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**To:** Clients and Friends

**From:** David F. Dulock

**Subject:** Legislative Update from 81st Regular Session of the  
Texas Legislature, 2009 – Bills Effective Immediately

This is the first of several legislative updates prepared by this firm and summarizes those bills effective before September 1, 2009, that we consider of interest to our clients. The legislative updates that follow this update will summarize, respectively, (i) those bills that we consider important enough to be the subject of a separate legislative update, and (ii) bills effective on and after September 1, 2009, that we consider of interest to our clients.

**1. Foreclosure of Dwelling of Active Duty Member of the Military (HB 3857):**

(1) Overview. Currently, when military servicemembers are ordered to active duty, certain financial protections are provided at the federal level through the Servicemembers Civil Relief Act (50 U.S.C. App. Sections 501, *et seq.*). House Bill 3857 attempts to give servicemembers who have dwellings in Texas the same level of protection by adding Section 51.015 to Chapter 51 of the Property Code to (i) allow for an active duty military servicemember (and a non active duty servicemember during the nine months after the date on which active duty service concluded) to either temporarily stay a judicial foreclosure proceeding or adjust the servicemember’s obligations under a contract secured by a dwelling located in Texas, and (ii) prohibit a foreclosure of a dwelling under a deed of trust or other contract lien from being conducted during the servicemember’s active duty or during the nine months after the date on which active duty service concluded.

(2) Summary. Section 51.015 - “Sale of Certain Property Owned by Member of the Military”- is summarized as follows:

Subsection (a) defines “active duty military service,” “dwelling,” “military servicemember,” and “person.” Of particular importance is the definition of “dwelling,” which is defined to mean “a residential structure or manufactured home that contains one to four family housing units.”

Subsection (b) provides that Section 51.015 applies only to an obligation that is secured by a mortgage, deed of trust, or other contract lien on real property or personal property that is a dwelling owned by a military servicemember, that originates before the date on which the servicemember’s active duty military service commences, and for which the servicemember is still obligated.

Subsection (c) provides that if, during the servicemember’s active duty military service or within nine months thereafter, a court action is filed to foreclose a lien or enforce an obligation as described in subsection (b), the court may on its own motion, and must on application of the servicemember, (i) temporarily stay the court action or (ii) adjust the contract obligations, but only if the servicemember’s ability to comply is materially affected by his/her military service.

**Subsection (d) prohibits a sale, foreclosure, or seizure of property under a mortgage, deed of trust, or other contract lien described by subsection (b) from being conducted during the servicemember's active duty military service or within nine months thereafter unless it is conducted under (i) a court order issued before the sale, foreclosure, or seizure; or, (ii) a waiver agreement that complies with subsection (e).**

Subsection (e) authorizes a servicemember to waive the servicemember's rights under Section 51.015, but only if the waiver (i) is a written agreement in at least 12-point type; (ii) is a separate instrument from the obligation to which the waiver applies; (iii) is executed during or after the servicemember's period of active duty military service; and, (iv) specifies the legal instrument to which the waiver applies and, if the servicemember is not a party to the legal instrument, the servicemember concerned.

Subsection (f) provides that a person commits a Class A misdemeanor offense if the person knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited by subsection (d).

Subsection (g) entitles a military servicemember's dependent, on application to a court, to Section 51.015 protections if the dependent's ability to comply with an obligation that is secured by a dwelling is materially affected by the servicemember's military service.

Subsection (h) authorizes a court that issues a stay or takes any other action under Section 51.015 regarding the enforcement of an obligation subject to Section 51.015 to grant a similar stay or take similar action with respect to any person who is or may be primarily or secondarily subject to the obligation, including but not limited to a surety, guarantor, endorser, accommodation maker, or comaker.

Subsection (i) authorizes a court, if a judgment or decree is vacated or set aside wholly or partly under Section 51.015, to also set aside or vacate the judgment or decree with respect to any person who is or may be primarily or secondarily subject to the obligation that is subject to the judgment or decree, including but not limited to a surety, guarantor, endorser, accommodation maker, or comaker.

Subsection (j) permits a surety, guarantor, endorser, accommodation maker, comaker, or other person, whether primarily or secondarily liable on an obligation, to waive the protections of subsections (h) and (i) by an instrument executed separate from the obligation to which it applies. Subsection (j) further provides that if the waiver is executed by an individual who after the execution of the waiver enters active duty military service, or by a dependent of an individual who after the execution of the waiver enters active duty military service, the waiver is not valid after the beginning of the period of the active duty military service unless the waiver was executed by the individual or dependent during the applicable period described by Section 516 of the Servicemembers Civil Relief Act, as that section existed on January 1, 2009 (*i.e.*, during the period beginning on the date of the individual's receipt of the order to report for active duty military service and ending on the date on which the individual reports for military service).

**Our Comments:**

1. Pursuant to Section 2 of House Bill 3857, the effective date of Section 51.015 is June 19, 2009 (*but see comment 3 below*).

2. Apparently, Section 51.015 may apply to any dwelling owned by the service member or the service member's dependent, whether or not homestead, as the text of Section 51.015 does not limit its application to a homestead dwelling or to a dwelling owned by the service member. For example, subsection (b) states that Section 51.015 is limited to a dwelling owned by the military service member; but subsection (g), in referring to the rights of the service member's dependent, contains no such ownership restriction. See also the definition of dwelling in subsection (a), which does not contain any ownership or homestead restriction.
3. In addition to the statements in comment 2., the text of Section 2 of House Bill 3857 also creates some uncertainty as to the occupancy status of the dwelling subject to Section 51.015 as well as the effective date of House Bill 3857 with respect to non-homestead dwellings. Section 51.015 defines "dwelling" without reference to whether the dwelling is the residence of the service member and/or dependants (*see, subsections (a), (b), and (g) above*). Section 2 of House Bill 3857 states, in pertinent part, that Section 51.015 applies to a non-judicial foreclosure (*i.e.*, a foreclosure sale under a power of sale conferred by a deed of trust or other contract lien) with respect to which a notice of default is given under Section 51.002(d) on or after the effective date of House Bill 3857. By its express terms Section 51.002(d) only requires a notice of default with respect to a foreclosure of "the debtor's residence." Thus, the foregoing could lead to confusion regarding the occupancy status of dwellings subject to Section 51.015 (*i.e.*, does Section 51.015 apply to any dwelling owned by the servicemember or dependant or only to a dwelling that is the residence of the service member or dependant?) and whether Section 51.015 would apply with respect to a non-judicial foreclosure of a non-homestead dwelling for which no notice of default required by Section 51.002(d) was given because Section 51.002(d) only requires this notice with respect to "the debtor's residence."
4. The majority of court actions under subsection (c) would involve judicially authorized foreclosures of home equity liens required by Article XVI, Section 50(r), Texas Constitution, and Rules 735 and 736, Texas Rules of Civil Procedure. Although subsection (c) does not provide any specific limits to the court's authority to adjust the obligations under the loan, the Statement of Intent in the Bill Analysis for House Bill 3857, dated May 21, 2009, states "House Bill 3857 does not release the servicemember from all mortgage and contractual obligations, it simply gives the servicemember an opportunity to fulfill the servicemember's contractual obligations on a timeline that is better suited to the servicemember's particular situation."
5. A non-judicial foreclosure - such as is authorized under a power of sale in a non-home equity deed of trust - is exempt from a court's authority to adjust contract obligations permitted by subsection (c), unless, as stated in subsection (d), the foreclosure is conducted pursuant to a court order issued before the foreclosure.

## **2. Release of "putative" Child Support Lien on Homestead Property (SB 1661):**

(1) Overview. Senate Bill 1661 amends the Family Code as follows: (i) adds Section 157.3171 to provide a procedure to release a child support lien that a child support obligor believes affects the obligor's homestead, (ii) amends Section 157.318 to provide for a 10-year statute of limitations for a child support lien filed on and after May 26, 2009 (currently, there is no statute of limitations for child support liens), and (iii) repeals Section 231.002(h) that required the attorney general to automatically file a child support lien under certain circumstances.

(2) Summary of Section 157.3171. In relation to removal of child support liens purporting to affect homestead, Section 157.3171 is summarized as follows:

Subsection (a) authorizes a child support obligor who believes that a child support lien has attached to said obligor's homestead real property to file an affidavit to release the lien

against the homestead in the same manner that a judgment debtor may file an affidavit under Section 52.0012, Property Code, to release a judgment lien against a homestead (*see*, Section 52.0012 and our August 6, 2007 legislative update memo discussing Section 52.0012).

Subsection (b) requires the child support obligor, except as provided in subsection (c), to comply with all requirements imposed by Section 52.0012 and provides that the obligor is considered to be a judgment debtor and the child support lien claimant is considered to be a judgment creditor for purposes of complying with Section 52.0012.

Subsection (c) requires the child support obligor, for purposes of Section 52.0012(d)(2) - which relates to the delivery of the required letter and affidavit - and for purposes of the associated text in the affidavit required by Section 52.0012(f) - which also relates to the delivery of the required letter and affidavit - only to send the letter and affidavit to the child support lien claimant at said claimant's last known address.

Subsection (d) authorizes the child support lien claimant to dispute the child support obligor's affidavit by filing a contradicting affidavit in the manner provided by Section 52.0012(e).

Subsection (e) provides, subject to subsection (f), that an affidavit filed by the child support obligor under Section 157.3171 has the same effect with respect to a child support lien as an affidavit filed under Section 52.0012 has with respect to a judgment lien.

Subsection (f) requires that if the child support lien claimant files a contradicting affidavit as described in subsection (d), that the issue of whether the real property is subject to the lien be resolved in an action brought for that purpose in the district court of the county in which the real property is located and the lien was filed.

(3) Summary of Amendments to Section 157.318. In relation to the statute of limitations for a child support lien, Senate Bill 1661 amends Section 157.318 of the Family Code by adding subsection (d), which:

- Provides that a child support lien is effective with respect to real property until the 10th anniversary of the date on which the lien notice was filed with the county clerk.

- Authorizes a child support lien to be renewed for subsequent 10-year periods by filing a renewed lien notice in the same manner as the original lien notice.

- Provides that, for purposes of establishing priority, a renewed lien notice filed before the applicable 10th anniversary relates back to the date the original lien notice was filed.

- Provides that a renewed lien notice filed on or after the applicable 10th anniversary has priority over any other lien recorded with respect to the real property only from the date the renewed lien notice is filed.

*Note:* The amendments to Section 157.318 summarized above apply only to child support lien notices filed on or after May 26, 2009 (*the effective date of Senate Bill 1661*).

(4) Repeal of Section 231.002(h). Senate Bill 1661 repeals Section 231.002(h) of the

the Family Code that required the attorney general, in certain cases, to automatically file child support liens.

**Our Comments:** Be advised that:

1. Section 157.317, Family Code, already provides that a child support lien does not attach to a homestead exempt under the Texas Constitution or Property Code. But it also provides that a child support lien attaches to all real property not exempt under the Texas Constitution owned or acquired by the child support obligor on or after the date the child support lien notice is filed with the county clerk of the county in which the real property is located. What is unclear from existing Section 157.317 and new Section 157.3171 is whether the affidavit release procedure of Section 157.3171 applies when the child support lien notice is filed prior to the real property becoming the child support obligor's homestead. We believe that the affidavit release procedure of Section 157.3171 does not apply in that instance.
2. In instances in which Section 157.3171 does apply, however, what this new affidavit release procedure does accomplish is to shift the burden to the child support lien claimant to reassert by a contradicting affidavit of record that the child support lien is valid against the child support obligor's homestead. If the child support lien claimant fails to do so, after the child support obligor's affidavit is filed, then the child support lien is released as to all subsequent bona fide purchasers and mortgagees for value and their successors or assigns.
3. If title companies will agree to issue title polices without taking exception to child support liens released in accordance with the affidavit release procedure of Section 157.3171, it should alleviate closing problems on Texas homesteads caused by child support lien notices filed in the real property records of the county of the homestead property.

### **3. Address Number Signs for Properties in Unincorporated Areas (HB 2665):**

House Bill 2665 amends Section 251.013, Transportation Code, by adding subsections (b-1) and (e) to: (i) authorize the commissioners court of a county to adopt and impose standards and specifications for the design and installation of address number signs identifying properties located in unincorporated areas of the county; (ii) require the owners of said properties to obtain, install and maintain these signs as required by the standards and specifications adopted by the commissioners court; and, (iii) provide that a person commits a Class C misdemeanor offense if the person knowingly fails or refuses to comply with an order of the commissioners court relating to standards and specifications for the design and installation of address number signs.

**Our Comments:** House Bill 2665 is effective June 19, 2009, and its main purpose is to require a visible address so that emergency responders may locate properties in a timely manner; but we believe it will also aid lenders in identifying properties for appraisal, survey and notification purposes.

### **4. First Week of October Designated as Monarch Butterfly Week (SB 909):**

Senate Bill 909 designates the first seven days of October as Monarch Butterfly Week to encourage Texas residents and visitors to study, observe, and promote the life of our state insect, the monarch butterfly. Living in Houston, I am relieved that the state insect is not the *periplaneta americana*.

Unless otherwise stated in this legislative update, the above bills are effective immediately. No attempt was made by this legislative update to summarize all the bills effective immediately that could affect mortgage lending or mortgage lenders or brokers. This legislative update is simply an attempt to advise our clients as to those bills effective immediately that we believe are of interest to our clients. The above summaries are not complete descriptions of these bills, and you are urged to review the entirety of any bill summarized above that you believe affects your business. You may request copies of these bills from us, if you so desire.

**This Memorandum is provided for the general information of the clients and friends of our firm only and is not intended as specific legal advice. You should not place reliance on this general information alone but should consult counsel regarding the application of the laws discussed in this Legislative Update to your specific case or circumstances.**