


Texas Consumer & Commercial Law Update

Published by the [Consumer Finance](#) and [Commercial Litigation](#) Groups of McGlinchey Stafford PLLC

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Welcome

This first volume of the *Texas Consumer & Commercial Law Update* will focus on some of the frequently asked questions we received in the last few months. We will also provide case alerts on issues that are making their way through the Texas court system, as well as legislation affecting financial institutions and other lenders in our state.

This Edition

Texas Constitution vs. Home Equity Lending

One of the most hotly contested areas in Texas is the interplay between the Texas Constitution and the various statutes that affect home equity lending whether directly, indirectly or unintentionally. By way of background, a lien cannot be placed against a homestead unless the Texas Constitution specifically grants an exception such as purchase money or taxes due on the property. To date there are eight such exceptions, one of the hottest areas being the lifting of the prohibition against home equity loans, which was passed by a constitutional amendment in 1997. The prudent lender confronts the risk of forfeiture in the event of an alleged violation of the Texas Constitution.

1. Are there any rules regulating transactions in which the consumer is not a native English speaker?

Answer:

Yes, but there is some confusion. The Texas Constitution, Article 16, §50 (g) requires “[i]f the discussions with the borrower are conducted primarily in a language other than English, the lender shall, before closing, provide an additional copy of the notice translated into the written language in which the discussion were conducted.” No reported case defines when discussions are “primarily” in another language or when a lender is on notice that it must provide a translated copy of the loan documents.

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2. What about the effect of HB 1547?

Answer:

HB 1547 requires that, if the discussion with a consumer is primarily in SPANISH, then the lender must provide a summary of the transaction in a form consistent with the Truth In Lending Act (TILA). (Note: This legislation is not restricted to home equity lending.) In yet another example of unintended consequences, the Texas legislature may have left the door open to a claim that the customer did not receive his/her TILA-type disclosure. Arguably, the consumer could demand forfeiture under the Texas Constitution, which was not a contemplated remedy under the legislation itself.

3. If the lender makes a simple typographical error, is it necessary to completely re-do the loan documents to comply with the cure provision in the Texas Constitution?

Answer:

Although the case is on appeal, at least one court (Judge Hoyt of the United States District Court for the Southern District of Texas) has held that typographical errors may be unilaterally considered reformed by the lender. In some respects, it depends on the loan documents as to the specific resolution of this issue. [View Judge Hoyt's Memorandum Opinion and Order.](#)

4. If it appears that the debtor may have committed fraud, what recourse does a lender have?

Answer:

One of the downsides of home equity lending in Texas is that home equity loans are non-recourse against the borrower. The only exception is if the borrower or spouse "obtains the extension of credit by actual fraud." Until recently, there was a lack of understanding regarding the circumstances in which a court could find "actual fraud" and whether it meant common law or statutory fraud. One court found fraud because the homeowner signed loan documentation and closed the loan knowing there was a typographical error. The court found that the representations in the loan documents themselves supported a finding of "actual fraud" and imposed personal liability on the borrower. [View Judge Hoyt's Memorandum Opinion and Order.](#)

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Does Tort Reform affect any aspect of banking or other financial operations?

Answer:

Yes, to a limited extent. HB 4 includes the passage of a settlement offer/demand procedure. For cases filed after January 1, 2004, a defendant may give notice of intent to make a settlement offer and then do so. (Note: the Texas Civil Practice & Remedies Code and Texas Rules of Civil Procedure lay out the timing and details.) If the offer is refused and a judgment is entered within 20% of the defendant's offer, then the plaintiff's recovery is reduced. Obviously the procedure is considerably more complicated; however, it is worth

utilizing if the lender is able to reasonably calculate damages.

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Is there a statute in Texas that governs lenders collecting their own loans?

Answer:

Yes. The federal Fair Debt Collection Practices Act has long been criticized for excluding lenders who collect their own debt. The Texas Legislature sought to fill this hole with the Texas Debt Collection Practices Act (the Act). The Act restricts itself to covering certain relatively narrow actions contrary to the federal catch-all approach. The downside is that the Act is a so-called “tie-in” statute, meaning that a violation leads to a cause of action under the Texas Deceptive Trade Practices Act. We will discuss in greater detail some of the pitfalls of debt collection in the State of Texas in a later edition of ***Texas Consumer and Commercial Law Update***.

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New Case Alert

ACORN v. Finance Commission of Texas, et al; Cause No. GN400269; pending in the 126th Judicial District Court of Travis County, Texas.

On October 7, 2005, a Travis County trial court judge ruled that certain interpretations by the Texas Finance Commission of the application of the Texas Constitutional provision governing home equity lending violate Article 16, §50 of the Texas Constitution. [View the court's letter opinion](#). We will continue to follow this case and report on its progress through the court system.

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