First American Title™
NATIONAL COMMERCIAL SERVICES

PRESENTED AT

55th Annual William W. Gibson, Jr
MORTGAGE LENDING INSTITUTE

September 16, 2021
Austin, Texas

LOAN MODIFICATIONS

Dawn M. Lewallen

Dawn M. Lewallen
Senior Division Underwriter
National Commercial Services-
First American Title Insurance Company
601 Travis Street, Suite 1875
Houston, Texas 77002
dlewallen@firstam.com
713-402-4381

INTRODUCTION

Mortgage lenders reacted quickly to the challenges facing homeowner borrowers at the onset of the Covid-19 pandemic by negotiating loan modifications with distressed borrowers. As a result, we have

seen a significantly increased in modifications of original deeds of trust between borrowers and lenders and insured by title insurers. This paper will focus on the effect of modification on the validity, priority, and enforceability of the original deed of trust, as well as some practical considerations for the lender, borrower, and title company.

IN GENERAL

A modification of a deed of trust and related loan documents is an agreement between the borrower and lender to change the original terms of a mortgage loan. A modification may adjust loan terms to include one or more of the following: extend the maturity date; increase or decrease the loan amount, including principal forbearance; change the interest rate; add new guarantors; add or release property, as collateral for the loan; change the loan structure; and revisit payment schedules. The goal of the modification is generally to avoid foreclosure and enable the borrower to stay in their home.

BASIC CONTRACT LAW APPLICABLE TO MODIFICATION AGREEMENTS

Practitioners may want to consider whether a modification agreement must be in writing to satisfy the statute of frauds. In Texas, a note, deed of trust, loan agreement and subsequent modifications are regarded as a contract binding the borrower and lender. Tex. Bus. & Com. Code § 26.02 states that "any promise, promissory notes, agreements, undertaking, security agreements, deeds of trust or other documents, or commitments, or any combination of these documents" must be in writing where the financial institution makes a financial accommodation in an amount that exceeds $50,000. These agreements must also be "signed by the party to be bound or by that party's authorized representative" to be enforceable. *Grievous v. Flagstar Bank FSB, Civ. A. No. H-11-246, 2012 U.S. Dist. LEXIS 72354, 2012 WL 1900564 (S.D. Tex. 2012), quoting Tex. Bus. & Com. Code Ann. § 26.02(b).* Texas and federal courts have held that any subsequent agreement to modify loan term must also be in writing. *Wiley v. U.S. Bank, N.A., 2012 U.S. Dist. LEXIS 74548 (N.D. Tex. 2012) quoting Montalvo v. Bank of America Corp., 864 F. Supp. 2d 567 (W.D. Tex. 2012); Martins v. BAC Home Loans Servicing, L.P., No. 12-20559, 2013 U.S. App. LEXIS 8529 (5th Cir. 2013)(Allegations that loan servicer had orally agreed to modify loan agreement failed due to the statute of frauds). SP Terrace, L.P. v. Meritage Homes of Tex., LLC, 334 S.W.3d 275 (Tex. App.—Houston, 2010)("Texas state and federal courts have held that if a contract falls within the ambit of the statute of frauds, then "any subsequent oral modification to the contract" also falls within the ambit of the statute of frauds"). Pittard v. CitiMortgage, Inc., 2020 U.S. Dist. LEXIS 132558, 2020 WL 4289385 (W.D. Tex. 2020) (to be enforceable, any modification of the loan agreement would have to be in writing and signed by the party to be bound).* The Statute of frauds may be a bar to foreclosure cause of action where there is an oral agreement to modify a mortgage loan. *Barcenas v. Fed. Home Loan Mortg. Corp., No. H-12-2466, 2013 U.S. Dist. LEXIS 9405 (S.D. Tex. Jan. 24, 2013).* Home equity loans on homestead and modifications to home equity loans must also be in writing if the value is more than $50,000. *Mulvey v. U.S. Bank N.A., 570 S.W.3d. 355 (Tex. App. -El Paso, 2018).*

For loans with a value of less than $50,000, the Texas Supreme Court set forth the standard for acceptable oral modifications in *Garcia v. Karam*. The issue before the Court is whether the Court of Civil Appeals correctly held that the original oral modification of the written contract was not prohibited by the Statute of Frauds. The Court found that it "should look to the written contract before modification and to the

character of the modification itself to answer this question. The Court noted that "if neither the portion of the written contract affected by the subsequent modification nor the matter encompassed by the modification itself is required by the Statute of Frauds to be in writing, then the oral modification will not render the contract unenforceable." *Garcia v. Karam, 154 Tex. 240, 276 S.W.2d 255 (Tex. 1955).* The Court held that "the oral modification did not violate the Statue of Frauds because it did not constitute a change in the character or value of the consideration originally contracted for. . . . and the subject matter of the contract has not been changed, but only the method of performing it". *Id.* Thus, a modification is unenforceable unless it is in writing when the modification encompasses a matter required to be in writing by the Statute of Frauds. I*d*. Barnett v. Legacy Bank of Tex., 2003 Tex. App. LEXIS 8873 (Tex. App. Eastland , 2003). Texas courts have further held material modifications to the original loan agreement must be in writing. *Horner v. Bourland, 724 F.2d 1142 (5th Cir. 1984) ("Some oral modifications need not be in writing if they do not materially alter the obligations imposed by the original contract).* For example, an oral modification agreement is not permissible to modify the percentage of interest to be paid, the amounts of installments, security rights, the terms of the remaining balance on the loan, the amount of monthly payments, the date of the first payment, and the amount to be paid monthly for taxes and insurance. *Id*. *Foster v. Mutual Savings Association, 602 S.W.2d 98 (Tex.Civ.App. -- Fort Worth, 1980); Barcenas v. Fed. Home Loan Mortg. Corp., No. H-12-2466, 2013 U.S. Dist. LEXIS 9405 (S.D. Tex. 2013)(Statute of frauds barred a wrongful foreclosure cause of action based on alleged oral agreements to modify a mortgage loan. Promissory estoppel did not provide an exception because the borrowers did not plead a promise to sign an existing written document complying with the statute of frauds.); Deuley v. Chase Home Finance, LLC, Civ. A. No. H-05-04253, 2006 U.S. Dist. LEXIS 28417, 2006 WL 1155230 (S.D. Tex. Apr. 26, 2006)("[W]here the plaintiffs allege that they applied for a specific program altering their obligations under the original loan and came to an oral agreement with the bank regarding this program, this is a material alteration of the underlying contract and thus subject to the statute of frauds").*

MODIFICATIONS OF TEXAS HOME EQUITY LOAN

Practitioners may want to consider additional questions raised by the requirements of Article XVI, Section § 50(a)(6) of the Texas Constitution; Chapter 153 of the Texas Administrative Code; the Home Equity Modification Advisory Bulletin; and *Sims* as it relates to home equity loans and what needs to be included in a modification of a Texas home equity loan.

Texas Constitution

Practitioners may want to consider if a modification of a home equity loan meets the requirements of Article XVI, Section § 50(a)(6) of the Texas Constitution. In Texas, a home equity loan on homestead property must conform to the requirements of Article XVI, Section § 50(a)(6) of the Texas Constitution. Section § 50(a)(6)(M)(iii) states as follows:

> …
> (a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for:
> …
> (6) an extension of credit that: . . .
> (M) is closed not before: . . .

Title search: Loan Modifications

First appeared as part of the conference materials for the
55th Annual William W. Gibson, Jr. Mortgage Lending and Servicing Institute session "Annotated Loan Modification"