

BILL ANALYSIS

C.S.H.B. 3083
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Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

A dragnet clause is a provision in a mortgage, deed of trust, or other security agreement that grants a security interest for other past debts or, more commonly, subsequent debts, as well as the present indebtedness. For example, language in a note that states that the loan is in default if the borrower defaults on other loans secured by the same property is a dragnet clause. When the collateral for one loan also is used as collateral for another loan, as in a second mortgage, the relationship is described as cross-collateralization. In the case of a real estate deed of trust, the dragnet clause provides that the property involved secures both the note that attends the deed of trust and the payment of other, future indebtedness.

Texas courts recognize the enforceability of a dragnet clause if the subsequent debt to be secured was reasonably within the contemplation of the parties to the deed of trust at the time it was executed. This situation can be onerous to a third party who, after execution of the deed of trust and the closing of the loan secured by the deed of trust, becomes the guarantor of the note attendant to the deed of trust. The guarantor may be unaware of and have no notice of the subsequent debt secured by the dragnet clause. Such a guarantor may lose its entire investment if the lender forecloses on the secured property as the result of the original debtor's default on the subsequent debt, though the guarantor had no knowledge of that subsequent debt. Current law does not require either party to the original deed of trust to provide the guarantor with notice of subsequent debts that are cross-collateralized.

C.S.H.B. 3083 requires a mortgagee to provide a specific written notice to a person before the person agrees to become obligated as a surety or guarantor on a loan secured by a deed of trust, and requires the notice to include information relating to the effects of a dragnet clause. The bill establishes that the failure to provide such notice removes the person's liability for certain obligations.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 3083 amends the Business & Commerce Code to require a mortgagee to provide a written notice to a person before the person agrees to become obligated as a surety or guarantor on a loan secured by a deed of trust. The bill sets out the language for the notice, which advises the person to review all documents with an attorney and informs the person of the effects of a dragnet clause. The bill requires the notice to be provided on a form separate from the guaranty or surety agreement and signed and dated by the surety or guarantor. The bill provides that, if a mortgagee fails to provide the required notice, the person entitled to the notice is not liable for obligations on the loan if any dragnet clause included in the deed of trust would prevent the surety or guarantor from being subrogated to the mortgagee's or the other holder's security interest in the property subject to the deed of trust. The bill makes its provisions applicable only to such an agreement that is entered into on or after January 1, 2010.

EFFECTIVE DATE

September 1, 2009.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 3083 differs from the original by requiring the mortgagee to provide written notice before a person agrees to become obligated as a surety or guarantor on a loan secured by a deed of trust, whereas the original requires the notice to be provided before the person becomes obligated as a debtor or guarantor on such a loan. The substitute differs from the original by specifying the language of the written notice, including a statement that if the deed of trust contains a "dragnet clause," which provides that the deed of trust secures other indebtedness, then the deed of trust may not be released in the event the person is called on to honor the obligation as a surety or guarantor, whereas the original requires the written notice to inform the person of conditions that could cause the deed of trust to secure certain specified indebtedness. The substitute adds a requirement not in the original for the notice to be provided on a form separate from the guaranty or surety agreement.

C.S.H.B. 3083 removes a provision in the original that requires an assignee mortgagee or other transferee to provide a guarantor to whom the mortgagee transfers interest notice of the transfer and of all indebtedness secured by the note at the time of the transfer if certain criteria are met.

C.S.H.B. 3083 differs from the original by establishing that, if a mortgagee does not provide the required notice, the person entitled to the notice is not liable for obligations on the loan if any dragnet clause included in the deed of trust would prevent the surety or guarantor from being subrogated to the mortgagee's or other holder's security interest in the property subject to the deed of trust, whereas the original provides that the obligations on the loan of the person entitled to the notice are voidable and entitles the person to the refund of all payments made by the person on the loan to the mortgagee, or any subsequent assignee or transferee, who failed to provide the notice and is entitled to interest on those payments.

C.S.H.B. 3083 differs from the original by making its provisions applicable to an agreement to become obligated as a surety or guarantor on a loan secured by a deed of trust entered into on or after January 1, 2010, whereas the original makes its provisions applicable to a loan closed on or after the bill's effective date of September 1, 2009.