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TEXAS STATE SENATOR
DISTRICT 25

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July 7, 2022

Office of the Texas Attorney General

Attention Opinion Committee

via email: opinion.committee@oag.texas.gov

P.O. Box 12548

Austin, TX 78711-2548

Re: Opinion Request: Entity Inclusion in Substitute Trustee Definition under
Texas Property Code, Title 5 Exempt Property and Liens, Subtitle B Liens,
Chapter 51 Provisions Generally Applicable to Liens. TEX. PROP. CODE Ch. 51.

Dear Attorney General Paxton:

This is a formal request for an Attorney General Opinion on:

1. Whether an entity can serve as a Substitute Trustee as defined in Texas Property Code §51.0001(7) for purposes of conducting a mortgage foreclosure sale.

BACKGROUND

In public foreclosure sales, current Texas law stipulates who may act as substitute trustee as designated by the trustee of the sale. Texas Property Code Section 51.001 defines the "Trustee" as "*a person or persons authorized to exercise the power of sale under the terms of a security instrument in accordance with Section 51.0074.*" Texas Property Code Section 51.001 also defines "Substitute Trustee" as "*a person appointed by the current mortgagee or mortgage servicer under the terms of the security instrument to exercise the power of sale.*"

Texas Property Code Chapter 51, however, does not include a specific definition of what a "person" means in this context. As a result, some question has arisen as to whether a substitute trustee is required to be a natural person, i.e. an individual human being, as opposed to a more encompassing legal person definition that would also include any legal entity such as an organization, governmental entity, corporation, partnership, association, etc.

ANALYSIS

Several existing statutes and case law appear to support the interpretation that the definition of Substitute Trustee is inclusive of an entity. The Texas Code Construction Act, Texas Government Code Section 311.005, for example, provides that “unless the statute or context in which the word or phrase is used requires a different definition,” the word “person” includes “corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.”

Other portions of the Texas Property Code also support this interpretation. Texas Property Code Section 111.004 defines a “person” to mean not just an individual but also a corporation; limited liability company; partnership; joint venture; association; joint-stock company; business trust; unincorporated organization; two or more persons having a joint or common interest; a government; a governmental subdivision; a public corporation; or any other legal or commercial entity.

Lastly, applicable case law seems to support this interpretation. *In re AMRCO, Inc.*, 496 B.R. 442 (2013), applies the Texas Property Code Section 111.004 definition of “person” to Texas Property Code Chapter 51, noting that “statutes commonly define “person” or “persons” to include artificial entities such as corporations and partnerships” and that “the inevitable conclusion, then, is that artificial persons are included within the definition of “person” under this section of the Texas Property Code, and may therefore serve as Trustee or Substitute Trustee.

Despite the above guidance from other statutes and applicable caselaw, confusion and difference in application of the definition of a “person” under Texas Property Code Section 51.001 remains.

CONCLUSION

For the foregoing reasons, the undersigned respectfully request the Texas Attorney General opinion as to whether a “person” acting as a “Trustee” or “Substitute Trustee” under Texas Property Code Chapter 51 can be a legal person or artificial person such as seen in the definitions of “person” offered by Texas Property Code Section 111.004 and Texas Government Code Section 311.005, or if instead a “person” for purposes of Texas Property Code Chapter 51 must be a natural person, i.e. an individual human being.

Please feel free to contact me if you require further information concerning the request for an opinion. Thank you for your attention to this inquiry.

Sincerely,

