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## 2011 TEXAS LEGISLATIVE UPDATE

By: Ashlee E. Ross, Associate Attorney

The Texas Legislature meets in a regular 140-day legislative session every two years, convening on the second Tuesday in January of odd-numbered years. The 82<sup>nd</sup> Legislative Session was adjourned on May 30, 2011, after passing more than 1,500 of the nearly 5,800 bills filed. Governor Rick Perry vetoed 24 bills. On May 31, 2011, the legislature began its special session after failing to pass a balanced budget. Below is a synopsis of selected legislation most likely to affect our clients and colleagues in the real estate finance and title business. Please click on the bill number for more information on each piece of legislation.

### 1. ASSIGNMENT OF RENTS

#### [Senate Bill 889](#)

Author: Carona (R)  
Sponsor: S. Davis (R)

Effective Immediately

Provides that an assignor who owns rent-generating property gives the assignee an assignment of rents unless the security instrument provides otherwise. The assignment of rents is a security interest in all accrued and unaccrued rents owed to the assignor from leasing the property. This perfected security interest in rents also gives the assignee a perfected security interest in the assignor's identifiable cash proceeds. Should the assignor not comply with the terms of the Note, the assignee may collect rent directly from the tenants.

How to enforce it: The security interest in the rents is perfected when the security instrument is recorded. To begin collecting rent from the tenants, the assignee must:

1. provide a demand notice to property owner (assignor) that all rents the assignee is entitled to collect be sent to the assignee; or
2. provide notice to the tenant that all rents be sent to the assignee. A form of this notice is provided in a new chapter added to the Texas Property Code, Chapter 64.

A tenant who forwards rents to the assignee after the tenant receives demand from the assignee satisfies the tenant's obligations under the lease.

*Affects Texas Business & Commerce Code §9.109  
Amends Texas Property Code with new chapter, Chapter 64*

### 2. CO-OWNER'S RIGHT TO ENCUMBER RESIDENTIAL REAL PROPERTY

#### [Senate Bill 1368](#)

Author: West (D)  
Sponsor: Deshotel (D)

Effective Immediately

Allows a co-owner to encumber 1-4 family residential real property with a lien by acting individually and as statutory agent and attorney-in-fact for another co-owner. When real property is owned by more than one person, the co-owner who has:

1. occupied property for more than five years;
2. paid all ad valorem taxes without contribution from co-owner; and
3. a homestead exemption on the property

may file an affidavit in county clerk's office to establish his/her authority to act as agent and attorney-in-fact for the other co-owner for purposes of entering into a mechanic's and materialman's and deed of trust lien to preserve or improve the property. The occupying co-owner filing this affidavit is the sole obligor of any note secured by the mechanic's and materialman's and/or deed of trust.

	<p>In order to act as agent and attorney-in-fact for the other co-owner(s), the co-owner must file with the county clerk's office:</p> <ol style="list-style-type: none"> <li>1. an affidavit stating the co-owner has occupied the property for more than five years, paid all ad valorem taxes without contribution from the co-owner and has a homestead exemption on the property;</li> <li>2. corroborating affidavits from two additional affiants with personal knowledge of the co-owner's occupancy of the property for the preceding five years; and</li> <li>3. a certificate from the tax assessor/collector stating the co-owner has paid all taxes for the preceding five years without delinquency.</li> </ol> <p><i>Amends Texas Property Code with new chapter, Chapter 64</i></p>
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<b>3. CORRECTION INSTRUMENTS</b>	
<p><b><u>Senate Bill 1496</u></b></p> <p>Author: Uresti (D) Sponsor: R. Anderson (R)</p> <p>Effective Immediately</p>	<p>Changes how to handle correction instruments based on whether the correction is a nonmaterial correction or a material correction.</p> <p>A person with personal knowledge may execute the correction instrument to make <u>nonmaterial corrections</u>, which include clerical errors such as:</p> <ul style="list-style-type: none"> <li>- an incorrect part of a legal description, such as a subdivision or condominium name, section number, county, or state name;</li> <li>- a correction of a party's name, such as a misspelling; or</li> <li>- an incorrect marital status.</li> </ul> <p>The correction instrument with the nonmaterial correction must disclose the basis for the person's personal knowledge of the facts, must be filed of record and a copy thereof must be sent via first class mail, e-mail, or other reasonable means to all individuals who executed the original conveyance document including, if necessary, their heirs, successors or assigns.</p> <p>Material corrections must be executed by each party to the original recorded instrument of conveyance or his/her respective heirs and filed of record.</p> <p><u>Material corrections</u> include:</p> <ul style="list-style-type: none"> <li>- a buyer's disclaimer of an interest in real property;</li> <li>- a mortgagee's consent or subordination to a recorded document; or</li> <li>- identifying a lot or unit of property owned by the grantor that was inaccurately identified as another lot or unit that was also owned by the grantor.</li> </ul> <p>A correction instrument is effective as of the effective date of the original conveyance.</p> <p><i>Amends Texas Property Code, Chapter 5, various sections</i></p>

<b>4. EXTENSION OF CREDIT</b>	
<p><b><u>Senate Bill 1320</u></b></p> <p>Author: Lucio (D) Coauthor: Carona (R) Sponsor: V. Gonzales (D)</p> <p>Effective Sept. 1, 2011</p>	<p>Prohibits seller or a person who makes an extension of credit and takes a security interest or mortgage against 1-4 family residential real estate from requesting or requiring the purchaser or borrower to execute a deed conveying the real estate to the seller or person making the extension of credit before or at the time of closing. A deed executed in such a manner is voidable in an action brought within four years by a purchaser or borrower. Compliance with new Chapter 21 may also be enforced through injunctive relief by the attorney general.</p> <p><i>Amends Texas Business &amp; Commerce Code with new chapter, Chapter 21</i></p>

<b>5. FINANCE COMMISSION</b>	
<p><a href="#"><u>Senate Bill 249</u></a></p> <p>Author: Estes (R) Sponsor: Orr (R)</p> <p>Effective Immediately</p>	<p>Expands Finance Commission from nine to eleven members. Six (instead of five) of the eleven members must be part of the general public, and two members (instead of one) must be banking executives.</p> <p><i>Amends Texas Finance Code §11.101</i></p>
<p><a href="#"><u>Senate Bill 1008</u></a></p> <p>Author: Carona (R) Sponsor: Orr (R)</p> <p>Effective Immediately</p>	<p>Requires governor to appoint to the Finance Commission either a residential mortgage loan originator licensed under Finance Code Chapter 156 (formerly a ‘mortgage broker’) or registered under Chapter 157 (a mortgage banker). Previously, this slot could be filled only by a mortgage broker.</p> <p><i>Amends Texas Finance Code §11.102</i></p>

<b>6. FORECLOSURES</b>	
<p><a href="#"><u>Senate Bill 767</u></a></p> <p>Author: Ellis (D) Sponsor: Alvarado (D)</p> <p>Effective Sept. 1, 2011</p>	<p><u>Foreclosure Consultants</u></p> <p>Regulates so-called foreclosure consultants who, for compensation, offer homeowners assistance in preventing or postponing a foreclosure sale. Foreclosure consultants must provide homeowners with a written disclosure as outlined in the bill and may not charge or receive compensation until they have completed each task represented to the homeowner. They may not receive compensation from a third party for their services unless this is disclosed in writing to the homeowner. Further, foreclosure consultants may not:</p> <ul style="list-style-type: none"> <li>- accept a power of attorney from a homeowner for any purpose other than reviewing documents;</li> <li>- acquire an interest in any real or personal property that is the subject of the foreclosure; or</li> <li>- take an assignment of wages from the homeowner to pay the foreclosure consultant.</li> </ul> <p>This bill does not apply to attorneys representing homeowners with property in foreclosure, beneficiaries of the underlying note, or to mortgage servicers. Violations of this bill can result in criminal charges.</p> <p><i>Amends Texas Business &amp; Commerce Code with new chapter, Chapter 21</i></p>
<p><a href="#"><u>Senate Bill 1233</u></a></p> <p>Author: West (D) Sponsor: Coleman (D)</p> <p>Effective Jan. 1, 2012</p>	<p><u>Foreclosure Data Collection</u></p> <p>Requires trustee or sheriff at a foreclosure sale to provide the county clerk with the property’s zip code and whether or not it is residential property. The county clerk must send this information to the Texas Department of Housing and Community Affairs within 30 days of receipt of such a form.</p> <p><i>Amends Texas Property Code, Chapter 51</i></p>
<p><a href="#"><u>Senate Bill 101</u></a></p> <p>Author: Van de Putte (D) Coauthor: Nelson (R), West (D) Sponsor: Farias (D)</p> <p>Effective Sept. 1, 2011</p>	<p><u>Foreclosure Notices</u></p> <p>Requires foreclosure notice to include a conspicuous bold and underlined statement that active members of the military or the National Guard of any state or their spouses should contact the sender of the foreclosure notice immediately. The bill provides a suggested text for this notice.</p> <p>Adds property owners’ associations to the list of lienholders who must stay foreclosure proceedings for members of the military on active duty through nine months after their active duty concludes.</p> <p><i>Amends Texas Property Code §51.002 &amp; §51.015</i></p>

**7. MANUFACTURED HOUSING**

**House Bill 1510**

Author: Hamilton (R)  
Sponsor: Carona (R)

Effective Sept. 1, 2011

Changes requirement that after certified copy of statement of ownership and location is filed in the county’s real property records, the county’s appraisal district chief appraiser must be notified of the real property election. Previously, owners were required to notify the county’s tax assessor collector.

Amends statute that after the real property election is perfected as set forth above, “the home is considered to be real property for all purposes,” and an additional statement of ownership and location is not required unless:

1. the home is moved from the location;
2. the real property election changes; or
3. the use of the property changes.

Texas Department of Housing and Community Affairs may provide a release of lien on a manufactured home without requiring all parties having an interest in the manufactured home give their written consent. Amends abandonment provisions to include a delinquency of the lease agreement between the owner of real property and the owner of the manufactured home.

*Amends Texas Occupations Code, Chapter 1201, various sections*

**8. REGULATION OF MORTGAGE BROKERS/RESIDENTIAL MORTGAGE LOAN ORIGINATORS**

**Senate Bill 1124**

Author: Carona (R)  
Sponsors: Truitt (R),  
Solomons (R)

Effective Sept. 1, 2011  
except for changes to Texas  
Finance Code §180.171, which  
are effective Nov. 1, 2011

Clarifies rules related to mortgage loan originators under the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act) and provisions of the legislation passed in 2009 where it contradicted other statutes or was ambiguous in its application.

Specifically, the bill:

- clarifies mortgage bankers and loan officers licensed under Texas Finance Code, Chapter 157 are not required to also be licensed under Texas Finance Code, Chapter 342 for second-lien loans.
- clarifies those licensed under Texas Finance Code, Chapter 342 are not required to also be licensed under Texas finance Code, Chapter 157.
- eliminates distinction between mortgage broker and loan officer and labels both as ‘residential mortgage loan originator’.
- defines residential mortgage loan originators as those who, for compensation, take a residential mortgage loan application or negotiate the terms of the loan.
- excludes from the definition of residential mortgage loan originators the administrative or clerical staff; licensed real estate brokers or salespersons unless they are compensated by a lender or residential mortgage loan originator; and those licensed to manufacture, install or sell manufactured homes.
- creates licenses and application requirements (a mortgage company license, a credit union subsidiary organization license and an auxiliary mortgage loan activity company license) that allow the licensee to act as a residential mortgage loan originator for residential real estate.

*Repeals Texas Finance Code, Chapters 156, 158 & 342, various sections*

*Amends Texas Finance Code, Chapters 11, 13, 156, 157, 180, various sections*

## 9. MORTGAGE FRAUD

### [Senate Bill 485](#)

Author: Huffman (R)  
Sponsor: Carter (R)

Effective Sept. 1, 2011

Allows criminal charges against those accused of mortgage fraud under Chapter 32 of the Texas Penal Code to be brought in the county where the property is located or in any county in which any part of the transaction occurred.

*Amends Texas Code of Criminal Procedure, Chapter 13*

## 10. MORTGAGE SERVICERS

### [Senate Bill 17](#)

Author: Carona (R)  
Coauthor: Davis (D)  
Sponsor: Truitt (R)

Effective Sept. 1, 2011

Requires residential mortgage loan servicers to register with the Department of Savings and Mortgage Lending. Mortgage bankers who are registered under Texas Finance Code Chapter 157 along with depository institutions, their subsidiaries and affiliates are exempt from the new registration requirements. The servicer must provide notice to the borrower within 30 days after the servicer begins servicing the loan including information where borrowers may file complaints, and the bill provides the procedure for handling borrower complaints. Previously, mortgage servicers have not been regulated.

*Amends Texas Finance Code, Chapter 158*

## 11. NOTARIZING REAL ESTATE DOCUMENTS

### [Senate Bill 1320](#)

Author: Lucio (D)  
Coauthor: Carona (R)  
Sponsor: V. Gonzales (D)

Effective Sept. 1, 2011

Allows a notary public to acknowledge deeds and other residential real estate documents with a current passport issued by a foreign country as the proof of identification.

*Amends Texas Civil Practice and Remedies Code §121.005*

## 12. STANDARD PAYOFF STATEMENTS REQUIRED OF LOAN SERVICERS

### [House Bill 558](#)

Author: Deshotel (D)  
Sponsor: Carona (R)

Effective Sept. 1, 2011

Requires Finance Commissioner adopt rules governing requests by title companies for payoff information from mortgage servicers and promulgate a standard payoff statement form that must be used by loan servicers. Incorrect payoff amounts provided from the mortgage servicer to the title company may be corrected within two business days before the specified closing date. Incorrect payoff statements resulting in underpayment are nevertheless effective to release the lien although the mortgagor remains liable for the shortfall. Mandatory compliance is 90 days after the Finance Commission prescribes the form and procedures required by the bill.

*Amends Texas Finance Code, Chapter 343*

## 13. PRIVATE TRANSFER FEES

### [House Bill 8](#)

Authors: Darby (R), Geren (R),  
R. Anderson (R), Pitts (R),  
Menendez (D)  
Numerous coauthors  
Sponsor: Harris (R)

Effective Immediately

Prohibits the further creation of private transfer fees created by a declaration, covenant, contractual agreement or promise where a subsequent purchaser of property must pay a fee to a person who may or may not have an interest in the property being conveyed. This bill will primarily affect developers who may receive private transfer fees each time a property in a development is conveyed. This bill also regulates private transfer fee obligations that are currently in place.

For private transfer fees already in existence, individuals who receive them must file a notice in the real property records of each county in which the property is located

	<p>outlining who is receiving the fee and his/her contact information, the legal description of the property subject to the fee, how the money collected will be used, etc. Sellers must give notice to potential purchasers stating the property may be subject to a private transfer fee. If a person receiving a private transfer fee fails to file this notice, the property is no longer subject to the fee and the private transfer fee obligation is void. Among other exclusions, a private transfer fee does not include fees paid to licensed real estate brokers or lenders or fees that are paid only once without binding successor owners. It does not include fees payable to a property owners' association because of a change in ownership, provided no portion of the fee is passed through to a third party (e.g., the builder or developer of the subdivision). Additionally, a private transfer fee does not include a fee assessed by the person holding a right of first refusal for waiving the right.</p> <p><i>Amends Texas Property Code, Chapter 5</i></p>
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<b>14. PROPERTY OWNERS' ASSOCIATIONS</b>	
<p><a href="#"><u>House Bill 1228</u></a></p> <p>Author: Dutton (D) Sponsor: West (D)</p> <p>Effective Jan. 1, 2012 except for changes to Texas Property Code §209.0092, which are effective Sept. 1, 2011</p>	<p>Requires property owners' association (POA) to give mortgagees notice of a homeowner's delinquent assessments and a 60-day cure period before initiating foreclosure proceedings. The POA must obtain a court order to begin foreclosure proceedings in a procedure similar to foreclosures of home equity liens. Additionally, POAs must allow owners to pay delinquent assessments over three to eighteen months, and the bill provides an order in which payments must be applied. When using a collection agent to pursue unpaid assessments, a POA must provide written notice to the owner as specified in the bill.</p> <p><i>Affects Texas Property Code, Chapter 209</i></p>
<p><a href="#"><u>Senate Bill 472</u></a></p> <p>Author: West (D) Sponsor: Giddings (D)</p> <p>Effective Sept. 1, 2011</p>	<p>Requires sixty-seven percent of the total votes allocated to property owners to amend a property owners' association (POA) declaration unless the declaration provides for a lesser majority. Additionally, bylaws may not be amended to conflict with the declaration, but this does not include amendments passed during the development period. Any provision that would deny an owner the right to vote in a POA election or matter of concern or that prohibits an owner from running for a position on the board is void. Except for uncontested races and electronic balloting, ballots must be in writing and signed by the owner.</p> <p><i>Amends Texas Property Code, Chapter 209</i></p>

<b>15. REAL ESTATE BROKERS AND SALESPERSONS</b>	
<p><a href="#"><u>Senate Bill 747</u></a></p> <p>Author: Carona (R) Sponsor: Hamilton (R)</p> <p>Effective Sept. 1, 2011</p>	<p>Addresses education requirements and application procedures for real estate brokers and salespersons. Specifically, the bill:</p> <ul style="list-style-type: none"> <li>- amends definition of real estate broker to include individuals who control acceptance of rent from single-family dwelling residents and those who provide estimated prices of real property that is not an appraisal but is provided in the person's ordinary course of business and is related to the actual or potential acquisition or disposition of an interest in real property.</li> <li>- requires the Texas Real Estate Commission (TREC) to create examination benchmarks for each category of license issued by TREC.</li> <li>- requires business entities to hold a license to act as a broker. Business entities must designate a managing officer as its agent and provide proof of errors and omissions insurance in the amount of \$1 million if the designated agent owns less than ten percent of the entity.</li> <li>- requires that in addition to the educational requirements currently in effect, brokers applying for licenses on or after January 1, 2012, must have at least</li> </ul>

	<p>four years of experience in the five-year period prior to submitting the application. Previously, brokers were required to have at least two years experience in the thirty-six month period prior to filing an application. This applies to in-state brokers and brokers applying for the license who are out-of-state. TREC will determine what qualifies as experience to satisfy this requirement.</p> <ul style="list-style-type: none"> <li>- requires salespersons applying for licenses on or after September 1, 2012, to complete 12 (previously 14) hours of education including classes in contract law, agency law, contract forms and real estate finance.</li> <li>- provides that license holders who supervise another license holder must complete six additional hours of TREC-approved classes on broker responsibility.</li> <li>- allows the TREC to solicit and accept gifts and donations from any source.</li> </ul> <p><i>Amends Texas Occupations Code, Chapter 1101, various sections</i></p>
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<b>16. SELLER'S DISCLOSURE NOTICE</b>	
<p><b><u>House Bill 3389</u></b>            Author: Workman (R)            Sponsor: Watson (D)            Effective Sept. 1, 2011</p>	<p>Amends Seller's Disclosure Notice of the property condition provided to purchaser of residential real property to include a disclosure of natural and liquid propane gas lines on the property.</p> <p><i>Amends Texas Property Code §5.008(b)</i></p>
<p><b><u>Senate Bill 710</u></b>            Author: Van de Putte (D)            Sponsor: Menendez (D)            Effective Sept. 1, 2011</p>	<p>Amends Seller's Disclosure Notice of the property condition provided to purchaser of residential real property to include the disclosure of the existence of a single blockable main drain in a pool, hot tub or spa and warn that a single blockable main drain may cause a suction entrapment hazard.</p> <p><i>Amends Texas Property Code §5.008(b)</i></p>

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