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Changes to Home Equity Lending 2017

Survey of the top ten issues Texas home equity lenders face, including discussion of S.J.R. 60 and why the vote on November 7, 2017 matters.

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Home Equity Lending[1]

I. Introduction

This paper offers a survey of ten issues Texas home equity lenders face including items that Senate Joint Resolution 60 attempts to address. The 85th Texas Legislature passed S.J.R. 60 which places Texas home equity Constitutional amendments on the November 7, 2017 ballot as Proposition 2. If approved by the voters, the Constitutional amendments will take effect January 1, 2018. Like all off-year elections voter turn-out is expected to be low so while all votes are important, votes in this election will count even more.

II. Brief History

In 1997 the Texas Legislature passed Constitutional amendments which voters approved November 4, 1997.[2] These amendments took effect January 1, 1998 and home equity lending in Texas began.[3] It is worth mentioning that these amendments also brought reverse mortgages to Texas, although it wasn't until curative amendments to the Texas Constitution were approved two years later that reverse mortgage originations actually began in Texas.[4] Although the Constitutional amendments authorized home equity lending, they did not provide for implementing legislation or for administrative interpretation or rule-making.[5] As a result many questions surrounding home equity lending remained and on October 7, 1998 four state agencies with authority over lenders jointly issued *Regulatory Commentary on Equity Lending Procedures.*[6] A few weeks later the Texas Attorney General issued an opinion interpreting the Texas Constitution and concluded that the Texas legislature *did not have the authority to interpret or declare a matter of constitutional construction, nor may it delegate such authority to an administrative agency*.[7] To solve the problem the Attorney General advised that the Constitution could be amended to give the necessary interpretative authority to an executive agency which is exactly what occurred in 2003 with the passage and adoption of new Constitutional amendments that added Section 50(u) to Article XVI of the Texas Constitution.[8] The Commissions acted quickly to propose home equity interpretations that took effect

[1] **THIS PAPER IS INTENDED TO PROVIDE GENERAL INFORMATION AND IS NOT INTENDED AS LEGAL ADVICE. YOU SHOULD NOT RELY UPON THIS INFORMATION ALONE BUT SHOULD CONSULT LEGAL COUNSEL REGARDING THE APPLICATION OF THE LAWS AND REGULATIONS DISCUSSED AND APPLIED TO YOUR SPECIFIC FACTS AND CIRCUMSTANCES.**

[2] Tex. H.R.J. Res. 31, 75th Leg., R.S., 1997 Tex. Gen. Laws 6739 (adopted at the general election on Nov. 4, 1997).

[3] *Id.*

[4] S.J.R. 12, 76th Leg., R.S., 1999 Tex Gen. Laws 6599 (adopted at the general election on Nov. 2, 1999).

[5] *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566, 571 (Tex. 2013).

[6] *Id.* at 572.

[7] *Id.*

[8] *Id.* at 573.

January 8, 2004. But, three weeks later six homeowners sued the Commissions challenging several of the newly released interpretations.[9] As the case moved through the court system the Commissions worked diligently to resolve and did resolve many but not all of the complained of issues.[10] The remaining issues were finally resolved by the Texas Supreme Court in their opinion, *Finance Commission of Texas v. Norwood*, decided June 21, 2013 and Supplemental Opinion on Overruling of Rehearing issued January 24, 2014.[11] This case took almost ten years before it was finally settled but when the dust settled it had profoundly reshaped the Texas home equity lending landscape.[12] In 2014 Texas Supreme Court also released its opinion in *Sims v. Carrington* that addresses home equity modifications.[13] In 2016 the Texas Supreme Court released two more impactful Texas home equity opinions that will be discussed in the paper.

It is no secret that Texas home equity lending laws as well as Texas lending laws in general are some of the most complicated and unforgiving in the nation and lenders are wise to rely upon their Texas legal counsel when navigating the Texas lending minefield. These Constitutional protections are intended to preserve the equity in Texas homesteads and ensure that consumers are not taken advantage up when buying, building, refinancing or taking cash-out of their homesteads. These homestead protections are important safeguards for both consumers and lenders and have been the envy of many states through the years, especially during the national economic downturn.[14]

Home equity lending in Texas has become a stable lending product over the past 20 years, in fact last year Fannie Mae removed special lender approval requirements making it easier for lenders to sell and service Texas 50(a)(6) loans.[15] With fewer barriers lenders have more reason to originate and service Texas 50(a)(6) loans which should benefit Texas consumers and the overall economy. If the proposed amendments pass it is expected that more home equity loans with lower loan amounts will be originated. But, before we get there we need to examine S.J.R. 60 and the changes to home equity lending that will occur if the Constitutional amendments pass and also highlight some of the questions that need to be addressed.

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[9] *Id.* at 574.
[10] *Id.* at 575.
[11] *Id.* at 566.
[12] *Id.* at 575.
[13] *Sims v. Carrington Mortgage Services, LLC,* 440 S.W.3d 10, 17, 57 Tex. Sup. Ct. J. 588 (Tex. 2014).
[14] Floyd Norris, *A Law Shielded Many Texans When the Housing Bubble Burst,* N.Y. Times, May 25, 2012, at B3.
[15] Fannie Mae Selling Guide Announcement SEL-2016-03 dated March 29, 2016.

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