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To: Clients and Friends

From: David F. Dulock

Subject: 2011 Legislative Update from 82nd Regular Session of the Texas Legislature – Bills Effective Immediately

This legislative update summarizes those bills effective before September 1, 2011, 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, 2011, that we consider of interest to our clients.

- ALLOWING A CO-OWNER OF RESIDENTIAL HOMESTEAD PROPERTY TO ENCUMBER THE PROPERTY WITHOUT JOINDER OF OTHER CO-OWNER(S) (SB 1368)

Senate Bill 1368 adds Chapter 64 to the Property Code authorizing an occupying co-owner, if certain conditions are met, to enter into a mechanic's and materialman's lien contract secured by residential homestead property to preserve or improve the property without the joinder of another co-owner.

Chapter 64 applies only to residential property that:

1. has residential improvements primarily designed for no more than four families;
2. is not more than 10 acres of land;
3. is owned by more than one person; and
4. for which a co-owner has a homestead tax exemption.

The occupying co-owner may act in the name of and on behalf of another co-owner (whether known or unknown) as the co-owner's statutory agent and attorney-in-fact if:

1. the occupying co-owner has occupied the property for more than five years;
2. the occupying co-owner has a homestead tax exemption for the property;
3. for the preceding five years, the occupying co-owner has paid all assessed property taxes without delinquency and without contribution from the other co-owner; and
4. the occupying co-owner has filed the documentation required by Chapter 64.

In order to establish the authority to act as an agent and attorney-in-fact for another co-owner of the property, the occupying co-owner must file in the office of the county clerk where the property is located:

1. an affidavit in which the occupying co-owner affirms that the occupying co-owner (i) has occupied the property for more than five years, (ii) has a homestead tax exemption for the property, and (iii) has in the last five years paid all assessed property taxes without delinquency and without contribution from the other co-owner;
2. the affidavits of two additional persons with personal knowledge corroborating the occupying co-owner's occupancy during the past five years; and
3. a certificate of the county tax assessor-collector where the property is located affirming that the occupying co-owner has paid all assessed property taxes for the past five years without delinquency.

The authority of the occupying co-owner to act as an agent and attorney-in-fact for another co-owner is limited to the authority to enter into a contract giving rise to a mechanic's and materialman's lien and to execute a deed of trust for the purpose of preserving or improving the residential property. The occupying co-owner would be the sole obligor of the debt incurred under the contract and secured by the deed of trust and the lien is not subject to repudiation or disaffirmance by another co-owner.

Our Comments: Chapter 64 appears to be poorly drafted as evidenced by the following:

1. Senate Bill 889, discussed below, also enacts a Chapter 64 to the Property Code, which relates to assignment of rents. Until the Texas Legislature corrects this error, there will be two Chapter 64s in the Property Code, each with a different subject matter.
2. Section 64.001 states that one of the conditions for Chapter 64's applicability to a residential property is that "at least one co-owner has received a residence homestead exemption under Section 11.13, Tax Code"; but Section 64.002 states that one of the conditions for the authority granted the occupying co-owner is that "the [occupying] co-owner has a residence homestead exemption for the property under Section 11.13, Tax Code."
3. Section 64.002 provides that the occupying co-owner must have "occupied the property for more than five years" without expressly state that the five-year period must be the preceding five years. Section 64.003, however, provides that that the corroborating affidavits must corroborate the occupying co-owner's "occupancy during the preceding five years."
4. Chapter 64 does not define "preserving or improving the residential property," which is the purpose stated in Section 64.004 for granting the occupying co-owner the authority to encumber the property without joinder of other co-owners.
5. According to the HRO Bill Analysis: The original purpose for Senate Bill 1368 was to provide a way for disaster victims and owners of homes that have fallen into disrepair to obtain assistance or a loan to repair the property; and, since some government assistance programs require a lien to be placed on the property, some property owners have not been able to place a lien on their property because multiple heirs have an interest in the property and the heirs cannot be located to consent to the lien. Senate Bill 1368 was drafted to address the problem by giving an occupying co-owner the ability to act as attorney-in-fact for the purpose of receiving assistance or funds to make repairs or improve the property. However, as drafted, Senate Bill 1368 is overly broad and applies not only to a situation where co-owners cannot be located, but also to a

situation where a known co-owner objects to a home improvement lien on the property. Senate Bill 1368 should have been more narrowly tailored to protect nonoccupying co-owners or, alternately, only to assistance programs and not to private loans.

The effective date of Senate Bill 1368 is June 17, 2011.

- ASSIGNMENT OF RENTS TO HOLDERS OF SECURITY INTERESTS IN REAL PROPERTY (SB 889)

Background and purpose. Senate Bill 889 clarifies and simplifies the process for creating, perfecting, and enforcing a security interest in rents. In 1981, the Texas Supreme Court complicated this process by holding in *Taylor v. Brennan*, 621 S.W.2d 592 (Tex. 1981), that a security interest in rents does not become operative until the lender proactively attempts to enforce it. This created a priority contest between a mortgage lender with a recorded but unenforced assignment of rents and a judgment lien creditor who had served a writ of garnishment on rents. Lenders responded by entering into absolute assignments of rents. Absolute assignments state that the lender is the owner of any rental income at the time it is paid, regardless of whether the lender ever actually takes possession of the rental income. Absolute assignments have created new problems for lenders. For example, it has been argued in some bankruptcy cases that rents collected and kept by a property owner should be credited against the owner's debt to the lender, even though the lender did not actually receive rent payments, because the lender "owns" the funds.

Senate Bill 889 simplifies this confusing area of the law, establishes that rents not actually received by the lender can not be credited against the property owner's debt to the lender, establishes that a lender with a recorded mortgage has priority and perfection of its lien on rents upon filing of the mortgage, and sets out a statutory means of enforcement. To accomplish this, Senate Bill 889 adds Chapter 64 to the Property Code to govern assignment of rents. It also amends Chapter 9 of the Business and Commerce Code, which governs secured transactions, by amending subsection 9.109(d) to exclude from Chapter 9 coverage an assignment of rents under Chapter 64 of the Property Code.

Our Comments: Senate Bill 1368, discussed above, also enacts a Chapter 64 to the Property Code, which relates to the authority of a co-owner of residential property to act for other co-owners in order to encumber the property. Until the Texas Legislature corrects this error, there will be two Chapter 64s in the Property Code, each with a different subject matter.

Creation of assignment of rents. An enforceable *security instrument* secured by real property creates an *assignment of rents* arising from the property unless the security instrument provides otherwise or the security instrument is governed by the Texas Constitution relating to a home equity loan on a homestead, a reverse mortgage on a homestead, or financing concerning a manufactured home used as a homestead (*i.e.*, respectively, Sections 50(a)(6), (7), and (8), Article XVI). An assignment of rents creates a presently effective *security interest* in all accrued and unaccrued *rents* arising from the real property described in the security instrument. An assignment of rents does not reduce the *secured obligation* except to the extent that the *assignee* collected rents and applied, or was obligated to apply, the collected rents to payment of the secured obligation. For the Chapter 64 definitions of the italicized terms, see **Our Comments** below.

Our Comments:

1. The term “security instrument” is defined as (i) a deed of trust, mortgage, or other contract lien on an interest in real property; or (ii) an agreement containing an assignment of rents.
2. The term “assignment of rents” is defined as a transfer of an interest in rents in connection with an obligation secured by real property from which the rents arise. It does not include (i) a true sale of rents or (ii) a contract for a charge in connection with a qualified commercial loan (Section 306.101, Finance Code).
3. The term “security interest” is defined as an interest in property that arises by agreement and secures an obligation.
4. The term “rents” is defined as:
 - consideration payable (i) for the right to possess or occupy, or for possessing or occupying, real property; (ii) to terminate an agreement to possess or occupy real property; (iii) to an assignor under a policy of rental interruption insurance covering real property; (iv) to an assignor for payment or reimbursement of expenses incurred in owning, operating, and maintaining, or constructing or installing improvements on, real property;
 - claims arising out of a default in the payment of consideration payable for the right to possess or occupy real property; or
 - any other consideration payable under an agreement relating to the real property that constitutes rents under Texas law other than Chapter 64.
5. The term “secured obligation” is defined as an obligation secured by an assignment of rents.
6. The term “assignee” is defined as a person entitled to enforce an assignment of rents.

Recordation, perfection, and priority. A document creating an assignment of rents may be recorded in the county where any part of the real property is located. Recording the document perfects the security interest. This provision prevails over a conflicting provision in the document or other Texas law, statutory (other than Chapter 64) or otherwise. A perfected security interest in rents has priority over the rights of a person who, after the security interest is perfected, acquires a lien or security interest in the rents or the real property or an interest in the rents or the real property. However, the priority for future advances of an assignee of a perfected security interest in rents would be the same as the assignee’s priority for the security interest in the property.

Enforcement of security interest. An assignee may enforce an assignment of rents by notice to the *assignor* or to a *tenant* in accordance with the notice methods of Chapter 64, or by another method sufficient to enforce the assignment under other Texas law. On and after the date an assignee began to enforce an assignment of rents, the assignee is entitled to collect all rents that accrued before, but remained unpaid on, that date and all rents that accrued on or after that date. For the Chapter 64 definitions of the italicized terms, see **Our Comments** below.

Our Comments:

1. The term “assignor” is defined as a real property owner who makes an assignment of rents arising from the property or that owner’s successor in interest.
2. The term “tenant” is defined as a person who has an obligation to pay for the right to possess or occupy, or for possessing or occupying, real property.

To enforce an assignment of rents by notice to the assignor, the assignee must provide the assignor a notice demanding that the assignor pay the *proceeds* of any rents. Notice may be provided after default or as otherwise agreed by the assignor. Assignment of rents may not be enforced if, on the date the security instrument was signed and the date of prospective enforcement, the real property constitutes the assignor’s homestead on which is located a 1- to 4 family dwelling. For the Chapter 64 definition of *proceeds*, see **Our Comments** below.

Our Comments: The term “proceeds” is defined as personal property that is received, collected, or distributed on account of an obligation to pay rents.

To enforce an assignment by notice to a tenant, the assignee must provide a tenant a notice demanding that the tenant pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue. Notice may be provided after default or as otherwise agreed by the assignor, and the assignee or the assignee’s authorized agent or representative must sign the notice. The assignee is required to provide a copy of the notice to the assignor. After a tenant receives the notice:

1. the tenant must pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue, unless the tenant had previously received a notice from another assignee of rents and the other assignee had not canceled that notice;
2. except as otherwise provided by a document signed by the tenant, the tenant is not obligated to pay to an assignee rent that was prepaid to the assignor before the tenant received the notice;
3. unless the tenant occupies the premises as the tenant’s primary residence, the tenant is not discharged from the obligation to pay rents to the assignee if the tenant pays rents to the assignor; (**Our Comments:** This means the tenant would pay these rents twice – once to the assignor in violation of the notice and then again to the assignee in compliance with the notice.)
4. the tenant’s payment to the assignee of rents then due satisfies the tenant’s obligation to the assignor to the extent of the payment made; and
5. the tenant’s obligation to pay rents to the assignee continues until the earliest date on which the tenant receives:
 - (i) a court order directing the tenant to pay the rents in a different manner;
 - (ii) a signed notice that a perfected security instrument that has priority over the assignee’s security interest has been foreclosed; or
 - (iii) a signed document from the assignee canceling the assignee’s notice.

Except as otherwise provided by a document signed by the tenant, a tenant who received a notice is not in default for nonpayment of rents that accrue during the 30 days after receipt of

the notice until the earlier of the 10th day after the next regularly scheduled rental payment would be due or the 30th day after the tenant received the notice.

An assignee that had provided notice to a tenant must immediately provide another notice to the tenant canceling the earlier notice if the assignee receives a notice from another creditor with priority that the creditor has conducted a foreclosure sale of the property or is enforcing the creditor's interest in the rents by notice to the tenant.

Procedure for providing notice. A person may provide notice only by the following means: (i) by sending the notice by certified mail; (ii) by depositing the properly addressed notice with the U.S. Postal Service or a commercially reasonable delivery service, prepaid; or (iii) by transmitting the notice to the recipient by any means agreed to by the recipient.

Except as provided in (iii) above, notice to the assignee or assignor must be sent to the party's address as provided in the security instrument or relevant change of address document, unless a more recent address has been given. Notice to an assignor also may be sent to an address to which a notice of default was properly sent.

Except as provided in (iii) above, notice to a tenant must be sent to:

1. an address in a document signed by the tenant and the person providing notice, unless a more recent address had been given;
2. if the address described above does not exist, the address in a written agreement between the tenant and the assignor for notices to the tenant if the person sending the notice has received a copy of the agreement or has actual knowledge of that address; or
3. if neither of the addresses described above exist, the tenant's address at the real property covered by the security instrument.

Notice is considered received on the earliest of: (i) the date the notice is received; (ii) the fifth day after the date the properly addressed prepaid notice was deposited with the U.S. Postal Service or a commercially reasonable delivery service; or (iii) the date on which notice is considered provided in accordance with an agreement made by the person to whom the notice is provided.

Form of notice to tenant. Notice to a tenant must be signed by the assignee and comply with the notice form prescribed by new Chapter 64 of the Property Code. The notice form must state:

1. the names of the tenant, landlord and assignee; the property address; and the assignee's address and contact person telephone number;
2. the assignee is entitled to collect rents under the recorded document assigning rents, and the tenant may obtain additional information at assignee's address;
3. a default exists between the landlord and the assignee, entitling the assignee to collect rents;
4. the notice affects the tenant's rights and obligations under the tenant's lease agreement;

5. unless the tenant has otherwise agreed in writing, the tenant will not be in default for nonpayment of a rental payment due within 30 days after the tenant's receipt of the notice until the 10th day after the date that rental payment was due or the 30th day after receiving the notice, whichever occurs first;
6. the tenant may consult a lawyer, at the tenant's expense, regarding the lease agreement and the notice;
7. the tenant must pay to the assignee all rents now due and payable and rents accruing after receipt of the notice;
8. rents paid to the assignee satisfy the tenant's rental obligation to the extent of the payment but if the tenant pays any rents to the landlord after receiving the notice, that payment does not discharge the rental obligation, for which the assignee may hold the tenant liable unless the tenant occupies the premises as the tenant's primary residence; and
9. if the tenant previously received a notice from another person holding an assignment of rents, the tenant should continue paying rents to that person until that person's notice is canceled and once that notice is canceled, the tenant must begin paying rents to the assignee.

Application of proceeds. Unless otherwise agreed by the assignor, an assignee that collects rents or collects on a judgment against the assignor for rents must apply the proceeds in the following order:

1. reimbursement of the assignee's expenses of enforcement, including reasonable attorney's fees and costs if provided for by agreement by the assignor and not prohibited by Texas law;
2. reimbursement of any expenses incurred by the assignee to protect or maintain the real property if the assignee elected or was required to apply the proceeds to those expenses;
3. payment of the secured obligation;
4. payment of any obligation secured by a subordinate security interest or other lien on the rents if, before distribution of the proceeds, the assignee received a signed notice from the holder of the subordinate interest or lien demanding payment of the proceeds; and
5. payment of any excess proceeds to the assignor.

Application of proceeds to protect real property. An assignee that collects rents following enforcement is not required to apply the collected rents to the payment of expenses of protecting or maintaining the real property, unless otherwise agreed by the assignee. But, unless otherwise agreed by a tenant, the right of the assignee to collect rents from the tenant is subject to the terms of any agreement between the assignor and tenant and any claim or defense of the tenant arising from the assignor's nonperformance of that agreement.

Our Comments: Under this provision it would appear that the assignee's rights to collect rents from a particular tenant may be conditioned on the tenant's rights under a preexisting lease or other agreement with the assignor.

Turnover of rents. If an assignor collects rents that the assignee is entitled to collect, the

assignor must turn them over to the assignee by the 30th day after the assignor received the assignee's rent enforcement notice described above or within another period prescribed by the security instrument or other document signed by the assignor and approved by the assignee, minus any amount representing payment of expenses authorized by the security instrument or other document signed by the assignee. If the assignor does not turn over the rent proceeds to the assignee, the assignee may in a civil action recover from the assignor (i) the rent proceeds and (ii) reasonable attorney's fees and costs incurred by the assignee to the extent provided for by an agreement between the assignor and assignee and not prohibited by Texas law. The assignee may bring this civil lawsuit with or without taking action to foreclose on the real property.

A subordinate creditor that enforced an interest in the rents before an assignee that has priority is not obligated to turn over any rent proceeds that the subordinate creditor collected before receiving a signed notice from the priority assignee that the priority assignee is enforcing the priority assignee's interest in the rents. The subordinate creditor is required to turn over to the priority assignee any rent proceeds collected after receiving the priority assignee's notice not later than the 30th day after receiving the notice or as otherwise agreed between the priority assignee and the subordinate creditor. Any subsequently collected proceeds by the subordinate creditor must be turned over to the priority assignee by the 10th day after the proceeds were collected or as otherwise agreed between the priority assignee and the subordinate creditor.

Our Comments: We cannot reconcile the apparent conflict between the 30-day turn over requirement in the second sentence with the 10-day turn over requirement in the third sentence.

Effect of enforcement, application of proceeds, and turnover of rents. The assignee's enforcement of an assignment of rents, application of proceeds after enforcement to protect/maintain the real property, the payment of expenses, or a civil action for the turnover of rents, as applicable, in accordance with Chapter 64 does not:

1. make the assignee a mortgagee in possession of the real property;
2. make the assignee an agent of the assignor;
3. constitute an election of remedies that precludes a later action to enforce the secured obligation;
4. make the secured obligation unenforceable;
5. limit any right available to the assignee with respect to the secured obligation; or
6. bar a deficiency judgment allowed by Texas law following foreclosure.

Security interest in proceeds. An assignee's security interest in rents attaches to identifiable proceeds. If an assignee's security interest in rents is perfected, the assignee's security interest in identifiable *cash proceeds* is perfected. For the Chapter 64 definition of *cash proceeds*, see **Our Comments** below.

Except as provided above, the provisions of Chapter 9 (Secured Transactions) of the Texas Business and Commerce Code, or an applicable jurisdiction's comparable Uniform Commercial Code provisions, determine:

1. whether an assignee's security interest in proceeds is perfected;
2. the effect of perfection or non-perfection;

3. the priority of an interest in proceeds; and
4. the law governing perfection, the effect of perfection or non-perfection, and the priority of an interest in proceeds.

Cash proceeds are considered identifiable if they are maintained in a segregated deposit account or, if commingled with other funds, to the extent they can be identified by a method of tracing recognized under Texas law regarding comingled funds.

Our Comments: The term “cash proceeds” is defined as proceeds that are money, checks, deposit accounts, or similar legal tender.

Priority subject to subordination. Chapter 64 does not prevent a person entitled to priority from subordinating that priority by agreement.

Our Comments: This provision clarifies that existing Texas subordination law applies to voluntarily subordination by a person entitled to priority under Chapter 64.

Effective date. The effective date of Senate Bill 889 is June 17, 2011, subject to the following:

1. Except as otherwise provided below, Chapter 64 applies to a document creating an assignment of rents signed and delivered before June 17, 2011.
 2. Chapter 64 does not affect an action or other proceeding commenced before June 17, 2011.
 3. An enforceable security instrument as defined in Chapter 64 creates an assignment of rents only if the security instrument is signed and delivered on or after June 17, 2011.
 4. Chapter 64 does not affect:
 - the enforceability of an assignee’s security interest in rents or proceeds if the security interest was enforceable immediately before June 17, 2011;
 - the perfection of an assignee’s security interest in rents or proceeds if the security interest was perfected immediately before June 17, 2011; or
 - the priority of an assignee’s security interest in rents or proceeds as to another person’s interest if that person’s interest was enforceable and perfected, and the assignee’s priority was established, immediately before June 17, 2011.
- **ADDITIONAL PENALTY FOR COLLECTION COSTS FOR CERTAIN DELINQUENT AD VALOREM TAXES (HB 499)**

Under Section 38.08 of the Property Tax Code, the governing body of a taxing unit or appraisal district may provide additional penalties for certain delinquent taxes due on or after June 1 to defray the costs of collection. House Bill 499 amends Section 38.08(b) to include corrected and supplemental tax bills under Section 42.42 to the types of delinquent taxes that may incur an additional penalty to defray the costs of collection. The effective date of House Bill 499

is June 17, 2011, and applies only to additional penalties on taxes that become delinquent on or after that date.

- **PROHIBITING CERTAIN PRIVATE TRANSFER FEES (HB 8)**

In 2007 the Texas Legislature enacted Section 5.017 of the Property Code (effective January 1, 2008) to prohibit a practice in connection with residential real property whereby a private entity creates a financial obligation payable over a long period of time by a deed restriction or other covenant requiring a fee (“private transfer fee”) in connection with future transfers of real property. The obligation usually specifies that if the private transfer fee is not paid, a lien could be placed on the property being transferred. The original owner of the private transfer fee could retain the transfer fee rights or could sell the transfer fee rights to a third party.

Section 5.017 prohibits a buyer or other transferee of a residential real property or the buyer/transferee’s heirs, successors, or assigns from being required to pay a fee in connection with a future transfer of the property to a person imposing the deed restriction or covenant or a third party designated by a seller or other transferor of the property. Section 5.017 provides that a deed restriction or covenant or a lien purporting to encumber residential real property to secure a right under such a requirement is void and unenforceable. It does not, however, prohibit a deed restriction or covenant that requires a fee associated with the conveyance of subdivision property payable to a property owners’ association that manages or regulates the subdivision or its managing agent, a governmental entity, or a section 501(c)(3) organization under the Internal Revenue Code. Unfortunately, certain exemptions in Section 5.017 have resulted in substantial efforts to circumvent it through creative interpretation of its provisions.

House Bill 8 repeals Section 5.017 and seeks to close its loopholes by (i) prohibiting future private transfer fees on real property, with certain exemptions, (ii) providing clarity and notice requirements to properties with existing private transfer fees, and (iii) providing penalties for violations. In order to accomplish this, House Bill 8 establishes a more comprehensive arrangement to govern private transfer fees by adding new Subchapter G to Chapter 5 of the Property Code (Sections 5.201 – 5.207), which among other provisions:

- Establishes that, except as provided by Subchapter G, a private transfer fee obligation is not binding or enforceable against a subsequent owner or purchaser of an interest in real property and is void.
- Defines a private transfer fee as a sum of money payable on the transfer of real property, or interest therein, or payable for a right to make or accept a transfer.
- Defines a private transfer fee obligation as an obligation to pay a private transfer fee created under a declaration or other covenant recorded in real property records in the county of the property, under a contractual agreement or promise, or under an unrecorded contractual agreement or promise.
- Defines a subsequent owner as a person who acquired real property by transfer from a person other than the person who was the seller of the property on the date the private transfer fee obligation was created.

- Defines a subsequent purchaser as a person who purchased real property from a person other than the person who was the seller on the date the private transfer fee obligation was created, including a lender who provided a mortgage loan to the subsequent purchaser to purchase the property.
- Excludes the following payments, among others, from the definition of a private transfer fee obligation: interest, a fee, a charge, or another type of payment to a lender under a loan secured by a mortgage on the property, including a fee or charge paid for the lender's consent to an assumption of the loan or transfer of the property, for an estoppel letter or certificate, a shared appreciation interest or profit participation, or other consideration payable in connection with the loan.
- Excludes from the definition of a private transfer fee obligation certain payments to a property owners' association, including, among other sums, a fee or charge to record the change of ownership in the association's records or for an estoppel letter or certificate issued by the association, provided that no portion of the fee or charge was required to pass through to a third party designated or identifiable in the declaration or other covenant or law, or in a document referenced therein, with certain specific exceptions.
- Requires a seller of real property that may be subject to a private transfer fee obligation to provide written notice to a potential purchaser stating that Subchapter G, Chapter 5 of the Property Code, may govern the obligation.
- Requires notices of the private transfer fee obligation to be filed in the real property records of each county where the property is located and to refile said notices every three years thereafter or the private transfer fee obligation is void.

Our Comments: Repealed Section 5.017 was limited to residential real property, whereas the provisions of House Bill 8 enacted in new Subchapter G of Chapter 5 simply refers to real property or encumbered property and does not contain a specific limitation to residential real property.

Effective date: The effective date of House Bill 8 is June 17, 2011, except for the notice requirement in contracts for sale, which is effective January 1, 2012, for contracts for sale entered into on or after that date.

- DUTY OF CARE TO A TRESPASSER ON THE LAND OF AN OWNER, LESSEE OR OCCUPANT (SB 1160)

In Texas, under historical common (court-made) law based on the principle that an owner, lessee or occupant (herein "land possessor(s)") are entitled to the free enjoyment of their land, land possessors generally owe no duty of care to trespassers and are not liable for their injuries (subject to narrow exceptions). New Section 75.007 added to Chapter 75, Civil Practice and Remedies Code, by Senate Bill 1160 freezes current common law in Texas, with the current exceptions, and preempts courts from subjecting land possessors to broad new liability for trespassers, whether adult or children.

Section 75.007 defines “trespasser” as one who enters another person’s land without any express or implied legal right. It provides that a land possessor does not owe a duty of care, and is not liable for any injury, to a trespasser except for the duty to not injure a trespasser willfully, wantonly or through gross negligence. Notwithstanding a land possessor’s general lack of liability for harm to a trespasser, Section 75.007 further provides that a land possessor may be liable for injury to a child caused by a highly dangerous artificial condition on the land if:

- (1) the artificial condition exists in a place on which the land possessor knew or reasonably should have known children were likely to trespass;
- (2) the land possessor knew or reasonably should have known the artificial condition existed and realized or should have realized that it involved an unreasonable risk of death or serious bodily harm to trespassing children;
- (3) the injured child did not discover the condition or realize the risk involved in interfering with the condition or coming within the area made dangerous by the condition;
- (4) the utility to the land possessor of maintaining the artificial condition and the burden of eliminating the danger were slight compared with the risk to the child involved; and
- (5) the land possessor failed to exercise reasonable care to eliminate the danger or otherwise protect the child.

Our Comments:

1. The terms “highly dangerous artificial condition” and “artificial condition” are not defined in Section 75.007.
2. Section 75.007 only applies in trespassing situations and not to situations involving another manner of entry on the land of a land possessor - *e.g.*, invitee or legal right of entry.
3. Senate Bill 1160 also amends Section 75.006, Civil Practice and Remedies Code, by adding protections for land possessors from liability for damage or injury to persons or property when a federal law enforcement officer or peace officer enters or causes another person to enter the agricultural land of a land possessor.

The effective date of Senate Bill 1160 is May 20, 2011, and Section 75.07 applies only to a cause of action that accrues on or after that date.

- CERTAIN CLAIMS AGAINST LICENSED REAL ESTATE BROKERS AND SALESPERSONS EXEMPT FROM TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT (SB 1353)

Senate Bill 1353 amends Section 17.49 of the Business & Commerce Code by adding subsection (i) to make the Texas Deceptive Trade Practices-Consumer Protection Act (Sections 17.41 – 17.63, Business & Commerce Code) inapplicable to a claim against a person licensed as a broker or salesperson under The Real Estate License Act (Chapter 1101, Occupations Code) arising from an act or omission by the person while acting as a real estate broker or salesperson, except for: (1) a claim arising from an express misrepresentation of a material fact that cannot be

characterized as advice, judgment, or opinion; (2) a claim arising from an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; or (3) a claim arising from a failure to disclose information in violation of Section 17.46(b)(24) - "*failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed*".

The effective date of Senate Bill 1353 is May 28, 2011, and subsection (i) applies only to a claim arising from an act or omission that occurs on or after that date.

- RECOGNIZING THE ORIGIN OF THE CHICKEN-FRIED STEAK – A TEXAS LEGEND (HCR 134):

House Concurrent Resolution 134 declares the City of Lamesa, Texas, the Legendary Home of the Chicken-fried Steak. The chicken-fried steak is an enduring Lone Star legend. For generations, Texans pondered the seemingly eternal mystery of who invented the chicken-fried steak; then, in 1976, Larry BeSaw published an article in the *Austin American-Statesman* explaining that this wondrous combination of beef, batter, and breading had first been dropped onto a well-oiled skillet in 1911 by Jimmy Don Perkins, a short-order cook at Ethel's Home Cooking in Lamesa, Texas. According to the published story, Mr. Perkins had mistakenly combined two separate orders for chicken and fried steak into a single culinary creation whose savory goodness became famous far beyond West Texas. The account was later repeated in publications that ranged from the *Washington Post* to *Texas Monthly* to trivia books. Cited again and again through the years and given a further boost through Internet postings, the anecdote about Jimmy Don's handiwork earned Lamesa the enviable status of being the home of the chicken-fried steak. There was just one small problem: it was not true. Mr. BeSaw had created his article as a spoof, never intending it to be taken as fact. Not wishing to spoil a good legend, the city of Lamesa has embraced its role as the epicenter of this epicurean invention by celebrating the lore of its mythical short-order cook with its Chicken-fried Steak Festival. In that same spirit, by passage of HCR 134 the Texas Legislature recognizes the city of Lamesa for its role in this imaginative and imaginary incident in Texas history.

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.

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