator
- (2) an individual who performs only real estate brokerage activities (unless that person is compensated by a lender or agent of the lender)
- (3) an individual who is involved solely in providing extensions of credit related timeshare plans.

This classifies everyone else as a loan originator and is applicable to private investors who provide their own financing.

The statute exempts:

- (1) a registered mortgage loan originator acting for a depository institution
- (2) an individual who offers or negotiates a residential mortgage for an immediate family member

- (3) a licensed attorney who negotiates the terms of a residential mortgage loan on behalf of a client, *unless* the attorney takes a residential mortgage loan application and offers or negotiates the terms of the loan
- (4) an individual who is an exclusive agent of a registered financial services company
- (5) an individual who offers or negotiates the terms of a residential loan secured by his own residence
- (6) a non-profit organization providing self-help housing who originates zero interest residential loans.

The statute also requires applicants to complete education and training courses, and meet the surety bond requirement or pay a recovery fund fee. It also provides a whole host of regulatory authorities in Texas with jurisdiction over enforcing the statute.

This is obviously a move to stop the mortgage fraud, as every loan originator will now be on a national system of identification. Remember the 1980's, when all the blame shifted to the appraisers, new regulations were passed for the appraisers that were repealed a few years later. It will be interesting to see how this statute plays out in the future.

XI. NEW FEDERAL LANDLORD AND TENANT LAW

Congress passed a new Landlord and Tenant Law that became effective May 20, 2009, which affects all foreclosures from that date through December of 2012. The new law enables a bona fide tenant who is leasing premises that are foreclosed upon, to continue occupancy during the full term of the lease but the new owner (who purchased the property at the foreclosure sale) intends to use the property as his primary residence. In this case, the new owner must still give the tenant 90 days notice to vacate.

In virtually every other circumstance, the tenant is entitled to a 90-day notice to vacate. It applies not

only to a federally regulated mortgage loan, but also to any dwelling or residential real property.

What is a bona fide tenant? It can't be the mortgagor, or the mortgagor's child, spouse, or parent, it must have been an arm's length transaction and for a substantially fair market value.

XII. NEW LIS PENDENS RULES

Notices for lis pendens are a constant thorn in the side of real property lawyers. One merely has to file a lawsuit alleging a claimed interest in real estate and it makes all subsequent owners and lien holders on notice that the property is being litigated, and, in effect, encumbers the title of the real estate. This is so even if the lawsuit is spurious and has no basis whatsoever.

The new rules now provide that if you are going to file a lis pendens, you must send a notice to each party who has an interest in the real property affected by the notice.

A party then has the right to apply to the court to expunge the notice. The statute provides that the court shall order the notice of lis pendens expunged if the court determines that the pleading that was filed in the lawsuit (1) does not contain a real property claim, (2) the claimant fails to establish by preponderance of the evidence that the probably validity of the real property claim, or (3) the person who filed the notice for record did not send a copy as required by the new statute. When the court issues its notice expunging the notice, a certified copy of the order must be filed within three days after the lawsuit in the real property records to effectively release the lis pendens.

See Section 12.0071, Property Code.

XIII. PROPERTY OWNER'S ASSOCIATIONS

A. Child Support Liens

Another issue is clarified by the 2009 legislature. Child support liens (they have no statute of limitations!) will be treated the same as

a judgment lien for purposes of homestead protection (i.e., they last ten years and can be released, similar to a judgment lien, by filing an affidavit. See Family Code Section 157.3171.

B. Failure to Record an Management Certificate

State law also requires that the property owner's association file a management certificate among the Real Property Records in the county in which the property is located. What happens if they fail to file? Legislature added a new provision [Section 209.004(d)] that provides in the event the property owner's association fails to record their management certificate, the owner of the property is not liable to the property owner's association for any amounts due the association as of the date of the transfer, or any debt to or claim of the association accrued before the transfer to a bona fide purchaser. This effectively keeps the HOA from surprising the new purchaser of fees, assessments, and attorney fees for their failure to timely file a management certificate.

C. Redemption Rights-Lien Holders

The Texas Property Code permits a lot owner to redeem a property for 180 days after a property owners association foreclosure sale. This new law provides that the property owners association must give notice to any lien holders if an address has been provided in the public records. The lien holder then has the right to redeem after the property owners association foreclosure sale for 90 days and only if the lot owner has not exercised their right of redemption. If either redemption occurs (owner's or lien holders), the property is required to be deeded by the property owners association back to the lot owner.

D. Resale Certificate Updates

State law requires a property owner's association to issue a resale certificate to confirm that no dues are owing for special assessments on a particular piece of property. This is frequently obtained further along the sales process, and needs to be updated at the closing. New Section 207.003(f) now provides that the homeowner's

association is required to update the resale certificate not later than the seventh day after written request by the owner or the owner's agent or title insurance company, confirming the status of any unpaid special assessments of any changes in the information provided in the prior resale certificate. The request must be made within 180 days after the date the original resale certificate was issued.

XIV. RESPA

New RESPA rules were adopted on November 17, 2008 by the Department of Housing and Urban Development. **Effective January 16, 2009**, all third parties charges paid by title agents must be separately itemized and cannot exceed the amount actually paid to the service provider. The new rule does permit any provider to use an average charge calculation to collect the amount due for a service billed by a third party provider that is paid for by the borrower or the seller provided this "average charge calculation" meets the criteria of the new rule (it's easier just to pass their actual cost if you know them).

Another amendment to the rules affects affiliated businesses. The rule still prohibits participants in affiliated business to require the use of an affiliated business.

A. Combined Services

However, under the new rule, a settlement service provider may offer combined services at a price lower than the sum of individuals' service without triggering "required use" concerns if:

- (1) the use is optional to the consumer; and
- (2) the lower price is not made up of higher costs elsewhere in the transaction.

This allows a settlement service provider to provide economic incentives. **The rule does not apply to homebuilders, as they are not settlement service providers.**

B. GFE Tolerances

Effective January 1, 2010, lenders and mortgage brokers are required to use a new Good Faith Estimate (GFE) to a potential borrower within 3 days after loan application. The new GFE must state: (1) dates, (2) terms of the loan, and (3) **all** charges for the loan.

The new good faith estimate of closing costs and provides for “tolerances” for variations of those costs.

- Origination fees, lender costs, and transfer taxes are subject to **zero** tolerance and may not increase.
- When the lender requires the settlement service provider or provides settlement services from a list of providers for title services and title insurance the tolerances are allowed to increase as much as **10%** over the original GFE.
- If the borrower chooses providers (including title insurance) the loan origination must provide a written list of settlement service providers at the time of the GFE, on a separate sheet of paper. The escrow amounts, per diem interest and homeowner’s insurance, there is **unlimited** tolerance, as the provider has no control over the costs.

The quoted terms and prices in the GFE must be available for at least 10 business days after the GFE is issued. Therefore, it can change on the 11th day!

No “POC” items can be listed on the GFE.

C. HUD Forms

The new rule also publishes two new HUD-1 and HUD-1A forms. The first page is unchanged but the second page added information to make the forms more closely follow the information set out in the GFE.

For the first time, the HUD-1A discloses the agent’s portion of the title premium along with the underwriter’s portion of the title premium. This is not disclosed in the GFE, but HUD felt that it was important to disclose it on the final settlement

statement so that the consumer could better understand their title charges.

D. Right to Cure

The rules give the loan originator the opportunity to cure any violation by reimbursing the borrower in any amount in which the tolerance has over exceeded. This reimbursement may be made at settlement or within 30 calendar days after settlement.

E. “Changed Circumstances”

Loan terms or charges can change in the event that there are changed circumstances. “Changed circumstances” is now defined in §3500.2 as:

- (1) act of God, war, disaster, or other emergency;
- (2) information particular to the borrower or transaction that was relied on in providing the GFE and that changes or is found to be inaccurate after the GFE has been provided, which information may include:
 - (a) information about the credit quality of the borrower,
 - (b) the amount of the loan,
 - (c) the estimated value of the property, or
 - (d) any other information that was used in providing the GFE;
- (3) new information particular to the borrower or transaction that was not relied on in providing the GFE; or
- (4) other circumstances that are particular to the borrower or transaction, including boundary disputes, the need for flood insurance, or environmental problems.

None of the information collected by the loan originator prior to issuing the GFE may later become the basis for a “changed circumstance” upon which a loan originator may offer a revised GFE, unless the loan originator can demonstrate

that there was a change in the particular information or that it was inaccurate, or that the loan originator did not rely on that particular information in issuing the GFE.

When there is a “changed circumstance” and the loan originator intends to issue a revised GFE, the loan originator must do so within three business days of receiving the information sufficient to establish changed circumstances.

F. New Construction

In transactions involving new home purchasers, where settlement is anticipated to occur more than 60 calendar days from the time a GFE is provided, the loan originator may provide the GFE to the borrower with a clear and conspicuous disclosure stating that at any time up until 60 calendar days prior to closing, the loan originator may issue a revised GFE. If no such separate disclosure is provided, the loan originator may not issue a revised GFE in the absence of changed circumstances or another event as provided in 24 CFR §3500.7(f).

XV. STRUCTURAL REPAIRS

In *Robertson vs. Odom*, ___ S.W.3d ___ (July 30, 2009), Robertson purchased a townhouse in which the replacement stucco exterior had been improperly installed. Robertson sued the seller of the house, and the seller’s Realtor (Barnes). Robertson’s townhouse was a part of a complex in which they were removing synthetic stucco and installing a “hard-coat” stucco exterior. Unbeknownst to Odom (the Seller) the new hard-coat stucco contained several latent installation defects. Odom prepared a Seller’s Disclosure Notice in which he represented that he was unaware of other structural repairs to the property.

The Realtor informed the buyer that the original synthetic stucco had been replaced and was “better than new”. Robertson was skeptical and instructed his property inspector to carefully examine the stucco. The inspector reported no problems with the stucco and Robertson purchased the townhouse. The trial court awarded a take nothing judgment and Robertson appealed because of the seller’s failure to disclose structural

repairs and alleging that the broker’s representation of “better than new” created liability for the seller. The court noted that the Property Code does not define structural repair as it relates to seller’s disclosures, but relied on several other references under the Property Code to determine that a structural repair refers to a repair to a low-bearing portion of the residence. This defect was not a structural repair and did not need to be disclosed in that portion of the Seller’s Disclosure Notice.

XVI. TEXAS REAL ESTATE LICENSE ACT

There were a number of “clean-up” provisions for the Texas Real Estate License Act out of the 2009 legislature.

One, which may be a little more substantive, involves a judgment against a licensee if a licensee declares bankruptcy. Is the lien discharged, and do the funds have to come out of the Texas Real Estate Commission’s Recovery Fund? This new provision provides that if an aggrieved person is precluded by a bankruptcy court from executing a judgment against the licensee, that person has to verify to the Commission that they have made a good-faith effort to protect the judgment from being discharged in bankruptcy.

XVII. TITLE INSURANCE COMPANY AFFIDAVITS

What happens if the lender never returns the lien release? In this event, the Texas Property Code provides the title insurance company can file an affidavit as to the release of lien. If a mortgagee fails to execute and deliver a release to mortgagor or mortgagor’s designated agent within 60 days after a receipt of payment of the mortgage by the mortgagor the title insurance company may issue the affidavit and how the payoff was confirmed. The 2009 legislature amended the provision to provide that an authorized title insurance agent could also provide the same release.

TABLE OF CASES

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C.W. 100 Louis Henna, Ltd., v. El Chico Restaurants of Texas, L.P., 2009 WL 2902735 (Tex. Ct. App. Aug 27, 2009)5

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