

# Note Guarantor vs. New Texas Laws



## *COUNSEL'S CORNER*

There was a foreclosure procedure used by lenders in Texas that increased leverage against borrowers. At foreclosure sales, some would offer a bid that was not only substantially less than the debt, but also significantly less than the property's value. This created a deficiency balance. Lenders then decided to pursue the deficiency balance against the party that signed the Note. And, if / when applicable, the Guarantor.

Borrowers were unhappy. So, they lobbied their legislators. A fix was provided a few years ago. Our own Texas Property Code (yes *THAT* TPC – the one I am writing about constantly) was amended to provide some relief in the form of a fair market value offset. Check out 51.003 of the TPC.

Stated in its most simple manner, a debtor (borrower or guarantor) can complain that the lender bid an artificially low amount at the foreclosure sale, and created an inequitable deficiency balance. If the debtor is right, then through operation of TPC 51.003, the foreclosure sale bid is essentially increased to equal the property's FMV as of the date of foreclosure.

And with that bit of introduction, here is today's case.

Interstate 35/Chisam Road, LP and Malachi Development Corp loaned Villages LP \$696,000. The Note was secured by a Deed of Trust on Denton County property. Further securing the Note was a Guaranty signed by Mehrdad Moayedi.

When the gravy train . . . err umm the debt payments stopped, Villages foreclosed and bid \$487,200. Villages then pursued Moayedi for \$266,748 plus attorney's fees and related expenses.

Moayedi defended the claim by citing the new provisions of the Texas Property Code and tendering evidence that the property had a FMV on the date of foreclosure of \$840,000. I-35 responded by claiming that Moayedi had waived his right to rely on the Texas Property Code.

Moayeddi had of course signed a Guaranty. The Guaranty did of course contain a waiver clause. However, the waiver clause did not specifically cite Section 51.003 of the TPC. And so – what lawyers dream about – a lawsuit was born.

The trial court sifted through most (maybe all) of this, and rendered a Judgment for Moayeddi that since the Guaranty did not specifically waive his rights under 51.003, he was not liable for the uber-deficiency.

I-35 appealed.

The Dallas Court of Appeals evaluated the Note, property value, FMV, evidence, Texas laws, Texas cases and the potential that the Rangers might yet go to the World Series again. That last part was a reading test.

The Appellate Court concluded that the Guaranty did not need to specifically state “**I WAIVE 51.003.**” It was enough that Moayeddi’s Guaranty Agreement waived “. . . *any defense*” and “. . . *each and every defense . . .*”

The trial court’s Judgment was reversed. I-35 wins. Moayeddi loses.

See *Interstate 35/ Chisam Road LP v. Moayeddi*; No. 05-11-00209-CV; Texas 5<sup>th</sup> Court of Appeals; August 8, 2012.

Lessons learned:

1. There are Texas laws to protect borrowers and guarantors against too-low foreclosure bids.
2. The protections offered by those laws can be waived, at least in a commercial context.
3. Don’t conclude that there is no waiver in place just because the loan documents do not specifically reference TPC 51.003.

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