

**PRESENTED AT**  
**49th Annual William W. Gibson, Jr.**  
**Mortgage Lending Institute**

September 17-18, 2015  
Austin, Texas

November 5-6, 2015  
Dallas, Texas

## **Case Law Update**

**David A. Weatherbie**



Author Contact Information:  
DAVID A. WEATHERBIE  
Cramer Weatherbie Richardson Walker LLP  
Dallas, Texas  
[dweatherbie@cwrwlaw.com](mailto:dweatherbie@cwrwlaw.com)  
(214) 369-1170  
cwrwlaw.com

**CASE LAW UPDATE**  
**DAVID A. WEATHERBIE**  
**CRAMER WEATHERBIE RICHARDSON WALKER LLP**  
**DALLAS, TEXAS**

The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 455S.W.3d and Supreme Court opinions released through August 7, 2015.

The Texas Property Code and the other various Texas Codes are referred to by their respective names. The references to various statutes and codes used throughout this presentation are based upon the cases in which they arise. You should refer to the case, rather than to my summary, and to the statute or code in question, to determine whether there have been any amendments that might affect the outcome of any issue.

A number of other terms, such as Bankruptcy Code, UCC, DTPA, and the like, should have a meaning that is intuitively understood by the reader, but, in any case, again refer to the statutes or cases as presented in the cases in which they arise.

This and past Case Law Updates are available at our website [cwrwlaw.com](http://cwrwlaw.com).

## TABLE OF CONTENTS

PART I MORTGAGES AND FORECLOSURES.....	1
PART II HOME EQUITY LENDING .....	7
PART III PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS.....	12
PART IV GUARANTIES.....	14
PART V LEASES.....	14
PART VI DEEDS AND CONVEYANCES.....	19
PART VII VENDOR AND PURCHASER.....	27
PART VIII EASEMENTS.....	30
PART IX ADVERSE POSSESSION, TRESPASS TO TRY TITLE, QUIET TITLE .....	31
PART X HOMESTEAD.....	35
PART XI BROKERS.....	37
PART XII TITLE INSURANCE AND ESCROW AGENTS.....	38
PART XIII PARTNERSHIPS .....	42
PART XIV CONSTRUCTION AND MECHANICS' LIENS .....	43
PART XV CONDEMNATION.....	48
PART XVI LAND USE PLANNING AND RESTRICTIONS .....	50
PART XVII AD VALOREM TAXATION.....	54

## **PART I MORTGAGES AND FORECLOSURES**

*PlainsCapital Bank v. Martin*, No. 13-0337 (Tex. March 27, 2015). Martin defaulted and PlainsCapital foreclosed on the deed of trust securing his loan. The bank was the highest bidder at the foreclosure sale and bought the property for less than the secured debt. Martin sued the bank, asserting, in part, that the property's fair market value on the date of foreclosure was in excess of the foreclosure sales price and Texas Property Code § 51.003 required the bank to offset the excess against his debt. The trial court determined that § 51.003 did not apply and rendered judgment for the bank on its counterclaim for damages and attorney's fees. The court of appeals reversed and remanded to the trial court. It held that (1) § 51.003 applied, and (2) the term "fair market value" as used in § 51.003 is the historical willing-seller/willing-buyer definition of fair market value.

PlainsCapital argued that the language of § 51.003(a) limits § 51.003's application to cases in which "the" deficiency sought from the borrower is the precise difference between the foreclosure sale price and the outstanding secured obligations. That being so, the Bank reasoned, the statute is inapplicable to its claim against Martin because the bank was not seeking a deficiency based on "the" foreclosure sale price; rather, it was seeking a deficiency based on the price for which it subsequently sold the property.

Section 51.003, enacted in 1991, adds balance to the mortgagor-mortgagee relationship regarding deficiency judgments. It does so by circumscribing mortgagees' rights to seek deficiency judgments and specifying rights that borrowers have regarding alleged deficiencies. Section 51.003 substantively provides that when realty is foreclosed on pursuant to a contract lien and the foreclosure sales price is less than the debt secured, a suit brought against the borrower for "the unpaid balance of the

indebtedness secured by the real property" is a suit for a deficiency judgment. The borrower in such a suit may request that the trial court make a finding as to the fair market value of the realty as of the date of the foreclosure sale. If the trial court finds the fair market value to be in excess of the foreclosure sales price, then the borrower is entitled to an offset against the deficiency in the amount of the excess.

PlainsCapital parses the language of § 51.003(a) and argues that the Legislature's use of the word "the" when referencing deficiency as opposed to "a" deficiency or "any" deficiency limits the application of § 51.003 to deficiencies calculated using the precise foreclosure sales price. The Bank reasons that use of "the" in the statute makes the section inapplicable to situations such as this where deficiencies are calculated using amounts that vary to some degree from the foreclosure sales price. The Supreme Court disagreed.

Read as a whole and in context with the remainder of § 51.003, § 51.003(a) provides that whenever a borrower is sued after real property is sold at a foreclosure sale as permitted by and described in § 51.002, and judgment is sought against the borrower because the foreclosure sales price is less than the amount owed, then (1) the suit is for a "deficiency judgment," (2) the suit must be brought within two years of the foreclosure sale, and (3) the suit is governed by § 51.003. But how the amount of the deficiency is calculated is not prescribed by § 51.003(a); rather it is prescribed by § 51.003(b) and (c). Section 51.003(b) affords a borrower the right to request the trial court to determine the fair market value of the property and sets forth how such is to be calculated. Section 51.003(c) prescribes how the amount of the deficiency judgment is to be determined. Under § 51.003(c), if the trial court is not requested to determine the property's fair market value, or if such a request is made but no competent evidence of fair market value is presented, then the foreclosure sales price must be used to

calculate the deficiency for purposes of a judgment.

PlainsCapital's proposed interpretation requires reading one word—"the"—out of context from the remainder of § 51.003. It would allow lenders to bypass the carefully crafted deficiency judgment statute with its two-year limitations period and other protections for borrowers and creditors by simply suing the borrower for some amount other than the difference between the amount of the secured debt and the exact foreclosure sales price. The word "the" in the statute referencing a deficiency cannot bear the burden the bank seeks to place on it. PlainsCapital's claim against Martin falls within the provisions of § 51.003.

PlainsCapital contends that even if § 51.003 applies to its claim, the court of appeals erred because it equated "fair market value" as that term is used in § 51.003 with the historic measure of fair market value, which is "the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying."

When a statute uses a word or phrase without defining it, the court presumes the Legislature intended the common meaning of the word or phrase to apply. And when a statute provides a definition for or uses a word or phrase in a particular manner, then courts must apply that definition or manner of use when interpreting the statute.

The Legislature used the phrase "fair market value" in § 51.003 without defining it, so the court would ordinarily presume the common meaning of the term applies, as did the court of appeals. However, the statute enumerates categories of evidence and clearly specifies that they may be considered by trial courts in determining fair market value. For example, § 51.003(b)(5) specifies that a trial court, when calculating the fair market value as of the date of the foreclosure sale, may consider evidence of

"the necessity and amount of any discount to be applied to the future sales price." This factor is forward looking, allowing the trial court to consider the price for which the lender eventually sells the property and to apply a discount, if appropriate, to determine a value as of the foreclosure sale date.

It may seem odd to make the price for which the property sold after foreclosure an integral component of competent evidence of the property's fair market value on the foreclosure sale date, but that is clearly what the Legislature intended. If it were not, then the relevant part of § 51.003(b)(5) would be nonsensical because an unknown fair market value, which is the value being sought, cannot mathematically be determined by applying a discount to an unknown future sales price, nor could either a prospective buyer or the seller know what the future sales price will be in order to factor it into their decision to buy or sell, regardless of whether a discount factor is applied. And the courts do not attribute to the Legislature an intent to enact nonsensical statutes.

Further, if the court were to rule the future sales price competent evidence, but only upon a showing of comparable market conditions between the foreclosure sale and the future sale, it would be adding words to § 51.003. The court refused to do that in the absence of clear legislative intent to reach a different result from that reached by applying the plain language of the statute, or to prevent the statute from yielding an absurd or nonsensical result.

Therefore, the enumerated factors in § 51.003(b) will support a fair market value finding under the statute even though that type of evidence might not otherwise be competent in the common or historical fair market value construct. That being so, the term "fair market value" in § 51.003 does not equate precisely to the common, or historical, definition. Rather, it means the historical definition as modified by evidence § 51.003(b) authorizes the trial court to consider in its discretion, to the extent such

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Case Law Update

Also available as part of the eCourse

[Mortgage Lending Case Law and Legislative Update](#)

First appeared as part of the conference materials for the  
49<sup>th</sup> Annual William W. Gibson, Jr. Mortgage Lending Institute session  
"Case Law Update, Part I"