

LENDER ALERT

Absolute Assignment of Rents is Dead in Texas (At Least for All Security Interests Going Forward)

On June 17, 2011, Governor Rick Perry signed SB 889, abolishing absolute assignment of rents in Texas. The new law is currently effective in Chapter 64 of the Texas Property Code.

Texas has long been one of the few states which recognized absolute assignment of rents. Under an absolute assignment of rents, the lender owns legal title of its borrower's rents, while the borrower holds a license to receive those rents. The borrower's license is subject to performance under the note, and can be revoked by the lender upon an event of default. Texas Courts have upheld the absolute assignment of rents while most other jurisdictions only recognize collateral assignment of rents. Under a collateral assignment of rents, the lender takes a security interest in the rents, but does not take legal title. The new law now provides that (a) all assignments of rents provide the lender with only a security interest in the rents (i.e. a collateral assignment of rents) regardless of whether the document is in the form of an absolute assignment and (b) all enforceable security instruments provide lenders with an assignment of rents arising from real property securing an obligation under the security instrument (i.e. the new law creates collateral assignment of rents even if there is no provision for an assignment of rents in the security instrument).

The new law is effective to all security instruments executed after June 17, 2011. Lenders should review their form documents used in their transactions and update them. The new law, however, does not apply to security instruments executed prior to June 17, 2011 that do not contain assignment of rents provisions (i.e. the new law does not create a collateral assignment of rents provisions in pre-June 17, 2011 security instruments where one did not exist, but, as described above, does do so for all security instruments executed after June 17, 2011).

Some other key features of the new law include:

- The assignment of rents is perfected for priority purposes upon the recording of the underlying deed of trust.
- The new law makes it clear where payments are to be made in the event of a default. Upon a default, the lender must give notice to both the landlord and tenant of its right to receive rents. Once notice has been delivered, the lender is entitled to all unaccrued rent under the lease. That means that (i) the landlord must pay to the lender all future/advance rent received and (ii) the tenant must direct its payments to the lender going forward. If a tenant directs payment to the landlord after it has received notice under the statute, the tenant will still be liable for making the scheduled payment to the lender. Thus, tenants risk being responsible for double rent if they ignore the notice. Likewise, if a borrower receives payments which should be directed to the lender under the notice, the borrower must forward such payments to the lender.

All lenders, tenants and landlords need to review the new Texas assignment of rents law and conform their respective documents and practices accordingly.

If you have any questions, please call our office at **(214) 752-2222**, or e-mail **Jason Katz** at jkatz@curtislaw.net.

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