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To: Clients and Friends of the Firm

From: Polunsky Beitel Green, LLP

Date: March 21, 2017

Subject: **CORRECTION:**
Recent Decision Regarding Texas Home Equity Lending
Carrington Mortgage Services, LLC v. Hutto, No. 14-15-00442-CV, 2017 WL 592120 (Tex. App. – Houston [14th Dist.] (extension of time granted for filing motion for rehearing))

We wanted to alert you to a recent decision of one of the Texas Court of Civil Appeals Courts that impacts Texas Home Equity Lending. As most lenders who make home equity loans in Texas are aware, the parties are required to execute an Acknowledgement of Fair Market Value, in which both the lender and the borrower agree as to the fair market value of the property as of the date of closing. Section 50(a)(6)(Q)(ix) provides that one condition of a home equity loan is that "the owner of the homestead and the lender sign a written acknowledgment as to the fair market value of the homestead on the date the extension of credit is made." An interpretation, 7 T.A.C. § 153.1(9), defines the term "Fair Market Value" as "the fair market value as determined on the date that the loan is closed."

In *Carrington Mortgage Services, LLC v. Hutto*, No. 14-15-00442-CV, 2017 WL 592120 (Tex. App. – Houston [14th Dist.] Feb. 14, 2017, no. pet. h.)(mot. reh'g granted, Feb. 27, 2017), one of the issues was whether the fair market value acknowledgement actually had to be executed by the lender on the date the extension of credit is made or if the temporal reference in the Constitution was solely a reference to the date of the fair market value of the property as of a specific date.

Significantly to lenders, the trial court found, among other things, that the "home-equity lien did NOT comply with the Texas Constitution because the lender signed the affidavit of fair market value after the closing date of the loan." Although the Fourteenth Court of Appeals initially affirmed the trial court's judgment, it did so on procedural grounds that the lenders had failed to properly argue the specific points of the trial court's findings regarding the lender's failure to comply with the Texas Constitutional requirements in the briefing of the matter. We note, however, that Carrington has filed a motion for an extension of time to request a rehearing, which the court of appeals has now granted. We contemplate the motion for rehearing being filed shortly for consideration.

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Although we believe the trial court reached an erroneous conclusion that the Lender is required to sign the Fair Market Value Acknowledgement on the date of the extension of credit, or the closing date, lenders should nevertheless, out of an abundance of caution, execute the fair market value acknowledgment on the closing date, if at all possible. One option for lenders is to send a lender-signed version of the document to the closing table. Based on applicable law, we believe that an electronic signature should be acceptable, provided the person signing it is properly authorized by the lender entity. Although the Constitution does not state that the form must be notarized, we note that many forms used by lenders include a notary acknowledgment, which is helpful in establishing the date the document is signed by the lender.

We encourage each of our lender clients to develop its own policies as to the method and timing of satisfying the Constitutional requirement for a written acknowledgment of fair market value signed by the borrower and lender. Such policy may reflect a very conservative approach (e.g. on closing date a wet signature with an acknowledgement certificate) or a more liberal approach (e.g. on closing date electronic signature without an acknowledgement) or may reflect investor requirements. However, in light of the uncertainty created by the lower court's decision in the *Carrington Mortgage v. Hutto*, we strongly encourage lenders to execute such document on the closing date either electronically or with a wet signature.

PLEASE NOTE: As stated previously, the Court of Civil Appeals in the *Carrington v. Hutto* case may consider a motion for rehearing. We will monitor this case and will send an update as information is available.

If you have any questions regarding this memorandum, please contact any of our firm attorneys below. We will provide an update regarding the rehearing of the matter when available.

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