HOUSE
RESEARCH
ORGANIZATION bill analysis 4/22/2015

HB 311
Canales

SUBJECT: Changing liability, seller's remedies under property executory contracts

COMMITTEE: Business and Industry — favorable, without amendment

VOTE: 6 ayes — Oliveira, Simmons, Collier, Fletcher, Romero, Villalba

1 nay — Rinaldi

WITNESSES: For — Robert Doggett, Texas Family Council; (*Registered, but did not testify*: Randy Lee, Stewart Title Guaranty Company)

Against — None

BACKGROUND: Under Property Code, sec. 5.061 default related to an executory contract for conveyance is the failure to make timely payment or comply with a term of the contract. Under sec. 5.066 , if the purchaser defaults after paying 40 percent or more of the amount due or the equivalent of 48 monthly payments under the executory contract, the seller can conduct a sale similar to a traditional foreclosure sale through a trustee. The purchaser's interest in the property can be sold, but the seller cannot enforce the remedy of rescission or of forfeiture and acceleration after the purchaser has paid 40 percent of the amount due or the equivalent of 48 monthly payments.

Under sec. 5.066 the seller must give the purchaser 60 days to cure the default after notice is given before the seller can sell the property. If the amount received for the property at the sale is greater than the amount of debt the purchaser still owes the seller, the seller must give the excess amount to the purchaser.

Sec. 5.076 requires a seller to record an executory contract within 30 days after it is executed. Sec. 5.079 requires a seller to transfer recorded, legal title of the property covered by an executory contract to the purchaser within 30 days of receiving the final payment due. A seller who fails to transfer the title is liable to the purchaser for liquidated damages of $250 per day for each day the seller fails to transfer the title from the 31st day until the 90th day, and $500 per day following the 90th day after final payment. The seller also would be liable for reasonable attorney's fees.

DIGEST: HB 311 would limit a seller's ability to enforce certain remedies under an executory contract for conveyance of real property, create liability for failing to record an executory contract, and specify the effect of a recorded executory contract related to legal title of the property.

The bill would add to the limitations on a seller's authority to exercise the remedy of rescission or of forfeiture and acceleration the condition that an executory contract had not been recorded. A seller could not enforce the remedies of rescission or of forfeiture and acceleration after the contract had been recorded.

The bill would specify that in the event the purchaser defaulted and the executory contract had been recorded, regardless of the amount the purchaser had paid, the seller could conduct a sale through a trustee to sell the purchaser's interest in the property. The requirements of the sale would be the same as under current law.

The bill would create liability for sellers who failed to record an executory contract within 30 days after the contract was executed. The liability of the seller to the purchaser would be similar to the liability for failing to transfer title that exists under current law, except the damages could not exceed the value of the property or the amount paid under the contract, whichever was greater. This would not limit or affect any other rights or remedies a purchaser had under the law.

On recording, an executory contract would convey legal title to the purchaser, subject to a lien retained by the seller for the amount of the unpaid contract price, less any lawful deductions. Extrinsic evidence could be used to supply the legal description of the property if that information was not apparent from the recorded contract.

The bill would allow a purchaser, as under current law, to convert an interest in the property under an executory contract into recorded, legal title at any time and without paying penalties or charges of any kind, but it would make this provision apply regardless of whether the seller had already recorded the executory contract. This could not be construed to limit the purchaser's equitable interest in the property or other rights of the purchaser.

The bill would take effect September 1, 2015, and would apply only to an executory contract entered into on or after that date.

SUPPORTERS SAY:

HB 311 would protect purchasers involved in executory contracts from unfair practices. Executory contracts often are used in transactions involving purchasers who do not understand their rights under the law. The bill would protect purchasers' equity and title in their homes by providing liability if the seller did not record the contract, as required by law, and by limiting the use of rescission or forfeiture and acceleration as a remedy when the purchaser defaulted. Under both rescission and forfeiture and acceleration, purchasers lose their homes and the money they have already paid under the contract, making it more similar to a landlord-tenant relationship than a homeowner-lender relationship. The bill would protect homeowners from losing everything because of a missed payment.

HB 311 would not restrict businesses because the use of executory contracts would not be limited, only clarified. The recording requirement for executory contracts already exists, but it is not always followed. The bill would encourage sellers to record executory contracts by creating liability if the seller did not, but a business still would be able to use this kind of contract. The bill also would change the remedies used in the event of a default of an executory contract to be more like traditional remedies under a conventional mortgage, such as a foreclosure sale. This also would not restrict businesses and still would offer a remedy for a seller to take the property back in the event of a default and receive the value of the property through a foreclosure-type sale.

OPPONENTS SAY:

HB 311 would restrict businesses in their activities by discouraging the use of executory contracts and changing their effect. These contracts are an important tool to use when conveying real property because they provide a much simpler process than a conventional mortgage through a bank. Many people are not able to obtain financing through conventional mortgages, and these contracts represent an alternative for them to contract with, for example, the developer or builder of the property.

The bill would transfer title of the property to the purchaser, subject to the seller's lien, upon recording. This would be a change in executory contracts and the seller's rights because under current law, title remains with the seller until the purchaser makes the final payment under the contract. Limiting a tool that businesses use to offer opportunities to purchasers that would not otherwise exist would be unduly restrictive. The law should not favor one form of transaction over another, and by making the executory contract more like a conventional mortgage, this bill could do that.

The bill could create uncertainty for future purchasers of properties under executory contracts. It would allow information outside of the recorded contract to dictate the legal description of a property. This is problematic because people should be able to rely solely on public records and not have to worry about other information they are unaware of that could affect their property transaction. This could be harmful to future purchasers because the property covered by the contract might not be clear.

NOTES: The author plans to introduce a floor amendment that would specify that the use of extrinsic evidence to supply the legal description of property if the recorded contract did not contain that information would not affect the rights of a creditor or a subsequent purchaser who paid valuable consideration and who did not have notice of the executory contract.