

BILL ANALYSIS

Senate Research Center
85R7727 AJA-F

S.B. 1405
By: Creighton
Business & Commerce
4/11/2017
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Certain aspects of the foreclosure process in Texas, including the reasonableness of fees charged by the trustees who conduct foreclosure auctions, the process of the auction itself, and the requirements for involved parties after the auction, are ill-defined.

S.B. 1405 amends the Business & Commerce Code to authorize a trustee or substitute trustee conducting a public sale of residential real property under a power of sale in a security instrument to contract with an attorney to advise the trustee or substitute trustee or to administer or perform any of the trustee's or substitute trustee's functions or responsibilities under a security instrument or the bill's provisions, or with an auction company to arrange, manage, sponsor, or advertise a public sale.

S.B. 1405 requires a winning bidder at such a sale, other than the foreclosing mortgagee or mortgage servicer, to provide specified information to the trustee or substitute trustee at the time the trustee or substitute trustee completes the sale and authorizes the trustee or substitute trustee to decline to complete the transaction or deliver a deed if a winning bidder required to provide such information fails or refuses to so provide.

S.B. 1405 requires the trustee or substitute trustee to provide the winning bidder with a receipt for the sale proceeds tendered and, except when prohibited by law and within a reasonable time, to deliver the deed to the winning bidder or to file the deed for recording.

S.B. 1405 requires the trustee or substitute trustee to ensure that funds received at the sale are maintained in a separate account until distributed and to cause to be maintained a written record of deposits to and disbursements from the account.

S.B. 1405 requires the trustee or substitute trustee to make reasonable attempts to identify and locate the persons entitled to all or any part of the sale proceeds.

S.B. 1405 authorizes a trustee or substitute trustee to receive in connection with the sale and specified related post-sale actions reasonable actual costs incurred, a reasonable trustee's or substitute trustee's fee, and reasonable trustee's or substitute trustee's attorney's fees and sets out provisions relating to the timing, payment, and reasonableness of such fees.

S.B. 1405 entitles a trustee or substitute trustee who prevails in a suit based on a claim that relates to the sale and that is found by a court to be groundless in fact or in law to recover reasonable attorney's fees necessary to defend against the claim and authorizes such fees to be paid from the excess sale proceeds, if any.

S.B. 1405 establishes that nothing in these provisions precludes the filing of an interpleader action or the depositing of funds in a court registry.

As proposed, S.B. 1405 amends current law relating to the public sale of real property under a power of sale in a security instrument.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Title 2, Business & Commerce Code, by adding Chapter 22, as follows:

CHAPTER 22. PUBLIC SALE OF RESIDENTIAL REAL PROPERTY UNDER POWER OF SALE

Sec. 22.001. DEFINITIONS. Defines "auction company, "residential real property," "security instrument," "substitute trustee," and "trustee."

Sec. 22.002. APPLICABILITY. Provides that this chapter applies only to a public sale of residential real property conducted under a power of sale in a security instrument.

Sec. 22.003. AGREEMENTS CONCERNING SALE. Authorizes a trustee or substitute trustee conducting a sale to which this chapter applies to enter into a written agreement with:

- (1) an attorney to advise the trustee or substitute trustee or to administer or perform any of the trustee's or substitute trustee's functions or responsibilities under a security instrument or this chapter; or
- (2) an auction company to arrange, manage, sponsor, or advertise a public sale.

Sec. 22.004. INFORMATION FROM WINNING BIDDER. (a) Requires a winning bidder at a sale to provide the following information to the trustee or substitute trustee at the time the trustee or substitute trustee completes the sale:

- (1) certain contact information of the bidder and of each individual tendering or who will tender the sale price for the winning bid;
- (2) if the bidder is acting on behalf of another individual or organization, certain contact information of the individual or organization and the name of a contact person for the organization;
- (3) the name and address of any person to be identified as the grantee in a trustee's or substitute trustee's deed;
- (4) the purchaser's tax identification number;
- (5) a government-issued photo identification to confirm the identity of each individual tendering funds for the winning bid; and
- (6) any other information reasonably needed to complete the trustee's or substitute trustee's duties and functions concerning the sale.

(b) Authorizes the trustee or substitute trustee, if a winning bidder fails or refuses to provide the information described by Subsection (a), to decline to complete the transaction or deliver a deed.

Sec. 22.005. RECEIPT AND DEED. Requires the trustee or substitute to provide the winning bidder with a receipt for the sale proceeds tendered and except when prohibited by law, within a reasonable time deliver the deed to the winning bidder or file the deed for recording.

Sec. 22.006. SALE PROCEEDS. (a) Requires the trustee or substitute trustee to cause funds received at the sale to be maintained in a separate account until distributed. Requires the trustee or substitute trustee to cause to be maintained a written record of deposits to and disbursements from the account. Provides that the trustee, the substitute trustee, or an agent acting pursuant to an agreement under Section 22.003 is not considered a fiduciary with respect to the account.

(b) Requires the trustee or substitute to make reasonable attempts to identify and locate the persons entitled to all or any part of the sale proceeds.

(c) Authorizes a trustee or substitute trustee, in connection with the sale and related post-sale actions to identify persons with legal claims to sale proceeds, determine the priority of any claims, and distribute proceeds to pay claims, to receive:

(1) reasonable actual costs incurred, including costs for evidence of title;

(2) a reasonable trustee's or substitute trustee's fee; and

(3) reasonable trustee's or substitute trustee's attorney's fees.

(d) Provides that a fee described by Subsection (c):

(1) is considered earned at the time of the sale;

(2) may be paid from sale proceeds in excess of any first priority purchase money lien payoff; and

(3) is conclusively presumed to be reasonable if the fee:

(A) is not more than the lesser of 2.5 percent of the sale proceeds or \$5,000, for a trustee's or substitute trustee's fee; or

(B) is not more than 1.5 percent of the sale proceeds, for trustee's or substitute trustee's attorney's fees incurred to identify persons with legal claims to sale proceeds and determine the priority of the claims.

(e) Provides that a trustee or substitute trustee who prevails in a suit based on a claim that relates to the sale and that is found by a court to be groundless in fact or in law is entitled to recover reasonable attorney's fees necessary to defend against the claim, which may be paid from the excess proceeds, if any.

(f) Provides that nothing in this section precludes the filing of an interpleader action or the depositing of funds in a court registry.

SECTION 2. Amends Section 1802.001, Occupations Code, by adding Subdivision (14) to define "security instrument," "substitute trustee," and "trustee."

SECTION 3. Reenacts Section 1802.002(a), Occupations Code, as amended by Chapters 777 (H.B. 2481) and 1230 (S.B. 1982), Acts of the 84th Legislature, Regular Session, 2015, and amends it as follows:

(a) Provides that this chapter does not apply to:

(1) through (3) makes no changes to these subdivisions;

(4) a foreclosure sale of real property personally conducted by a trustee or substitute trustee under a security instrument, rather than a foreclosure sale of real property personally conducted by a trustee under a deed of trust;

(5) through (14) makes no changes to these subdivisions.

SECTION 4. Makes application of this Act prospective.

SECTION 5. Provides that to the extent of any conflict, this Act prevails over another Act of the 85th Legislature, Regular Session, 2017, relating to nonsubstantive additions to and corrections in enacted codes.

SECTION 6. Effective date: September 1, 2017.