



1-1-2010

New Law Complicates Foreclosure Sales in Texas.

Katherine A. Tapley

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Recommended Citation

Katherine A. Tapley, *New Law Complicates Foreclosure Sales in Texas.*, 41 ST. MARY'S L.J. (2010).
Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol41/iss3/3>

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NEW LAW COMPLICATES FORECLOSURE SALES IN TEXAS

KATHERINE A. TAPLEY*

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I. HOUSE BILL 655—CHANGING THE TIME FOR PAYMENT

A. Introduction

A new law that took effect on September 1, 2009, has changed the way non-judicial real property foreclosure sales¹ work in Texas.² Foreclosure sales occur only on the first Tuesday of the month within a six-hour window, from 10:00 a.m. to 4:00 p.m.³ The property is sold to the highest bidder who, in the past, had to pay with cash or a cash equivalent immediately.⁴

During the eighty-first regular legislative session, concluded in June 2009, the Texas Legislature passed a law related to foreclosure sales known as House Bill 655.⁵ This new law

1. As used in this Article, “foreclosure sale” means a nonjudicial real property foreclosure sale.

2. Act of May 21, 2009, 81st Leg., R.S., ch. 323, § 1, 2009 Tex. Sess. Law Serv. 854, 854 (current version at TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009)) (adopting Tex. H.B. 655).

3. TEX. PROP. CODE ANN. § 51.002(a) (Vernon 2007 & Supp. 2009).

4. See Act of May 23, 2007, 80th Leg., R.S., ch. 903, § 4, 2007 Tex. Gen. Laws 2245, 2246 (amended 2009) (current version at TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009)) (enacting Tex. H.B. 2738, and adding the following: *The purchase price in a sale held by a trustee or substitute trustee under this section is payable immediately on acceptance of the bid by the trustee or substitute trustee*). It is well-settled Texas law that a credit bid against the outstanding indebtedness is considered the equivalent of cash for the purpose of purchasing real property at a foreclosure sale. See *Elmore v. McCammon*, 640 F. Supp. 905, 908 (S.D. Tex. 1986) (recognizing that despite any provisions requiring a cash sale, a credit bid is the equivalent of cash); see also *Blum v. Rogers*, 71 Tex. 668, 677–68, 9 S.W. 595, 597 (1888) (“If the plaintiff becomes the purchaser, the officer ought not to exact payment in coin from him when he is clearly entitled to the proceeds of the sale.”); *Valley Int’l Props., Inc. v. Ray*, 586 S.W.2d 898, 901 (Tex. Civ. App.—Corpus Christi 1979, no writ) (clarifying that a sale will not be avoided where a trustee fails to tender cash in a sale for cash authorized by a deed of trust and instead enters an agreement with the bidder that credit will be given); *McClure v. Casa Claire Apartments, Ltd.*, 560 S.W.2d 457, 461 (Tex. Civ. App.—Beaumont 1977, no writ) (reasoning that to require a noteholder to tender cash at a foreclosure sale would be “idle ceremony” in situations where the same proceeds would be returned to the noteholder instantly); *Habitat, Inc. v. McKanna*, 523 S.W.2d 787, 790 (Tex. Civ. App.—Eastland 1974, no writ) (recognizing that another court had determined that a mortgagee’s bid not actually paid in cash but instead applied as credit has the equivalent effect of a cash receipt (citing *Thomason v. Pac. Mut. Life Ins. Co. of Cal.*, 74 S.W.2d 162 (Tex. Civ. App.—El Paso 1934, writ ref’d))).

5. See Act of May 21, 2009, 81st Leg., R.S., ch. 323, § 1, 2009 Tex. Sess. Law Serv. 854, 854 (current version at TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009)) (changing the time period for payment at a public nonjudicial real property foreclosure sale to state that “[t]he purchase price in a sale held by a trustee or substitute trustee under this section is *due and payable without delay . . . on acceptance of the bid or within*

complicates foreclosure sales in Texas during a time when foreclosures are up and regular real estate sales are down.⁶ Although the changes made by this law at first glance may appear simple, they could change the face of foreclosure sales in Texas—affecting everyone involved in the process from property owners to lenders and purchasers at the sale. As a result, lawsuits related to foreclosure sales may increase.

Imagine the following: A property owner has failed to make loan payments for several months, and the lender has decided to foreclose. The lender has taken all the steps necessary for the foreclosure, and it is the day of the foreclosure sale. Two parties show up to the sale, and each would like to purchase the property. The sale begins. The first party bids \$100,000 cash; this party has a cashier's check for that amount at the sale. The second party bids \$125,000 but does not have cash. The second party asks for additional time to get the money. Can payment be made tomorrow or at some other later time? Which potential buyer gets to purchase the property? Prior to the changes in the law made by House Bill 655, the answers would have been clear. The party with the cash at the time of the sale would have been allowed to purchase the property. As of September 1, 2009, however, there is no longer a clear answer to this question.

B. *Background*

House Bill 655 changed less than one full sentence of the Texas

such reasonable time as may be agreed upon by the purchaser and the trustee or substitute trustee if the purchaser makes such request for additional time to deliver the purchase price . . .”); see also TEX. PROP. CODE ANN. § 51.0075 (Vernon Supp. 2009) (codifying the statutory change).

6. See Dan Levy, *Foreclosure Filings in U.S. Reach Record 1.5 Million (Update2)*, BLOOMBERG.COM, July 16, 2009, <http://www.bloomberg.com/apps/news?pid+20601087&sid=aHAbmgVoHjA4> (detailing that one of eight Americans is late on a mortgage payment or is already in foreclosure); see also Les Christie, *Foreclosure Plague: No Cure Yet*, CNNMONEY.COM, Aug. 13, 2009, http://money.cnn.com/2009/08/13/real_estate/july_foreclosures/ (explaining that one in every 355 homes in the United States has had at least one foreclosure filing); Les Christie, *Foreclosures Spike 112%—No End in Sight*, CNNMONEY.COM, Apr. 29, 2008, http://money.cnn.com/2008/04/29/real_estate/foreclosures_still_rising/index.htm?postversion=200842909 (discussing the United States residential foreclosure crisis and which states were hit the hardest).

Property Code.⁷ Before House Bill 655, Texas Property Code section 51.0075(f) stated: “*The purchase price in a sale held by a trustee or substitute trustee under this section is payable immediately on acceptance of the bid by the trustee or substitute trustee.*”⁸ House Bill 655 amended this section to state:

The purchase price in a sale held by a trustee or substitute trustee under this section is *due and payable without delay . . . on acceptance of the bid or within such reasonable time as may be agreed upon by the purchaser and the trustee or substitute trustee if the purchaser makes such request for additional time to deliver the purchase price . . .*⁹

The purchase price at the foreclosure sale is no longer due immediately.¹⁰ Instead, if a purchaser at a foreclosure sale requests additional time to deliver the purchase price, the trustee¹¹—the person conducting the foreclosure sale—may make an agreement with the purchaser to allow the purchaser additional time to deliver the purchase price.¹²

Texas Property Code section 51.0075(f) is a relatively new statute, with the original version effective only since June 15, 2007.¹³ House Bill 655 contains the first legislative amendment to

7. See Act of May 21, 2009, 81st Leg., R.S., ch. 323, § 1, 2009 Tex. Sess. Law Serv. 854, 854 (current version at TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009)) (altering the process for payment at a foreclosure sale in Texas).

8. Act of May 23, 2007, 80th Leg., R.S., ch. 903, § 4, 2007 Tex. Gen. Laws 2245, 2246 (amended 2009) (current version at TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009)).

9. Act of May 21, 2009, 81st Leg., R.S., ch. 323, § 1, 2009 Tex. Sess. Law Serv. 854, 854 (current version at TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009)).

10. Compare Act of May 23, 2007, 80th Leg., R.S., ch. 903, § 4, 2007 Tex. Gen. Laws 2245, 2246 (amended 2009) (current version at TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009)) (requiring immediate payment upon acceptance of the purchase bid), with TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009) (changing the rules regarding the time frame within which payment is required by allowing the parties to agree that payment will be made within a reasonable time as opposed to immediately).

11. For simplicity, the word “trustee,” as used in this Article, is intended to include both trustees and substitute trustees.

12. See TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009) (allowing the trustee and the purchaser to agree upon a “reasonable time” by which the payment must be made).

13. See Act of May 21, 2009, 81st Leg., R.S., ch. 323, § 1, 2009 Tex. Sess. Law Serv. 854, 854 (current version at TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009)) (adding Texas Property Code section 51.0075(f), which allows the parties to agree to a

section 51.0075(f).¹⁴

Prior to the enactment of Texas Property Code section 51.0075(f), the common law required trustees to provide purchasers with a reasonable time, during the time of the sale, to obtain the funds to pay the purchase price.¹⁵ In practice, if a successful bidder did not have cash or a cash equivalent, trustees typically provided a recess to allow the successful bidder to obtain and return with the funds. Such recesses typically ended long enough before the end of the sale at 4:00 p.m. so that the trustee could reopen the sale if the winning bidder was unable to return with the funds.

II. THE TRUSTEE'S ROLE

Why are the changes made by House Bill 655 a problem? The law does not provide guidelines for agreeing upon a reasonable time for payment.¹⁶ Further, the law does not even require that an agreement be made; it simply gives the trustee the option to make the agreement.¹⁷ Before this new law, the trustee's role in a foreclosure sale could have been classified as mostly administrative. The rules were very clear. Trustees typically did not act without specific instructions from the lender.¹⁸ Trustees were

delayed payment of a purchase bid).

14. *See id.* (amending Texas Property Code section 51.0075(f) and adjusting when payment is due at a nonjudicial foreclosure sale in Texas).

15. *See* First Fed. Sav. & Loan Ass'n of Dallas v. Sharp, 359 S.W.2d 902, 903 (Tex. 1962) (holding that the trustee should have given the successful bidder time to obtain and return with the cash during the hours of the sale); First Tex. Serv. Corp. v. McDonald, 762 S.W.2d 935, 937 (Tex. App.—Fort Worth 1988, writ denied) (reiterating the Texas Supreme Court's holding that a reasonable time must be given for obtaining the funds to pay the purchase price (citing *Sharp*, 359 S.W.2d 902)), *overruled on other grounds*, Kitchen v. Frusher, 181 S.W.3d 467, 473 (Tex. App.—Fort Worth 2005, no pet.); Intertex, Inc. v. Cowden, 728 S.W.2d 813, 816 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (acknowledging the general rule that “if successful as the highest bidder, [the bidder] must produce the cash within a reasonable time during the hours of the sale”).

16. *See* TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009) (changing less than one sentence of the statute and not providing any guidance for carrying out its provisions).

17. *See id.* (authorizing that additional time “*may* be agreed upon” (emphasis added)).

18. *See, e.g., id.* § 51.0074 (prohibiting a trustee from being “held to the obligations of a fiduciary of the mortgagor or mortgagee” and from being assigned any duties other than conducting the foreclosure sale in accordance with the security agreement).

required to send certain notices at specific times.¹⁹ The notices were required to contain specific information.²⁰ The sale was required to occur during a specific period of time on a specific day.²¹ The highest cash bidder won the bid and purchased the property. The trustee's role was very narrow and did not require much decision-making. The trustee simply followed the specific steps required by law,²² as well as the specific instructions provided by the lender.

In order to understand the effects of the new law, it is necessary to understand the role of the trustee. The Texas Property Code dictates that a trustee cannot be "held to the obligations of a fiduciary of the mortgagor or mortgagee."²³ Further, the trustee "becomes a special agent for both [the mortgagor and the mortgagee], and he must act with absolute impartiality and with fairness to all concerned."²⁴ These parameters must be considered when analyzing the consequences of House Bill 655.

When the changes set forth in House Bill 655 took effect, the trustee's role in Texas changed. Trustees are now required to make decisions in negotiating agreements and determining reasonableness—a concept not clearly defined in the new law.²⁵ It

19. See TEX. PROP. CODE ANN. § 51.002 (Vernon 2007 & Supp. 2009) (detailing the requirements for notices that must be given before a foreclosure sale can occur). Notice of the foreclosure sale must be given at least twenty-one days before the date of the sale. *Id.* § 51.002(b). In the event that the property being foreclosed upon is the debtor's residence, notice of default providing an opportunity to cure must be given at least twenty days before giving the notice of sale. *Id.* § 51.002(d).

20. See *id.* § 51.002 (delineating what information must be contained within the required preforeclosure sale notices).

21. See *id.* § 51.002(a) (explaining that foreclosure sales must occur the first Tuesday of the month between 10:00 a.m. and 4:00 p.m.).

22. See TEX. PROP. CODE ANN. §§ 51.002–.009 (Vernon 2007 & Supp. 2009) (setting forth the requirements and procedures for foreclosure sales in Texas).

23. *Id.* § 51.0074(b)(2) (Vernon Supp. 2009).

24. *First Fed. Sav. & Loan Ass'n of Dallas v. Sharp*, 359 S.W.2d 902, 904 (Tex. 1962); *accord Powell v. Stacy*, 117 S.W.3d 70, 74 (Tex. App.—Fort Worth 2003, no pet.) ("When exercising a power in a deed of trust, the trustee becomes a special agent for both parties, and he must act with absolute impartiality and with fairness to all concerned in conducting a foreclosure."); *Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.—Corpus Christi 1996, no writ) (concluding that a trustee exercising power under a deed of trust is a special agent for the parties and, as such, must be fair and impartial to all concerned "to achieve the objective of the trust").

25. See TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009) (allowing the trustee and the purchaser to agree upon a "reasonable time" for the payment of the

will become more difficult for lenders to provide specific instructions to trustees about which bids to accept because lenders will not be able to know in advance the specific agreements that potential purchasers will request.

III. DEFINING “REASONABLE”—INTERPRETING THE STATUTE

The largest question raised by the changes to the law is: What does it mean to give a potential purchaser a “reasonable” period of time to secure the cash needed to close the sale? Does “reasonable” mean that the potential purchaser must return with the cash during the six-hour window on the first Tuesday of the month? Or does “reasonable” mean that the purchaser could provide the cash the following day, the following week, or even over a period of years as a part of a credit agreement?

A. *Statutory Construction and House Bill 655*

“In construing a statute, [the courts’] objective is to determine and give effect to the Legislature’s intent.”²⁶ The legislative intent of a statute must be determined by looking at the “plain and common meaning” of the words.²⁷ Courts “look first and

purchase price).

26. *Nat’l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000); *accord* *Tex. Dep’t of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004) (“Our primary objective when construing a statute is to ascertain and give effect to the Legislature’s intent.”); *State ex rel State Dep’t of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002) (“In construing a statute, we try to determine and give effect to the Legislature’s intent.”); *Albertson’s, Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999) (stating that the court’s goal in construing a statute is to determine and fulfill the legislative intent); *Gables Realty Ltd. P’ship v. Travis Cent. Appraisal Dist.*, 81 S.W.3d 869, 872 (Tex. App.—Austin 2002, pet. denied) (finding that ascertaining and implementing the legislature’s intent is one of the cardinal rules of statutory construction).

27. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008); *accord* *Sunset Valley*, 146 S.W.3d at 642 (noting that the court begins by looking at the “plain and common meaning” of the words to discern legislative intent (quoting *Gonzalez*, 82 S.W.3d at 327)); *Gonzalez*, 82 S.W.3d at 327 (asserting that when trying to determine the legislative intent, the court looks first to the “plain and common meaning of the statute’s words” (citing *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 865, 865 (Tex. 1999))); *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 529 (Tex. 2002) (construing a statute by looking at the “plain and common meaning” of the words); *Nat’l Liab. & Fire Ins.*, 15 S.W.3d at 527 (“We first look to the statute’s plain and common meaning.”); *Albertson’s*, 984 S.W.2d at 960 (declaring that to construe a statute to effectuate the legislature’s intent, the court starts by looking at the statute’s “plain and common meaning”); *St. Luke’s Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997) (noting that the legislature’s

foremost to the words of the statute.”²⁸ Courts can look to the dictionary for a word’s plain and common meaning.²⁹

Further, the statute must be interpreted “as a whole” and not just by reviewing “isolated portions.”³⁰ Courts “should read every word, phrase, and expression in a statute as if it were deliberately chosen, and presume the words excluded from the statute are done so purposefully.”³¹ “If possible, [courts] must ascertain the Legislature’s intent from the language it used in the statute and not look to extraneous matters for an intent the statute does not state.”³²

As the Texas Supreme Court explained:

Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent in its language and not elsewhere. . . . They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will

intent is determined “from the plain and common meaning of the words used”); *Eddins-Walcher Butane Co. v. Calvert*, 156 Tex. 587, 591, 298 S.W.2d 93, 96 (1957) (stating that “words of enactment will usually be given their ordinary meaning”).

28. *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex. 2006); see *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (explaining that statutory interpretation should “begin with its language”).

29. See *Albertson’s*, 984 S.W.2d at 960 (analyzing the “plain and common meaning” of a word by looking to the Webster’s dictionary); *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998) (utilizing the *American Heritage Dictionary* to determine the plain meaning of a word).

30. *Sunset Valley*, 146 S.W.3d at 642; accord *Gonzalez*, 82 S.W.3d at 327 (“[W]e determine legislative intent from the entire act and not just from isolated portions.”); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (stating that the statute should be looked at as a whole; therefore, one provision should not be given a meaning inconsistent with other provisions in the statute); *Gables*, 81 S.W.3d at 873 (noting that the legislature’s intent should be determined by looking at an act in its entirety).

31. *Gables*, 81 S.W.3d at 873; see *Helena*, 47 S.W.3d at 493 (explaining that by incorrectly reading one portion of a statute separately from the rest of the statute, “one provision [could be given] a meaning out of harmony or inconsistent with other provisions”); *Eddins-Walcher Butane*, 298 S.W.2d at 96 (emphasizing that “each sentence, clause, phrase[,] and word be given effect if reasonably possible”).

32. *Nat’l Liab. & Fire*, 15 S.W.3d at 527; accord *Helena*, 47 S.W.3d at 493 (declaring that the legislature’s intent should be determined by the statute’s language if possible).

clearly sustain.³³

This must be balanced with the requirement that courts must “also consider the objective the law seeks to obtain and the consequences of a particular construction.”³⁴

The Texas Government Code provides a list of matters that a court *may* consider when interpreting a statute, whether or not the court is dealing with an ambiguous statute.³⁵ In addition to the statute’s objective and the consequences of the interpretation discussed above, the Texas Government Code permits considering: (1) “circumstances under which the statute was enacted”; (2) “legislative history”; (3) “common law or former statutory provisions, including laws on the same or similar subjects”; (4) “administrative construction of the statute”; and (5) “title (caption), preamble, and emergency provision[s].”³⁶ Despite the fact that these factors may be considered, the role of a court “is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, [the court’s] task is to interpret statutes in a manner that effectuates the Legislature’s intent.”³⁷

Finally, “[w]hen a statute’s language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language.”³⁸ This furthers the rule that “ordinary

33. *Simmons v. Arnim*, 110 Tex. 309, 324, 220 S.W. 66, 70 (1920), *quoted in* *RepublicBank Dallas, N.A. v. Interkal, Inc.* 691 S.W.2d 605, 607 (Tex. 1985); *accord Helena*, 47 S.W.3d at 493 (stating that courts must construe statutes as written and the courts must, where possible, “ascertain legislative intent from the statute’s language”).

34. *Sunset Valley*, 146 S.W.3d at 642; *see* TEX. GOV’T CODE ANN. § 311.023 (Vernon 2007) (listing matters courts may consider when interpreting statutes).

35. *See* TEX. GOV’T CODE ANN. § 311.023 (Vernon 2007) (listing seven factors that “a court *may* consider among other matters” (emphasis added)).

36. *Id.*; *see also* *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (discussing the other factors that may be considered when construing a statute, “including the objective of the law, its history, and the consequences of a particular construction”).

37. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 690 (Tex. 2007) (quoting *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003)).

38. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008); *accord Shumake*, 199 S.W.3d at 284 (stating that the rules of construction and extrinsic aids should not be used when the statute is clear and unambiguous); *Cail v. Serv. Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983) (noting that clear and unambiguous statutes should be given their plain meaning and rules of statutory construction should not be used); *see State ex rel State Dep’t of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002) (explaining that unambiguous statutes are generally interpreted in accordance with their plain meaning).

citizens [should be] able to rely on the plain language of a statute to mean what it says.”³⁹

B. *How Long Is Reasonable?*

Although the ramifications of the statute at issue are unclear, the plain meaning of the words of the statute are clear and unambiguous. Therefore, the statute should be interpreted by focusing on the actual language of the statute and by reviewing the provision as part of the overall Texas foreclosure statute.

Merriam-Webster's New Collegiate Dictionary defines “reasonable” as “not conflicting with reason,” “not extreme or excessive,” “moderate, fair,” and “possessing sound judgment.”⁴⁰ *Black's Law Dictionary* defines “reasonable” as “[f]air, proper, or moderate under the circumstances” or as “[a]ccording to reason.”⁴¹ The definition of the word alone, however, does not answer the questions raised by the statute.

As previously discussed, prior to the enactment of Texas Property Code section 51.0075(f), trustees were required to provide bidders with a reasonable time to obtain their cash or cash equivalent.⁴² Courts further required that bidders return with the cash or cash equivalent prior to 4:00 p.m. the day of the sale.⁴³ These common law rules were superseded by the statutory requirement that payment be made immediately as set forth in

39. *Rockwall*, 246 S.W.3d at 628 (alteration in original) (internal quotation marks omitted) (quoting *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999)).

40. MERRIAM-WEBSTER'S NEW COLLEGIATE DICTIONARY 981 (9th ed. 1988).

41. BLACK'S LAW DICTIONARY 1379 (9th ed. 2009).

42. See *First Fed. Sav. & Loan Ass'n of Dallas v. Sharp*, 359 S.W.2d 902, 903 (Tex. 1962) (holding that the trustee should have given the successful bidder a reasonable time to obtain and return with the cash during the hours of the sale); *First Tex. Serv. Corp. v. McDonald*, 762 S.W.2d 935, 937 (Tex. App.—Fort Worth 1988, writ denied) (reiterating the Texas Supreme Court's holding that a reasonable time must be given for obtaining the funds to pay the purchase price (citing *Sharp*, 359 S.W.2d at 903)), *overruled on other grounds by Kitchen v. Frusher*, 181 S.W.3d 467, 473 (Tex. App.—Fort Worth; no pet.); *Intertex, Inc. v. Cowden*, 728 S.W.2d 813, 816 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (acknowledging the general rule that “if successful as the highest bidder, [the bidder] must produce the cash within a reasonable time during the hours of the sale”).

43. See *Sharp*, 359 S.W.2d at 903 (holding that “‘reasonable time’ should be limited to a reasonable time during the hours of the sale”); *Intertex*, 728 S.W.2d at 816 (stating the rule that payment must be made before 4:00 p.m. on the day of the foreclosure sale).

House Bill 655.⁴⁴ These changes confuse the definition of what constitutes a reasonable period of time during which payment must be made.

It is possible that the courts will revert to the common law interpretation of a “reasonable” time for payment of the purchase price at a foreclosure sale.⁴⁵ Arguably, if the Texas Legislature intended this result, the statutory language should have clearly stated so. Such an interpretation, however, is not clear from the language of House Bill 655. Additionally, the language of House Bill 655 is distinguishable from the prior common law requirements for several reasons. First, House Bill 655 gives the trustee the discretion to choose whether to allow a reasonable time for payment.⁴⁶ No such discretion existed under the common law. Second, the determination of what is “reasonable” is placed upon the trustee.⁴⁷ If legislators did not intend for the definition of “reasonable” to be determined by the trustee, but instead to mean before 4:00 p.m., the statute should not say “within such reasonable time as may be agreed upon by the purchaser and the trustee or substitute trustee.”⁴⁸ The statute instead should state that the payment must be made before 4:00 p.m. on the day of the sale.

If the courts decide that the following day or the following week is considered “reasonable” under the law, the impact could be far-reaching. Property owners receive notice that their property is

44. Compare Act of May 23, 2007, 80th Leg., R.S., ch. 903, § 4, 2007 Tex. Gen. Laws 2245, 2246 (amended 2009) (current version at TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009)) (requiring that payment be made immediately), with TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009) (allowing the trustee to agree to a reasonable time for payment).

45. See *Sharp*, 359 S.W.2d at 903 (holding that the trustee should have given the successful bidder time to obtain and return with the cash during the hours of the sale); *First Tex. Serv. Corp.*, 762 S.W.2d at 937 (reiterating that a reasonable time must be given for obtaining the funds to pay the purchase price); *Intertex*, 728 S.W.2d at 816 (acknowledging that the highest bidder must produce the purchase money within a reasonable time).

46. See Act of May 21, 2009, 81st Leg., R.S., ch. 323, § 1, 2009 Tex. Sess. Law Serv. 854, 854 (current version at TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009)) (providing that the trustee “may” agree to allow the purchaser to deliver the payment within a reasonable time).

47. See *id.* (specifying a “reasonable time” is such “time as may be agreed upon by the purchaser and the trustee or substitute trustee”).

48. *Id.*

going to be foreclosed upon well in advance of the actual foreclosure sale.⁴⁹ Property owners are also told on which day and at what time the foreclosure sale will be held.⁵⁰ If the property owner is not able to negotiate with the lender to stop the foreclosure sale, owners may choose to vacate the premises before the sale. Property owners may also choose to cancel utilities and property insurance, expecting that they will no longer own the property at the end of the day of the sale. If the property is not transferred to a new owner on the day of the sale, the property could sit vacant and unattended until the cash and the deed actually change hands. With no one accepting responsibility for the property during this interim period, unsafe conditions could arise in the area where the property is located.

C. *Extension of Credit*

In addition to determining whether payment can be made the following day or the following week, the statute raises the question of whether it is reasonable for the trustee to agree to the payment being made over a period of years. In Texas, it has been held that credit can be extended by the lender to induce payment at a foreclosure sale if doing so would “induce [the bidder] to . . . [pay] the *full amount* of the debt secured.”⁵¹ The justification behind this rule is that obtaining the full amount of the debt does not cause “injury [to] the mortgagor, or those claiming under him

49. See TEX. PROP. CODE ANN. § 51.002(b), (d) (Vernon 2007 & Supp. 2009) (requiring that notice of the foreclosure sale be given at least twenty-one days before the date of the sale and imposing an additional notice requirement in the event that the property being foreclosed upon is a debtor's homestead).

50. See *id.* § 51.002(b), (c) (requiring that the notice provide the earliest time the sale will begin and that the sale begin within three hours of the time specified in the notice). Notwithstanding these notice requirements, trustees have the right, without further notice, to cancel a foreclosure sale, even if notices of the sale have already been delivered, posted, and filed.

51. *Chase v. First Nat'l Bank of Cleburne*, 20 S.W. 1027, 1029 (Tex. Civ. App.—Fort Worth 1892, no writ) (emphasis added); *accord* *Valley Int'l Props., Inc. v. Ray*, 586 S.W.2d 898, 901 (Tex. Civ. App.—Corpus Christi 1979, no writ) (authorizing the trustee to make a valid cash sale through the extension of credit in order to secure the full bid price of the property); *French v. May*, 484 S.W.2d 420, 425 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.) (upholding a trustee's ability to extend credit for the full amount of debt owed when the appellant failed “to pay the matured installment at the time of the trustee's sale”).

...”⁵² In at least one case, the extension of credit was permitted even though the bid was for slightly less than the full amount due.⁵³

The discretionary nature of House Bill 655 may expand the right to accept payment by extending credit to the purchaser. A lender could be authorized to extend credit for far less than the full amount of the debt due at the time of the foreclosure sale. Standing alone, such an extension of credit does not harm the defaulting party.

Texas, however, allows a lender to obtain a deficiency judgment against the borrower in the event that the property is sold at the foreclosure sale for less than the amount of the outstanding indebtedness.⁵⁴ The amount of deficiency that can be sought is the difference of the amount of the outstanding indebtedness (including allowable fees and expenses related to the sale) minus either the fair market value of the property at the time of the foreclosure sale or the sales price of the property at the foreclosure sale.⁵⁵ Unless a party requests a determination of fair market value at the time of the sale and provides competent evidence of the value, the court defaults to using the sales price for its calculation.⁵⁶

If it is reasonable to extend credit (as a cash equivalent) at a foreclosure sale for an amount below the full amount of the indebtedness due, how does this affect the value given to the property for the purpose of determining whether a deficiency judgment should be awarded to the lender? In other words, would the extension of credit change the “sales price” for the purpose of

52. *Chase*, 20 S.W. at 1029; *see also French*, 484 S.W.2d at 425 (stating that the property owner’s “rights were the same under the sale, regardless of whether the purchasers of the property paid all cash, or otherwise, so long as the property was sold for at least the amount of the debt then owing thereon”).

53. *See Valley Int’l Props.*, 586 S.W.2d at 901 (permitting the extension of \$5.7 million of credit as payment at a foreclosure sale when the outstanding indebtedness “was slightly greater than 6 million dollars”).

54. *See* TEX. PROP. CODE ANN. § 51.003(a) (Vernon 2007) (providing the right for a lender to obtain a deficiency judgment within two years after a nonjudicial real property foreclosure sale).

55. *Id.* § 51.003(c).

56. *See id.* (providing that a party’s failure to request a determination of fair market value, or a request unaccompanied by competent evidence, will result in “the sale price at the foreclosure sale [being] used to compute the deficiency”).

calculating a deficiency judgment? House Bill 655 does not provide guidance about the interplay between sections 51.003 and 51.0075(f) of the Texas Property Code.

IV. NEW CAUSES OF ACTION

Prior to the implementation of House Bill 655, the failure of a potential purchaser to win the bid at a foreclosure sale did not, by itself, provide that potential purchaser with a viable legal action against a trustee, nor did a low purchase price, by itself, create a cause of action for the borrower.⁵⁷ Could the new law be interpreted to change these rules? Further, prior to House Bill 655, trustees did not have the option of granting additional time

57. See *Biddle v. Nat'l Old Line Ins.*, 513 S.W.2d 135, 138 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (“[A foreclosure] sale properly conducted may not be attacked on the ground of mere inadequacy of price.”); *accord Am. Sav. & Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975) (holding that the inadequacy of sale price “is not grounds for setting aside a trustee’s sale if the sale was legally and fairly made” unless there is evidence that indicates the irregularity “caused or contributed to cause the property to be sold for a grossly inadequate price”); *Tarrant Sav. Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965) (reasoning that a legal and fair sale should not be rendered void by the mere inadequacy of consideration); *Sanders v. Shelton*, 970 S.W.2d 721, 726 (Tex. App.—Austin 1998, pet. denied) (explaining that the inadequacy of consideration alone will not void the sale); *Hunt v. Jefferson Sav. & Loan Ass'n*, 756 S.W.2d 762, 764 (Tex. App.—Dallas 1988, writ denied) (holding that appellants failed to present any evidence indicating the sale prices for the foreclosed properties were sufficiently inadequate to warrant setting aside the trustee’s sale); *Jenkins v. Chambers*, 622 S.W.2d 614, 615–17 (Tex. Civ. App.—Tyler 1981, no writ) (affirming the judgment of the trial court by finding that the trustee’s sale was not legally and fairly made, which led to a grossly inadequate sale price); *Micrea, Inc. v. Eureka Life Ins. Co. of Am.*, 534 S.W.2d 348, 358 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (stating the general rule that a mere inadequacy in price is insufficient to annul a foreclosure sale unless the appellants established any irregularities to void the transaction); *Skeen v. Glenn Justice Mortgage Co.*, 526 S.W.2d 252, 256 (Tex. Civ. App.—Dallas 1975, no writ) (holding that the sale was not void due to inadequacy of the consideration or the fact that the buyer and the seller were the same person); *Koehler v. Pioneer Am. Ins. Co.*, 425 S.W.2d 889, 890–92 (Tex. Civ. App.—Fort Worth 1968, no writ) (rejecting the appellant’s contention that the foreclosure sale was invalid because of inadequacy of consideration by reasoning that “none of the documentary instruments in the record” established any irregularities on the part of the plaintiff); *Chandler v. Orgain*, 302 S.W.2d 953, 956–57 (Tex. Civ. App.—Fort Worth 1957, no writ) (holding that appellants did not establish by a preponderance of the evidence that the appellees’ ability to secure a higher bid at the trustee’s sale constituted an irregularity necessary to void the sale); *Onion v. Moreland*, 97 S.W.2d 726, 728 (Tex. Civ. App.—San Antonio 1936, no writ) (holding that the “inadequacy of the consideration paid” for the property alone is not sufficient to void the foreclosure sale).

for payment because payment was due immediately.⁵⁸ Could House Bill 655 create a cause of action for the borrower if the borrower bids or intends to bid at the sale and the trustee refuses to negotiate or negotiates unfairly? As further discussed below, House Bill 655 may have inadvertently created several new causes of action.

A. *Property Owners*

1. Trustee's Failure to Negotiate with Borrower

Imagine the following: A company owns a small warehouse. The purchase price of the warehouse was financed under a seven-year loan with a balloon payment due at the end of the seven years. The seven years have come and gone. As a result of the stricter lending guidelines that have arisen since the loan was originated, the borrower has been unable to refinance the amount owed for the balloon payment and does not have enough cash to make the payment in full. Therefore, the borrower is in default, and the lender has decided to foreclose. The day before the foreclosure sale, a representative of the borrower approaches the lender and the trustee, providing the same information and making the same offer to both parties. The borrower plans to bid at the foreclosure sale for the full amount of its outstanding debt. The borrower informs the lender and the trustee that it will request reasonable time for payment in accordance with Texas Property Code section 51.0075(f).⁵⁹ Both the lender and the trustee tell the property owner that the company has had its opportunity to pay its debt, and it will not be granted any additional time to obtain the payment at the foreclosure sale. If the borrower bids at the foreclosure sale, payment will be due "without delay."⁶⁰

Based on this scenario, for example, the company may be able

58. Act of May 23, 2007, 80th Leg., R.S., ch. 903, § 4, 2007 Tex. Gen. Laws 2245, 2246 (amended 2009) (current version at TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009)).

59. See TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009) (allowing the trustee to provide additional reasonable time for payment upon the request of the purchaser at a foreclosure sale).

60. See *id.* (specifying that if additional time is not granted, payment is due "without delay").

to obtain a temporary restraining order preventing the foreclosure sale, which would postpone the sale for at least one month. The property owner's argument could be that the owner explicitly indicated that it would make a reasonable offer at the foreclosure sale—the full amount of the outstanding debt. Further, the property owner could argue that the lender's and the trustee's preemptive refusal to grant a "reasonable time" for payment, as authorized by Texas Property Code section 51.0075(f),⁶¹ showed that the lender and the trustee were not acting in good faith. A trustee is a "special agent for both [the debtor and the lienholder], and he must act with absolute impartiality and with fairness to all concerned."⁶² The property owner could allege that the actions described above fail to show "absolute impartiality and . . . fairness to all concerned" and instead show partiality toward the lender.⁶³ Further, the property owner could argue that the actions of the lender and the trustee chilled the bidding at the foreclosure sale and likely resulted in the lender obtaining a lower amount for the property.⁶⁴ "[T]he trustee must conduct a foreclosure sale fairly

61. *See id.* (allowing the trustee and a purchaser at a foreclosure sale to agree that payment will be made within a reasonable time).

62. *First Fed. Sav. & Loan Ass'n of Dallas v. Sharp*, 359 S.W.2d 902, 904 (Tex. 1962); *accord Hammonds v. Holmes*, 559 S.W.2d 345, 347 (Tex. 1977) (explaining that the trustee has a particular legal responsibility to "act with absolute impartiality and fairness to the grantor in performing the powers vested in him by the deed of trust"); *Peterson v. Black*, 980 S.W.2d 818, 822 (Tex. App.—San Antonio 1998, no pet.) ("The trustee becomes a special agent for both the debtor and the lienholder and must act with absolute impartiality and fairness in conducting a foreclosure.").

63. *See Sharp*, 359 S.W.2d at 904 (explaining the requirement for trustees to act in this manner).

64. *See Powell v. Stacy*, 117 S.W.3d 70, 74 (Tex. App.—Fort Worth 2003, no pet.) (prohibiting trustees from taking actions or making statements at or before the foreclosure sale to chill the bidding); *accord Peterson*, 980 S.W.2d at 822 (stating a trustee "must conduct a foreclosure sale fairly and not discourage bidding by acts or statements made before or during the sale"); *Sanders v. Shelton*, 970 S.W.2d 721, 724 (Tex. App.—Austin 1998, pet. denied) (providing that a mortgagee "is under a duty to avoid affirmatively deterring third party bids . . . but is under no duty to take affirmative action, beyond that required by statute or deed of trust, to secure a fair sale"); *Pentad Joint Venture v. First Nat'l Bank of La Grange*, 797 S.W.2d 92, 96 (Tex. App.—Austin 1990, writ denied) (explaining Texas law requires a mortgagee to hold a fair sale and not chill bidding upon foreclosure); *Biddle v. Nat'l Old Line Ins.*, 513 S.W.2d 135, 138 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (stating the mortgagee is obligated not to discourage bidding "to produce as good a price as possible"). "It has been held that the fact that negotiations were pending for renewal of an indebtedness at the time of the trustee's sale does not constitute such an irregularity as will warrant setting aside of a sale under a deed of trust."

and not discourage bidding by acts or statements made before or during the sale.”⁶⁵

Because foreclosure sales occur only one day per month, the grant of such a temporary restraining order would postpone the sale at least one month, until the next possible sale date.⁶⁶ That additional time may be enough for the borrower to obtain financing to cover the outstanding balloon payment and avoid the sale entirely. If not, the additional time would enable the borrower to continue negotiating with the lender for a loan modification or workout.

Over the past few years, the world has seen a financial crisis second only to the Great Depression.⁶⁷ One consequence of this crisis has been tighter credit markets in both commercial and personal lending.⁶⁸ Unlike residential loans, which are typically

Donaldson v. Mansel, 615 S.W.2d 799, 802 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). This rule, however, would not apply to the hypothetical situation because the hypothetical addresses a situation where the trustee and the mortgagee refuse to enter into permissible negotiations related to the foreclosure sale itself and not to the underlying debt.

65. *Peterson*, 980 S.W.2d at 822.

66. See TEX. PROP. CODE ANN. § 51.002(a) (Vernon 2007 & Supp. 2009) (requiring that foreclosure sales occur the first Tuesday of the month).

67. See Jon Hilsenrath, Serena Ng & Damian Paletta, *Worst Crisis Since '30s, with No End Yet in Sight*, WALL ST. J., Sept. 18, 2008, at A1, available at <http://online.wsj.com/article/SB122169431617549947.html> (quoting Mark Gertler, a New York University economist as stating, “This has been the worst financial crisis since the Great Depression. There is no question about it”); see also *Roubini Sees 'Worst' U.S. Recession in Decades* (transcript), BLOOMBERG.COM, July 17, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aXkTyUujvVKk> (addressing the severity of the economic crisis); John Ydstie, *How Does Economy Compare to Past Downturns?*, NPR, Mar. 13, 2009, <http://www.npr.org/templates/story/story.php?storyId=101857872> (comparing the severity of the current crisis with that of the Great Depression).

68. See, e.g., Edmund L. Andrews & Jack Healy, *Credit Markets Still Tight, Geithner Says*, N.Y. TIMES, Apr. 21, 2009, <http://www.nytimes.com/2009/04/22/business/22tarp.html?pagewanted=1> (discussing Treasury Secretary Timothy F. Geithner’s acknowledgement in April 2009 that federal assistance “had not cured all problems in lending”); Ken Sweet, *In Tight Credit Markets, M&A Still Struggles*, FOX BUS., Sept. 18, 2009, <http://www.foxbusiness.com/story/markets/industries/finance/tight-credit-markets-ma-struggles/> (maintaining that “credit availability [is] the dominant issue” behind the slowing of mergers and acquisitions); see Sudeep Reddy, *Recession, Tight Credit Compound Housing Woes: Data Show Sales of New and Existing Homes Plunge, As Do Prices; Coming Foreclosures Likely to Add to Inventory Overhang*, WALL ST. J., Dec. 24, 2008, at A3, available at <http://online.wsj.com/article/SB123003859646029853.html> (explaining the impact that an oversupply of homes bore on the housing market, credit market, and the overall battered economy); see also Madlen Read, *Credit Markets Still Tight As More*

spread over thirty- or fifteen-year terms, many commercial loans extend for much shorter periods, for example, five-, seven-, or ten-year terms, with a large payment due at the end of the term.⁶⁹ As a result of the credit crisis, many commercial borrowers, even well-qualified borrowers, have been and may continue to be unable to refinance their debt at the end of the term of their loan similar to the above hypothetical situation.⁷⁰

A new wave of potential commercial defaults and foreclosures is still on the horizon for 2011 and 2012.⁷¹ Including both commercial real property and other commercial loans, “there are

Companies Report Finance Problems, USA TODAY, Oct. 6, 2008, http://www.usatoday.com/money/markets/2008-10-06-credit-markets-monday_N.htm (“As stock markets around the globe swooned[,] . . . bank to bank lending remained pricey, indicating that financial institutions are still loath to lend.”); Casey Wooten, *Renting vs. Owning: Tight Credit Markets Cause Many Would-be Buyers to Lease*, HOUS. BUS. J., June 19, 2009, <http://www.bizjournals.com/houston/stories/2009/06/22/focus1.html> (noting that demands for rental property increase as Americans find it difficult to secure financing for homeownership); *Despite Bailout, Credit Markets Tight* (NPR radio broadcast Oct. 7, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=95484251> (discussing the tight credit market and its impact on the overall U.S. economy).

69. See *Commercial vs. Residential Loan Terms: 4 Key Differences*, LOAN.COM, <http://www.loan.com/business-loans/commercial-vs-residential-loan-terms-4-key-differences.html> (last visited Mar. 1, 2010) (setting out differences between commercial and residential loans including the lengths of the loans); see also William Patalon III, *Will the Dark Cloud of Commercial Real Estate Blot Out the U.S. Recovery?*, MONEY MORNING, Apr. 1, 2009, <http://www.moneymorning.com/2009/04/01/commercial-real-estate-crisis/> (discussing the typical terms of commercial loans and the escalating rate of delinquencies in the commercial sector).

70. See Lingling Wei & Peter Grant, *Commercial Real Estate Lurks As Next Potential Mortgage Crisis*, WALL ST. J., Aug. 31, 2009, at A2, available at <http://online.wsj.com/article/SB125167422962070925.html> (explaining debtors' inability to refinance certain commercial real property loans); see also William Patalon III, *Will the Dark Cloud of Commercial Real Estate Blot Out the U.S. Recovery?*, MONEY MORNING, Apr. 1, 2009, <http://www.moneymorning.com/2009/04/01/commercial-real-estate-crisis/> (addressing the concerns related to the potential crisis with commercial real property lending, including problems relating to refinancing).

71. See Sam Chandan, *Economic, Financial Conditions Stabilizing; for CRE Major Challenges Yet to Come*, REAL EST. LAW & INDUSTRY REP., July 28, 2009, at 769, 773 (“Driving an increasing default rate in 2011 and 2012—after the economy has resumed a growth trajectory—will be the crop of [commercial] loans originated in 2006 and 2007 . . .”). “Roughly \$530 billion in mortgage-backed securities are due for refinancing between now and 2011 . . . [T]he U.S. banking sector could incur as much as \$250 billion in commercial real estate losses, enough to cause . . . as many as 700 banks to fail, in that time.” Bob Blandeburgo, *Commercial Real Estate Defaults Could Threaten 700 US Banks*, NUWIRE INVESTOR, Sept. 17, 2009, <http://www.nuwireinvestor.com/articles/bank-fail-53687.aspx>.

\$1.4 trillion in commercial loan maturities through 2013.”⁷² These loan maturities will reach a peak in 2012.⁷³ As previously mentioned, many of the defaults are expected to occur because of an inability for companies to refinance their debt.⁷⁴ “With no liquidity, otherwise healthy commercial real estate borrowers face a growing challenge to refinance maturing debt and the threat of rising foreclosures and delinquencies.”⁷⁵

As a result of the current economic situation, the hypothetical situation discussed above is all too real. The ability of commercial borrowers to obtain a temporary restraining order in this situation could harm lenders by increasing the length of time it takes to foreclose on their collateral and by increasing the costs associated with conducting a foreclosure. At the same time, such a restraining order could enable borrowers to obtain at least one additional month to attempt to refinance their debt.

2. Lower Price

As a second potential new cause of action, property owners could argue that the trustee’s unreasonable negotiations resulted in the property being sold for a fraction of the amount for which it should have been sold. It is blackletter law that “a [foreclosure] sale properly conducted may not be attacked on the ground of *mere inadequacy* of price.”⁷⁶ “There must be evidence of

72. *Bad Commercial Real Estate Loans Are Coming in Hot! And They’re Right on Schedule*, REIT WRECKS, Aug. 12, 2009, <http://www.reitwrecks.com/2009/08/bad-commercial-real-estate-loans-are.html>.

73. *Id.*

74. See Lingling Wei & Peter Grant, *Commercial Real Estate Lurks As Next Potential Mortgage Crisis*, WALL ST. J., Aug. 31, 2009, at A2, available at <http://online.wsj.com/article/SB125167422962070925.html> (discussing the inability to refinance certain commercial real property loans); see also William Patalon III, *Will the Dark Cloud of Commercial Real Estate Blot Out the U.S. Recovery?*, MONEY MORNING, Apr. 1, 2009, <http://www.moneymorning.com/2009/04/01/commercial-real-estate-crisis/> (“The delinquency rate on commercial-real-estate debt has more than *doubled* just since September [2009] . . .”).

75. Letter from Douglas M. Bibby, President, Nat’l Multi Housing Council, & Douglas S. Culkin, President, Nat’l Apartment Ass’n, to Henry M. Paulson, U.S. Sec’y of the Treasury (Nov. 25, 2008), available at <http://www.nmhc.org/Content/ServeFile.cfm?/FileID=6994>.

76. *Biddle v. Nat’l Old Line Ins.*, 513 S.W.2d 135, 138 (Tex. Civ. App.—Dallas 1974, writ ref’d n.r.e.) (emphasis added); *accord* *Am. Sav. & Loan Ass’n of Houston v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975) (reasoning that inadequacy of price alone is not sufficient to set aside a trustee’s sale); *Tarrant Sav. Ass’n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475

irregularity, though slight, which irregularity must have caused or contributed to cause the property to be sold for a grossly inadequate price.”⁷⁷ Further, “[e]vidence showing that a better price would have resulted if the sale was conducted in a different manner is required.”⁷⁸ “When it is shown that such inadequacy is due to any misconduct, fraud or unfairness on the part of the

(Tex. 1965) (determining that a foreclosure sale will not be voided merely because of an inadequate selling price); *Powell v. Stacy*, 117 S.W.3d 70, 75 (Tex. App.—Fort Worth 2003, no pet.) (holding that “inadequacy of consideration does not render a foreclosure sale void if the sale was legally and fairly made”); *Sanders v. Shelton*, 970 S.W.2d 721, 726 (Tex. App.—Austin 1998, pet. denied) (reiterating that inadequacy of price alone will not void a sale); *Hunt v. Jefferson Sav. & Loan Ass’n*, 756 S.W.2d 762, 764 (Tex. App.—Dallas 1988, writ denied) (recognizing the rule that “mere inadequacy of consideration is not grounds for setting aside a trustee’s sale”); *Jinkins v. Chambers*, 622 S.W.2d 614, 615 (Tex. Civ. App.—Tyler 1981, no writ) (acknowledging the “well established” rule that more than an inadequate price is required to set aside a trustee’s sale); *Micrea, Inc. v. Eureka Life Ins. Co. of Am.*, 534 S.W.2d 348, 358 (Tex. Civ. App.—Fort Worth 1976, writ ref’d n.r.e.) (“Mere inadequacy in the amount for which property was sold is not sufficient reason to annul a sale made by authority of a Deed of Trust.”); *Skeen v. Glenn Justice Mortgage Co.*, 526 S.W.2d 252, 256 (Tex. Civ. App.—Dallas 1975, no writ) (discussing that a foreclosure sale will not be voided solely on the basis of an inadequate selling price); *Bellah v. First Nat’l Bank of Hereford*, 478 S.W.2d 636, 637 (Tex. Civ. App.—Amarillo 1972, writ ref’d n.r.e.) (noting that voiding a sale requires more than an inadequate price—“there must be evidence of irregularity which caused or contributed to cause the property to be sold for a grossly inadequate price”); *Koehler v. Pioneer Am. Ins. Co.*, 425 S.W.2d 889, 890 (Tex. Civ. App.—Fort Worth 1968, no writ) (requiring more than mere inadequacy of consideration to void a foreclosure sale); *Chandler v. Orgain*, 302 S.W.2d 953, 956 (Tex. Civ. App.—Fort Worth 1957, no writ) (“Inadequacy of price brought by the property at its sale is not in and of itself any ground for the avoidance of the sale.”); *Onion v. Moreland*, 97 S.W.2d 726, 728 (Tex. Civ. App.—San Antonio 1936, no writ) (opining that a deed of trust gives discretionary power to the trustee, such that an inadequate price alone will not be an error by the trustee by which the sale will be void). “The fact of inadequacy might, of course, constitute collateral evidence bearing upon some other ground for avoiding the sale.” *Chandler*, 302 S.W.2d at 956.

77. *Am. Sav. & Loan*, 531 S.W.2d at 587; *accord Powell*, 117 S.W.3d at 75 (holding that there must be some evidence of an irregularity in the sale to void a foreclosure sale); *Sanders*, 970 S.W.2d at 726 (recognizing that to void a foreclosure sale, there must be at least slight evidence of irregularity in the sale); *Jinkins*, 622 S.W.2d at 615 (“For avoidance of a trustee’s sale, there must be evidence of irregularity, though slight, that caused or contributed to cause a sale for an inadequate price.”); *Donaldson v. Mansel*, 615 S.W.2d 799, 802 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.) (indicating that while the foreclosure property may have been sold for an inadequate price, such an inadequate price must be coupled with evidence of an irregularity in the sale); *Micrea*, 534 S.W.2d at 358 (determining that there must be “at least slight irregularities” to void a foreclosure sale); *Bellah*, 478 S.W.2d at 637 (affirming the rule that requires an irregularity in the sale proceedings to void a foreclosure sale).

78. *Hunt*, 756 S.W.2d at 764.

trustee or mortgagee, equity will avoid the sale.”⁷⁹

Based on the new statutory language in House Bill 655, a borrower may be able to persuade a court to void a foreclosure sale. The borrower could argue that a trustee’s refusal to negotiate for a reasonable time for payment or that a trustee’s unreasonable negotiations related thereto were irregularities that “cause[d] the property to be sold for a grossly inadequate price.”⁸⁰ Further, the borrower could argue that the trustee’s actions or inactions rose to the level of “misconduct” or “unfairness.”⁸¹ Over the coming months and years, we will see whether House Bill 655 creates this unintended result.

B. *Potential Purchasers*

Additionally, the new statutory language of House Bill 655 opens the door for potential purchasers to argue that the trustee unreasonably chose not to negotiate or that the trustee negotiated in an unreasonable manner. Based on Texas’s historical rules regarding standing to contest a foreclosure sale,⁸² this may be the least successful of the three potential new causes of action.

“To establish standing, an individual must ‘demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.’”⁸³ As a general rule in Texas, for a challenger

79. *Jenkins*, 622 S.W.2d at 615.

80. *See Am. Sav. & Loan*, 531 S.W.2d at 587 (holding that “evidence of irregularity, though slight, which irregularity must have caused or contributed to cause the property to be sold for a grossly inadequate price” is necessary if the argument for voiding the foreclosure sale involves the result of a low price); *accord Powell*, 117 S.W.3d at 75 (recognizing that irregularity leading to a grossly inadequate price at a foreclosure sale is required to render that sale void); *Sanders*, 970 S.W.2d at 726 (holding that irregularity leading to grossly inadequate price and inadequacy of consideration are requirements to set aside foreclosure sale); *Jenkins*, 622 S.W.2d at 615 (“For avoidance of a trustee’s sale, there must be evidence of irregularity, though slight, that caused or contributed to cause a sale for an inadequate price.”); *Donaldson*, 615 S.W.2d at 802 (refusing to set aside foreclosure sale because no irregularity at the sale caused a grossly inadequate sale price); *Micrea*, 534 S.W.2d at 358 (stressing that inadequate amount for which property sold at foreclosure sale, alone, will not suffice to hold the sale void).

81. *See Jenkins*, 622 S.W.2d at 615 (“When it is shown that such inadequacy is due to any misconduct, fraud or unfairness on the part of the trustee or the mortgagee, equity will avoid the sale.”).

82. *See EMC Mortgage Corp. v. Window Box Ass’n*, 264 S.W.3d 331, 334 (Tex. App.—Waco 2008, no pet.) (expressing Texas’s general rule regarding standing).

83. *Id.* (quoting *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007)).

of a foreclosure sale to have standing to sue, the challenger must be the mortgagor, a party in privity with the mortgagor, or a party whose legal or equitable property rights are affected by the sale.⁸⁴ If the third-party bidder offered the highest bid and failed to win the property only because the trustee refused to provide him with additional time for making the payment, the bidder could argue that such actions by the trustee denied the bidder his right to become the owner of the property.

In *Elmore v. McCammon*,⁸⁵ the plaintiff alleged that his cash bid at the foreclosure sale entitled him to ownership of the property.⁸⁶ In *Elmore*, the trustee conveyed the property to the lender based on a credit bid that was higher than the plaintiff's cash bid.⁸⁷ The court reiterated the rule that a lender's credit bid

84. See *Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 489 (Tex. 1988) ("As a general rule, only the mortgagor or a party who is in privity with the mortgagor has standing to contest the validity of a foreclosure sale pursuant to the mortgagor's deed of trust. However, when the third party has a property interest, whether legal or equitable, that will be affected by a sale, the third party [also] has standing to challenge such a sale to the extent that its rights will be affected by the sale." (citations omitted)); see also *Elmore v. McCammon*, 640 F. Supp. 905, 908 (S.D. Tex. 1986) ("Consistent with traditional contract principles, Texas case law restricts standing to attack a foreclosure sale pursuant to a deed of trust to the mortgagor or those whose property interests or rights are affected by the sale."); *Am. Sav. & Loan*, 531 S.W.2d at 586 (upholding the right for third parties to have standing when their rights are affected by the foreclosure, specifically related to a party that held an interest in the property at issue); *Abraham v. Ryland Mortgage Co.*, 995 S.W.2d 890, 893 (Tex. App.—El Paso 1999, no pet.) (discussing which parties have standing to contest foreclosure sales); *Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.—Corpus Christi 1996, no writ) ("To contest foreclosure of a deed of trust, a party must, at the time of foreclosure, either be a mortgagor under the deed of trust or be in privity with the mortgagor, or have an ownership interest in property affected by the foreclosure."); *Long v. NCNB-Tex. Nat'l Bank*, 882 S.W.2d 861, 867 (Tex. App.—Corpus Christi 1994, no writ) ("A nonjudicial foreclosure under deed of trust will suffer challenges to its validity from only the note maker, the note maker's privies, and parties with a property interest affected by the sale."); *Ursic v. NBC Bank S. Tex., N.A.*, 827 S.W.2d 334, 336 (Tex. App.—Corpus Christi 1991, writ denied) (reiterating the rule set forth in *Goswami*, 751 S.W.2d at 489); *Mercer v. Bludworth*, 715 S.W.2d 693, 698 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (discussing which parties have standing to challenge foreclosure sales), *overruled on other grounds*, *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 894 (Tex. 1991); *Owens v. Grimes*, 539 S.W.2d 387, 390 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) ("[T]he exercise of the power of sale may be disputed only by the mortgagor or his privies insofar as the inquiring relates to the divesting of the mortgagor's title and the investing of the title in the purchaser.").

85. *Elmore v. McCammon*, 640 F. Supp. 905 (S.D. Tex. 1986).

86. *Id.* at 906.

87. *Id.* at 907.

is equivalent to a cash bid.⁸⁸ Therefore, the plaintiff did not have the requisite property interest to maintain his standing.⁸⁹ The court did not go so far as to hold that the plaintiff would have lacked standing if the plaintiff had made a higher bid. Instead, the court held that the plaintiff did not make the high bid.⁹⁰ This ruling leaves the door open for a claim by a third-party bidder if the trustee accepts a lower price from another bidder based solely on the winning bidder (with the lower bid) having the purchase price available “without delay,” and the losing bidder (with the higher bid) requiring additional reasonable time.

V. PRACTICAL SOLUTIONS

A. *Changing Deeds of Trust*

A trustee obtains the power to foreclose through the foreclosure statute, as well as through the deed of trust.⁹¹ Typically, “a lien is retained or given as security, with simultaneous execution of a deed of trust to one who is to hold the office of trustee for the purpose of foreclosure without necessity of resort to litigation.”⁹² The deed of trust provides the parameters by which the trustee must conduct a foreclosure sale. “*A trustee may not be . . . assigned a duty under a security instrument other than to exercise the power of sale in accordance with the terms of the security instrument . . .*”⁹³ The powers given to a trustee under a deed of trust “must

88. *Id.* at 908.

89. *See id.* (holding the trustee’s selection of the higher credit bid over the lower cash bid did not provide the plaintiff with standing to challenge the foreclosure).

90. *See Elmore*, 640 F. Supp. at 908 (holding that plaintiff’s cash bid, which was lower than the mortgagee’s credit bid, would not give him priority over the mortgagee’s credit bid).

91. *E.g.*, *Slaughter v. Qualls*, 139 Tex. 346, 346, 162 S.W.2d 671, 675 (1942) (“A trustee has no power to sell the debtor’s property, except such as may be found in the deed of trust.”); *see Winters v. Slover*, 151 Tex. 485, 490, 251 S.W.2d 726, 728 (1952) (following the rule set forth in *Slaughter v. Qualls*); *Olivares v. Nix Trust*, 126 S.W.3d 242, 246 (Tex. App.—San Antonio 2003, pet. denied) (explaining that the trustee receives the power to sell from the deed of trust); *see also Gomez v. Kamper Invs., L.L.C. (In re Gomez)*, 388 B.R. 279, 288 (Bankr. S.D. Tex. 2008) (“The power of the trustee to sell the deed for the parties is derived wholly from the trust instrument.”).

92. *Lucky Homes, Inc. v. Tarrant Sav. Ass’n*, 379 S.W.2d 386, 388 (Tex. Civ. App.—Fort Worth 1964), *rev’d on other grounds*, 390 S.W.2d 473 (Tex. 1965).

93. TEX. PROP. CODE ANN. § 51.0074(b) (Vernon Supp. 2009).

be strictly followed.”⁹⁴ “Thus, a trustee must strictly pursue the terms of the instrument, the provisions of law relative to such a sale, and the details prescribed as to the manner of the sale.”⁹⁵

As a practical solution, lawyers should consider including provisions in new deeds of trust that define the trustee’s actions under Texas Property Code section 51.0075(f). Specifically, the provisions might define whether, and under what circumstances, trustees are permitted to negotiate regarding the time for payment of the purchase price.

Unfortunately, such provisions do not completely solve the issues created by House Bill 655 for two reasons. First, adding provisions into new deeds of trust does nothing to resolve the issue with existing deeds of trust. Existing deeds of trust are much more likely to be subject to foreclosure proceedings between now and the next time the Texas Legislature addresses Texas Property Code section 51.0075(f).

Second, an argument can be made that a deed of trust cannot remove the trustee’s ability to agree upon a reasonable time for payment. The statute does not require that the deed of trust provide this power to the trustee, and trustees are required to look not just to the deed of trust, but also to the statutes governing foreclosure sales to obtain guidance for their actions.⁹⁶ Further, the statute does not state that this provision can be waived or altered by a deed of trust.⁹⁷

94. *Am. Sav. & Loan Ass’n of Houston v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975) (quoting *Slaughter*, 139 Tex. at 346, 162 S.W.2d at 675); see also *Elmore*, 640 F. Supp. at 907 (explaining that “contract principles mandate strict conformity to the deed of trust”); *Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.—Corpus Christi 1996, no writ) (explaining the requirement of “strict compliance”).

95. *Bonilla*, 918 S.W.2d at 21 (citing *Durkay v. Madeo Oil Co.*, 862 S.W.2d 14, 17 (Tex. App.—Corpus Christi 1993, writ denied)); accord *Olivares*, 126 S.W.3d at 246 (explaining the importance of the trustee’s compliance with the terms of the security instrument).

96. See, e.g., *Conversion Prop., L.L.C. v. Kessler*, 994 S.W.2d 810, 813 (Tex. App.—Dallas 1999, pet. denied) (noting the requirement that a trustee comply with the terms of the instrument and related statutory requirements in conducting a sale of the property).

97. See TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009) (setting forth the time frame during which payment must be made, without indicating whether the provision can be altered or amended by agreement of the parties).

B. *Notice of Trustee's Sale*

Modifying the notice of a trustee's sale is another partial solution to the issues raised by House Bill 655. These sale notices are typically prepared by the trustee and not by the lender. Although the Texas Property Code sets forth specific items that must be included in the notice, the statute does not nullify a notice because the notice contains more information than required.⁹⁸ Because the power to negotiate is given directly to the trustee, a trustee may be able to waive the right to negotiate or restrict how such negotiations will occur in the notice of the trustee's sale.

Unfortunately, not all notices are sent by the actual trustee. The notice could be sent by the lender or the lender's attorney. Further, a lender has the right to appoint a substitute trustee to replace the trustee, even after the notice of the sale has been given.⁹⁹ If a substitute trustee is appointed after the notice has been given, a new notice of sale is not required.¹⁰⁰ In the event that the trustee conducting the sale did not send the notice, the waiver would not have been made by the trustee, which would call into question the validity of the waiver.

In addition, the trustee is not merely an agent for the lender.¹⁰¹ Trustees have "a separate [legal] capacity with a particular legal responsibility."¹⁰² Therefore, the actions of a trustee are not the actions of the lender, and the amount of control and influence that a lender can assert over the actions of a trustee is not limitless.

Most importantly, the actions discussed above could potentially

98. See TEX. PROP. CODE ANN. § 51.002(a), (b) (Vernon 2007) (specifying information that must be in a sale notice).

99. See *Tarrant Sav. Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965) (acknowledging that a trustee can be substituted after the notice of sale has been given).

100. See *id.* (stating that the appointment of a substitute trustee does not necessitate a new sale notice); *Loomis Land & Cattle Co. v. Diversified Mortgage Investors*, 533 S.W.2d 420, 424 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (noting that a substitute trustee does not need to repost a sale notice issued by the former trustee); *Koehler v. Pioneer Am. Ins. Co.*, 425 S.W.2d 889, 891 (Tex. Civ. App.—Fort Worth 1968, no writ) (explaining that a substitute trustee does not have to reissue notice for a sale to be valid).

101. See *Peterson v. Black*, 980 S.W.2d 818, 822 (Tex. App.—San Antonio 1998, no pet.) ("The trustee becomes a special agent for both the debtor and the lienholder . . ."); *accord Powell v. Stacy*, 117 S.W.3d 70, 74 (Tex. App.—Fort Worth 2003, no pet.) (explaining the special relationship between the trustee and the parties in a deed of trust).

102. *Peterson*, 980 S.W.2d at 822; *accord Hammonds v. Holmes*, 559 S.W.2d 345, 347 (Tex. 1977) (indicating that trustees act in a separate capacity and are given specific responsibilities by law).

be viewed as chilling the bidding at the foreclosure sale. As previously discussed in this Article, a trustee is not permitted to take actions that discourage bidding at the sale.¹⁰³

C. *Setting Conditions for the Sale*

The trustee can set forth the manner in which it will grant additional time for payment as a part of its “reasonable conditions for conducting the public sale.”¹⁰⁴ The Texas Property Code gives the trustee the right to “set reasonable conditions for conducting the public sale if the conditions are announced before bidding is opened for the first sale of the day held by the trustee or substitute trustee.”¹⁰⁵ However, similar to placing such restrictions in the notice of sale, such actions could be interpreted as chilling the bidding, which is prohibited.¹⁰⁶

D. *Lender's Instructions to Trustee*

To some extent, the lender's instruction letter to a trustee could place restrictions on or provide guidelines for the actions a trustee can take in negotiating a reasonable time for payment. This solution brings with it the same issues addressed with regard to placing restrictions and guidelines in the notice of sale. In addition, the powers to negotiate under House Bill 655 are not granted to lenders; these powers are explicitly granted to trustees.¹⁰⁷

VI. STATUTORY SOLUTION

The practical solutions set forth above may help bridge the gap until the next legislative session or until the next time the Texas Legislature addresses Texas Property Code section 51.0075(f). These solutions, however, do not solve the dilemma created by the statutory change. The Texas Legislature should revisit and clarify

103. *Powell*, 117 S.W.3d at 74; *accord Peterson*, 980 S.W.2d at 822 (acknowledging that a trustee is forbidden from taking steps to discourage bidding).

104. TEX. PROP. CODE ANN. § 51.0075(a) (Vernon 2007 & Supp. 2009).

105. *Id.*

106. *See Powell*, 117 S.W.3d at 74 (prohibiting trustees from certain actions that would chill the bidding); *accord Peterson*, 980 S.W.2d at 822 (indicating that a trustee is prohibited from taking actions to discourage bidding).

107. TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009).

this statute when it next convenes.

It is logical to allow a winning bidder to have additional time to obtain cash or a cash equivalent.¹⁰⁸ A bidder at a foreclosure sale should not be required to carry thousands of dollars to the courthouse to bid on a property. If the trustee otherwise would accept a bid, the fact that a bidder needs a short period of time to obtain the funds should not, by itself, cause or require a trustee to refuse to accept the bid.

It is also necessary to limit the amount of time given to a winning bidder to obtain the funds to purchase a property at a foreclosure sale.¹⁰⁹ The foreclosure statute contemplates that the sale should be started and completed between 10:00 a.m. and 4:00 p.m.¹¹⁰ Therefore, Texas Property Code section 51.0075(f) should explicitly require that the purchaser return before 4:00 p.m. with the funds.¹¹¹

Finally, a lender may not desire to give the trustee the power to negotiate as to a reasonable period of time. The foreclosure statute should also explicitly allow the provisions to be waived or amended within a deed of trust and should allow the trustee to set forth the parameters under which the sale will be conducted in the notice of sale.

This Article proposes that the Texas Legislature further amend section 51.0075(f) of the Texas Property Code at its next opportunity with the following language:

The purchase price in a sale held by a trustee or substitute trustee under this section is due and payable without delay on acceptance of the bid or within such reasonable time as may be agreed upon by the purchaser and the trustee or substitute trustee if the purchaser makes such request for additional time to deliver the purchase price, but in no event shall such reasonable time be later than 4:00 p.m. on

108. See Tex. Sen. Jurisprudence Comm., Bill Analysis, Tex. H.B. 655, 81st Leg., R.S. (2009), available at <http://www.legis.state.tx.us/tlodocs/81R/analysis/pdf/HB00655E.pdf> (“As an unintended consequence, [the language of the statute before House Bill 655] allows trustees to refuse any potential parties from bidding on the property without the exact amount of the awarded bid in the form of a cashier’s check or certified check.”).

109. *Contra* TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009) (failing to define a “reasonable” period of time).

110. See TEX. PROP. CODE ANN. § 51.002(a) (Vernon 2007 & Supp. 2009) (setting forth the requirements for the time frame during which foreclosure sales may occur).

111. *Contra* TEX. PROP. CODE ANN. § 51.0075(f) (Vernon Supp. 2009) (failing to indicate whether a “reasonable” amount of time can extend after 4:00 p.m.).

the day of the sale. The deed of trust, notice of trustee's sale, or notice of substitute trustee's sale may set forth more restrictive guidelines regarding the foregoing sentence.

VII. CONCLUSION

It seems unlikely that the Texas Legislature intended the results discussed in this Article. The ramifications of the statutory changes made by House Bill 655 could be far-reaching. In addition to the consequences discussed in this Article, House Bill 655 may cause the unintended result of fewer people being willing to serve as trustees because of the uncertainties created by the statute.

According to the author's and sponsor's statement of intent contained in the Senate Bill Analysis, House Bill 655 was put forward to address the following concerns:

In an effort to address fraud concerns at auction biddings on foreclosures, the purchase price in a sale held by a trustee was required to be payable immediately. As an unintended consequence, this language allows trustees to refuse any potential parties from bidding on the property without the exact amount of the awarded bid in the form of a cashier's check or certified check.¹¹²

Further, the changes probably were made so that all potential purchasers did not have to bring thousands of dollars to foreclosure sales and so that the highest bidders could have time to go to the bank to obtain and return quickly that day with the cash or cash equivalent needed to purchase the property. Despite these likely intentions, the law, as written, leaves much to interpretation. The ramifications of these changes to the Texas foreclosure law have yet to be seen.

As everyone involved in the foreclosure process—including property owners, lenders, trustees, and purchasers—tries to understand the consequences of the new law, it is likely that lawsuits will arise, and that the Texas courts will have an opportunity to address and help clarify these issues in the months and years to come.

112. Tex. Sen. Jurisprudence Comm., Bill Analysis, Tex. H.B. 655, 81st Leg., R.S. (2009), available at <http://www.legis.state.tx.us/tlodocs/81R/analysis/pdf/HB00655E.pdf>.