

REPORTER

CONTENTS

Volume 53, No. 3

CLICK ON THE TITLE
BELOW TO JUMP TO ARTICLE

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ABOUT THE REPORTER

POTPOURRI

by Gerry W. Beyer
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3

CURRENT DEVELOPMENTS

ESTATE PLANNING CASE UPDATE

by Gerry W. Beyer
gwb@professorbeyer.com

4

GUARDIANSHIP LAW CASE NOTES

by Chasity W. Thomas
CThomas@craincaton.com

6

REAL ESTATE UPDATE

by David A. Weatherbie
dweatherbie@cwrwlaw.com

11

COMMON INTEREST OWNERSHIP CASE UPDATE

by W. Austin Barsalou
abarsalou@barsalou.com

32

REAL ESTATE AND OIL & GAS TAX DEVELOPMENTS

by Edward E. Hartline
hartline@ohdlegal.com

34

FEATURED ARTICLES

DRAFTING FAIR DEFAULT REMEDIES IN REAL ESTATE CONTRACTS

by James D. Eggleston, Jr.

40

INTERNATIONAL ESTATES OVERVIEW

by Joshua Dietz
jddietz@jddietz.com

51

WHAT EVERY LAWYER SHOULD "FRANKLY" KNOW ABOUT MORTGAGES AND THE DODD-FRANK ACT

by Julie Pettit & Ma Jnana Ananda
julie_a_pettit@yahoo.com & mananda@smu.edu

56

A TEXAS NOTARY'S GUIDE TO ESTATE PLANNING DOCUMENTS

by Gerry W. Beyer
gwb@professorbeyer.com

59

TOO "QUALIFIED"? OR NOT "QUALIFIED" ENOUGH?-CRITICISM AND SUGGESTED REFORMS TO THE CURRENTLY INEFFECTIVE "QUALIFIED MORTGAGE" STANDARDS

by Amanda Brett Ethridge

64

THINKING A-DEAD-DEVELOPING SOLUTIONS BY PACKAGING TRADITIONAL ESTATE PLANNING WITH MODERN DEATH PLANNING

by Krizia Martinez
martinez.krizia@gmail.com

83

A DYING CONSIDERATION: BRINGING PARTNERSHIP ESTATE PROTECTION BACK TO LIFE

by Jordyn Anders

100

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The Official Journal of the Real Estate, Probate and
Trust Law Section State Bar of Texas

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The REPTL Reporter is the official journal of the Real Estate, Probate and Trust Law Section of the State Bar of Texas (REPTL). It is published by REPTL to provide education and information for REPTL members in the areas of real estate, probate, trust, guardianship, tax and water law. A copy of each issue is furnished to the members of REPTL as part of their section dues.

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WHAT EVERY LAWYER SHOULD “FRANKLY” KNOW ABOUT MORTGAGES AND THE DODD-FRANK ACT

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You have probably heard a lot about the Dodd-Frank Act in recent years, but how much do you know about its inception and how it affects the financing of real estate? If your practice is not immersed on a day-to-day basis in mortgage issues, but you still practice in the areas of real estate and/or probate law, here are some basics about the Dodd-Frank Act as pertains to mortgage financing that you need to be aware of to protect yourself—and your clients.

Origins of the Dodd-Frank Act

In 2010, Congress adopted the [Dodd-Frank Wall Street Reform and Consumer Protection Act](#) (the Dodd-Frank Act or, as I will refer to it here, simply “Dodd-Frank”). Dodd-Frank was developed in response to the national financial crisis of the late 2000s and sought to provide more regulation and oversight to the banking and financial industry. It is named after two legislators who sponsored the bill: Barney Frank, a former congressman from Massachusetts, and Christopher Dodd, a former senator from Connecticut. Dodd-Frank was a response to public outcry over the Great Recession and addressed some of the most insidious problems within the financial industry that led to the real estate bubble bursting and the subsequent big bank bailouts.

Title XIV—the Mortgage Reform and Anti-Predatory Lending Act

Of most interest to real estate borrowers and the attorneys that serve them is Title XIV within Dodd-Frank, which concerns mortgage reform. After the housing bubble burst, it became common knowledge that lenders had been making loans to borrowers who could not afford to keep up the monthly payments, then foreclosing on the homes. This was known as predatory lending, and it enriched lenders because they could receive months or years of mortgage payments, in addition to any forfeited down payment, and then they could turn around and resell the foreclosed home.

Minimum Standards for Lenders

Perhaps the most important development within Title XIV, and certainly the one that has received the most attention, is the setting of minimum standards for lenders. With the advent of the Ability-To-Repay/Qualified Mortgage (ATR/QM) Rule, a mortgage lender now must have “a reasonable and good faith determination . . . that the consumer has a reasonable ability to repay the . . . loan[.]” Lenders have a new duty to verify income and then to determine, based on a fixed-year mortgage, whether the borrower has the means to repay the loan. There are civil penalties for lenders who do not follow these rules and increased options available to borrowers (including award of attorney’s fees) who fall prey to this sort of predatory lending. However, borrowers who at the time of the origination had the income and ability to repay but later face financial hardships are not protected by this rule.

What Factors Must a Lender Take Into Account?

The determination must include an evaluation of eight ATR underwriting factors: (1) current or

reasonably expected income or assets that the consumer will rely on to repay the loan; (2) current employment status of the consumer; (3) monthly mortgage payment for the loan; (4) monthly payments on any simultaneous loans secured by the same property; (5) monthly payments for property taxes and insurance, and other costs related to the property, such as homeowners association fees or ground rent; (6) debts, alimony, and child support obligations; (7) monthly debt-to-income ratio or residual income; and (8) credit history.

What are Lenders Forbidden from Doing?

Several abusive practices from the days of the housing boom have been targeted. Amongst the most egregious are “steering,” “affinity fraud,” and (perhaps most shocking) outright lying to a borrower about the borrower’s correct credit score or the appraised value of a home. “Steering” refers to a practice in which mortgage brokers or loan officers referred borrowers with good credit scores, who could have easily qualified for low-rate loans, into subprime mortgages with much higher interest. This put extra money into the pockets of unscrupulous lenders. “Affinity fraud” is a practice in which loan officers used shared traits such as ethnicity between themselves and borrowers to build trust and then abused that trust by engaging in unscrupulous lending practices, such as the aforementioned steering. Both of these practices are now specifically illegal under Dodd-Frank, as well as lying about a borrower’s credit score or about an appraisal used in connection with an application for a mortgage.

Foreclosures Under the Dodd-Frank Act

In addition to lending procedures, foreclosure law has been impacted by Dodd-Frank as well. Now, lenders are required to wait until borrowers are 120 days or more delinquent prior to sending an acceleration notice or actually filing for foreclosure. And, if the borrower files a loss mitigation application before foreclosure has started, Dodd-Frank incorporates additional restrictions on a lender’s ability to file for foreclosure. These servicing requirements went into effect as of January 10, 2014, but they apply to loans that were originated both prior to and after this date.

Unfortunately, not all loan foreclosures are protected by Dodd-Frank. The legislation focused heavily on mortgages, and the servicing requirements described above do not apply to home equity lines of credit (HELOC), time-share loans, or reverse mortgages amongst others. For instance, homeowners facing foreclosure under Texas Rules of Civil Procedure Rule [736](#) for a HELOC loan cannot claim these protections. In addition, there are some exceptions that apply to loans that are secured by property other than the consumer’s principal residence and for small mortgage servicers.

The Consumer Financial Protection Bureau (CFPB)

Title XIV of Dodd-Frank also authorized the creation of the new [Consumer Financial Protection Bureau](#), which is an independent federal agency devoted to acting as a watchdog in the financial sector, promulgating financial guidelines for consumers’ protections, and various regulatory activities. It also writes and enforces rules for many financial institutions and tracks consumer complaints about financial products such as mortgages, credit cards, and student loans.

The Future of Mortgage Financing

This is just a brief overview of some of the complex ways in which Dodd-Frank affects real estate financing. As time passes since its inception, and especially as the newly-created Consumer Financial Protection Bureau flexes its (regulatory) muscles, we will continue to see new ways in which Dodd-Frank

impacts consumer protection law. Especially in regard to mortgages, the effects of this higher level of regulatory protection for homeowners requires the attorneys who represent them to keep abreast of the newest regulations and interpretive case law that impacts both the rights and remedies of borrowers. As always, it is an exciting time to be on the forefront of real estate law!