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Texas Banking Update The 82nd Texas Legislature and Recent Texas Cases

By [David Curcio](#) and [Brooke Relyea](#)

I. The 82nd Texas Legislature

As in 2009, the big news from this legislative session in Texas was the bills which did not pass. Banks operating in Texas were facing possible foreclosure grace periods, altered limitations periods for consumer debts, construction trust funds and mandatory positive consent to the transfer of personal information. However, all of these bills died during the regular session, and only the less dramatic legislation summarized below was signed by Governor Perry.

A. Standard Payoff Form for Home Loans

Mortgage servicers will be required to use a standard payoff to respond to payoff requests from title companies. The form must include the proposed closing date and an accurate payoff amount, and the servicer must be given at least seven business days to provide the completed form. The form will be created by the Texas Finance Commission and mortgage servicers will need to comply with the new law 90 days after the adoption of the form by the Commission. HB 558; Tex. Fin. Code §343.106.

The mortgage servicer cannot require a higher payoff amount than the amount quoted in the completed payoff form. However, if the servicer discovers an error in the form, a corrected form can be sent on or before the second day before the closing date. The corrected form must be delivered electronically if the title company provided means to deliver the form electronically. Otherwise, the mortgage servicer must release the lien upon payment of the amount quoted in the payoff statement. However, any surplus funds owed to the mortgagor after closing would be subject to a constructive trust to the extent of the underpayment and, if the closing is of a refinance (rather than a sale), the mortgagee on the existing loan retains a lien subordinate to the new loan.

B. Unsworn Declarations Allowed in Lieu of Affidavits

Unsworn declarations may be used in lieu of a required written sworn declaration, verification, certification, oath, or affidavit. The declaration must be written and be subscribed to as true under penalty of perjury. HB 3674; Tex. Civ. Prac. & Rem. Code § 132.001.

The law also provides a form of jurat for unsworn declarations:

My name is [First, Middle and Last Name], my date of birth is [DOB], and my address is [Address, including Country]. I declare under penalty of perjury that the foregoing is true and correct.

Executed in _____ County, State of _____, on
the _____ day of _____, 20____.

Declarant

C. SCRA Notices

The statutory forms of citation for evictions and notices for foreclosures must inform the recipient of the potential rights or relief available to persons on active military duty under state and federal law. HB 1127; Tex. Prop. Code §§ 24.0051(d), 51.002.

D. Other New Laws

SB 1233: The Texas Department of Housing and Community Affairs Will Collect Data on Completed Foreclosures. Trustees selling property at a foreclosure sale must complete a form reporting the zip code of the property sold and stating whether it was residential property. (This will allow for the tracking and reporting of completed foreclosures, in addition to the reporting of foreclosure postings.)

SB 767: Setting Requirements for Contracts and Limiting Powers of Attorney for Residential Foreclosure Consultants, Providing Criminal Penalties (Tex. Civ. Prac. & Rem. Code Chap. 21).

SB 762/HB 1796: Authorized Fees for Ad Valorem Tax Lien Transfers, Administrative Penalty for Violations (Tex. Fin. Code Chap. 351). Tax Lien Lenders are only allowed to charge specified fees and cannot charge fees for expenses after closing. Violators are subject to penalties.

SB 17: Requiring Registration of State Mortgage Loan Servicers with the Texas Finance Commission. Affiliates of federal or state depository institutions are exempt from the registration requirement.

II. Recent Texas Cases

A. Use of Verified Photocopies Allowed for Lost Originals in Real Property Records

In *Genesis Tax Loan Services, Inc. v. Kothmann*, the Texas Supreme Court held that a tax lien vendor could substitute a verified original of lost statutory real property form into the County Real Property Records. In this case, the verification stated that the original tax lien transfer document had been mailed to the County, but was "lost in the mail or at the courthouse." Another lienholder sought to foreclose and challenged the validity of the tax lien transfer. (The case was decided under the law in effect before the enactment of Tex. Prop. Code §12.0011(b) which provides for a similar procedure.)

B. Declaratory Judgment as to Mortgagee's Lack of Standing Bars Subsequent Foreclosure Action

Wells Fargo brought an action for judicial foreclosure of a home equity lien which was dismissed when the borrowers filed a separate action for declaratory judgment challenging Wells Fargo's standing to foreclose. The borrowers argued that Wells Fargo did not own the mortgage. Wells Fargo filed a counterclaim seeking a contrary declaratory judgment and a foreclosure judgment. After a bench trial, the court entered judgment declaring that Wells Fargo lacked standing to foreclose because it did not own the note secured by the homestead, and denying all other relief.

Rather than appeal that judgment, Wells Fargo reinstated its separate foreclosure suit. That trial court, and the court of appeals, concluded that the first declaratory judgment barred the second foreclosure action under *res judicata* and collateral estoppel. Although the first declaratory judgment was couched in terms of "standing," an element of subject matter jurisdiction, the court of appeals held that the court had subject matter jurisdiction. Although the "question of whether a party is entitled to sue on a contract is sometimes informally referred to as an issue of standing," that issue was not jurisdictional, but rather was on the merits. Therefore, the finding of the first court barred re-litigation of the issue in the

second proceeding.

If you have any questions regarding this e-Alert, please contact **David Curcio** at 713.752.4441 or dcurcio@jw.com.

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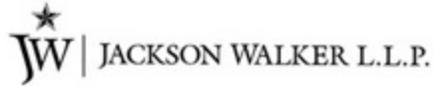
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