

- SUBJECT:** Creating a process to rescind non-judicial foreclosure sales
- COMMITTEE:** Business and Industry — committee substitute recommended
- VOTE:** 7 ayes — Oliveira, Simmons, Collier, Fletcher, Rinaldi, Romero, Villalba
0 nays
- WITNESSES:** For — Brian Engel, Barrett Daffin Frappier Turner and Engel; Mark Hopkins; (*Registered, but did not testify:* Vicki Truitt, Mackie, Wolf, Zeintz and Mann; Daniel Gonzalez, Texas Association of Realtors; Chuck Rice, Texas Land Developers Association)
- Against — Scott Gillen, Stewart Title; (*Registered, but did not testify:* Brian Yarbrough, JPMorgan Chase; Bruce Eppinger; Jocelyn Whisnant)
- On — Karen Neeley, Independent Bankers Association of Texas; (*Registered, but did not testify:* Thomas Tallent, Cendera Funding, Inc.; Caroline Jones, Texas Department of Savings and Mortgage Lending; Robert Doggett, Texas Family Council; Pam McCollum and Julie Gross, Texas Mortgage Bankers Association)
- DIGEST:** CSHB 2066 would create a process to rescind a non-judicial foreclosure sale of property and specify the remedies available to the purchaser.
- The bill would apply to a sale conducted under statutory provisions governing the sale of real property under a contract lien. A mortgagee, trustee, or substitute trustee could rescind a foreclosure sale within 15 days after the sale. A sale could be rescinded if:
- the statutory requirements for the sale were not satisfied;
 - the default leading to the sale was cured before the sale;
 - a receivership or dependent probate administration involving the property was pending at the time of the sale;
 - a condition prescribed by the trustee or substitute trustee before the

- sale that was made available in writing to prospective bidders at the sale was not met;
- the mortgagee or mortgage servicer and the debtor agreed before the sale to cancel the sale based on a written agreement by the debtor to cure the default; or
 - at the time of the sale, a court-ordered or automatic stay of the sale in a bankruptcy case filed by a person with an interest in the property was imposed on the property.

The bill would provide for two methods of rescinding the sale, depending on whether the deed of the property had been recorded in the county deed records. If the deed had not been recorded, the foreclosure sale could be rescinded by serving a written notice of rescission that described the reason for rescission. The notice would have to be sent by certified mail to the purchaser and each debtor who was obligated to pay the debt. Service of the notice would be complete when the notice was placed in the mail, postage was paid, and the notice was addressed to the recipient at their last known address. If the deed had been recorded in the county deed records, the sale could be rescinded by serving notices of rescission as described above and recording a copy of each notice in the county records.

CSHB 2066 would require the mortgagee to return to the purchaser the amount paid for the property at the sale within five business days after the foreclosure sale. The debtor would have to return to the trustee the amount of any excess proceeds received by the debtor from the sale. The rescission would restore the mortgagee and the debtor to their respective title, rights, and obligations under any instrument relating to the foreclosed property that existed immediately before the sale occurred.

A lawsuit challenging the effectiveness of a rescission would have to be filed within 90 days after the date the notices of rescission were served. This limitation would not apply to a lawsuit claiming damages resulting from the rescission.

The bill would limit the damages that could be awarded in a lawsuit challenging the rescission or claiming damages resulting from the

rescission. If the foreclosure sale was rescinded because a stay was imposed in a bankruptcy case filed by a person with an interest in the property, the court could award as damages to the purchaser only the amount paid for the property that had not been refunded to the purchaser. If the foreclosure sale was rescinded for any other reason, the court could award as damages only the amount paid for the property that had not been refunded to the purchaser, plus interest of 10 percent per year. In addition, the court could not order the reinstatement of the sale as a remedy for the purchaser.

CSHB 2066 would not prohibit the rescission of a sale by agreement of the affected parties on other terms or by a lawsuit to rescind a sale that was not covered by the bill.

The bill would take effect September 1, 2015, and would apply only to a foreclosure sale that occurred on or after that date.

**SUPPORTERS
SAY:**

CSHB 2066 would create a reset button for foreclosure sales that never should have taken place. These situations currently have to be resolved through litigation or agreement by the parties involved. By outlining a clear procedure for non-judicial foreclosure sale rescissions, this bill would help those involved in the sale of foreclosed property avoid costly litigation. It also would provide clarity about the various parties' rights and roles during and after the rescission process.

When a non-judicial foreclosure sale occurs, sometimes there are facts that are not known by all of the parties involved, which can make it difficult to deliver clear title on the property. For example, on the day of the sale, the debtor could file for bankruptcy mere moments before the sale was scheduled to take place. This would cause an automatic stay to be imposed on the property, but the trustee might not learn about the bankruptcy filing until after the sale took place. Without this rescission mechanism, the only way to return all parties to the rights and positions they had immediately before the sale would be to file a lawsuit or have all parties agree on an outcome. However, lawsuits are expensive and time-consuming, and while the litigation is pending, the property is in limbo

because it is not clear who the owner is. It also is difficult to get multiple parties with competing interests to agree on what should happen with the property. This bill would reduce the confusion and uncertainty that can surface when a foreclosure sale is rescinded.

The short window for rescission would limit any negative effects on the bidding process. The 15 days provided by the bill would be a reasonable amount of time to learn of any issues with the title that were not discovered prior to the sale. There is an inherent risk in any transaction conveying property, especially a foreclosure sale, and this bill would provide a way for the third-party purchaser to be made whole within a short amount of time — five business days after the sale was rescinded. Additionally, the rescission only would rescind a sale that never should have taken place because the property title was not conveyable. The bill would offer a faster and less expensive solution to correct that mistake.

OPPONENTS
SAY:

CSHB 2066 would discourage third-party purchasers from bidding on foreclosure properties because of the uncertainty that would be created by the possibility of rescission.

Third-party purchasers should be exempt from the rescission process because they are an important part of driving up bids to more accurately reflect the actual value of the property. Without third-party purchasers, properties would be sold for much less than they actually are worth because there would not be as much competition in the bidding process. While 15 days is an improvement from the 60-day period provided in the original bill, it is still too long for a third-party purchaser to be in limbo after purchasing a property.

NOTES:

CSHB 2066 would differ from the bill as filed in that the substitute would:

- decrease from 60 days to 15 the amount of time a foreclosure sale could be rescinded by a mortgagee, trustee, or substitute trustee;
- decrease from seven days to five the amount of time the mortgagee would have to return to the purchaser the amount paid for the property at the sale;

- require the debtor to return to the trustee, not the mortgagee, the amount of any excess proceeds received by the debtor from the sale; and
- specify that the bill would not prohibit the rescission of a sale by agreement of the affected parties on other terms or a lawsuit filed to rescind a sale that would not be covered by the bill.