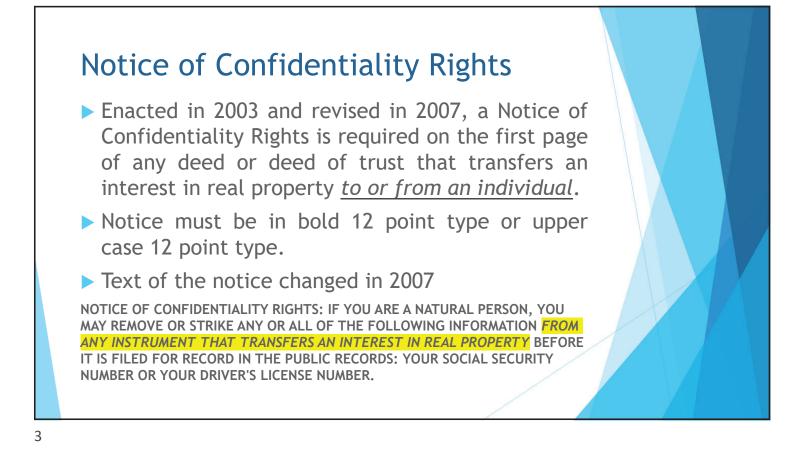


How to Lose a Client with 10 or More Outdated Loan Provisions

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Express Negligence Doctrine

- Created by the Texas Supreme Court in <u>Dresser</u> and <u>Enserch Corp. v. Parker</u>
- 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, <u>WHETHER OR NOT AS THE</u> <u>RESULT OF THE NEGLIGENCE OF LENDER</u>, 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.

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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. Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the <u>UT Law CLE eLibrary (utcle.org/elibrary)</u>

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Answer Bar: The Ins and Outs of Commercial Real Estate Loans and Title Insurance

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