

SUBJECT: Rights of parties to an executory contract for conveyance of real property

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 6 ayes — Giddings, Elkins, Solomons, Taylor, Vo, Zedler

0 nays

3 absent — Bailey, Bohac, Martinez

SENATE VOTE: On final passage, April 27 — 29-1 (Nelson)

WITNESSES: For —Clare Crawford, Texas ACORN Members' Translator; Toni McElroy, ACORN; Walter Toledo, Houston ACORN; Santiago Cornejo

Against — None

BACKGROUND: Under executory contracts for the conveyance of real property, interest in real property passes from the seller to the buyer only when all requirements of the contract have been met, including payment in full for the property.

Deceptive trade practices are defined and prohibited in the Business and Commerce Code, ch. 17. A consumer who files suit under ch. 17 for a deceptive trade practice is eligible to recover economic damages. If the judge or jury finds that the seller acted knowingly, the consumer also may recover mental anguish damages, and the judge or jury may triple the amount of economic damages. If the judge or jury finds that the seller acted intentionally, the judge or jury may triple the combined amount of the economic and mental anguish damages. A consumer may also recover reasonable attorney's fees and other damages.

DIGEST: CSSB 629 would amend Business and Commerce Code, ch. 5, subch. D, to entitle a buyer, at any time and without penalties, to convert an interest in property under an executory contract into recorded, legal title. To do so, the buyer would have to deliver to the seller a promissory note equal to the amount owed under the executory contract, containing the same interest, due dates, and late fees. Within 10 days of receiving the

promissory note, the seller would have to execute a deed conveying recorded, legal title to the buyer. Simultaneously, the buyer would be required to execute a deed of trust that secured the buyer's payment and conveyed the property to a trustee with authority to sell the property if the buyer defaulted on the promissory note. A seller who refused without legal justification to convey recorded, legal title to the buyer would be liable to the buyer for liquidated damages of \$250 per day each day past the 10th day the seller received the promissory note and failed to comply. The daily penalty would increase to \$500 per day after the 90th day of non-compliance. The seller also would be liable to the buyer for reasonable attorney's fees.

The bill would prohibit a person who had a right of first refusal in real property from charging a fee for declining to exercise that right, such as a fee for providing written evidence of declination. Under the bill, an option to purchase real property that included or was combined or executed concurrently with a residential lease agreement, together with the lease, would be considered an executory contract for conveyance. Further, the bill would exclude a lease-option agreement if the contract was three years or less and the purchaser and seller had not been parties to an executory contract to purchase the property for longer than three years.

The bill would add sec. 5.0721 to the Property Code, requiring an executory contract to contain a legal description of the property and an explanation of the buyer's right to receive an annual accounting statement and the buyer's remedies if the seller failed to provide the accounting. The seller could not place any liens or encumbrances on the property that were not disclosed in the contract and would be required to state that the property had been lawfully subdivided and platted. The seller could not include in the contract a provision that forfeited an option fee because of a late payment. Any provision in the contract that attempted to waive a right or exempt a party from liability or a duty required by subch. D would be void. At the time the contract was executed, the seller would have to provide to the buyer copies of application forms for any tax exemption available from property taxes for residential property and a description of those exemptions, and at execution, would provide an amortization schedule showing all payments due under the contract, including a breakdown of the adjustment of the interest and principal in each payment.

The annual accounting statement would have to include the amount of interest paid under the contract and a disclosure notifying the buyer that

the interest paid under the contract might be tax deductible.

The bill would amend Local Government Code, sec. 212.0115(c) to entitle a purchaser of real property under a contract for deed or executory contract to obtain information on whether a plat for the land the purchaser had contracted to buy was required and whether such a plat had been approved. The bill would add sec. 5.083 to the Property Code to allow a buyer to cancel and rescind an executory contract at any time if the buyer learned that the seller had not properly subdivided or platted the property. After the seller received notice of cancellation from the buyer, the seller would have 10 days either to notify the buyer of an intention to properly subdivide or plat the property or return to the buyer all payments made under the contract, including any payments for property taxes paid and the value of any improvements made to the property. The seller could not terminate the buyer's possession of the property before the seller paid the buyer this money. A buyer could not cancel the contract if, within 90 days of receiving notice of the buyer's intent to cancel, the seller properly subdivided or platted the property and notified the buyer.

The buyer could deduct from any amount owed to the seller any amount the seller owed to the buyer under subch. D, and could do so without taking judicial action.

A potential seller could not execute an executory contract with a potential buyer if the seller did not own the property in fee simple, free from any liens or encumbrances. The seller also would have to maintain fee simple title for the duration of the contract. A buyer could agree, before the contract was executed, to accept property that was not held in fee simple if the encumbrance on the property resulted from the seller obtaining a loan in the past to purchase the property. A buyer also could agree, after the contract was executed, that an encumbrance could be placed on the property in order to obtain a loan to make improvements to the property. A violation of this section would be a false, misleading, or deceptive act or practice, actionable in a public or private suit brought under the Business and Commerce Code, ch. 17, Deceptive Trade Practices. A violation also would entitle the buyer to cancel and rescind the contract, receive from the seller the return of payments made and reimbursement of payments for

property taxes paid, and the value of any improvements made to the property.

The bill also specifically would address what are commonly known as rent-to-own agreements for homes. It would amend the Property Code to state that ch. 5, subch. D, and ch. 92, applied to a residential lease of real property, including a lease with an option to buy the property. Such a lease would be defined as an executory contract. Ch. 92 would cease to apply to the contract if the tenant exercised the option to purchase. The seller could not include in the contract a provision that increased the purchase price or penalized a buyer who was leasing with an option to buy for requesting repairs.

Except as provided by a contract entered into before September 1, 2005, sec. 5.014 would apply only to a fee that was solicited on or after that date. The changes to law made by secs. 5.062 and 5.0621 would apply to an executory contract in effect on September 1, 2005, regardless of the date on which the buyer and seller entered into the contract. The changes and additions in law made by secs. 5.0721, 5.0731, and 5.073 would apply to an executory contract for conveyance entered into on or after September 1, 2005. The changes in law made by sec. 5.077(b) would apply to an annual accounting statement provided on or after September 1, 2005. The changes in law made by secs. 5.081 and 5.082 would apply to a conversion of title initiated or a request made on or after September 1, 2005. Sec. 5.083 would apply to a seller's failure or refusal to subdivide or plat real property on or after September 1, 2005, regardless of the date on which the buyer and seller entered into the contract. Sec. 5.084 would apply to the computation of any amount owed to the seller by the buyer under the terms of any executory contract on or after September 1, 2005, regardless of the date on which the buyer and seller entered into the contract. Sec. 5.085 would apply to an executory contract entered into on or after September 1, 2005. The bill would take effect September 1, 2005.

**SUPPORTERS
SAY:**

Executory contracts – which include contracts for deed and rent-to-own contracts – have been used more frequently in recent years as predatory lenders prey on the immigrant, minority, and low-income populations of Texas. Under such a contract, the seller holds the deed for the property until the buyer has paid for the property in full. If the buyer for any reason does not pay in full for the property, such as if the buyer moves or is evicted, the seller keeps the deed and all money paid under the contract. The buyer never earns equity in the house. The seller does not have to institute foreclosure proceedings to regain possession of the house.

Executory contracts are not well regulated. As a result, abuse of such

contracts has become rampant in Texas. This has come to the public's attention after thousands of people in Houston lost their homes under such contracts with a single seller. CSSB 629 would provide numerous protections for buyers under such contracts, while not banning them outright, and would not place too great a burden on legitimate sellers.

Additionally, the bill would prohibit solicitation of fees in exchange for a waiver of a right of first refusal. Condominium owners and owners of time-share property or homeowners who are members of property owners' associations frequently experience exploitation by holders of interest (with the first option) charging fees for written evidence that declines the right of first refusal.

In its current form, CSSB 629 would be identical to the engrossed version of HB 1823 by Dutton, which passed the House on May 12.

**OPPONENTS
SAY:**

CSSB 629 could make it more difficult for lower income people or people with poor credit histories to buy a house in Texas because sellers may be less likely to sell a house under a contract for deed due to restrictions and regulations imposed by the bill.

As to the right of first refusal, property owners are aware of a holder of interest's ability to charge a fee from a written conveyance. The provision to charge a fee usually comes with a time period after which the fee would be waived, usually 10 to 60 days. A property owner could wait the specified length of time before completing a sale in order to avoid the declination fee by the holder of interest.

NOTES:

The committee substitute differs from the Senate-passed bill by including:

- a prohibition on soliciting fees in exchange for a waiver of a right of first refusal;
- the exclusion from the bill's provisions of a lease-option agreement of three years or less; and
- information required in an executory contract, including legal description and proper platting.

The companion bill, HB 1823 by Dutton et al., passed the House on May 12 and was reported favorably, as substituted, by the Senate Business and Commerce Committee on May 20.