

SUBJECT: Determination of fair market value of judicially foreclosed property

COMMITTEE: Financial Institutions: favorable, with amendment

VOTE: 6 ayes — Tallas, H. Cuellar, Carona, Gutierrez, Marchant, Patterson  
0 nays  
3 absent — D. Smith, Larry, Wallace

WITNESSES: For — Cyril D. Kasmir; Travis R. Phillips, The Coalition of Property Owners.  
  
Against — Karen Neeley, Independent Bankers Association of Texas; and Robert Harris, Texas Bankers Association.  
  
On — Larry Temple, Texas Mortgage Bankers' Association.

BACKGROUND: Chapter 51 of the Property Code was amended earlier in this legislative session by HB 169 by Tallas, which became effective on April 1. HB 169 added sec. 51.003, Deficiency Judgments, which outlines procedures for debtors to challenge the foreclosure-sale price of property, and thus any deficiency amount remaining on the loan that had been secured by the property foreclosed, in cases of *non-judicial* foreclosures. HB 169 allows a determination of the fair market value of the foreclosed property and allows the difference between the fair market value and the amount received at the foreclosure sale to be offset against any deficiency remaining on the loan.

Lienholders of non-judicially foreclosed and sold property must bring suit within two years from the foreclosure-sale date in order to obtain a deficiency judgment against the debtor.

*Judicial* foreclosures are most often used in situations where there are a number of unknown owners of property interests (such as with divorce or death), or other title issues, in order to guarantee a clear title to the property. HB 169 does not apply to determination of fair market value for judicial foreclosures.

**DIGEST:**

HB 2825 would apply to judicial foreclosures procedures regarding determination of the fair market value of property sold at a foreclosure sale and allow an offset of the difference against any deficiency remaining on the loan that was secured by the foreclosed property.

**Judicial foreclosure-deficiency.** HB 2825 would establish a new sec. 51.004, Judicial Foreclosure-Deficiency, for real property subject to a deed of trust or other contract lien. This provision would apply when the property had been sold at a foreclosure sale under a court judgment foreclosing the lien and ordering the sale, if the property sale brought less than the secured debt's unpaid balance, resulting in a deficiency.

Any person obligated to pay on the indebtedness, including a guarantor of the loan, could bring suit to determine the foreclosed property's fair market value as of the date of the foreclosure sale. The suit would have to be brought within 90 days after the foreclosure sale. However, if the action was brought by a guarantor who had not received adequate notice of the sale, it would have to be initiated within 90 days after the guarantor received notice.

The fair market value would be determined (as under sec. 51.003, added by HB 169) by the finder of fact (a judge or jury) based on competent evidence of value. If the fair market value was found to be greater than the property's foreclosure sale price, the obligated debtor, including guarantors, would be entitled to an offset against the deficiency equal to the difference between the unpaid balance and the fair market value. Should no competent evidence of fair market value be introduced, the foreclosure-sale price would be used to compute the deficiency.

If a lender had received any amount from a private mortgage-guaranty insurer, that amount would be credited to the borrower's account before the lender could sue for a deficiency owed by the borrower. However, the credit would not apply to a private mortgage-guaranty insurer exercising its subrogation rights against a person liable for the deficiency.

**Judicial or non-judicial foreclosure after judgment against guarantor-deficiency.** This section would apply when the holder of a debt has

obtained a court judgment against a guarantor of the debt. Property subject to a deed of trust or other contract lien securing the guaranteed debt would have to have been sold at a foreclosure sale under sec. 51.002, Sale of Real Property Under Contract Lien, or under a court judgment foreclosing the lien and ordering the sale. The property's sale price would have to have been less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency. A motion or suit to determine the property's fair market value could not have been filed under either sec. 51.003, Deficiency Judgment (HB 169 as enacted), or 51.004 (the judicial foreclosure-deficiency section of this bill) as of the date of the foreclosure sale.

A guarantor could bring suit in order to determine the foreclosed property's fair market value as of the date of the foreclosure sale. Such a suit would have to be brought within 90 days after the foreclosure sale or the date the guarantor had received actual notice of the foreclosure sale, whichever was later.

The same procedures for determination of fair market value and offset against the deficiency would apply as for secs. 51.003 and 51.004.

HB 2825 would apply only to a deficiency resulting from a foreclosure sale conducted on or after the bill's effective date.

**SUPPORTERS  
SAY:**

HB 2825 would extend to judicial foreclosures the same fairness and balance given to borrowers in the recently enacted HB 169. HB 169 provides for the determination of the fair market value of foreclosed property when an artificially low price is paid for property at a foreclosure sale following a *non-judicial* foreclosure. Yet lenders already are beginning to use *judicial* foreclosures, since this type of foreclosure has no mechanism for determining fair market value, allowing the same inequities that resulted in enactment of HB 169.

HB 2825 outlines procedures by which a borrower or a guarantor obligated to pay the deficiency on a loan secured by foreclosed property could initiate

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suit against a lienholder of foreclosed and sold property to determine market value when it is in dispute. The same basic procedures for non-judicial foreclosures would apply to judicial foreclosures, in order to ensure uniformity in this area.

OPPONENTS  
SAY:

A lienholder has two years to seek a deficiency judgment, yet guarantors and debtors would have to initiate a suit to determine market value within 90 days from the foreclosure sale. This period should be extended to two years so as not to rush a debtor or guarantor to court.

OTHER  
OPPONENTS  
SAY:

A committee amendment would delete a prohibition against waiving the procedures provided for in the bill. The waiver prohibition is needed to protect borrowers from being pressured into signing a loan contract that is not in their best interests. Lenders might be expected to insert such a waiver into their loan contracts for homeowner and other loans in order to avoid having to offset loan deficiencies.

NOTES:

The Senate companion, SB 1504 by Glasgow, was reported favorably without amendment by the Senate Economic Development Committee on May 3.

The committee amendments would delete from the original version of HB 2825 provisions voiding any waiver of the procedures in the bill and applying Chapter 37 of the Civil Practices and Remedies Code, which provides for declaratory judgments.