

How to Lose a Client with 10 or More Outdated Loan Provisions

Presented by:
Colette M. Breedlove and Niles W. Holmes

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Overview

Not unlike the job of painting the Golden Gate Bridge, the task of keeping forms up-to-date is never ending for any real estate lending lawyer.

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Notice of Confidentiality Rights

- Enacted in 2003 and revised in 2007, a Notice of Confidentiality Rights is required on the first page of any deed or deed of trust that transfers an interest in real property *to or from an individual*.
- Notice must be in bold 12 point type or upper case 12 point type.
- Text of the notice changed in 2007

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION *FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY* BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

Express Negligence Doctrine

- Created by the Texas Supreme Court in Dresser and Enserch Corp. v. Parker
- Simply stated, the scope of an indemnity clause in Texas will not cover the negligence of an indemnified party unless the language is conspicuous and provides fair notice of the indemnity.

Express Negligence Doctrine (cont'd)

Example:

EXCEPT FOR THOSE LOSSES, COSTS, LIABILITIES OR EXPENSES THAT ARE CAUSED BY THE WILLFUL MISCONDUCT OR GROSS NEGLIGENCE OF LENDER, BORROWER AGREES TO INDEMNIFY AND HOLD LENDER HARMLESS, *WHETHER OR NOT AS THE RESULT OF THE NEGLIGENCE OF LENDER*, AGAINST AND FROM ANY LOSS, COST, LIABILITY OR EXPENSE (INCLUDING, BUT NOT LIMITED TO, ATTORNEYS' FEES) RESULTING FROM ANY FAILURE OF BORROWER TO SO PERFORM.

Note: It is best practice to also include a notice near the end of the document stating the sections that include indemnity provisions.

Usury – 60 Day Notice

Although usury is rarely an issue in this low interest rate environment, there are situations where it can come up, especially in certain short-term, rescue lending transactions or those with atypical collateral structures. Usury savings clauses drafted prior to a 1999 revision to the Texas Finance Code may not include reference to a lender's right to notice and an opportunity to cure any alleged usury as a condition precedent to any claim made by a borrower seeking usury penalties.

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