2015 SUPPLEMENT to
Texas Foreclosure Manual
Third Edition

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This supplement updates the practice notes and forms and incorporates relevant statutory and case law handed down since 2014.

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4. After the pages have been checked, insert pages xvii–xx (the List of Effective Pages) in their proper place, immediately after page xvi and before the tab divider for Summary of Contents.

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Instructions for Removing and Inserting Pages

Remove Old Pages	*Insert New Pages*
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Behind tab CASES CITED	
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Behind tab LIST OF FORMS BY TITLE	
entire contents behind tab	Forms-1 – Forms-6
Behind tab SUBJECT INDEX	
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TEXAS FORECLOSURE MANUAL

Third Edition

Volume 1

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Ralph Martin Novak, Jr.
G. Tommy Bastian

Austin 2014

International Standard Book Number: 978-1-938873-06-5
International Standard Book Number: 978-1-938873-34-8 (2015 Supplement)
Library of Congress Control Number: 2014935946

Printed in the United States of America

Third Edition, 2014

TEXAS FORECLOSURE MANUAL

Third Edition

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Bill Locke is a shareholder with Graves, Dougherty, Hearon & Moody, A Professional Corporation, in Austin, Texas. He earned both his B.A. and J.D. with honors, from the University of Texas and was admitted to the bar in 1972. He is a twenty-year maintaining member of the College of Law of the State Bar of Texas; fellow member of the Texas Bar Foundation; director of the Real Estate, Probate and Trust Law Council; and a founding director of the Texas College of Real Estate Lawyers. He is a former president of the Corpus Christi Bar Association. He is listed in *The Best Lawyers in America* for real estate, *Who's Who in America*, and *Who's Who in American Law*, is a fellow of the American College of Real Estate Lawyers, is a frequent speaker for continuing legal education programs, and is the author of numerous articles relating to real estate law. He is board certified in commercial real estate, residential real estate, and farm and ranch real estate law. In addition to conceiving and bringing to fruition this book, which is an outgrowth of experiences in the economic downturn of the 1980s and his desire to help other practitioners avoid traps for the unwary, he regards the following as accomplishments: establishing the Palmer Drug Abuse Program in Corpus Christi in 1979 and in Austin in 2000 as programs helping teens and young adults recover from alcohol and drug abuse; conceiving of obtaining designations of the Corpus Christi Aquarium as the official aquarium of the state of Texas and the Mexic-Arte Museum of Austin, Texas, as the official Mexican and Mexican American fine art museum of Texas; and conceiving and participating in the implementation as chairman of the Corpus Christi Zoning and Planning Commission of the neighborhood zoning plan process for the city of Corpus Christi.

RALPH MARTIN NOVAK, JR.

Marty Novak is a real estate attorney in the Office of the General Counsel at the University of Texas. Before joining the University of Texas System, he was a partner at Brown McCarroll L.L.P. Hilgers and Watkins, P.C. and Kleberg, Dyer, Redford and Weil, P.C. He is board certified by the Texas Board of Legal Specialization in commercial real estate and is a member of the College of the State Bar of Texas. Over the years he has been a frequent speaker for continuing legal education programs offered by the State Bar of Texas, the University of Texas School of Law, and the University of Houston Law Center. In addition to being coauthor of the *Texas Foreclosure Manual*, he has contributed to the mechanic's lien section of the *Texas Collections Manual* published by the State Bar of Texas and is the author of *Christianity and the Roman Empire: Background Texts*, a widely praised work on early Christian history that has been used as required reading at a number of universities in the United States and abroad.

Mr. Novak holds a Bachelor of Arts in History and Anthropology, with honors, from Rice University (1973); a Masters Degree in Roman History from the University of Chicago (1975); and a Doctor of Jurisprudence, with honors, from the University of Houston (1982). He is married to Amy Novak and has two children, Becky and Michael.

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G. Tommy Bastian, board certified by the Texas Board of Legal Specialization in residential real estate law, focuses his practice on mortgage banking issues related to title, real estate, probate, and class-action litigation, as well as legislative matters. He is the author of more than fifty articles and publications, including a chapter in the Texas Practice Series, *Texas Foreclosure: Law and Practice*. He has served as a frequent lecturer on both state and national issues related to mortgage banking. Mr. Bastian is a graduate of Howard Payne University, Texas Tech Law School, the U.S. Army Command and General Staff College, and the U.S. National Defense Security University. He is actively involved in the Texas Mortgage Bankers Association, American Land Title Association Education Committee, Mortgage Banking Association, and Texas Land Title Association. In 2006, he served on the Residential Foreclosure Task Force mandated by Texas House Bill 1582 and was the course director for the State Bar's Advanced Real Estate Law Course. Mr. Bastian served as the principal drafter for the three Texas Supreme Court Task Forces responsible for creating Rules 735 and 736 dealing with foreclosure of home equity, reverse mortgage, home equity line of credit, and transferred tax liens. He received the Texas Mortgage Bankers Distinguished Service Award in 2010. He enjoys cultivating roses, which he then uses to illustrate many of his CLE presentations.

Acknowledgments

When it comes to foreclosures, superior performance depends on superior learning, and it is hoped that the new third edition of the *Texas Foreclosure Manual* will provide superior learning for any lawyer seeking to provide superior foreclosure legal services for the lawyer's clients or employer.

Twenty-one contributing authors made this new edition possible. The editors would like to acknowledge and thank all the persons named below who participated in the mammoth project of rewriting the third edition, which is still a work in progress. In addition to acknowledging the persons below for their assistance, the principal authors of each chapter are recognized for their contribution in the body of the new manual.

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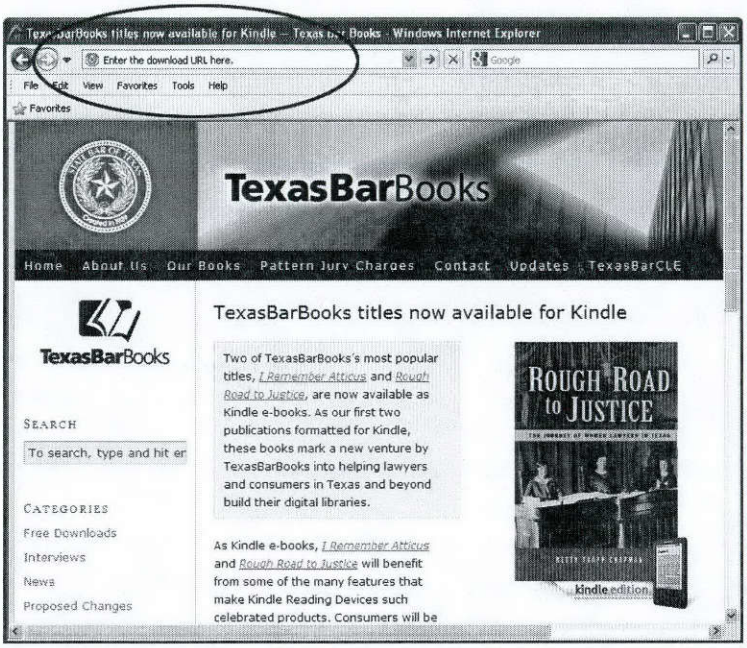

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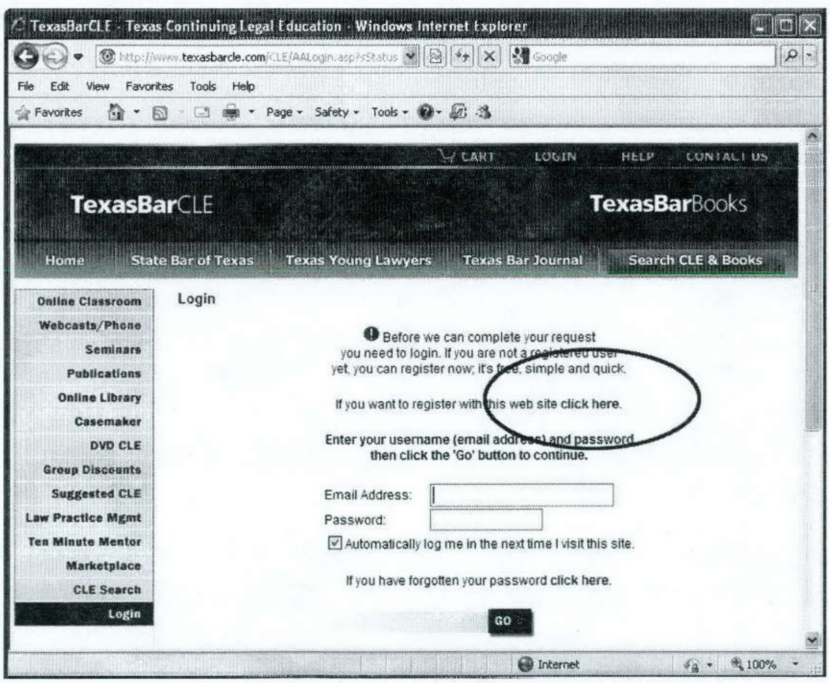

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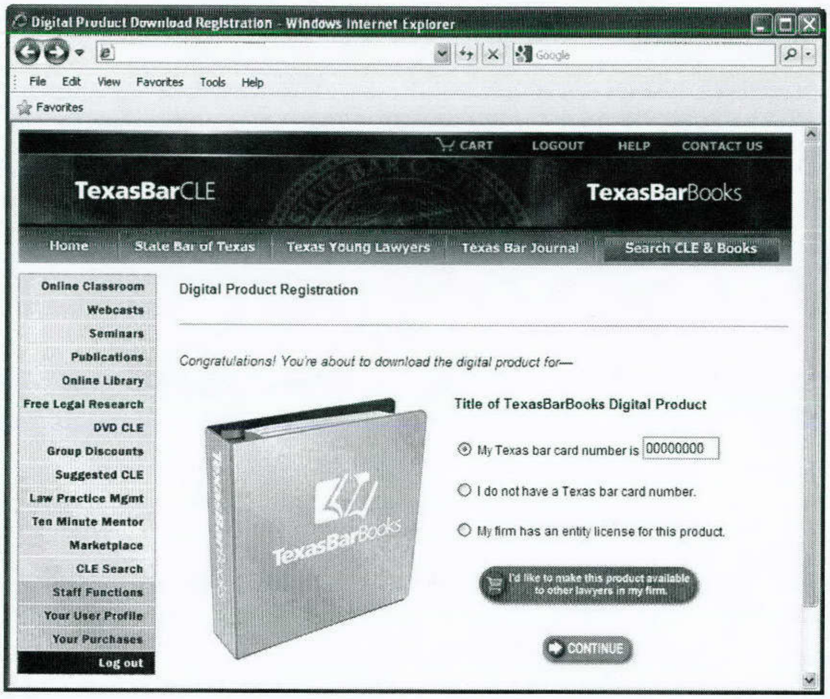

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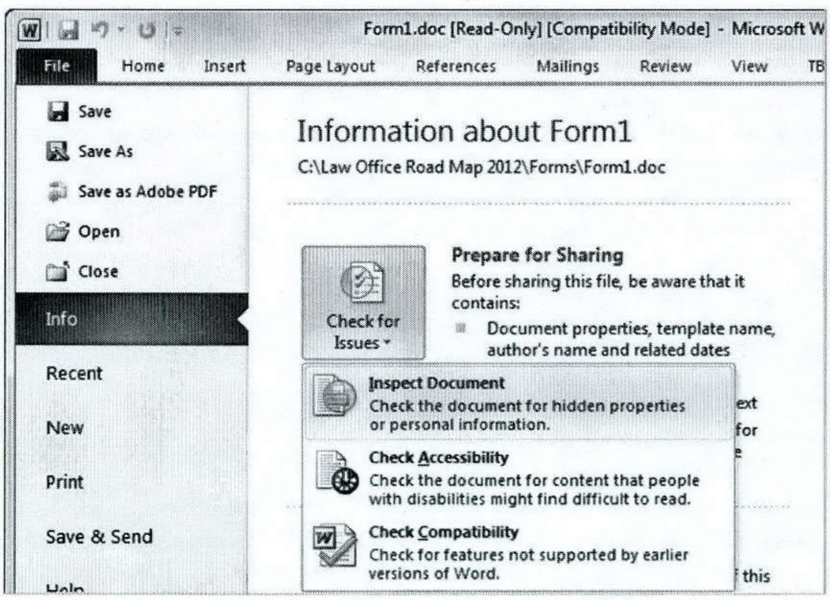

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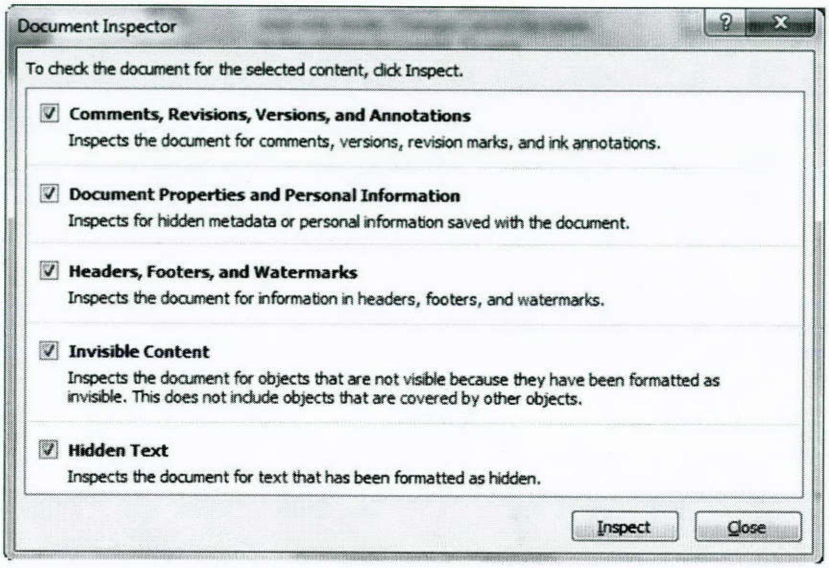

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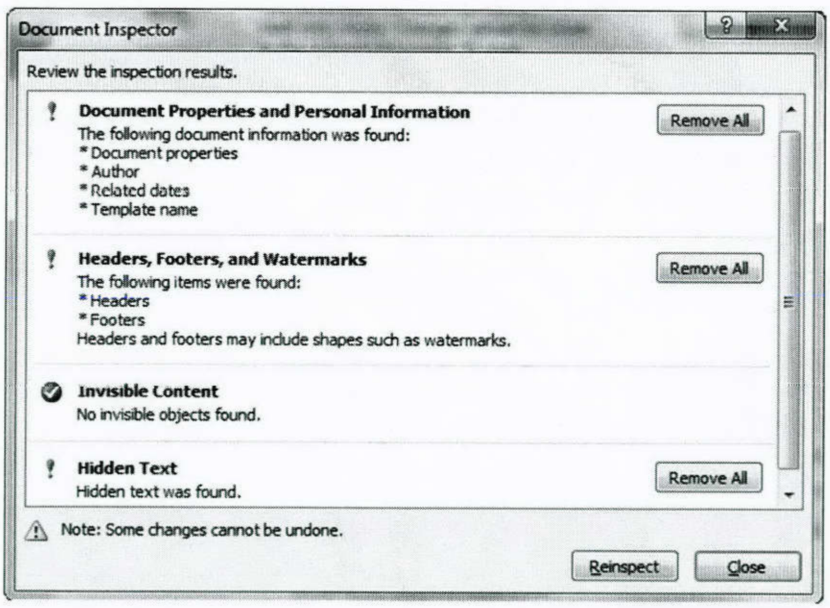

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Chapter 1

Attorney-Client Relations in the Foreclosure Process

§ 1.1 Introduction

The Texas Disciplinary Rules of Professional Conduct set the standard of conduct for Texas attorneys and are found in the Texas Government Code in title 2, subtitle G, appendix A, following section 84.004 of the Government Code. The rules are also available online at **http://legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct.aspx**.

This chapter follows the attorney-client relationship from the initial client interview to the termination of the relationship, with examples of what an attorney might do to document compliance with the rules during the foreclosure process. This chapter is very general and is not intended to be a substitute for a complete study of the rules.

§ 1.1:1 The Texas Lawyer's Creed

On November 7, 1989, the Supreme Court of Texas and the Texas Court of Criminal Appeals adopted 'The Texas Lawyer's Creed—A Mandate for Professionalism. An attorney adhering to the Creed agrees to advise a client of the contents of the Creed when undertaking a representation (article II, paragraph 1).

The Creed requires an attorney to advise clients of its contents when undertaking representation. See form 1-2 in this manual for the full text of the Texas Lawyer's Creed as appended to the attorney's engagement letter.

§ 1.1:2 Notice of Grievance Process

Section 81.079 of the Texas Government Code requires attorneys to notify clients of the grievance process. Notice must be provided by making available in the attorney's office grievance brochures prepared by the State Bar, by prominently posting a sign in the attorney's office describing the process, by including the information in a written contract for services, or by providing the information in a bill for services. Tex. Gov't Code § 81.079(b).

§ 1.2 Sources of Interpretation of Rules

Judicial decisions in Texas regarding ethical violations are referenced in the annotations to the Texas Disciplinary Rules of Professional Conduct.

The Committee on Professional Ethics of the Supreme Court of Texas issues opinions on the rules and the Texas Code of Professional Responsibility (the predecessor to the rules). These opinions are published in the *Texas Bar Journal*.

An attorney may obtain informal explanations of the rules from the State Bar. A consultation with the disciplinary counsel's office may be not only informative but also probative of good faith should a question later arise. The telephone number of the attorney ethics line is 800-532-3947.

The Texas Center for Legal Ethics also maintains an online library, index, and text of all published Texas Supreme Court Professional Ethics Committee opinions; Texas cases dealing with ethics and professionalism; and a bibliography. The Center's Web site is at **www.legalethicstexas.com**, and its phone number is 800-204-2222, ext.1477.

§ 1.3 Disciplinary Action

Article VIII of the Texas Disciplinary Rules of Professional Conduct (Maintaining the Integrity of the Profession) generally governs an attorney's conduct. Rule 8.04 sets out a comprehensive restatement of all forms of conduct that will subject an attorney to disciplinary action. Tex. Disciplinary Rules Prof'l Conduct R. 8.04, *reprinted* in Tex. Gov't Code, tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9). It includes conduct controlled by the State Bar Act and the State Bar Rules. The rules govern attorneys who are admitted to practice in Texas or specially admitted for a particular proceeding. A licensed Texas attorney's conduct in another state may also be the subject of a Texas grievance procedure. Tex. Disciplinary Rules Prof'l Conduct R. 8.05.

The rules do not prescribe either disciplinary procedures or penalties for a violation. Tex. Disciplinary Rules Prof'l Conduct preamble para. 14. Possible sanctions are found instead in the Texas Rules of Disciplinary Procedure. These rules are reproduced in the Texas Government Code in title 2, subtitle G, appendix A-1, following section 84.004 of the Government Code. The rules are also available online at **http://legalethicstexas.com/Ethics-Resources/Rules/Texas-Rules-of-Disciplinary-Procedure.aspx**.

§ 1.4 Consulting Potential Client

§ 1.4:1 Attorney-Client Relationship

The relationship of attorney and client is one of principal-agent. *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 633 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.). It is created by consent and governed by the general rules covering agency. *Bar Ass'n of Dallas v. Hexter Title & Abstract Co.*, 17.2d 108, 115 (Tex. Civ. App.—Fort Worth 1943), *aff'd*, 179 S.W.2d 946 (Tex. 1944). The fiduciary obligations and responsibilities imposed on the attorney are predicated on the existence of the attorney-client relationship. *Shropshire v. Freeman*, 510 S.W.2d 405 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.).

The attorney-client relationship can be implied from the conduct of the parties. *Duval County Ranch Co.*, 663 S.W.2d at 633. A written contract or payment of a retainer is not necessary. For example, gratuitous services can establish an attorney-client relationship. *Prigmore v. Hardware Mutual Insurance Co. of Minnesota*, 225 S.W.2d 897, 899 (Tex. Civ. App.—Amarillo 1949, no writ). But the fact that an attorney had business dealings with someone does not establish an attorney-client relationship. *McGary v. Campbell*, 245 S.W. 106, 116 (Tex. Civ. App.—Beaumont 1922, writ dism'd w.o.j.). The existence of an attorney-client relationship is a question of fact. *Jinks v. Moppin*, 80 S.W. 390 (Tex. Civ. App. 1904, no writ).

§ 1.4:2 Areas of Concern When Consulting Potential Client

Consultation alone does not create an attorney-client relationship. Nevertheless, some duties attach during a consultation. *See* Tex. Disciplinary Rules Prof'l Conduct preamble para. 12.

During a consultation, an attorney must maintain the requirements of confidentiality and must be wary to avoid current and future conflicts. A consultation and certainly an investigation may impose additional duties such as advising the potential client of the statute of limitations. *See Villarreal v. Cooper*, 673 S.W.2d 631 (Tex. App.—San Antonio 1984, no writ). At least one state has held an attorney liable for negligently investigating a claim, even though the attorney

Additional Resources

The Board of Disciplinary Appeals, accessed Jan. 8, 2016, **www.txboda.org**.

Cox, Susan C. Karen Gren Scholer, and Catherine Weir. "Ethics Do's and Don'ts for the Dirt Lawyer. In *Advanced Real Estate Strategies Course, 2013*. Austin: State Bar of Texas, 2013.

Dillard, D. Diane. 'Engagement Agreements: The Top 20 Country Countdown with Tips for Ethical Compliance. In *Advanced Real Estate Drafting Course, 2013*. Austin: State Bar of Texas, 2013.

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[Reserved]

Chapter 2

Getting Started—Information Required

Forms

[Reserved]

§ 2.5:3 Verification of Addresses

If the debt is secured by the debtor's residence, the "debtor's last known address" is defined by Texas Property Code section 51.001(2)(A) as "the debtor's residence address unless the debtor provided the mortgage servicer a written change of address before the date the mortgage servicer mailed a notice required by Section 51.002." Tex. Prop. Code § 51.0001(2)(A). For any other debt, the debtor's last known address is the address contained in the mortgage servicer's file unless there was a written change of address given in accordance with the requirements of the loan documents. *See* Tex. Prop. Code § 51.0001(2)(B). Because failure to send foreclosure notices to the correct addresses is generally a fatal foreclosure defect, obtaining the correct addresses from the lender or servicer is critical. Many attorneys simply mail notices to all currently valid addresses that the lender has for the borrower.

Many attorneys also deem it useful to confirm the physical address of the collateral property, even if the loan documents provide that notices must be given to a different address. In addition to being necessary to conduct any inspection of the mortgaged property prior to foreclosure, the physical address is useful if the client desires an eviction action, as the eviction notice to vacate and the eviction petition should list the actual physical address of the property. If the eviction petition only contains a mailing address and not the property street address, the constable will not serve the eviction petition, and the attorney will not be able to obtain a writ of possession if the eviction pleading or the judgment lists a mailing address rather than the street address.

See generally chapter 8 in this manual concerning notices to the obligors and mortgagors.

§ 2.5:4 Loan Payment History

The attorney should review the loan payment history to verify that the demand being made to cure the loan default is correct. If the attorney makes a demand for an amount of money that is in excess of the actual debt owed, both the attorney and client may be liable for statutory damages and subject to counterclaims by the borrower. See chapter 7 in this manual for considerations of both the Texas Debt Collection Act and federal Fair Debt Collection Practices Act.

§ 2.5:5 Loan File Comments

The attorney should review the client's loan file comments/communication record to ensure that the client has not made representations or agreements with the borrowers or mortgagors that may hinder or prevent the foreclosure, such as an enforceable promise to modify a loan or forbear from certain actions. Typically, residential mortgage servicers will not provide loan comments for review without a special request from the attorney.

§ 2.5:6 Prior Correspondence with Parties

In an effort to control legal fees, large residential mortgage servicers will typically prepare and mail notices of default, demands for cure, and notices of intent to accelerate before engaging an attorney to assist with the collection effort. The attorney should verify that such prior correspondence was done properly, and if necessary the attorney should resend notices that comply with the requirements of the loan documents and applicable law.

Beginning in 2014 and escalating dramatically thereafter, borrowers have been challenging foreclosure by claiming that the statute of limitations under Texas Civil Practice and Remedies Code section 16.035 bars the mortgagee from foreclosing because a notice of acceleration sent four or more years earlier matured the debt. *See* Tex. Civ. Prac. & Rem. Code § 16.035. Consequently, before proceeding with foreclosure, counsel must determine whether a notice of acceleration was previously sent and, if sent, ensure the notice was abandoned or rescinded. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562 (Tex. 2001); Acts 2015, 84th Leg., R.S., ch. 759, § 1 (H.B. 2067), eff. June 17, 2015 (adding Tex. Civ. Prac. & Rem. Code § 16.038). See section 10.26 in this manual for a discussion of this issue.

§ 2.5:7 Mortgagee Policy

The attorney should review the loan policy of title insurance (T-2) ("Mortgagee Policy"). It is important to verify that the identity of the insured, the legal description of the mortgaged property, the description of the insured amount, the loan document recording information, and the Schedule B encumbrances are accurately set out in the title policy and comport with the loan documents. Mistakes in transcribing information onto the Mortgagee Policy are not uncommon. If a truly significant problem is discovered that cannot be corrected, the attorney should consult with the client concerning both the viability of proceeding with the collection effort and the appropriateness of filing a claim under the title Mortgagee Policy. See Texas Department of Insurance, Title Insurance Basic Manual at **www.tdi.texas.gov/title/titleman.html**.

See chapter 4 in this manual for further discussion of title issues.

§ 2.6 Foreclosure Calendar and Checklist

It is highly recommended that the attorney prepare both a foreclosure calendar and a foreclosure checklist for each loan being handled by the attorney, as these instruments are a useful means of organizing and tracking the key steps in the foreclosure process for each particular loan. See form 2-3 in this manual for a foreclosure calendar that lists key dates and deadlines during the foreclosure process. See form 2-4 for an attorney's foreclosure checklist.

Form 2-1

Note: When preparing this form, the attorney should carefully review Tex. Prop. Code §§ 51.0001, 51.0025, and 51.0075 and Tex. Bus. & Com. Code §§ 3.203 and 3.301 to ensure any reference to a person accurately describes the role the person holds or performs in the context of a foreclosure proceeding, e.g., references to "noteholder," "beneficiary," "owner," "lender," "obligor of the debt," "mortgagor," "mortgagee," or "mortgage servicer" as appropriate.

Loan Referral Questionnaire

Pursuant to your request that our firm represent you in foreclosing on the [**describe**] property, please complete this questionnaire and return it by [**date**].

A. Summary Loan Information

Foreclosure Referral Date: ____________________

Loan Reference Number: ____________________

Original Lender's Name and Address:

____

Current Lender or Holder's Name, Address, and Phone Number:

____

If Applicable, Mortgage Servicer's Name, Address, and Phone Number:

____

Contact Person's Name, Day Phone Number, and After Hours Contact Information:

____

[Borrower's/Borrowers'] Name[s] and Address[es] (include county name):

____

Deed of Trust Property Description and Mailing Address (if different from the above address; include county name):

____

[Borrower's/Borrowers'] Social Security Number: ___________________

Loan Origination Date: ___________________

Original Loan Amount:___________________

Payment Amount: ___________________

Loan Due Date: ___________________

Collateral Property Legal Description:

____

Deed of Trust Recording Information (clerk's file no. or volume and page):

____

Original Trustee's Name: ______________________________________

Substitute Trustee's Name, Address, and Phone Number:

____

Number of Days Required before Loan can be Accelerated: _________________________

Must the appointment of substitute trustee be recorded prior to the posting of the foreclosure sale?

______Yes ______No

Lien Position: ___________________

Chapter 3

Evaluating the Options for Collecting the Debt

The editors gratefully acknowledge Dominique Marshall Varner for her contribution to this chapter.

§ 3.1 Introduction

While this manual is devoted primarily to the enforcement of a loan through judicial or nonjudicial foreclosure of a deed of trust, the attorney should always keep in mind that a secured lender has a number of alternatives to foreclosure of the loan collateral and that in appropriate circumstances these alternatives may be of greater utility and value to the lender than foreclosure. The possible avenues for dealing with default on a secured loan include the following:

1. *Negotiated Restructuring of the Debt.* This entails accepting additional security for a reinstatement or modification of the debt; restructuring the debt payments, on either a temporary or permanent basis, and perhaps forgiving a portion of the debt; selling the loan (often at a discount) to a third party procured by the borrower; or for a residential loan, restructuring through a government-assistance-to-homeowner program. See section 3.3 below.

2. *Negotiated Plans for Liquidation of the Collateral.* This entails permitting a "short sale" of the mortgaged property, with or without compromise of payment of the shortfall; cooperating with the borrower in a voluntary plan to liquidate assets for application to the debt, either inside or outside of bankruptcy or receivership; or negotiating a deed in lieu of foreclosure. See section 3.4.

3. *Unilateral Acts by Creditor to Take Control of All or Part of the Collateral.* This entails taking control of rents under an assignment of rents; taking physical control of the mortgaged property as a mortgagee in possession; proceeding to nonjudicial foreclosure of the mortgaged property, with the option to thereafter pursue any deficiency against obligors on the debt; rescission of a vendor's lien; involuntary bankruptcy filing against the obligor; or receivership proceedings. See section 3.5.

4. *Judicial Action by Lender.* This entails obtaining judgment on the debt, without seeking foreclosure of the mortgaged property; obtaining judgment on the debt, with judicial foreclosure of the mortgaged property; obtaining judgment on the debt and subsequently pursuing nonjudicial foreclosure of the mortgaged property; or filing suit on the debt and seeking judicial control of the mortgaged property during the interim (such as through receivership, injunction, or sequestration). See section 3.6.

The attorney must keep in mind that with some of these courses of action, the doctrine of election of remedies may be invoked to prevent the lender from simultaneously pursuing one or more other remedies. See section 3.6:1.

The attorney may also find it necessary to remind the lender that, unlike the self-help repossession of personal property allowed under section 9.609 of the Texas Business and Commerce Code, Texas law does not recognize self-help repossession of real estate. If the deed of trust contains no clause authorizing the lender to take possession of the mortgaged property prior to foreclosure, the only remedy afforded to the lender under a deed of trust is the right of nonjudicial foreclosure the lender bargained for. The lender who wrongfully exercises self-help repossession exposes itself to a variety of counterclaims. See, for example, *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595 (Tex. App.—Houston [14th Dist.] 1994, writ denied), where the court (construing former section 9.503, now section 9.609) found that the repossessing lender had committed trespass by changing the locks on the doors of its borrower (a church) and posting guards to ensure that church members did not break back into the church for services. See section 3.5:2 for additional discussion.

Likewise, the lender is not entitled to collect the rents or profits of the mortgaged property prior to foreclosure except through a contractual agreement with the mortgagor. See chapter 9 concerning the collection of rents and profits prior to foreclosure.

§ 3.2 Analyzing the Circumstances

To determine the most efficient way to resolve a default in payment of a debt or breach of security instrument, the lender must evaluate a significant number of circumstances pertaining to the situation of the lender, the borrower, and the mortgagor. The attorney can advise the lender of the legal implications of the facts and circumstances of the particular loan transaction, but ultimately it is the lender who must make the business decision (and accept the business risk) on how best to proceed with enforcement of the loan documents.

Common Factors: In making its decision on how best to proceed, the lender will invariably be influenced by any number of factors that may or may not be unique to the lender, which are not necessarily related to the ability to legally enforce the loan documents but which materially affect the relative value of the debt and the collateral to be realized by the lender in light of the estimated time and cost (both monetary and otherwise) of a particular course of action. Such factors might include—

1. the degree to which the lender is financially dependent on realizing immediate payment from the borrower;
2. the existence of other business relationships with the borrower that would be affected by the lender's action on this particular debt;
3. the borrower's availability and willingness to discuss an agreed resolution to the default;
4. casualty damage to the mortgaged property;
5. significant renovations to the mortgaged property that could be required under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213, to facilitate a postforeclosure resale of the collateral;
6. suspected or known environmental problems with the mortgaged property that may affect the value of the collateral;
7. the lender's ability to realize payment more easily through a guarantor than through pursuit of the borrower or foreclosure of the mortgaged property;
8. the availability of other borrower assets to bolster the existing credit relationship;
9. competition with other creditors of the borrower for access to the borrower's assets (including the relative lien posi-

tion of the lender in the lender's existing collateral);

10. the nature of any defenses or counterclaims available to the borrower in light of the documentation or administration of the lender's loan;

11. the likelihood of the borrower resisting collection efforts through bankruptcy or other court action; and

12. the likelihood that any arrangement with the borrower might be set aside as a preference by a third-party action, such as an involuntary bankruptcy filing against the borrower.

Bankruptcy Risk: In analyzing the best way to proceed with collection, the lender may also be faced with a number of factors that are beyond the lender's control. The most commonly encountered of these factors is the unilateral right of the borrower and the mortgagor to file for bankruptcy and thereby stay all collection activities until the lender can obtain a lift of stay through bankruptcy proceedings. There are, however, many other borrower circumstances that can affect the lender's decision as to how best to enforce a loan in default.

Military Service: The Servicemembers Civil Relief Act of 2003, codified at 50 U.S.C. §§ 3901–4043, protects military personnel from foreclosure actions arising out of loan defaults attributable to military service by suspending the lender's collection rights while the servicemember is on active duty and for nine months after discharge from active duty. See chapter 33 for a discussion of the Act and related Texas statutes.

Divorce: The borrower or mortgagor may be involved in a divorce action. If so, the filing of a divorce action or the granting of a divorce after the execution of the mortgage and before the proposed deed-of-trust foreclosure sale does not suspend or prohibit a lender from nonjudicially foreclosing its lien. *See Mussina v. Morton*, 657 S.W.2d 871, 874 (Tex. App.—Houston [1st Dist.] 1983, no writ). However, the appointment of a receiver by a family law court does. *Texas American Bank/West Side v. Haven*, 728 S.W.2d 102, 104 (Tex. App.—Fort Worth 1987, writ. dism'd w.o.j.); *see also Texas Trunk Railway Co. v. Lewis*, 16 S.W. 647, 649 (Tex. 1891).

Guardianship: Similarly, a deed of trust executed by a guardian for a minor may not be foreclosed except pursuant to court order. *Crowley v. Redmond*, 41 S.W.2d 274, 278 (Tex. Civ. App.—Fort Worth 1931), *aff'd*, 70 S.W.2d 1113 (Tex. 1934).

Death of Mortgagor: The death of the mortgagor prior to foreclosure creates an enormous risk for the lender without first resolving the estate, as the foreclosure sale could be set aside by the subsequent opening of a dependent administration within four years of the mortgagor's death. See chapter 26 for a discussion of the effect of probate law on the collection of the deceased's debts through foreclosure.

Drug Enforcement Laws: The lender's interest in the mortgaged property may be threatened or lost through illegal activities (of the borrower or others) on or related to the mortgaged property, as more than 140 different federal forfeiture statutes and several Texas statutes allow the government to seize a defendant's interest in property. See sections 4.30 and 4.31.

Residential Lease: The lender's freedom to deal with the mortgaged property postforeclosure may be restricted by residential leases granted by the mortgagor, as the Protecting Tenants at Foreclosure Act of 2009, which is title VII, sections 701–704 of the Helping Families Save Their Homes Act of 2009, requires that a lender who forecloses on a residence must honor any existing lease or, for tenants on month-to-month leases, provide tenants with a minimum of ninety-days' notice to vacate. (Section 8 tenants are provided with parallel eviction protection.) *See* Pub. L. No. 111-22, § 702, 123 Stat.

1632, 1660–61; 12 U.S.C. § 5220 note; *Fontaine v. Deutsche Bank National Trust Co.*, 372 S.W.3d 257, 260 (Tex. App.—Dallas 2012, pet. dism'd w.o.j.). See sections 15.9:1 and 15.9:4 concerning protections for residential tenants.

Finally, it is absolutely essential that the lender be aware of any title issues surrounding its collateral. In many respects, the analysis of how to proceed with collection cannot begin until the lender understands whether title issues affect the value and marketability of the mortgaged property. See chapter 4 for a discussion of these title issues. For these and many other possible reasons, the lender must carefully evaluate all of the alternatives for collection and not merely proceed to foreclosure as a "knee-jerk" to a loan default.

§ 3.3 Negotiated Agreements to Restructure the Debt

A negotiated restructuring of the existing credit relationship may provide a quicker resolution of a defaulted loan than a judicial or nonjudicial foreclosure actively resisted by the borrower or mortgagor, but to be successful the negotiated restructuring normally requires that the borrower (1) has access to material additional assets that can be pledged to secure the defaulted debt in consideration for a reinstatement, restructuring, or forbearance agreement, and/or (2) realistically can be expected to realize sufficient cash flow in the future to service a restructured debt payment plan. Even where the lender doubts that such is true, the lender may still wish to engage in negotiations with the borrower concerning the default, both to explore possible areas of agreement and to collect further information concerning the borrower's circumstances.

Care must be exercised by the lender in workout discussions and communications to the obligors to avoid later claims of reliance on course of dealings, oral promises, and misrepresentation arising out of the discussions. Before starting such negotiations with the borrower, the lender should obtain a written agreement with the borrower concerning the terms of any workout negotiations, to avoid later claims that a borrower had relied on purported statements or agreements reached during the negotiations but never reduced to writing. See form 3-1 for a sample agreement concerning terms of workout negotiations. If necessary to facilitate negotiations, a foreclosure forbearance agreement may also be required. See form 3-2.

In *Bluebonnet Savings Bank, F.S.B. v. Grayridge Apartment Homes, Inc.*, 907 S.W.2d 904, 909–10 (Tex. App.—Houston [1st Dist.] 1995, writ denied), the court found a borrower's claim that the lender had agreed to refinance its delinquent loan to be unreasonable, partly on the basis that the parties had entered into a prenegotiation agreement. Also, in *Commercial National Bank of Beeville v. Batchelor*, 980 S.W.2d 750, 753–54 (Tex. App.—Corpus Christi 1998, no pet.), the court found that the lender's previous acts of lenience with the borrower did not impose any obligation to continue such extra-contractual lenience in the future based on the UCC's good-faith provision.

A key point to remember in connection with any material modification of a guaranteed loan is that the guarantor may be inadvertently released of liability for payment of the debt absent the guarantor's consent to the modification. The guarantor's consent for a material modification should be obtained either at the time of the modification or by prior agreement. See, for example, *NCNB Texas National Bank v. Johnson*, 11 F.3d 1260, 1266 (5th Cir. 1994), in which the court rejected the guarantor's objection of no notice of debt restructure where the guaranty provided that the guarantor waived "notice of extensions, renewals or rearrangements of Debt, [notice] of release or substitution of collateral . . . and every other notice of every kind." *See also Wiman v. Tomaszewicz*, 877 S.W.2d 1, 7 (Tex. App.—Dallas 1994, no writ);

FDIC v. Attayi, 745 S.W.2d 939, 944 (Tex. App.—Houston [1st Dist.] 1988, no writ).

§ 3.3:1 Loans to Financially Distressed Borrowers

A voluntary restructuring of the delinquent loan may involve the loan of additional cash to the borrower or the taking of new collateral, or both. A loan made to a borrower in financial distress that is secured by a lien on the borrower's assets and subsequently foreclosed is not a fraudulent transfer if the lien granted was made for reasonably equivalent value. *See* Tex. Bus. & Com. Code §§ 24.005(a)(2), 24.009(a). In *Yokogawa Corp. of America v. Skye International Holdings, Inc.*, 159 S.W.3d 266, 271 (Tex. App.—Dallas 2005, no pet.), the court noted that "[t]he value of the collateral is irrelevant because the excess over the debt is not lost to the debtor or other creditors" (citing *First National Bank of Seminole v. Hooper*, 104 S.W.3d 83, 86 (Tex. 2003)). The *Yokogawa* court also held that if this were not the case, "creditors would be reluctant to negotiate loan workouts with financially troubled debtors because taking collateral in excess of their loan would expose them to substantial risk over and above the amount of their debt." *Yokogawa*, 159 S.W.3d at 271 (quoting *First National Bank of Seminole*, 104 S.W.3d at 86).

§ 3.3:2 Statute of Frauds and Written Loan Agreements

All loan agreements with financial institutions involving amounts exceeding $50,000 must be in writing and signed by the party to be bound or by that party's authorized representative. Tex. Bus. & Com. Code § 26.02(b). Likewise, agreements falling within the statute of frauds must be in writing. *See* Tex. Bus. & Com. Code § 26.01. In cases governed by section 26.01, "there must be a written memorandum which is complete within itself in every material detail and which contains all of the essential elements of the agreement so that the contract can be ascertained from the writings without resorting to oral testimony." *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978).

The written memorandum must, within itself or by reference to other writings and without resort to parol evidence, contain all the elements of a valid contract, including an identification of both the subject matter of the contract and the parties to the contract. *Dobson v. Metro Label Corp.*, 786 S.W.2d 63, 65 (Tex. App.—Dallas 1990, no writ). In a contract to loan money, the material terms include the amount to be loaned, the maturity date of the loan, the interest rate, and the repayment terms. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). Parties to a written contract that is within the provisions of the statute of frauds—

> may not by mere oral agreement alter one or more of the terms thereof and thus make a new contract resting partly in writing and partly in parol, the reason for the rule being that, when such alteration is made, part of the contract has to be proven by parol evidence, and the contract is thus exposed to all the evils which the statute was intended to remedy.

Dracopoulas v. Rachal, 411 S.W.2d 719, 721 (Tex. 1967) (quoting *Robertson v. Melton*, 115 S.W.2d 624 (Tex. 1938)). A modification to a contract need not restate all the essential terms of the original agreement. A modification alters only those terms of the original agreement to which it refers, leaving intact those unmentioned portions of the original agreement that are not inconsistent with the modification. *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 547–48 (Tex. App.—Houston [1st Dist.] 1994, no writ).

One Texas court has held that under Tex. Bus. & Com. Code § 26.02 (unlike the traditional statute of frauds language in section 26.01), the loan agreement itself must be in writing; a memorandum of agreement is not sufficient. *Bank of*

Texas, N.A. v. Gaubert, 286 S.W.3d 546, 554 (Tex. App.—Dallas 2009, pet. dism'd w.o.j.). The court further noted that no Texas case has expressly held that the equitable exceptions to section 26.01 also apply to section 26.02 (and the court did not make any decision regarding such in reaching its verdict). *Gaubert*, 286 S.W.3d at 555. Finally, the court held that while equity will avoid the statute of frauds where application of the statute would itself work a fraud, there is no authority for avoiding the statute of frauds based on mere negligence. *Gaubert*, 286 S.W.3d at 556 (citing *Nagle v. Nagle*, 633 S.W.2d 796, 799 (Tex. 1982); *Birenbaum v. Option Care, Inc.*, 971 S.W.2d 497, 503–04 (Tex. App.—Dallas 1997, pet. denied)).

In *BACM 2001-1 San Felipe Road Ltd. Partnership v. Trafalgar Holdings I, Ltd.*, 218 S.W.3d 137 (Tex. App.—Houston [14th Dist.] 2007, pet. denied), the court found that the lender's cashing of a $250,000 check tendered by the borrower bearing the notation "This payment on the captioned loans (see attachment) is in confirmation of your previous acceptance of the agreement contained in our letter of March 23, 2004 (attached)" coupled with a transmittal letter stating, "With further reference to my letter and proposal [20 percent discount on the loan's principal, payment of discounted balance within four months, and immediately bringing loan current], I am enclosing our cashier's check in the amount of $250,000 as was agreed upon during your telephone conference call to us yesterday . . . ," were not sufficient to either establish a new contract meeting the requirements of Tex. Bus. & Com. Code § 26.02 or to be a contract modifying the existing loan. Without resorting to parol evidence, which is barred by Tex. Bus. & Com. Code § 26.02, the court could not establish several essential terms to the alleged new contract or a modification to the existing contract: identities of the parties, interest rate, treatment of late fees and default interest, and treatment of prepayment penalty. The court also found that if the proposal and good-faith payment made by the borrower and accepted by the lender were to be treated as a modification of the existing loan, the borrower breached the modified agreement by not immediately bringing the loan current, did not continue to make installment payments as they became due, did not pay late-payment charges, and did not pay the prepayment premium of $7,500,000 (i.e., terms that were not addressed in the proposal and thus were left intact as terms of the modified agreement).

§ 3.3:3 Limitations and Reinstatement Agreements

The purpose of limitations statutes is to establish a point of repose for past actions and for "ensur[ing] that the search for truth is not impaired by stale evidence or the loss of evidence." *Childs v. Haussecker*, 974 S.W.2d 31, 38–39 (Tex. 1998); *accord Stewart Title Guaranty Co. v. Hadnot*, 101 S.W.3d 642, 644 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). If the lender accelerates the maturity of the indebtedness, the statute of limitations will begin to run from the date of acceleration. If the lender allows the borrower to cure the default and resume regular payments on the note, the statute of limitations will nevertheless continue to run unless the lender reinstates the loan or unaccelerates the note. If no reinstatement agreement is signed, the borrower may at a later date assert a statute of limitations defense to continued payment. See form 3-3 in this manual, Reinstatement, Modification, Renewal, and Extension Agreement. A general agreement in advance by the borrower to waive or not plead the defense of limitations on a particular obligation is void as against public policy. *Duncan v. Lisenby*, 912 S.W.2d 857, 858–59 (Tex. App.—Houston [14th Dist.] 1995, no writ).

See sections 5.12 and 10.26 for further discussion of limitations.

§ 3.3:4 Renewal and Extension Agreements

Renewal and extension agreements pertaining to existing loans should be evidenced by a signed instrument recorded in the official records of the county in which the mortgaged property is located. Failure to do so creates the risk that the four-year limitations for enforcement of a deed of trust will run as to third-party lenders and purchasers relying on the public record. See sections 5.12 and 10.26 in this manual.

The mortgagee's title insurance coverage will remain in effect for four years past the original maturity date of the note or a subsequently renewed and extended maturity date, whichever is later. Thus, the coverage provided by the mortgagee title insurance policy will be extended to the new maturity date of the note each time the note is renewed, provided, however, that the title insurance company will not be responsible for any loss incurred by the mortgagee as a result of the execution of an invalid renewal and extension agreement or the failure to record any renewal and extension agreement. See section 3.3:10 below.

§ 3.3:5 Modification of Consumer Debt

The Truth in Lending Act is implemented by Regulation Z of the Federal Reserve Board, 12 C.F.R. pt. 226. If the workout agreement involves consumer credit governed by Regulation Z for which a truth-in-lending statement was originally required, a new truth-in-lending disclosure statement may need to be delivered to the borrower at the time the mortgage loan is reinstated. Regulation Z also provides that refinancing is a new transaction requiring new disclosures to the consumer, unless the refinancing falls within one of the exceptions. *See* 12 C.F.R. § 226.20(a). Section 226.20(a) provides for an exception for workout agreements if they involve a change in the payment schedule or collateral requirements as a result of the consumer's default, *unless* the rate is increased or the new amount financed exceeds the unpaid balance plus earned finance charge and premiums for the continuation of certain types of insurance. *See* 12 C.F.R. § 226.20(a)(4).

§ 3.3:6 Sale of Loan to Third Party

Even though a loan may never have been in default, there are times when, for any number of reasons, the relationship between the lender and the borrower has deteriorated to the point that one or both parties want to end it. Terminating the relationship is most commonly done through a loan sale or refinancing involving a third-party lender procured by the borrower. When the loan is in default, the lender may be willing to sell the loan at a discount, calculating that the reduction in recovery is more than offset by the uncertainties of the time, cost, and likely success in pursuing collection of the full loan balance.

See form 3-4, Loan Purchase Agreement; form 3-5, Assignment of Note and Lien; form 3-6, T-3 Endorsement Instructions for Use Upon Assignment of Lien; form 3-7, Estoppel Certificate from Note Seller; form 3-8, Estoppel Certificate from Obligors; and form 3-9, Letter to Maker.

§ 3.3:7 Government Assistance to Homeowners

A number of federal programs exist to assist homeowners and creditors in the restructuring of delinquent residential home loans so as to avoid foreclosure of the residence. Depending on the particular circumstances of the loan and agreements between the creditor and the government, participation in some of these restructuring and assistance programs is mandatory. See chapter 36 in this manual for further discussion of these programs.

§ 3.3:8 Release and Settlement of Claims

A relatively common lender practice is to require that, as a condition to a restructuring of the loan, the borrower and the mortgagor must release all known and unknown causes of action that arose under the loan transaction prior to the effective date of the restructuring agreement. The lender may also require that the borrower and mortgagor provide sworn affidavits as to their financial condition in connection with accepting a settlement and compromise plan. Both proposals obviously require careful consideration by the borrower, mortgagor, and their respective attorneys.

§ 3.3:9 Failure of Workout

Assuming the loan is not part of one of the federal government's homeowner assistance programs (and thus subject to the contractual/statutory requirements of the program), upon failure of a borrower to perform under an executory accord, the lender may treat the accord as repudiated and may choose to claim its rights under the original cause of action or the accord. *Alexander v. Handley*, 146 S.W.2d 740, 742–43 (Tex. 1941); *BACM 2001-1 San Felipe Road Ltd. Partnership v. Trafalgar Holdings I, Ltd.*, 218 S.W.3d 137, 146 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

§ 3.3:10 Mortgagee Title Insurance Concerns in a Restructuring

Procedural Rule P-9b(3), "Endorsement of Owner or Mortgagee Policies," promulgated by the Texas Department of Insurance, provides:

> Partial Release, Release of Additional Collateral, Modification Agreement, Reinstatement Agreement and/or Release from Personal Liability—When a Mortgagee Policy has been issued covering the lien securing an indebtedness, and the holder of such Mortgagee Policy desires to:
>
> (a) release a part of the land described in Schedule A of said Policy; and/or
>
> (b) release additional collateral securing indebtedness described in said Schedule A; and/or
>
> (c) modify only one or more of the following items described in Schedule A of said policy: the mortgage, deed of trust, security instrument, guaranty or promissory note by entering into a Modification Agreement; and/or
>
> (d) reinstate said mortgage or deed of trust by entering into a Reinstatement Agreement; and/or
>
> (e) release the mortgagor(s) or other obligors from personal liability;
>
> Upon payment of the premium prescribed by rate rule R-11.b, the Company which issued the original policy may issue a Form T-38 Endorsement thereto to show that policy coverage has not been reduced or terminated solely by virtue of the modification, reinstatement or release. An endorsement shall not be issued under this subparagraph (3) if:
>
> (i) the modification agreement, reinstatement agreement or other instrument expressly creates or grants a lien or power of sale; or
>
> (ii) the indebtedness secured by the lien of the insured mortgage or

deed of trust is evidenced by a new promissory note; or

(iii) the insured mortgage or deed of trust is modified to secure additional principal indebtedness other than accrued or deferred interest on the specific indebtedness described on Schedule A of the policy or advances made pursuant to the terms of the original mortgage or deed of trust; or

(iv) the insured mortgage or deed of trust is cross-collateralized or otherwise modified to cover property not described on Schedule A of the policy.

28 Tex. Admin. Code § 9.1 (emphasis added) (adopting by reference *The Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, as amended (hereinafter Basic Manual), available from the Texas Department of Insurance, at **www.tdi.texas.gov/title/titleman.html**.

Anytime the lender reinstates or modifies the terms of payment of the secured debt, the mortgagee should consider obtaining a form T-38 endorsement for its mortgagee title insurance policy to reflect that its title insurance is still in effect and unaffected by the reinstatement or modification. A premium of $100 shall be charged for each endorsement within one year after the date of the original policy; if issued after the one-year period, an additional $10 shall be charged for each year thereafter, not to exceed 50 percent of the premiums applying to the original policy under Schedule of Basic Rates. *See* Basic Manual, rate rule R-11b.

The T-38 endorsement only confirms that the title company will not claim that its liability under the mortgagee title insurance policy has been terminated, waived, reduced, or otherwise impaired as a result of a release of collateral, modification, reinstatement agreement, or release of a mortgagor from personal liability. The T-38 endorsement expressly states that it does not (1) extend coverage on pre–March 1, 1983, policies past the statutory bar date as calculated from the original maturity date of the indebtedness; (2) extend coverage on post–February 28, 1983, mortgagee title insurance policies past the bar date as calculated from the extended maturity date unless there is a valid and recorded renewal and extension agreement; (3) change the original effective date of the mortgagee's title insurance policy or the face amount of insurance stated on Schedule A of the policy; (4) alter or increase the coverage of the policy; (5) include within its scope any modification agreement, reinstatement, or other instrument not specifically set forth in the policy; or (6) cause the title company to have any liability by reason of the invalidity of the instruments described in the policy or the failure to record any renewal or extension agreement. *See* Basic Manual, form T-38. See also section 3.3:4 above.

§ 3.4 Negotiated Plans for Liquidation of Collateral

For various reasons, the lender and borrower may find it mutually advantageous to enter into a negotiated plan for liquidation of the loan and the loan collateral, rather than seek to restructure and continue the loan. From the lender's perspective, the agreed liquidation avoids the threat of bankruptcy by the borrower and many of the uncertainties of repossessing and reselling the collateral against opposition by the borrower. As an incentive to the borrower to participate in the liquidation, the lender may offer to reduce the loan balance or deficiency amount in exchange for the borrower's cooperation. (In some situations, the lender will make such reduction conditional on the borrower realizing a stipulated sum from liquidation of the collateral within a specified period, as a further incentive for the borrower's cooperation.) Another typical settlement agreement strategy contemplates a deed in lieu of foreclosure (see section 3.4:3 below) being held in escrow while the debtor is permitted a marketing period to avoid losing the mortgaged property and equity. See *Kent v. Citizens State Bank*, 99 S.W.3d 870 (Tex. App.—Beaumont 2003, pet. denied), in which the mortgagor unsuccessfully challenged the bank's filing of an escrowed deed. In any event, the basic calculation is that cooperation will lead to a better result for both sides of the loan relationship.

§ 3.4:1 The Short Sale

A short sale occurs when the mortgage holder agrees to allow mortgaged property to be sold through the normal real estate market rather than foreclosure, even if the proceeds of the sale will not cover the amount due on the mortgage. Because of this shortfall, if there are junior liens on the collateral, the junior lienholders must approve the sale and release their liens; otherwise, the continued existence of junior liens securing any significant debt against the property will normally discourage any prospective purchaser from closing the short sale.

The advantage of a short sale to the lender is that a sale through the normal real estate market with the cooperation of the property owner may help the mortgage holder realize a greater net return than trying to market the property after foreclosure. In cases where foreclosure of the mortgage makes little sense (because, e.g., the resale will be time consuming and expensive), the lender may provide incentives for the obligor to arrange a short sale. For example, the U.S. Housing and Urban Development's short sale program for residential homeowners provides latitude for the mortgage holder to make payments (up to $1000) to the homeowner in order to encourage a short sale. (Lenders typically do not volunteer this information, so it is a good idea to ask about this point when representing the homeowner in a short sale situation.)

From the borrower's perspective, the short sale will avoid a foreclosure notation on the borrower's credit report and usually results in a greater loan pay-down than if the property went to foreclosure. In addition, under Fannie Mae's short sale option for qualified homeowners, homeowners are eligible for cash relocation assistance.

Because a short sale does not necessarily discharge the borrower's debt (it merely results in the release of lien), the borrower may resist closing a short sale unless the lender agrees to waive or reduce the resulting deficiency (notwithstanding that in practice, a short sale will usually result in a greater pay-down of the obligor's debt than the foreclosure process). However, in some federal homeowner assistance programs (like the Home Affordable Modification Program; see section 36.5:3 in this manual), the lender is *required* to waive the deficiency. If the borrower has other assets at risk and the lender is not required to waive any deficiency, the borrower may want to offer a cash contribution in addition to the sale price in exchange for a waiver of the balance of the deficiency. Any agreement between the lender and the borrower for a short sale should be reduced to writing and expressly set out how the deficiency will be handled.

If any whole or part of the deficiency remaining after a short sale is forgiven by the lender, the amount of the deficiency forgiven may be imputable as taxable income to the borrower, depending on whether the borrower is solvent at the time the deficiency is forgiven. See chapter 23 in this manual for further discussion and IRS Topic 431 and IRS Publication 4681.

§ 3.4:2 Agreed Bankruptcy or Receivership to Liquidate Assets

While outside the scope of this manual, agreed bankruptcies (such as the 2009 Chapter 11 bankruptcy filing of General Motors where, with federal assistance, General Motors negotiated agreements with many of its creditors prior to entering bankruptcy that were ratified by the bankruptcy court against the opposition of other creditors) and receiverships are ways that borrowers and lenders may freeze collection activities by third parties, arrange for an orderly disposition of claims against the debtor's property, and (in bankruptcy) even discharge claims against the debtor and/or obtain time for implementation of a reorganization of the debtor's business affairs.

The Bankruptcy Code provides an automatic stay on all actions or proceedings, including nonjudicial foreclosure sales, against the debtor in bankruptcy or his mortgaged property. *See* 11 U.S.C. § 362. The stay of action also includes a stay of demanding payments, accelerating the debt, posting for or proceeding with foreclosure, filing suit against the debtor, repossessing or otherwise obtaining or perfecting liens against the property of the debtor, exercising any right of offset, and most other collection efforts. 11 U.S.C. § 362(a)(4). A foreclosure sale knowingly made in violation of the automatic stay can expose the lender to liability for actual and punitive damages. 11 U.S.C. § 362(k)(1). It is very important to run a bankruptcy check on a borrower before proceeding with a foreclosure action so as not to be exposed to liability for violating the automatic stay.

In a receivership, the court appoints a receiver over the debtor's or mortgagor's property, which is held in *custodia legis*. The effect is that any action related to the property must be approved by the court that appointed the receiver. In *Pratt v. Amrex, Inc.*, 354 S.W.3d 502 (Tex. App.—San Antonio 2011, pet. denied), the court held that the first lien mortgagee had no authority to foreclose its deed of trust against real property held in *custodia legis* by a receiver without the permission of the court that appointed the receiver. *Pratt*, 354 S.W.3d at 506 (citing *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976).

A voluntary receivership is accordingly a means by which the lender and borrower may stop action against the mortgaged property by third parties and arrange for an orderly disposition of the mortgaged property without going through a bankruptcy proceeding. See generally, Donna Brown, *Post Judgment Remedies, Judgment Liens, Garnishment, Execution, Turnover Proceedings, Receiverships Under the DTPA, and "Other Stuff"*, *in* Agricultural Law Course, State Bar of Texas (2013); Randolph L. Burns, *Looking at a Receivership Issue? Here's What You Need to Know*, *in* Advanced Real Estate Drafting Course, State Bar of Texas (2012). See sections 4.18 and 6.7:10 in this manual for additional discussion.

It is strongly recommended that attorneys considering bankruptcies or receiverships prenegotiated by the lender and borrower should consult with attorneys specializing in those areas of law before implementing any such actions.

§ 3.4:3 Deed in Lieu of Foreclosure

The deed in lieu of foreclosure is a conveyance of the mortgaged property by the mortgagor to the lender (or to a person designated by the lender) in full or partial satisfaction of the debt owing on the secured promissory note, outside of a nonjudicial foreclosure sale.

See form 3-10 in this manual, Warranty Deed in Lieu of Foreclosure, and form 3-11, Agreement for Deed in Lieu of Foreclosure.

The court in *Morrison v. Christie*, 266 S.W.3d 89 (Tex. App.—Fort Worth 2008, no pet.), described this practice as follows: "No specific statutory scheme governs the format of this type of transaction, although the Texas Legislature provides some protections against undisclosed liens or encumbrances on the property to a holder of a debt secured by a deed of trust who accepts such a conveyance as payment." *Morrison*, 266 S.W.3d at 93 (citing Tex. Prop. Code § 51.006). Texas common law concerning deeds in lieu of foreclosure has been significantly affected by the adoption of Texas Property Code section 51.006 in 1995, which reads:

> (a) This section applies to a holder of a debt under a deed of trust who accepts from the debtor a deed conveying real property subject to the deed of trust in satisfaction of the debt.
>
> (b) The holder of a debt may void a deed conveying real property in satisfaction of the debt before the fourth anniversary of the date the deed is executed and foreclosed under the original deed of trust if:
>
> (1) the debtor fails to disclose to the holder of the debt a lien or other encumbrance on the property before executing the deed conveying the property to the holder of the debt in satisfaction of the debt; and
>
> (2) the holder of the debt has no personal knowledge of the undisclosed lien or encumbrance on the property.
>
> (c) A third party may conclusively rely upon the affidavit of the holder of a debt stating that the holder has voided the deed as provided in this section.
>
> (d) If the holder elects to void a deed in lieu of foreclosure as provided in this section, the priority of its deed of trust shall not be affected or impaired by the execution of the deed in lieu of foreclosure.
>
> (e) If a holder accepts a deed in lieu of foreclosure, the holder may foreclose its deed of trust as provided in said deed of trust without electing to void the deed. The priority of such deed of trust shall not be affected or impaired by the deed in lieu of foreclosure.

Tex. Prop. Code § 51.006.

Advantages of Deed in Lieu: A deed in lieu of foreclosure attempts to satisfy the following desires of the borrower, the mortgagor, and the lender: (1) the lender obtains immediate control and use of the mortgaged property, (2) the parties are permitted to choose the tax year in which the transfer will occur, (3) the expenses incident to a foreclosure may be reduced, (4) the stigma to the borrower of having lost property through a foreclosure sale is eliminated, (5) the lender avoids the possibility of competitive bidding by third parties at the foreclosure sale, (6) future attacks by the borrower against a nonjudicial sale as a wrongful foreclosure are avoided, (7) the risk of the borrower's filing bankruptcy may be limited, and (8) the lender may recover the collateral when foreclosure is precluded because of (a) the death of a mortgagor whose estate is not in independent administration or (b) the mortgagor and the mortgaged property are subject to the Servicemembers Civil Relief Act (*see generally* 50 U.S.C. §§ 3901–4026). See chapter 33 in this manual.

Section 51.003 of the Property Code may also make the use of deeds in lieu of foreclosure an attractive alternative. *See* Tex. Prop. Code § 51.003. If the lender expects the debtor to contest the issue of fair market value and if the potential deficiency judgment does not justify the costs and uncertainty of a jury trial, the lender may want to accept a deed in lieu of fore-

Form 3-3

Note: When preparing this form, the attorney should carefully review Tex. Prop. Code §§ 51.0001, 51.0025, and 51.0075 and Tex. Bus. & Com. Code §§ 3.203 and 3.301 to ensure any reference to a person accurately describes the role the person holds or performs in the context of a foreclosure proceeding, e.g., references to "noteholder," "beneficiary," "owner," "lender," "obligor of the debt," "mortgagor," "mortgagee," or "mortgage servicer" as appropriate.

Reinstatement, Modification, Renewal, and Extension Agreement

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

This reinstatement, modification, renewal, and extension agreement ("Agreement") is entered into by [**name of lender**] ("Lender") and [**name of borrower**] ("Borrower").

Lender is the holder of the promissory note ("Note") dated [**date**], in the original principal amount of $[**amount**] executed by [**name of notemaker**], originally payable to the order of [**name of lender**].

The Note is secured by the following instruments ("Security Documents"):

1. *Deed of Trust.* The Note is secured by a deed of trust and security agreement executed by Borrower to [**name of trustee**], Trustee, dated [**date**], recorded in [**recording data**] of the real property records of [**county**] County, Texas ("Deed of Trust"). The Deed of Trust encumbers real property located in [**county**] County, Texas, improvements situated thereon, and other property, as described in the Deed of Trust ("Property") and includes the property described as follows: [**insert legal description of property**].

2. *Assignment of Rents.* The Note is secured by an assignment of rent executed by Borrower to Lender, dated [**date**], recorded in [**recording data**] of the real property records of [**county**] County, Texas ("Assignment of Rent").

3. *Assignment of Leases.* The Note is secured by an assignment of leases dated **[date]**, recorded in **[recording data]** of the real property records of **[county]** County, Texas ("Assignment of Leases").

4. *Guaranty.* The Note is secured by a guaranty agreement ("Guaranty") given to Lender by **[name of guarantor]** ("Guarantor").

The Note and the Security Documents are collectively referred to as the Loan Documents.

Borrower is in default under the terms of the Loan Documents. Lender accelerated the maturity of the Note on **[date]** and demanded payment in full of all amounts owed thereunder, as set forth in the notice to Borrower dated **[date]**. Lender caused the Trustee of the Deed of Trust to post the Property for foreclosure sale to be held on **[date]**.

Borrower has requested and Lender has agreed to (1) accept payment of the delinquent installments on the Note and reinstate the Loan Documents to the same extent as if no default had occurred and (2) modify certain provisions of the Note and Loan Documents, as provided in this Agreement.

Therefore, for valuable consideration, the receipt and sufficiency of which are acknowledged, Borrower and Lender agree as follows:

1. *Receipt of Amounts.* Lender acknowledges receipt as of the execution of this Agreement of the following amounts:

   a. Installments due in the amount of $**[amount]** each for the months of **[month]** **[year]** through **[month]** **[year]** totaling $**[amount]**.

   b. Late charges to date assessed under the terms of the Loan Documents of $**[amount]**.

Form 3-6

The following are instructions to the title company issuing a T-3 Endorsement in connection with the assignment of a lien insured by a loan title policy issued by the title company's underwriter. The T-3 Endorsement is found in Section II, Insuring Forms of The Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas issued by the Texas Department of Insurance. The Basic Manual, forms, and endorsements can be found at the Texas Department of Insurance Web site at **www.tdi.texas.gov/title/titleman.html**.

T-3 Endorsement Instructions for Use Upon Assignment of Lien

When a lien is assigned, and upon compliance with Rules P-9.b.(1) or P-9.b(2) and R-11, the Company may issue the T-3 Endorsement by inserting therein:

"Said Loan Policy is hereby amended to name as the Insured: ________________. The lien described in Schedule A of said policy has been assigned to said named Insured by assignment dated ____________________, and recorded in the Office of the County Clerk of __________________ County, Texas (here insert clerk's file number or book and page of recording), and Schedule A of said policy is hereby amended to cover said assignment, and it is expressly stated that the effective date of said policy is changed to the date of this Endorsement."

"As of the date of this Endorsement, Company insures the insured against loss, if any, sustained by the insured under the terms of the policy if said lien is not a valid lien against the property described in Schedule A of said policy, subject to the matters set forth in Schedule B, the terms and provisions of said policy and the following:"

(Here insert any exception necessary by reason of matters arising since the date of the Policy)

"The Company insures that all standby fees, taxes and assessments by any taxing authority against the property described in Schedule A of said policy have been paid up to and including the year ________ except subsequent taxes and assessments for prior years due to change in land usage or ownership, and except: (specify or delete the immediately preceding words "and except".)"

"This endorsement does not insure against loss or damage, and the Company will not pay costs, attorney's fees, or expenses, by reason of any claim that arises out of the transaction creating the assignment by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws that is based on:

1. the assignment being deemed a fraudulent conveyance or fraudulent transfer; or

2. the assignment being deemed a preferential transfer."

"This endorsement shall be effective provided that, at Date of Endorsement:

1. the note or notes secured by the lien of the Insured Mortgage have been properly endorsed and delivered to the Assignee, or

2. if the note or notes are transferable records, the Assignee has "control" of the single authoritative copy of each "transferable record" as these terms are defined by applicable electronic transaction laws."

Form 3-10

Warranty Deed in Lieu of Foreclosure

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address [**include county**]:

Grantee:

Grantee's Mailing Address [**include county**]:

Note

Date:

Amount:

Maker:

Payee:

Final Maturity Date:

Terms of Payment (optional):

Property (including any improvements):

Exceptions to Conveyance and Warranty:

State "None" or include one or both of the following title exceptions as applicable.

1. Lien of deed of trust, security agreement, and financing statement dated [**date**], in favor of [**name of trustee**], Trustee, recorded in [**recording data**] of the real property records of [**county**] County, Texas.

And/Or

2. Vendor's lien and superior title reserved in and transferred in the deed recorded in [**recording data**] of the real property records of [**county**] County, Texas.

Continue with the following.

Grantor, in consideration of the cancellation and extinguishment of $[**amount**] (the "Obligations") of the unpaid balance on the Note and for other valuable consideration and subject to the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, located in [**county**] County, Texas, to have and to hold it to Grantee and Grantee's heirs, executors, administrators, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs, executors, administrators, successors, and assigns to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, executors, administrators, successors, and assigns against every person who lawfully claims the Property or any part thereof, subject to the liens and other matters herein set forth or referenced.

Grantor and Grantee agree to the following:

1. This Warranty Deed and the conveyances being made by it are being executed, delivered, and accepted in lieu of foreclosure of the deed of trust, security agreement, and financing statement described below and will be interpreted and construed as an absolute conveyance to Grantee of all right, title, and interest in the Property, including specifically but without limitation any equity or rights of redemption of Grantor or others in or to the Property.

Chapter 4

Preforeclosure Title Concerns

Forms

[Reserved]

Chapter 4

Preforeclosure Title Concerns

The editors gratefully acknowledge Richard Melamed for his contribution to this chapter.

§ 4.1 Introduction

To conduct a foreclosure, the chain of title of a property should be examined to identify any recorded instrument that affects title. The failure to do a thorough title search can be expensive. For example, a mortgagee who acquires a property at a foreclosure sale for its debt may be responsible for a federal tax lien that could have been removed as a cloud on title if the lien had been identified in a preforeclosure title search and a timely notice sent to the IRS prior to the foreclosure sale in accordance with 26 C.F.R. § 301.7425-2.

The best practice is to review copies of all the documents recorded in the chain of title and not depend on an abstractor's run sheet. The cost difference for the actual title documents as opposed to a run sheet may be significant, but most investors and government-sponsored enterprises will pay the costs for obtaining copies of the actual documents in the chain of title. Therefore, it is not worth the risk to depend on a run sheet to prosecute a foreclosure.

Federal and state tax liens as well as other federal and state statutory liens, receiverships, lawsuits, lis pendens, and probate proceedings are just some of the title issues that will affect how a foreclosure must be prosecuted.

It should be noted that when it comes to title issues related to real property, state law applies unless there is a clear and manifest intent that federal law preempts state law. *See In re Robertson*, 203 F.3d 855 (5th Cir. 2000); *In re T.F. Stone Co., Inc.*, 72 F.3d 466 (5th Cir. 1995).

This chapter identifies title-related matters that can affect foreclosure and provides a short overview of each title-related issue. See G. Roland Love, *Involuntary Liens, in* Advanced Real Estate Law Course, State Bar of Texas (2013).

The Eighty-fourth Texas Legislature passed House Bill 2063, which allows statutory foreclosure notices and other foreclosure-related documents to be attached to a trustee's or substitute trustee's deed or affidavit and recorded in the real property records. *See* Acts 2015, 84th Leg., R.S., ch. 653, § 1 (H.B. 2063), eff. Sept. 1, 2015 (adding Tex. Prop. Code § 12.0012). At the discretion of the foreclosure professional, if Property Code section 12.0012 is used, a permanent record will be created in the chain of title of the documents used to initiate and conduct a foreclosure. This eliminates future frustration and laborious document searches, phone calls, and other inquiries from interested persons—especially title companies—seeking assurances that critical foreclosure-related documents were prepared, mailed, and filed correctly. Section 12.0012(a) provides that any foreclosure document filed in accordance with subsection (b) is proof of the information stated and proof of service by mail. *See* Tex. Prop. Code § 12.0012(a). The downside to section 12.0012 is that foreclosure documents are now permanent records and open for public review.

§ 4.2 Texas Tax Liens

If there is any indication that a Texas tax lien exists in the chain of title, a copy of the lien should be obtained to determine its priority and enforceability. Except for IRS liens, ad valorem tax liens are superior to preexisting liens regardless of the date a prior lien was recorded. *See* Tex. Tax Code §§ 32.04–.06.

§ 4.2:1 Meaning of "Owner"

Because the Texas Tax Code does not define the term *owner*, in a title search it cannot be presumed that the person who holds legal title is the "owner" for tax purposes. The Texas Supreme Court noted in *Realty Trust Co. v. Craddock*, 112 S.W.2d 440, 443 (Tex. 1938), that the meaning of the term *owner* is not the same under all circumstances. Therefore, to find tax liens, a title search should be conducted using the record owner, the apparent owner (or a person in possession of the property), or an equitable title holder, who will be considered the taxable owner over a party with a contingent interest. *Childress County v. State*, 92 S.W.2d 1011, 1015 (Tex. 1936); *Travis County Appraisal District v. Signature Flight Support Corp.*, 140 S.W.3d 833 (Tex. App.—Austin 2004, no pet.).

§ 4.2:2 Property Tax Lien Loan

If property taxes are not escrowed, a mortgagee must be aware of property tax lien loans, also known as transferred tax liens, originated under Texas Tax Code sections 32.06 and 32.065, which are superior to previously recorded liens, including purchase money liens. If the deed of trust evidencing a property tax loan is not obtained and examined, many out-of-state mortgagees assume a property tax loan deed of trust is extinguished when a first lien that was recorded in the land title records forecloses. This is incorrect.

Property tax lien loans are created when an investor—called a transferee—pays a borrower's delinquent tax bill and receives a certified statement of payment from the taxing authority. *See* Tex. Tax Code § 32.06(b). The taxpayer then signs a note and deed of trust in favor of the investor for the taxes and penalties paid to the taxing authority, as well as transaction and closing costs. The property tax loan deed of trust encumbering the property has the same superior lien status as a taxing authority's ad valorem tax lien. If the investor forecloses its property tax loan deed of trust, the foreclosure extinguishes all liens against the borrower's property, including purchase money liens.

See chapter 25 in this manual, which discusses the foreclosure of property tax loan liens in greater detail.

§ 4.2:3 Foreclosure of Ad Valorem Tax Liens

Taxing authorities must foreclose delinquent ad valorem tax liens by judicial foreclosure, and all lienholders must be made a party in the delinquent tax suit; otherwise, the judgment against the nonparty lienholder is void. *Murphee Property Holdings, Ltd. v. Sunbelt Savings Ass'n of Texas*, 817 S.W.2d 850 (Tex. App.—Houston [1st Dist.] 1991, no writ).

See chapter 24 in this manual, which discusses foreclosure of ad valorem tax liens in more detail.

To challenge a tax sale, a mortgagee may seek a restricted appeal. *See Quaestor Investments Inc. v. State of Chiapas*, 997 S.W.2d 226 (Tex. 1999); *Texaco Inc. v. Central Power & Light Co.*, 925 S.W.2d 586 (Tex. 1996). However, a restricted appeal must be filed within six months of the date the judgment was signed. Tex. Civ. Prac. & Rem. Code § 51.013.

The terms of most deeds of trusts permit a mortgagee to pay a mortgagor's taxes to preserve and protect the mortgagee's interest in the mortgaged property. In this instance, the mortgagee is not a volunteer and is subrogated to the rights of the taxing authority. *Vista Development Joint Venture II v. Pacific Mutual Life Insurance Co.*, 822 S.W.2d 305 (Tex. App.—Houston [1st

Dist.] 1992, writ denied); *Smart v. Tower Land & Investment Co.*, 582 S.W.2d 543 (Tex. Civ. App.—Dallas 1979), *rev'd on other grounds*, 597 S.W.2d 333 (Tex. 1980).

§ 4.3 Federal Tax Liens

§ 4.3:1 Introduction

Special rules apply to federal tax liens, but they are foreclosed subject to state law and are extinguished pursuant to state law. *United States v. Brosnan*, 363 U.S. 237 (1960); *Rust v. Johnson*, 597 F.2d 174 (9th Cir. 1979). However, the priority of an IRS lien is determined by federal law. *Aquilino v. United States*, 363 U.S. 509 (1960).

The basic rules for determining federal tax lien priority are found in 26 U.S.C. § 6323, which also addresses the subordination of federal tax liens to certain perfected liens and security interests and the rights of bona fide purchasers. *See also* Tex. Bus. & Com. Code §§ 9.301, 9.312; *C.I.R. v. Stern*, 357 U.S. 39 (1958); *United States v. City of New Britain, Conn.*, 347 U.S. 81 (1954).

Whenever an issue of priority arises between an IRS and conventional lien, the various factual scenarios presented in *Dietrich Industries, Inc. v. United States*, 988 F.2d 568 (5th Cir. 1993), should be reviewed to determine whether a subrogation argument can be made to establish lien priority over an IRS lien under certain circumstances. See also *United States v. Clifford*, No. 3-92-CV-0833-P, 1993 WL 306669 (N.D. Tex. Apr. 29, 1993), which approved the *Dietrich* holding.

§ 4.3:2 Identity of Taxpayer

The name of the taxpayer affected by a tax lien must be disclosed with reasonable preciseness on the tax lien notice, but the misspelling of a taxpayer's name through the transposition of two letters has been held immaterial. *See Richter's Loan Co. v. United States*, 235 F.2d 753 (5th Cir. 1956). However, the wrong middle initial for an individual (*see Continental Investments v. United States*, 142 F. Supp. 542 (W.D. Tenn. 1953)), and the omission of the first initial of a corporation (*see United States v. Ruby Luggage Corp.*, 142 F. Supp. 701 (S.D.N.Y. 1954)), have been held material. Filing a tax lien against a taxpayer under a name used before marriage is not effective against a lienholder with a conventional lien who has a claim against the taxpayer under the taxpayer's married name. *See United States v. Clark*, 81-1 U.S.T.C. P 9406 (S.D. Fla. 1981).

If the IRS files a lien against a single person while the person is single, the IRS does not have to refile the lien if the taxpayer marries and takes a new name. *See Pioneer National Title Insurance Co. v. United States*, 81-2 U.S.T.C. P 9482 (D.N.J. 1981).

§ 4.3:3 Taxpayer's Interest in Property

The Internal Revenue Code creates a lien in favor of the United States on all real or personal property belonging to a person who neglects, fails, or refuses to pay any tax for which that individual is liable. 26 U.S.C. § 6321. The tax lien attaches to both property belonging to the taxpayer on the assessment date and to any property acquired by the taxpayer after the assessment date, for as long as the tax lien remains in effect. *United States v. McDermott*, 507 U.S. 447, 448 (1993) (citing *Glass City Bank v. United States*, 326 U.S. 265) (1945)); 26 U.S.C. § 6322.

Federal law governs the United States' rights to enforce a tax lien, but the nature and extent of the taxpayer's interest in property is determined by state law. *See Aquilino v. United States*, 363 U.S. 509 (1960); *United States v. Bess*, 357 U.S. 51 (1958). Even the slightest interest under state law may be sufficient for an IRS lien to attach.

For example, in *United States v. Creamer Industries, Inc.*, 349 F.2d 625 (5th Cir. 1965), a taxpayer sold real property to a bona fide purchaser by a deed recorded before the filing of a tax lien. A corrective deed that added property that was inadvertently omitted from the original deed executed at closing was filed after a tax lien. The federal tax lien was held to attach to the omitted property. *Creamer Industries*, 349 F.2d at 628.

The failure to record a divorce decree granting an interest in real property to the wife before an IRS lien was filed against the husband resulted in the attachment of the IRS lien against the wife's interest in the real property, notwithstanding the fact that the divorce was final before the tax lien was assessed. The Fifth Circuit held that the IRS was entitled to the benefits of the Texas recording statutes just as any other good-faith creditor, and the failure to timely record the divorce decree was sufficient to support a tax lien on the property. *Prewitt v. United States*, 792 F.2d 1353, 1355–56 (5th Cir. 1986).

Until an IRS lien is filed of record in the real property records, bona fide third parties may acquire an interest in the taxpayer's property free of the tax lien. 26 U.S.C. § 6323(a); *see also Sgro v. United States*, 609 F.2d 1259 (7th Cir. 1979).

§ 4.3:4 Partnership

State law determines the nature of the legal interest the taxpayer has in property sought to be reached by the federal tax lien under United States Code title 26, section 6321. Under Texas law, a partner's interest in the partnership is his share of the profits and surplus, and a partner's rights in specific partnership property are not subject to attachment or execution, except for partnership claims. *See* Tex. Bus. Orgs. Code § 154.002. The tax lien against an individual partner will therefore not attach to specific partnership property. *See* Rev. Rul. 73-24, 1973-1 C.B. 602; *Economy Plumbing & Heating Co. v. United States*, 456 F.2d 713 (Ct. Cl. 1972); *United States v. Woodard*, 444 F.2d 752 (10th Cir. 1971); *United States v. Balanovski*, 236 F.2d 298 (2d Cir. 1956); *United States v. Worley*, 213 F.2d 509 (6th Cir. 1954). *Contra Lidberg v. United States*, 375 F. Supp. 631 (D. Minn. 1974); *Adams v. United States*, 328 F. Supp. 228 (D. Neb. 1971).

§ 4.3:5 Tenants in Common

The separate interests of tenants in common are subject to a federal tax lien. For example, a lien attaches to a delinquent taxpayer's interest in a time-sharing condominium unit and related areas but not to interest of any other owners in the time share or the condominium itself. *See* Rev. Rul. 79-55, 1979-1 C.B. 400.

§ 4.3:6 Joint Tenants

A tax lien will attach to the interest of a joint tenant in property. *United States v. Kocher*, 468 F.2d 503, 506–07 (2d Cir. 1972); *United States v. Trilling*, 328 F.2d 699, 702 (7th Cir. 1964). On the death of a joint tenant, the tax lien will follow a transfer of the joint-tenancy interest, but the lien will be extinguished if the interest is extinguished—not transferred—on death. *See United States v. Bess*, 357 U.S. 51 (1958); *see also Hedlund v. Brellenthin*, 520 F. Supp. 81 (W.D. Wash. 1981) (lien extinguished when interest extinguished by cancellation of real estate contract).

§ 4.3:7 Community Property

If only one spouse is liable for a tax debt, an IRS lien does not attach to the separate property or one-half community property interest of the other spouse. If the property is sold at a tax sale, the nondelinquent spouse's interest in the property may be compensated from the sales proceeds. *United States v. Rodgers*, 461 U.S. 677 (1983); *Broday v. United States*, 455 F.2d 1097 (5th Cir. 1972).

§ 4.3:8 Homestead Property

Federal tax liens attach to and are effective against homestead interests created under state law. A nondelinquent taxpayer's homestead right under state law does not prevent the levy on and sale of the homestead to pay federal taxes owed by the taxpayer's spouse. The nondelinquent taxpayer is entitled to receive compensation for the taxpayer's separate homestead interest from the sale proceeds. *United States v. Rodgers*, 461 U.S. 677 (1983).

§ 4.3:9 Leasehold Estate

A tax lien attaches to a tenant's leasehold estate, notwithstanding that the terms of the lease may provide that the landlord must consent to transfers of interests in the leasehold estate. *See Carolina Apartment Investors "A" v. United States*, 77-1 U.S.T.C. P 9262 (E.D. Cal. 1977).

§ 4.3:10 Twenty-Five-Day Notice

It is critical that proper notice be sent to the IRS before any foreclosure sale. An inferior IRS lien will survive a foreclosure sale and continue to encumber the foreclosed property if the mortgagee failed to provide the IRS with the required notice and information at least twenty-five days before the foreclosure sale. 26 C.F.R. §§ 301.7425–2(b), 301.7425–3(d); 26 U.S.C.A. § 7425(c)(1).

Notice of a foreclosure sale to the IRS must be given in accordance with its regulations in writing and by registered or certified mail, or by personal service, not less than twenty-five days before the sale. 26 U.S.C. § 7425(b)(1), (c)(1).

The sender of an IRS foreclosure notice must ensure that the U.S. Postal Service postmarks the envelope at least twenty-five days before the foreclosure sale. 26 C.F.R. § 301.7502–1. Postmarked dates made by an in-house mailing machine are not acceptable. The date of sale is not included in the twenty-five-day calculation. 26 C.F.R. § 301.7425–2.

If notice is not properly given to the IRS, the IRS lien continues to encumber the property after the foreclosure sale, even though the IRS lien may have been recorded after the lien that was foreclosed.

Preparing the Notice: The procedures for preparing the notice to the IRS are found in IRS Publication 786, "Instructions for Preparing a Notice of Nonjudicial Sale of Property and Application for Consent to Sale," and IRS Publication 4235, "Collection Advisory Group Numbers and Addresses." According to Publication 786, the application or notice should be addressed to the "Collection Advisory Group Manager" for the area in which the notice of federal tax lien was filed. Publication 786 then instructs the reader to use Publication 4235, which lists the addresses for the Collection Advisory offices, to determine where to mail the notice. For more information, see 26 C.F.R. § 301.7425–3(a)(1) and Internal Revenue Bulletin 2007-36 (T.D. 9344). See form 4-1 in this manual for instructions for preparing a notice of nonjudicial sale of property and application for consent to sale, form 4-2 for the notice of nonjudicial sale, and form 4-3 for the application for consent to sale of property free of the federal tax lien. See Appendix A in this manual for the current IRS Collections Advisory Group addresses and the Texas counties that are assigned to each group. See also the IRS's Web site (**https://www.irs.gov**) to obtain copies of all the IRS publications.

§ 4.3:11 Postponement of Foreclosure Sale

If notice of a scheduled sale has been timely given to the IRS, the mortgagee is "required to give notice of the postponement to the IRS in the same manner as is required under local law with respect to other secured creditors." 26

C.F.R. § 301.7425–3(a)(2)(i). Texas Property Code section 51.002 does not require notice of postponement to other secured creditors for a real property foreclosure sale, but when dealing with the IRS, it may be a good practice to notify the IRS of the postponement of a sale.

§ 4.3:12 IRS Right of Redemption

A preforeclosure notice to the IRS does not extinguish the IRS lien; rather, the IRS has the right to redeem the property for the foreclosure sale price for a period of 120 days after the date of the foreclosure sale. *See* 26 U.S.C. § 7425(d)(1) and Treasury Regulations 26 C.F.R § 301.7425–4. If the IRS does not redeem, the purchaser at the foreclosure sale takes the property free of the IRS lien.

Tendering the amount necessary to pay off the tax lien after the foreclosure does not void the government's right of redemption. The IRS may reject the tender and enforce its redemption right. *See Olympic Federal Savings & Loan Ass'n v. Regan*, 648 F.2d 1218 (9th Cir. 1981).

To redeem the property from the purchaser at the foreclosure sale, the federal government must pay the sum of the actual amount paid at the foreclosure sale, plus the following:

1. 6 percent interest from the date of sale;
2. an amount equal to the excess of the purchaser's maintenance expenses since the sale date over income realized by the purchaser since the sale date;
3. a reasonable rent value under certain defined circumstances; and
4. if applicable, amounts paid to senior lienholders after the foreclosure.

See 26 C.F.R. § 301.7425–4(b).

The federal government does not pay any costs or expenses incurred before foreclosure except to the extent these costs were part of a valid bid price. 26 C.F.R. § 301.7425–4(b)(2).

If the mortgagee buys the property at foreclosure for less than the full amount of the debt, the redemption price does not include any deficiency. *See Equity Mortgage Corp. v. Loftus*, 504 F.2d 1071 (4th Cir. 1974); *Republic Bank v. United States*, 527 F. Supp. 415 (W.D. La. 1981).

See form 4-4 in this manual for instructions for preparing the application requesting the United States to release its right to redeem property secured by a federal tax lien (IRS Publication 487) and form 4-5 for a form letter requesting a waiver of right of redemption.

§ 4.3:13 Certificates of Discharge

If a mortgagee or the purchaser at a foreclosure sale believes there is no equity in property encumbered by an IRS lien, an application for a certificate of discharge of the federal tax lien may be filed with the IRS. See form 4-6 in this manual for instructions for applying for the certificate of discharge (IRS Publication 783). If the IRS determines that there is no equity in the property and issues a certificate of discharge, the federal tax lien no longer encumbers the property. *See* 26 C.F.R. § 301.6325–1(b).

§ 4.3:14 Certificates of Release

The IRS may issue a certificate of release of an IRS lien if an appropriate bond is furnished. 26 C.F.R. § 301.6325–1(a)(2).

§ 4.3:15 Statute of Limitations

The statute of limitations bars the enforcement of an IRS tax lien ten years from the date the taxes were assessed—not from the date the IRS lien was filed in the real property records. *See* 26 U.S.C. § 6502.

§ 4.4 Unreleased Liens in Chain of Title

Because of sloppy loan origination and closing practices, it is common to find that a mortgagee never bothered to file a release of a lien that was paid off at closing, even though the mortgagee could be liable for damages for failing to prepare and file a release of lien. *See Bayless v. Strahan*, 182 S.W.2d 262 (Tex. Civ. App.—Amarillo 1944, writ ref'd).

If a loan was paid off at a closing conducted at a title company, the title company may file a release of the lien using the procedure found in Texas Property Code section 12.017. However, because proper distribution of the closing proceeds releases the title company from any liability if the mortgagee fails to file a release, the procedure in section 12.017 is rarely used. *See FCLT Loans, L.P. v. United Commerce Center, Inc.*, 76 S.W.3d 58 (Tex. App.—Eastland 2002, no pet.).

If a release that should have been prepared and filed cannot be obtained, sometimes a HUD-1 settlement statement can be used as proof that a lien was paid off because the HUD-1 was signed under penalty of perjury. In addition, because a title company must keep a copy of the check used to pay off a prior lien for three years, a canceled check from the title guaranty file could be used as proof of the payoff of an unreleased lien.

§ 4.5 Municipal Utility Liens

Municipalities can impose utility liens for "delinquent bills for municipal utility services to the property," and these municipal liens can be superior to other liens, which include previously recorded judgment liens and any lien recorded after the municipal lien. *See* Tex. Loc. Gov't Code § 552.0025(d). However, a municipal utility lien is inferior to a "bona fide mortgage" if the mortgage was recorded prior to the recording of the municipality's lien. Tex. Loc. Gov't Code § 552.0025(h). A municipality's lien is perfected by recording a notice in the real property records of the county where the property is located that contains a legal description of the property and the utility's account number for the delinquent charges. Tex. Loc. Gov't Code § 552.0025(g). The lien may include additional fees and costs for penalties, interest, and collection costs.

A municipality cannot enforce a municipal or utility lien against a homestead because municipal liens are not listed as permissible liens against homestead in Tex. Const. art. XVI, § 50.

§ 4.6 Labor Liens

Two liens that often cause confusion arise under Texas Labor Code chapter 61 related to nonpayment of wage claims and Texas Labor Code chapter 213 dealing with overpayment of unemployment compensation. These liens are easily distinguishable because the standard lien form used by the state of Texas clearly states the particular Texas Labor Code provision that gives rise to the lien.

Liens arising from unemployment compensation claims are assessed and collected pursuant to Texas Labor Code sections 213.031 through 213.036. *See* Tex. Lab. Code §§ 213.031–.036. Once the notice of levy is filed, the notice is effective against all property rights of the delinquent taxpayer. This lien is not superior to preexisting liens. *See* Tex. Lab. Code § 213.059.

Wage claim liens arising under Labor Code chapter 61, however, are superior to all other liens encumbering the property except for ad valorem taxes. Tex. Lab. Code § 61.0825.

§ 4.7 Abstract of Judgment

The purpose of an abstract of judgment is to create a lien based on a judgment and provide notice of the lien. *Citicorp Real Estate, Inc. v. Banque Arabe Internationale D'Investissement*, 747 S.W.2d 926, 928–30 (Tex. App.—Dallas 1988, writ denied). A judgment lien is perfected by obtaining and filing an abstract of judgment in accordance with Texas Property Code chapter 52.

§ 4.7:1 Required Contents

The required content of an abstract of judgment is set out in section 52.003 of the Texas Property Code. *See* Tex. Prop. Code § 52.003; *see also Gordon v. West Houston Trees, Ltd.*, 352 S.W.3d 32 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Gary E. Patterson & Associates, P.C. v. Holub*, 264 S.W.3d 180 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). An abstract must name only the defendant(s) against whom the judgment was rendered and not necessarily all defendants named in the suit. *See* Tex. Prop. Code § 52.004(b)(2); *In re Herman*, 315 B.R. 399 (Bankr. E.D. Tex. 2004) (distinguishing a number of older cases decided under former Tex. Rev. Civ. Stat. art. 5447, predecessor to section 52.003).

§ 4.7:2 Creditor Responsible for Abstract

It is the judgment creditor's responsibility to make sure the judgment is abstracted correctly in accordance with section 52.004 of the Texas Property Code. *See* Tex. Prop. Code § 52.004; *In re Davis*, 174 B.R. 223, 226 (Bankr. N.D. Tex. 1994); *Citicorp Real Estate, Inc. v. Banque Arabe Internationale D'Investissement*, 747 S.W.2d 926, 928–30 (Tex. App.—Dallas 1988, writ denied). See also *Caruso v. Shropshire*, 954 S.W.2d 115, 117 (Tex. App.—San Antonio 1997, no pet.), where the failure to list fifty-three judgment plaintiffs on the abstract was found to be a material omission under the statute, and accordingly the judgment lien against the defendant did not come into effect upon recording.

§ 4.7:3 Release of Abstract

An abstract of judgment can be released without the judgment creditor's consent if the creditor cannot be located using the provisions in Tex. Civ. Prac. & Rem. Code § 31.008. The judgment debtor must pay the amount of the judgment into the registry of the court, prepare a recordable release, and send notice to the judgment creditor in accordance with section 31.008(b). *See* Tex. Civ. Prac. & Rem. Code § 31.008(a), (b). If the judgment creditor is located, the money deposited into the registry of the court is paid to the judgment creditor. If the judgment creditor cannot be located, the funds are escheated to the state of Texas in accordance with chapter 72 of the Texas Property Code. Once the provisions of section 31.008 are fulfilled, the judge or clerk executes a release of the judgment.

§ 4.7:4 Foreign Judgments

Under the Uniform Enforcement of Foreign Judgment Act (UEFJA), codified at Tex. Civ. Prac. & Rem. Code §§ 35.001–.008, a foreign judgment in the chain of title has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying a judgment as a judgment of the court in which the foreign judgment is filed. Tex. Civ. Prac. & Rem. Code § 35.003(c); *see McCoy v. Knobler*, 260 S.W.3d 179 (Tex. App.—Dallas 2008, no pet.); *Karstetter v. Voss*, 184 S.W.3d 396, 401 (Tex. App.—Dallas 2006, no pet.).

Under the UEFJA, an authenticated copy of the judgment may be filed with the clerk of any state court of competent jurisdiction. Tex. Civ. Prac. & Rem. Code § 35.003(a). The clerk is required to treat the foreign judgment as a judgment that was rendered in Texas. Tex. Civ. Prac. & Rem. Code § 35.003(b); *see also Walnut Equipment Leasing Co. v. Wu*, 920 S.W.2d 285, 286 (Tex. 1996). The burden of proof then shifts to the judgment debtor to prove that the judgment should not be given full force and effect. *Mitchim v. Mitchim*, 518 S.W.2d 362, 364 (Tex. 1975).

If a judgment debtor raises the issue that the court does not have personal jurisdiction based on due process of law, the court then has two options—either enforce the judgment or declare the order void due to want of jurisdiction. *See Markham v. Diversified Land & Exploration Co.*, 973 S.W. 2d 437, 439 (Tex. App.—Austin 1998, pet. denied); *Trinity Capital Corp. v. Briones*, 847 S.W.2d 324, 326–27 (Tex. App.—El Paso 1993, no writ).

To enforce a foreign judgment using a common law cause of action, see *Lawrence Systems Inc. v. Superior Feeders, Inc.*, 880 S.W.2d 203, 206 (Tex. App.—Amarillo 1994, writ denied).

§ 4.8 Constitutional Mechanic's and Materialman's Liens

Section 37 of article XVI of the Texas Constitution provides that an original contractor may have a silent but superior constitutional mechanic's and materialman's lien. *See* Tex. Const. art. XVI, § 37. The lien is self-executing (that is, the lien is automatically created without the necessity of either a written agreement or the recording of a notice of lien claim), but is only valid if the lien claimant had a direct contractual relationship with the owner. *Hayek v. Western Steel Co.*, 478 S.W.2d 786, 790 (Tex. 1972); *Berry v. McAdams*, 55 S.W. 1112 (Tex. 1900). However, a constitutional mechanic's and materialman's lien does not have lien priority over any person without actual or constructive knowledge of the lien. *Detering Co. v. Green*, 989 S.W.2d 479, 481 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Irving Lumber Co. v. Alltex Mortgage Co.*, 446 S.W.2d 64, 72 (Tex. Civ. App.—Dallas 1969), *aff'd*, 468 S.W.2d 341 (Tex. 1971).

For an excellent discussion of constitutional mechanic's and materialman's liens, see *Ralph M. Parsons Co. v. South Coast Supply Co. (In re A & M Operating Company Inc.)*, 182 B.R. 997 (E.D. Tex. 1995), *aff'd*, 84 F.3d 433 (5th Cir. 1996).

§ 4.9 Statutory Mechanic's and Materialman's Liens

Special rules apply for the perfection of a statutory mechanic's and materialman's lien against the homestead and require substantial compliance by those who furnished labor or materials. *See* Tex. Prop. Code ch. 53. See Thomas J. Walthall, Jr., *Texas Mechanic's Liens and Construction Payment Issues, in* Real Estate Law 101, State Bar of Texas (2013).

Architects, engineers, surveyors, and landscapers who have written contracts with the original owner also have mechanic's and materialman's lien rights. Tex. Prop. Code § 53.021(c), (d).

§ 4.9:1 Limitations

The statute of limitations for enforcing a statutory mechanic's and materialman's lien is one year for residential property and, for commercial property, the latter of two years after the last day a lien affidavit may be filed under Property Code section 53.052 or one year after completion, termination, or abandonment of the work under the original contract under which the lien is claimed. *See* Tex. Prop. Code § 53.158.

§ 4.9:2 Discharge of Lien

Texas Property Code section 53.157 outlines the procedures for discharging a mechanic's and materialman's lien. *See* Tex. Prop. Code § 53.157. If a mechanic's and materialman's lien is waived, it cannot be revived. *Collinsville Manufacturing Co. v. Street*, 196 S.W. 284, 287 (Tex. Civ. App.—Amarillo 1917, no writ).

Texas Property Code sections 53.160 and 53.161 set the motion and bond requirements to remove an invalid or unenforceable lien. *See* Tex. Prop. Code §§ 53.160, 53.161.

If a patently fraudulent mechanic's and materialman's lien clouds title to the property, lien expungement should be considered. *See* Tex. Gov't Code §§ 51.901–.905. This type of lien is usually filed by a Republic of Texas adherent or as part of a foreclosure rescue scam. See section 4.21 below for additional discussion. See J. Paulo Flores, *Mechanic's and Constitutional Liens*, *in* Soaking Up Some CLE, State Bar of Texas (2013).

§ 4.9:3 Foreclosure of Mechanic's and Materialman's Lien

If the mechanic's and materialman's lien security instrument does not contain a power of sale, the mechanic's and materialman's lien cannot be foreclosed nonjudicially but must be enforced by a judicial foreclosure sale. *See* Tex. Prop. Code § 53.154.

§ 4.9:4 Arbitration Clauses

Because many construction contracts contain arbitration clauses, the Texas Supreme Court case upholding an arbiter's findings that a mechanic's and materialman's lien was valid should be reviewed. *See CVN Group, Inc. v. Delgado*, 95 S.W.3d 234 (Tex. 2002).

§ 4.9:5 Vendor and Purchase-Money Liens

Vendor and purchase-money liens have priority over subsequently recorded mechanic's and materialman's liens. However, if the mechanic's and materialman's lien is secured by removables, i.e., any improvements that can be removed from the structure without material damage, the lienholder can obtain a judicial order to repossess the removables from the property. *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974), is the seminal case that discusses removables in a mechanic's and materialman's lien context. Also see *Summerville v. King*, 83 S.W. 680 (Tex. 1904); *Exchange Savings & Loan Ass'n v. Monocrete Proprietary Ltd.*, 629 S.W.2d 34 (Tex. 1982); and *Hoarel Sign Co. v. Dominion Equity Corp.*, 910 S.W.2d 140 (Tex. App.—Amarillo 1995, writ denied).

§ 4.9:6 Removables

Examples of removables that can be repossessed by judicial order, so long as there is no damage to the structure, are—

1. garbage disposals and dishwashers (*First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974)) and windows and doors (*First Continental Real Estate Investment Trust v. Continental Steel Co.*, 569 S.W.2d 42 (Tex. Civ. App.—Fort Worth 1978, no writ));
2. carpets, appliances, smoke detectors, burglar alarms, light fixtures, and door locks (*Richard H. Sikes, Inc. v. L & N Consultants, Inc.*, 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.)); and
3. pumps, compressors, air conditioning and heating systems, fans, toilets, basins, light fixtures, wall switches, electrical control panels, hardware, and cabinets (*In re Orah Wall Financial Corp.*, 84 B.R. 442 (Bankr. W.D. Tex. 1986); *Houk Air Conditioning, Inc. v. Mortgage & Trust, Inc.*, 517 S.W.2d 593 (Tex. Civ. App.—Waco 1974, no writ)).

The test to determine whether an improvement is a removable is found in *Exchange Savings & Loan Ass'n v. Monocrete Proprietary Ltd.*, 629 S.W.2d 34 (Tex. 1982), and refined in *In re Orah Wall Financial Corp.*, 84 B.R. 442.

Instead of paying off a removables lien claim, prior to foreclosure, a mortgagee should consider demanding that the lien claimant repossess the removables from the property. Otherwise, if the mortgagee forecloses and attempts to sell the property as a real estate owned property, the mortgagee must ensure the earnest money contract does not include "removables" as part of the real estate owned sales contract because a mechanic's and materialman's removable lien claimant could remove the removables before the real estate owned sale closes. See Thomas J. Walthall, Jr., *Mechanic's Lien "Removables": Representing the Contractor in Default Situationns, in* Advanced Real Estate Law, State Bar of Texas (2009).

§ 4.10 Property Owners Association Liens

The foreclosure of liens held by a property owners association (POA) or homeowners association (HOA) to secure payments of assessments established by restrictive covenants is governed by Texas Property Code sections 209.009 through 209.011. *See* Tex. Prop. Code §§ 209.009–.011. Under section 209.009, a POA may not foreclose a POA's assessment lien if the debt securing the lien consists solely of (1) fines assessed by the POA or (2) attorney's fees incurred by the POA solely associated with fines assessed by the POA. Tex. Prop. Code § 209.009.

Beginning in 2011, significant changes were made to the general scheme of lien assessments and enforcement of a POA lien. *See* Tex. Prop. Code §§ 209.0062–.0064; 209.0091–.0094. Unless waived by the property owner pursuant to section 209.0092(c), a POA lien must be enforced by either judicial foreclosure, if there is no power of sale language in the POA's recorded dedicatory instruments, or by a court order obtained under Texas Rules of Civil Procedure 735 and 736 before the encumbered property can be sold at a nonjudicial foreclosure sale if the POA declaration contains express power-of-sale language. *See* Tex. R. Civ. P. 735, 736.

§ 4.11 Junior Liens

Junior liens are extinguished on the foreclosure of a superior deed-of-trust lien, except to the extent that junior lienholders have claims on excess foreclosure sale proceeds. *Mortgage & Trust, Inc. v. Bonner & Co.*, 572 S.W.2d 344, 352 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). There is no obligation to give notice of foreclosure sale to the holder of a second-lien deed of trust (*TMS Mortgage, Inc. v. Golias*, 102 S.W.3d 768, 771 (Tex. App.—Beaumont 2003, no pet.)), nor is there a right of redemption after foreclosure (*Hampshire v. Greeves*, 143 S.W. 147 (Tex. 1912); *Scott v. Dorothy B. Schneider Estate Trust*, 783 S.W.2d 26, 28 (Tex. App.—Austin 1990, no writ)).

Priority is generally determined by the date of filing, but there are exceptions, such as ad valorem, IRS, and property tax liens. The lien positions may also be affected by subordination or subrogation agreements filed in the real property records.

§ 4.12 Leases Superior to Deed of Trust

A lease on a portion of the mortgaged property (for example, apartment tenant, office tenant, or laundry lease) executed before the deed of trust was recorded is superior to it and not extinguished by foreclosure, unless the lease has been subordinated by its own terms. *F. Groos & Co. v. Chittim*, 100 S.W. 1006, 1010 (Tex. Civ. App. 1907, no writ). The rule is that when a lienholder takes a lien in good faith and for a valuable consideration and without notice of outstanding claims or equities, a purchaser at the lien foreclosure sale, regardless of the knowledge or notice the purchaser has, takes good title from the bona fide mortgagee. *Moran v. Adler*, 570 S.W.2d 883, 885 (Tex. 1978); *see also Gainesville Oil & Gas Co. v. Farm Credit Bank of Texas*, 847 S.W.2d 655 (Tex. App.—Texarkana 1993, no writ) (oil and gas lease with producing well subsequent to deed of trust extinguished by foreclosure sale irrespective of knowledge of foreclosure sale purchaser as to existence of well). The purchaser at the foreclosure sale becomes the new landlord.

§ 4.13 Leases Inferior to Deed of Trust

Leases executed after the recording of the deed of trust may be terminated at the election of the foreclosure sale purchaser. *Peck & Hills Furniture Co. v. Long*, 68 S.W.2d 288, 289 (Tex. Civ. App.—Fort Worth 1934, no writ) (sale under foreclosure gave right to purchaser to either terminate lease or continue it in force with tenant's consent); *F. Groos & Co. v. Chittim*, 100 S.W. 1006, 1010 (Tex. Civ. App. 1907, no writ). In *United General Insurance Agency v. American National Insurance Co.*, 740 S.W.2d 885 (Tex. App.—El Paso 1987, no writ), the court found that a lease executed after the deed of trust was terminated by a foreclosure sale unless both the foreclosure sale purchaser and the tenant expressly or impliedly agreed to continue the lease. The court held that "the continuation in possession by the tenant, without anything else, does not establish an agreement to pay rent on the rental contract." *United General*, 740 S.W.2d at 887. The court further stated, "Where the lease is executed after the mortgage, the sale under foreclosure gives the right to the purchaser to either terminate the lease or continue it in force with the tenant's consent, but does not of necessity terminate the lease." *United General*, 740 S.W.2d at 887. The court found that there was no express agreement between United General (tenant) and American National (mortgagee) to continue the lease and that "the circumstances do not evidence that both parties consented to [United General's] paying rent subsequent to the foreclosure." *United General*, 740 S.W.2d at 887.

§ 4.14 Elevation of Priority of Inferior Lease

If the purchaser at the foreclosure sale accepts rent from a tenant of a subordinate lease without executing a new lease, the purchaser will be deemed to have ratified the lease. *Peck & Hills Furniture Co. v. Long*, 68 S.W.2d 288, 289 (Tex. Civ. App.—Fort Worth 1934, no writ); *see also F. Groos & Co. v. Chittim*, 100 S.W. 1006, 1010–11 (Tex. Civ. App. 1907, no writ). In *Peterson v. NCNB National Bank*, 838 S.W.2d 263 (Tex. App.—Dallas 1992, no writ), the court held that a tenant's payment of four consecutive monthly rent payments in response to a letter from the foreclosure purchaser requesting rent pursuant to the original lease and with knowledge of the foreclosure sale was sufficient to constitute an implied agreement reaffirming the lease notwithstanding the foreclosure sale. *But see FDIC v. Inducto-Bend, Inc.*, 753 F. Supp. 651, 654 (S.D. Tex. 1991) (holding that mortgagee/foreclosure sale purchaser's acceptance of rent from tenant, without more, did not ratify lease but merely represented payment of rent by tenant at sufferance).

If the deed of trust is prior to a lease that the mortgagee wishes to retain and there is neither an attornment agreement between the mortgagee and tenant nor a provision in the lease binding the tenant to continue the lease after a foreclosure, the mortgagee may consider unilaterally subordinating the deed of trust to the lease or leases. This approach has some support in court decisions holding that in a judicial foreclosure in which a tenant is not made a party to the proceeding there is no termination of the lease. In

B.F. Avery & Sons' Plow Co. v. Kennerly, 12 S.W.2d 140 (Tex. Comm'n App. 1929, judgm't adopted), the court stated, "It is true that lessee, not being a party to the foreclosure proceeding, was not bound by the decree rendered therein." *See also McDonald v. Miller*, 39 S.W. 89 (Tex. 1897); *Alford v. Carver*, 72 S.W. 869 (Tex. Civ. App. 1903, no writ); *contra Yarbrough v. John Deere Industrial Equipment Co.*, 526 S.W.2d 188 (Tex. Civ. App.—Dallas 1975, no writ).

An alternate means of elevating an inferior lease or interest is for the mortgagee to accept a deed in lieu of foreclosure.

A mortgagee who elects to continue a subordinate lease after foreclosure or who unilaterally subordinates its lien before foreclosure or who accepts a deed in lieu of foreclosure may become liable to the tenant on the mortgagor's landlord-lease covenants. In an analogous situation, the court in *Amco Trust, Inc. v. Naylor*, 317 S.W.2d 47 (Tex. 1958), considered the question of the liability of a leasehold mortgagee for the tenant's rent obligation. The court held that merely by taking possession of the mortgaged property after default and before foreclosure the mortgagee did not become liable for the tenant's covenants, because it had not become an assignee of the tenant (foreclosed) or otherwise assumed the lease. *See Amco Trust, Inc.*, 317 S.W.2d at 51. Apparently the court would have held the mortgagee liable for the rent if the mortgagee had foreclosed on the mortgagor's leasehold estate. See Annotation, *Liability of Mortgagee or Lienholder of a Lease with Respect to Rents or Covenants Therein*, 73 A.L.R.2d 1118 (1960). See form 15-5 in this manual for a letter to a tenant by the successful bidder at the foreclosure sale accepting the tenant's lease and form 15-6 for a letter giving notice that although rent may be accepted by the bidder, such action is not to constitute an acceptance of the lease.

§ 4.15 Security Deposit under Lease

The Texas Property Code exempts a "real estate mortgage lienholder who acquires title by foreclosure" from liability for return of a residential tenant's security deposit. Tex. Prop. Code § 92.105(c). The tenant's only recourse is against the mortgagor (the prior owner/landlord). However, there is no express exemption for persons other than the real estate mortgage lienholder who purchase at the foreclosure sale. Presumably subordinate leases are terminated by the foreclosure, and a purchaser at the foreclosure sale does not assume liability for the return of security deposits received by the mortgagor under a residential lease that is terminated by foreclosure. There does not appear to be any strong policy reason to grant a preferential position to a real estate mortgage lienholder who purchases at the foreclosure sale over any other purchaser at the sale. If the foreclosure sale purchaser impliedly continues a subordinate lease by accepting rent from the tenant, as opposed to terminating the lease, the purchaser may have assumed liability for the return of the security deposit even though the purchaser did not receive it in the foreclosure. If the foreclosure sale purchaser on a residential project assumes that it is not liable for the security deposit and consequently fails either to return a security deposit or to provide a written statement of any deductions therefrom on or before thirty days after the premises are surrendered, that purchaser may be presumed to have acted in bad faith, if subsequently determined to be liable for the security deposit. *See* Tex. Prop. Code § 92.109(d). A purchaser who wrongfully withholds a security deposit is liable for an amount equal to the sum of $100, three times the portion of the deposits wrongfully withheld, and the tenant's reasonable attorney's fees in a suit to recover the deposit. Tex. Prop. Code § 92.109(a). Also, the purchaser may find that it has forfeited its right "to bring suit against the tenant for damages to the premises." Tex. Prop. Code § 92.109(b).

In *Consolidated Capital Special Trust v. Summers*, 737 S.W.2d 327, 333 (Tex. App.—Houston [14th Dist.] 1987), *rev'd*, 783 S.W.2d 580 (Tex. 1989), the court of appeals refused to award the security deposits to the foreclosing lender apparently on the grounds that since Property Code section 92.105(c) exempts the foreclosing lender from successor-owner liability for the return of security deposits, the lender was not entitled to the deposits. The court of appeals also noted that the notice of foreclosure sale did not list security deposits as part of the mortgaged property being sold. The appellate court's holding in this regard is consistent with its holding that the lender was also not entitled to preforeclosure rent, because it had not undertaken any preforeclosure affirmative action to impound the rent. The supreme court reversed the decision, saying, "As to rents, it is difficult to imagine what [the lender] could have done beyond foreclosing on the property, purchasing it at sale and promptly taking possession of it." *Summers*, 783 S.W.2d at 583. As to prepaid rent (for example, monthly rent paid on the first day of the month for the ensuing month as opposed to in arrears), the supreme court adopted an apportionment rule. The supreme court held the foreclosure sale purchaser was entitled to obtain a judgment against the mortgagor as a matter of law for the rent collected before foreclosure and attributable to a time after the foreclosure. *Summers*, 783 S.W.2d at 583. The supreme court did not discuss the disposition of security deposits, noting that the lender had abandoned its claim for security deposits. *But see Skyland Developers, Inc. v. Sky Harbor Associates*, 586 S.W.2d 564 (Tex. Civ. App.—Corpus Christi 1979, no writ) (construing postsale-term cash-flow reservation by seller as failing to retain security deposits). The supreme court in *Consolidated Capital* was not adjudicating the rights and liabilities between the new landlord and tenants. The apportionment rule was announced in a case in which the mortgagee-purchaser sued for rent relating to the postforeclosure period and therefore elected to treat the leases as surviving foreclosure. It would follow from the supreme court's holding that the new landlord would be required in situations governed by the apportionment rule to give the tenant credit for rent prepaid to the mortgagor before foreclosure, whether or not the new landlord was able to realize on its judgment for rent.

§ 4.16 Lis Pendens

A lis pendens is a "notice, recorded in the chain of title to real property . . . to warn all persons that certain real property is the subject matter of litigation." *Countrywide Home Loans, Inc. v. Howard*, 240 S.W.3d 1, 4 (Tex. App.—Austin 2007, pet. denied) (quoting *Black's Law Dictionary* 942–43 (7th ed. 1999)).

A lis pendens is appropriate if the lawsuit supporting it concerns a direct interest in the property. *See* Tex. Prop. Code §§ 12.007, 13.004; Tex. Civ. Prac. & Rem. Code § 125.002; *In re Collins*, 172 S.W.3d 287, 293 (Tex. App.—Fort Worth 2005, no pet.). If a lawsuit only concerns a collateral interest in the property, a lis pendens is not appropriate. *Flores v. Huberman*, 915 S.W.2d 477, 478 (Tex. 1995).

§ 4.17 Easements

A person is deemed to have knowledge of an easement if a reasonable inspection of the premises would have put the person on notice. *Fender v. Schaded*, 420 S.W.2d 468, 473 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.). If a mortgagor grants an easement after the execution of a deed of trust, foreclosure of the deed of trust will extinguish all rights under the easement. *Motel Enterprises, Inc. v. Nobani*, 784 S.W.2d 545, 547 (Tex. App.—Houston [1st Dist.] 1990, no writ) (citing *Hampshire v. Greeves*, 143 S.W.147, 150 (Tex. 1912)).

The foreclosure sale extinguishes subordinate burdening easements. *See Cousins v. Sperry*, 139 S.W.2d 665, 667 (Tex. Civ. App.—Beaumont 1940, no writ) (foreclosure sale terminated access right-of-way granted by mortgagor to adjoining landowner subsequent to filing of mortgage). See generally Annotation, *Foreclosure of Mortgage or Trust Deed as Affecting Easement Claimed In, On, Over, or Under Property*, 46 A.L.R.2d 1197 (1956).

The mortgaged property may have the benefit of valuable rights, interests, easements, and protective covenants granted after the lien of the deed of trust that the mortgagee would want to preserve. The foreclosure sale, however, may extinguish these subordinate rights, interests, easements, and covenants unless the trustee and the beneficiary take steps before the foreclosure sale to preserve them. If the mortgagee has not expressly ratified subsequent-in-time restrictive covenants imposed on the mortgaged property or subordinated its lien thereto, purchasers from the mortgagor may claim that the foreclosure sale extinguished such restrictions. *See Rembert v. Wood*, 41 S.W. 525 (Tex. Civ. App. 1897, writ ref'd) (judicial foreclosure in which mortgagee took no steps to preserve valuable water and access easement). In holding that the foreclosure extinguished the easement, the court stated:

> [W]hen Mrs. Rembert foreclosed her mortgage, in order to have preserved her water rights or easement in the premises sold, she should have set them up in her pleadings, and had the decree of foreclosure to show that the estate ordered to be sold was burdened with such easement, and had the property sold subject to it. Failing in this, she is estopped from asserting such a claim, because, when she sold under her mortgage, she, having this water right and being a party to the suit, sold not only all the estate which the mortgagor, Hamlin, had in the property at the date of the mortgage, but also all the estate which her testator has therein, or acquired afterwards, up to the date of foreclosure; and the purchaser at such sale gets the title as it existed at the time the mortgage was executed, unless it is foreclosed subject to subsequent encumbrances. *Rembert*, 41 S.W. at 527.

In *Nobani*, the court remanded the case for determination of a fact issue about whether the purchaser at foreclosure sale had ratified a subordinate easement. The trustee's deed that conveyed property "subject to any and all . . . easements . . . to the extent, and only to the extent, that the same may still be in force and effect" did not constitute a ratification of the junior easement. *Nobani*, 784 S.W.2d at 547.

§ 4.18 Receiverships

A property subject to a receivership proceeding cannot be foreclosed without a court order. *Texas Trunk Railway Co. v. Lewis*, 16 S.W. 647 (Tex. 1891); *Cline v. Cline*, 323 S.W.2d 276 (Tex. Civ. App.—Houston [1st Dist.] 1959, writ ref'd n.r.e.). A receivership, however, does not extinguish the mortgagee's security interest; it simply preserves the status quo. *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339 (Tex. 1976).

Rules of equity govern all matters relating to the appointment, powers, duties, and liabilities of a receiver as well as the receivership powers of the court. *See* Tex. Civ. Prac. & Rem. Code ch. 64; Tex. R. Civ. P. 695; 695a. A receiver who performs any act without court approval may be held personally liable. *See Kansas City, M. & O. Railway Co. of Texas v. Weaver*, 191 S.W. 591 (Tex. Civ. App.—El Paso 1917, writ ref'd).

Receiverships arising because of marital property disputes are governed by Texas Family Code sections 6.502 and 6.709. *See* Tex. Fam. Code §§ 6.502, 6.709. If a borrower is involved in an acrimonious divorce, the divorce court docket sheet should be reviewed for a receivership. Although a mortgagee is entitled to notice of a receivership, receivers in divorce cases often fail to give notice of the receivership and also fail to file a lis pendens in the real property records. *See North Side Bank v. Wachendorfer*, 585 S.W.2d 789 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ). Consequently, most mortgagees never know a receivership exists and that the property is in custodia legis.

Mineral interest receiverships are governed by sections 64.091 and 64.092 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code §§ 64.091, 64.092; *see generally Jones v. Colle*, 727 S.W.2d 262 (Tex. 1987).

Upon the sale of a receivership asset, a superior lien is entitled to be paid in full before receivership fees are paid, unless the lienholder asked for or consented to the receivership. *Chase Manhattan Bank v. Bowles*, 52 S.W.3d 871 (Tex. App.—Waco 2001, no pet.). Any objections to receivership fees and expenses must be made in the trial court to preserve an objection on appeal. *Jocson v. Crabb*, 133 S.W.3d 268 (Tex. 2004).

If there appears to be no equity in the receivership encumbered property, the mortgagee should consider vacating the receivership. *Couch Mortgage Co. v. Roberts*, 544 S.W.2d 944 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dism'd); *Best Investment Co. v. Whirley*, 536 S.W.2d 578 (Tex. Civ. App.—Dallas 1976, no writ); *King Land & Cattle Corp. v. Fikes*, 414 S.W.2d 521 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.).

A borrower's failure to pay taxes and keep the property insured are not grounds for a receivership. *Ferguson v. Dickenson*, 138 S.W. 221 (Tex. Civ. App.—Fort Worth 1911, no writ). See sections 3.4:2 and 6.7:10 in this manual for additional discussion.

§ 4.19 Temporary Restraining Orders and Injunctions

If a temporary restraining order or injunction is entered by a court to prevent foreclosure, a mortgagee forecloses at its own risk. The elements required to support a temporary restraining order are found in *PILF Investments v. Arlitt*, 940 S.W.2d 255, 258–59 (Tex. App.—San Antonio 1997, no writ); *see also* Tex. Civ. Prac. & Rem. Code ch. 65; Tex. R. Civ. P. 680–693a; *Town of Palm Valley v. Johnson*, 87 S.W.3d 110 (Tex. 2011); *Golden Rule Insurance Co. v. Harper*, 925 S.W.2d 649 (Tex. 1996).

Generally, borrowers use the "irreparable injury to real property" under Tex. R. Civ. P. 680 as grounds for a temporary restraining order. However, if the purpose of the temporary restraining order is merely for delay, damages may be awarded against the applicant. *Swoboda v. Wilshire Credit Corp.*, 975 S.W.2d 770 (Tex. App.—Corpus Christi 1998), *disapproved on other grounds by Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 570 (Tex. 2001).

A person seeking a temporary restraining order must verify the petition by affidavit and present a plan and intelligible statement of the grounds for relief. Tex. R. Civ. P. 682; *Atkinson v. Arnold*, 893 S.W.2d 294, 297 (Tex. App.—Texarkana 1995); *Ex parte Rodriguez*, 568 S.W.2d 894 (Tex. Civ. App.—Fort Worth 1978, no writ).

The maxim "he who seeks equity must do equity" applies to temporary restraining orders and injunctions. *See Ginther-Davis Center, Ltd. v. Houston National Bank*, 600 S.W.2d 856, 864–65 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

If a trial court's order granting a temporary injunction does not include a mandatory trial setting as required by Texas Rule of Civil Procedure 683, the trial court's temporary injunction is void and must be dissolved. *Escoe v. City of Sherman*, No. 05-06-01385-CV, 2007 WL

2110348 (Tex. App.—Dallas July 24, 2007, no pet.) (mem. op.).

See also section 10.23 in this manual.

§ 4.20 Deceased Mortgagor

When a mortgagor dies, title to the decedent's interest in the mortgaged property is immediately vested in the mortgagor's devisees and heirs. *See* Tex. Est. Code §§ 101.001(a), 201.001, 201.002, 201.003. If a probate proceeding is opened, title of all real and personal property of the decedent vests in the probate estate subject to the custody and control of the personal representative.

As a practical matter, a deceased mortgagor file is not a default problem but rather a title problem. If the mortgagee forecloses before resolving the title issue caused by the mortgagor's death, the mortgagee is faced with both litigation and title challenges complicated by the fact that the note and security instrument were extinguished by the foreclosure.

Since a dependent administration can be opened at any time within four years of the mortgagor's death, title companies are hesitant to issue a title policy if a mortgagee foreclosed within four years of the mortgagor's death. If a dependent administration is opened after a decedent's property is foreclosed, the personal representative can force the foreclosed property back into the probate estate and sue the mortgagee for conversion. *American Savings & Loan Ass'n of Houston v. Jones*, 482 S.W.2d 62 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

See chapter 26 in this manual for a more thorough discussion of deceased mortgagor foreclosure issues.

§ 4.21 Republic of Texas Liens

A recent proliferation of specious liens and claims have been filed to thwart foreclosures and evictions. For convenience sake, these claims are typically referred to as Republic of Texas claims. Because of the fanatical behavior of borrowers who use common-law liens, bogus lien releases, and numerous weird and nonsensical documents filed in the chain of title to stymie foreclosure, many title insurance underwriters refuse to insure a foreclosure with Republic of Texas claims because of the litigation risk unless the lender judicially forecloses.

Whenever faced with a Republic of Texas issue, the provisions in Texas Government Code sections 51.901 through 51.905 may be used to expunge any instrument that clouds title or purports to be a UCC filing. *See* Tex. Gov't Code §§ 51.901–.905. However, the nuances connected with using sections 51.901 through 51.905 should be studied in light of *In re Purported Judgment Lien Against Barcroft*, 58 S.W.3d 799 (Tex. App.—Texarkana 2001) (case remanded because trial court's order expunging bogus lien failed to follow Government Code section 51.902).

Though the claims made by Republic of Texas adherents are without merit, lenders can spend years in protracted litigation trying to foreclose and obtain title and possession of the secured property. The best defense against these zealots is to (1) remove the case to federal court and counterclaim for a judicial foreclosure suit with Tex. Gov't Code §§ 51.901–.905 and Tex. Civ. Prac. & Rem. Code §§ 12.001–.007 allegations to remove the bogus liens and UCC filings; (2) request a permanent injunction to prevent further specious document harassment by the Republic of Texas zealot; and (3) request for a writ of possession from the district court to evict any occupant of the property under Tex. R. Civ. P. 310.

See chapter 10 in this manual for typical borrower allegations and a mortgagee's defenses in litigation.

§ 4.22 General Tax Liens

General tax liens under title 2 of the Texas Tax Code, such as liens from sales, use, and excise taxes; hotel occupancy taxes; gross receipts taxes; severance taxes; and inheritance taxes have priority over deed-of-trust liens only if notice of the general tax lien was recorded before the deed of trust was recorded. The Code provides:

> (a) No lien created by this title is effective against a person listed in subsection (b) of this section who acquires a lien, title, or other right or interest in property before the filing, recording, and indexing of the lien:
>
> > (1) on real property, in the county where the property is located; or
> >
> > (2) on personal property, in the county where the taxpayer resided at the time the tax became due and payable or in the county where the taxpayer filed the report.
>
> (b) This section applies to a bona fide purchaser, mortgagee, holder of a deed of trust, judgment creditor, or any other person who acquired the lien, title or right, or interest in the property for bona fide consideration.

Tex. Tax Code § 113.101.

§ 4.23 Franchise Tax Liens

Franchise tax liens can encumber real property owned by corporate and business taxpayers. Lien priority is determined by the date the lien was filed in the real property records by the state of Texas and continues until the lien is paid. *See* Tex. Tax Code § 113.105.

If a mortgagor is a corporation, a title search should be conducted in the county where the real property is located as well as in the county where the mortgagor's principal place of business is located for a franchise tax lien. To be safe, a certificate of good standing should be obtained from the Texas Comptroller of Public Accounts stating the corporation's franchise tax status.

§ 4.24 Medicaid Estate Recovery Program Liens

A common misconception is that the Texas Department of Aging and Disability Service under the Medicaid Estate Recovery Program can encumber a mortgagor's real property for Medicaid benefits. Though the department can file a claim for Medicaid benefits with the estate of a person who died on or after March 1, 2005, and who received Medicaid funds after March 1, 2005, the claim is filed in a decedent's probate estate as a class 7 claim and not as a real property lien. *See* 15 Tex. Admin. Code ch. 373.

§ 4.25 Tax Lien on Manufactured Home

If a manufactured home is attached to real property, a recorded ad valorem tax lien can be imposed against a manufactured home. *See* Tex. Tax Code §§ 25.08(d); 32.014. See chapter 29 in this manual.

§ 4.26 Paving, Water System, and Sewer System Assessments and Weed Liens

Cities in Texas can impose liens against property for (1) street improvements, including all costs of constructing, reconstructing, repairing, and realigning curbs, gutters, and sidewalks (Tex. Transp. Code ch. 313), and (2) the costs of expanding water and sewer systems (Tex. Loc. Gov't Code §§ 552.065–.069). Except for ad valorem tax liens, Transportation Code liens are superior to any other lien from the date the municipality ordered the improvement. *See* Tex. Transp. Code § 313.054. Cities also have first and prior liens superior to all other liens, except ad valorem liens, for the city's cost of abating certain health hazards and other objectionable or unsightly matters, such as removing stagnant water, trash, or weeds. *See* Tex. Health & Safety Code §§ 342.001–.008.

§ 4.27 Child Support Liens

Effective September 1, 2011, Texas Tax Code section 34.04(a) allows the Texas Attorney General's Office (as a Title IV-D state agency) to file a petition in the court that orders a tax foreclosure sale to set out a child support claim against any excess proceeds resulting from a tax foreclosure sale. The claim must be filed before the second anniversary of the date of the tax foreclosure sale. *See* Tex. Tax. Code § 34.04(a).

§ 4.28 Owelty Liens

The Texas Constitution specifically permits owelty liens against Texas homesteads, which typically arise during a divorce. *See* Tex. Const. art. XVI, § 50(a)(3). An owelty lien enables a divorcing spouse to mortgage not only the community half interest the spouse owns, but also the undivided one-half interest in the homestead owned by the other spouse. Consequently, an owelty lien encumbers the "entirety" of the property. An owelty lien is transferred to the lender in the owelty deed in essentially the same manner a vender's lien is reserved to the lender in a warranty deed.

§ 4.29 Registration of Environmental Liens

Texas's adoption of the Uniform Federal Lien Registration Act (Tex. Prop. Code § 14.001–.007) mandates that federal environmental liens must be filed in the county clerk's office of the county in which the land is located. *See* Tex. Prop. Code § 14.002(b). Section 361.194 of the Texas Health and Safety Code grants a lien in favor of the state for remediation costs of environmental problems. *See* Tex. Health & Safety Code § 361.194(a). The lien attaches to the real property in question at the time of the filing of an affidavit with the county clerk by the Texas Commission on Environmental Quality, but it does not have superpriority, nor does it relate back to a time before the date on which the affidavit is recorded. *See* Tex. Health & Safety Code § 361.194(b). The lien may be foreclosed only by court judgment, and a suit for cost recovery must be initiated no later than one year from the completion of all remediation action. *See* Tex. Health & Safety Code § 361.194(f), (j).

§ 4.30 Criminal Forfeiture

A mortgagee's interest in its collateral may be affected by the illegal activities on or tied to the mortgaged property. More than 140 different federal forfeiture statutes and several Texas statutes allow the government to forfeit a defendant's interest in property. *See* Stefan D. Cassella, *Criminal Forfeiture Procedure in 2011: An Annual Survey of Developments in the Case Law*, 47 Crim. Law Bull. 593 (2011); Dee Edgeworth, *Asset Forfeiture: Practice and Procedure in State and Federal Courts* (2004).

Drug Abuse Prevention and Control Act: Pursuant to the Drug Abuse Prevention and Control Act, the federal government may forfeit any property, including mortgaged real property, used to facilitate the commission of a federal drug trafficking crime that is punishable by more than one year in prison. Additionally, mortgaged property may be forfeited if it is acquired in exchange for an illegal substance or if it constitutes the proceeds of an illegal drug transaction. *See* 21 U.S.C. § 881(a)(6) (traceable proceeds), § 881(a)(7) (properties facilitating).

Forfeiture proceedings under the Controlled Substances Act are an in rem proceeding in which the defendant is the "property," including the lien of the lienholder, not the owner or the lienholder itself.

§ 4.31 Texas Drug Forfeiture Statute

Under the Texas Drug Forfeiture Statute, an owner's interest in real property, including a lienholder's lien, may not be forfeited if the owner (lienholder) acquires its ownership interest, security interest, or lien interest before a lis pendens notice is filed in the appropriate public records, and the owner did not know, or should not reasonably have known, of the act or omission giving rise to the forfeiture or that it was likely to occur at or before the time of acquiring the ownership interest, security interest, or lien interest. *See* Tex. Code Crim. Proc. art. 59.02(c).

§ 4.32 Racketeer Influenced and Corrupt Organizations Act

A person who violates the Racketeer Influenced and Corrupt Organizations Act (RICO) is subject to criminal forfeiture of any property (including real property) constituting, or derived from, any proceeds that the person obtained, directly or indirectly, in violation of the Act. *See* 18 U.S.C. § 1963(a), (b). Section 1963(c) provides protection from forfeiture for "a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture." *See* 18 U.S.C. § 1963(c). Like the term *owner* in the Drug Abuse Prevention and Control Act, "purchaser" can include anyone (a "transferee" of the criminal defendant) who acquires an interest in the property, such as a secured lender, who at the time of purchase was "reasonably without cause to believe that the property was subject to forfeiture" under RICO. *See United States v. Reckmeyer*, 628 F. Supp. 616, 621–22 (E.D. Va. 1986), *aff'd on other grounds*, 786 F.2d 1216 (4th Cir. 1986); *see also Shelden v. United States*, 19 Cl. Ct. 247 (1990), *vacated upon reconsideration*, 26 Cl. Ct. 375 (1992), *rev'd*, 7 F.3d 1022 (Fed. Cir. 1993) (although order of forfeiture eventually vacated in RICO criminal enterprises forfeiture proceeding, United States Claims Court held that effect of forfeiture proceeding preventing mortgagee from foreclosing for two years, during which mortgaged property sustained severe, preventable, and permanent damage, resulted in condemnation of property right cognizable under Fifth Amendment).

For additional reading helpful in understanding this topic, see Brad A. Chapman & Kenneth W. Pearson, Comment, *The Drug War and Real Estate Forfeiture Under 21 U.S.C. § 881: The "Innocent" Lienholder's Rights*, 21 Tex. Tech. L. Rev. 2127 (1990); and David F.B. Smith, *Mortgage Lenders Beware: The Threat to Real Estate Financing Caused by Flawed Protection for Mortgage Lenders in Federal Forfeiture Actions Involving Real Property*, 25 Real Prop. Prob. & Tr. J. 481 (Fall 1990).

§ 4.33 Title Insurance

On receiving a request to foreclose, the attorney should immediately determine if the lender has title insurance. The warranty of title in the deed of trust and the subsequent foreclosure trustee's deed are of little comfort to a foreclosing lender absent mortgagee title insurance. Coverage under a loan policy—formerly known as a mortgagee's title policy—continues in the foreclosing lender as if it had an owner's title policy, until the foreclosing lender sells the property.

§ 4.34 Title Search Conclusion

Before proceeding with a foreclosure sale, it is imperative to secure a title report, abstractor's certificate, or other endorsement reflecting the current status of title and listing all the encumbrances of record against the mortgaged property since the date of the closing.

This report must cover the status of all ad valorem taxes, tax suits or foreclosure sales, recorded mechanic's liens, filed federal tax liens, condominium or subdivision assessments, franchise tax liens, prior lien foreclosure notices, abstracts of judgment, notices of bankruptcy, receiverships, and divorce proceedings. See form 4-7 in this manual for a letter to the title company requesting a title search.

If an attorney intends to rely on a title company certificate without conducting an independent review of record title, the attorney should obtain the client's informed consent for such limited search. See form 4-8 for a checklist for preforeclosure title search and tax lien search, form 4-9 for a letter to taxing jurisdictions, and form 4-10 for a letter to a UCC search service.

The best practice is to obtain and carefully review all the documents in the chain of title. Because Fannie Mae, Freddie Mac, VA, HUD, and most investors will pay for a title search that includes copies of all the documents in the chain of title, cost should not be a factor.

§ 4.35 Locating Successor of a Defunct Mortgagee

A good Internet source for tracking successors to no-longer-existing lenders is the home page of the National Information Center (NIC) of the Federal Reserve and its "Institutional Search" tab. The NIC is a depository of financial data and institutional characteristics collected by the Federal Reserve System. It may be accessed at the Federal Financial Institutions Examination Council Web site at **www.ffiec.gov/nicpubweb/nicweb/SearchForm.aspx**. Another useful tool for showing entity history is at the Federal Deposit Insurance Corporation Web site at **https://research.fdic.gov/bankfind/**.

Additional Resources

Flores, J. Paulo. "Mechanic's Constitutional Liens." In *Soaking Up Some CLE, 2013*. Austin: State Bar of Texas, 2013.

Love, G. Roland. "Involuntary Liens." In *Advanced Real Estate Law Course, 2013*. Austin: State Bar of Texas, 2013.

Walthall, Jr., Thomas J. "Mechanic's Lien 'Removables': Representing the Contractor in Default Situations." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

_____. "Texas Mechanic's Liens and Construction Payment Issues." In *Real Estate Law 101, 2013*. Austin: State Bar of Texas, 2013.

Form 4-1

Instructions for Preparing a

Notice of Nonjudicial Sale of Property and Application for Consent to Sale

IRS

Table of Contents

What's New

1. Revised instructions introduce courtesy forms for submitting Notices of Sale and Applications for Consent.
2. Courtesy Forms with instructions for completing and submitting Notices of Sale and Applications for Consent.

FAQs

What is a Federal Tax Lien and a Notice of Federal Tax Lien
A **federal tax lien** is the government's legal claim against property when there has been a neglect or refusal to pay a tax debt. The **Notice of Federal Tax Lien** is a public document filed to alert creditors of the lien's existence and to secure the government's claim to property subject to the lien. For more information see **http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Understanding-a-Federal-Tax-Lien**

What is a Notice of Sale and why is it required? A notice of sale informs the IRS of a foreclosure sale when the IRS is a secured creditor. In order for property described in Internal Revenue Code (IRC) § 7425(b) to be sold at a nonjudicial sale free and clear of liens or title of the United States, a **notice of the sale** must be provided in accordance with IRC § 7425(c) or consent for the property to be sold free of the liens or title of the United States must be obtained in accordance with IRC § 7425(c). An effective Notice of Sale discharges or removes any junior lien or claim the United States has in the property through the sale. It will not remove a lien or claim which is senior to the foreclosing party's interest.

How do I know if there is an IRS lien interest? In general, for nonjudicial foreclosure sale purposes, the United States has a lien or claim against the property being foreclosed when a Notice of Federal Tax Lien attaching the property has been filed more than 30 days prior to the sale.

Are there consequences for not providing a Notice of Sale? If the United States has a junior lien or claim against the property being sold and a Notice of Sale is not provided to the IRS as required, then the sale does not disturb the lien and it remains attaching to the property. After the sale, the foreclosure sale purchaser would need to apply for a Certificate of Discharge of Property From Federal Tax Lien. See **Publication 783, Application Form 14135,** and the video **Selling or Refinancing when there is an IRS Lien**.

What is included in a Notice of Sale? A Notice of Sale must contain the information identified as ***required*** in the *Notice of Sale Instructions* section. The Notice is considered inadequate if it does not include all the required information. The IRS notifies the party identified as submitting the Notice of Sale not less than five days before the foreclosure sale of the inadequacy. **Letter 1840,** *Notice of Inadequacy,* is used for this purpose. Unless an adequate Notice of Sale is provided at least 25 days before the sale, the Notice of Sale will not be effective to discharge or remove the lien or title of the United States.

What happens if the Notice of Sale is not effective? The liens or claims of the United States are not discharged. *Consent to Sale of Property Free of the Lien* may be applied for prior to the sale. This consent is the IRS' agreement allowing the foreclosure sale to discharge the property of the liens or claims of the United States where the Notice of Sale will not be effective.

Where to Submit a Notice of Sale or Application for Consent

Collection Advisory Group Manager *(for the geographical area where the Notice of Federal Tax Lien was filed. Use* Publication 4235, *Collection Advisory Group Addresses, to find the Collection Advisory office where you would submit your documents.)*

Submission is in writing, by registered or certified mail or by personal service.

► **For Your Convenience**

- **Form 14497,** *Nonjudicial Notice of Sale* is included as assistance in providing the Notice of Sale.
- **Form 14498,** *Application for Consent to Sale of Property Free of the Federal Tax Lien* is included as assistance in providing an application for Consent.

Notice of Sale Requirements

1. Submit in writing;
2. Send by registered or certified mail or by personal service;
3. Send to the Internal Revenue Service (IRS) official, office and address specified in *Where to Submit a Notice of Sale or Application for Consent;*
4. Provide the ***required*** information in the Notice of Sale Instructions (*items marked optional are not required) and

Additional Requirements Non-Perishable Property

5. Send at least 25 days before the sale or date of termination of the contract for deed. The 25 day period commences upon receipt of an adequate notice of nonjudicial sale. The date of receipt for notices sent by certified or registered mail is determined by the U.S. Postal Service postmark date.

► **WARNING:** A Notice of Sale not received in the manner described in this section, will not be effective to remove the federal tax lien from the property or extinguish any title held by the United States, without the express consent of the United States. *(See Consent to Sale of Property Free of the Lien).*

► **POSTPONEMENTS:** Where a sale is postponed, if a Notice of Sale was required and provided, notify the IRS in the same way that local law requires other secured creditors to be notified. Where a Notice of Sale was not required for the original sale, but the new sale date is more than 30 days after the postponement and a notice of lien was filed at least 30 days before the rescheduled sale, a notice of sale must be provided following the directions in this publication.

► **ACKNOWLEDGEMENT**
Only the original of a Notice of Sale is required. If acknowledgement of receipt is desired, include a duplicate copy of the original Notice of Sale along with a written request for acknowledgement. An acknowledgement will be provided indicating the date and time of receipt.

Additional Requirements Perishable Property

5. Send at any time before the sale;
6. Provide the reasons the property is liable to perish or become greatly reduced in value if kept a minimum of 25 days, or reasons it cannot be kept for that period of time without incurring great expense;
7. Hold the proceeds (exclusive of costs) of the sale as a fund, for not less than 30 days after the date of the sale, subject to the liens and claims of the United States, in the same manner and with the same priority as the liens and claims of the United States had with respect to the property prior to sale.

► **WARNING:** The seller becomes personally liable for the amount of the liens and claims of the United States if they do not hold these funds for the IRS.

► **DEFINITION OF PERISHABLE**
Any tangible personal property which, in the reasonable view of the person selling the property, is liable to perish or become greatly reduced in price or value by keeping, or cannot be kept without great expense.

Application for Consent

1. Submit in writing;
2. Made with a declaration under penalties of perjury that the information is true, correct, and complete; and
3. Send to the Internal Revenue Service (IRS) official, office and address specified in *Where to Submit a Notice of Sale or application for Consent*

► **WARNING:** The IRS cannot consent after the date of the sale.

4. Provide the ***required*** Information in the Application for Consent Instructions Provide the ***required*** Information in the Notice of Sale Instructions (*items marked optional are not required, and
5. Provide Adequate Protection.

► **ADEQUATE PROTECTION** of the government's claims must be provided. Protection is considered adequate if:

- The taxpayer has no equity in the property, or
- The taxpayer's interest in the property being sold has been assigned to the IRS, C/O the Collection Advisory Group Manager, or
- Any proceeds in excess of prior encumbrances have been assigned to the IRS, C/O the Collection Advisory Group Manager, or
- The sale divests the taxpayer of all rights, title and interest in the property, and the proceeds are to be held as a fund subject to the liens and claims of the United States in the same manner and priority as the liens and claims were held on the discharged property, or
- There are other known circumstances acceptable to the Collection Advisory Group Manager.

General Information

Notice of Sale: What Is It and Why Is it Required

A Notice of Sale is a document or documents used by the foreclosing party to inform the Internal Revenue Service (IRS) of a nonjudicial foreclosure sale. It allows the IRS to identify what, if any, interest the United States has in the property being sold. In the case of real property, it allows the IRS to begin considering whether to exercise its redemption rights after the sale. More information can be found on www.irs.gov about federal tax liens.

A Notice of Sale is required when the IRS has a lien or claim on the property to be sold which is junior to the foreclosing party's claim. When properly noticed, an IRS junior interest is discharged from the property through the foreclosure sale.

Redemption

When real property is sold, the United States retains the right to redeem the property from the foreclosure sale purchaser. If the IRS redeems the property for the United States, it will resell the property for the purpose of obtaining money which can be applied to the taxpayer's tax lien debt.

Consent to Sale of Property Free of the Lien

Consent to Sale of Property Free of the Lien is the IRS' agreement allowing the foreclosure sale to discharge the property of the liens or claims of the United States. When the foreclosure sale will not be effective to discharge the property being sold from the liens or claims of the United States, the IRS may consent to the sale of the property free of the liens. Consent can only be provided by the Collection Advisory Group Manager for the IRS office where the sale is to take place.

General Instructions

Certain information is required by regulation to be included in the Notice of Sale or Consent Application. Items marked optional are not required. The instructions will indicate if it is required or optional information. The forms themselves are not required.

Notice of Sale Instructions

(Form 14497, *Notice of Nonjudicial Sale of Property*)

Required

1. Name and address and telephone number of the person submitting the notice (please include a fax number);

   OPTIONAL (Additional Names and Addresses):
   - The names and addresses of the Current Beneficiary/Mortgagee, Service Provider (representing the Current Beneficiary / Mortgagee under a servicing agreement), Original Beneficiary/Mortgagee
   - The certified mail control number
   - The Foreclosing Instrument's file number
   - The Foreclosing Instrument's recording date.

Required

2. A copy of each **Form 668(Y)(c),** *Notice of Federal Tax Lien,* effecting the property to be sold **-OR-** from the recorded Notice of Federal Tax Lien, you may provide the following information:
   a. The name of the IRS Area *(District)* office or the place where the notice was prepared and signed;
   b. The name and address of the taxpayer; and
   c. The date and place where the notice of lien was filed.

   OPTIONAL (Taxpayer Identification and Lien Notice Identification Numbers):
   - The social security number, with first five digits redacted, of the person named in the Notice of Federal Tax Lien –or– the Employer Identification Number of the Business named in the Notice of Federal Tax Lien
   - If known, the redacted secondary social security number of any spouse whose name is listed on the Notice of Federal Tax Lien
   - If the applicable Notice of Federal Tax Lien is not being included in the Notice of Sale, list the System Lien Identification Number (SLID) found in the top right hand box of the lien notice document, if available.

Required

3. A detailed description, including location, of the property to be sold that is affected by this Notice of Sale.
   a. For **real property,** give the complete physical address; the legal description contained in the title or deed of the property; if available, a copy of the abstract of title,
   b. For **personal property,** include serial or vehicle numbers, as appropriate, (e. g. 2002 Cessna twin engine airplane, serial number AT919000000000X00)
   c. For **perishable property,** provide the reasons the property is liable to perish or become greatly reduced in value if kept a minimum of 25 days, or reasons it cannot be kept for that period of time without incurring great expense.

   OPTIONAL: (Real Property Description):
   - Real Property, include the type of property (e.g. 3-bedroom single family house, 4-family rental).
4. The date, time, place, and terms of the sale of the property OR the date the taxpayer's interest in the property is terminated; and

Required

5. The approximate amount of principal obligation including interest due the person selling the property and a complete description of any expenses. This may include legal expenses, selling costs, maintenance fees and expenses, which will be charged against the sale proceeds. NOTE: not all expenses may be reimbursable if there is an IRS redemption of the property.

   OPTIONAL: (Property Value Details):
   - Estimated Fair Market Value
   - Estimated amount of any anticipated foreclosure sale surplus or excess.

   NOTICE OF SALE ACKNOWLEDGEMENT

   Check the box, if an acknowledgment of the Notice of Sale is being requested.

Application for Consent

(Form 14498, *Application for Consent to Sale of Property Free of the Federal Tax Lien*)

Required

1. Provide applicant name, address, and telephone number (please include a fax number);

   OPTIONAL (Additional Names and Addresses):
   - The names and addresses of the Current Beneficiary/Mortgagee, Service Provider (representing the Current Beneficiary / Mortgagee under a servicing agreement), Original Beneficiary/Mortgagee
   - The certified mail control number
   - The Foreclosing Instrument's file number
   - The Foreclosing Instrument's recording date.

Required

2. A copy of each **Form 668(Y)(c),** *Notice of Federal Tax Lien,* effecting the property to be sold **-OR-** from the recorded Federal tax lien, you may provide the following information:
   a. The name of the IRS Area *(District)* office or the place where the notice was prepared and signed;

b. The name and address of the taxpayer; and
c. The date and place where the notice of lien was filed.

OPTIONAL (Taxpayer Identification and Lien Notice Identification Numbers):

- The social security number, with first five digits redacted, of the person named in the Notice of Federal Tax Lien –or– the Employer Identification Number of the Business named in theNotice of Federal Tax Lien
- If known, the redacted secondary social security number of any spouse whose name is listed on the Notice of Federal Tax Lien
- If the applicable Notice of Federal Tax Lien is not being included in the Notice of Sale, list the System Lien Identification Number (SLID) found in the top right hand box of the lien notice document, if available.

REQUIRED

3. A detailed description, including location, of the property to be sold that is affected by this Notice of Sale.
   a. For **real property,** give the complete physical address; the legal description contained in the title or deed of the property; if available, a copy of the abstract of title,
   b. For **personal property,** include serial or vehicle numbers, as appropriate, (e.g. 2002 Cessna twin engine airplane, serial number AT919000000000X00),
   c. For **perishable property,** provide the reasons the property is liable to perish or become greatly reduced in value if kept a minimum of 25 days, or reasons it cannot be kept for that period of time without incurring great expense.

OPTIONAL (Real Property Description):

- Real Property, include the type of property (e.g., 3-bedroom single family house, 4-family rental).

REQUIRED

4. The date, time, place, and terms of the sale of the property **-OR-** the date the taxpayer's interest in the property terminated.

REQUIRED

5. The approximate amount of principal obligation including interest due the person selling the property and a complete description of any expenses. This may include legal expenses, selling costs, maintenance fees and expenses, which will be charged against the sale proceeds. NOTE: not all expenses may be reimbursable if there is an IRS redemption of the property.

OPTIONAL (Additional Property Value and Creditor Details):

- Estimated Fair Market Value - Attach a legible copy of a professional appraisal by a disinterested third party; a county valuation; broker opinion of property; informal valuation of property by disinterested third party; proposed selling price (for property being sold at auction); or other, if available.
- Amount due lien holders superior to the Federal Tax Lien, if known. List any encumbrances (liens or claims) against the property that came into existence before the United States' lien interest or which have priority over the lien, if known. Include name and address of holder: description of encumbrance, e.g. mortgage, state lien, etc.; date of agreement; original amount and interest rate; current amount due; and family relationship of the holder, if applicable.
- Estimated amount of any anticipated foreclosure sale surplus or excess proceeds.

CONSENT APPLICATION ACKNOWLEDGEMENT

Check the box, if an acknowledgment of the Consent Application is being requested.

REQUIRED

6. Provide the basis for requesting the consent;

REQUIRED

7. Include a statement indicating what adequate protection is being afforded to the United States lien or title;

REQUIRED

8. Attach any documents needed to substantiate the application; and

REQUIRED

9. Include the following declaration over your signature and title. "Under the penalties of perjury, I declare that I have examined this application (including any accompanying schedules, exhibits, affidavits, and statements) and to the best of my knowledge and belief it is true, correct, and complete."

Internet Sales

A Notice of Sale should be given to the Collection Advisory Group Manager in the IRS office where the property is located, when the sale is conducted over the Internet.

NOTE: All other provisions referred to in this publication apply.

Privacy and Paperwork Reduction Act Notice

We ask for the information on these forms to carry out the Internal Revenue laws of the United States. The information is used to process your Notice of Sale or Application for Consent. You are not required to notify us of a non-judicial sale, or to apply for consent to the sale; however, if you want a federal tax lien to be discharged by the sale, IRC § 7425 requires you to provide certain information, as indicated. Section 6109 requires you to provide the requested identification numbers. Failure to provide this information may delay or prevent processing your Notice or Application; providing false or fraudulent information may prevent discharge of the lien and may subject you to penalties.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as stated in section 6103. However, section 6103 authorizes us to disclose the information pursuant to the Code. We may disclose this information to the Department of Justice for civil and criminal litigation, and to cities, states, the District of Columbia, and U.S. commonwealths and possessions for use in administering their tax laws. We may contact you, your representative, or any person to obtain additional information about the transaction. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated burden for individuals filing this form is approved under OMB control number 1545-0854. The estimated burden for those who file this form is shown below.

- Recordkeeping 2 hr., 45 min.
- Learning about the law or the form 2 hr.
- Preparing the form 1 hr., 30 min.
- Copying, assembling, and sending the form to the IRS 85 min.

Form 4-2

Form **14497** (April 2015)	Department of the Treasury–Internal Revenue Service **Notice of Nonjudicial Sale of Property**	OMB Number 1545-0854

Section 1. Notice Submitter's Information

Name *(First, Middle Initial, Last)*

Firm name *(if applicable)*

Telephone number *(with area code)*	Fax number *(with area code)*	
Address *(Number, Street, P.O. Box)*		
City	State	ZIP Code

Section 1 Optional *(Additional Contact Names and Addresses)* Check here to add additional contact names and addresses ☐

Section 2. Copy of the Notice of Federal Tax Lien(s)

☐ Attached *(go to Section 3)* ☐ Not attached ***(if box checked, complete remaining section 2 items)***

Place lien notice was prepared and signed	Earliest lien notice filing date *(MM/DD/YYYY)*	Location lien notice filed

Taxpayer's Information *(Individual or Business named on the notice of lien)*

Name *(Individual First, Middle Initial, Last)* or *(Business)* as it appears on the notice of lien

Secondary name or business *(d/b/a)*

Address *(Number, Street, P.O. Box)*	City	State	ZIP Code

Section 2 Optional *(Taxpayer [i.e., Foreclosed Party or Debtor] Identification and Lien Notice Identification Numbers)* Check here to add ☐

Section 3. Property

☐ Real property Abstract of Title attached ☐ Yes ☐ No Copy of deed attached ☐ Yes ☐ No

☐ Personal property

☐ Perishable personal property *Likely to perish or be greatly reduced in price or value by keeping*

Provide reason property perishable if box checked

Real property legal description/Personal property detailed description

Catalog Number 62857J www.irs.gov Form **14497** (4-2015)

Address *(if this is personal property, list the address where the property is located)*

City	State	ZIP Code

Section 3 Optional *(Additional real property description)* Check here to add optional information ☐

Section 4. Sale Information

Sale location

Terms of the sale

Sale date	Sale time	Time zone	**OR**	Date the taxpayer's interest in the property is terminated

Section 5. Principal Obligation

Amount of principal obligation	
Interest owed to the seller	
Known expense amounts	
Total	

Complete description of any expenses. This may include legal expenses, selling costs, maintenance fees and expenses, which will be charged against the sale proceeds. **Note:** Not all expenses may be reimbursable if there is an IRS redemption of the property.

Section 5 Optional *(Additional property value details)* Check here to add optional information ☐

Acknowledge Notice of Sale	**Submitter Completes**	**IRS Completes**
	☐ Acknowledgement requested	☐ Acknowledgement sent

Form 4-3

Form **14498** (April 2015)	Department of the Treasury–Internal Revenue Service **Application for Consent to Sale of Property Free of the Federal Tax Lien**	OMB Number 1545-0854

Section 1. Applicant's Information

Name *(First, Middle Initial, Last)*

Firm name *(if applicable)*

Telephone number *(with area code)*	Fax number *(with area code)*	
Address *(Number, Street, P.O. Box)*		
City	State	ZIP Code

Section 1 Optional *(Additional contact names and addresses)* Check here to add additional contact names and addresses ☐

Section 2. Copy of the Notice of Federal Tax Lien(s)

☐ Attached ***(go to Section 3)*** ☐ Not attached ***(If box checked, complete remaining section 2 items)***

Place lien notice was prepared and signed	Earliest lien notice filing date *(MM/DD/YYYY)*	Location lien notice filed

Taxpayer's Information *(Individual or Business named on the Notice of Federal Tax Lien)*

Name *(Individual First, Middle Initial, Last)* or *(Business)* as it appears on the notice of lien

Secondary name or business *(d/b/a)*

Address *(Number, Street, P.O. Box)*	City	State	ZIP Code

Section 2 Optional *(Taxpayer [i.e., Foreclosed Party or Debtor] Identification and Lien Notice Identification Numbers)* Check here to add ☐

Section 3. Property

☐ Real property Abstract of Title attached ☐ Yes ☐ No Copy of deed attached ☐ Yes ☐ No

☐ Personal property

☐ Perishable personal property Likely to perish or be greatly reduced in price or value by keeping

Provide reason property perishable if box checked

Real property legal description/Personal property detailed description

Address *(if this is personal property, list the address where the property is located)*

City	State	ZIP Code

Section 3 Optional *(Additional real property description)* Check here to add optional information ☐

Section 4. Sale Information

Sale location

Terms of the sale

Sale date	Sale time	Time zone	OR	Date the taxpayer's interest in the property is terminated

Section 5. Principal Obligation

Amount of principal obligation	
Interest owed to the seller	
Known expense amounts	
Total	

Complete description of any expenses. This may include legal expenses, selling costs, maintenance fees and expenses, which will be charged against the sale proceeds. **Note:** Not all expenses may be reimbursable if there is an IRS redemption of the property.

Section 5 Optional *(Additional property value and creditor details)* Check here to add optional information ☐

Acknowledge Notice of Sale	Submitter Completes	IRS Completes
	☐ Acknowledgement requested	☐ Acknowledgement sent

Section 6. Basis for Consent

Provide the reason an adequate and timely Notice of Sale cannot be provided

Section 7. Adequate Protection

What is being offered for the Consent

IRS lien interest is valueless ☐ Yes ☐ No

Reason

Section 8. Documents Attached

Substantiating documentation is attached ☐ Yes ☐ No ☐ N/A

List documents provided or reason not provided

Section 9. Declaration

Under the penalties of perjury, I declare that I have examined this application, including any accompanying schedules, exhibits, affidavits, and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signature Date

Printed Name Title

[Reserved]

Chapter 5

The Note in Foreclosure

[Reserved]

Chapter 5

The Note in Foreclosure

The editors gratefully acknowledge Nathan T. Anderson for his contribution to this chapter.

§ 5.1 Introduction

In the last ten years, changes to the Texas Property Code have significantly altered prior law concerning the enforcement of a promissory note secured by a deed of trust. Most significantly, changes to the statutes have (1) clearly distinguished between the procedures for enforcement of the promissory note and enforcement of the deed of trust, (2) introduced new parties (such as mortgage servicers) into the loan enforcement process, and (3) overturned long standing common law concepts. These changes are the basis of the discussion of the promissory note in this chapter and the deed of trust in the next chapter.

§ 5.2 Identification of Parties, Their Roles, and Key Terms

Understanding the identity and role of the parties to a loan transaction involving a promissory note secured by a deed of trust is one of the first steps in understanding the note in foreclosure.

§ 5.2:1 Promissory Note

A *promissory note* is the instrument that evidences the borrower's promise to pay a monetary obligation (i.e., the debt) to the person (the *payee*) named in the instrument. A promissory note may or may not be a negotiable instrument as defined in article three of the Uniform Commercial Code. Tex. Bus. & Com. Code § 3.104(a). To enforce payment on a promissory note, the plaintiff must be the owner or holder of the note at the time of the suit. *Jernigan v. Bank One, Texas, N.A.*, 803 S.W.2d 774, 775 (Tex. App.—Houston [14th Dist.] 1991, no writ).

§ 5.2:2 Holder

A *holder* is the person or entity in possession of a negotiable instrument that is either payable to the bearer or to an identified person that is the person in possession of the negotiable instrument. Tex. Bus. & Com. Code § 1.201(b)(21). A person can own a promissory note without being a holder, either because the note is not a negotiable instrument or the note was not properly negotiated to the owner. To enforce the payment of a promissory note, a plaintiff must show that it is in possession of a note that the plaintiff either owns or that the note has been indorsed to it or its order. *See Jernigan v. Bank One, Texas, N.A.*, 803 S.W.2d 774, 775. See section 5.4 below.

§ 5.2:3 Obligor

The *obligor* is a person legally liable for the repayment of a debt evidenced by a promissory note. *See, e.g.*, Tex. Bus. & Com. Code § 3.103(a)(7). The obligor can be a maker, guarantor, or assumptor of the debt evidenced by the promissory note. The term *obligor* is used in the Texas Property Code but is not defined therein.

§ 5.2:4 Mortgagor

The *mortgagor* is the grantor of a deed of trust encumbering the interest in property that serves as the collateral for repayment of the debt evidenced by the promissory note. The mortgagor is not necessarily an obligor on the debt but may have separate monetary obligations under the deed of trust (such as, e.g., the obligation to pay ad valorem taxes, carry insurance on the property, keep the property in good condition and repair, etc.). See section 6.3:1 in this manual.

§ 5.2:5 Mortgagee

The *mortgagee* is (1) the grantee, beneficiary, owner, or holder of the mortgage or other contract lien on real property; (2) a book entry system; or (3) the last person to whom the security interest has been assigned of record. Tex. Prop. Code § 51.0001(4). (Note that this definition, effective as of January 1, 2004, represents a significant change from the prior common usage of "mortgagee" to mean the beneficiary of a deed of trust.) If there is a material breach of any covenant of the promissory note or deed of trust, the mortgagor's signature evidences the agreement between the mortgagor and the mortgagee to authorize a trustee or a substitute trustee to sell the property pledged under the deed of trust at a nonjudicial foreclosure sale and apply the net sales proceeds to the balance due on the obligor's note. *See, e.g., Taylor v. Brennan*, 621 S.W.2d 591, 593 (Tex. 1981); *NCNB Texas National Bank v. Sterling Projects, Inc.*, 789 S.W.2d 358, 359 (Tex. App.—Dallas 1990, writ dism'd w.o.j.). See section 6.3:2 in this manual.

§ 5.2:6 Mortgage Servicer

The *mortgage servicer*, which may range from one or two persons in a small local bank or credit union to a multinational financial institution with thousands of employees, administers the collection of payments on the promissory note and any foreclosure of the mortgagor's mortgaged property, pursuant to Tex. Prop. Code § 51.0025. As the duly authorized agent for its principal, the mortgagee, the mortgage servicer manages the day-to-day loan level activities related to the obligor's loan agreement account; keeps documents and electronic records of communications to and from the mortgage servicer, obligor, mortgagor, and any third party; debits and credits the obligor's account according to monies received and paid out in accordance with generally accepted accounting practices and keeps electronic records of the same; remits the principal and interest received from the obligor's scheduled loan payments to the account of the mortgagee; and, in some instances, maintains custody and control of the physical possession of the obligor's promissory note. See section 6.3:7 in this manual.

§ 5.2:7 Investor

The *investor* is a beneficiary or equity holder in the trust or other entity that is formed to own a pool of securitized promissory notes. As a beneficiary of the deed of trust, the investor is entitled to a share of the payments made by the various obligors on the pooled promissory notes. In the typical securitized loan pool, the mortgage servicer receives payments from the obligors on the promissory notes and remits the payments to the trustee of the pooling trust, which distributes the income stream to the investors in proportion to the investors' beneficial ownership. *See, e.g., Reinagel v. Deutsche Bank National Trust Co.*, 735 F.3d 220, 228 n.29 (5th Cir. 2013).

§ 5.2:8 Negotiation

Negotiation is the transfer of possession (whether voluntary or involuntary) of a negotiable instrument by a person other than the issuer to a person who becomes its holder. Tex. Bus. & Com. Code § 3.201(a). If an instrument is payable to an identified person, negotiation requires transfer of possession and its indorsement by the holder; if the instrument is payable to bearer, it may be negotiated by transfer of possession alone. Tex. Bus. & Com. Code § 3.201(b).

§ 5.2:9 Special Indorsement

The *special indorsement* of a promissory note is the indorsement of a promissory note as payable to a specific person or to bearer. *See* Tex. Bus. & Com. Code § 3.205(a).

§ 5.2:10 Blank Indorsement

A *blank indorsement* is any indorsement of the promissory note by the holder that is not a special indorsement. Under Texas law, physical possession of a promissory note that bears a blank indorsement becomes payable to the bearer and is transferred by possession alone until specially indorsed. Blank indorsements can be converted into special indorsements by the holder inserting words identifying the payee above the signature of the indorser. *See* Tex. Bus. & Com. Code § 3.205(b), (c); *Kiggundu v. Mortgage Electronic Registration Systems, Inc.*, 469 F. App'x 330, 331–32 (5th Cir. 2012). *See also Robeson v. Mortgage Electronic Registration Systems, Inc.*, No. 02-10-00227-CV, 2012 WL 42965, at *4 (Tex. App.—Fort Worth Jan. 5, 2012, pet. denied) (mem. op.). Thus, if a note is specially indorsed, it is payable to the party listed on the indorsement. If the note is indorsed in blank, then it is payable to the person in possession of the note.

§ 5.3 Enforcement of Note Separate from Deed of Trust

It is well settled that Texas differentiates between enforcement of a note and foreclosure—the note must be enforced through a lawsuit, while a deed of trust can be enforced by foreclosure, without judicial supervision. *Carter v. Gray*, 81 S.W.2d 647, 648 (Tex. 1935); *Tyler v. Bank of America, N.A.*, No. SA-12-CV-00909-DAE, 2013 WL 1821754, at *3 (W.D. Tex. Apr. 29, 2013); *Bierwirth v. BAC Home Loans Servicing, L.P.*, No. 03-11-00644-CV, 2012 WL 3793190, at *4 (Tex. App.—Austin Aug. 30, 2012, no pet.) (mem. op.). Neither the doctrine of election of remedies nor Texas Property Code section 51.003 preclude a lender from first obtaining judgment on the note and later determining whether to pursue either judicial or nonjudicial foreclosure of the deed-of-trust lien. *Stephens v. LPP Mortgage, Ltd.*, 316 S.W.3d 742, 748 (Tex. App.—Austin 2010, pet. denied). Similarly, the secured lender may pursue foreclosure of a deed-of-trust lien independent of any personal action against the borrower for collection on the note. *Bierwirth*, 2012 WL 3793190, at *3; *Stephens*, 316 S.W.3d at 748. See section 3.6:4 in this manual.

Texas law has long recognized that the foreclosure of a lien is a separate and distinct right from a suit to collect a debt. *See Carter*, 81 S.W.2d at 648 ("[I]t is so well settled as not to be controverted that the right to recover a personal judgment for a debt secured by a lien on land and the right to have a foreclosure of lien are severable."); *Aguero v. Ramirez*, 70 S.W.3d 372 (Tex. App.—Corpus Christi 2002, pet. denied) ("Where there is a debt secured by a note, which is, in turn, secured by a lien, the note and lien constitute separate obligations."); *Lazidis v. Goidl*, 564 S.W.2d 453, 456 (Tex. App.—Dallas 1978, no writ) (same); *see also Bergs v. Hoover Bax & Slovacek*, No. 3:01-CV-1572, 2003 WL 22255679, at *5–6 (N.D. Tex. Sept. 24, 2003) (holding foreclosure of security interest is not collection of a debt for purposes of federal Fair Debt Collection Practices Act and Texas Debt Collection Act).

Additionally, the rules governing the enforcement of a deed of trust are separate and distinct from those which govern the right to enforce the note secured by that same deed of trust. The right to enforce a note is governed by the Texas Business and Commerce Code. *See* Tex. Bus. & Com. Code ch. 3.101. The Business and Commerce Code, however, expressly does not govern the enforcement of a deed of trust securing that same note if the deed of trust creates a lien against real property. *See* Tex. Bus. & Com.

Code § 9.109(d)(11). The only statute governing the enforcement of a deed of trust which creates a lien against real property is chapter 51 of the Texas Property Code. *See* Tex. Prop. Code § 51.002. While it is generally true that, pursuant to the Business and Commerce Code, only an owner or holder may enforce a promissory note (*see, e.g., Nelson v. Regions Mortgage, Inc.*, 170 S.W.3d 858, 864 (Tex. App.—Dallas 2006, no pet.)), no such requirement exists under chapter 51 of the Property Code.

§ 5.3:1 Suit on Debt Only

A noteholder or owner may decide to file suit on the note and not seek a judicial or nonjudicial foreclosure of the mortgaged property or collateral. *Storms v. Reid*, 691 S.W.2d 73, 75 (Tex. App.—Dallas 1985, no writ). There is no legal requirement that all collateral be liquidated before entry of judgment on the promissory note. To recover on a promissory note, the lender must prove (1) the note in question, (2) that the party sued signed the note, (3) that the plaintiff is the owner or holder of the note, and (4) that a certain balance is due and owing on the note. *See Diversified Financial Systems, Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, 99 S.W.3d 349, 354 (Tex. App.—Fort Worth 2003, no pet.); *Commercial Services of Perry, Inc. v. Wooldridge*, 968 S.W.2d 560, 564 (Tex. App.—Fort Worth 1998, no pet.); *see also Roth v. JPMorgan Chase Bank, N.A.*, 439 S.W.3d 508, 512 (Tex. App.—El Paso 2014, no pet.).

See section 3.6:2 in this manual for further discussion of this topic.

§ 5.3:2 Suit on Note with Nonjudicial Foreclosure

A noteholder or owner is entitled to conduct a nonjudicial foreclosure sale while concurrently prosecuting a suit on the promissory note that does not also seek judicial foreclosure of the deed of trust. *C.I.T. Corp. v. Hanks*, 48 S.W.2d 1015, 1016 (Tex. Civ. App. 1932); *see French v. May*, 484 S.W.2d 420, 428 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.); *see also* Tex. Bus. & Com. Code § 9.601. If the mortgagee forecloses the deed of trust, the resulting proceeds from the trustee's sale are credited to the judgment under the suit on the note in the same manner as any other payment on the judgment. *Carter v. Gray*, 81 S.W.2d 647, 648 (Tex. 1935); *Kempner v. Comer*, 11 S.W. 194, 196 (Tex. 1889); *Stephens v. LPP Mortgage, Ltd.*, 316 S.W.3d 742, 746 (Tex. App.—Austin 2010, pet. denied); *Lodal & Bain Engineers, Inc. v. Bayfield Public Utility District*, 583 S.W.2d 653, 654–55 (Tex. Civ. App.—Houston [1st Dist.] 1979, *rev'd on other grounds*, 602 S.W.2d 262 (Tex. 1980)); *see* Tex. Prop. Code §§ 51.003, 52.005.

See section 3.6:1 for further discussion of this topic in light of the Texas doctrine of election of remedies.

§ 5.4 Ownership and Negotiation of Promissory Note

The Texas Business and Commerce Code defines "holder" as being the person in possession of a negotiable instrument that is payable either to the bearer or to an identified person that is the person in possession. *See* Tex. Bus. & Com. Code § 1.201(b)(21)(A). While negotiation or assignment can change ownership of a promissory note, the indorsement of a nonnegotiable promissory note does not create a presumption of ownership in the transferee. *FFP Marketing Co., Inc. v. Loan Lane Master Trust IV*, 169 S.W.3d 402, 409 (Tex. App.—Fort Worth 2005, no pet.). Similarly, there is no presumption of ownership of the note if there is not indorsement to the holder of the note. *See* Tex. Bus. & Com. Code § 3.204. In the absence of an indorsement to the plaintiff, the plaintiff is not entitled to a presumption of ownership. *See* Tex. Bus. & Com. Code § 3.201(c).

Negotiation of an instrument is a transfer of that instrument in such a way that the transferee becomes a holder. *See* Tex. Bus. & Com. Code § 3.302(a). Holder status depends on delivery plus proper indorsement. *Lawson v. Gibbs*, 591 S.W.2d 292 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). The nonnegotiable note is nevertheless susceptible of assignment. *Dillard v. NCNB Texas National Bank*, 815 S.W.2d 356 (Tex. App.—Austin 1991, no writ), *overruled on other grounds*, *Amerboy v. Societe de Banque Privee*, 831 S.W.2d 793 (Tex. 1992); *see also First National Bank in Grand Prairie v. Lone Star Life Insurance Co.*, 524 S.W.2d 525 (Tex. Civ. App.—Dallas) (opinion on rehearing), *writ ref'd n.r.e.*, 529 S.W.2d 67 (Tex. 1975). A transferee without indorsement of an instrument, who seeks to recover on the instrument, must account for its possession by proving the transaction through which it acquired the note. *Lawson v. Finance America Private Brands*, 537 S.W.2d 483 (Tex. Civ. App.—El Paso 1976, no writ); *see also Carroll v. Kennon*, 734 S.W.2d 34 (Tex. App.—Waco 1987, no writ).

Absent controverting evidence, affidavit testimony together with a true and correct copy of a note proves ownership for summary judgment purposes. *Zarges v. Bevan*, 652 S.W.2d 368, 369 (Tex. 1983). Negotiation or assignment can change ownership of a promissory note. *Dillard*, 815 S.W.2d at 360. Affidavit testimony can establish transfer of ownership or assignment from a federal agency to another institution. *See NCNB Texas National Bank v. Johnson*, 11 F.3d 1260, 1265 (5th Cir. 1994); *Christian v. University Federal Savings Ass'n*, 792 S.W.2d 533, 534 (Tex. App.—Houston [1st Dist.] 1990, no writ).

§ 5.5 Holder-in-Due-Course Status

A *holder in due course* is a holder who takes the debt instrument (1) for value, (2) in good faith, and (3) without notice that it is overdue or has been dishonored or notice of any defense against or claim to it on the part of any person. *See* Tex. Bus. & Com. Code § 3.302(a)(2). The Texas Business and Commerce Code allows the holder in due course of a promissory note to hold the note free from personal defenses. *See* Tex. Bus. & Com. Code § 3.305. Note, however, that while holder in due course status may immunize the holder from certain personal defenses, it does not eliminate the holder's responsibility to meet the elements of its own cause of action. *Friedman v. Atlantic Funding Corp.*, 936 S.W.2d 38, 41 (Tex. App.—San Antonio 1996, no pet.).

§ 5.6 Note Payable on Demand

When a date of payment is not specified in the promissory note, the obligation is considered payable on demand. Tex. Bus. & Com. Code § 3.108; *Ada Oil Co. v. Logan*, 447 S.W.2d 205 (Tex. App.—Houston [14th Dist.] 1969, no writ).

A demand note is matured on demand by the holder. Tex. Bus. & Com. Code § 3.108. However, one case has held that "[a] demand note is due from the moment of execution and actionable immediately without demand." *Stavert Properties, Inc. v. RepublicBank of Northern Hills*, 696 S.W.2d 278, 281 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

Formal demand for payment and failure to pay must occur on a demand note before commencement of the foreclosure process. The demand feature of the note involves a number of issues that have not been extensively dealt with by state and federal courts. A negotiable instrument that is payable at a definite time may provide for the right of acceleration of the debt on default. *APM Enterprises, LLC v. National Loan Acquisitions Co.*, 357 S.W.3d 405, 407–08 (Tex. App.—Texarkana 2012, no pet.) (citing Tex. Bus. & Com. Code § 3.108). Because acceleration of a debt is viewed as a harsh remedy, however, any such clause will be strictly construed. *APM Enterprises*, 357 S.W.3d at 406; *see Ramo, Inc. v. English*, 500 S.W.2d 461, 466 (Tex. 1973). Texas law requires clear notice of intent to exercise acceleration rights, followed (if the debtor continues in default) by notice of actual acceleration. *See Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232, 233–34 (Tex. 1982). "If the required notices are given, acceleration occurs." *Burns v. Stanton*, 286 S.W.3d 657, 661 (Tex. App.—Texarkana 2009, pet. denied). See chapter 8 in this manual for further discussion of these issues.

§ 5.7 Note Payable at Definite Time

Texas Business and Commerce Code section 3.108(b) provides that—

> A promise or order is "payable at a definite time" if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to the rights of:
>
> (1) prepayment;
>
> (2) acceleration;
>
> (3) extension at the option of the holder; or
>
> (4) extension to a further definite time at the option of the maker or acceptor or automatically on or after a specified act or event.

Tex. Bus. & Com. Code § 3.108(b). A term note matures at the expiration of the term or on the date stipulated in the note. As recognized in section 3.108(b)(2), a term note may provide that the maturity may or shall be accelerated on the occurrence of a default or other event before the end of the term.

Also note that under section 3.108(c), if an instrument payable at a fixed date is also payable on demand made before the fixed date, the instrument is payable on demand until the fixed date and, if demand for payment is not made before that date, becomes payable at a definite time on the fixed date. Tex. Bus. & Com. Code § 3.108(c).

§ 5.8 Installment Note with Power to Accelerate Unmatured Principal

As with term notes, installment notes may provide that, on the occurrence of a default or other event, the unmatured (not yet due) installments may be matured.

Texas courts look with disfavor on acceleration because it imposes a severe burden on the mortgagor. For example, in one case, the Texas Supreme Court stated, "The accelerated maturity of a note, which is initially contemplated to extend over a period of months or years, is an extremely harsh remedy." *Allen Sales & Servicenter, Inc. v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975).

Texas courts require that notes be accelerated in strict accordance with the contractual requirements of the loan documents, any applicable statutes, and case-law interpretation of these requirements. Generally, Texas courts require compliance with the following procedures:

1. Demand is made for payment, and the debtor is afforded an opportunity to remedy the default.

2. Advance notice is given of the payee's intention to accelerate to maturity the unmatured balance of principal on the note.

3. Notice is given that acceleration has occurred.

Ogden v. Gibraltar Savings Ass'n, 640 S.W.2d 232, 233–34 (Tex. 1982).

§ 5.9 Default Defined

The Texas Business and Commerce Code does not define the various events that may be a default on the loan. Default is defined by the agreement of the parties. Tex. Bus. & Com. Code § 9.601 cmt. 3. Default may consist of the failure to make a payment on the loan within a specified period or may be the breach of a covenant, representation, or warranty or the occurrence or nonoccurrence of some event. An uncertified check is merely a conditional payment for an obligation owed to the payee. *See Probus Properties v. Kirby*, 200 S.W.3d 258, 262–63 (Tex. App.—Dallas 2006, pet. denied). Where a party makes its payment by uncertified check, that party takes the risk that the check will not be honored and the payment obligation will not be fulfilled. *See Deep Nines, Inc. v. McAfee, Inc.*, 246 S.W.3d 842 (Tex. App.—Dallas 2008, no pet.) (default occurred under settlement agreement when party failed to pay debt within three-day cure period after uncertified check dishonored).

All documents and communications between the parties and the course of conduct of the parties must be analyzed before a default is declared or payment is demanded. If care is not taken, the parties may discover after the fact that the debt was not due or a default did not exist. The erroneous publicizing of default can seriously affect the obligor's ability to perform his obligations to the lender and others, and may also be a violation of the federal and state fair debt collection statutes. See chapter 7 in this manual.

§ 5.10 Statute of Frauds

Section 26.01 of the Texas Business and Commerce Code states that to be enforceable, agreements subject to chapter 26 of the Texas Business and Commerce Code must be in writing and signed by the party charged with the agreement. *See* Tex. Bus. & Com. Code § 26.01(a). The statute of frauds applies, among other agreements, to—

- loan agreements in excess of $50,000;
- an agreement for the sale of real property;
- an agreement that contemplates the creation of a lien or mortgage; and
- agreements that cannot be performed within one year from the date of the making of the agreement.

See Tex. Bus. & Com. Code §§ 26.01(b), 26.02(b); *Khoshnoudi v. Bird*, No. 05-98-00388-CV, 2000 WL 1176587, at *5 (Tex. App.—Dallas Aug. 21, 2000, no pet.) (not designated for publication) (citing *West v. First Baptist Church*, 71 S.W.2d 1090, 1100 (Tex. 1934); *Edward Scharf Associates, Inc. v. Skiba*, 538 S.W.2d 501, 502 (Tex. App.—Waco 1979, no writ); and *Woodman v. Bishop*, 203 S.W.2d 977, 978 (Tex. App.—San Antonio 1947, no writ)).

Promissory estoppel may overcome the statute-of-frauds requirement in Texas, but "there must have been a promise to sign a written contract which had been prepared and which would satisfy the requirements of the statute of frauds." *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 256–57 (5th Cir. 2013) (quoting *Beta Drilling, Inc. v. Durkee*, 821 S.W.2d 739, 741 (Tex. App.—Houston 1992, writ denied). *See also Carpenter v. Phelps*, 391 S.W.3d 143 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("For promissory estoppel to create an exception to the statute of frauds requires a promise to sign a prepared written contract which would satisfy the requirements of the statute of frauds."); *Ford v. City State Bank of Palacios*, 44 S.W.3d 121, 139 (Tex. App.—Corpus Christi 2001, no pet.) ("When promissory estoppel is raised to bar the application of the statute of frauds, there is an additional requirement that the promisor promised to sign a written document complying with the statute of frauds.").

A purported agreement to modify the terms of a promissory note or deed of trust is within the statute of frauds. *Martins*, 722 F.3d at 257. In order for the promissory estoppel exception to the statute of frauds to apply, a party must allege the other party promised to sign a written agreement which would satisfy the statute of frauds. *Martins*, 722 F.3d at 256–57.

See sections 3.3:2 and 10.4 in this manual for further discussion.

§ 5.11 Lost Notes

A plaintiff need not be a holder in due course to recover on a lost promissory note. *See* Tex. Bus. & Com. Code § 3.309; *see also RTC v. Camp*, 965 F.2d 25, 29 (5th Cir. 1992); *Priesmeyer v. Pacific Southwest Bank*, 917 S.W.2d 937, 939 (Tex. App.—Austin 1996, no writ); *Bean v. Bluebonnet Savings Bank*, 884 S.W.2d 520, 522 (Tex. App.—Dallas 1994, no writ); *Jernigan v. Bank One, Texas, N.A.*, 803 S.W.2d 774, 776 (Tex. App.—Houston [14th Dist.] 1991, no writ). A collateral assignee may collect on a collaterally pledged note lost by the collateral assignee. *See Bray v. Cadle Co.*, 880 S.W.2d 813, 817–18 (Tex. App.—Houston [14th Dist.] 1994, writ denied). For the steps to prove up a lost assignment of a note, see *Western National Bank v. Rives*, 927 S.W.2d 681, 684–85 (Tex. App.—Amarillo 1996, writ denied).

§ 5.12 Statute of Limitations

The Eighty-fourth Texas Legislature passed House Bill 2067, which added section 16.038, "Rescission or Waiver of Accelerated Maturity Date," to the Texas Civil Practice and Remedies Code. *See* Acts 2015, 84th Leg., R.S., ch. 759, § 1 (H.B. 2067), eff. June 17, 2015 (adding Tex. Civ. Prac. & Rem. Code § 16.038). Section 16.038 provides a statutory safe harbor for documenting an abandonment, waiver, or rescission of a notice of acceleration that previously matured a borrower's debt and thus triggered the statute of limitations barring enforcement of a mortgagee's lien if the property was not nonjudicially foreclosed or a suit for judicial foreclosure filed within four years of the notice of acceleration under section 16.035. *See* Tex. Civ. Prac. & Rem. Code § 16.038.

Rescission of acceleration is effective if made by a written notice of rescission served by the lienholder, the servicer of the debt, or an attorney representing the lienholder on each debtor who, according to the records of the mortgagee or servicer, is obligated to pay the debt. Tex. Civ. Prac. & Rem. Code § 16.038(b). Service of the written notice must be by first-class or certified mail, and service is complete when the notice is deposited in the United States mail, postage prepaid, and addressed to the debtor at the debtor's last known address. Tex. Civ. Prac. & Rem. Code § 16.038(c). The notice of rescission does not affect a lienholder's right to accelerate the maturity date of the debt in the future, nor does it waive past defaults. Tex. Civ. Prac. & Rem. Code § 16.038(d). Section 16.038 does not create an exclusive method for evidencing rescission of acceleration. *See* Tex. Civ. Prac. & Rem. Code § 16.038(e).

Section 16.038 is retroactive, but only if the four-year statute of limitations has not run. *See* Acts 2015, 84th Leg., R.S., ch. 759, § 2 (H.B. 2067). See section 10.26 in this manual for a discussion of this issue.

§ 5.12:1 Four-Year Statute

Under section 16.035(e) of the Texas Civil Practice and Remedies Code, the four-year statute of limitations does not begin to run on past-due installments until the entire debt is due. Section 16.035(e) provides: "If a series of notes or obligations or a note or obligation payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment." Tex. Civ. Prac. & Rem. Code § 16.035(e). Section 16.035(e) applies not only to suits to foreclose a deed-of-trust lien but also to suits on the real property secured debt since the lien is an incident of and inseparable from the debt. Tex. Civ. Prac. & Rem. Code § 16.035(e). Section 16.035 modifies the general rule that a claim accrues and limitations begin to run on each installment when it becomes due. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001).

Importantly, if a note or deed of trust secured by real property contains an optional acceleration clause, default does not start the limitations running on the note. *Holy Cross Church*, 44 S.W.3d at 566. Instead, under these circumstances, a cause of action for foreclosure accrues only when the noteholder or owner actually exercises its option to accelerate. *Holy Cross Church*, 44 S.W.3d at 566; *see also Khan v. GBAK Properties, Inc.*, 371 S.W.3d 347, 353 (Tex. App.—Houston [1st Dist.] 2012, no pet.). This requires two acts: (1) notice of intent to accelerate and (2) notice of acceleration. *Holy Cross Church*, 44 S.W.3d at 566; *see also Burney v. Citigroup Global Markets Realty Corp.*, 244 S.W.3d 900, 903 (Tex. App.—Dallas 2008, no pet.). "Notice of intent to accelerate is necessary in order to provide the debtor an opportunity to cure his default prior to harsh consequences of acceleration and foreclosure," while notice of acceleration "cuts off the debtor's right to cure his default and gives notice that the entire debt is due and payable." *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232, 234 (Tex. 1982). Notice that the debt has been accelerated is ineffective unless preceded by proper notice of intent to accelerate. *Ogden*, 640 S.W.2d at 234. Both notices must be clear and unequivocal. *Holy Cross Church*, 44 S.W.3d at 566.

§ 5.12:2 Six-Year Statute

If the noteholder or owner is suing only on the note and not seeking to foreclose its lien, the six-year statute of limitations of section 3.118 of the Texas Business and Commerce Code is applicable. *See* Tex. Bus. & Com. Code § 3.118; *Parker v. Dodge*, 98 S.W.3d 297, 300–301 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Aguero v. Ramirez*, 70 S.W.3d 372, 375 (Tex. App.—Corpus Christi 2002, pet. denied). The court in *Ward v. Stanford*, 443 S.W.3d 334, 343 (Tex. App.—Dallas 2014, pet. denied) held that whether the six-year rather than the four-year statute of limitations applies depends on whether the note is negotiable or nonnegotiable, with the six-year statute of limitations applying to negotiable notes. The court in *Stanford* found the note in question to be a negotiable one.

§ 5.12:3 Calculation of Limitations

By statute, if a series of notes or obligations or a note or obligation payable in installments is secured by a lien on real property, limitations do not begin to run until the maturity date of the last note, obligation, or installment. Tex. Civ. Prac. & Rem. Code § 16.035(e). If a note or deed of trust secured by real property contains an acceleration clause, default does not start limitations running on the note; rather, the action accrues only when the noteholder or owner exercises its option to accelerate. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). In the case of a demand obligation, limitations begin to run on demand or, if no date is stated, on the date of issue. Tex. Bus. & Com. Code § 3.118(b). Whether a note will be treated as a demand instrument or a time instrument subject to acceleration depends on the language of all the loan documents and the circumstances. *Reid v. Key Bank of Southern Maine*, 821 F.2d 9, 14 (1st Cir. 1987). It is conclusively presumed that the debt has been paid after the expiration of four years after the maturity of the debt. On the expiration of the four-year limitations period, the real property lien and a power of sale to enforce the real property lien become void. Tex. Civ. Prac. & Rem. Code § 16.035(d).

§ 5.12:4 Suit against Guarantor

The four-year statute of limitations barring recovery against a guarantor begins running the day the cause of action accrues. When the cause of action accrues on a guaranty is a question of law for the court to decide. *See Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). A cause of action generally accrues when facts come into existence that authorize a claimant to seek a judicial remedy. *Provident Life & Accident Insurance Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003); *Gabriel v. Alhabbal*, 618 S.W.2d 894, 896 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). Usually, a cause of action for the breach of a promise to pay arises when a demand for payment has been made and refused. *Intermedics, Inc. v. Grady*, 683 S.W.2d 842, 845 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

In the case of a guaranty of payment, which provides that the payee may sue the guarantor without first bringing a cause of action to recover on the note against the maker, the statute of limitations runs independently on the obligation of the guaranty. *See Willis v. Chowning*, 40 S.W. 395, 396–97 (Tex. 1897); *Beddall v. Reader's Wholesale Distributors, Inc.*, 408 S.W.2d 237, 240 (Tex. Civ. App.—Austin 1966, no writ); *Western Casket Co. v. Estrada*, 116 S.W. 113, 113–14 (Tex. Civ. App.—El Paso 1909, no writ) (applying principles announced in *Willis* to guarantors); *see also Ford v. Darwin*, 767 S.W.2d 851, 854 (Tex. App.—Dallas 1989, writ denied).

When construing a guaranty agreement, the court's primary goal is to ascertain and give effect to the intent of the parties. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *Hasty v. Keller HCP Partners, L.P.*, 260 S.W.3d 666, 670 (Tex. App.—Dallas 2008, no pet.). The surest guide to the parties' intent is the language used in the guaranty, and where the language is clear and unambiguous, the court may not look to the subject matter or attending circumstances in order to give it a different construction. *See University Savings Ass'n v. Miller*, 786 S.W.2d 461, 462 (Tex. App.—Houston [14th Dist.] 1990, writ denied); *Southwest Savings Ass'n v. Dunagan*, 392 S.W.2d 761, 767 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

§ 5.12:5 Two-Year Limitation on Deficiency Action

Section 51.003(a) of the Texas Property Code provides that, if real property is sold at a foreclosure sale for a price less than the unpaid balance of the indebtedness securing it, "any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section." Tex. Prop. Code § 51.003(a). Courts have construed this as a statute of limitations, not a statute of repose. *Trunkhill Capital, Inc. v. Jansma*, 905 S.W.2d 464, 467–68 (Tex. App.—Waco 1995, writ denied). This is so because, from the date that section 51.003(a) requires the two-year period to begin, i.e., the date of foreclosure, a lender possesses all facts that authorize him to seek a judicial remedy. *Trunkhill Capital*, 905 S.W.2d at 468; *see Celtic Life Insurance Co. v. Coats*, 885 S.W.2d 96, 100 (Tex. 1994); *Thompson v. Chrysler First Business Credit Corp.*, 840 S.W.2d 25, 28 (Tex. App.—Dallas 1992, no writ).

§ 5.13 Third-Party Mortgage to Secure Borrower's Debt

Generally, a deed of trust can be executed to secure the debt of a person other than the mortgagor. *See Wilbanks v. Wilbanks*, 330 S.W.2d 607 (Tex. 1960); *Nelson v. Citizens Bank & Trust Co.*, 881 S.W.2d 128 (Tex. App.—Houston [1st Dist.] 1994, no writ). This means, for example, that if the maker of a note dies and a default exists, the mortgagee is entitled to foreclose on the mortgaged property of a third party who as mortgagor had pledged his property to secure the obligor's debt, without first having to proceed against the deceased obligor's estate to collect the debt. *Planters' & Mechanics' National Bank v. Robertson*, 86 S.W. 643, 645 (Tex. Civ. App.—Galveston 1905, no writ); *see also Kimball-Krough Pump Co. v. Judd*, 88 S.W.2d 579, 584 (Tex. Civ. App.—Amarillo 1935, no writ).

[Reserved]

Chapter 6
The Deed of Trust

Chapter 6

The Deed of Trust

The editors gratefully acknowledge Brian T. Morris for his contribution to this chapter.

§ 6.1 Introduction—Deed of Trust as Contract

Although the deed of trust reads as if it is a conveyance, sale, or transfer of the mortgaged property to the trustee "in trust," Texas law characterizes the transaction as creating a nonpossessory lien on the mortgaged real property and personal property collateral in favor of the mortgagee. A deed of trust is a mortgage with a power of sale. *Johnson v. Snell*, 504 S.W.2d 397, 399 (Tex. 1973); *Cortez v. Brownsville National Bank*, 664 S.W.2d 805, 810 (Tex. App.—El Paso 1984, no writ). The purpose of the deed of trust is to secure the repayment of the debt, and the deed of trust creates a lien against the mortgaged property. *Financial Freedom Senior Funding Corp. v. Horrocks*, 294 S.W.3d 749, 755–56 (Tex. App.—Houston [14th Dist.] 2009, no pet.). When a mortgagor executes a deed of trust to secure an extension of credit, the mortgagor conveys only equitable title to the mortgaged property and retains legal title. *Flag-Redfern Oil Co. v. Humble Exploration Co.*, 744 S.W.2d 6, 8 (Tex. 1987); *Leighton v. Leighton*, 921 S.W.2d 365, 368 (Tex. App.—Houston [1st Dist.] 1996, no writ). Accordingly, prior to default and the pursuit of its remedies, the mortgagee is not entitled to possession, rentals, or profits from the mortgaged property. *Taylor v. Brennan*, 621 S.W.2d 592, 593 (Tex. 1981). Additional authority on the nature of the deed of trust includes *Humble Oil & Refining Co. v. Atwood*, 244 S.W.2d 637, 644 (Tex. 1951); *Carroll v. Edmondson*, 41 S.W.2d 64 (Tex. Comm'n App. 1931, judgm't adopted); *Armenta v. Nussbaum*, 519 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); *Lucky Homes, Inc. v. Tarrant Savings Ass'n*, 379 S.W.2d 386 (Tex. Civ. App.—Fort Worth 1964), *rev'd on other grounds*, 390 S.W.2d 473 (Tex. 1965); *Pioneer Building & Loan Ass'n v. Cowan*, 123 S.W.2d 726 (Tex. Civ. App.—Waco 1938, writ dism'd judgm't cor.); and *Texas Loan Agency v. Gray*, 34 S.W. 650 (Tex. Civ. App. 1896, writ ref'd).

§ 6.1:1 Contract between Parties

The deed of trust is regarded as a binding contract between the mortgagor, the trustee, and the mortgagee. Certain provisions of the Texas Property Code apply notwithstanding an agreement to the contrary, including section 51.002(d) (twenty-day notice of default and right to cure for lien on property used as debtor's residence) and section 51.0075 (appointment of substitute trustee), and section 51.002 controls to the extent of any conflict between the terms of the deed of trust and the statute. *See* Tex. Prop. Code §§ 51.002(d), 51.0075. See section 6.5 below. The deed of trust is typically executed only by the mortgagor and not by the trustee or mortgagee. The deed of trust must include a grant of the lien, a description of the real property and any other collateral, a description or identification of the debt and other obligations secured by the deed of trust, and a description of the defaults triggering the mortgagee's right to pursue remedies. *See Sunbelt Service Corp. v. Vandenburg*, 774 S.W.2d 815, 817 (Tex. Civ. App.—El Paso 1989, writ denied). A general description of the debt is sufficient. *Clementz v. Jones Lumber Co.*, 18 S.W. 599, 600 (Tex. 1891). A failure to state the amount of the debt secured by the deed of trust does not invalidate the deed of trust where the amount can be ascertained, or so long as the deed of trust is sufficient to identify the debt from other sources or by parol evidence. *Barnett v. Houston*, 44 S.W. 689, 692 (Tex. Civ. App. 1898, writ ref'd). Texas law does not require the maturity date of the debt to be stated in the deed of trust. *Cadle Co. v. Butler*, 951 S.W.2d 901, 909 (Tex. App.—Corpus Christi 1997, no writ).

A deed of trust will typically contain representations and warranties by the mortgagor with respect to: title to the collateral; affirmative and negative covenants regarding the maintenance, repair, use, and protection of the property; the protection of the mortgagee's lien position (such as covenants obligating the mortgagor to pay taxes and to maintain insurance for the property); covenants prohibiting waste, removal of fixtures, and certain uses or changes in the property; provisions regarding the use or application of insurance proceeds and condemnation proceeds; provisions listing the defaults which permit the mortgagee to pursue remedies and cause the mortgaged property to be sold; and provisions stating the procedures to be followed in connection with the mortgagor's breach of the deed of trust (for example, acceleration, notices, waivers, substitution of trustee, and requirements of sale).

§ 6.1:2 Power of Sale

Although a power of sale is not necessary for the deed of trust to create a lien against the property described in the deed of trust, a power of sale is necessary to permit a nonjudicial foreclosure of the lien pursuant to the terms of the deed of trust and Texas Property Code section 51.002. *See Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.—Corpus Christi 1996, no writ). A trustee has no power to sell the mortgaged property except as provided for in the deed of trust. *Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671, 675 (1942). Section 51.002 provides the procedures for a nonjudicial foreclosure "of real property under a power of sale conferred by a deed of trust or other contract lien." Tex. Prop. Code § 51.002(a). In the absence of a power of sale, a nonjudicial foreclosure is unavailable.

§ 6.2 Enforcement Is Independent of Note and Vendor's Lien

Texas law differentiates between the enforcement of a promissory note and foreclosure of the deed-of-trust lien securing the note. See section 5.3 in this manual. The mortgage or deed of trust secures the debt, and the note is evidence of the debt. *W.C. Belcher Land Mortgage Co. v. Taylor*, 212 S.W. 647, 650 (Tex. Comm'n App. 1919, judgm't adopted). The note and lien are separate obligations. *Aguero v. Ramirez*, 70 S.W.3d 372, 374 (Tex. App.—Corpus Christi 2002, pet. denied). In addition, different statutes of limitation apply to the foreclosure of the lien and a suit to collect the debt. *See Aguero*, 70 S.W.3d at 374–75. See section 10.26. Foreclosure enforces the deed of trust, not the underlying note. *See Slaughter v. Qualls*, 162 S.W.2d 671 (Tex. 1942), *Rearden v. CitiMortgage, Inc.*, No. A-11-CA-420-SS, 2011 WL 3268307, at *3 (W.D. Tex. July 25, 2011). The right to recover a personal judgment for the debt secured by a lien on land and the right to foreclosure of the lien are severable rights, and the mortgagee may elect to pursue a personal judgment for the debt without foreclosure of the lien and without waiving the lien. *Carter v. Gray*, 81 S.W.2d 647, 648 (Tex. 1935). Foreclosure of a lien is an in rem proceeding. *Tierra Sol Joint Venture v. City of El Paso*, 311 S.W.3d 492, 499 (Tex. App.—El Paso 2009, pet. denied). Enforcement of the note, however, is a personal action against the maker. *TrueStar Petroleum Corp. v. Eagle Oil & Gas Corp.*, 323 S.W.3d 316, 319 (Tex. App.—Dallas 2010, no pet.). Texas courts recognize that the note and deed of trust afford distinct remedies on separate obligations and have rejected the argument that a note and its security are inseparable. *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 255 (5th Cir.

2013) (citing *Bierwirth v. BAC Home Loans Servicing, L.P.*, 2012 WL 3793190, at *3 (Tex. App.—Austin, Aug. 30, 2012, no pet.), and *Robeson v. Mortgage Electronic Registration Systems, Inc.*, No. 02-10-00227-CV, 2012 WL 42965, at *4 (Tex. App.—Fort Worth, Jan. 5, 2012, pet. denied) (mem. op.)).

In Texas, a seller of real property retains a vendor's lien against the conveyed property for the unpaid portion of the purchase price. *Helm v. Weaver*, 6 S.W. 420, 421 (Tex. 1887). In a typical seller-financed transaction, the purchaser executes a note payable to the seller, which is secured by a deed of trust for the benefit of the seller. However, the vendor's lien is in addition to and independent of any deed-of-trust lien arising out of the sale. A vendor's lien can be an express lien reserved in the deed transferring the property, or in the absence of an express reservation in the deed, an equitable vendor's lien is implied. *Wilcox v. First National Bank*, 55 S.W. 317, 330 (Tex. 1900); *Skelton v. Washington Mutual Bank, F.A.*, 61 S.W.3d 56, 60 (Tex. App.—Amarillo 2001, no pet.); *Delley v. Unknown Stockholders of Brotherly & Sisterly Club of Christ, Inc.*, 509 S.W.2d 709, 714 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.). Where there is an express vendor's lien in the deed or otherwise acknowledged in a recorded document, the seller retains superior title to secure the unpaid purchase price, and the purchaser merely acquires an equitable right to acquire title by carrying out the agreement. *State v. Forest Lawn Lot Owners Ass'n*, 254 S.W.2d 87, 91 (Tex. 1953); *Dominey v. Unknown Heirs & Legal Representatives of Lokomski*, 172 S.W.3d 67, 73 (Tex. App.—Fort Worth 2005, no pet.); *Jones v. Bank United of Texas, FSB*, 51 S.W.3d 341, 343 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). In the absence of an express vendor's lien, the implied lien in favor of the seller arises by operation of law. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984). The implied vendor's lien creates a constructive trust that precludes the purchaser from obtaining the estate of the seller without paying the entirety of the purchase price. *Trison Investment Co. v. Woodard*, 838 S.W.2d 790, 792 (Tex. App.—Dallas 1992, writ denied).

Upon a default by the purchaser, the vendor has a choice of remedies. *Whiteside v. Bell*, 347 S.W.2d 568, 570 (Tex. 1961). When there is an express vendor's lien, the vendor may sue for payment of the purchase price, may rescind the contract and take possession of the property, may recover title and possession of the property in a suit for that purpose or by agreement, or may sue for the debt and to foreclose the vendor's lien. *Whiteside*, 347 S.W.2d at 570; *Dominey*, 172 S.W.3d at 73; *Zapata v. Torres*, 464 S.W.2d 926, 928 (Tex. Civ. App.—Dallas 1971, no writ). The remedy of rescission is separate and distinct from and wholly independent of the remedies to enforce payment. *Lusk v. Mintz*, 625 S.W.2d 774, 775 (Tex. App.—Houston [14th Dist.] 1981, no writ). In the absence of an express vendor's lien reserved in the deed, the vendor's implied lien may be established by suit and judicially foreclosed. *Zapata*, 464 S.W.2d at 928. See section 3.5:4.

See also W. Mike Baggett and Brian Thompson Morris, 1 Texas Practice Guide, *Real Estate Litigation* §§ 4:108–4:110 (2012).

§ 6.3 Identification of Parties

In the past, the traditional real estate secured loan involved the lender who originated the loan and who was the named payee in the note and the named beneficiary in the deed of trust. The borrower was more often than not the owner or one of the owners of the property, and the borrower would sign the note as maker and execute the deed of trust as the grantor and mortgagor. The trustee named in the deed of trust was often an employee or agent of the lender or the lender's counsel. With the advent of the secondary mortgage market, residential and commercial mortgage-backed securities, the use of servicers in monitoring and collecting the loans and administering the foreclosure process and the role of electronic registration systems and the use of Mortgage Electronic Registration Systems, Inc., (MERS) as beneficiary, few loans fit the traditional model at the time of origination and even fewer involve the parties named in the loan documents at the time of enforcement.

See the discussion of the difference between "mortgagee" and "noteholder" at sections 10.3:3 and 10.3:4 in this manual.

§ 6.3:1 Mortgagor, Pro Forma Mortgagor, Nonobligated Collateral Owner

The Texas Property Code defines a "mortgagor" as the grantor of a security instrument and defines a "security instrument" as a deed of trust, mortgage, or other contract lien on an interest in real property. Tex. Prop. Code § 51.0001(5), (6). The mortgagor may be any individual or any legal entity holding an interest in the mortgaged property encumbered by the deed of trust. The mortgagor need not be the borrower or maker of the promissory note that is secured by the deed-of-trust lien. *Wilbanks v. Wilbanks*, 330 S.W.2d 607, 608 (Tex 1960). A mortgagor may pledge property as security for the repayment of the debt of another. *First Baptist Church v. Baptist Bible Seminary*, 347 S.W.2d 587, 591 (Tex. 1961); *Nelson v. Citizens Bank & Trust Co.*, 881 S.W.2d 128 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Lawler v. Loomis & Nettleton Financial Corp.*, 583 S.W.2d 810, 812 (Tex. Civ. App.—Dallas 1979, no writ). In such cases, the granting of the lien by itself does not impose personal liability on the mortgagor for the repayment of the debt but does create liability to the extent of the mortgagor's interest in the mortgaged property. *Hodges v. Roberts*, 12 S.W. 222, 223 (Tex. 1889).

Either spouse can incur debts that will subject the contracting spouse's interest in the community property to being attached by the creditor through a judgment, but the noncontracting spouse is not personally liable for the debt. *See* Tex. Fam. Code § 3.201. A conveyance of separate property by an individual does not require the joinder of the spouse of that individual unless the property is the homestead. *See* Tex. Fam. Code § 5.001; *Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624 (Tex. 1987). A spouse who holds record title to a community asset may mortgage the property without the joinder of the nonrecord owner spouse, provided that the creditor does not have actual knowledge that the nonjoining spouse objects to the proposed encumbrance. *See* Tex. Fam. Code § 3.104(b).

The better practice when dealing with spouses is for both spouses to sign the deed of trust as grantors regardless of whether both spouses are borrowers and regardless of whether the property is the separate property of one of the spouses. In the case of the homestead, no encumbrance or conveyance by a spouse is valid without the joinder of the other spouse except when there has been a declaration of incapacity or unusual circumstances as set forth in Texas Family Code chapter 5. *See* Tex. Fam. Code ch. 5. In the case of a home equity loan, the consent of each owner and each owner's spouse is required. Tex. Const. art. XVI, § 50(a)(6)(A).

§ 6.3:2 Mortgagee

Historically, at the time of the origination of the loan, the originating lender, the mortgagee, and the beneficiary were the same person or entity. As amended effective January 1, 2004, Texas Property Code section 51.0001(4) now defines a "mortgagee" as (1) the grantee, beneficiary, owner, or holder of a security instrument; (2) a book entry system; or (3) if the security instrument has been assigned of record, the last person to whom the security interest has been assigned of record. Tex. Prop. Code § 51.0001(4). At the time of the origination of the loan, the mortgagee may be the originating lender and the payee on the note who is also named as the beneficiary in the deed of trust. However, the payee on the note and the beneficiary in the deed of trust do not have to be the same person or entity, and the beneficiary can be a book entry system such as MERS. If the loan has been transferred by endorsement and delivery of the note or by assignment, the holder or transferee of the loan can be a mortgagee, and if the lien has been assigned, the last person to whom the security instrument has been assigned of record is the mortgagee. A book entry system such as MERS can be the assignee of record. *See* Tex. Prop. Code § 51.0001(4). See section 6.3:5 below for further discussion of MERS.

§ 6.3:3 Lender

At origination, the lender is the person or entity who makes the loan secured by the property or who sells the property and finances the purchase. The lender is the payee on the debt instrument and may or may not be the beneficiary identified in the deed of trust. If the loan has been assigned, the transferee who acquires the rights of the transferor is the lender entitled to enforce the instrument. A person entitled to enforce a promissory note includes a holder of the note, a nonholder in possession of the note who has the rights of a holder, or a person not in possession of the note who is entitled to enforce an instrument that has been lost or destroyed; a person may be entitled to enforce a note even though the person is not the owner. *See* Tex. Bus. & Com. Code § 3.301. A "holder of the note" means the person in possession of the original negotiable instrument that is payable either to that person or to the bearer. Tex. Bus. & Com. Code § 1.201(b)(21); *Chance v. CitiMortgage, Inc.*, 395 S.W.3d 311, 315 (Tex. App.—Dallas 2013, pet. denied). For the transferee to be a holder, the note must be indorsed to the transferee or endorsed in blank. *See* Tex. Bus. & Com. Code § 1.201(b)(21). Both possession and the indorsement are required for the transferee to be a holder of the note. *See* Tex. Bus. & Com. Code § 1.201(b)(21). If the transferee is in possession of an original note that has not been either endorsed to the transferee or in blank, the transferee does not qualify as a holder but may still prove ownership of the note or its right to enforce the note. *See* Tex. Bus. & Com. Code § 3.301. An owner may transfer a note without endorsement, and in that case, the transferee acquires whatever right the transferor had in the note but does not become a holder of the note. *Martin v. New Century Mortgage Co.*, 377 S.W.3d 79, 84 (Tex. App.—Houston [1st Dist.] 2012, no pet.). The nonholder, however, must prove the transfer by which he acquired the note. *Martin*, 377 S.W.3d at 84. The foreclosure is conducted by the mortgage servicer or mortgagee, and there is no requirement that the foreclosure be administered by an owner or holder of the note or that the mortgagee be an owner or holder of the note. *See Chance*, 395 S.W.3d at 314; *Kyle v. Countrywide Home Loans, Inc.*, 232 S.W.3d 355, 361–62 (Tex. App.—Dallas 2007, pet. denied).

§ 6.3:4 Beneficiary

The beneficiary is the person or entity for whom the conveyance of the property unto the trustee is granted in the deed of trust. Texas Property Code section 11.003 provides that the validity of a conveyance between the parties is not effected by the failure to include the address of the beneficiary in the instrument or an attached writing, but for any instrument executed after December 31, 1981, the instrument may not be accepted for recordation unless the beneficiary's or grantee's address is included. *See* Tex. Prop. Code § 11.003(a), (b).

§ 6.3:5 Mortgage Electronic Registration Systems, Inc.

Mortgage Electronic Registration Systems, Inc. (MERS) is a wholly owned subsidiary of MERSCORP Holdings, Inc. MERS is a book entry system, which acts as a nominee for the lender and the lender's successors and assigns. A "book entry system" is defined as a national book entry system for registering a beneficial interest in a security instrument that acts as a nominee for the grantee, beneficiary, owner, or holder of the security instrument and its successors and assigns. Tex. Prop. Code § 51.0001(1). Typically, a deed of trust naming MERS as beneficiary will identify MERS "acting solely as nominee for [lender] and [lender's] successors and assigns" as the beneficiary, such that MERS is the mortgagee as that term is defined in Texas Property Code section 51.0001(4)(B). MERS serves as the mortgagee of record and is the beneficiary in the deed of trust. MERS does not perform any mortgage servicing or payment collections, nor does MERS hold deeds of trust, mortgages, or promissory notes. In some instances, MERS is not named as the original beneficiary in the deed of trust, but following origination of the loan, the deed of trust is assigned to MERS.

MERS maintains an electronic registry system that tracks changes in servicing rights and the beneficial ownership interest in mortgages. Each registered mortgage is assigned a mortgage identification number, and by using the mortgage identification number, the mortgagor can obtain information regarding the servicer and the beneficial ownership interest in the deed of trust. The deed of trust is not recorded with MERS; it is recorded in the real property records. When a loan is transferred, MERS tracks the transfer on its system, but MERS, as nominee for the lender and the lender's successors and assigns, remains the mortgagee of record. There is no recorded assignment of the deed of trust unless and until the loan is transferred to a non-MERS member or prior to a foreclosure as discussed below.

MERS is used primarily for residential mortgages, but MERS Commercial provides a similar and separate registration system for commercial mortgage backed securities. The use of MERS eliminates breaks in the chain of title through MERS's role as the common agent for its members. Additionally, data on the MERS system is accessible to borrowers and to county and regulatory officials, and use of MERS simplifies identifying the servicer for the loan. MERS also reduces multiple recording fees, which would otherwise be required for each transfer.

As discussed in chapter 34 in this manual, there has been substantial litigation regarding MERS involving various issues, including whether MERS can assign a deed of trust or conduct a foreclosure. Based in part on the inclusion of a book entry system within the definition of "mortgagee" in the Texas Property Code, there has been substantially less controversy in Texas regarding MERS's role. *See* Tex. Prop. Code § 51.0001(1), (4). However, there was a split among federal district courts in Texas regarding whether MERS has authority to transfer the deed of trust and whether an assignment of the deed of trust by MERS separate from the note has any force and effect. The split was based largely on language in *McCarthy v. Bank of America, N.A.*, No. 4:11-CV-356-A, 2011 WL 6754064 (N.D. Tex. Dec. 22, 2011). In *McCarthy*, the court denied a rule 12(b)(6) motion to dismiss and held that MERS, as the mortgagee of record and as the nominee of the lender, had no authority to assign the deed of trust. The court's decision was based in part on the language of the assignment from MERS to Bank of America, N.A., which purported a transfer of both the note and the security instrument to Bank of America, N.A. even though MERS had no interest in the note. *McCarthy*, 2011 WL 6754064, at *1–2. Other cases have held that where MERS is the nominee for the lender named in the deed of trust, MERS has the power of sale, which it can transfer to assigns. *See Odum v. Mortgage Electronic Registration Systems, Inc.*, No. 4:12-cv-959, 2012 WL 2376071, at *3 (S.D. Tex. Jun. 22, 2012); *DeFranceschi v. Wells Fargo Bank, N.A.*, 837 F. Supp. 2d 616, 623 (N.D. Tex. 2011); *Richardson v. CitiMortgage, Inc.*, No. 6:10cv119, 2010 WL 4818556, at *5 (E.D. Tex. Nov. 22, 2010). The Fifth Circuit Court of Appeals in *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 255 (5th Cir. 2013), rejected the "split-the-note" theory and held that the party seeking to foreclose need not possess the note itself, and where the deed of trust named MERS as the beneficiary for the originating lender and where the lien was assigned by MERS to BAC, BAC was entitled to foreclose. *See also Casterline v. OneWest Bank, F.S.B.*, 537 F. App'x 314, 316–17 (5th Cir. 2013). Additionally, the court in *Martin* ruled that because MERS qualifies as a mortgagee under Texas Property Code section 51.0001(4), the Property Code contemplates and permits MERS to either grant a mortgage servicer the authority to foreclose or to administer the foreclosure itself. *Martins*, 722 F.3d at 255.

Although pursuant to the Texas Property Code MERS, as a book entry system, is authorized to conduct a foreclosure, MERS no longer conducts foreclosures in MERS's name. As of July 22, 2011, MERS Rules of Membership require MERS to execute an assignment of the deed of trust from MERS to the note owner or servicer before initiating a foreclosure, and as a result, foreclosures are no longer conducted in MERS's name. *See* MERS System Rules of Membership, Rule 8, § 1 (eff. Sept. 1, 2015), *available at* **www.mersinc.org/join-mers-docman/979-mers-system-rules-final-1/file**.

§ 6.3:6 Trustee

The Eighty-fourth Texas Legislature passed House Bill 2063, which added Texas Property Code section 51.0076. *See* Acts 2015, 84th Leg., R.S., ch. 653, § 2 (H.B. 2063), eff. Sept. 1, 2015. Section 51.0076 provides that the mandatory notice of sale required by Property Code section 51.002(b) may also serve as the means to appoint a substitute trustee. Under this new provision, if the notice of sale is signed by an attorney or agent of the mortgagee or mortgage servicer and contains the mandatory disclosure found in section 51.0076(3), the notice may serve as proof of the appointment of a substitute trustee as of the date of the notice. *See* Tex. Prop. Code § 51.0076.

A *trustee* is defined in the Texas Property Code as "a person or persons authorized to exercise the power of sale under the terms of the security instrument in accordance with Section 51.0074." Tex. Prop. Code § 51.0001(8). A trustee may be any person or entity with the legal capacity to serve as trustee. The Texas Finance Code expressly authorizes a Texas bank to serve as a trustee. *See* Tex. Fin. Code § 32.001(b)(3). The mortgagee may act as trustee. *Valley v. Patterson*, 614 S.W.2d 867, 872 (Tex. Civ. App.—Corpus Christi, 1981, no writ). There is no conflict of interest for the mortgagee or its officers or attorneys to act as the trustee. *Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475–76 (Tex. 1965); *Donaldson v. Mansel*, 615 S.W.2d 799, 802 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Heiner v. Homeland Realty Co.*, 100 S.W.2d 793, 796 (Tex. Civ. App.—Waco 1936, no writ).

Texas cases have held that the trustee becomes a special agent for both the mortgagor and beneficiary and must act with upmost fairness and impartiality in conducting the foreclosure. *Hammonds v. Holmes*, 559 S.W.2d 345, 347 (Tex. 1977); *First Federal Savings & Loan Ass'n v. Sharp*, 359 S.W.2d 902, 904 (Tex. 1962). A trustee, however, "does not owe a fiduciary duty to the mortgagor." *Stephenson v. LeBeouf*, 16 S.W.3d 829, 837 (Tex. App.—Houston [14th

Dist.] 2000, pet. denied). The duties of a trustee are contained in Texas Property Code section 51.0074, which provides that one or more persons may be authorized to exercise the power of sale under the security instrument, and further provides that the trustee may not be assigned a duty under the security instrument other than to exercise the power of sale in accordance with the terms of the security instrument or held to the obligations of a fiduciary of the mortgagor or the mortgagee. Tex. Prop. Code § 51.0074. Section 51.0074 applies only to a trustee under a security instrument executed on or after June 15, 2007. The duties and obligations of a trustee under deeds of trust executed before June 15, 2007, are governed by the law in effect immediately before that date and that law is continued in effect for that purpose. *See* Acts 2007, 80th Leg., R.S. ch. 903, § 5(c) (H.B. 2738), eff. June 15, 2007. Texas Property Code section 51.007, which became effective on September 1, 1999, provides that a trustee shall not be liable for any good-faith error resulting from reliance on any information in law or fact provided by the mortgagor or mortgagee or their respective attorney, agent, or representative or other third party. *See* Tex. Prop. Code § 51.007(f).

A *substitute trustee* is defined as "a person appointed by the current mortgagee or mortgage servicer under the terms of the security instrument to exercise the power of sale" as substitute for a previously designated trustee. *See* Tex. Prop. Code § 51.0001(7). A substitute trustee may be appointed by the mortgagee, the mortgage servicer, or an attorney authorized by the mortgage servicer to appoint a substitute trustee. Tex. Prop. Code § 51.0075(c), (d). Before the September 1, 2005, effective date of subsection 51.0075(c) and (d), the power to appoint a substitute trustee in place of the trustee designated in the deed of trust was required to be expressly stated in the deed of trust, and the provisions in the deed of trust for appointing the trustee were strictly construed. *See Johnson v. Koening*, 353 S.W.2d 478, 484 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.).

§ 6.3:7 Mortgage Servicer

Unless the mortgagee is also the mortgage servicer, the mortgage servicer is not identified or named in the deed of trust. *See* Tex. Prop. Code § 51.0001(3). A *mortgage servicer* is the last person to whom a mortgagor has been instructed by the current mortgagee to send payments for the debt secured by a security instrument, and a mortgagee may be the mortgage servicer. Tex. Prop. Code § 51.0001(3). Texas Property Code section 51.0025 provides that a mortgage servicer may administer the foreclosure of the property pursuant to section 51.002 on behalf of the mortgagee if the mortgage servicer and mortgagee have entered into an agreement granting the current mortgage servicer authority to service the mortgage and the notices required by section 51.002(b) disclose that the mortgage servicer is representing the mortgagee under a servicing agreement with the mortgagee, the name of the mortgagee, and the address of the mortgagee or the address of the mortgage servicer if there is an agreement granting the mortgage servicer the authority to service the mortgage. Tex. Prop. Code § 51.0025.

§ 6.3:8 Relationship between Mortgagor and Mortgagee

Although sometimes referred to as a relationship of trust, the relationship between a mortgagor and mortgagee is not a fiduciary relationship. *Lovell v. Western National Life Insurance Co.*, 754 S.W.2d 298, 303 (Tex. App.—Amarillo 1988, writ denied). In addition, the relationship between a lender and borrower or mortgagor and mortgagee does not involve a duty of good faith and fair dealing. *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983); *Powell v. Stacy*, 117 S.W.3d 70, 74 (Tex. App.—Fort Worth 2003, no pet.).

§ 6.4 Effect of Recording Deed of Trust

A properly recorded deed of trust is notice to all persons of the existence of the deed of trust. Tex. Prop. Code § 13.002(1). When a deed of trust is recorded in the county where the land is located, all the world is charged with notice of the deed of trust. *First Savings & Loan Ass'n v. Avila*, 538 S.W.2d 846, 849 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.). A properly executed, acknowledged, and recorded instrument "is notice to any and all subsequent purchasers and creditors of its existence and of the rights which it secures, and any person dealing with said property contrary to said instrument does so at his peril." *Potka v. Potka*, 205 S.W.2d 51, 53 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.); *see also Smith v. Morris & Co.*, 694 S.W.2d 37, 39 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.). A deed of trust should be recorded immediately following the closing of the loan or as soon as it is discovered that the deed of trust is unrecorded.

§ 6.4:1 Enforceability of Unrecorded Deed of Trust

A deed of trust or mortgage that has not been acknowledged, sworn to, and filed for record as required by law is void as to a creditor or to a subsequent purchaser for valuable consideration who does not have notice of the deed of trust or mortgage. *See* Tex. Prop. Code § 13.001(a). However, the unrecorded deed of trust or mortgage is binding on the parties to the instrument, their heirs, and any subsequent purchaser who does not pay valuable consideration or who has actual or constructive notice of the instrument. Tex. Prop. Code § 13.001(b); *Denson v. First Bank & Trust of Cleveland*, 728 S.W.2d 876, 877 (Tex. App.—Beaumont 1987, no writ); *Fitzgerald v. LeGrande*, 187 S.W.2d 155, 158–59 (Tex. Civ. App.—El Paso 1945, no writ). A party has actual notice when the party has knowledge of the unrecorded claim. *Hampshire v. Greeves*, 130 S.W. 665, 668 (Tex. Civ. App.—Galveston 1910), *aff'd*, 143 S.W. 147 (Tex. 1912); *Masterson v. Harris*, 83 S.W. 428, 429 (Tex. Civ. App.—Galveston 1904, no writ). Although constructive notice typically arises when an instrument is of record, notice can also be implied if the parties are aware of certain facts that would cause a reasonably prudent person to inquire further into those facts. *Smith v. Morris & Co.*, 694 S.W.2d 37, 39 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *Wessels v. Rio Bravo Oil Co.*, 250 S.W.2d 668, 670 (Tex. Civ. App.—Eastland 1952, writ denied); *O'Ferral v. Coolidge*, 225 S.W.2d 582, 584 (Tex. Civ. App.—Texarkana 1950), *aff'd*, 228 S.W.2d 146 (Tex. 1950). An implied duty arises if a third party is in possession of the property, and when the duty arises, the purchaser is charged with notice of all of the occupant's claims that the purchaser might reasonably have discovered upon proper inquiry. *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001).

§ 6.4:2 Filing of Previously Unrecorded Deed of Trust

The unrecorded deed of trust should be recorded in the county where the property is located as soon as possible after discovering that the deed of trust is not of record. Doing so will cut off the possibility of subsequent creditors or purchasers acquiring an interest in the property without notice of the deed of trust. Tex. Prop. Code § 13.002. As to instruments erroneously recorded in a county other than the county where the property is located, Texas Property Code section 13.003 provides that the original or a certified copy of a deed of trust or mortgage relating to land that has been recorded in a county other than the county where the land is located is valid as to a creditor or subsequent purchaser acquiring his interest after the mortgage or deed of trust is recorded in the county in which the land is located. *See* Tex. Prop. Code § 13.003.

§ 6.5 Contract Rights Restricted by Statute

Texas Property Code section 51.002 establishes the minimum requirements for a nonjudicial foreclosure of real property under the power of sale conferred by a deed of trust or other contract lien. *See* Tex. Prop. Code § 51.002. In the event that a provision in the deed of trust conflicts with the provisions in section 51.002, the provisions in section 51.002 control. *See Wylie v. Hays*, 263 S.W. 563 (Tex. Comm'n App. 1924, judgm't adopted). The deed of trust can establish additional requirements for foreclosure, and if such requirements for foreclosure are established, those requirements must also be satisfied for there to be an effective foreclosure sale. *Harwath v. Hudson*, 654 S.W.2d 851, 854 (Tex. App.—Dallas 1983, writ ref'd n.r.e.); *see also Faine v. Wilson*, 192 S.W.2d 456 (Tex. Civ. App.—Galveston 1946, no writ).

§ 6.6 Identifying Secured Collateral

Before writing the first demand letter or notice of intent to accelerate, the types of collateral securing the obligation should be identified. Any type of property that may be sold or conveyed or that may pass by descent may be mortgaged to secure an obligation. *See Bellah v. First National Bank of Hereford*, 478 S.W.2d 636, 638 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.). Many deeds of trust include only the real property, but other deeds of trust use separate definitions to identify the different types of collateral that comprise the mortgaged property.

§ 6.6:1 Real Property

Unless the description of the mortgagor's estate in the land is expressly limited by the language of the deed of trust, the deed of trust will cover the mortgagor's entire estate in and to the mortgaged real property. *Reeves v. Towery*, 621 S.W.2d 209, 212 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.); *Jasper State Bank v. Goodrich*, 107 S.W.2d 600, 602 (Tex. Civ. App.—Beaumont 1937, writ dism'd). The real property is often identified by a metes-and-bounds description or, where there is an approved plat, by lot number, block number, and plat name, and the description is often either stated within the deed of trust or attached as an exhibit. Some deeds of trust refer to the description to identify the mortgaged real property but include within the definition of "real property" or "property" all rights, title, interest, and privileges in and to such property, all streets, roadways, alleys, easements, rights of way, licenses, rights of ingress and egress, parking rights, public places, any strips or gores of real property between such real property and abutting or adjacent properties, and all reversions and remainders in or to such property. Since the loan was originally made, the description of the mortgaged property may have changed through platting, replatting, partial release of liens, or condominium declaration. Failure to verify the description may result in a clouding of the title, inadequately advertising the sale, or foreclosing on more or less property than the actual mortgaged property.

In *Stribling v. Millican DPC Partners, LP*, 458 S.W.3d 17, 22 (Tex. 2015), the Texas Supreme Court held that when the metes-and-bounds description in a deed conflicts with another, more general description in the deed, the metes-and-bounds description controls. It would seem safe to assume that the same rule of construction will apply to the deed of trust.

§ 6.6:2 Improvements

An improvement to real property generally includes anything that permanently enhances the value of the real property. *See Kraisch v. Allied Signal, Inc.*, 837 S.W.2d 679, 680 (Tex. App.—Corpus Christi 1992, no writ). The term *improvement* covers a broader range of items than does the term *fixture*. *Dubin v. Carrier*

Corp., 731 S.W.2d 651, 653 (Tex. App.—Houston [1st Dist.] 1987, no writ). Items which have been held under Texas law to be improvements include buildings (*Producers Lumber & Supply Co. v. Olney Building Co.*, 333 S.W.2d 619, 624 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.)); a house (*Dennis v. Dennis*, 256 S.W.2d 964, 966 (Tex. Civ. App.—Amarillo 1952, no writ)); fences (*Jarrell v. Boedeker*, 146 S.W.2d 293, 295 (Tex. Civ. App.—Fort Worth 1940, no writ)); oil wells (*Jenkins v. Pure Oil Co.*, 53 S.W.2d 497, 503 (Tex. Civ. App.—Dallas 1932, no writ)); and storage tanks (*Big West Oil Co. v. Wilborn Bros. Co.*, 836 S.W.2d 800, 803 (Tex. App.—Amarillo 1992, no writ)). Deeds of trust often expressly include all improvements and list all buildings, structures, additions, alterations, betterments, and appurtenances in, on, situated, placed, or constructed on the real property or any portion thereof. A description of the land without reference to improvements is probably sufficient to convey the improvements based on the general rules that deeds are construed to convey to the grantee the greatest estate possible and that a deed that does not except or reserve interests owned by the grantor conveys the grantor's entire interest, but the better practice is to include the term *improvements* and to identify types of improvements included within the grant. *See Reeves v. Towery*, 621 S.W.2d 209, 212 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (citing *Waters v. Ellis*, 312 S.W.2d 231, 234 (1958)).

§ 6.6:3 Fixtures

Fixtures are items of property that are personal in nature but that have been annexed to the realty so as to become part of the real estate. *Gawerc v. Montgomery County*, 47 S.W.3d 840, 842 (Tex. App.—Beaumont 2001, pet. denied); *Houston Building Service, Inc. v. American General Fire & Casualty Co.*, 799 S.W.2d 308, 311 (Tex. App.—Houston [14th Dist.] 1990, writ denied). Generally the term *fixtures* includes all chattels or structures attached to the real property that cannot be removed without materially damaging the real property. *Cammack the Cook, L.L.C. v. Eastburn*, 296 S.W.3d 884, 892 (Tex. App.—Texarkana 2009, pet. denied); *W.H.V., Inc. v. Associates Housing Finance, LLC*, 43 S.W.3d 83, 88 (Tex. App.—Dallas 2000, pet. denied). A three-part test has been developed to determine whether an item of personal property has become a fixture: (1) Did the person who annexed the chattel to the realty intend it to become a fixture? (2) Was the mode and sufficiency of annexation adequate to attach the chattel to the realty? and (3) Has the chattel been adapted to the use of the realty? *Logan v. Mullis*, 686 S.W.2d 605, 607 (Tex. 1985); *Harris County Flood Control District v. Roberts*, 252 S.W.3d 667, 670 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Absent evidence to the contrary, an owner who affixes improvements onto land is assumed to have intended for such improvements to become fixtures. *McDaniel v. Pettigrew*, 536 S.W.2d 611, 615 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.); *Clark v. Clark*, 107 S.W.2d 421, 424 (Tex. Civ. App.—Texarkana 1963, no writ). If there was an intent that the improvement be temporary in nature, however, such an improvement will not be deemed a fixture. *O'Neill v. Quilter*, 234 S.W. 528, 529 (Tex. 1921). The term *fixtures* is defined in Texas Business and Commerce Code section 9.102(a)(41) as "goods that have become so related to particular real property that an interest in them arises under the real property law of the state in which the real property is situated." Tex. Bus. & Com. Code § 9.102(a)(41). A creditor with a secured interest in fixtures can perfect its lien by either filing a financing statement with the Texas secretary of state or recording the financing statement as a fixture filing in the real property records in the county in which the real property is located. *See* Tex. Bus. & Com. Code § 9.501. In most instances, the recording of a deed of trust will be sufficient to constitute a fixture filing by the beneficiary provided that the deed of trust expressly refers to fixtures or describes the fixtures covered, provides the name of the debtor, provides the name of the secured party or representative of the secured party, indicates that it is to be filed for record in the real property records, and provides a description of the real property to which the fixtures are related. *See* Tex. Bus. & Com. Code § 9.502. When a deed of trust covers both realty and personalty, the beneficiary has the option of pursuing the foreclosure both under the real estate foreclosure procedures or pursuing only the personal property under the provisions of the Texas Uniform Commercial Code. *See* Tex. Bus. & Com. Code § 9.604(a); *Van Brunt v. BancTexas Quorum, N.A.*, 804 S.W.2d 117 (Tex. App.—Dallas 1989, no writ).

§ 6.6:4 Appurtenances

An appurtenance means a real property interest that is annexed to, instant to, or necessarily connected with the use and enjoyment of a tract of real property. *Black's Law Dictionary*, 118 (9th ed. 2009). "Appurtenance" includes improvements and easements. *See Angelo v. Biscant*, 441 S.W.2d 524, 526 (Tex. 1969); *Pine v. Gibraltar Savings Ass'n*, 519 S.W.2d 238, 241 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.). Under common law, the conveyance of a tract of real property includes appurtenances unless the deed provides otherwise. *Pollock v. Lowry*, 345 S.W.2d 587, 590 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.).

§ 6.6:5 Water Rights

Water rights are included as part of the mortgaged property if the deed of trust does not expressly reserve or except water rights. *Graham v. Kuzmich*, 876 S.W.2d 446, 449 (Tex. App.—Corpus Christi 1994, no writ). The obligation of a municipal utility district to lease and later purchase water, sanitary sewer, and drainage facilities installed by the mortgagor has been held to be an appurtenance passing at a foreclosure sale. *See Olmos v. Pecan Grove Municipal Utility District*, 857 S.W.2d 734, 738–39 (Tex. App.—Houston [14th Dist.] 1993, no writ).

§ 6.6:6 Manufactured Homes

AA manufactured home is personal property except as provided by Texas Property Code section 2.001(b). Tex. Prop. Code § 2.001(a). Texas Property Code section 2.001(b) provides that a manufactured home is real property if (1) the statement of ownership and location for the home issued under Texas Occupations Code section 1201.207 reflects that the owner has elected to treat the home as real property and (2) a certified copy of the statement of ownership and location has been filed in the real property records in the county in which the manufactured home is located. Tex. Prop. Code § 2.001(b). Texas Property Code chapter 63 addresses manufactured home liens arising out of the purchase of a manufactured home and includes sections regarding the conversion of the lien from a personal property lien to a real property lien, the refinancing of the lien, and the conversion of the lien from a personal property lien to a real property lien for the debt for new improvements to the property. *See* Tex. Prop. Code ch. 63. When a manufactured home converts to real property as provided by Texas Property Code section 2.001(b), the lien on the property is converted to a purchase money lien on the real property by operation of law and exists independent of any existing lien on the real property to which the home is permanently attached. Tex. Prop. Code § 63.003. A person who provides funds to refinance the lien secured by a manufactured home is subrogated to the lien position of the previous lienholder. Tex. Prop. Code § 63.004(a). A lien that converts to a purchase money lien on real property pursuant to Texas Property Code section 63.003 or a lien for the debt for new improvements thereon under section 63.005 may be refinanced with another lien on the real property to which the manufactured home is permanently attached as provided by section 2.001. Tex. Prop. Code § 63.004(c). See generally chapter 29 in this manual concerning the enforcement of liens against manufactured housing units.

A manufactured home becomes a new improvement to the homestead of a family or single adult person upon the filing of a certificate of attachment as provided in Occupations Code chapter 1201. Thereafter, if the debt for the manufactured home was contracted for in writing, that debt is considered to be for working materials used in constructing new improvements thereon and constitutes a valid lien on the homestead when the certificate of attachment is filed in the real property records in the county where the land is located. Tex. Prop. Code § 63.005(a). When the manufactured home converts to real property as provided for in Texas Property Code section 2.001, the lien on the property exists independently of any existing lien on the real property to which the home is permanently attached. Tex. Prop. Code § 63.005(b). If the manufactured home is personal property, chapter 9 of the Texas Business and Commerce Code governs foreclosure of the security interest, and if the manufactured home is part of the real property, Texas Property Code section 51.002 applies.

The titling of ownership and recordation of liens on manufactured homes is governed by Texas Occupations Code chapter 1201 and the regulations and procedures of the Texas Department of Housing Community Affairs (TDHCA). *See* Tex. Occ. Code §§ 1201.001–.611. The Manufactured Housing Division (MHD) of the TDHCA maintains and issues records for all manufactured homes, indicating whom the state of Texas recognizes as the owner, where the home is recognized as being located and installed, whether the owner has elected to treat it as real property, and any liens recorded against the home that is being treated as personal property.

The official record detailing ownership of the manufactured home is called a statement of ownership and location (SOL). *See* Tex. Occ. Code §§ 1201.003(30), 1201.205. If the owner desires to elect for the home to be real property, a certified copy of the SOL reflecting the election and description of the land on which the home is located must be issued by the TDHCA and filed in the real property records of the county in which the land is located. Tex. Prop. Code § 2.001(b). Texas Finance Code chapter 347 provides specific provisions applicable to debt collection and foreclosures for credit sales and consumer loans for the purchase of manufactured homes. See chapter 29 for further discussion of documenting title ownership of manufactured homes, the conversion of manufactured homes from personal property to realty, and the procedures for foreclosing on manufactured homes.

The Texas Finance Code provides that regulations of the federal Office of Thrift Supervision (OTS) relating to the disclosures required to repossess, foreclose, or accelerate a loan are applicable to any actions to repossess, foreclose, or accelerate payment of the entire outstanding balance of an obligation secured by a manufactured home, except in the case of abandonment, voluntary surrender, or other extreme circumstances. *See* Tex. Fin. Code § 347.356. The OTS regulations are found at 12 C.F.R. § 590.4(h). These regulations, which are otherwise applicable to only "federally related loans," are made applicable by the Texas Finance Code to all persons who have extended credit that is secured by a manufactured home.

The OTS regulations require, except in the case of abandonment or other extreme circumstances, that no action be taken to repossess, foreclose, or accelerate a manufactured housing loan until thirty days after the creditor sends a notice of default and a right to cure to the debtor in the form promulgated in subsection (h)(2) of 12 C.F.R. § 590.4. The notice must be sent by registered or certified mail, with return receipt requested. 12 C.F.R. § 590.4(h)(1). In the case of a default on periodic payments, the sum stated as being required to cure may include only the past-due payments, plus any applicable late or deferral charges. 12 C.F.R. § 590.4(h)(1). Section 590.4(h)(2) provides the form of the notice. The notice must include the nature of the default, the action the debtor must take to cure the default, the creditor's intended actions upon failure of the debtor to cure the default, and the debtor's right to redeem under state law, as applicable. *See* 12 C.F.R. § 590.4(h)(2). Although the OTS regulations except from the federal notice situations involving abandonment, an abandonment does not eliminate the notices required by Texas Business and Commerce Code section 9.611. *See All Valley Acceptance Co. v. Durfey*, 800 S.W.2d 672, 675 (Tex. App.—Austin 1990, writ denied) (holding that abandonment or voluntary repossession does not constitute a waiver by debtor of debtor's right to notice of repossession and intent to sale as required by Texas Business and Commerce Code). If the debtor cures the default within thirty days of the postmarked date of the notice and subsequently defaults a second time, the creditor is again required to give the notice. 12 C.F.R. § 590.4(h)(1). However, a debtor is not entitled to be notified more than twice in any one-year period. 12 C.F.R. § 590.4(h)(1).

Texas Finance Code sections 347.351 through 347.355 provide the requirements for the acceleration of maturity; the charging and collection of out-of-pocket expenses incurred in connection with the repossession or foreclosure, storage, and resale of the manufactured home; the application of insurance and tax escrow accounts; a postacceleration interest rate; and the prior right of the first recorded perfected security interest holder to repossess the manufactured home. *See* Tex. Fin. Code §§ 347.351–.355. Texas Finance Code section 347.307 provides that the credit document may provide for the payment of reasonable attorney's fees, court costs and disbursements, and the charge and collection of actual and reasonable out-of-pocket expenses incurred in connection with the repossession of the manufactured home that secures the payment of the credit transaction or foreclosure of the lien on the manufactured home, including the storing, reconditioning, and reselling of the manufactured home, subject to the standards of good faith and commercial reasonableness as set by the Business and Commerce Code. Tex. Fin. Code § 347.307.

If the manufactured home has been affixed to the real property, the creditor after the thirty-day right to cure notice may repossess the manufactured home from the real property in accordance with the applicable provisions of the Texas Business and Commerce Code as if the manufactured home were personal property. Tex. Fin. Code § 347.355(b); *see also Moore v. General Electric Capital Corp.*, No. 01-96-01252-CU, 1999 WL 82621 (Tex. App.—Houston [1st Dist.] Feb. 4, 1999, no pet.) (not designated for publication). After repossession, the creditor is still subject to all the creditor's obligations under chapter 9 of the Texas Business and Commerce Code.

Following foreclosure, title and the name of the foreclosure purchaser is obtained by filing with the TDHCA an application of a statement of ownership and location, Form B (Release of Lien or Foreclosure of Lien) (see Block 3, "For Foreclosure of Lien") and Form T (Notice of Installation), if the manufactured home has been moved and installed at a new location. *See* Tex. Occ. Code § 1201.212(b). The forms may be downloaded from the TDHCA Web site at **www.tdhca.state.tx.us/mh/ownership-location.htm**.

See the Web site of the Texas Department of Housing Community Affairs—Manufactured Housing Division (**www.tdhca.state.tx.us/mh/index.htm**) or call (800) 500-7074 for current forms and information. Also, for further discussion of this topic, see 51 Tex. Jur. 3d, *Manufactured Housing and Mobile Homes* §§ 135–136 (2004).

§ 6.6:7 Crops, Crop Rent, and Farm Tenants

The purchaser at foreclosure will take title to crops and crop rent only if there has not been an actual or constructive severance of the crops and the rent from the land. The severance may be created by harvest, sale, assignment, or mortgage. A lease of the land creates a severance of the crops under the proper circumstances. The severance may be subsequent in time to the mortgage and without actual or constructive notice to the mortgagee. Furthermore, a tenant of the mortgagor may also have rights in the crops that will survive the foreclosure, notwithstanding the fact that the tenant's lease is junior to the deed of trust.

Crops: Texas case law is well settled that crops produced by annual cultivation, whether growing or matured, are distinct in nature from the land on which they are cultivated and that title to the crops may reside in a person other than the owner of the land. However, unless the deed of trust specifically covers crops, the crops will pass with the land at a foreclosure sale only if they have not been actually or constructively severed from the land before the foreclosure sale. *See Greenland v. Pryor*, 360 S.W.2d 423, 425 (Tex. Civ. App.—San Antonio 1962, no writ); *Gulf Stream Realty Co. v. Monte Alto Citrus Ass'n*, 253 S.W.2d 933, 936 (Tex. Civ. App.—San Antonio 1952, writ ref'd); *Dodson v. Beaty*, 144 S.W.2d 609, 611 (Tex. Civ. App.—Dallas 1940, writ dism'd, judgm't cor.). The severance may be by harvesting or constructively by assignment or mortgage. *Willis v. Moore*, 59 Tex. 628 (1883); *Gulfstream Realty Co.*, 253 S.W.2d at 936; *Dodson*, 144 S.W.2d at 611. There is some authority that even crops not yet planted may be severed by sale or mortgage. *See Sanger Bros. v. Hunsucker*, 212 S.W. 514, 516 (Tex. Civ. App.—Fort Worth 1919, no writ). There is also authority that an executory contract of sale, which provides that title to crops shall not pass until they are "picked and prepared for delivery" is not sufficient to create a severance with the crops from the land, and the crops shall pass to the purchaser at foreclosure. *See Gulfstream Realty Co.*, 253 S.W.2d at 936.

Crop Rent: The same reasoning is applied to crop rent due to the mortgagor under a lease. The rent passes to the purchaser at foreclosure only if there has not been a previous assignment of the rent. *Dodson*, 144 S.W.2d at 611; *Standridge v. Vines*, 81 S.W.2d at 289, 290 (Tex. Civ. App.—Eastland 1935, no writ); *Hunsucker*, 212 S.W. at 515. In *Standridge*, the court stated the following:

> It is immaterial that no constructive notice may be given at the sale, mortgage, assignment, etc. Where not interdicted by the statute of frauds, the evidence thereof is not required to be in writing. It necessarily follows that the purchaser at the foreclosure sale is charged with knowledge of a law that he gets no title to growing crops and rents if there has been a severance. In other words, a purchaser is under the obligation to ascertain if there has been a severance and only takes title to the crops and rents if there has been none.

Standridge, 81 S.W.2d at 290.

Crop allotments under the Agricultural Adjustment Act, 7 U.S.C. §§ 1281–1393, which are assigned as an annual allotment and under which farmers are allowed to grow an annual quota of crops, runs with the land, and unless the allotment is reserved when the lien against the property is granted, the allotment is subject to the lien under the deed of trust and passes to the purchaser who acquires the property at the foreclosure of the lien. *See Lindsey v. FDIC*, 960 F.2d 567, 571 (5th Cir. 1992).

Rights of Farm Tenants: The distinction between crops and the land is the basis for the common law doctrine of emblements, an equitable doctrine protecting leases of farm land. The doctrine of emblements is a common law right of the tenant whose lease of uncertain duration has been terminated without his fault and without previous knowledge on his part, to enter on the lease premises to cultivate, harvest, and remove the crops planted by him before termination of the lease. *Dinwiddie v. Jordan*, 228 S.W. 126, 127 (Tex. Comm'n App. 1921, jugm't adopted); *see also Miller v. Gray*, 149 S.W.2d 582, 583 (Tex. 1941). In *Dinwiddie*, the court held that the three elements of emblement—(1) existence of a tenancy of uncertain duration, (2) the termination of the tenancy by the act of the lessor, and (3) the planting of the crop by the tenant during his period of legal occupancy without notice—were satisfied by (1) a five-year lease subject to earlier termination under certain specified conditions, (2) a default by the lessor leading to the foreclosure of the lessor's mortgage, and (3) the tenant's planting of the crops before the tenant received notice of the pending foreclosure sale. The court in *Dinwiddie* stated that the tenant not only retained title to the crop but also had a right of entry onto the land to cultivate the crop until maturity and harvest. *Dinwiddie*, 228 S.W. at 127. The court further quoted with approval a decision of the Supreme Court of Nebraska stating that while the tenant's right was a right of ingress and egress and not of possession of the land, the tenant had a cause of action for any interference by the owner of the land with his right of entry. *Dinwiddie*, 228 S.W. at 128. The doctrine of emblements does not apply when a lease of certain duration expires, and thus the lessee is not entitled to crops planted so late in the lease term that they do not and cannot mature before expiration of the lease. *Miller*, 149 S.W.2d at 583; *Beken v. Elstner*, 503 S.W.2d 408, 410 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ). In *Beken*, however, the court drew an exception to this rule by stating that a lessee is entitled to the crop if the evidence shows the lessor knew the crop could not mature during the term of the lease and still consented to or acquiesced in the planning and cultivating of the crop. *Beken*, 503 S.W.2d at 410. At least one court has noted the possibility of the doctrine of emblements providing a tenant with a right of reentry for purposes of removing and harvesting crops after a foreclosure sale. *Wooton v. Bishop*, 257 S.W. 930, 931 (Tex. Civ. App.—Amarillo 1923, writ ref'd).

§ 6.6:8 USDA Insured Farm and Ranch Property

Federal Loan Programs: Various agencies of the United States Department of Agriculture (USDA) make, guarantee, or service farm and ranch loans. In Texas, for example, the Farm Credit System accounts for approximately 30 percent of all farm and ranch lending in Texas. A farm or ranch loan that is originated, guaranteed, or serviced under these federal programs cannot simply be foreclosed on default by the borrower. Instead, the applicable federal law provides the borrower with significantly greater rights than under Texas foreclosure law, and the borrower's rights under federal law must be exhausted before the defaulted loan can be referred to the Office of the General Counsel of the USDA for foreclosure.

Loans originated or serviced under the USDA's Farm Service Agency (FSA) are governed by the regulations at 7 C.F.R. pts. 765 and 766 and FSA Handbook 5-FLP, *Direct Loan Servicing—Special and Inventory Property Management.* Because numerous other agencies under the USDA make, guarantee, or service loans under a variety of federal programs, however, it can be a very difficult process to determine the exact provisions of the federal statutes and regulations applicable to the loan in question.

Borrower's Rights: Certain statutes or regulations are generally applicable to these federal loan programs. The "borrower's rights" provisions set forth at 12 U.S.C. §§ 2199–2202e and particularly 7 C.F.R. pt. 766, subpt. C, apps. A–C, are applicable to agricultural loans serviced under the various federal programs. In addition, the debt settlement policies and procedures found at 7 C.F.R. §§ 792.1–.22 generally apply to all collection efforts involving agricultural loans.

In situations involving the collection of a distressed loan made under the Farm Credit System, the regulations at 7 C.F.R. pt. 766 require that, before any foreclosure action may be initiated, the borrower must be given written notice of all the options available to the borrower to restructure or modify the loan.

Additional information is available from the Web sites of the Farm Credit Administration at **www.fca.gov** and the Farm Service Agency at **www.fsa.usda.gov**. See also chapter 32 in this manual for a fuller discussion of USDA farm and ranch loan foreclosures.

§ 6.6:9 Personal Property

The deed of trust may extend to personalty, including removable items, and it is not uncommon for a deed of trust to include furniture, furnishings, equipment, machinery, goods, general intangibles, insurance proceeds, accounts, contract and subcontract rights, trademarks, trade names, rights, architectural works, and other chattel paper. The *Texas Real Estate Forms Manual* in clause 22-9-10 contains suggested language for inclusion in the deed of trust for the creation of the lien on such mixed collateral. The first part of clause 22-9-10 provides—

> In addition to creating a deed-of-trust lien on all the real and other property described above, Grantor also grants to Lender a security interest in all of the above-described personal property pursuant to and to the extent permitted by the Texas Uniform Commercial Code.

1 State Bar of Tex., *Texas Real Estate Forms Manual*, ch. 22, form 22-9, clause 22-9-10 (2d ed. 2011). If personal property is included, the owner may proceed against the personal property under the personal property foreclosure provisions of article 9 as if there is no real property involved, or the lender may elect to foreclose on both the real property and personal property pursuant to Texas Property Code section 51.002. *See* Tex. Bus. & Com. Code § 9.604(a); Tex. Prop. Code § 51.002. Comment 2 to Texas Business and Commerce Code section 9.604 provides—

> In the interest of simplicity, speed and economy, subsection (a), like former Section 9-501(4), permits (but does not require) the secured party to proceed as to both real and personal property in accordance with its rights and remedies with respect to the real property. Subsection (a) also makes clear that a secured party who exercises rights under Part 6 with respect to personal property does not prejudice any rights under real property law.

Tex. Bus. & Com. Code § 9.604 cmt. 2.

The election between real property and personal property foreclosure procedures is set out in the second part of clause 22-9-10 in the form of deed of trust in the *Texas Real Estate Forms Manual*, which provides: "In the event of a foreclosure sale under the deed of trust, Grantor agrees that all the Property may be sold as a whole at Lender's option and that the Property need not be present at the place of sale." 1 State Bar of Tex., *Texas Real Estate Forms Manual*, ch. 22, form 22-9, clause 22-9-10 (2d ed. 2011).

In *Van Brunt v. BancTexas Quorum, N.A.*, 804 S.W.2d 117, 127 (Tex. App.—Dallas 1990, no writ), the court relied on former Texas Business and Commerce Code section 9.501(d) to justify not extending the rule announced in *Tanenbaum v. Economics Laboratory*, 628 S.W.2d 769 (Tex. 1982), eliminating deficiencies after a defective personal property sale to bar a subsequent real property foreclosure or suit for deficiency after the subsequent real property foreclosure sale. "We hold that any defect in [lender's] foreclosure under the Code has no effect on its rights under the real property mortgage, including its right to seek a deficiency." *Van Brunt*, 804 S.W.2d at 129–30. The defect in *Van Brunt* was the failure of the lender to renotify the debtor that the lender would sell the collateral at a private sale after the lender held a public sale but rejected the highest bid and later sold to the highest bidder at the private sale for a higher price. Additionally, the debt in *Van Brunt* was a series of notes each guaranteed by a guarantor and secured by separate security agreements granting a security interest in accounts, inventory, and equipment to secure all indebtedness of the borrower to the lender. One of the borrower's notes expressly stated that it was secured by a deed of trust but did not refer to any of the security agreements.

The *Tanenbaum* rule was overturned in nonconsumer personal property foreclosure cases by the Texas legislature's adoption of revised chapter 9 of the Uniform Commercial Code. Texas Business and Commerce Code section 9.626 provides that in a nonconsumer transaction, a secured party need not prove compliance with the provisions of subchapter F, sections 9.601through 9.628, relating to collection, enforcement, disposition, or acceptance, unless the debtor or secondary obligor places the secured party's compliance in issue. Tex. Bus. & Com. Code § 9.626(a)(1). If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with subchapter F. Tex. Bus. & Com. Code § 9.626(a)(2). Except as otherwise provided in section 9.628, if the secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of subchapter F, the liability of the debtor or secondary obligor for deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of (1) the proceeds of the collection, enforcement, disposition, or acceptance or (2) the amount of the proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of subchapter F. Tex. Bus. & Com. Code § 9.626(a)(3). For this purpose, the amount of proceeds that would have been realized is deemed equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party establishes that the amount is less than that sum. Tex. Bus. & Com. Code § 9.626(a)(4). If a deficiency or surplus is calculated under section 9.615(f), the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought. Tex. Bus. & Com. Code § 9.626(a)(5). Section 9.626 further provides that its limitation to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions, but that "the court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches." Tex. Bus. & Com. Code § 9.626(b).

Texas Business and Commerce Code section 9.610(b) requires that a disposition of personal property collateral including the method, manner, time, place, and other terms must be commercially reasonable. Tex. Bus. & Com. Code

§ 9.610(b). If a lender decides to proceed against the personal property separately, the lender must comply with the commercially reasonable standard in the repossession and disposition of the collateral. Texas Business and Commerce Code section 9.627 provides the following:

> (a) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.
>
> (b) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
>
> > (1) in the usual manner on any recognized market;
> >
> > (2) at the price current in any recognized market at the time of the disposition; or
> >
> > (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.
>
> (c) A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved:
>
> > (1) in a judicial proceeding;
> >
> > (2) by a bona fide creditors' committee;
> >
> > (3) by a representative of creditors; or
> >
> > (4) by an assignee for the benefit of creditors.
>
> (d) Approval under Subsection (c) need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable.

Tex. Bus. & Com. Code § 9.627.

Whether the standard has been met is generally a question of fact. *AlGailani v. Riyad Bank, Houston Agency*, 144 S.W.3d 1, 3 (Tex. App.—El Paso 2003, pet. denied). Although commercial reasonableness is not precisely defined, courts have considered a number of factors when determining whether a disposition was commercially reasonable, such as (1) whether the secured party endeavored to obtain the best price possible; (2) whether collateral was sold in bulk or piecemeal; (3) whether it was sold via private or public sale; (4) whether it was available for inspection before the sale; (5) whether it was sold at a propitious time; (6) whether expenses incurred from the sale are reasonable and necessary; (7) whether the sale was advertised; (8) whether multiple bids were received; (9) what state the collateral was in; and (10) where the sale was conducted. *Regal Finance Co. v. Texas Star Motors, Inc.*, 355 S.W.3d 595, 601–02 (Tex. 2010). The commercial reasonableness standard does not apply when the personal property and real property are sold in accordance with the rights with respect to real property. Tex. Bus. & Com. Code § 9.604(a); *Huddleston v. Texas Commerce Bank–Dallas*, 756 S.W.2d 343, 347 (Tex. App.—Dallas 1988, writ denied).

In foreclosing on personal property together with real property, a UCC search should be conducted to determine initial perfection, continued perfection, and priority. Before the foreclosure sale, the mortgagee needs to determine to the extent possible the scope of the personal property and whether all of the personal property described in the deed of trust is property that should be included in the foreclosure. The deed of trust may include an omnibus description of mortgaged property, such as “all agreements affecting or benefiting the mortgage property.” There is no way of knowing at the time of the execution of the deed of trust which present or future agreements will be assets and which will be liabilities. Whether the mortgagee or purchaser can pick and choose the foreclosure or whether the foreclosure sale documents can specifically exclude undesirable agreements are unsettled issues. Even if they can be excluded, the undesirable agreements may not be identifiable as such at the time of foreclosure.

§ 6.6:10 Cross-Collateral

When two debts are cross-collateralized, excess foreclosure proceeds from the foreclosure of one mortgage may be applied by the mortgagee against the balance owing on the indebtedness secured by the other mortgage, even if the obligor is not the same. *See Nelson v. Citizens Bank & Trust Co.*, 881 S.W.2d 128, 129–30 (Tex. App.—Houston [14th Dist.] 1994, no writ).

§ 6.6:11 Bankruptcy Effect

A lien created on or within ninety days before the date of the filing of a bankruptcy petition (or between ninety days and one year in the case of an insider) may be set aside as a preference if determined to unjustifiably favor the creditor or other creditors. 11 U.S.C. § 547(b); *Weaver v. Aquila Energy Marketing Corp.*, 196 B.R. 945, 950–51 (Bankr. S.D. Tex. 1996); *see also* 11 U.S.C. § 547(i).

§ 6.6:12 Minerals

In Texas, a grantor can sever the minerals from the surface estate. *See Humphreys-Mexia Co. v. Gammon*, 254 S.W. 296, 299 (Tex. 1923). The severance is accomplished by conveying the property and reserving the mineral estate or conveying the mineral estate and reserving the surface estate. *See Elliott v. Nelson*, 251 S.W. 501, 504 (Tex. Comm’n App. 1923, judgm’t adopted); *Klein v. Humble Oil & Refining Co.*, 86 S.W.2d 1077, 1079 (Tex. 1935). Of the two estates, the mineral estate is the dominant estate. *See Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980); *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971); *Texaco Inc. v. Faris*, 413 S.W.2d 147, 149 (Tex. Civ. App.—El Paso 1967, writ ref’d n.r.e.).

Minerals should be clearly defined in the document by identifying the specific minerals included such as oil, gas, hydrocarbons, coal, lignite, carbon dioxide, nonhydrocarbon gases, uranium, gold, silver, copper, iron, other metallic ores and substances, and radioactive substances. Otherwise, the term *minerals* will be left to construction. *See Mosser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984); *Reed v. Wiley II*, 597 S.W.2d 743 (Tex. 1980); *Reed v. Wiley*, 554 S.W.2d 169 (Tex. 1977); *Acker*, 464 S.W.2d 348. The owner of the dominant mineral estate is entitled to access to the surface estate in order to have access to the minerals. *See Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943). A determination of whether the grant includes both the surface and mineral estate is important to the value and use of the property beyond just the value of the minerals. The access rights of the mineral owner impact the ability of the property owner to develop and use property. Conversely, if the mortgagee’s valuation of the property includes a valuation of the minerals, it is important to not only determine that the mineral estate has not been severed, but also to determine whether there are any antidrilling ordinances or land use restrictions that would preclude a subsequent owner of the property from extracting the minerals.

See the discussion of chapter 66 of the Texas Property Code at section 13.11 in this manual.

§ 6.7 Default under Contract

Prior to the exercise of any remedies available under the deed of trust, there must be a default. The default must be defined by the agreement between the parties. A default may be found in the debt instrument, the deed of trust, or in a loan agreement governing the overall relationship between the parties. The default may be a failure to pay or a breach of an affirmative or negative covenant in the documents. The factual circumstances must be reviewed to determine if there is a default and whether the default has been waived or estopped based on the actions or course of dealings of the parties. The loan documents must be carefully reviewed to determine whether an event of default has occurred and what actions, if any, by the mortgagee are necessary to trigger an event of default. For example, a breach of a covenant or a failure to pay an installment by a due date may in and of itself be an event of default, which entitles the mortgagee to immediately provide a notice of intent to accelerate if such notice has not been waived, or the loan documents may require a notice to the borrowers of the breach of the covenant or failure to pay the past-due amount and an opportunity to eliminate the breach or failure to pay, prior to the breach or failure to pay ripening into a default or event of default.

§ 6.7:1 Failure to Pay

A default arising out of a failure of the borrower to pay the debt as it becomes due is the most common default. *See Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 891 (Tex. 1991). The determination of when the payment is due and, in the absence of a matured debt or a demand note, what action is required by the lender to accelerate maturity based on the default, depends on the terms of the debt instrument. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). Promissory notes are typically (1) demand notes payable on demand, (2) term notes that are payable in full on or before a specified date, or (3) installment notes with periodic payments due in specified intervals and that can be accelerated on the failure of the borrower to pay an installment when due. For installment notes, in the absence of an effective waiver provision, the holder must provide the notice of intent to accelerate the maturity, and when the maturity has been accelerated, notice that the debt has been accelerated. *Holy Cross Church*, 44 S.W.3d at 566; *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232, 234 (Tex. 1982). For an installment obligation, in the absence of acceleration of the maturity date, the only outstanding indebtedness due prior to maturity is the amount of the past-due installments. *See General Motors Acceptance Corp. v. Uresti*, 553 S.W.2d 660, 663 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

§ 6.7:2 Insecurity

Texas Business and Commerce Code section 1.309 provides that when a contract permits a party to accelerate payment or performance or require collateral or additional collateral at will or when the party deems itself insecure or words of similar import, that party has the power to do so only if that party in good faith believes that the prospect of payment or the performance is impaired. Tex. Bus. & Com. Code § 1.309. The burden of establishing good faith is on the party against whom the power has been exercised. Tex. Bus. & Com. Code § 1.309; Tex. Jur. 3d *Secured Transactions* § 120, 134. The comment to section 1.309 makes clear that the good faith requirement has "no application to demand instruments or obligations whose very nature permits call at any time or without reason." Tex. Bus. & Com. Code § 1.309 cmt.

§ 6.7:3 Bankruptcy or Insolvency

It is common for a deed of trust to provide for an event of default upon the execution of an assignment for the benefit of creditors, admission in writing by the borrower of the borrower's inability to pay, the filing of a bankruptcy case or proceeding, or any other applicable law involving insolvency, liquidation, or reorganization affecting the rights of creditors. Upon a bankruptcy filing, the automatic stay provided by Bankruptcy Code section 362 will preclude a mortgagee from pursuing remedies against the mortgagor or borrower filing bankruptcy and from foreclosing on or taking any action against the property of the bankrupt mortgagor or borrower. *See* 11 U.S.C. § 362. However, the automatic stay under section 362 does not restrict the lender from pursuing a guarantor following the default resulting from the bankruptcy of the maker. *See In re MortgageAmerica Corp.*, 714 F.2d 1266, 1268 (5th Cir. 1983). A foreclosure sale knowingly made in violation of an automatic stay can expose the mortgagee to liability for actual and punitive damages. *See* 11 U.S.C. § 362(k)(1).

Some deeds of trust contain clauses whereby the mortgagor purports to waive the effect of the automatic stay upon filing of a bankruptcy petition. These "stay waiver" clauses have been inconsistently enforced by bankruptcy courts. For additional discussion, see Matthew P. Goren, *Chip Away at the Stone: The Validity of Pre-Bankruptcy Clauses Contracting Around Section 363 of the Bankruptcy Code*, 51 N.Y. L. Sch. L. Rev. 1077, 1091–92 (2007); C. Edwards Dobbs, *Negotiating Points in Secured Lien Financing Transactions*, 4 Depaul Bus. & Com. L. J. 189, 222 (2006); Pamela Dunlop Gate, *Drafting Considerations in Anticipation of Insolvency or Bankruptcy, in Real Estate Documents, Closings and Workouts*, 2001, University of Houston Law Foundation, Houston (2001); Michael D. Fielding, *Preventing Voluntary and Involuntary Bankruptcy Petitions by Limited Liability Companies*, 18 Bankr. Dev. J. 51, 71 (2001); Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 Tex. L. Rev. 515 (1999).

§ 6.7:4 Loss, Damage, Destruction, or Reduction of Value of Mortgaged Property

Most loan documents contain a default clause based on the loss, damage, destruction, or reduction in value of the mortgaged property. This type of default clause is also referred to as a waste clause. This type of default is more difficult to prove or sustain than a purely monetary default or a default based on an objective standard. Usually declarations of default on breach of the waste clause are asserted in conjunction with other more quantifiable defaults. Sometimes the loan documents provide for a measure of loss or waste (such as reduction in fair market value below the balance of the secured debt) to determine whether a default has occurred.

Cases concerning waste and foreclosure include *U.S. Bank, N.A. v. American Realty Trust, Inc.*, 275 S.W.3d 647 (Tex. App.—Dallas 2009, pet. denied) (failing to reapply for franchise license and entering franchise agreement with cheaper hotel chain did not constitute "waste" where loan documents did not obligate borrower to maintain franchise agreement with any specific hotel chain); *Frio Investments, Inc. v. 4M-IRC/Rohde*, 705 S.W.2d 784 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (damages not recoverable for waste if value of property after alleged injury remains sufficient to secure debt; waste not sufficient grounds for default if it did not unreasonably impair mortgagee's security); and *Chapa v. Herbster*, 653 S.W.2d 594 (Tex. App.—Tyler 1983, no writ) (foreclosure upheld based in part on failure to keep mortgaged property in good repair and condition), *disapproved on other grounds*, *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991).

Waste is an injury to reversionary interest in land resulting from the wrongful act committed by one rightfully in possession or in failure by one rightfully in possession to exercise reasonable care to preserve the property. *See R.C.*

Bowen Estate v. Continental Trailways, 256 S.W.2d 71, 72 (Tex. 1953); *Lesiker v. Rappeport*, 809 S.W.2d 246, 250 (Tex. App.—Texarkana 1991, no writ); *Weaver v. Royal Palms Associates, Inc.*, 426 S.W.2d 275, 277 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ). There can be no breach of a covenant against waste to support a foreclosure unless there is evidence of a wrongful act or failure to exercise reasonable care in preserving the property. *Erickson v. Rocco*, 433 S.W.2d 746, 750–51 (Tex. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.). Additionally, the waste must impair the mortgagee's security even if the waste results from the removal of improvements or structures. *Frio Investments*, 705 S.W.2d at 786.

§ 6.7:5 Maintenance of Insurance

Loan documents may also contain a default clause for failure to maintain insurance. *Chapa v. Herbster*, 653 S.W.2d 594, 601 (Tex. App.—Tyler 1983, no writ) (foreclosure upheld based in part on default of requirement to maintain insurance), *disapproved on other grounds*, *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991). In the absence of provisions to the contrary, the beneficiary or mortgagee has no right to participate in the proceeds of the insurance policy. *Shelton v. Providence Washington Insurance Co.*, 131 S.W.2d 330, 332 (Tex. Civ. App.—El Paso 1939, no writ). Disposition of insurance proceeds from casualty or loss as to mortgaged property depends on the agreement between the parties. *See Zidell v. John Hancock Mutual Life Insurance Co.*, 539 S.W.2d 162, 165 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). Deeds of trust and loan documents commonly require the maintenance of insurance on the property, proof of insurance, and, upon a casualty, the payment of the proceeds to the mortgagee or to the mortgagor and mortgagee jointly, with the requirement that the mortgagor endorse the proceeds to the mortgagee to be disbursed for repairs or applied to reduce the debt.

Texas Insurance Code section 549.003 provides that, after foreclosure, the lender is entitled to cancel an insurance policy covering the foreclosed property and is entitled to any unearned premiums from the policy if the unearned premiums are applied to the deficiency and any excess delivered to the borrower. *See* Tex. Ins. Code § 549.003. Texas Insurance Code sections 549.051 through 549.102 identify certain prohibited practices and exceptions for lenders with regard to insurance for real and personal property collateral and create both a private cause of action by the borrower and an enforcement action by the state for any violation. *See* Tex. Ins. Code §§ 549.051–.102. See section 13.4 in this manual for additional discussion.

§ 6.7:6 Defaults on Other Indebtedness

Many loan documents contain a cross-default clause providing that a default on any indebtedness owed by the maker, the guarantor, or the mortgagor to the mortgagee or other persons qualifies as a default on the indebtedness secured by the deed of trust. The *Texas Real Estate Forms Manual*'s form for deed of trust does not contain a cross-default clause.

§ 6.7:7 Payment of Taxes

Failure to pay property taxes may also be defined as a default. *Terra XXI, Ltd. v. Harmon*, 279 S.W.3d 781 (Tex. App.—Amarillo 2007, pet. denied) (upholding foreclosure over challenge that default due to nonpayment of taxes did not in fact exist based on mortgagor's allegations that tax office applied tax payment to wrong account and finding that trustee had a valid basis for initiating foreclosure proceedings because tax records showed taxes as delinquent as of date trustee sent debtor notice of default on security instrument); *Chapa v. Herbster*, 653 S.W.2d 594 (Tex. App.—Tyler 1983, no writ) (foreclosure upheld based in part on default under deed-of-trust requirement to pay ad valorem taxes due on mortgaged property), *disapproved on other grounds*, *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991). See chapter 24 and section 4.23 in this manual for further discussion of ad valorem tax liens.

§ 6.7:8 Death

Often the death of the maker or guarantor constitutes a default under the loan documents. See chapter 26 and section 4.20 in this manual concerning the foreclosure process when the mortgagor is deceased.

§ 6.7:9 Due-on-Sale Clause

Due-on-sale clauses that permit the acceleration of the indebtedness upon a disposition without the beneficiaries' prior written consent has been upheld in Texas. *Sonny Arnold, Inc. v. Sentry Savings Ass'n*, 633 S.W.2d 811, 814 (Tex. 1982); *A.R. Clark Investment Co. v. Green*, 375 S.W.2d 425, 432 (Tex. 1964); *Slusky v. Coley*, 668 S.W.2d 930 (Tex. App.—Houston [14th Dist.] 1984, no writ). A due-on-sale clause is not a restraint on alienation because the conveyance only causes an acceleration of the debt, not a forfeiture of the mortgaged property. *See Sonny Arnold*, 633 S.W.2d at 815; *Slusky*, 668 S.W.2d at 934; *Crestview, Ltd. v. Foremost Insurance Co.*, 621 S.W.2d 816, 818 (Tex. Civ. App.—Houston 1981, writ ref'd n.r.e.). In *Adams v. First National Bank*, 154 S.W.3d 859, 869–71 (Tex. App.—Dallas 2005, no pet.), the court upheld the acceleration of the debt and foreclosure of the property based on a violation of the due-on-sale clause resulting from the transfer by an individual owner/borrower to a corporation owned by the owner/borrower even though the deed signed in connection with the transfer was never recorded and that following acceleration the transfer was rescinded. The fact that the mortgaged property becomes subject to a dependent administration by the probate court following the death of the mortgagor does not invalidate the mortgagee's right to accelerate the loan in the event of a sale approved by the probate court. *See Howell v. Murray Mortgage Co.*, 890 S.W.2d 78, 83 (Tex. App.—Amarillo 1994, writ denied).

Some Texas cases have held that optional acceleration clauses in a deed of trust providing for prepayment penalty, in which the mortgagor transfers the mortgaged property without the consent of the mortgagee, are impermissible restraints on alienation. In *North Point Patio Offices Venture v. United Benefit Life Insurance Co.*, 672 S.W.2d 35, 37–38 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), the court held that where the provision precluded a transfer of the property and the lender required the borrower to pay a percentage of the loan balance notwithstanding the absence of any specific provision of the agreement for such a waiver fee, the imposition imposed by the lender was coercive and by its nature a restraint on alienation of the property. In *Metropolitan Savings & Loan Ass'n v. Nabours*, 652 S.W.2d 820, 821–23 (Tex. Civ. App.—Tyler 1983, writ dism'd), the lender accelerated after a transfer of the property without its consent. In *Nabours*, the provision precluded any transfer of the property and permitted the lender to charge a prepayment penalty upon acceleration resulting from the transfer. In *Meisler v. Republic of Texas Savings Ass'n*, 758 S.W.2d 878, 885 (Tex. App.—Houston [14th Dist.] 1988, no writ), the court of appeals held in dictum that coupling a prepayment penalty with a prohibition against the transfer without the mortgagee's consent is not an unreasonable restraint on alienation if the consent requirement is expressly qualified by the requirement of reasonable conduct on the part of the mortgagee. The focus of these cases was largely the propriety of the assessment of the prepayment penalty upon acceleration resulting from the transfer. Subsequent Texas cases held that a lender may contractually charge a prepayment premium on the accelerated amount of principal as a result of the lender's exercise of the lender's right to accelerate the indebtedness evidenced by the note, provided that the note clearly states that the premium is to be charged subsequent to an acceleration of maturity. *Parker Plaza West Partners v. UNUM Pension & Thrift Co.*, 941 F.2d 349, 355–56 (5th Cir. 1991); *Affiliated Capital Corp. v. Commercial Federal Bank*, 834 S.W.2d 521, 526–27 (Tex. App.—Austin 1992, no writ).

A due-on-encumbrance provision is similar to a due-on-sale provision. A deed of trust may provide that a default occurs when the mortgagor places or acquiesces in the placing or allowing of any lien or encumbrance against the property, including any inferior encumbrance. However, in *Lavigne v. Holder*, 186 S.W.3d 625, 628 (Tex. App.—Fort Worth 2006, no pet.), the deed of trust excepted from the due-on-sale clause the creation of a lien or encumbrance subordinate to the deed of trust, and the court held that the mortgagor's granting of a thirty-five foot easement was a permitted encumbrance because the term *encumbrance* includes easements and the easement was subordinate to the deed of trust.

The Garn–St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, codifided at 12 U.S.C. § 1701j-3(a)–(g), preempts state prohibitions on the exercise of due-on-sale clauses by lenders and reaffirms the authority of federal lenders to use and enforce due-on-sale clauses in their loan instruments. *See* 12 U.S.C. § 1701j-3(b), (c). However, the statute exempts certain real property loans secured by a lien on residential real property containing less than five dwelling units and prohibits the exercise of due-on-sale clauses for certain transfers, including a transfer into an inter vivos trust in which the borrower is and remains the beneficiary and which does not relate to transfer of rights of occupancy in the property. 12 U.S.C. § 1701j-3(d)(8).

§ 6.7:10 Properties in Receivership

Property in the custody of a receiver may not be foreclosed on without court approval. *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976); *Cline v. Cline*, 323 S.W.2d 276, 282 (Tex. Civ. App.—Houston 1979, writ ref'd n.r.e.). Once a property is placed in receivership, it is held in custodia legis by the receiver and any sale or disposition of the property must be authorized by the court in which the receivership is pending. *Huffmeyer v. Mann*, 49 S.W.3d 554, 559–60 (Tex. App.—Corpus Christi 2001, no pet.). However, the appointment of a receiver destroys no prior vested rights nor does it determine any rights as between the parties by reason of an existing contract. *Huffmeyer*, 49 S.W.3d at 560. The enforcement of the third parties' rights or liens are merely suspended until the enforcement is approved by the court having custody of the property. *Huffmeyer*, 49 S.W.3d at 560. As a general rule, a lienholder's interest in property held by a receiver has priority over the cost and expenses incurred and the administration and operation of the receiver. *CitiMortgage, Inc. v. Hubener*, 345 S.W.3d 193, 197 (Tex. App.—Dallas 2011, no pet.); *Chase Manhattan Bank v. Bowles*, 52 S.W.3d 871, 880 (Tex. App.—Waco 2001, no pet.). However, a lienholder who requests the appointment of receiver or who acquiesces in the receivership and seeks its benefits may not be entitled to priority over the receiver's fees and expenses. *Bowles*, 52 S.W.3d at 880. See sections 3.4:2 and 3.5:6 in this manual for additional discussion.

§ 6.7:11 Change in Form of Entity

The court in *Burns v. Stanton*, 286 S.W.3d 657, 660–61 (Tex. App.—Texarkana 2009, pet. denied), held that the conversion of a corporation to a limited partnership was a violation of the loan document covenants even though the conversion was undertaken to save substantial taxes.

[Reserved]

Chapter 7

Consumer Debt Collection Laws

Forms

[Reserved]

Chapter 7

Consumer Debt Collection Laws

The editors gratefully acknowledge Manuel H. Newburger for his contribution to this chapter. In addition, Mr. Newburger would like to recognize Kevin Crocker for his assistance.

§ 7.1 Introduction

The Fair Debt Collection Practices Act (FDCPA), codified at 15 U.S.C. §§ 1692–1692p, is the primary federal statute regulating collection of consumer debts. Some, but not all, of the FDCPA is mirrored in the Texas Debt Collection Act (TDCA), codified at Tex. Fin. Code ch. 392. Both Acts apply only to the collection of "personal, family, or household" debts, which would include all residential mortgage obligations. *See* 15 U.S.C. § 1692a(5); Tex. Fin. Code § 392.001(2).

Debt collectors need to be mindful of the fact that what makes a debt "personal, family, or household" is the nature of the debt at the time it is created, not the nature of the debt at the time of the foreclosure. Thus, a property that was purchased as a residence but is now being used as a rental property will still be the subject of a "consumer" debt under the FDCPA. *See Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 874–75 (7th Cir. 2000).

This chapter focuses primarily on the FDCPA. That is because it is the statute that adds specific disclosure requirements, only one of which is mirrored in the TDCA. The TDCA allows recovery of actual damages, injunctive relief, and attorney's fees pursuant to Tex. Fin. Code § 392.403, and punitive damages under appropriate circumstances. *See Ledisco Financial Services, Inc. v. Viracola*, 533 S.W.2d 951, 957 (Tex. Civ. App.—Texarkana 1976, no writ). It is also a tie-in statute to the Texas Deceptive Trade Practices–Consumer Protection Act. *See* Tex. Fin. Code § 392.404. However, actual damages often are absent from cases that involve mere notice letter violations. The FDCPA allows for recovery of actual damages, statutory damages, and attorney's fees. 15 U.S.C. § 1692k(a). An individual plaintiff may recover statutory damages of up to $1,000, and a class may recover statutory damages of up to $500,000 or one percent of the defendant's net worth (whichever is less), and those statutory damages are recoverable even in the absence of actual damages. 15 U.S.C. § 1692k(a).

§ 7.1:1 Applicability to Attorneys

The FDCPA defines a "debt collector" as—

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.

15 U.S.C. § 1692a(6). Under this definition attorneys who regularly collect consumer debts are subject to the FDCPA. This applies even to attorneys whose activities are limited solely to

collection litigation. *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995).

The TDCA defines "debt collector" so broadly that both attorneys and creditors are included within the definition. *See* Tex. Fin. Code § 392.001(6). The TDCA also contains a separate category of "third-party debt collector" definition:

> "Third-party debt collector" means a debt collector, as defined by 15 U.S.C. Section 1692a(6), but does not include an attorney collecting a debt as an attorney on behalf of and in the name of a client unless the attorney has nonattorney employees who:
>
> (A) are regularly engaged to solicit debts for collection; or
>
> (B) regularly make contact with debtors for the purpose of collection or adjustment of debts.

Tex. Fin. Code § 392.001(7). The TDCA imposes special requirements on third-party debt collectors. *See* Tex. Fin. Code §§ 392.101, 392.202, 392.304(a)(5).

§ 7.1:2 Foreclosure as Debt Collection

The applicability of the FDCPA to attorneys does not resolve the question of whether foreclosure is a debt collection activity that triggers the Act. The plain language of the statute excludes from "debt collector" status persons whose business has the principal purpose of enforcing security interests, but only to the extent that such persons do not otherwise satisfy the definition of a debt collector and only if they do not run afoul of 15 U.S.C. § 1692f(6). *Kaltenbach v. Richards*, 464 F.3d 524, 527 (5th Cir. 2006). Section 1692f(6) forbids taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
>
> (B) there is no present intention to take possession of the property; or
>
> (C) the property is exempt by law from such dispossession or disablement.

15 U.S.C. § 1692f(6). Attorneys and trustees who seek payment of mortgage debts or who try to foreclose in violation of section 1692f(6) are debt collectors, even when performing nonjudicial foreclosures. *Burnett v. Mortgage Electronic Registration Systems*, 706 F.3d 1231, 1236 (10th Cir. 2013).

Courts have split on whether foreclosure is "debt collection" that is subject to the FDCPA. Multiple federal appellate courts have applied the FDCPA to foreclosure-related activities. *See, e.g., Wallace v. Washington Mutual Bank., F.A.*, 683 F.3d 323, 326 (6th Cir. 2012); *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 386 (7th Cir. 2010); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006). As the Sixth Circuit Court of Appeals has stated:

> Furthermore, in the words of one law dictionary: "To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." *Black's Law Dictionary* 263 (6th ed. 1990). The Supreme Court relied on this passage when it declared the following in a case concerning the Act's definition of "debt collector": "In ordinary English, a lawyer who regularly tries *to obtain payment* of consumer debts through legal

within a reasonable period of time to communication from the debt collector.

See 15 U.S.C. § 1692b(3)–(6).

§ 7.4 Communication Issues

The FDCPA contains a number of provisions dealing with the timing of communications and the persons to whom collection-related communications may be directed as discussed below. *See* 15 U.S.C. § 1692c. For the purposes of section 1692c, the term *consumer* includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator. 15 U.S.C. § 1692c(d).

§ 7.4:1 Communications at Inconvenient Times

Unless the consumer gives prior consent directly to the debt collector, or a court of competent jurisdiction gives express permission, a debt collector may not communicate with a consumer in connection with the collection of any debt at any unusual time or place or at a time or place known to be inconvenient to the consumer. 15 U.S.C. § 1692c(a)(1). The debt collector is required to assume that the convenient time for communicating with a consumer is after 8:00 A.M. and before 9:00 P.M., local time at the consumer's location. 15 U.S.C. § 1692c(a)(1).

A debt collector must not communicate with the consumer at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication. 15 U.S.C. § 1692c(a)(3).

§ 7.4:2 Ceasing Communication

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the debt collector is to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

15 U.S.C. § 1692c(c). If the consumer gives such notice by mail, notification is complete upon receipt. 15 U.S.C. § 1692c(c).

Though section 1692c(c) seems to imply that a consumer could block the pursuit of litigation through a refusal to pay or a demand that communications cease, the Supreme Court has rejected that idea. *See Heintz v. Jenkins*, 514 U.S. 291, 296–97 (1995).

§ 7.4:3 Communications with Consumers Who Have Attorneys

If the debt collector knows the consumer is represented by an attorney with respect to the debt and has knowledge of, or can readily ascertain, such attorney's name and address, the debt collector may not communicate with any person other than that attorney. Knowledge of prior representation with regard to a different debt does not necessarily preclude the debt collector from communicating directly with the consumer on a subsequent collection matter. *Robinson v. Transworld Systems, Inc.*, 876 F. Supp. 385, 390 (N.D.N.Y. 1995). Furthermore, a debt collector must have actual knowledge. The creditor's knowledge of legal representation is not imputed to its attorney. *Schmitt v. FMA Alliance*, 398 F.3d 995, 997–98 (8th Cir. 2005).

However, the debt collector may communicate with the consumer if the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer. 15 U.S.C. § 1692c(a)(2). Although the Act does not define what constitutes a "reasonable time," the question is probably irrelevant in the case of attorney debt collectors. The more restrictive provisions of Tex. Disciplinary Rules Prof'l Conduct R. 4.02 would prohibit communicating with a represented person even if the person's attorney is nonresponsive.

A letter directed to the consumer's attorney should be addressed specifically to the attorney and not addressed to the consumer in care of the attorney. In *Clark's Jewelers v. Humble*, 823 P.2d 818 (Kan. App. 1991), the debtors hired an attorney who directed the collection agency to communicate solely with him. The agency continued to write to the debtors, in care of the attorney, rather that addressing its correspondence to the attorney himself. The court of appeals held that this conduct violated the Act as it was a direct communication with the debtors. *Clark's Jewelers*, 823 P.2d at 820–21.

§ 7.4:4 Third-Party Communications

Except as provided for location calls, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, the consumer's attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector. 15 U.S.C. § 1692c(b).

Tex. R. Civ. P. 736, the expedited foreclosure rule for certain loans, was originally drafted with this problem in mind. Former rule 736(8)(B) stated the following:

> (B) Form of Order. The order shall recite the mailing address and legal description of the property, direct that foreclosure proceed under the security instrument and Tex. Prop. Code § 51.002, provide that a copy of the order shall be sent to respondent with the notice of sale, *provide that applicant may communicate with the respondent and all third parties reasonably necessary to conduct the foreclosure sale*, and, if respondent is represented by counsel, direct that notice of the foreclosure sale date shall also be mailed to counsel by certified mail.

Tex. R. Civ. P. 736 (1998, amended 2012) (emphasis added). Because the rule has since been amended, attorneys would be wise to include in their court orders such consent because the authority to communicate is no longer expressly enumerated in the rule.

§ 7.4:5 Disclosure of Mortgage Information to Surviving Spouse

Effective September 1, 2015, section 343.103 was added to the Texas Finance Code, which requires a mortgage servicer and lender to provide information on a home loan within thirty days of receiving a request by the surviving spouse of a mortgagor of the home. *See* Acts 2015, 84th Leg., R.S., ch. 511, § 1 (H.B. 831). The requirements for the surviving spouse to prove his status are set out in the statute and include a statutorily required notice in the request letter that reads, "THIS REQUEST IS

MADE PURSUANT TO TEXAS FINANCE CODE SECTION 343.103. SUBSEQUENT DISCLOSURE OF INFORMATION IS NOT IN CONFLICT WITH THE GRAMM-LEACH-BLILEY ACT UNDER 15 U.S.C. SECTION 6802(e)(8)." *See* Tex. Fin. Code § 343.103(c), (d).

§ 7.5 Harassment or Abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. 15 U.S.C. § 1692d. The terms *harassment* or *abuse* include expressly, but are not limited to—

(1) the use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person;

(2) the use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader;

(3) the publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of 15 U.S.C. §§ 1681a(f) or 1681b(3) (the sections governing who is a consumer reporting agency and who may be given credit reports);

(4) the advertisement for sale of any debt to coerce payment of the debt;

(5) causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with the intent to annoy, abuse or harass any person at the called number; or

(6) except as provided in section 1692b (acquisition of location information), the placement of telephone calls without meaningful disclosure of the caller's identity.

15 U.S.C. § 1692d(1)–(6). The corresponding statute under the TDCA is Tex. Fin. Code § 392.302.

§ 7.6 False or Misleading Representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. The terms *false*, *deceptive*, or *misleading* include expressly, but are not limited to—

(1) the false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any state, including the use of any badge, uniform, or facsimile thereof;

(2) the false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt;

(3) the false representation or implication that any individual is an attorney or that any communication is from an attorney;

(4) the representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment,

or sale of any property or wages of any person unless such action is lawful and the debt collector intends to take such action;

(5) the threat to take any action that cannot legally be taken or that is not intended to be taken;

(6) the false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by the subchapter governing debt collection practices;

(7) the false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer;

(8) communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed (Note that an oral dispute is sufficient for a consumer to invoke the provisions of this section 1692e(8). *Brady v. Credit Recovery Co.*, 160 F.3d 64 (1st Cir. 1998).);

(9) the use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any state, or which creates a false impression as to its source, authorization, or approval;

(10) the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer;

(11) except for communications to acquire location information under section 1692b, the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose";

(12) the false representation or implication that accounts have been turned over to innocent purchasers for value;

(13) the false representation or implication that documents are legal process;

(14) the use of any business, company or organization name other than the true name of the debt collector's business, company or organization;

(15) the false representation or implication that documents are not legal process forms or do not require action by the consumer; or

(16) the false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by 15 U.S.C. § 1681a(f).

15 U.S.C. § 1692e(1)–(16). The corresponding statute under the TDCA is Tex. Fin. Code § 392.304.

An attorney who sends letters on law firm letterhead, threatening suit, into a state where he is not licensed and who has not secured local associate counsel violates section 1692e(5). *Newman v. Checkrite California, Inc.*, 912 F. Supp. 1354, 1380 (E.D. Cal. 1995). An attorney should never threaten to file suit and should never send the consumer draft copies of complaints unless the attorney actually intends to file the complaints. *See Newman*, 912 F. Supp. at 1379–80.

Suing for legal fees or other charges that are neither agreed to by the debtor nor otherwise authorized by law will be a violation of the Act. *See Newman*, 912 F. Supp. at 1369. Even when a note provides for fees those fees may not be demanded prior to judgment unless the note allows for fees upon placement of the account, rather than when "awarded by the court" or to "the prevailing party." *Compare Bernstein v. Howe*, No. IP 02-192-C-K/H, 2003 WL 1702254 (S.D. Ind. Mar. 31, 2003), *with Shapiro v. Riddle & Associates, P.C.*, 351 F.3d 63 (2d Cir. 2003), *and James v. Olympus Servicing, L.P.*, No. 02 C 2016, 2003 WL 21011804 (N.D. Ill. May 5, 2003).

Section 1692g(a) of the FDCPA does not require a validation notice to itemize the components of the amount of the debt. However, if the current balance includes attorney's fees, collection costs, title fees, or sums other than principal, interest, and late fees those other charges should be itemized. *See Fields v. Wilber Law Firm, P.C.*, 383 F.3d 562, 566 (7th Cir. 2004). Failing to include such a breakdown could make an unexplained balance misleading and deceptive.

In connection with a residential mortgage foreclosure, the failure to give a statutorily required notice of intention to accelerate and of opportunity to cure has been held to violate section 1692e. *Crossley v. Lieberman*, 868 F.2d 566, 571 (3d Cir. 1989).

A letter to a consumer that references a creditor as "plaintiff" and makes demand for "plaintiff's damages and costs" when no suit has yet been filed has been held to violate section 1692e. *Crossley*, 868 F.2d at 571.

§ 7.7 Unfair Practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. The term *unfair practices* includes expressly, but is not limited to—

(1) the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law;

(2) the acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit;

(3) the solicitation by a debt collector of any postdated check or other postdated instrument for the purpose of threatening or instituting criminal prosecution;

(4) depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument;

(5) causing charges for communications (including, but not limited to, collect telephone calls and telegram fees) to be made to any person by concealment of the

true purpose of the communication;

(6) taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

 (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

 (B) there is no present intention to take possession of the property; or

 (C) the property is exempt by law from such dispossession or disablement;

(7) communicating with a consumer regarding a debt by post card; or

(8) using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

5 U.S.C. § 1692f(1)–(8). The corresponding statute under the TDCA is Tex. Fin. Code § 392.303.

The *attempt* to collect an unauthorized fee is prohibited by section 1692f(1), not just the actual collection of such a fee. *Sandlin v. Shapiro & Fishman*, 919 F. Supp. 1564, 1568 (M.D. Fla. 1996).

A debt collector's filing of suit on a time-barred debt without first making reasonable inquiry on whether limitations have been tolled is an unfair or unconscionable means of collecting a debt. *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987).

§ 7.8 Multiple Debts

If the consumer owes multiple debts and makes a single payment to be applied to one or more of the debts, the debt collector may not apply the payment to any debt which the consumer is disputing. Furthermore, if the consumer has given specific directions as to how the payment should be applied, the debt collector must apply the payment in accordance with such instructions. 15 U.S.C. § 1692h.

§ 7.9 Venue for Foreclosure Actions

Venue for an action to enforce an interest in real property that secures a consumer's obligation must be brought only in a judicial district or similar legal entity in which such real property is located. 15 U.S.C. § 1692i(a)(1). This provision is consistent with Tex. Civ. Prac. & Rem. Code § 15.011 (action must be brought in the county where the real property is located).

A suit that does not seek to foreclose but that seeks a judgment for a postforeclosure deficiency must be brought in the judicial district or similar legal entity in which such consumer signed the contract sued upon or in which such consumer resides at the commencement of the action. 15 U.S.C. § 1692i(a)(2); *see also* Tex. Bus. & Com. Code § 17.46(b)(23) (making it a violation of the Texas Deceptive Trade Practices–Consumer Protection Act's (DTPA's) "laundry list" to file suit in a different county than that which would be mandated by section 1692i). If the DTPA was in conflict with 15 U.S.C. § 1692i, the venue provisions of the FDCPA would preempt the state law venue provisions to the contrary. *Martinez v. Albuquerque Collection Services, Inc.*, 867 F. Supp. 1495, 1501 (D. N.M. 1994).

Chapter 8

Demand for Payment, Notice of Intent to Accelerate, and Notice of Acceleration

Forms

Chapter 8

Demand for Payment, Notice of Intent to Accelerate, and Notice of Acceleration

The editors gratefully acknowledge David Tomek for his contribution to this chapter.

§ 8.1 Introduction

Because a notice of acceleration matures an obligor's installment debt and involves the four-year statute of limitations for completing a non-judicial foreclosure sale under section 16.035(b) of the Texas Civil Practice and Remedies Code or filing a judicial foreclosure suit under section 16.035(c), House Bill 2067, passed during the 2015 legislative session, must be carefully reviewed to ensure compliance with the detailed statutory scheme required to properly waive or rescind a notice of acceleration before the statute of limitations runs. *See* Acts 2015, 84th Leg., R.S., ch. 759, § 1 (H.B. 2067), eff. June 17, 2015 (adding Tex. Civ. Prac. & Rem. Code § 16.038). Failure to abide by the statute may result in an unenforceable lien. See form 8-1 in this chapter; see section 10.26 in this manual for additional discussion.

This chapter generally addresses the processes involved in giving notice of default, notice of intent to accelerate, and notice of acceleration. For more in-depth coverage of specific issues related to these notices, see chapter 7 in this manual regarding consumer debt collection, chapter 33 discussing special rights for armed servicemembers, section 36.2 discussing federal loss mitigation programs for residential loans, and section 36.3 discussing federal homeowner counseling programs.

§ 8.2 Repayment of Real Estate–Secured Notes

The typical real estate–secured promissory note, whether the mortgaged property is a debtor's residence or otherwise, provides for repayment in installments with a stated maturity date on which all unpaid amounts are due. The installments usually amortize at least a portion of the principal balance over some or all of the term of the loan, but it is not uncommon for installments of interest only to be due, especially for the earliest installments. Other types of payment arrangements for real estate–secured notes are occasionally used, including demand only notes, notes with no installments due before a stated maturity date (often referred to as term notes), and hybrid term/demand notes (such as no installments due before a stated maturity date but subject to earlier demand by the lender). The focus of this chapter, however, is on making demand for payment on defaulted installment notes (whether before or after the stated maturity date), affording an opportunity for the debtor to cure the default(s) (if required by the governing loan documents or by statute or if the lender should elect to do so without contractual or statutory obligation), notifying the debtor obligated on an unmatured installment note in default of the lender's intention to accelerate the maturity of the note if the cure is not timely made, and accelerating an unmatured installment note for which the requisite cure of noticed defaults is not timely made.

§ 8.3 Matured Note

If the secured note has matured by its terms, the lender and its counsel must comply with any applicable contractual notice requirements before initiating the nonjudicial foreclosure process but, in the likely absence of any such post-maturity contractual notice requirements, may also elect to make demand on the debtor for payment in full of the secured indebtedness and afford at least a modest amount of time to pay that indebtedness before initiating the nonjudicial foreclosure process, especially if the lender is willing to consider an extension of the maturity date or a broader workout of the matured loan. See form 8-2 in this manual for such a demand for payment.

§ 8.4 Requisites for Acceleration of Unmatured Installment Note in Default

An installment note is characterized by a certain sum that is payable in smaller, periodic payments before and on its stated maturity date. Without an acceleration right in the governing loan documents, the holder of an installment note that is in default can only (1) sue the debtor periodically for portions of the debt as they accrue, (2) foreclose periodically on only a part of the mortgaged property to the extent necessary to satisfy the matured portion of the debt (if the deed of trust so provides), or (3) wait until the entire debt has become due and payable to fully exercise its remedies for payment.

§ 8.4:1 Contractual Requirements for Acceleration

Counsel for the lender should carefully review all relevant loan and collateral documents to determine if, as a threshold matter, a customary contractual right to accelerate is included in the applicable loan documents and, if so, whether there are any particular contractual demand, notice, grace, or cure provisions that must be complied with or recognized in order to establish a default and/or validly accelerate the debt.

Counsel for the lender should be particularly mindful to determine whether any of the applicable loan documents provides for *automatic* (as contrasted with the much more common *optional*) acceleration on default. Although so rare as to be almost only a theoretical risk, automatic acceleration will be triggered on the occurrence of any default provided in the loan documents (whether known by the lender and whether the lender would be inclined to exercise available remedies as a result) and, most importantly, the applicable statute of limitations on the entire accelerated debt begins to run at that time. The worst case scenario for the lender in the case of an automatic acceleration is that the debtor is able to successfully assert the defense of limitations following the requisite period after a default that the lender either didn't know about or had chosen not to act upon.

§ 8.4:2 Common-Law Notice Requirements

Although courts recognize the necessity of a lender's right to enforce a contractual remedy of acceleration, because of the harsh effect that such a remedy has on the debtor, courts will insist that any acceleration be accomplished in strict accordance with all requirements established both by the loan documents and at common law. *See Allen Sales & Servicenter, Inc. v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975). A right of acceleration must be stated in "clear and unequivocal" terms to be enforceable. *Motor & Industrial Finance Corp. v. Hughes*, 302 S.W.2d 386, 394 (Tex. 1957). The common law obligates the holder to provide the following three distinct notices to the debtor: (1) demand for payment; (2) notice of intent to accelerate; and (3) notice that the debt has been accelerated. *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991); *Ogden v. Gibraltar Sav-*

ings Ass'n, 640 S.W.2d 232, 233 (Tex. 1982); *Allen Sales & Servicenter, Inc.*, 525 S.W.2d at 866. Although the common law notices would not be required if the note or deed of trust provided for the *automatic* acceleration of the debt, the lender usually has an *option* to accelerate the debt and, in that event, the requirement for proper service of these common law notices, unless effectively waived, must be satisfied.

§ 8.4:3 Demand for Payment

The lender must comply with any requirements set forth in the note, deed of trust, or other loan documents in making demand for payment and giving the debtor an opportunity to cure. Even without express notice requirements in the loan documents, it is clear that, unless properly waived, the lender must demand payment of past-due installments from the debtor before exercising the option to accelerate. *Williamson v. Dunlap*, 693 S.W.2d 373, 374 (Tex. 1985); *Allen Sales & Servicenter, Inc. v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975). In the case of a loan secured by a deed of trust, the notice must afford an opportunity to cure the default and "bring home to the [debtor] that failure to cure will result in acceleration of the note and foreclosure under the power of sale." *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232, 233 (Tex. 1982). See form 8-2 in this manual for a letter to the debtor that includes a customary demand for payment.

If the mortgaged property is the debtor's residence, section 51.002(d) of the Texas Property Code requires that the debtor be given twenty days to cure the default before notice of foreclosure sale is given:

> Notwithstanding any agreement to the contrary, the mortgage servicer of the debt shall serve a debtor in default under a deed of trust or other contract lien on real property used as the debtor's residence with written notice by certified mail stating that the debtor is in default under the deed of trust or other contract lien and giving the debtor at least 20 days to cure the default before notice of sale can be given under Subsection (b).

Tex. Prop. Code § 51.002(d). The notice of default required by section 51.002(d) does not literally have to use the word *default* as long as the notice puts the debtor on notice of the delinquency and gives the debtor twenty days to cure. *Herrington v. Sandcastle Condominium Ass'n*, 222 S.W.3d 99, 101 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The debtor is entitled to the notice even if the loan originated before the passage of the statute. *Rey v. Acosta*, 860 S.W.2d 654, 657–58 (Tex. App.—El Paso 1993, no writ).

The address of the debtor for purposes of section 51.002(d) is the debtor's last known address, being the debtor's residence address unless the debtor provided the mortgage servicer with a written change of address before the notice of sale was mailed. Tex. Prop. Code § 51.0001(2)(A). The debtor must inform the mortgage servicer in a reasonable manner of a change of address for purposes of being served with a notice of sale. Tex. Prop. Code § 51.0021.

§ 8.4:4 Notice of Intent to Accelerate

Unless the right to notice of intent to accelerate is waived by the debtor, the lender must give clear and unequivocal notice of its intent to accelerate. *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991) (finding that waiver of "notice" is sufficient to waive notice of acceleration but not notice of intent to accelerate). The lender must give notice to the debtor of the holder's intent to accelerate that states *explicitly* that failure to cure the default will result in acceleration of the entire debt and could lead to a foreclosure and, possibly, a deficiency judgment against the debtor if the proceeds from the foreclosure sale do not fully extinguish the secured debt. *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232, 233 (Tex. 1982); *Crow v. Heath*, 516 S.W.2d 225, 228 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). In *Ogden*, the statement that "failure to cure such breach on or before [September 16, 1978] may result in acceleration of the sums secured by the Deed of Trust and sale of the property standing as security thereunder" was not "clear and unequivocal notice that Gibraltar would exercise the option [but] merely restated [the existence of] the option conferred in the deed of trust." *Ogden*, 640 S.W.2d at 233–34. Although demand for payment and notice of intent to accelerate are *distinct* common law requirements, they are not *separate* requirements. The notice of intent to accelerate can be incorporated with the demand for payment. See form 8-3 in this manual for a letter to a commercial debtor that includes a customary demand for payment, along with a customary notice of intent to accelerate.

Additional cases on notice of intent to accelerate include *Motor & Industrial Finance Corp. v. Hughes*, 302 S.W.2d 386, 394 (Tex. 1957); *Tamplen v. Bryeans*, 640 S.W.2d 421 (Tex. App.—Waco 1982, writ ref'd n.r.e.) (holding that failure to give notice of intent to accelerate can result in foreclosure sale's being set aside); *Purnell v. Follett*, 555 S.W.2d 761, 764–65 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (holding letter to debtor advising that default "in any of [debtor's] monthly payments" would result in acceleration not broad enough to cover subsequent default in tax payments); *Crow*, 516 S.W.2d at 228 (requiring notice of intention to accelerate to state explicitly that failure to cure default would result in foreclosure and would entail possibility of deficiency judgment). A fact issue sufficient to go to the jury was raised by the debtor's testimony that he did not receive a letter notice of intention to accelerate in *Dillard v. Broyles*, 633 S.W.2d 636, 640–41 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

§ 8.4:5 Notice of Acceleration

After the acceleration of the secured debt, the debtor must be told that the secured debt has been accelerated. See form 8-4 in this manual for a letter that advises the debtor that the indebtedness has been accelerated. The notice that the secured debt has been accelerated is distinct from and must be given after the notice of intent to accelerate. *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893–94 (Tex. 1991); *Joy Corp. v. Nob Hill North Properties*, 543 S.W.2d 691, 695 (Tex. Civ. App.—Tyler 1976, no writ) (holding that letter stating legal action will be taken not notice that acceleration has occurred).

Texas law is unclear whether a mere notice of foreclosure sale can serve as notice of acceleration. The Texas Supreme Court reserved judgment on this issue in *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232 (Tex. 1982). The court stated, "We do not decide whether, after proper notice of intent to accelerate, a notice of trustee's sale is sufficient to give notice that the debt has been accelerated." *Ogden*, 640 S.W.2d at 234. In *McLemore v. Pacific Southwest Bank, FSB,* 872 S.W.2d 286, 291–92 (Tex. App.—Texarkana 1994, writ dism'd by agr.), the court found that the notice of foreclosure sale was effective as a notice of acceleration. *See also Meadowbrook Gardens, Ltd. v. WMFMT Real Estate Ltd. Partnership*, 980 S.W.2d 916, 919 (Tex. App.—Fort Worth 1998, pet. denied); *Phillips v. Allums*, 882 S.W.2d 71, 74 (Tex. App.—Houston [14th Dist.] 1994, writ denied). The *McLemore* court may have been indicating that there is a difference between merely posting a trustee's notice of foreclosure sale as establishing the fact of acceleration as opposed to giving notice of such acceleration to the debtor and in filing suit for judicial sale. Most commonly, a separate notice of acceleration is given in addition to the notice of foreclosure sale. See form 8-5, which serves as both a notice of acceleration and a transmittal letter for the notice of foreclosure sale.

§ 8.5 Waiver of Common-Law Acceleration Requirements

The common law requirements for demand for payment, notice of intent to accelerate, and notice of acceleration may be waived by the terms of the governing loan documents. In the years following *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232 (Tex. 1982), Texas courts of appeal struggled to define what quality of waiver was required to effectively waive the clear and unequivocal notices required in *Ogden*. The Texas Supreme Court ended the confusion in *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991). Several months after the Shumways defaulted on their loan, Horizon accelerated the payments due on the note without notice of presentment, notice of intent to accelerate, or notice of acceleration, and then sued the Shumways for the entire unpaid balance plus interest. The sole issue in *Shumway* was whether the Shumways waived presentment and notice under the terms of the note. The language in question was as follows: "ENTIRE BALANCE DUE. If I [the Shumways] default under this Note, you [Horizon] may require that the entire unpaid balance of the Amount of Loan plus accrued interest and late charges be paid at once without prior notice or demand." *Shumway*, 801 S.W.2d at 982.

The *Shumway* court saw no reason why the waiver of presentment, notice of intent to accelerate, and notice of acceleration should not have to meet the same clear and unequivocal standard imposed by *Motor & Industrial Finance Corp. v. Hughes*, 302 S.W.2d 386 (Tex. 1957), for creating an optional right to accelerate and the *Ogden* case for giving the common law notices. Accordingly, the supreme court held that a waiver of presentment, notice of intent to accelerate, and notice of acceleration is effective if and only if it is clear and unequivocal. Offering specific guidance on how to satisfy this standard, the court stated the following:

> To meet this standard, a waiver provision must state specifically and separately the rights surrendered. Waiver of "demand" or "presentment", and of "notice" or "notice of acceleration", in just so many words, is effective to waive presentment and notice of acceleration. Likewise, a waiver of "notice of intent to accelerate" is effective to waive that right. However, waiver of "notice" or "notice of acceleration" does not waive notice of intent to accelerate, a separate right. Waiver of "notice" or even "all notice" or "any notice whatsoever", without more specificity, does not unequivocally convey that the borrower intended to waive both notice of acceleration and notice of intent to accelerate, two separate rights.

Shumway, 801 S.W.2d at 893–94 (citations omitted).

Because the Shumways had agreed in their note to acceleration "without prior notice or demand," they waived presentment and notice of acceleration, but not notice of intent to accelerate. *Shumway*, 801 S.W.2d at 894–95.

Even if the lender is unable to rely on the validity of certain waiver provisions, if the lender discovers that any of the notices have not been properly given, then the easiest solution, time permitting, is to simply send correct notices. *See Slusky v. Coley*, 668 S.W.2d 930 (Tex. App.—Houston [14th Dist.] 1984, no writ).

A court of appeals case decided in 2012 highlights the importance for a lender and its counsel of carefully coordinating across the set of loan documents, especially the note and deed of trust, the purported waivers of the common law acceleration requirements. In *Mathis v. DCR Mortgage III Sub I, L.L.C.*, 389 S.W.3d 494 (Tex. App.—El Paso 2012, no pet.), the note included language that the court found sufficient under *Shumway* to waive notice of intent to accelerate and notice of acceleration. *Mathis*, 389 S.W.3d at 507. If the deed of trust securing the note had included no waivers of the common law acceleration requirements or waiver language identical to that in the note, the lender (who purported to accelerate the maturity of the note without sending an earlier, separate notice of intent to accelerate) would have prevailed based on the valid waiver language in the note. The deed of trust included, however, different and far less "clear and unequivocal" waiver language. Construing the note and the deed of trust together as a single instrument and—because acceleration is not favored in the law—applying strict scrutiny to the combined waiver provisions, the court found the purported waiver language in the deed of trust created a reasonable doubt as to whether the parties clearly and unequivocally intended to waive notice of intent to accelerate, thereby concluding that the purported acceleration (no notice of intent having been given) void as a matter of law. *Mathis*, 389 S.W.3d at 507–08.

§ 8.6 Right to Accelerate/Acceleration Affected by Lender's Actions

The cases cited in this section reveal the variability in outcomes on a lender's right to accelerate or the validity of a prior acceleration based on the actions of the lender. Because acceleration of the maturity begins the running of the statute of limitations, if the parties desire to undo the acceleration, a written reinstatement agreement executed by the lender and the debtor, wherein the acceleration is rescinded and prior or modified payment provisions are set, is advisable. In some circumstances, however, the lender may be deemed to have reinstated the loan without a written reinstatement agreement, thereby waiving acceleration. Such conduct might involve acceptance of a late or partial payment. Acceptance of late payments has been held to preclude the lender from validly accelerating maturity because of a subsequent late payment without giving a second notice of default and opportunity to cure. *See Dhanani Investments, Inc. v. Second Master Bilt Homes, Inc.*, 650 S.W.2d 220, 221–23 (Tex. App.—Fort Worth 1983, no writ) (finding that lender accepted seven late payments and attempted to accelerate without notice of intent to accelerate); *see also Highpoint of Montgomery Corp. v. Vail*, 638 S.W.2d 624, 627 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (finding that notice of intent to accelerate still required even though note contained clause providing that "time is of the essence" and that waiver of one opportunity to accelerate "shall not constitute a waiver on the part of the holder of the right to accelerate the same at any other time"); *McGowan v. Pasol*, 605 S.W.2d 728, 732 (Tex. Civ. App.—Corpus Christi 1980, no writ) (finding that acceptance of several late payments precluded holder from accelerating maturity because of single late payment, as note did not provide that failure to exercise option to accelerate on default did not constitute waiver of right on subsequent default).

But other cases have upheld waivers of notice of intent to accelerate even after acceptance of late payments if the note contains an express waiver in such circumstances. *See Emfinger v. Pumpco, Inc.*, 690 S.W.2d 88, 89 (Tex. App.—Beaumont 1985, no writ) (clause provided, "Failure to exercise this option upon any default shall not constitute a waiver of the right to exercise it in the event of any subsequent default."), *disapproved on other grounds by Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991); *see also Zeller v. University Savings Ass'n*, 580 S.W.2d 658, 660–61 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

In *Dillard v. Broyles*, 633 S.W.2d 636, 645 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.), the court found that a substantial delay (twenty-two months) between the date of the notice of acceleration and the date of notice of sale did not invalidate the sale since "[l]aches and stale demand are peculiarly available against the assertion of equitable rights, and may not be invoked to resist the enforcement of a purely legal right." *Dillard*, 633 S.W.2d at 645. Acceleration of maturity was not waived where a lender accepted two years' payments on the note pending the mortgagor's bankruptcy. *Thompson v. Chrysler First Business Credit Corp.*, 840 S.W.2d 25, 30–31 (Tex. App.—Dallas 1992, no writ). A creditor may revoke its acceleration of a debt's maturity if the debtor has not detrimentally relied on the acceleration. *Swoboda v. Wilshire Credit Corp.*, 975 S.W.2d 770, 776–77 (Tex. App.—Corpus Christi 1998), *disapproved on other grounds by Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 570 (Tex. 2001).

A lender may reestablish the waiver of notice of intent-to-accelerate provisions by giving the debtor notice that no further late payments will be accepted and that the lender will insist on strict compliance with the terms of the note. *See Bowie National Bank v. Stevens*, 532 S.W.2d 67, 68–69 (Tex. 1975); *Slivka v. Swiss Avenue Bank*, 653 S.W.2d 939, 941–42 (Tex. App.—Dallas 1983, no writ), *disapproved on other grounds by Shumway*, 801 S.W.2d at 894.

Once the note's maturity has been accelerated, the lender may be put to an election if the maker tenders past-due installments. The lender may be required to either accept the past-due installments and cancel the acceleration or refuse the tendered installments, return them to the maker, and proceed with the foreclosure. *Stergios v. Babcock*, 568 S.W.2d 707, 708 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

A lender is prevented from accelerating the maturity of a note if the mortgagor's default was the result of accident, mistake, or the inequitable conduct of the lender. *See Hiller v. Prosper Tex, Inc.*, 437 S.W.2d 412, 414–15 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) (finding that mortgagee failed to provide information to mortgagor regarding amount of substantial excess proceeds in escrow account, which mortgagor requested be used to pay accruing monthly installments).

Waiver of the contract terms by the lender does not occur merely because the holder of the note does not immediately declare default. *Slaughter Investment Co. v. Cooper*, 597 S.W.2d 455, 457 (Tex. Civ. App.—Dallas 1980, no writ).

Waiver by the lender of some rights is not waiver of strict performance of other rights. *See Bluebonnet Savings Bank, F.S.B. v. Grayridge Apartment Homes, Inc.*, 907 S.W.2d 904, 911 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (finding that bank repeatedly passing on posted foreclosure sales did not waive right to finally foreclose when bank's attorneys notified debtor that passing of sale did not constitute waiver by bank of its right to foreclose).

§ 8.7 Partial Payment in Accord and Satisfaction; Inadequate Payment

Care should be taken by the lender in accepting partial payments. Acceptance of a partial-payment check with the notation that it is "in payment of all claims" or "payment in full" may result in the borrower's debt being paid in full. *See, e.g., Boland v. Mundaca Investment Corp.*, 978 S.W.2d 146 (Tex. App.—Austin 1998, no pet.); *Hixson v. Cox*, 633 S.W.2d 330 (Tex. Civ. App.—Dallas 1982, writ ref'd n.r.e.).

The amount owing must be paid in order to cure default. *See Arguelles v. Kaplan*, 736 S.W.2d 782, 784 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.); *Forestier v. San Antonio Savings Ass'n*, 564 S.W.2d 160, 164–65 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.). The amount due includes principal, interest accrued, and attorney's fees. *French v. May*, 484 S.W.2d 420, 426–27 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.). If a dispute exists about the amount due, the debtor must tender the amount the debtor believes in good faith to be due in order to obtain an injunction. *See Lee v. Howard Broadcasting Corp.*, 305 S.W.2d 629 (Tex. Civ. App.—Houston 1957, writ dism'd by agr.); *see also Church v. Rodriguez*, 767 S.W.2d 898 (Tex. App.—Corpus Christi 1989, no writ).

§ 8.8 Demand for Payment Should Include Demand for Rents

In 2011 the Texas legislature enacted Texas Property Code chapter 64, Assignment of Rents to Lienholder, also known as the Texas Assignment of Rents Act (TARA). *See* Acts 2011, 82d Leg., R.S., ch. 636 (S.B. 889), eff. June 17, 2011. Upon the enactment of TARA, all assignments of rent in Texas became collateral assignments (as opposed to the "absolute assignment with license-back" common in Texas since *Taylor v. Brennan*, 621 S.W.2d 592, 594 (Tex. 1981)), regardless of the form the assignment takes in the security instrument. Tex. Prop. Code § 64.051(b). Chapter 9 of this manual covers TARA in depth, including the means by which an assignee of the rents (the holder of the note and deed of trust) may enforce the collateral assignment of rents against the assignor of the rents. See language demanding payment of rents and proceeds to which the assignee is entitled under TARA in forms 8-2 through 8-4 and forms 9-1 and 9-2 in this manual.

§ 8.9 Treatment of Guarantors

Even though commercial real estate loan guaranties in Texas are often more replete with waivers than the other customary documents that evidence and secure such a loan, there appears to be no requirement that notice of intent to accelerate be given to a guarantor of the debt (absent contractual language to the contrary). *See Miller v. University Savings Ass'n*, 858 S.W.2d 33, 36 (Tex. App.—Houston [14th Dist.] 1993, writ denied). For an excellent discussion of other cases in which guarantors were not afforded a variety of rights of note makers, see *Long v. NCNB–Texas National Bank*, 882 S.W.2d 861, 866 (Tex. App.—Corpus Christi 1994, no writ) (holding that guarantor was not entitled to notice of foreclosure sale served under section 51.002 of the Texas Property Code); *Goff v. Southmost Savings & Loan Ass'n*, 758 S.W.2d 822, 824–25 (Tex. App.—Corpus Christi 1988, writ denied) (waiver in guaranty upheld); and *Micrea, Inc. v. Eureka Life Insurance Co. of America*, 534 S.W.2d 348, 357 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (notice to guarantor of acceleration waived and not properly pleaded). A guarantor is, however, a debtor within the meaning of sections 9.102(a)(28) and (60) and 9.611 of the Texas Business and Commerce Code. *See Carroll v. General Electric Credit Corp.*, 734 S.W.2d 153, 154–55 (Tex. App.—Houston [1st Dist.] 1987, no writ) (failure to notify guarantor of nonjudicial foreclosure sale of personal property bars assertion of deficiency claim on behalf of creditor); *see also Hernandez v. Bexar County National Bank*, 710 S.W.2d 684 (Tex. App.—Corpus Christi), *writ ref'd n.r.e. per curiam*, 716 S.W.2d 938 (Tex. 1986); *Peck v. Mack Trucks, Inc.*, 704 S.W.2d 583 (Tex. App.—Austin 1986, no writ).

Notwithstanding the *Miller* case, the *Long* case, and the various cases cited in *Long* that do not confer on guarantors all of the rights of a note maker, prudence suggests that the demands and notices that a lender may choose or be obligated to send to a note maker (debtor) also be served on each guarantor.

§ 8.10 Limitations on Installment Notes

Nonnegotiable installment notes are subject to a four-year statute of limitations under state law.

Tex. Civ. Prac. & Rem. Code § 16.004(a)(3). Negotiable installment notes are subject to a six-year statute of limitations under state law. Tex. Bus. & Com. Code § 3.118(a). Unlike the limitations period for foreclosure of a real property lien securing an installment note (which, according to section 16.035(e) of the Civil Practice and Remedies Code, does not begin to run until the maturity date of the last installment), the limitations period to sue to enforce an installment note begins to run on the due date of each installment. Tex. Bus. & Com. Code § 3.118(a) (as to negotiable installment notes); *Gabriel v. Alhabbal*, 618 S.W.2d 894, 897 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Lufkin Nursing Home, Inc. v. Colonial Investment Corp.*, 491 S.W.2d 459, 463 (Tex. Civ. App.—Amarillo 1973, no writ) (as to nonnegotiable installment notes). Because of the foregoing considerations, lenders have historically included in their loan documents the right to accelerate the maturity of an installment debt upon default.

§ 8.11 Practice Tips

§ 8.11:1 Reasonable Notice to Cure

For loans not secured by the debtor's residence, the lender and its counsel may wish to afford the debtor a reasonable time under the circumstances to cure a default before acceleration of the secured debt, even if the governing loan documents include valid waivers of the common law acceleration requirements. A common practice in Texas is to give the debtor at least ten days after receipt of the demand letter to cure the default. At least two courts have held cure periods of ten days or less to be reasonable. *See Hammond v. All Wheel Drive Co.*, 707 S.W.2d 734, 737–38 (Tex. App.—Beaumont 1986, no writ) (relying on presentation requirements of former Texas Business and Commerce Code section 3.504 (now section 3.501) requiring payment by close of next business day following presentment); *Investors Realty Trust v. Carlton Corp.*, 541 S.W.2d 289, 290–91 (Tex. Civ. App.—Dallas 1976, no writ) (finding ten-day period sufficient under circumstances).

§ 8.11:2 Coordination between Debtor and Its Counsel

The attorney for the lender, as soon as practicable before mailing any notice to the debtor, should check with the lender to verify that it has not accepted late payment or agreed to a delay in accelerating the debt. Posting notice of foreclosure when the lender and the debtor have agreed to some form of repayment could expose the lender to liability. It is advisable for the attorney to send all proposed correspondence to the debtor first to the lender for review, allowing the lender, among other things, to verify that the address(es) listed for the debtor is/are the debtor's last known address(es) according to the records of the lender. Tex. Prop. Code § 51.0001(2). The attorney may also wish to advise the lender not to send notices of payoff due or computer-generated dunning letters to the debtor once the matter is placed with the attorney.

§ 8.11:3 Mailing Correspondence to Debtor

All correspondence should be sent (and must be sent in the case of a loan secured by the debtor's residence) by certified mail. To substantiate delivery, the notice letters should be sent with return receipt requested. Additionally, the attorney should have the mailing receipt stamped by the post office to prove mailing. These procedures are useful to counter the argument that the debtor never received notice. *See Handelman v. Handelman*, 608 S.W.2d 298, 300–301 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (discussing certified mail receipt provision requiring signature by obligor on green card); *Hensley v. Lubbock National Bank*, 561 S.W.2d 885, 891 (Tex. Civ. App.—Amarillo 1978, no writ) (finding sworn denial of receipt of notice some evidence of nonnotification of sale).

The attorney for the lender may also wish to send a duplicate demand letter by regular mail at the same time the certified letter is sent. Often, even though the certified letter is returned marked "refused," the letter sent by regular mail is not returned. A certificate of mailing (PS Form 3817) stamped at the post office serves as proof of mailing the letter by regular mail. If the attorney does not have all notice mail stamped at the post office, special procedures should be adopted in the attorney's mail room to substantiate mailing. The attorney may wish to have the person handling the mailing log the actual deposit of the mail (time, date, and place) and should at least have that person sign a mailing affidavit at the time of mailing. Both the certified mail and regular mail envelopes should be marked "Forwarding and Address Correction Requested." Receipts of certified mail should be monitored to determine if address problems exist before actually foreclosing. The client should be informed of the attorney's receipt of green return-receipt cards. Copies of the green cards may simply be mailed to the lender as they are received.

§ 8.11:4 Resending Notices

At least two objectives should be paramount in the notice process: (1) getting notice to the debtor in a reasonable time to cure the default and (2) minimizing the debtor's trial defenses based on perceived unreasonable conduct of the lender. The lender should be prepared to restart the notice process if any of the multitude of possible mailing and mail-receipt problems develop (for example, wrong address, changed address, divorce, and separate addresses). Acceleration and foreclosure are harsh remedies strictly construed against the lender. Delaying the process by a month is much less costly than defending the propriety of the sale and the entitlement to a deficiency because of mailing problems.

§ 8.11:5 Curing Defective Notice

A defective notice may be cured by a subsequent corrected notice. *Slusky v. Coley*, 668 S.W.2d 930, 933 (Tex. App.—Houston [14th Dist.] 1984, no writ).

Form 8-1

Notice of Abandonment, Waiver, Rescission, and Withdrawal of Acceleration of Debt

[Name and address of obligor]

Re: Notice of Abandonment, Waiver, Rescission, and Withdrawal of Acceleration of Debt secured by the deed of trust recorded in **[recording data]** of the real property records of **[county]** County, Texas, under Texas Civil Practice and Remedies Code section 16.038

Property Address:	**[Address of property]**
Borrower(s) or Obligor(s):	**[Name(s) of borrower(s) or obligor(s)]**
Lender or Mortgagee:	**[Name of lender or mortgagee]**
Mortgage Servicer:	**[Name of mortgage servicer]**
Effective Date:	**[Date]**

[Salutation]

[Name of mortgage servicer] ("Mortgage Servicer") is the duly authorized agent for loan servicing administration of Obligor's loan agreement debt ("Debt") for its principal, the mortgagee, as evidenced by a note secured by a security instrument generally known as the Deed of Trust that encumbers the real property and improvements described as:

Select one of the following.

[Recite legal description]

Or, if legal description is more than five lines long, attach legal description as exhibit.

See legal description attached.

Continue with the following.

[Name of mortgagee] or its Mortgage Servicer ("Mortgagee"), on its behalf, has voluntarily abandoned and withdrawn its option under the loan agreement to exercise the contractual right to immediate payment of the Debt from Obligor after giving notice of intent to accelerate and notice of acceleration of the maturity of the Debt. Therefore, to Obligor's benefit but to Mortgagee's detriment, the terms of Obligor's loan agreement are restored to its original terms and conditions, including the maturity date, and Obligor may make the loan payments according to the original loan agreement's payment schedule. The effective date of the Mortgagee's abandonment, withdrawal, relinquishment, or rescission of its right to immediate payment of the Debt is when Mortgagee mailed this notice to Obligor at Obligor's last known address in accordance with Texas Civil Practice and Remedies Code section 16.038 and abandoned any previous acceleration of the maturity of the Debt.

The abandonment, withdrawal, relinquishment, or rescission of any or all previous notices or acts of acceleration, whether expressed or implied, does not waive or suspend the Mortgagee—or its successor or assigns—the right in the future to reaccelerate the maturity of Obligor's Debt and declare the Debt immediately due.

Mortgagee has appointed the undersigned as its duly authorized agent to execute this instrument on its behalf for the purposes herein stated.

Sincerely yours,

____

[Name of attorney, mortgage servicer, or mortgagee]

STATE OF TEXAS)

COUNTY OF)

BEFORE ME, the undersigned notary public, on this day personally appeared [**name of affiant**], known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [**specify**] day of [**month**], [**year**].

____
Notary Public, State of Texas

Certified Mail No. [**number**]
Return Receipt Requested

[Reserved]

Form 8-2

Note: When preparing this form, the attorney should carefully review Tex. Prop. Code §§ 51.0001, 51.0025, and 51.0075 and Tex. Bus. & Com. Code §§ 3.203 and 3.301 to ensure any reference to a person accurately describes the role the person holds or performs in the context of a foreclosure proceeding, e.g., references to "noteholder," "beneficiary," "owner," "lender," "obligor of the debt," "mortgagor," "mortgagee," or "mortgage servicer" as appropriate.

Demand for Payment and Notice That Note Has Matured by Its Terms

[**Date**]

[**Name and address of borrower**]

Re: Demand for payment and notice that note has matured by its terms pursuant to the following instruments, among others (collectively, the "Loan Documents"):

[**Exact title of deed of trust**] ("Deed of Trust"):

Dated:	[**Date**]
Grantor:	[**Name of grantor**]
Trustee:	[**Name of trustee**]
Lender:	[**Name of lender**]
Recorded in:	[**Recording data**] of the real property records of [**county**] County, Texas [**include if applicable:** being in renewal and extension of [**exact title of deed of trust**] recorded in [**recording data**] of the real property records of [**county**] County, Texas]

Secures: [**Exact title of promissory note**] ("Note") in the original principal amount of $[**amount**], executed by [**name of borrower**] ("Borrower") and payable to the order of Lender [**include if applicable:** and all other indebtedness of Borrower to Lender]

Include the following if applicable.

Modifications and Renewals: [**Describe most recent document(s) known to preparer, using exact title(s)**] (as used herein, the terms "Note" and "Deed of Trust" mean the Note and Deed of Trust as so modified, renewed, and/or extended)

And/Or

Assignment: The Note [and/,] the liens and security interests of the Deed of Trust [, and the Guaranty] were transferred and assigned to [**name of beneficiary**] ("Beneficiary") by an instrument dated [**date**], recorded in [**recording data**] of the real property records of [**county**] County, Texas

And/Or

Guaranty: The Note [and all other indebtedness of Borrower to Lender] is guaranteed by a [**exact title of guaranty**] dated [**date**], and executed by [**name of guarantor**] in favor of Lender

Continue with the following.

> If the loan is being serviced pursuant to a servicing agreement and the servicer is to receive payment of past-due amounts and/or contacted about the amount past due, the last sentence of the following paragraph should be revised to name the servicer, its address, and contact person.

[**Salutation**]

This letter is written at the request and on behalf of our client, [Lender/Beneficiary]. The Note matured by its terms on [**date**] and remains due and payable. Borrower and any other party obligated on the Note are given notice that Borrower's failure to pay the amounts due constitutes a monetary default under the terms of the Note and the Deed of Trust. Demand is hereby made for (1) payment in full of the past-due amounts, together with all lawful accrued and unpaid interest due until the date of payment, on or before [**time**] [A.M./P.M.] on [**date that is at least twenty days from date of this letter**] by cashier's check at the offices of [Lender/Beneficiary] at [**location**], attention: [**name**] [**include if applicable:** , or by wire transfer in accordance with instructions furnished by [**name**] at [Lender/Beneficiary]], and (2) payment by Grantor of rents and proceeds of any rents to which [Lender/Beneficiary] is entitled under the Loan Documents and Texas Property Code chapter 64, Assignment of Rents to Lienholder.

If payment of all amounts that are then currently due and owing under the Note are not received by [Lender/Beneficiary] by the time and date stated above, [Lender/Beneficiary] intends to (1) enforce payment of the Note against Borrower and each other person or entity obligated therefor (except to the extent that the Note is nonrecourse or any party's liability has been limited by contract); (2) commence nonjudicial proceedings to foreclose the liens and security interests existing under the Deed of Trust (foreclosure of such liens and security interests would be by a sale of the real property and personal property, if any, described in the Deed of Trust, pursuant to the power of sale existing under the Deed of Trust); and (3) exercise some or all of the other rights and remedies available to [Lender/Beneficiary] under the Loan Documents, at law, or in equity.

If any party who receives this letter is a debtor in a bankruptcy proceeding subject to the provisions of the United States Bankruptcy Code (title 11 of the United States Code), this letter is merely intended to be written notice of the defaults under the Note in compliance with the Loan Documents and applicable law. This letter is not an act to collect, assess, or recover a claim against that party, nor is this letter intended to violate any provisions of the Code. Any and all claims that [Lender/Beneficiary] asserts against that party will be properly asserted in compliance with the Code in the bankruptcy proceeding. In addition, all of [Lender/Beneficiary]'s claims, demands, and accruals regarding the Loan Documents, whenever made, and whether for principal, interest, or otherwise, are intended to comply in all respects, both independently and collectively, with all applicable usury laws, and are accordingly limited so that all applicable usury laws are not violated.

Nothing contained in this letter is intended to waive any default or event of default; waive any rights, remedies, or recourses available to [Lender/Beneficiary]; or be an election of remedies resulting from any default that may exist with respect to the Loan Documents.

Include the following if applicable.

Please understand that no communication, written or oral, that Borrower [or Grantor] has had or may have with [Lender/Beneficiary] concerning any modification, renewal, extension, or restructure of the Loan Documents, including any deed in lieu of foreclosure, waiver of deficiency, or agreed foreclosure in any way modifies this letter or constitutes consent to the nonpayment of the Note or a waiver by [Lender/Beneficiary] of any of the remedies described herein. There are currently no modification, renewal, extension, or settlement agreements between Borrower [, Grantor,] and [Lender/Beneficiary] with regard to the Note and Deed of Trust, except as noted above, and all proposals made by [Borrower/Grantor] to [Lender/Beneficiary] relating to any of the foregoing are rejected.

Continue with the following.

You may contact [**name**] of [**name of lender or beneficiary**] at [**address and telephone number**], regarding any questions that you may have, including the outstanding balance of the past-due amounts on the Note as of any particular date. If you have any questions that you believe I can answer, you or your attorney may contact me at the telephone number or address listed below.

> As required by Tex. Prop. Code § 51.002(i), include language substantially similar to the following that is conspicuously printed in bold-faced or underlined type.

Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.

> Continue with the following.

Sincerely yours,

____

[**Name of attorney**]
Attorney for [**name of lender or beneficiary**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certified Mail No. [**number**]
Return Receipt Requested
c: [**name of lending officer**]
c: [**name of grantor, if applicable**]
c: [**name of borrower's counsel, if applicable**]
c: [**name of general partner(s) of borrower, if applicable**]
c: [**name of guarantor, if applicable**]
c: [**name of assumptor, if applicable**]

Form 8-3

Note: When preparing this form, the attorney should carefully review Tex. Prop. Code §§ 51.0001, 51.0025, and 51.0075 and Tex. Bus. & Com. Code §§ 3.203 and 3.301 to ensure any reference to a person accurately describes the role the person holds or performs in the context of a foreclosure proceeding, e.g., references to "noteholder," "beneficiary," "owner," "lender," "obligor of the debt," "mortgagor," "mortgagee," or "mortgage servicer" as appropriate.

Demand for Payment and Notice of Intent to Accelerate

[**Date**]

[**Name and address of borrower**]

Re: Demand for payment and notice of intention to accelerate unpaid principal balance regarding the following instruments, among others (collectively, the "Loan Documents"):

[**Exact title of deed of trust**] ("Deed of Trust"):

Dated:	[**Date**]
Grantor:	[**Name of grantor**]
Trustee:	[**Name of trustee**]
Lender:	[**Name of lender**]
Recorded in:	[**Recording data**] of the real property records of [**county**] County, Texas [**include if applicable:** being in renewal and extension of [**exact title of deed of trust**] recorded in [**recording data**] of the real property records of [**county**] County, Texas]
Secures:	[**Exact title of promissory note**] ("Note") in the original principal amount of $[**amount**], executed by [**name of bor-**

rower] ("Borrower") and payable to the order of Lender [**include if applicable:** and all other indebtedness of Borrower to Lender]

Include the following if applicable.

Modifications and Renewals: [**Describe most recent document(s) known to preparer, using exact title(s)**] (as used herein, the terms "Note" and "Deed of Trust" mean the Note and Deed of Trust as so modified, renewed, and/or extended)

And/Or

Assignment: The Note [and/,] the liens and security interests of the Deed of Trust [, and the Guaranty] were transferred and assigned to [**name of beneficiary**] ("Beneficiary") by an instrument dated [**date**], recorded in [**recording data**] of the real property records of [**county**] County, Texas

And/Or

Guaranty: The Note [and all other indebtedness of Borrower to Lender] is guaranteed by a [**exact title of guaranty**] dated [**date**], and executed by [**name of guarantor**] in favor of Lender

Continue with the following.

If the loan is being serviced pursuant to a servicing agreement and the servicer is to receive payment of past-due amounts and/or contacted about the amount past due, the last sentence of the following paragraph should be revised to name the servicer, its address, and contact person.

[**Salutation**]

This letter is written at the request and on behalf of our client, [Lender/Beneficiary]. Borrower has failed to make payment of amounts owing under the Note. Borrower and any other party obligated on the Note are given notice that Borrower's failure to pay the amounts due constitutes a monetary default under the terms of the Note and the Deed of Trust. Demand is hereby made for (1) payment in full of the past-due amounts, together with all lawful accrued and unpaid interest due until the date of payment, on or before [**time**] [A.M./P.M.] on [**date that is at least twenty days from date of this letter**] by cashier's check at the offices of [Lender/Beneficiary] at [**location**], attention: [**name**] [**include if applicable:** , or by wire transfer in accordance with instructions furnished by [**name**] at [Lender/Beneficiary]], and (2) payment by Grantor of rents and proceeds of any rents to which [Lender/Beneficiary] is entitled under the Loan Documents and Texas Property Code chapter 64, Assignment of Rents to Lienholder.

If payment of all amounts that are then currently due and owing under the Note are not received by [Lender/Beneficiary] by the time and date stated above, [Lender/Beneficiary] intends to (1) accelerate the maturity of the indebtedness evidenced by the Note and secured by the Deed of Trust and declare the entire unpaid principal balance of the Note, plus all lawful accrued and unpaid interest thereon, to be immediately due and payable; (2) enforce payment of the Note against Borrower and each other person or entity obligated therefor (except to the extent that the Note is nonrecourse or any party's liability has been limited by contract); (3) commence nonjudicial proceedings to foreclose the liens and security interests existing under the Deed of Trust (foreclosure of such liens and security interests would be by a sale of the real property and personal property, if any, described in the Deed of Trust, pursuant to the power of sale existing under the Deed of Trust); and (4) exercise some or all of the other rights and remedies available to [Lender/Beneficiary] under the Loan Documents, at law, or in equity.

If any party who receives this letter is a debtor in a bankruptcy proceeding subject to the provisions of the United States Bankruptcy Code (title 11 of the United States Code), this letter is merely intended to be written notice of the defaults under the Note in compliance with the Loan Documents and applicable law. This letter is not an act to collect, assess, or recover a claim against that party, nor is this letter intended to violate any provisions of the Code. Any and all claims that [Lender/Beneficiary] asserts against that party will be properly asserted in compliance with the Code in the bankruptcy proceeding. In addition, all of [Lender/Beneficiary]'s claims, demands, and accruals regarding the Loan Documents, whenever made, and whether for principal, interest, or otherwise, are intended to comply in all respects, both independently and collectively, with all applicable usury laws, and are accordingly limited so that all applicable usury laws are not violated.

Nothing contained in this letter is intended to waive any default or event of default; waive any rights, remedies, or recourses available to [Lender/Beneficiary]; or be an election of remedies resulting from any default that may exist with respect to the Loan Documents.

Include the following if applicable.

Please understand that no communication, written or oral, that Borrower [or Grantor] has had or may have with [Lender/Beneficiary] concerning any modification, renewal, extension, or restructure of the Loan Documents, including any deed in lieu of foreclosure, waiver of deficiency or agreed foreclosure, in any way modifies this letter or constitutes consent to the nonpayment of the Note or a waiver by [Lender/Beneficiary] of any of the remedies described herein. There are currently no modification, renewal, extension, or settlement agreements between Borrower [, Grantor,] and [Lender/Beneficiary] with regard to the Note and Deed of Trust, except as noted above, and all proposals made by [Borrower/Grantor] to [Lender/Beneficiary] relating to any of the foregoing are rejected.

Continue with the following.

You may contact [name] of [name of lender or beneficiary] at [address and telephone number], regarding any questions that you may have, including the outstanding balance of the past-due amounts on the Note as of any particular date. If you have any questions that you believe I can answer, you or your attorney may contact me at the telephone number or address listed below.

As required by Tex. Prop. Code § 51.002(i), include language substantially similar to the following that is conspicuously printed in bold-faced or underlined type.

Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.

Continue with the following.

Sincerely yours,

____

[Name of attorney]
Attorney for [name of lender or beneficiary]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certified Mail No. [number]
Return Receipt Requested
c: [name of lending officer]
c: [name of grantor, if applicable]
c: [name of borrower's counsel, if applicable]
c: [name of general partner(s) of borrower, if applicable]
c: [name of guarantor, if applicable]

c: [**name of assumptor, if applicable**]

Form 8-4

Note: When preparing this form, the attorney should carefully review Tex. Prop. Code §§ 51.0001, 51.0025, and 51.0075 and Tex. Bus. & Com. Code §§ 3.203 and 3.301 to ensure any reference to a person accurately describes the role the person holds or performs in the context of a foreclosure proceeding, e.g., references to "noteholder," "beneficiary," "owner," "lender," "obligor of the debt," "mortgagor," "mortgagee," or "mortgage servicer" as appropriate.

Notice of Acceleration

[**Date**]

[**Name and address of borrower**]

Re: Notice of acceleration regarding the following instruments, among others (collectively, the "Loan Documents"):

[**Exact title of deed of trust**] ("Deed of Trust"):

Dated:	[**Date**]
Grantor:	[**Name of grantor**]
Trustee:	[**Name of trustee**]
Lender:	[**Name of lender**]
Recorded in:	[**Recording data**] of the real property records of [**county**] County, Texas [**include if applicable:** being in renewal and extension of [**exact title of deed of trust**] recorded in [**recording data**] of the real property records of [**county**] County, Texas]
Secures:	[**Exact title of promissory note**] ("Note") in the original principal amount of $[**amount**], executed by [**name of bor-**

rower] ("Borrower") and payable to the order of Lender [**include if applicable:** and all other indebtedness of Borrower to Lender]

Include the following if applicable.

Modifications and Renewals: [**Describe most recent document(s) known to preparer, using exact title(s)**] (as used herein, the terms "Note" and "Deed of Trust" mean the Note and Deed of Trust as so modified, renewed, and/or extended)

And/Or

Assignment: The Note [and/,] the liens and security interests of the Deed of Trust [, and the Guaranty] were transferred and assigned to [**name of beneficiary**] ("Beneficiary") by an instrument dated [**date**], recorded in [**recording data**] of the real property records of [**county**] County, Texas

And/Or

Guaranty: The Note [and all other indebtedness of Borrower to Lender] is guaranteed by a [**exact title of guaranty**] dated [**date**], and executed by [**name of guarantor**] in favor of Lender

And/Or

Substitute Trustee: [**Name of substitute trustee**]

[**Salutation**]

This letter is written at the request and on behalf of our client, [Lender/Beneficiary]. Written notice dated [**date**], was served on Borrower by [**name**] on behalf of [Lender/Beneficiary] by certified mail, return receipt requested, informing Borrower of the existence of one or more defaults under the Note and the Deed of Trust ("Defaults"). The Note, among other things, constitutes part of the indebtedness secured by the Deed of Trust ("Indebtedness"). In that notice, demand was made on Borrower to pay the unpaid past-due amounts then owing under the Note and Borrower was advised of [Lender/Beneficiary]'s intention to accelerate the maturity of the Note if the Defaults were not cured.

According to the records of [Lender/Beneficiary], Borrower has not cured the Defaults. Therefore, [Lender/Beneficiary], by this letter, accelerates the maturity of the Indebtedness (including all unpaid principal of, and all lawful accrued and unpaid interest and other lawful amounts due under, the Note) and declares the entire Indebtedness immediately due and payable. [Lender/Beneficiary] makes demand (1) on Borrower and on all persons and entities obligated on the Note (except to the extent that obligation is expressly limited by written contract or applicable law) for payment in full of the entire Indebtedness and (2) on Grantor for payment of rents and proceeds of any rents to which [Lender/Beneficiary] is entitled under the Loan Documents and Texas Property Code chapter 64, Assignment of Rents to Lienholder.

If any party who receives this letter is a debtor in a bankruptcy proceeding subject to the provisions of the United States Bankruptcy Code (title 11 of the United States Code), this letter is merely intended to be written notice of the defaults under the Note in compliance with the Loan Documents and applicable law. This letter is not an act to collect, assess, or recover a claim against that party, nor is this letter intended to violate any provisions of the Code. Any and all claims that [Lender/Beneficiary] asserts against that party will be properly asserted in compliance with the Code in the bankruptcy proceeding. In addition, all of [Lender/Beneficiary]'s claims, demands, and accruals regarding the Loan Documents, whenever made, and whether for principal, interest, or otherwise, are intended to comply in all respects, both independently and collectively, with all applicable usury laws, and are accordingly limited so that all applicable usury laws are not violated.

Nothing contained in this letter is intended to waive any default or event of default; waive any rights, remedies, or recourses available to [Lender/Beneficiary]; or be an election of remedies resulting from any default that may exist with respect to the Loan Documents.

You may contact [**name**] of [**name of lender or beneficiary**] at [**address and telephone number**], regarding any questions that you may have, including the outstanding balance of the past-due amounts on the Note as of any particular date. If you have any questions that you believe I can answer, you or your attorney may contact me at the telephone number or address listed below.

> As required by Tex. Prop. Code § 51.002(i), include language substantially similar to the following that is conspicuously printed in bold-faced or underlined type.

Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.

> Continue with the following.

Sincerely yours,

____

[Name of attorney]
Attorney for **[name of lender or beneficiary]**
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certified Mail No. **[number]**
Return Receipt Requested
c: **[name of lending officer]**
c: **[name of grantor, if applicable]**
c: **[name of borrower's counsel, if applicable]**
c: **[name of general partner(s) of borrower, if applicable]**
c: **[name of guarantor, if applicable]**
c: **[name of assumptor, if applicable]**

[Reserved]

Form 8-5

Note: When preparing this form, the attorney should carefully review Tex. Prop. Code §§ 51.0001, 51.0025, and 51.0075 and Tex. Bus. & Com. Code §§ 3.203 and 3.301 to ensure any reference to a person accurately describes the role the person holds or performs in the context of a foreclosure proceeding, e.g., references to "noteholder," "beneficiary," "owner," "lender," "obligor of the debt," "mortgagor," "mortgagee," or "mortgage servicer" as appropriate.

Letter to Debtor—Notice of Acceleration and Transmittal Letter for Notice of Foreclosure Sale

[**Date**]

[**Name and address of debtor**]

Re: Notice of foreclosure sale on [**date**], by [**name**], [Trustee/Substitute Trustee] of property described in deed of trust dated [**date**], executed by [**name of mortgagor**] and recorded [**date**], in [**recording data**] of the real property records of [**county**] County, Texas, securing the obligations therein described (the "Indebtedness") originally payable to [**name of mortgagee**] and now owned by [**name of noteholder**]

[**Salutation**]

This letter and the enclosed copy of the Notice of Foreclosure Sale are being sent to you as [an obligor on the Indebtedness evidenced by the promissory note dated [**date**], in the original principal amount of $[**amount**], executed by [**name**] and payable to the order of [**name**]/an owner of the collateral] described in the enclosed notice. Default has occurred in the payment of the Indebtedness secured by the deed of trust. I have been employed by [**name of noteholder**] (the "Noteholder"), to represent it in collecting the Indebtedness and enforcing the referenced deed of trust.

I have been appointed the [trustee/substitute trustee] to conduct the foreclosure sale of the property encumbered by the deed of trust.

I am enclosing a copy of the Notice of Foreclosure Sale, which is being posted on the public notice board of the [**county**] County Courthouse and in accordance with the provisions of the deed of trust. You are informed that the public auction of the property described in the Notice of Foreclosure Sale is scheduled for Tuesday, [**date**], between the hours of 10:00 A.M. and 4:00 P.M. at the [**county**] County Courthouse. The sale will begin no earlier than [**time**] [A.M./P.M.] or no later than three hours thereafter. The sale will be held at the location described in the Notice of Foreclosure Sale.

Select one of the following.

The total amount due on this indebtedness as of the date set forth below is as follows:

$[**amount**] principal and

$[**amount**] unpaid interest accrued through [**date**] for a total of

$[**amount**] balance

plus attorney's fees permitted the Noteholder under the note evidencing the Indebtedness and deed of trust. The Indebtedness is accruing interest at the rate of $[**amount**] per day in addition to the interest accrued through [**date**].

Or

As of this date, $[**amount**] in principal, plus all unpaid accrued interest thereon, is due and owing to the Noteholder. Interest will continue to accrue on the matured unpaid principal in accordance with the terms of the Indebtedness until this debt is paid. Additionally, the note evidencing the Indebtedness and deed of trust provide for reimbursement to the Noteholder of its reasonable attorney's fees and expenses incurred in collecting this debt. You may contact me at [**address and phone number**] to obtain a complete statement of the balance owed on your debt to the Noteholder and to arrange payment of this debt.

Include the following if applicable.

Demand is hereby made that you pay the Noteholder the Indebtedness now owed that is secured by the deed of trust.

Continue with the following.

You will be able to prevent this foreclosure by paying the Noteholder before the foreclosure sale the total amount now owed that is secured by the referenced deed of trust, plus the additional interest that accrues to the date of payment and all attorney's fees incurred by the Noteholder in collecting this Indebtedness. Payment must be made in cash or by cashier's check received by Noteholder or by me before conducting the foreclosure sale. Partial payments will be applied on the Indebtedness but will not prevent the foreclosure sale. If you mail payment and it is received after the sale, it will have been sent too late. To the extent permitted under the terms of the note and applicable law, the obligors on the note will be liable for any deficiency remaining after application of the net foreclosure sale proceeds to the Indebtedness. You may contact the undersigned about the balance owed on the Indebtedness.

Include the following if applicable.

You are notified that the undersigned is attempting to collect this debt and any information obtained from you will be used for such purpose.

Continue with the following.

If you have any questions, please contact me.

Sincerely yours,

____

[Name of attorney]
Attorney for **[name of noteholder]**
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Enc.

Certified Mail No. **[number]**
Return Receipt Requested
c: **[name of noteholder]**

Include attachments.

Chapter 9

Collection of Rent by Lender before Foreclosure

The editors gratefully acknowledge Edward F. Walker for his contribution to this chapter.

§ 9.1 Introduction

§ 9.1:1 Historical Background

Rents and proceeds (rents that have been paid) are key elements of the mortgage lender's collateral. Typically mortgage lenders have obtained assignments of rent. However, before June 17, 2011, Texas had no statutory guidance regarding how to obtain a valid, perfected security interest in or possession of rents or proceeds before foreclosure. These issues were left to the courts. Texas applies the lien theory of mortgages to real property, including rents, proceeds, and leases. *Taylor v. Brennan*, 621 S.W.2d 592, 594 (Tex. 1981); *see also*, *In the Matter of Village Properties, Ltd.*, 723 F.2d 441, 445 (5th Cir. 1984); *In re Spears*, 352 B.R. 83, 89 (Bankr. N.D. Tex. 2006). A valid foreclosure of title to the underlying real property would pass title to the rents to the purchaser at foreclosure. Before such a foreclosure, a mortgage lender could obtain possession of rents only by holding an absolute assignment of rents. *Taylor*, 621 S.W.2d at 594. An absolute assignment carried with it a number of problems, including possible reduction of the loan obligation by an amount of the value of the rents and proceeds absolutely assigned to the mortgage lender. *Taylor*, 621 S.W.2d at 594. For a more extensive discussion of the foregoing issues, see Edward Walker, *Drafting Assignments of Rent under the Texas Assignment of Rents Act*, *in* Advanced Real Estate Drafting Course, State Bar of Texas, Austin (2012).

All of this left Texas lawyers in a quandary about how best to obtain a perfected lien or security interest in rents from mortgaged real estate, obtain possession of rents prior to foreclosure, and avoid the attendant risks.

§ 9.1:2 Enactment of Texas Property Code Chapter 64

In response to the issues created by the *Taylor* decision and the problems that resulted from efforts to address those issues, and based on the recommendation of the Texas Assignment of Rents Act Committee of the Real Property, Probate and Trust Law Section of the State Bar of Texas, in 2011 the Texas legislature enacted Texas Property Code chapter 64, Assignment of Rents to Lienholder, also known as the Texas Assignment of Rents Act (TARA). *See* Acts 2011, 82d Leg., R.S., ch. 636 (S.B. 889), eff. June 17, 2011. Upon the enactment of TARA, all assignments of rent in Texas became collateral, regardless of the form the assignment takes in the security instrument. Tex. Prop. Code § 64.051(b). Except for the automatic creation of assignments of interest in each security instrument, TARA is retroactive. *See* Acts 2011, 82d Leg., R.S., ch. 636, § 3(a) (S.B. 889), *as amended by* Acts 2013, 83d Leg., R.S., ch. 453, § 12(a) (S.B. 848), eff. June 14, 2013. TARA provides detailed guidelines for obtaining a perfected security interest in and the collection of rents and proceeds by an assignee before consummation of a foreclosure. TARA was amended effective June 14, 2013, to make technical corrections. Acts 2013, 83d Leg., R.S., ch. 453 (S.B. 848), eff. June 14, 2013.

§ 9.2 Assignment of Rents Forms

It is not essential to have an express assignment of rents. TARA provides that an enforceable security instrument automatically creates an assignment of rents arising from real property securing an obligation under the security instrument, unless the security instrument provides otherwise. Tex. Prop. Code § 64.052(b). If, for example, an enforceable deed of trust is recorded in the county in which the real property securing an obligation is located, a perfected security interest will be created automatically in the rents arising from that property. Debtors and their tenants may prefer to leave the automatic assignment of rents unmodified. However, assignees may prefer to modify the assignor- and tenant-protective provisions of TARA outlined below.

Assignees desiring to modify the application of assignor- or tenant-protective provisions of TARA must obtain written agreements from the assignor or tenant to each such modification. Form 9-1 in this manual contains provisions modifying the assignor- and tenant-protective provisions of TARA as well as other terms lenders have obtained from debtors prior to enactment of TARA. *See also* Edward Walker, *Drafting Assignments of Rent under the Texas Assignment of Rents Act*, *in* Advanced Real Estate Drafting Course, State Bar of Texas, Austin (2012); Lorin Williams Combs & Jeffrey Warren Matthews, *Texas Annotated Assignment of Rents*, Mortgage Lending Institute, University of Texas, Austin (2012). Form 9-1 is an abbreviated version of an annotated assignment of rents and lease appended to *Drafting Assignments of Rent under the Texas Assignment of Rents Act*.

Alternatively, an assignee may incorporate an express assignment of rents into the State Bar of Texas's deed of trust form using form 9-2. Form 9-2 may be adapted, *mutatis mutandis*, and inserted into any other form of deed of trust assignment of rents or security agreement.

It is essential to understand the provisions of TARA before using any of the forms associated with this chapter. The forms will not address all of the parties' concerns and each form must be adapted to the facts and circumstances of the mortgage loan transaction in question.

§ 9.3 Texas Assignment of Rents Act

§ 9.3:1 Short Title

Chapter 64 of the Texas Property Code does not contain a short title. For convenience, this chapter refers to that chapter 64 as "TARA."

§ 9.3:2 Definitions

Reference to the definitions contained in TARA is indispensible to understanding and using TARA. The following are some of the more important definitions:

Assignment of rents means a transfer of an interest in rents in connection with an obligation secured by real property from which the rents arise. Tex. Prop. Code § 64.001(2). The definition contains carve-outs for assignments of rent made under section 306.101 of the Texas Finance Code, which are sometimes referred to as equity kickers, and true sales of rents, which means a transfer of rents that is not a disguised secured transaction. The first exception refers to a form of assignment of rent that is intended as noninterest additional consideration that may be charged in connection with qualified commercial loans. See section 306.101 of the Texas Finance Code, which provides in pertinent part:

> The parties to a qualified commercial loan agreement may contract for the following charges: . . . (4) an option or other right created by contract, conveyance, or otherwise, to participate in or own a share of the income, revenues, production, or profits: (A)

Chapter 10

Borrower Challenges to Foreclosure and Lender Responses

[Reserved]

Chapter 10

Borrower Challenges to Foreclosure and Lender Responses

The editors gratefully acknowledge Jason L. Sanders for his contribution to this chapter. In addition, Mr. Sanders would like to recognize Marc D. Cabrera, Stephen M. Cole, and Grant C. Johnson for their assistance.

§ 10.1 Introduction

Texas foreclosure law is constantly evolving due to the abundance of home-mortgage litigation in Texas. To save their properties from foreclosure, or to rescind foreclosure sales, borrowers regularly assert a wide variety of state and federal law causes of action against lenders, banks, investors, and mortgage servicers in connection with foreclosure actions. In addition to claims under state law, borrowers frequently bring a variety of claims related to origination and servicing issues under federal consumer protection statutes, such as the Truth in Lending Act (15 U.S.C. §§ 1601–1667f), the Real Estate Settlement Procedures Act (12 U.S.C. §§ 2601–2617), the Fair Debt Collection Practices Act (15 U.S.C. §§ 1692–1692p), the Fair Credit Reporting Act (15 U.S.C. §§ 1681–1681x), and the Servicemembers Civil Relief Act (50 U.S.C. §§ 3901–4043). This chapter provides an overview of the jurisdiction and forum issues applicable to foreclosure actions, the common claims borrowers assert in foreclosure actions in which borrowers seek to invalidate liens or contest foreclosure, and the lender responses and defenses to such claims.

§ 10.2 Jurisdiction and Forum

Selection of the best forum in which to litigate is an important and possibly an outcome determinative decision in a foreclosure action. Borrowers generally tend to favor state court over federal court in hopes of gaining a home-court advantage. Notably, however, a significant number of foreclosure cases in Texas are litigated in its federal courts based on diversity jurisdiction applying Texas law, so federal authority is particularly persuasive and encompasses the majority of the jurisprudence on Texas foreclosure law in recent years. *See Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 253 n.2 (5th Cir. 2013) (citing *Bierwirth v. BAC Home Loans Servicing, L.P.*, No. 03-11-644-CV, 2012 WL 3793190, at *1 n.3 (Tex. App.—Austin Aug. 30, 2012, no pet.) (mem. op.) ("Federal authority is persuasive here because a great amount of home-mortgage litigation in Texas is tried in its federal courts, applying Texas foreclosure law.")); *Robeson v. Mortgage Electronic Registration Systems, Inc.*, No. 02-10-00227-CV, 2012 WL 42965, at *4 n.4 (Tex. App.—Fort Worth Jan. 5, 2012, pet. denied) (mem. op.) (explaining that federal authority, although not controlling, is "particularly persuasive" in this area). This section discusses the advantages and disadvantages to the parties of litigating in federal court and provides an overview of the basis for removal and the various tactics borrowers use to avoid litigating in federal court.

§ 10.2:1 Advantages to Lender of Litigating in Federal Court

There are numerous reasons defendant lenders remove cases to federal court, including, but not limited to: (1) less home-court advantage for local borrowers; (2) uniformity of, and familiarity with, the federal rules and certainty regarding obligations and expectations, which may vary in state court; (3) more consistent treatment; (4)

better development of case law; (5) federal judges are generally more experienced in handling foreclosure-related cases; (6) federal courts can be more receptive to out-of-state authorities in the absence of controlling law; (7) cases tend to proceed, and get resolved, at a faster pace, which generally results in lower litigation costs and less business disruption; (8) the jury pool is usually broader and covers a wider demographic; (9) federal judges, who benefit from having law clerks, generally have more time to review pleadings and analyze motions; (10) federal courts are more likely to dismiss a case based on an early dispositive motion; and (11) the availability of motions to dismiss under rule 12 of the Federal Rules of Civil Procedure. Whether a case should be removed to federal court requires the exercise of judgment, balancing of the risks, and consideration of the particular circumstances of the case.

§ 10.2:2 Removal to Federal Court

The removal of a case filed in state court to federal court is proper if the federal court has federal subject matter jurisdiction over the matter because of a federal question or diversity jurisdiction. 28 U.S.C. § 1441(a). The relevant removal statutes include: 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1332 (diversity jurisdiction); 28 U.S.C. § 1441 (removal of civil actions); and 28 U.S.C. § 1446 (procedure for accomplishing removal).

§ 10.2:3 Federal Question Jurisdiction

Foreclosure-related actions are removable based on federal question jurisdiction if the borrowers assert claims under federal laws, such as the Truth in Lending Act, Real Estate Settlement Procedures Act, Fair Debt Collection Practices Act, Fair Credit Reporting Act, or Servicemembers Civil Relief Act. *See* 28 U.S.C. § 1331. (See below and in chapters 7 and 33 in this manual for further discussion of these laws.) If a case presents federal and nonfederal claims, a federal court has supplemental jurisdiction to hear the nonfederal claims under certain circumstances. *See* 28 U.S.C. § 1367. When Freddie Mac (and by implication, Fannie Mae) is a party, federal question jurisdiction exists. *Gallien v. Washington Mutual Home Loans Inc.*, 294 F. App'x 882 (5th Cir. 2008) (per curiam); *see also* 28 U.S.C. § 1452(f).

§ 10.2:4 Diversity Jurisdiction

Foreclosure actions are also frequently removed to federal court under diversity jurisdiction because the amount in controversy regularly exceeds $75,000, and the borrower and the defendants are often citizens of different states. *See* 28 U.S.C. § 1332.

§ 10.2:5 Removal Deadlines

A defendant must remove a case to federal court within thirty days of being served with the summons and complaint. *See* 28 U.S.C. § 1446(b)(1); *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347–48 (1999). In cases with multiple defendants, "[e]ach defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons . . . to file the notice of removal." 28 U.S.C. § 1446(b)(2)(B). Section 1446 contains additional requirements related to removal, including consent of other defendants and requirements related to cases that are not immediately removable. *See* 28 U.S.C. § 1446.

§ 10.2:6 Common Tactics Employed to Prevent Removal

Borrowers that desire to remain in state court to litigate their foreclosure action often employ various tactics to avoid federal court jurisdiction. These tactics, include, but are not limited to, joining nominal, improper, unknown, or fictitious defendants, or failing to allege an amount in controversy.

Nominal and/or Improperly Joined Defendants: Borrowers join nondiverse defendants that do not have any real interest in the outcome of the litigation, which are referred to as "nominal" or "improperly joined" defendants, to avoid federal diversity jurisdiction. This practice is known as "fraudulent joinder" in other circuits, but the Fifth Circuit has adopted the phrase "improper joinder." *Mumfrey v. CVS Pharmacy, Inc.*, 719 F.3d 392, 401 n.14 (5th Cir. 2013). Improper joinder can be shown in two ways: (1) actual fraud in the pleading of jurisdictional facts or (2) the inability of the plaintiff to establish a cause of action against the nondiverse party in state court. *Mumfrey*, 719 F.3d at 401 (citing *McKee v. Kansas City Southern Railway Co.*, 358 F.3d 329, 333 (5th Cir. 2004)). The citizenship of "nominal" or "improperly joined" defendants is not considered in determining whether complete diversity exists. *See, e.g., Cuevas v. BAC Home Loans Servicing, LP*, 648 F.3d 242, 249 (5th Cir. 2011); *Larroquette v. Cardinal Health 200, Inc.*, 466 F.3d 373, 376 (5th Cir. 2006).

Trustees and substitute trustees under a deed of trust, contract lien, or security instrument are frequently joined as defendants in foreclosure actions to defeat diversity jurisdiction. In Texas, a security interest in real property is created by a deed of trust. *See Asonibe v. Flagstar Bank, FSB*, No. 3:12-CV-2113-M (BH), 2013 WL 1828842, at *8 (N.D. Tex. Apr. 5, 2013). A deed of trust is a mortgage with a power to sell on default. *See Wiley v. U.S. Bank, N.A.*, No. 3:11-CV-1241-B, 2012 WL 1945614, at *4 (N.D. Tex. May 30, 2012). "Though a deed of trust is formally distinct from a mortgage, Texas courts tend to use the two terms interchangeably." *Reinagel v. Deutsche Bank National Trust Co.*, 735 F.3d 200, 222 n.1 (5th Cir. 2013).

A trustee named solely in his capacity as a trustee is a nominal party and the trustee's presence does not defeat diversity jurisdiction. *See Turner v. JP Morgan Chase Bank, N.A.*, No. 3:12-CV-2701-M (BF), 2013 WL 2896883, at *3 (N.D. Tex. June 13, 2013) (trustee named solely in action to enjoin foreclosure is a nominal party whose presence does not affect diversity jurisdiction); *see also* Tex. Prop. Code § 51.007 (providing procedure for dismissal of causes of action asserted against trustees solely in their capacity as trustees under a deed of trust, contract lien, or security instrument).

In addition, alleging various causes against the law firm handling the foreclosure generally does not defeat federal diversity jurisdiction. *Adams v. Chase Bank*, No. 3:11-CV-3085-M, 2012 WL 2122175, at *3 (N.D. Tex. May 11, 2012), *rec. adopted*, 2012 WL 2130907 (N.D. Tex. June 12, 2012) (plaintiff could not recover against improperly joined foreclosure law firm on breach of contract claim); *Marsh v. Wells Fargo Bank, N.A.*, 760 F. Supp. 2d 701, 710 (N.D. Tex. 2011) (plaintiffs could not state declaratory judgment claim against improperly joined foreclosure counsel and substitute trustees); *Mortberg v. Litton Loan Servicing, L.P.*, No. 4:10-CV-668, 2011 WL 4431946, at *4 (E.D. Tex. Aug. 30, 2011), *rec. adopted*, 2011 WL 4440170 (E.D. Tex. Sept. 22, 2011) (remand to state court not appropriate where foreclosure counsel was improperly joined); *Cook v. Wells Fargo Bank, N.A.*, No. 3:10-CV-0592-D, 2010 WL 2772445, at *3 (N.D. Tex. July 12, 2010) (plaintiff could not recover for breach of contract against improperly joined foreclosure counsel and substitute trustee).

Borrowers also sometimes unsuccessfully attempt to add the property itself as a defendant to defeat diversity jurisdiction and claim that the property is a Texas citizen that can be served by publication. But the property is not a person or entity, and therefore, it is not a necessary or proper party to foreclosure-related lawsuits. *Perry v. JPMorgan Chase*, No. 4:11-CV-524, 2011 WL 5837297, at *1 n.1 (E.D. Tex. Oct. 28, 2011). Accordingly, joining the property as a defendant will not defeat federal diversity jurisdiction.

Unknown or Fictitious Defendants: To defeat federal diversity jurisdiction, borrowers have attempted to join unknown defendants to the lawsuit. For purposes of removal, however, the citizenship of an unknown defendant is irrelevant. *See* 28 U.S.C. § 1441(b)(1) ("In determining whether a civil action is removable on the basis of [diversity] . . . the citizenship of defendants sued under fictitious names shall be disregarded."); *see also Powell v. Bank of America, N.A.*, No. 4:12CV512, 2012 WL 5931552, at *1 (E.D. Tex. Oct. 17, 2012) (quoting 28 U.S.C. § 1441(b)(1)); *Jones v. American Home Products Corp.*, 344 F. Supp. 2d 500, 501 n.1 (E.D. Tex. 2004) (court disregarded citizenship of defendants that were sued under fictitious names "John Does # 1–200").

Failure to Allege the Amount in Controversy: To prevent removal and avoid federal court, borrowers will often not allege an amount in controversy in their lawsuit. Many courts in Texas have held that if the right to property is called into question, for example where a party seeks to enjoin a foreclosure sale, the value of the property constitutes the amount in controversy. *See generally Copeland v. U.S. Bank National Ass'n*, 485 F. App'x 8, 9 (5th Cir. 2012) (finding that in action to enjoin foreclosure "the amount in controversy exceeds $75,000 due to the value of the subject property"); *Nationstar Mortgage LLC v. Knox*, 351 F. App'x 844, 848 (5th Cir. 2009); *Lindsey v. JPMorgan Chase Bank National Ass'n*, No. 3:12-CV-4535-M-(BH), 2013 WL 2896897, at *16 (N.D. Tex. June 13, 2013) ("[W]here the plaintiff puts the title to property in dispute, the value of the property is the proper measure of the amount in controversy."); *Purported Lien or Claim Against Bond v. Barrett Daffin Frappier Turner & Engel, LLP*, No. G-12-188, 2013 WL 1619691, at *4 (S.D. Tex. Mar. 24, 2013); *Anderson v. Wells Fargo Bank, N.A.*, No. 4:12CV764, 2013 WL 1196535, at *2 (E.D. Tex. Feb. 22, 2013); *DTND Sierra Investments LLC v. CitiMortgage, Inc.*, No. SA-12-CV-1178-XR, 2013 WL 123006, at *1 (W.D. Tex. Jan. 8, 2013).

Accordingly, the value of the property at issue in a foreclosure action is generally the appropriate measure of the amount in controversy on which to base removal. *See Copeland*, 485 F. App'x at 9. At least one Texas federal court has remanded cases originally removed on the basis of diversity jurisdiction where the amount in controversy is not set forth in the petition, even when the value of the property exceeds the jurisdictional minimum. *See Branch v. Federal National Mortgage Corp.*, No. 4:13-CV-408, 2013 WL 2396793, at *3 (N.D. Tex. May 31, 2013) ("[T]he sole goal of plaintiff's action is to avoid or delay a foreclosure sale and to be able to retain possession of the property. . . . The value to the plaintiff of his rights in the litigation is, at most, the value of his interest in the property, not the value of the property itself."); *Thomas v. Wells Fargo Bank, N.A.*, No. 4:12-CV-108-A, 2013 WL 708220, at *3 (N.D. Tex. Feb. 27, 2013) (same).

In eviction suits, courts have held that a party may not rely on the value of the property for removal purposes in forcible detainer actions because title to the property is not a matter in controversy. *See Deutsche Bank Trust Co. Americas v. Sexton*, No. 4:13CV485, 2013 WL 4547453, at *2 (E.D. Tex. Aug. 26, 2013).

In addition to the value of the property, courts may consider actual damages, exemplary damages, and attorney's fees to determine the amount in controversy. *See White v. FCI U.S.A., Inc.*, 319 F.3d 672, 675–76 (5th Cir. 2003).

§ 10.3 Typical State Law Claims

Some of the most frequently asserted state law theories, claims, and/or challenges made by borrowers in connection with foreclosure actions include, but are not limited to, the "show-me-the-note" and "split-the-note" theories, challenges to assignments and securitizations, attempted wrongful foreclosure, wrongful foreclosure, breach of contract, promissory estoppel, fraud, statutory fraud, negligent misrepresentation, breach of fiduciary duty, breach of the duty of good faith and fair dealing, waiver, quiet title, trespass to try title, slander of title, accounting, and violations of the Uniform Commercial Code, Texas Deceptive Trade Practices–Consumer Protection Act, section 12.002 of the Texas Civil Practice and Remedies Code, Texas Debt Collection Practices Act, and Texas Constitution.

§ 10.3:1 Attempted Wrongful Foreclosure

Even if a foreclosure has not occurred, borrowers still claim that the attempted foreclosure was wrongful and assert a claim for "attempted wrongful foreclosure." Texas law does not recognize such a cause of action. *See Felchak v. JP Morgan Chase Bank, N.A.*, No. H-12-2847, 2013 WL 1966972, at *4 n.1 (S.D. Tex. May 10, 2013) (dismissing wrongful foreclosure claim because no foreclosure had occurred); *Sauer v. Wells Fargo Bank, N.A.*, No. SA-12-CV-1085-XR, 2013 WL 1824094, at *2 (W.D. Tex. Apr. 30, 2013) (same); *Westbrooks v. GMAC Mortgage, LLC*, No. 3:12-CV-3719-M (BF), 2013 WL 2093062, at *3 (N.D. Tex. Apr. 16, 2013) ("Texas courts have yet to recognize a claim for 'attempted wrongful foreclosure.'"); *Mortberg v. Litton Loan Servicing, L.P.*, No. 4:10-CV-668, 2011 WL 4431946, at *6 (E.D. Tex. Aug. 30, 2011) ("Texas law does not recognize an action for attempted wrongful foreclosure."); *Biggers v. BAC Home Loans Servicing, LP*, 767 F. Supp. 2d 725, 729 (N.D. Tex. 2011); *Peterson v. Black*, 980 S.W.2d 818, 823 (Tex. App.—San Antonio 1998, no pet.).

§ 10.3:2 Wrongful Foreclosure

Borrowers assert claims for wrongful foreclosure for a variety of reasons (for example, lack of proper notice, the foreclosing party did not produce the note or is not the owner or holder of their note, the deed of trust was split from the note and is no longer enforceable, there was no default under the loan documents, an inadequate selling price, and failure to send preforeclosure notices).

To state a claim for wrongful foreclosure, a borrower must establish (1) a defect in the foreclosure sale proceedings, (2) a grossly inadequate selling price, and (3) a causal connection between the defect and the grossly inadequate selling price. *See Hurd v. BAC Home Loans Servicing, LP*, 880 F. Supp. 2d 747, 766 (N.D. Tex. 2012) (citing *Sauceda v. GMAC Mortgage Corp.*, 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.)). Borrowers often claim that a defect in the foreclosure proceedings occurred based on allegations that they did not receive notice of the foreclosure sale. However, there is no requirement under Texas law that the borrower actually receive the notice. *See Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 256 (5th Cir. 20 13) ("Service of notice is complete when the notice is sent via certified mail.") (citing Tex. Prop. Code § 51.002(e)); *Lambert v. First National Bank of Bowie*, 993 S.W.2d 833, 835 (Tex. App.—Fort Worth 1999, pet. denied) ("There is no requirement that the [borrower] receive actual notice."). Further, the "weight of Texas authority rejects a determination of gross inadequacy where . . . property sells for over 60% of fair market value, and precedent exists for disregarding a jury finding to the contrary." *FDIC v. Blanton*, 918 F.2d 524, 531–32 (5th Cir. 1991); *Christensen v. Bank of America, N.A.*, No. 5:10-CV-176-C, 2011 WL 7070568, at *3 (N.D. Tex. Nov. 4, 2011) (holding that a sales price that was 58.94 percent of fair market value was not grossly inadequate as a matter of law). Moreover, a wrongful foreclosure claim is only available when the irregularity in the foreclosure sale causes the inadequate price for the property. *See Matthews v. Wells Fargo Bank, N.A.*, No. 3-10-CV-O-BD, 2011 WL 2429153, at *1 (N.D. Tex. May 27, 2011).

A borrower asserting a wrongful foreclosure claim "may seek two *alternative* remedies." *Diversified, Inc. v. Gibraltar Savings Ass'n*, 762 S.W.2d 620, 623 (Tex. App.—Houston [14th Dist.] 1988, writ denied). A borrower may elect to set aside, cancel, and rescind the foreclosure sale or recover damages in the amount of the value of the property less the indebtedness. *Diversified, Inc.*, 762 S.W.2d at 623. However, under Texas law, a borrower that remains in possession of property may be barred from recovery. *See Peterson v. Black*, 980 S.W.2d 818, 823 (Tex. App.—San Antonio 1998, no pet.) ("Recovery is conditioned on the disturbance of the mortgagor's possession based on the theory that the mortgagee must have committed a wrong similar to the conversion of personal property."); *see also Barcenas v. Federal Home Loan Mortgage Corp.*, No. H-12-2466, 2013 WL 286250, at *7 (S.D. Tex. Jan. 24, 2013) (holding that under Texas law, loss of possession is required to state a claim for wrongful foreclosure); *Burnette v. Wells Fargo Bank, N.A.*, No. 4:09-CV-370, 2010 WL 1026968, at *2–3 (E.D. Tex. Feb. 16, 2010); *Baker v. Countrywide Home Loans, Inc.*, No. 3:08-CV-0916-B, 2009 WL 1810336, at *4 (N.D. Tex. Jun. 24, 2009). Further, to set aside, cancel, or rescind a foreclosure sale, a borrower is required to tender the full amount due under the note. *See Lambert v. First National Bank of Bowie*, 993 S.W.2d 833, 835–36 (Tex. App.—Fort Worth 1999, pet. denied); *Fillion v. David Silvers Co.*, 709 S.W.2d 240, 246 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

Editors' Note: See, however, the following commentaries stating that if the sale should not have been conducted (for example, debt not due, fraud, or other fundamental invalidating circumstance exists), then it is wrongful and the mortgagor has an election to sue for damages, particularly in cases where the mortgaged property has been resold by the foreclosure sale bidder to a bona fide purchaser or the foreclosure sale purchaser has appropriated the mortgaged property for its own use or the property has sustained damage after the foreclosure sale. *See* William M. Howard, Annotation, *Recognition of Action for Damages for Wrongful Foreclosure—General Views*, 81 A.L.R. 6th 161 (2013); William M. Howard, Annotation, *Recognition of Action for Damages for Wrongful Foreclosure—Types of Actions*, 82 A.L.R. 6th 43 (2013).

The court in *Sauceda*, 268 S.W.3d 135, cited by *Hurd*, 880 F. Supp. 2d 747, 766, for the "grossly inadequate selling price" as a condition to recovery rule, relied on *Charter National Bank—Houston v. Stevens*, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied). The *Sauceda* court reversed the trial court's finding of no cause of action by determining that fact issues existed as to the service of the required twenty-one-day certified mail foreclosure notice and compliance by the mortgagee with its own thirty-day notice of intent to accelerate covenant. The court in *Stevens*, cited by *Sauceda*, held that a finding of a grossly inadequate bid was not required under the facts of the case. In upholding the trial court's award to the mortgagee of the difference between the mortgaged property's fair market value at the time of the wrongful foreclosure and the balance due on the mortgage debt, the *Stevens* court stated:

> We have traced the threads of Texas law on wrongful foreclosure back through more than one hundred years. Texas law conforms with the general rule found in other jurisdictions that mere irregularities in the conduct of the foreclosure sale will

> not vitiate the sale unless the irregularities result in injury to the mortgagor. 59 C.J.S. *Mortgages* § 572 (1949). In the development of Texas law, however, a universal need for the plaintiff to prove a *grossly inadequate selling price* may have inadvertently crept into the picture as to *all* lawsuits for wrongful foreclosure. We believe this to be an erroneous portrayal. It never was intended that there should be an automatic need to prove a *grossly inadequate selling price* in a situation where the bidding at a non-judicial foreclosure sale was deliberately "chilled" by the affirmative acts of a mortgagee and the injured mortgagor seeks a recovery of damages rather than a setting aside of the sale itself.
>
> Society and the injured mortgagor are properly served through money damages, if that election has been made, where deliberate acts of the mortgagee had a "chilling" effect on the bidding. Under such facts there seems to be no rational ground for requiring a finding that the foreclosure selling price was "grossly inadequate." Given proof of proximate cause, the damages should be recoverable.

Stevens, 781 S.W.2d at 371–74.

In so holding, the court set out its analysis of the decisions of the courts in *American Savings & Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581 (Tex. 1975); *University Savings Ass'n v. Springwoods Shopping Center*, 644 S.W.2d 705 (Tex. 1982); *Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965); *McKennon v. McGowan*, 11 S.W. 532 (Tex. 1889); *Allen v. Pierson*, 60 Tex. 604 (Tex. 1884); *Sparkman v. McWhirter*, 263 S.W.2d 832, 837 (Tex. Civ. App.—Dallas 1953, writ ref'd) and cases cited in *Pierson.* See also W. Mike Baggett & Brian Thompson Morris, 1 Texas Practice Guide, *Real Estate Litigation* § 4:189 (2013) and James N. Johnson, 2 Texas Practice Guide, *Real Estate Transactions* § 10:168 (2013).

§ 10.3:3 Show-Me-the-Note

The "show-me-the-note" theory began circulating in courts across the country in 2009. *Wells v. BAC Home Loans Servicing, L.P.*, No. W-10-CA-00350, 2011 WL 2163987, at *2 (W.D. Tex. Apr. 26, 2011) (citing *Stein v. Chase Home Finance, LLC*, No. 09–1995, 2010 WL 4736828, at *3 (D. Minn. Aug. 13, 2010) (collecting cases)). Proponents of this theory believe that only the holder of the original wet-ink signature note has the lawful power to initiate a nonjudicial foreclosure. *See, e.g., Carrie v. Chase Home Finance*, No. 3:12-CV-852-G-BN, 2013 WL 704943, at *3 (N.D. Tex. Feb. 1, 2013), *rec. adopted sub nom., Carrie v. JPMorgan Chase Bank, N.A.*, 2013 WL 705865 (N.D. Tex. Feb. 27, 2013); *Islamic Ass'n of DeSoto, Texas, Inc. v. Mortgage Electronic Registration Systems, Inc.*, No. 3:12-CV-613, 2012 WL 2196040, at *1 (N.D. Tex. June 15, 2012).

Borrowers often attempt to rely on chapter 3 of the Uniform Commercial Code, which regulates promissory notes and other negotiable instruments, to support such a claim. *See* Tex. Bus. & Com. Code § 3.102(a). "Article 3 provides that only holders and non-holders in possession can enforce a note." *Wells*, 2011 WL 2163987, at *2. A holder is a "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." *Wells*, 2011 WL 2163987, at *2 (citing Tex. Bus. & Com. Code § 1.201(b)(21)(A)). Accordingly, borrowers allege that, before nonjudicially foreclosing, the foreclosing party must prove that it is a holder by producing the original promissory note.

The Fifth Circuit, however, rejected the "show-me-the-note" theory. *See Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 253–54 (5th Cir. 2013). The *Martins* court recognized that Texas federal district courts had "roundly rejected this theory" because Texas foreclosure statutes "simply do not require possession or production of the original note" to conduct a nonjudicial foreclosure. *Martins*, 722 F.3d at 253 (internal citations and quotation marks omitted); *see also Casterline v. OneWest Bank, F.S.B.*, 537 F. App'x 314, 316 (5th Cir. July 2013) (per curiam) (following *Martins* and stating the "show-me-the-note" theory is meritless under Texas law); *Islamic Ass'n of DeSoto*, 2012 WL 2196040, at *2 (collecting cases criticizing the "show-me-the-note" theory); *Puente v. CitiMortgage, Inc.*, No. 3:13-CV-106-N, slip op. at 6 (N.D. Tex. Aug. 19, 2013) (citing *Martins* and holding that defendant did not need to possess note in order to foreclose under a deed of trust).

The Texas Property Code, which sets forth the requirements to conduct a nonjudicial foreclosure, does not require the production or possession of the original promissory note. *See* Tex. Prop. Code § 51.002(a)–(h).

In *Morlock, L.L.C. v. Bank of New York*, 448 S.W.3d 514 (Tex. App.—Houston [1st Dist.] 2014, pet. denied), the court held that Morlock, which had purchased the mortgaged property at a homeowners association (HOA) lien foreclosure sale, did not have standing to claim that a mortgage assignment from the original note payee to Countrywide, an intermediary in the chain of title of the mortgage to Bank of New York (BONY), was executed without authorization. However, in *Morlock, L.L.C. v. Nationstar Mortgage, L.L.C.*, 447 S.W.3d 42 (Tex. App.—Houston [14th Dist.] 2014, pet. denied), the fourteenth district court of appeals, in a decision issued shortly before the first district court of appeals decision with apparently similar facts, held that Morlock did have standing to challenge validity of the lien assignment in the chain of title to the mortgage because it sought to invalidate the assignment as a cloud on its title. Like the first district decision, the fourteenth district held that the Texas Property Code does not require a foreclosing party to prove its status as "holder" or "owner" of the secured note, but will look to see if the foreclosing party is a "mortgagee" under section 51.0001(4) of the Texas Property Code. Section 51.0001(4)(C) defines "mortgagee" as the "last person to whom the security interest has been assigned of record." Tex. Prop. Code § 51.0001(4)(C). BONY and Nationstar each were the last assignee of the security interest of record. In another case, *Vasquez v. Deutsche Bank National Trust Co.*, 441 S.W.3d 783 (Tex. App.—Houston [1st Dist.] 2014, no pet.), the court held that a borrower had standing to challenge a pending foreclosure by an alleged assignee of the mortgage on grounds that the assignment was forged. Note, however, that a federal district court in *Morlock, L.L.C. v. Bank of America, N.A.*, No. H-14-1678, 2015 WL 136654 (S.D. Tex. Jan. 9, 2015), distinguished the *Vasquez* case on the ground that the challenge in *Vasquez* went to the validity, not the voidability, of the assignment and noted that the same judge who decided *Vasquez* also decided *Morlock v. Bank of New York.*

For additional discussion, see section 34.9:2 in this manual.

§ 10.3:4 Split-the-Note

Another theory that borrowers often advance is that a transfer of a deed of trust by way of Mortgage Electronic Registration Systems, Inc. (MERS) or another assignor to an entity other than the holder of the note splits or bifurcates the note from the deed of trust, which renders a subsequent foreclosure sale null and of no force and effect. *See, e.g., Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 253 (5th Cir. 2013). Borrowers challenge MERS's role in the assignment of deeds of trust claiming it was never an owner or holder of their note. MERS is an electronic mortgage registration system and clearinghouse that tracks beneficial ownerships in, and servicing rights to, mortgage loans. *In re Mortgage Electronic Registration System (MERS) Litigation*, 659 F. Supp. 2d 1368, 1370 (J.P.M.L. 2009). Under section 51.0001(1) of the Texas Property Code, MERS is defined as a "book entry system," which means a "national book system for registering a beneficial interest in a security instrument that acts as a nominee for the grantee, beneficiary, owner, or holder of the security instrument and its successors and assigns." Tex. Prop. Code § 51.0001(1); *Richardson v. CitiMortgage, Inc.*, No. 6:10-cv-119, 2010 WL 4818556, at *5 (E.D. Tex. Nov. 22, 2010).

For a time, there was a split among courts in Texas as to the viability of the "split-the-note" theory. *Compare Wells v. BAC Home Loans Servicing, L.P.*, No. W-10-CA-00350, 2011 WL 2163987, at *3 (W.D. Tex. Apr. 26, 2011) ("[W]hile suits on a promissory note typically require possession, foreclosures do not. Under Texas law, a mortgage servicer can foreclose under a deed of trust, regardless of whether it is a holder."), *and Stevens v. Wells Fargo Bank, N.A.*, No. 4:12-CV-594-A, 2012 WL 5951087, at *3 (N.D. Tex. Nov. 27, 2012), *with McCarthy v. Bank of America, N.A.*, No. 4:11-CV-356-A, 2011 WL 6754064, at *3 (N.D. Tex. Dec. 22, 2011) ("If the holder of the deed of trust does not own or hold the note, the deed of trust serves no purpose, is impotent, and cannot be a vehicle for depriving the grantor of the deed of trust of ownership of the property described in the deed of trust."); *see also Routh v. Bank of America, N.A.*, No. SA-12-CV-244-XR, 2013 WL 427393, at *6 (W.D. Tex. Feb. 4, 2013) (discussing varying positions).

The divide among the federal district courts was settled in *Martins*, where the Fifth Circuit rejected the "split-the-note" theory, declaring it "inapplicable under Texas law where the foreclosing party is a mortgage servicer and the mortgage has been properly assigned." *Martins*, 722 F.3d at 255. The *Martins* court analyzed the arguments supporting the split-the-note theory, but determined that the "weight of Texas authority" supported the "dual nature of a note and deed of trust." *Martins*, 722 F.3d at 255. The court held that the right to recover a personal judgment for a debt secured by a lien and the right to have a foreclosure were "severable" rights, and thus, separate obligations. *Martins*, 722 F.3d at 255. Accordingly, when a deed of trust is assigned to a foreclosing party, the foreclosing party may foreclose without possessing the note. *Martins*, 722 F.3d at 255; *see also Wiley v. Deutsche Bank National Trust Co.*, 539 F. App'x 533, 536 (5th Cir. 2013) (citing *Martins* and rejecting "split-the-note" theory where deed of trust was properly assigned to foreclosing party); *Casterline v. OneWest Bank, F.S.B.*, 537 F. App'x 314, 317 (5th Cir. 2013) (per curiam) (following *Martins* and rejecting argument that "splitting the Security Instrument from the underlying Note, and separately assigning them, rendered the mortgage unenforceable").

For additional discussion, see section 34.9:3 in this manual.

§ 10.3:5 Assignment Challenges

In addition to "split-the-note" challenges to assignments, borrowers also allege defects in the assignment of their note or deed of trust.

Standing to Challenge Assignment: The Fifth Circuit has held that borrowers may challenge an assignment to which they are not a party, but only on grounds that the assignment is void, rather than merely voidable. *See Reinagel v. Deutsche Bank National Trust Co.*, 735 F.3d 220, 225 (5th Cir. 2013) ("Texas courts follow the majority rule that the obligor *may* defend 'on any ground which renders the assignment void.'") (quoting *Tri-Cities Construction, Inc. v. America National Insurance Co.*, 523 S.W.2d 426, 430 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ)); *Wiley v. Deutsche Bank National Trust Co.*, 539 F. App'x 533, 536 (5th Cir. 2013) (citing *Reinagel* and noting that party may challenge an assignment based on grounds which would render the assignment void); *Hull v. Ocwen Loan Servicing, LLC*, No. 3:12-cv-1098-M (BF), 2013 WL 3089050, at *3 (N.D. Tex. June 19, 2013); *Green v. Bank of America N.A.*, No. H-13-1092, 2013 WL 2417916, at *2 (S.D. Tex. June 4, 2013) (recognizing that borrowers only have standing to challenge assignments that are void, not those that are merely voidable); *Venegas v. U.S. Bank National Ass'n*, No. SA-12-CV-1123-XR, 2013 WL 1948118, at *5 (W.D. Tex. May 9, 2013) ("[T]his Court has recognized that Texas law permits a debtor to challenge an assignment on a ground that renders the assignment void or invalid, but a debtor may not challenge an assignment on a ground that renders the assignment merely voidable."); *Asonibe v. Flagstar Bank, FSB*, No. 3:12-CV-2113, 2013 WL 1828842, at *4 (N.D. Tex. Apr. 5, 2013); *Castle Mortgage Corp. v. GMAC Mortgage LLC*, No. 3:12-CV-1969-N-BF, 2013 WL 1123381, at *1 (N.D. Tex. Mar. 18, 2013) (rejecting per se bar to all claims by a borrower that pertain to an assignment of deed of trust); *Puente v. CitiMortgage, Inc.*, No. 3:11-CV-2509, 2012 WL 4335997, at *6 (N.D. Tex. Aug. 29, 2012) ("[A] careful review of Texas law persuades the Court that it is not completely accurate to say that one can never challenge assignments to which one is not a party.").

Challenge to Chain of Assignments: One such challenge that certain courts have determined borrowers have standing to bring is a challenge to the chain of assignments by which a party claims the right to foreclose. *Miller v. Homecomings Financial, LLC*, 881 F. Supp. 2d 825, 832 (S.D. Tex. 2012). In this regard, borrowers typically claim that there is no chain of assignments from the original lender to the entity that assigned the deed of trust to the foreclosing party, which renders the final assignment void and deprives the foreclosing party of the right to foreclose. *See Miller*, 881 F. Supp. 2d at 827. Borrowers also have standing to assert that an assignment never occurred, which would invalidate the foreclosing party's alleged right to foreclose. *See Ortiz v. Citimortgage, Inc.*, 954 F. Supp. 2d 581, 586–87 (S.D. Tex. June 2013).

Challenge to Robo-signed Assignments: Borrowers have further maintained that assignments that are "robo-signed" are void. *See, e.g., Reinagel*, 735 F.3d at 223. In this context, "robo-signing" refers to a variety of practices that borrowers allege are employed to perfect the right to foreclose. *See Reinagel*, 735 F.3d at 223–24. Robo-signing could include: (1) executing and acknowledging large quantities of transfer documents within a short period of time, often without the assignor's authorization and/or outside the presence of a notary certifying the acknowledgement, or (2) signing affidavits confirming the existence of missing loan documentation, without personal knowledge and/or outside the presence of a notary. *Reinagel*, 735 F.3d at 223–24. If the assignment was forged, then a challenge would be allowed because the assignment is void. *See Reinagel*, 735 F.3d at 227–28. However, if the challenged action would merely make the assignment voidable, such as a signatory fraudulently purporting to be a corporate officer, the borrower lacks standing to challenge the assignment. *Reinagel*, 735 F.3d at 226. Similarly, alleged defects in the acknowledgment of an assignment are insufficient to void the assignment. *See Reinagel*, 735 F.3d at 227–28. Thus, a borrower cannot base his claim on defective acknowledgments because the borrower is not a party to the assignment.

Fraudulent Assignments: Borrowers have also claimed assignments are fraudulent. Under Texas law, however, "deeds obtained by fraud . . . are voidable rather than void." *Smith v. Wells Fargo Bank, N.A.*, No. 3:12-cv-4633, 2013 WL 3324195, at *6 (N.D. Tex. June 28, 2013) (quoting *Poag v. Flories*, 317 S.W.3d 820, 826 (Tex. App.—Fort Worth 2010, pet. denied)). Thus, borrowers do not have standing to assert this challenge. *See Smith*, 2013 WL 3324195, at *6.

§ 10.3:6 Securitization Challenges

Assignments of loans into a securitization trust are also acts about which borrowers commonly complain. A regular claim is that the transfer occurred after the trust's closing date, thereby allegedly voiding the assignment. *See, e.g., Jones v. Deutsche Bank National Trust Co.*, No. 3:12-CV-3929, 2013 WL 3455716, at *6 (N.D. Tex. July 9, 2013). However, courts reject borrowers' attempts to support their claims with alleged violations of securitization agreements. *See Reinagel v. Deutsche Bank National Trust Co.*, 735 F.3d 220, 228 (5th Cir. 2013); *Rodriguez v. U.S. Bank, N.A.*, No. SA-12-CV-345-XR, 2013 WL 3146844, at *7 (W.D. Tex. June 18, 2013) ("Federal district courts in Texas have consistently held that a mortgagor does not have standing to challenge an assignment of a mortgage loan based on alleged violations of a [pooling and servicing agreement]."); *Auriti v. Wells Fargo Bank, N.A.*, No. 3:12-CV-334, 2013 WL 2417832, at *9 (S.D. Tex. June 3, 2013) ("[E]ven those courts taking a more generous approach [to borrowers' standing to challenge assignments] have held that plaintiffs cannot challenge a defendant's right to foreclose when the sole basis for the challenge is an alleged violation of a pooling and servicing agreement."); *Abruzzo v. PNC Bank, N.A.*, No. 4:11-CV-735-Y, 2012 WL 3200871, at *2 (N.D. Tex. July 30, 2012) ("Plaintiffs do not have standing to raise this type of challenge because they were not parties to the pooling-and-servicing agreement.").

Similarly, courts have also rejected arguments that the securitization of a loan splits or bifurcates the note from the deed of trust. *See Wallingsford v. Chase Bank, National Ass'n*, No. SA-12-CV-341-XR, 2013 WL 588755, at *5 (W.D. Tex. Feb. 12, 2013); *Naddour v. Nationstar Mortgage, LLC*, No. 3:11-CV-1096-B, 2012 WL 4473127, at *4 (N.D. Tex. Sept. 27, 2012).

§ 10.3:7 Economic Loss Doctrine

Under Texas law, the economic loss doctrine precludes recovery in tort when the loss complained of is the subject matter of a contract between the parties. *See Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 494–95 (Tex. 1991); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986); *Dewayne Rogers Logging, Inc. v. Propac Industries, Ltd.*, 299 S.W.3d 374, 382–83 (Tex. App.—Tyler 2009, pet. denied). In other words, tort damages are generally not recoverable unless the plaintiff suffers an injury that is independent and separate from the economic losses recoverable under a breach of contract claim. *See Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 45–47 (Tex. 1998); *Heil Co. v. Polar Corp.*, 191 S.W.3d 805, 815–18 (Tex. App.—Fort Worth 2006, pet. denied) (citing *D.S.A., Inc. v. Hillsboro Independent School District*, 973 S.W.2d 662, 663 (Tex. 1998)).

Defendants often assert the economic loss doctrine in defense to a variety of tort claims. Texas courts have held that the economic loss doctrine applies to claims for fraud, misrepresentation, negligence-based claims (including negligent misrepresentation claims) and Texas Deceptive Trade Practices–Consumer Protection Act (DTPA) claims that arise from a contract, such as a note or deed of trust. *See Kiper v. BAC Home Loans Servicing, LP*, Nos. 4:11-CV-3008, 4:11-CV-3363, 2012 WL 5456105, at *2 (S.D. Tex. Nov. 6, 2012) (fraud and misrepresentation); *Williams v. Federal National Mortgage Ass'n*, No. 2:11-CV-157-J, 2012 WL 443986, at *4 (N.D. Tex. Feb. 13, 2012); *Kiper v. BAC Home Loans Servicing, LP*, 884 F. Supp. 2d 561, 573 (S.D. Tex. 2012) (negligent misrepresentation); *Simms v. Jones*, 879 F. Supp. 2d 595, 602–03 (N.D. Tex. 2012) (holding that economic loss doctrine barred plaintiffs' DTPA claims).

Economic Loss and the TDCA: Courts have also applied the economic loss doctrine to Texas Debt Collection Act (TDCA) claims "premised on alleged misrepresentations where the actions taken by the lender were wrongful only because they violated the agreement between the borrower and lender." *Caldwell v. Flagstar Bank, FSB*, No. 3:12-cv-1855-K-BD, 2013 WL 705110, at *12 (N.D. Tex. Feb. 4, 2013), *rec. adopted*, 2013 WL 705876 (N.D. Tex. Feb. 26, 2013) (applying economic loss doctrine to dismiss claims under the TDCA); *see also Singh v. JPMorgan Chase Bank, N.A.*, No. 4:11-CV-607, 2012 WL 3904827, at *7 (E.D. Tex. July 31, 2012), *rec. adopted*, 2012 WL 3891060 (E.D. Tex. Sept. 7, 2012) (holding that because the deed of trust governed the conduct plaintiff alleged violated the TDCA, plaintiff could not recover under a tort theory); *McCartney v. CitiFinancial Auto Credit, Inc.*, No. 4:10-CV-424, 2010 WL 5834802, at *5 (E.D. Tex. Dec. 14, 2010), *rec. adopted*, 2011 WL 675386 (E.D. Tex. Feb. 16, 2011) (allegations of misrepresentation by attempting to collect a debt in violation of agreement stated breach of contract but not TDCA claim).

New Business Relationships: Certain courts, however, have held that fraud and negligent misrepresentation claims are not precluded by the economic loss doctrine where the allegations arise from entering into a new business relationship and/or offering a new service or product to a borrower, such as a loan modification. *See, e.g., Auriti v. Wells Fargo Bank, N.A.*, No. 3:12-CV-34, 2013 WL 2417832, at *5 (S.D. Tex. June 3, 2013) (noting that allegations of fraud relating to loan modification negotiations were not subject to economic loss rule because note and deed of trust did not "impose[ ] on Defendants a contractual obligation to provide . . . a modification"); *Ernster v. Bank of America, N.A.*, No. 2:12-CV-00098, 2012 WL 4798843, at *4 (S.D. Tex. Oct. 9, 2012) (economic loss rule did not bar negligent misrepresentation claim where alleged false representations related to a loan modification); *Hurd v. BAC Home Loans Servicing, LP*, 880 F. Supp. 2d 747, 763–64 (N.D. Tex. 2012) (negligent misrepresentation claim based on alleged false representations regarding possibility of obtaining a loan modification and plaintiff's eligibility for a loan modification was not barred by economic loss rule); *Jackson v. Wells Fargo Bank, N.A.*, No. 4:12CV524-RAS-DDB, 2013 WL 4414862, at *8 (E.D. Tex. Aug. 14, 2013).

Damages Recoverable Despite Bar: The economic loss doctrine also does not bar recovery for damages "over and above the economic loss to the subject matter of the note and deed of trust," such as mental anguish, lost opportunity to obtain other financing, or out-of-pocket expenses. *See Auriti*, 2013 WL 2417832, at *6 (quoting *Hurd*, 880 F. Supp. 2d at 764). Borrowers' attempts to allege damages unrelated to the note and deed of trust have been met with resistance. *See Rhodes v. Wells Fargo Bank, N.A.*, No. 3:10-CV-02347-L, 2012 WL 5363424, at *30 (N.D. Tex. Oct. 31, 2012), *vacated in part on other grounds*, 2013 WL 2090307 (N.D. Tex. May 14, 2013) (rejecting plaintiff's attempt to avoid economic loss rule by pleading damages beyond typical economic harm); *Wiley v. U.S. Bank, N.A.*, No. 3:11-CV-1241-B, 2012 WL 1945614, at *12 (N.D. Tex. May 30, 2012) ("Plaintiff attempts to circumvent the economic loss doctrine by alleging a variety of damages unrelated to the Note and Deed of Trust including attorneys' fees, lost time, emotional distress, and a lower credit rating. Such allegations are not sufficient to avoid the economic loss doctrine in this case.").

§ 10.3:8 Breach of Contract

Borrowers often assert breach of contract claims in connection with foreclosure-related actions. They premise such claims on alleged violations of various terms of the note and deed of trust. Borrowers have also brought breach of contract claims where a lender or servicer force places insurance on the property, which is typically much more expensive than insurance homeowners can otherwise obtain. Borrowers may also allege that they did not agree to allow the lender or servicer to pay for property taxes. Alleged oral promises also often form the basis of borrowers' breach of contract claims, including oral promises to (1) modify their loan, (2) not foreclose while a loan modification review is pending, and (3) review their loan for a modification.

Elements of Claim: To establish a breach of contract claim, a borrower must show (1) the existence of a valid contract, (2) performance or tender of performance, (3) breach by the defendant, and (4) damages resulting from the breach. *Obumseli v. Citimortgage, Inc.*, No. 4:12cv706, 2013 WL 3197911, at *2 (E.D. Tex. June 21, 2013) (citing *Cadillac Bar West End Real Estate v. Landry's Restaurants, Inc.*, 399 S.W.3d 703, 705 (Tex. App.—Dallas 2013, pet. denied)). A borrower suing for breach of contract is often himself in default under the note and deed of trust. The borrower's default under the note and deed of trust is a serious impediment to the ability to assert a breach of contract claim. To state a breach of contract claim, a borrower must show, among other things, that he performed under the terms of the note and deed of trust. *See May v. Wells Fargo Home Mortgage*, No. 3:12-CV-4597-D, 2013 WL 2984795, at *2 (N.D. Tex. June 17, 2013) ("Thus where the plaintiff has failed to perform a duty under the contract, such as the duty to pay his mortgage, he cannot maintain a breach of contract action."); *Enis v. Bank of America, N.A.*, No. 3:12-CV-0295, 2012 WL 4741073, at *3 (N.D. Tex. Oct. 3, 2012) ("Under Texas law, a party to a contract who is himself in default cannot maintain a suit for its breach.") (internal quotation omitted); *Steele v. Green Tree Servicing, LLC*, No. 3:09-CV-0603-D, 2010 WL 3565415, at *4 (N.D. Tex. Sept. 7, 2010); *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n*, 205 S.W.3d 46, 55 (Tex. App.—Dallas 2006, pet. denied). A borrower who does not perform his obligations under a contract cannot enforce the remaining terms against the other party. *See Long Trusts v. Griffin*, 222 S.W.3d 412, 415 (Tex. 2006). Thus, borrowers who have defaulted on their note and deed of trust obligations often are unable to recover under a breach of contract claim.

Failure to Identify Breached Provisions: Borrowers basing breach of contract claims on a violation of the note or deed of trust, or both, often fail to identify the provision of the note or deed of trust that was allegedly violated. *See Obumseli*, 2013 WL 3197911, at *2; *Coleman v. Bank of America, N.A.*, No. 3-11-CV-0430-G-BD, 2011 WL 2516169, at *1 (N.D. Tex. May 27, 2011), *rec. adopted*, 2011 WL 2516668 (N.D. Tex. June 22, 2011) (dismissing breach of contract claim where "plaintiff points to no specific provision in the Deed of Trust that was breached by defendant"). A borrower "suing for breach of contract must point to a specific provision in the contract that was breached by the defendant." *King v. Wells Fargo Bank, N.A.*, 3-11CV-0945-M-BD, 2012 WL 1205163, at *2 (N.D. Tex. Mar. 20, 2012); *see also Sandhar v. Grewal*, No. H-08-2348, 2009 WL 175073, at *4 (S.D. Tex. Jan. 23, 2009) (stating that a plaintiff "must plead . . . the provisions of the contract allegedly breached" to survive a motion to dismiss); *Case Corp. v. Hi-Class Business Systems of America, Inc.*, 184 S.W.3d 760, 769–70 (Tex. App.—Dallas 2005, pet. denied) ("A breach of contract occurs when a party fails to perform an act that it has expressly or impliedly promised to perform.").

Failure to Receive Contractual Notices: In addition to the requirements of the Texas Property Code, the loan documents typically require certain notices to be sent before foreclosing on the property. Accordingly, if a lender or servicer does not send the notices required in the note and deed of trust, such as the notice of acceleration, a borrower can assert a breach of contract claim for such failure. *See Mathis v. DCR Mortgage III Sub I, LLC*, 952 F. Supp. 2d 828, 837 (W.D. Tex. 2013) (holding that plaintiff stated breach of contract claim where he alleged defendant did not provide proper notice of acceleration under loan documents).

Premature Payment of Taxes: Borrowers may complain that the defendant prematurely paid the taxes due and owing on the property, and in connection therewith, issued delinquency notices to them. *See White v. Wells Fargo Bank, N.A.*, No. 3:09-CV-126, 2010 WL 4942174, at *3–4 (N.D. Tex. Dec. 1, 2010). Borrowers may also assert that the defendant wrongfully collected escrow funds to cover premiums for hazard insurance on the property. *White*, 2010 WL 4942174, at *4. In either event, the borrower must show how, in so doing, the defendant breached the note or deed of trust, as the loan documents typically authorize the lender or servicer to pay the taxes and force-place insurance if certain conditions exist. *See White*, 2010 WL 4942174, at *3–4.

Failure to Defer Taxes: Borrowers also premise breach of contract claims on allegations that the defendant improperly refused their request to defer payment of taxes owed on their property pursuant to section 33.06 of the Texas Tax Code, which allows a homeowner who is over sixty-five years of age to defer paying his taxes, or abate any suit or pending sale to collect taxes on his property until such time as it ceases to be his residence. *See* Tex. Tax Code § 33.06(a); *see also Kowalski v. Wells Fargo Bank, N.A.*, No. 4:12-CV-142, 2012 WL 6621737, at *8 (E.D. Tex. Dec. 17, 2012), *rec. adopted*, 2013 WL 395242 (E.D. Tex. Jan. 31, 2013); *Mechali v. CTX Mortgage Co.*, No. 4:11-CV-114, 2011 WL 5006511, at *3–4 (E.D. Tex. Sept. 28, 2011). That such taxes are deferred, however, does not excuse a borrower's obligations to pay them under the deed of trust. *See Lyles v. Duetsche Bank National Trust Co.*, No. G-09-300, 2011 WL 96591, at *3 (S.D. Tex. Jan. 11, 2011). "Although the taxes are deferred from the standpoint that the County will not collect the taxes, the taxes remain due and a tax lien is placed on the property throughout the deferment." *Mechali*, 2011 WL 5006511, at *3 (citing Tex. Tax Code § 33.06(d)). While certain borrowers may have the "legal right to defer the payment of real estate taxes assessed against their homestead, that right does not trump their prior obligation to timely pay these same taxes upon assessment." *Lyles*, 2011 WL 96591, at *3.

Failure to Comply with HUD Regulations: Borrowers may argue that a lender's failure to comply with U.S. Housing and Urban Development (HUD) regulations, when they are incorporated by reference into the loan documents, constitutes a breach of the parties' agreement. However, if the borrower has admitted default, or no evidence to the contrary is presented, some courts have held the borrower is precluded from bringing a breach of contract claim for a lender's subsequent alleged failure to comply with HUD regulations before accelerating the note or foreclosing. *See e.g., Rabe v. Wells Fargo Bank, N.A.*, No. 4-11-cv-787, 2013 WL 5458068, at *4 (E.D. Tex. Sept. 30, 2013); *Hill v. Wells Fargo Bank, N.A.*, No. V–12–11, 2012 WL 2065377, at *5 (S.D. Tex. Jun. 6, 2012); *see also Johnson v. JPMorgan Chase Bank, N.A.*, No. 4:12cv285, 2013 WL 2554415, at *8 (E.D. Tex. June 7, 2013); *but cf. Franklin v. BAC Home Loans Servicing, L.P.*, No. 3:10-CV-1174-M, 2011 WL 248445, at *2 (N.D. Tex. Jan. 26, 2011) (holding that borrower could maintain cause of action for lender's breach of its obligations under HUD regulations even though borrower did not tender full performance).

Failure to Offset Default Insurance Payments: Borrowers sometimes base a breach of contract claim on allegations that the amount owed on their loan should be offset by credit default swap payments or payments from default insurance that a lender receives from a third party. Borrowers that are in default will occasionally allege that credit default swap payments or default insurance payments, or both, constitute performance under the note or deed of trust. Based on these allegations, borrowers argue that a lender's attempt to foreclose after it has been partially paid through a credit default swap or default insurance payment without providing a proper accounting constitutes a breach of the note or deed of trust.

"A credit default swap is a financial instrument, similar to insurance, used by corporations to transfer credit risk from one party to another." *Yares v. Bear Stearns Residential Mortgage Corp.*, No. CV 10-2575-PHX-JAT, 2011 WL 2531090, at *6 (D. Ariz. June 24, 2011) (citing *Dumont v. HSBC Mortgage Corp., USA*, No. CV-10-1106-PHX-MHM, 2010 WL 3023885, at *6 (D. Ariz. Aug. 2, 2010)). Default insurance is insurance that protects a lender against a borrower's default or other credit loss. *See In re Consolidated 'Non-Filing Insurance' Fee Litigation*, 431 Fed. App'x 835, 837 (11th Cir. 2001).

Courts have dismissed breach of contract claims based on allegations that a borrower is entitled to an offset for a credit default swap because the benefit of such payment does not accrue to the borrower. *See Yares*, 2011 WL 2531090, at *6 ("To the extent a credit default swap pays money owed to a lender when a borrower defaults on a loan, the benefit does not accrue to the borrower.") (citing *Dumont*, 2010 WL 3023885, at *6); *see also Warren v. Sierra Pacific Mortgage Services Inc.*, No. CV10-2095-PHX-NVW, 2010 WL 4716760, at *3 (D. Ariz. Nov. 15, 2010) (stating that "claims regarding the impact of any possible credit default swap on [plaintiff's] obligations under the loan are premised on a misunderstanding of the meaning and effect of credit default swaps, and accordingly do not provide a basis for a claim for relief").

Borrowers that premise breach of contract claims on credit default swap or default insurance payments often fail to allege facts that demonstrate such payments would have been sufficient to constitute their performance of the note and deed of trust. *See Martinez v. Wells Fargo Bank, N.A.*, No. SA-12-CV-789-XR, 2013 WL 1562759, at *9 (W.D. Tex. Apr. 12, 2013) (dismissing breach of contract claim and explaining that "[a]lthough Plaintiff makes vague references to 'payments received via insurance or credit default swaps,' he does not allege facts sufficient to demonstrate that the payments, even if paid on behalf of [the borrowers], would have been sufficient to constitute performance"); *Washington v. JP Morgan Chase*, No. SA-11-CV-763-XR, 2013 WL 636054, at *13 (W.D. Tex. Feb. 20, 2013) ("Nor does Plaintiff allege that payments from insurance policies or 'credit default swaps,' even if paid on her behalf, would have been sufficient to constitute her performance of the contract."); *Scott v. Bank of America, N.A.*, No. SA-12-CV-00917-DAE, 2013 WL 1821874, at *9 (W.D. Tex. Apr. 29, 2013) ("Plaintiff makes a vague allegation that 'Defendant has been paid [according to the terms of the Note] in part via multiple insurance policies and credit default swaps' . . . but does not allege facts sufficient to demonstrate that the payments satisfied Plaintiff's obligations under the Note."); *Tyler v. Bank of America, N.A.*, No. SA–12–CV–00909–DAE, 2013 WL 1821754, at *10 (W.D. Tex. Apr. 29, 2013) (same).

§ 10.4 Statute of Frauds

Borrowers sometimes assert that the lender has broken an oral promise to, for example, review a loan for a modification, modify a loan, or not foreclose during a loan modification review. The statute of frauds often serves as a bar to claims for breach of contract, promissory estoppel, fraud, or negligent misrepresentation based on an alleged oral promise for a loan modification or a promise not to foreclose while a loan modification for the borrower is under review. Under Texas law, oral statements regarding the modification of a loan and promises not to foreclose while a loan is under a modification review are subject to the statute of frauds, so long as the loan is for more than $50,000. *See Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 256 (5th Cir. 2013) ("A loan agreement for more than $50,000 is not enforceable unless it is in writing. . . . An agreement regarding the . . . modification of a loan must therefore be in writing.") (citing Tex. Bus. & Com. Code § 26.01(b)(4)); *Fath v. BAC Home Loans*, No. 3:12-cv-1755-O, 2013 WL 3203092, at *6 (N.D. Tex. June 25, 2013) ("[A]ny oral statements that Plaintiff claims modified, terminated, or otherwise altered the Deed of Trust, the Note, or any other agreement between the parties are barred by the statute of frauds."); *Bailey v. BAC Home Loans Servicing, LP*, No. 4:11CV590, 2012 WL 5497632, at *2 (E.D. Tex. Nov. 13, 2012); *Kew v. Bank of America, N.A.*, No. H-11-2824, 2012 WL 5832354, at *4 (S.D. Tex. Nov. 16, 2012); *BACM 2001-1 San Felipe Road Ltd. Partnership v. Trafalgar Holdings I, Ltd.*, 218 S.W.3d 137, 144 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing Tex. Bus. & Com. Code § 26.02). If such statements serve as the basis for a borrower's claim for breach of contract, the statute of frauds may bar the claim.

Under Texas law, a plaintiff may not recover in tort for claims arising out of an unenforceable contract because of the statute of frauds. *See Haase v. Glazner*, 62 S.W.3d 795, 799 (Tex. 2001) (holding that statute of frauds bars a fraud claim for benefit-of-the-bargain damages when claim arises from a contract that has been held to be unenforceable); *but see Baylor University v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007) (holding statute of frauds does not bar recovery of out-of-pocket damages for fraud) (citing *Haase*, 62 S.W.3d at 800). Accordingly, the statute of frauds has been held to bar both fraud and negligent misrepresentation claims. *See Roberts v. Federal Home Loan Corp.*, No. H-11-3304, 2013 WL 1345222, at *7 (S.D. Tex. Mar. 30, 2013) (holding that statute of frauds barred cause of action for negligent misrepresentation); *Hugh Symons Group, plc v. Motorola, Inc.*, 292 F.3d 466, 470–71 (5th Cir. 2002) (affirming grant of summary judgment on fraud and negligent misrepresentation claims where such claims were based on an alleged contract that was unenforceable under statute of frauds).

A promissory estoppel claim is also subject to the statute of frauds, but this allegation may overcome the statute of frauds if the claim is based on an oral promise to sign an existing document that satisfies the statute of frauds. See section 10.5 below.

§ 10.5 Promissory Estoppel

Promissory estoppel is another common claim that borrowers assert, often alleging oral promises by the lender to modify a loan or to postpone foreclosure during a modification review. Under the doctrine of promissory estoppel, if justice requires, a person may be bound by a promise that he reasonably believed would induce action or inaction and that did induce the action or forbearance. *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 256 (5th Cir. 2013) (citing *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex. 1972)). To establish a claim for promissory estoppel, a borrower must show (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 n.25 (Tex. 2002) (citing *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983)); *see also Ortiz v. Citimortgage, Inc.*, 954 F. Supp. 2d 581, 588 (S.D. Tex. 2013). Texas courts require a finding of "reasonable or justified reliance" on the conduct or statement of the person sought to be estopped. *Clardy Manufacturing Co. v. Marine Midland Business Loans Inc.*, 88 F.3d 347, 360 (5th Cir. 1996).

Promissory estoppel claims, however, often fail because they are subject to the statute of frauds. Promissory estoppel may overcome the statute-of-frauds requirement in Texas, but "there must have been a promise to sign a written contract which had been prepared and which would satisfy the requirements of the statute of frauds." *Martins*, 722 F.3d at 256–57 (citing *Beta Drilling, Inc. v. Durkee*, 821 S.W.2d 739, 741 (Tex. App.—Houston [14th Dist.] 1992, writ denied)). *See Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 769 (5th Cir. 1988) ("[T]he doctrine of promissory estoppel does not apply where there is no proof of a promise to sign a written contract that *had been prepared* and that would satisfy the requirement of the statute of frauds."); *Perales v. Wells Fargo Bank, N.A.*, No. SA-12-CV-00515-DAE, 2013 WL 3456998, at *5 (W.D. Tex. July 9, 2013) (stating that nonmovant must present evidence to show "the movant orally represented the statute of frauds had been satisfied, and the nonmovant relied to his detriment on the misrepresentation"); *Carpenter v. Phelps*, 391 S.W.3d 143, 149 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("For promissory estoppel to create an exception to the statute of frauds requires a promise to sign a prepared written contract which would satisfy the requirements of the statute of frauds."); *Ford v. City State Bank of Palacios*, 44 S.W.3d 121, 139 (Tex. App.—Corpus Christi 2001, no pet.) ("When promissory estoppel is raised to bar the application of the statute of frauds, there is an additional requirement that the promisor promised to sign a written document complying with the statute of frauds."); *see also Bank of Texas, N.A. v. Gaubert*, 286 S.W.3d 546, 553–54 (Tex. App.—Dallas 2009, pet. dism'd w.o.j.). However, in a recent decision, the Fifth Circuit allowed a promissory estoppel claim to move forward based solely on the plaintiff's contentions that the lender had promised that a loan modification was "certain and imminent" and that she *believed* the lender had, in fact, prepared a specific loan modification agreement, even though the plaintiff had never seen such an agreement. *See Martin-Janson v. JP Morgan Chase Bank, N.A.*, 536 Fed. App'x 394, 399 (5th Cir. 2013).

§ 10.6 Fraud, Statutory Fraud, and Negligent Misrepresentation

In connection with foreclosure actions, borrowers commonly assert claims of common law fraud, statutory fraud, and negligent misrepresentation, frequently alleging that they were advised (1) not to make payments on their loan, (2) that no foreclosure would occur during a loan modification review, or (3) a loan modification was approved.

§ 10.6:1 Fraud

The elements of a fraud claim are (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party justifiably relied on the representation; and (6) the party thereby suffered injury. *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 212 (5th Cir. 2009) (citing *Ernst & Young, L.L.P. v. Pacific Mutual Life Insurance Co.*, 51 S.W.3d 573, 577 (Tex. 2001)). Common law fraud requires reliance that must be both actual and justifiable. *Grant Thornton L.L.P. v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010).

Borrowers have successfully pled claims for fraud where the lender or servicer allegedly misled the borrower into believing he would receive a loan modification. *See, e.g., Auriti v. Wells Fargo Bank, N.A.*, No. 3:12-CV-334, 2013 WL 2417832, at *4 (S.D. Tex. June 3, 2013). A borrower may be damaged by relying on such representations because, once the falsity of the representation is discovered, the borrower is too far behind on his loan and cannot obtain financing elsewhere. *See Auriti*, 2013 WL 2417832, at *6.

Fraud claims have also been allowed where the foreclosing party informed the borrower that a foreclosure would not occur if certain conditions were met, yet a foreclosure occurred despite the imposed conditions being satisfied. *See Cuevas v. BAC Home Loans Servicing, LP*, No. 4:10-CV-31, 2012 WL 4339063, at *6–7 (S.D. Tex. Sept. 19, 2012). In this context, borrowers satisfy the "reliance" element by showing that they met the conditions stated to avoid foreclosure. *See Cuevas*, 2012 WL 4339063, at *6.

Fraud claims that arise from a note or deed of trust may be precluded by the economic loss doctrine and must meet the heightened pleading requirements of rule 9(b) of the Federal Rules of Civil Procedure if the action is removed to federal court. See the discussion at section 10.3:7 above.

Federal Pleading Requirements: In federal court, fraud claims must satisfy the heightened pleading requirements of rule 9(b) of the Federal Rules of Civil Procedure. *See Massey v. JPMorgan Chase Bank, N.A.*, No. 4:12-CV-154-A, 2012 WL 3743493, at *7 (N.D. Tex. Aug. 29, 2012) ("Plaintiffs' fraud claims are governed by the heightened pleading standard under Rule 9(b) of the Federal Rules of Civil Procedure."); *see also Lone Star Fund V (US), LP v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010); *Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 723 (5th Cir. 2003).

Under rule 9(b), "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Thus, borrowers who assert fraud claims must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997); *see also Flaherty & Crumrine Preferred Income Fund*, 565 F.3d 200, 206–07. In other words, borrowers should specify the "who, what, when, where, and how" of the alleged fraud, but often do not. *Williams*, 112 F.3d. at 179; *Pollett v. Aurora Loan Services*, 455 F. App'x 413, 415 (5th Cir. 2011) (dismissing fraud claim where "[plaintiff] did not allege . . . when and where Aurora's allegedly fraudulent statements were made"); *Moore v. Federal National Mortgage Ass'n*, No. H-12-1518, 2012 WL 6048999, at *2 (S.D. Tex. Dec. 5, 2012) (dismissing fraud claims for failure to meet required degree of specificity of rule 9(b)); *Roubinek v. Select Portfolio Servicing Inc.*, No. 3:11-CV-3481-D, 2012 WL 2358560, at *4 (N.D. Tex. June 21, 2012) (same); *Ybarra v. Wells Fargo Bank, N.A.*, No. SA-12-CV-01167-DAE, slip op. at 15 (W.D. Tex. Aug. 29, 2013) ("Where, as here, a plaintiff alleges that a fraud was perpetuated by means of forgery, he must adhere to the heightened pleading standard of Federal Rule of Civil Procedure . . . 9(b).").

Where the factual allegations underlying a negligent misrepresentation and a fraud claim are the same, the heightened pleading standards of rule 9(b) also apply to a negligent misrepresentation claim. *See Benchmark Electronics*, 343 F.3d at 723.

State Court Requirements: In state court, borrowers' common law fraud claims often fail because they cannot demonstrate all of the required elements. For example, borrowers must show reliance that was "both actual and justifiable." *Grant Thornton*, 314 S.W.3d at 923; *Willis v. Marshall*, 401 S.W.3d 689, 698 (Tex. App.—El Paso 2013, no pet.); *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 389 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't set aside, remanded by agr.). Furthermore, "a person may not justifiably rely on a misrepresentation 'if there are "red flags" indicating such reliance is unwarranted.'" *Grant Thornton*, 314 S.W.3d at 923 (quoting *Lewis v. Bank of America NA*, 343 F.3d 540, 546 (5th Cir. 2003)). Thus, "reliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law." *DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

§ 10.6:2 Statutory Fraud

Section 27.01 of the Texas Business and Commerce Code provides a statutory cause of action for fraud in real estate and stock transactions. *See* Tex. Bus. & Com. Code § 27.01. Such fraud occurs if (1) a person makes a false representation of a past or existing material fact in a real estate transaction to another person for the purpose of inducing the making of a contract and (2) the false representation is relied on by the person entering into the contract. Tex. Bus. & Com. Code § 27.01(a)(1). Texas courts have determined that this statute applies only to real estate or stock transactions, not loan transactions or modifications. *See, e.g., Higgins v. Bank of America, N.A.*, No. 3:12-cv-5297, 2013 WL 2370564, at *6 (N.D. Tex. May 31, 2013) ("A loan transaction, even if secured by land, is not considered to come under the statute." (citing *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 343 (5th Cir. 2008))).

§ 10.6:3 Negligent Misrepresentation

A claim for negligent misrepresentation requires proof of the following elements: (1) defendant made a representation in the course of his business or in a transaction in which he has a pecuniary interest; (2) defendant supplied false information for the guidance of others; (3) defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) plaintiff justifiably relied on the representation. *See Burnette v. Wells Fargo Bank, N.A.*, No. 4:09-CV-370, 2010 WL 1026968, at *7 (E.D. Tex. Feb. 16, 2010) (quoting *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 n.24 (Tex. 2002)). A negligent misrepresentation claim under Texas law "contemplates that the false information provided by the defendant is a misstatement of *existing* fact." *Clardy Manufacturing Co. v. Marine Midland Business Loans Inc.*, 88 F.3d 347, 357 (5th Cir. 1996) (internal quotation and citation omitted); *see also DeFranceschi v. Wells Fargo Bank, N.A.*, 837 F. Supp. 2d 616, 625 (N.D. Tex. 2011) ("The false information complained of in a negligent-misrepresentation claim 'must be a misstatement of an existing fact rather than a promise of future conduct.'" (quoting *Scherer v. Angell*, 253 S.W.3d 777, 781 (Tex. App.—Amarillo 2007, no pet.))). A promise to do or refrain from doing an act in the future is not actionable. *See BCY Water Supply Corp. v. Residential Investments, Inc.*, 170 S.W.3d 596, 603 (Tex. App.—Tyler 2005, pet. denied). Furthermore, the false information provided must have been for the guidance of others in their business. *See Ayres v. Parker*, No. SA-12-CV-621, 2013 WL 3929711, at *14 (W.D. Tex. July 2013) (rejecting negligent-misrepresentation claim based on statements made during home-loan-modification process because plaintiffs failed to show representations were made for guidance in their business).

Allegations that the foreclosing party promised to act or refrain from acting in the future, such as a promise that the lender or servicer would not foreclose or that a scheduled foreclosure would be postponed, or promises regarding a future loan modification, cannot form the basis of a negligent-misrepresentation claim. *See Thomas v. EMC Mortgage Corp.*, 499 F. App'x 337, 342 (5th Cir. 2012); *Keen v. SunTrust Mortgage, Inc.*, No. 1:10-CV-733, 2013 WL 1181451, at *5 (E.D. Tex. Mar. 19, 2013); *Stapp v. Bank of America, N.A.*, No. 4:11CV203, 2013 WL 1313160, at *5 (E.D. Tex. Feb. 28, 2013).

A borrower can bring a negligent misrepresentation claim if the representation complained of is one of existing fact. Such claims could be premised on (1) misrepresentations as to the authority of the foreclosing party to foreclose, (2) misrepresentations as to amounts owed on the loan or under modification agreements, or (3) representations as to documents received or lacking with respect to a modification application. *See Preston v. Seterus, Inc.*, 931 F. Supp. 2d 743, 763 (N.D. Tex. 2013) (holding that plaintiff stated claim for negligent misrepresentation to extent it was based on a misrepresentation as to authority of foreclosing entity); *Stapp*, 2013 WL 1313160, at *6 (holding that alleged misrepresentations of amounts due under a modification agreement and alleged misrepresentations related to documents received during modification application process were misrepresentations of existing fact).

As with fraud-based claims, the economic loss doctrine and statute of frauds may preclude a negligent misrepresentation claim. See the discussion at sections 10.3:7 and 10.4 above.

§ 10.7 Breach of Fiduciary Duty and Breach of Duty of Good Faith and Fair Dealing

Borrowers urge courts to find that lenders, banks, investors, or servicers owe and have breached a fiduciary duty or duty of good faith and fair dealing in connection with wrongful foreclosure actions. To maintain a claim for breach of fiduciary duty, a borrower must establish that (1) the borrower and the defendant had a fiduciary relationship, (2) the defendant breached its fiduciary duty to the borrower, and (3) the defendant's breach resulted in injury to the borrower. *See Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied). Texas law recognizes two types of fiduciary relationships. The first is a formal fiduciary relationship, such as between an attorney and a client, a principal and an agent, partners, and joint venturers. *See Insurance Co. of North America v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998). The second is an informal or confidential relationship that "may arise from a moral, social, domestic, or purely personal relationship of trust and confidence." *Associated Indemnity Corp. v. CAT Contracting Co.*, 964 S.W.2d 276, 287 (Tex. 1998).

§ 10.7:1 No Fiduciary Relationship

Generally, the relationship between a lender and a borrower does not involve a special or confidential relationship. *See Manufacturers' Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607, 610 (Tex. App.—Houston [1st Dist.] 1991, no writ) (holding as a general rule that a bank and its customers do not have a special or confidential relationship); *see also 1001 McKinney Ltd. v. Credit Suisse First Boston Mortgage Capital*, 192 S.W.3d 20, 36 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) ("Generally, the relationship between a borrower and a lender is an arm's length business relationship in which both parties are looking out for their own interests."). "In order to prove that a fiduciary relationship does exist in such a context, the plaintiff must show extraordinary circumstances such as excessive control and influence by the lender on the borrower's business activities." *Hopkins v. Wells Fargo Bank, N.A.*, No. 3:10–CV–1857–D, 2011 WL 611664, at *2 (N.D. Tex. Feb. 18, 2011) (quoting *In re Absolute Resource Corp.*, 76 F. Supp. 2d 723, 734 (N.D. Tex. 1999)). "Mere subjective trust by the borrower or evidence of prior dealings is not sufficient." *In re Absolute Resource Corp.*, 76 F. Supp. 2d at 734 (citing *Greater Southwest Office Park, Ltd. v. Texas Commerce Bank N.A.*, 786 S.W.2d 386, 391 (Tex. App.—Houston [1st Dist.] 1990, writ denied)). Therefore, to demonstrate a fiduciary relationship, a borrower must show extraordinary circumstances, such as (1) he had a long-standing relationship of trust and confidence with the lender, (2) the lender had dealt with him in such a manner for a long period of time and the borrower was justified in expecting the lender to act in his best interest, and (3) the lender betrayed the borrower's confidence or exercised excessive control or influence over his business activities. *See NetVet Group v. Fagin*, No. 3:10-CV-1934-BH, 2011 WL 2601526, at *3 (N.D. Tex. July 1, 2011) (stating Texas law "rejects the position that lenders become fiduciaries by exchanging business information or 'advice' with their borrowers") (quoting *Williams v. Countrywide Home Loans, Inc.*, 504 F. Supp. 2d 176, 193 (S.D. Tex. 2007)).

§ 10.7:2 Duty of Good Faith and Fair Dealing

Under Texas law, a duty of good faith and fair dealing does not exist in all contractual contexts. *See Great American Insurance Co. v. North Austin Municipal Utility District No. 1*, 908 S.W.2d 415, 418 (Tex. 1995). Rather, the duty of good faith and fair dealing arises where a special relationship of trust exists between the parties. *See Vogel v. Travelers Indemnity Co.*, 966 S.W.2d 748, 753 (Tex. App.—San Antonio 1998, no pet.). "Ordinarily, there is no such duty in lender/lendee relationships." *Vogel*, 966 S.W.2d at 753 (citing *FDIC v. Coleman*, 795 S.W.2d 706, 709 (Tex. 1990)). Texas law does not "recognize a common law duty of good faith and fair dealing in transactions between a mortgagee and mortgagor, absent a special relationship marked by shared trust or an imbalance in bargaining power." *Coleman v. Bank of America, N.A.*, No. 3:11-CV-430-G-BD, 2011 WL 2516169, at *1 (N.D. Tex. May 27, 2011) (internal quotations omitted), *rec. adopted*, 2011 WL 2516668 (N.D. Tex. June 22, 2011). This is because there is no "special relationship between a mortgagor and mortgagee." *UMLIC VP LLC v. T&M Sales & Environmental Systems, Inc.*, 176 S.W.3d 595, 612 (Tex. App.—Corpus Christi 2005, pet. denied); *see also Watson v. Citimortgage, Inc.*, 814 F. Supp. 2d 726, 731 (E.D. Tex. 2011) (citing *Coleman*, 2011 WL 2516169, at *1); *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983); *Lovell v. Western National Life Insurance Co.*, 754 S.W.2d 298, 302–03 (Tex. App.—Amarillo 1988, writ denied).

In applying Texas law, the Fifth Circuit has explicitly refused to recognize any duty of good faith and fair dealing in the lender-borrower relationship. *See Milton v. U.S. Bank National Ass'n*, 508 F. App'x 326, 329–30 (5th Cir. 2013) (rejecting contention that mortgagee had a "special relationship" with mortgagor where plaintiff had alleged active participation by lender and substantial interactions, including numerous oral representations by lender that the loan would not be foreclosed); *see also Hall v. Resolution Trust Corp.*, 958 F.2d 75, 79 (5th Cir. 1992) ("Three Texas intermediate appellate courts have explicitly refused to overlay an implied duty of good faith and fair dealing duty in the lender-borrower relationship. We join them in that respect.") (internal quotation marks and citations omitted).

§ 10.8 Waiver of Right to Foreclose

Borrowers commonly argue that a defendant waived the right to foreclose based on representations that no foreclosure would occur, no foreclosure would occur during a loan modification review, or they were advised not to make payments on their loan. Additionally, borrowers may assert that a defendant waived its right to foreclose by regularly accepting late payments.

Under Texas law, "[w]aiver is the intentional relinquishment of a right actually known, or intentional conduct inconsistent with claiming that right." *Ulico Casualty Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008). "To prove waiver, a party must show '(1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right or intentional conduct inconsistent with the right.'" *Wiley v. U.S. Bank, N.A.*, No. 3:11-CV-1241-B, 2012 WL 1945614, at *6 (N.D. Tex. May 30, 2012) (quoting *Ulico Casualty*, 262 S.W.3d at 778).

Waiver cannot be leveled against a defendant to establish a cause of action or create liability. Waiver is defensive in nature and does not create an independent cause of action or create liability where it does not otherwise exist. *See Kern v. GE Capital Information Technology Solutions*, No. 3:01CV2109-P, 2003 WL 22433817, at *8 (N.D. Tex. Feb. 19, 2003); *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1988); *Thomas v. Compass Bank,* No. 01-01-00467-CV, 2002 WL 1340333, at *4 (Tex. App.—Houston [1st Dist.] June 20, 2002, no pet.).

When borrowers argue that defendants waive the right to foreclose merely by delaying foreclosure, entering into modification negotiations, or otherwise exercising forbearance, without additional conduct inconsistent with the right to foreclose, these arguments fail. *See Watson v. Citimortgage, Inc.*, 530 F. App'x 322, 325–26 (5th Cir. 2013); *A.R. Clark Investment Co. v. Green*, 375 S.W.2d 425, 434 (Tex. 1964) (holding that a noteholder had not waived its right to accelerate merely by engaging in protracted settlement negotiations with debtor over alleged default); *Stephens v. LPP Mortgage, Ltd.*, 316 S.W.3d 742, 749 (Tex. App.—Austin 2010, pet. denied); *Bluebonnet Savings Bank, F.S.B. v. Grayridge Apartment Homes, Inc.*, 907 S.W.2d 904, 911–12 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Veltmann v. Hoffman*, 621 S.W.2d 441, 442 (Tex. App.—San Antonio 1981, no writ) ("We know of no case holding that a lienholder who, at the request of the debtor, postpones a nonjudicial foreclosure sale in order to afford the debtor an opportunity to avoid loss of his land is to be penalized by being deprived of the right to foreclose.").

The postponement of foreclosure while a loan is under a modification review does not waive the right to foreclose at a later time if the deed of trust contains the universal provision that any forbearance by the lender in exercising any right or remedy shall not be a waiver of, or preclude the exercise of, any right or remedy under the deed of trust. *See Watson*, 530 F. App'x at 326–27 (finding that deed of trust contained an unambiguous nonwaiver provision); *Montalvo v. Bank of America Corp.*, No. SA-10-CV-360-XR, 2013 WL 870088, at *10 (W.D. Tex. Mar. 7, 2013) (citing cases).

Importantly, the deed of trust typically contains language that prevents commonly asserted waiver claims. For example, an ordinary deed of trust may include provisions that provide (1) "an extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower . . . shall not operate to release the liability of Borrower[;]" and/or (2) "[a]ny forbearance by Lender in exercising any right or remedy . . . shall not be a waiver of or preclude the exercise of any right or remedy." Because the deed of trust executed by borrowers expressly prohibits typical waiver allegations, borrowers will have difficulty asserting such claims.

§ 10.9 Quiet Title, Trespass to Try Title, and Slander of Title Claims

A variety of causes of action are available to borrowers who are confronted with issues related to the title to their property, such as claims for quiet title, trespass to try title, and slander of title. As one court noted—

> A suit to quiet title and a trespass to try title action are two distinct causes of action under Texas law. A trespass to try title action is a statutory cause of action that is "the method of determining title" to real property. In contrast, a suit to quiet title is an equitable action intended to remove a cloud of title on property.

Richardson v. Wells Fargo Bank, N.A., 873 F. Supp. 2d 800, 816 (N.D. Tex. 2012) (internal citations omitted) (citing *Fricks v. Hancock*, 45 S.W.3d 322, 327 (Tex. App.—Corpus Christi 2001, no pet.)).

§ 10.9:1 Quiet Title and Trespass to Try Title

Usually, borrowers' quiet title and trespass to try title claims arise from the same set of facts underlying another asserted claim. For example, borrowers may contend that because the lender failed to comply with the deed of trust or with section 51.002 of the Texas Property Code, or both, the lender had no right to foreclose on their property, and thus, any subsequent foreclosure sale was void. Borrowers will then argue that the purchase of the property at the foreclosure sale is void. Therefore, the purchaser obtained no title because a purchaser at a foreclosure sale obtains no better title than the trustee can give. In this scenario, the borrower must prevail on the underlying claim to demonstrate the validity of his own title.

In a suit to quiet title action, a borrower must show: "(1) an interest in a specific property; (2) title to the property is affected by a claim by the defendant; and (3) the claim, although facially valid, is invalid or unenforceable." *Omrazeti v. Aurora Bank FSB*, No. SA:12-CV-730, 2013 WL 3242520, at *12 (citing *Sadler v. Duvall*, 815 S.W.2d 285, 293, n.2 (Tex. App.—Texarkana 1991, writ denied)); *see also James v. Wells Fargo Bank, N.A.*, No. 3:11-CV-2228-B, 2012 WL 778510, at *2 (N.D. Tex. Mar. 12, 2012) (quoting *Bell v. Bank of America Home Loan Servicing LP*, No. 4:11-cv-02085, 2012 WL 568755, at *7 (S.D. Tex. Feb. 21, 2012)).

To prevail in a trespass to try title action, a borrower must prove (1) a regular chain of conveyances from the sovereign, (2) superior title out of a common source, (3) title by limitations, or (4) title by prior possession coupled with proof that possession was not abandoned. *James*, 2012 WL 778510, at *2. The pleading rules are "detailed and formal" on a trespass to try title claim, and require borrowers to "prevail on the superiority of [their] title, not on the weakness of [a] defendant's title." *Sgroe v. Wells Fargo Bank, N.A.*, 941 F. Supp. 2d 731, 751 (E.D. Tex. 2013) (quoting *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004)).

In both types of actions, borrowers "must prove and recover on the strength of [their] own title, not the weakness of [their] adversary's title." *Machleit v. Bank of America, N.A.*, No. H-12-1942, 2012 WL 6840539, at *7 (S.D. Tex. Dec. 12, 2012) (quoting *Fricks v. Hancock*, 45 S.W.3d 322, 327 (Tex. App.—Corpus Christi 2001, no pet.)); *see also Cruz v. OneWest Bank, FSB*, No. 3:11-cv-01985-M, 2012 WL 1684622, at *2 (N.D. Tex. May 15, 2012); *Ballard v. Allen*, No. 12-03-00370-CV, 2005 WL 1037514, at *3 (Tex. App.—Tyler May 4, 2005, no pet.) (mem. op.).

§ 10.9:2 Slander of Title

A slander of title claim requires a borrower to demonstrate (1) the utterings and publishing of disparaging words, (2) that were false, (3) malicious, (4) that special damages were sustained thereby, (5) that the plaintiff possessed an estate or interest in the property disparaged, and (6) the loss of a specific sale. *See Singh v. U.S. Bank*

Home Mortgage, No. H-12-3037, 2013 WL 3192938, at *3 (S.D. Tex. June 21, 2013) (citing *Williams v. Jennings*, 755 S.W.2d 874, 879 (Tex. App.—Houston [14th Dist.] 1988, writ denied)).

In support of their slander of title claims, borrowers often allege that the lender has recorded various documents, such as a notice of trustee's sale or substitute trustee's deed, which evidence an unlawful foreclosure that impaired their title to the property. As with quiet title and trespass to try title claims, to prove the lender has uttered or published disparaging words that were false, borrowers must first demonstrate the foreclosure was invalid. Otherwise, any document filed by the lender regarding rights to the property would be true.

A statement is published with legal malice when it is deliberate and made without reasonable cause. *See Preston Gate, LP v. Bukaty*, 248 S.W.3d 892, 896 (Tex. App.—Dallas 2008, no pet.). "A claim of title does not constitute malice where the claim is made under color of title or upon reasonable belief that parties have title to the property acquired." *Storm Associates, Inc. v. Texaco, Inc.*, 645 S.W.2d 579, 588–89 (Tex. App.—San Antonio 1982, writ denied) (citations omitted), *aff'd*, 645 S.W.2d 579 (Tex. 1985). Further, proving damages under a claim for slander of title requires borrowers to prove that they actually lost a specific sale of the property on account of the alleged disparaging statement. *See U.S. Enercorp, Ltd. v. SDC Montana Bakken Exploration, LLC*, No. SA:12-CV-1231-DAE, 2013 WL 4400880, at *4 (W.D. Tex. Aug. 14, 2013); *Northcutt v. CitiMortgage, Inc.*, No. H-12-646, 2013 WL 3280211, at *4 (S.D. Tex. June 27, 2013); *A.H. Belo Corp. v. Sanders*, 632 S.W.2d 145, 146 (Tex. 1982).

§ 10.10 Fraudulent Assignments under Section 12.002 of Texas Civil Practice and Remedies Code

Borrowers frequently bring claims against lenders for violations of section 12.002 of the Texas Civil Practice and Remedies Code in connection with wrongful foreclosure actions. Borrowers asserting section 12.002 violations typically allege that their lender or servicer recorded a fraudulent assignment of the deed of trust. In support thereof, borrowers often claim that the assignment violates section 12.002 because the signature on the assignment was forged or because the signatory did not have the authority from the lender or servicer to sign the assignment.

Section 12.002(a) prohibits a person from making, presenting, or using a document with (1) knowledge that the document is a fraudulent court record or a fraudulent lien or claim against real property, (2) intent that the document be given the same legal effect as a court record or document of a court evidencing a valid lien or claim against real property, and (3) intent to cause another person to suffer financial injury. Tex. Civ. Prac. & Rem. Code § 12.002(a); *Centurion Planning Corp. v. Seabrook Venture II*, 176 S.W.3d 498, 504–05 (Tex. App.—Houston [1st Dist.] 2004, no pet.). The term *lien* is defined as "a claim in property for the payment of a debt and includes a security interest." Tex. Civ. Prac. & Rem. Code § 12.001(3). However, most courts hold that section 12.002 claims based on an alleged fraudulent assignment fail because an assignment does not create a lien or claim against real property. Courts have recognized that "the plain language and legislative history of section 12.002 indicates it was never intended to be used to challenge mortgage assignments." *Rojas v. Wells Fargo Bank, N.A.*, No. 1:12-cv-996-SS, slip op. at 6 (W.D. Tex. Jan. 25, 2013). The legislative history of section 12.002 confirms that the statute was enacted to "remove liens and encumbrances that are on their face patently without basis in recognized law." *David Powers Homes, Inc. v. M.L. Rendleman Co.*, 355 S.W.3d 327, 338 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (citing Senate Research Ctr., Bill Analysis, Tex. H.B. 1185, 75th Leg., R.S. (1997)). Note that H.B. 1185 created chapter 51, subchapter J of the Texas Government Code (Certain Fraudulent Records or Documents) and chapter 11 of the Civil Practice and Remedies Code (Liability Related to a Fraudulent Court Record or a Fraudulent Lien or Claim Filed against Real or Personal Property). During the 76th legislative session, chapter 11 of the Civil Practice and Remedies Code was renumbered to become chapter 12. *See* Tex. S.B. 1185, 76th Leg., R.S. (1999). The statute "was not created to determine the legitimacy and validity of the claimed interest in the property, but was instead enacted to expeditiously determine the legitimacy of the document manifesting the purported lien or interest." *David Powers Homes*, 355 S.W.3d at 338.

Section 12.002 claims based on an allegedly "fraudulent" assignment typically fail as a matter of law because an assignment does not create a lien or claim against real property. *See Perdomo v. Federal National Mortgage Ass'n*, No. 3:11-cv-734-M, 2013 WL 1123629, at *5 (N.D. Tex. Mar. 18, 2013) (collecting cases dismissing plaintiffs' claims under section 12.002 on grounds that challenged assignments of deeds of trust are not "liens" or claims against real property as contemplated by statute); *see also Martinez v. Wilmington Trust Co.*, No. SA-13-CA-53-FB, 2013 WL 6818251, at *9–10 (W.D. Tex. July 23, 2013) (same); *Marsh v. JPMorgan Chase Bank, N.A.*, 888 F. Supp. 2d 805, 812–14 (W.D. Tex. 2012) (holding an assignment from MERS to a bank "[did] not purport to create a lien or claim; it merely purport[ed] to transfer an existing deed of trust from one entity to another" and finding "plaintiffs . . . failed to plead the Assignment constituted a lien under Section 12.002(a)"); *but cf. Howard v. JPMorgan Chase, N.A.*, SA–12–CV–00440, 2013 WL 1694659, at *12 (W.D. Tex. Apr. 18, 2013) (concluding that the *Marsh* court's reading of section 12.002(a) is overly narrow and finding that an assignment of a deed of trust does qualify as a "claim" against real property or against an interest in real property under that section) (citing *Bernard v. Bank of America, N.A.*, No. 04–12–00088–CV, 2013 WL 441749 (Tex. App.—San Antonio Feb. 6, 2013, no pet.) (mem. op.)).

§ 10.11 Texas Deceptive Trade Practices–Consumer Protection Act

The Texas Deceptive Trade Practices–Consumer Protection Act (DTPA) is a consumer protection statute under which borrowers routinely assert claims against lenders, banks, investors, and servicers in foreclosure-related actions. *See* Tex. Bus. & Com. Code §§ 17.41–.63. The DTPA prohibits entities engaged in commerce from engaging in "false, misleading, or deceptive acts or practices." Tex. Bus. & Com. Code § 17.46(a).

Among other things, to establish a DTPA claim, a borrower must allege facts showing that he is a consumer. *See* Tex. Bus. & Com. Code §§ 17.45(4); *see also Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996). To qualify as a consumer, a borrower must meet two requirements: "(1) the person has sought or acquired goods or services by purchase or lease, and (2) the goods or services purchased or leased must form the basis of the complaint." *Visconti v. Bank of America*, No. 4:10-cv-532, 2012 WL 3779083, at *4–5 (E.D. Tex. Aug. 31, 2012) (citing Tex. Bus. & Com. Code Ann. § 17.45(4)).

Texas courts, however, have consistently held that borrowers do not qualify as "consumers" within the meaning of the DTPA because borrowing or lending money does not constitute the acquisition of a good or service. *See La Sara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558, 566 (Tex. 1984); *Riverside National Bank v. Lewis*, 603 S.W.2d 169, 174–75 (Tex. 1980); *see also Fraley v. BAC Home Loans Servicing, LP*, No. 3:11-CV-1060-N-BK, 2012 WL 779130, at *9 (N.D. Tex. Jan. 10, 2012); *Watson v. Citimortgage, Inc.*, 814 F. Supp. 2d 726, 735 (E.D. Tex. 2011) ("Because lending money does not constitute the acquisition of a good or service, this court finds that Plaintiffs do not qualify as 'consumers' under section 17.45(4) of the Texas Business and Commerce Code and do not have standing under the DTPA."); *Manno v. BAC Home Loans Servicing, LP*, No. A-11-CA-347 LY, 2011 WL 3844900, at *4 (W.D. Tex. Aug. 26, 2011); *Burnette v. Wells Fargo Bank, N.A.*, No. 4:09-CV-370, 2010 WL 1026968, at *9 (E.D. Tex. Feb. 16, 2010); *Gomez v. Wells Fargo Bank, N.A.*, No. 3:10-CV-0381-B, 2010 WL 2900351, at *4 (N.D. Tex. July 21, 2010) (dismissing consumer protection act claim because a borrower is not a consumer); *Marketic v. U.S. Bank National Ass'n*, 436 F. Supp. 2d 842, 855 (N.D. Tex. 2006) ("merely obtaining a loan or an extension of credit does not qualify one as a 'consumer'"); *Grant-Brooks v. WMC Mortgage Corp.*, No. 3:02-CV-2455-AH, 2003 WL 23119157, at *7–8 (N.D. Tex. Dec. 9, 2003) (holding that home equity loan borrowers do not constitute "consumers" under the DTPA).

Courts have also expressly held that "subsequent actions related to mortgage accounts—for example, extensions of further credit or modifications of the original loan—do not satisfy the 'good or services' element of the DTPA." *Choe v. Bank of America, N.A.*, No. 3:13-CV-0120-D, 2013 WL 3196571, at *8 (N.D. Tex. June 25, 2013) (quoting *Broyles v. Chase Home Finance*, No. 3:10-CV-2256-G, 2011 WL 1428904, at *4 (N.D. Tex. Apr. 13, 2011)). Even if a lender provides services that are incidental to the completed mortgage loan, the performance of such services does not transform the borrower into a "consumer" for purposes of the DTPA. *See Porter v. Countrywide Home Loans, Inc.*, No. V-07-75, 2008 WL 2944670, at *3–4 (S.D. Tex. July 24, 2008); *Maginn v. Norwest Mortgage, Inc.*, 919 S.W.2d 164, 166–67 (Tex. App.—Austin 1996, no writ).

However, at least one Texas court has held that borrowers may qualify as consumers under the DTPA in certain circumstances. *See, e.g., Bennett v. Bank United*, 114 S.W.3d 75, 80–82 (Tex. App.—Austin 2003, no pet.) (holding borrower was a consumer in relation to mortgage insurance that borrower was forced to purchase in connection with a loan transaction and purchase of a home).

§ 10.12 Texas Debt Collection Act

Borrowers often assert claims for violation of the Texas Debt Collection Act (TDCA). Borrowers allege that they were informed their loan was under a modification review and foreclosure was being postponed during that time, but a foreclosure occurred or was attempted nonetheless.

§ 10.12:1 Parties Subject to TDCA

The TDCA is applicable to creditors, debt collectors, and third-party debt collectors. A *creditor* is a "party, other than a consumer, to a transaction or alleged transaction involving one or more consumers." Tex. Fin. Code § 392.001(3). A *consumer* is an "individual who has consumer debt." Tex. Fin. Code § 392.001(1). A *debt collector* under the TDCA is "a person who directly or indirectly engages in debt collection and includes a person who sells or offers to sell forms represented to be a collection system, device, or scheme intended to be used to collect consumer debts." Tex. Fin. Code § 392.001(6). A *third-party debt collector* is a debt collector, as that term is defined by the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692a(6). *See* Tex. Fin. Code

§ 392.001(7). Thus, a third-party debt collector is defined as "any person who uses any instrumentality of interstate commerce or mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *See* Tex. Fin. Code § 392.001(7); 15 U.S.C. § 1692a(6). See also chapter 7 in this manual for further discussion of the FDCPA and the TDCPA.

§ 10.12:2 Why TDCA Claims Often Fail

Claims brought under the TDCA often fail because the courts have held that the definition of a third-party debt collector "does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned." *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir.1985), *modified on other grounds*, 761 F.2d 237; *Mortberg v. Litton Loan Servicing, L.P.*, No. 4:10-CV-668, 2011 WL 4431946, at *6 (E.D. Tex. Aug. 30, 2011); *Vick v. NCO Financial Systems, Inc.*, No. 2:09-CV-114-TJW-CE, 2011 WL 1193027, at *2 (E.D. Tex. Mar. 7, 2011); *Dabney v. Chase Manhattan Mortgage*, No. 3:10-CV-00259-N, 2010 WL 4502155, at *2 (N.D. Tex. Oct. 4, 2010) (stating that mortgage servicer is not a debt collector under FDCPA); *Bittinger v. Wells Fargo Bank NA*, 744 F. Supp. 2d 619, 626–27 (S.D. Tex. 2010); *Niera v. Frost National Bank*, No. 04-09-00224-CV, 2010 WL 816191, at *5 (Tex. App.—San Antonio Mar. 10, 2010, pet. denied) (mem. op.); *CA Partners v. Spears*, 274 S.W.3d 51, 78–79 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). The Fifth Circuit has held, however, that a mortgage servicer is a "debt collector" under the TDCA, reasoning that the TDCA's definition of "debt collector" is broader than the FDCPA's definition. *See Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 722–23 (5th Cir. 2013). The *Miller* court held that mortgage servicers and assignees qualify as debt collectors under the TDCA "irrespective of whether the [plaintiffs'] mortgage was already in default at the time of its assignment." *Miller*, 726 F.3d at 723.

TDCA claims can also fail because exercising or threatening to exercise a statutory or contractual right of seizure, repossession, or sale that does not require court proceedings, such as a nonjudicial foreclosure, does not constitute a violation of the TDCA. *See McAllister v. BAC Home Loans Servicing, LP*, No. 4:10-CV-504, 2011 WL 2200672, at *8 (N.D. Tex. Mar. 15, 2013) (quoting Tex. Fin. Code § 392.301(b)(3)); *see also Carrillo v. Bank of America, N.A.*, No. H-12-3096, 2013 WL 1558320, at *7 (S.D. Tex. Apr. 11, 2013) (same); *but cf. Biggers v. BAC Home Loans Servicing, LP*, 767 F. Supp. 2d 725, 731–32 (N.D. Tex. 2011) (holding that TDCA can apply to actions taken in foreclosing on real property).

§ 10.12:3 Why Classification as a Debt Collector Is Important

The significance of whether a party is a third-party debt collector is that only a third-party debt collector is required to post a surety bond with the Texas secretary of state. Section 392.101 of the TDCA prohibits a third-party debt collector from engaging in debt collection unless it obtains a $10,000 surety bond and files a copy of the bond with the secretary of state. *See* Tex. Fin. Code § 392.101. However, the bond requirement is inapplicable if a defendant is not a third-party debt collector. *See, e.g., Tetro v. CitiMortgage, Inc.*, No. 4:11-CV-582-Y, 2013 WL 1194480, at *7 (N.D. Tex. Mar. 25, 2013) ("An entity that might otherwise qualify as a third-party debt collector is excepted from the bond requirement where the entity obtained the debt before it went into default." (citing *Enis v. Bank of America, N.A.*, No. 3:12-CV-0295-D, 2012 WL 4741073, at *7 (N.D. Tex. Oct. 3, 2012))).

§ 10.12:4 Associated Violations of DTPA

If a TDCA violation does exist, it is actionable under the DTPA because the TDCA is a tie-in statute, and a violation of the TDCA is a deceptive trade practice under the DTPA. *See* Tex. Bus. & Com. Code § 17.50(h); Tex. Fin. Code § 392.404(a). However, despite this tie-in statute, borrowers must still prove they are consumers under the DTPA. *See Cushman v. GC Services, L.P.*, 397 Fed. App'x 24, 28, (5th Cir. 2010); *Taylor v. Ocwen Loan Servicing, LLC*, No. H-12-2929, 2013 WL 3353955, at *5 (S.D. Tex. July 3, 2013); *Eads v. Wolpoff & Abramson, LLP*, 538 F. Supp. 2d 981, 989 (W.D. Tex. 2008); *Marketic v. U.S. Bank National Ass'n*, 436 F. Supp. 2d 842, 854–55 (N.D. Tex. 2006) ("In all cases, a plaintiff must qualify as a 'consumer' in order to have standing to bring an action under the DTPA.").

§ 10.13 Accounting

Borrowers in default often maintain that the amount claimed due on their loan is incorrect and that a foreclosing party should account for the arrearage because, among other things, they were not credited for payments sent, payments were misapplied, or payments were applied to a loan that was not their loan. Thus, borrowers may seek an order for an accounting of all transactions on their loan to determine whether their payment obligations on the promissory note have been satisfied.

"[A]n action for accounting may be a suit in equity, or it may be a particular remedy sought in conjunction with another cause of action." *Wigginton v. Bank of New York Mellon*, No. 3:10-CV-2128-G, 2011 WL 2669071, at *4 (N.D. Tex. July 7, 2011) (citing *Michael v. Dyke*, 41 S.W.3d 746, 754 (Tex. App.—Corpus Christi 2001, no pet.)). The trial court has discretion to order an accounting, but should do so only when "the facts and accounts in issue are so complex that adequate relief cannot be obtained at law." *Wigginton*, 2011 WL 2669071, at *4 (citing *Southwest Livestock & Trucking Co. v. Dooley*, 884 S.W.2d 805, 809 (Tex. App.—San Antonio 1994, writ denied); *T.F.W. Management, Inc. v. Westwood Shores Property Owners Ass'n*, 79 S.W.3d 712, 717 (Tex. App.—Houston [14th Dist.] 2002, pet. denied)); *see also Hutchings v. Chevron U.S.A., Inc.*, 862 S.W.2d 752, 762 (Tex. App.—El Paso 1993, writ denied). When a party can obtain adequate relief "through the use of standard discovery procedures, such as requests for production and interrogatories, a trial court does not err in not ordering an accounting." *T.F.W. Management*, 79 S.W.3d at 717–18.

§ 10.14 Violation of Consent Judgment/Decrees

A consent judgment or consent decree is a decision reached by a court upon the agreement of all parties involved in a suit. Consent judgments are binding on the parties involved in the agreement. Over the past few years, numerous banks, lenders, and servicers have entered into consent judgments or decrees with the United States and/or the attorneys general of various states, including Texas. *See JPMorgan Chase Bank, N.A. v. Shatteen*, No. 4:12-CV-579, 2013 WL 607837, at *1 (E.D. Tex. Feb. 19, 2013); *Daniels v. JPMorgan Chase, N.A.*, No. 4:11-CV-616, 2011 WL 7040036, at *1 (E.D. Tex. Dec. 14, 2011). In general, the consent judgments provide the details of the servicers' financial obligations under the agreements, which include payments to foreclosed borrowers and new standards the servicers will be required to implement regarding loan servicing and foreclosure practices.

Borrowers often complain that defendants violate the consent judgments or decrees by, among other things, not presenting all loss mitigation options to them before acceleration, not responding to their applications for loan modifications under the federal Home Affordable Modification Program, or simultaneously pursuing a foreclosure while considering a borrower for a loan modification (dual tracking). *See Reynolds v. Bank of America, N.A.*, No. 3:12-CV-1420, 2013 WL 1904090, at *10 (N.D. Tex. May 8, 2013); *Shatteen*, 2013 WL 607837, at *1; *Daniels*, 2011 WL 7040036, at *1. However, courts have consistently held that borrowers do not have standing to enforce a consent decree or judgment that banks have entered into with the government and that the consent decrees confer no private right of action on borrowers. *See Pachecano v. JPMorgan Chase Bank National Ass'n*, No. SA-11-CV-00805-DAE, 2013 WL 4520530, at *12–13 (W.D. Tex. Aug. 26, 2013); *Holloway v. Wells Fargo Bank, N.A.*, No. 3:12-CV-2184-G, 2013 WL 1187156, at *9, 14 (N.D. Tex. Feb. 26, 2013), *rec. adopted*, 2013 WL 1189215 (N.D. Tex. Mar. 22, 2013); *Reynolds*, 2013 WL 1904090, at *10; *Daniels*, 2011 WL 7040036, at *3.

§ 10.15 Home Equity Loan Claims

The Texas Constitution permits home equity lending. A home equity loan is a financial product that allows borrowers to use the market value of their home as collateral for a loan. Home equity loans permit homeowners to cash out the equity in their home and are commonly used to finance large expenses or purchases, such as home-improvement projects, or to pay off debts. The Texas Constitution allows for an extension of credit that "is secured by a voluntary lien on the homestead created under a written agreement with the consent of each owner and each owner's spouse."

Tex. Const. art. XVI, § 50(a)(6)(A). See the discussion in chapter 28 in this manual concerning the foreclosure of a home equity loan.

Borrowers with home equity loans may allege all principal and interest of their home equity loan has been forfeited because the loan violated certain provisions of the Texas Constitution. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x). Importantly, however, the Texas Constitution provides a "cure" provision, which allows lenders to remedy violations of the home equity requirements. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(a)–(f). A lender may avoid invalidation of a homestead lien by curing any failures to comply within sixty days of receiving notice of the deficiencies from the borrower. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x); *see also Puig v. Citibank, N.A.*, No. 12–10609, 2013 WL 657676, at *3 (5th Cir. Feb. 22, 2013); *Doody v. Ameriquest Mortgage Co.*, 49 S.W.3d 342, 346–47 (Tex. 2001).

§ 10.15:1 Limitations for Home Equity Loan Claims

Although the Texas Constitution does not include a limitations period related to claims under section 50(a)(6), "[e]very action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues." Tex. Civ. Prac. & Rem. Code § 16.051. Several courts, including the Fifth Circuit and at least two Texas appellate courts, have determined that a four-year statute of limitations applies to the home equity constitutional provisions. *See Priester v. JP Morgan Chase Bank, N.A.*, 708 F.3d 667, 674 (5th Cir. 2013) ("Numerous district and bankruptcy courts have also applied the four-year limitations period. We thus conclude that a limitations period applies to constitutional infirmities under Section 50(a)(6)."); *Williams v. Wachovia Mortgage Corp.*, 407 S.W.3d 391, 396–97 (Tex. App.—Dallas 2013, pet. filed) (citing *Priester*); *see also Schanzle v. JPMC Specialty Mortgage LLC*, No. 03–09–00639–CV, 2011 WL 832170, at *4 (Tex. App.—Austin Mar. 11, 2011, no pet.) (noting that the "four-year statute of limitations has been applied to violations of the constitutional requirements for home equity loans, calculated from the date of closing on the loan."); *Rivera v. Countrywide Home Loans, Inc.*, 262 S.W.3d 834, 839 (Tex. App.—Dallas 2008, no pet.) (concluding that the "four-year statute of limitations applies to the constitutional and fraudulent lien causes of action" embodied in the Texas Constitution). This four-year limitations period has also been applied to "derivative" constitutional claims based on alleged violations of the home equity provisions. *See Underwood v. Wells Fargo Bank, N.A.*, No. H:12-3437, 2013 WL 3788094, at *2 (S.D. Tex. July 18, 2013).

By an order dated November 13, 2013, the Fifth Circuit posed by certified question the limitation issue to the Texas Supreme Court in *Moran v. Ocwen Loan Servicing, L.L.C.*, No. 13-20242 (5th Cir. 2013). As of the publication date of this manual, the issue has not been settled.

§ 10.15:2 Texas Rules of Civil Procedure 735 and 736

Pursuant to the constitutional requirement that a home equity loan may only be foreclosed by court order, the Texas Supreme Court promulgated rules 735 and 736 of the Texas Rules of Civil Procedure to govern expedited foreclosure of a lien secured by a home equity loan, a reverse mortgage, or a home equity line of credit. *See* Tex. R. Civ. P. 735.1(a). When a home equity loan is at issue, and a court order of foreclosure is required, the party seeking to foreclose may elect to pursue an expedited order of foreclosure under rule 736. A party electing expedited foreclosure proceedings must file an application in a county where all or part of the real property encumbered by the lien sought to be foreclosed is located or in a probate court with jurisdiction over proceedings involving the property. *See* Tex. R. Civ. P. 736.1(a).

Any expedited foreclosure proceeding or order is automatically stayed if a respondent files a separate, original proceeding in a court of competent jurisdiction that puts in issue any matter related to the origination, servicing, or enforcement of the loan agreement, contract, or lien sought to be foreclosed before 5:00 P.M. on the Monday before the scheduled foreclosure sale. *See* Tex. R. Civ. P. 736.11(a); *see also* Tex. R. Civ. P. 736.11(d) (any foreclosure sale of property while stay in effect is void). Within ten days of filing the separate, original proceeding, the respondent must file a motion and proposed order to dismiss or vacate the expedited foreclosure proceeding with the clerk of the court in which the application was filed. *See* Tex. R. Civ. P. 736.11(c). If no order has been signed, the court must dismiss the pending proceeding. If an order has been signed, the court must vacate it. Tex. R. Civ. P. 736.11(c).

Third-party purchasers at foreclosure sales of home equity loans have filed suits when lenders seek foreclosure under rule 736 claiming that they are respondents under that rule. However, a respondent is a statutorily defined term that does not include third-party purchasers. *See* Tex. R. Civ. P. 736.1(d)(1)(B) ("Respondent" means "each person obligated to pay the loan agreement, contract, or lien sought to be foreclosed and each mortgagor, if any, of the loan agreement, contract, or lien sought to be foreclosed.").

See chapter 28 in this manual concerning the procedure for enforcement of home equity loans.

§ 10.16 Truth in Lending Act

Borrowers often assert claims under the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1667f. TILA requires creditors to provide the borrower with certain disclosures. *See, e.g.*, 15 U.S.C. § 1638(a); *see also Moor v. Travelers Insurance Co.*, 784 F.2d 632, 633 (5th Cir. 1986) ("Concluding a credit transaction without giving the required disclosures constitutes a TILA nondisclosure violation."). TILA grants the borrower a private right of action against a creditor that fails to comply with the statute. *See Martinez-Bey v. Bank of America, N.A.*, No. 3:12-CV-4986-G (BH), 2013 WL 3054000, at *6 (N.D. Tex. June 18, 2013); *Jameel v. Flagstar Bank, FSB*, No. H-12-1510, 2012 WL 5384177, at *7 (S.D. Tex. Nov. 2, 2012). Borrowers attempting to recover under TILA must identify the material disclosures required by TILA that the defendant failed to provide. *See Green v. Bank of America N.A.*, No. H-13-1092, 2013 WL 2417916, at *4 (S.D. Tex. June 4, 2013). A successful claimant may recover his actual damages incurred as a result of the failure to comply with TILA's requirements as well as statutory damages up to twice the amount of any finance charge in connection with the transaction. 15 U.S.C. § 1640(a)(1)–(2).

Additionally, section 1641(g) requires that "not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer" and provide certain disclosures. 15 U.S.C. § 1641(g)(1); *see also Martinez-Bey*, 2013 WL 3054000, at *6; *Sigaran v. U.S. Bank National Ass'n*, No. H-12-3588, 2013 WL 2368336, at *8 (S.D. Tex. May 29, 2013).

§ 10.16:1 Right of Rescission

Among other protections, TILA provides that in the case of any consumer credit transaction in which a security interest will be retained on any property used as the consumer's principal dwelling, the consumer shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or delivery of the material disclosure and rescission forms, whichever is later. 15 U.S.C. § 1635(a). If the creditor fails to deliver the forms, or fails to provide the required information, then the consumer's right of rescission extends for three years after the date of consummation of the transaction. 15 U.S.C. § 1635(f); *see also Taylor v. Domestic Remodeling, Inc.*, 97 F.3d 96, 98 (5th Cir. 1996). The federal circuit courts are split on whether a borrower is required to file suit or merely provide notice of the borrower's intent to rescind within this three-year period. *Compare Keiran v. Home Capital, Inc.*, 720 F.3d 721, 728 (8th Cir. 2013) (borrower must file suit within three-year period), *and McOmie-Gray v. Bank of America Home Loans, FKA*, 667 F.3d 1325, 1328 (9th Cir. 2012) (same), *and Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1188 (10th Cir. 2012) (same), *with Sherzer v. Homestar Mortgage Services*, 707 F.3d 255, 261 (3d Cir. 2013) (holding that borrower timely asserted his right to rescission by validly notifying creditor of intent to rescind), *and Gilbert v. Residential Funding LLC*, 678 F.3d 271, 277 (4th Cir. 2012) (same). Furthermore, the Eighth Circuit has held that a borrower must file suit on a TILA rescission claim before the property is foreclosed. *Hartman v. Smith*, 734 F.3d 752, 760 (8th Cir. 2013). However, in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015), the Supreme Court held that a borrower exercising his right to rescind under TILA need only provide written notice to his lender within the three-year period, not file suit within that period, abrogating *Keiran*.

Not Applicable to Residential Mortgage Transactions: To the extent borrowers seek rescission under TILA, the parties should be aware that "[t]here is no right of rescission with respect to 'residential mortgage transactions.'" *Green v. Bank of America N.A.*, No. H-13-1092, 2013 WL 2417916, at *4 (S.D. Tex. June 4, 2013); *see* 15 U.S.C. § 1635(e)(1); 12 C.F.R. § 226.23(f)(1). A "residential mortgage transaction" means "a transaction in which a mortgage . . . is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(w). Additionally, mortgage servicers are not subject to TILA disclosure requirements "unless the servicer is or was the owner of the obligation." *See* 15 U.S.C. §§ 1602(g), 1641(f)(1); *see also Garcia v. University Mortgage Corp.*, No. 3:12-CV-2460, 2013 WL 1858195, at *6 (N.D. Tex. May 3, 2013).

§ 10.16:2 Limitations on Action

A borrower must bring a claim for damages under TILA within one year of the date of the alleged violation, which is the date the transaction was consummated. 15 U.S.C. § 1640(e); *Moor v. Travelers Insurance Co.*, 784 F.2d 632, 633 (5th Cir. 1986).

§ 10.17 Real Estate Settlement Procedures Act

Borrowers also frequently bring claims under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617. For a loan to be subject to RESPA, it must be a "federally related mortgage loan," as defined in section 2602(1). *Levels v. Merlino*, No. 3:11-cv-3434-M-BN, 2013 WL 4733993, at *22 (N.D. Tex. Sept. 3, 2013); *see also Coleman v. Bank of New York Mellon*, No. 3:12-CV-04783, 2013 WL 1187158, at *5 (N.D. Tex. Mar. 4, 2013); 12 U.S.C. § 2605(a).

§ 10.17:1 Qualified Written Request

RESPA defines a "qualified written request" as "a written correspondence" that "(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower." 12 U.S.C. § 2605(e)(1)(B). The qualified written request must relate to the "servicing" of the loan, which is defined as "receiving any scheduled periodic payments from a borrower" and "making the payments of principal and interest . . . received from the borrower as may be required pursuant to the terms of the loan." 12 U.S.C. §§ 2605(i)(3), 2605(e)(1)(A); *see also Cyrilien v. Wells Fargo Bank, N.A.*, No. H-10-5018, 2012 WL 2133551, at *4 n.3 (S.D. Tex. June 11, 2012) ("The [qualified written request] must relate to the servicing of the loan."). However, a "written request does not constitute a qualified written request if it is delivered to a servicer more than 1 year after either the date of transfer of servicing or the date that the mortgage servicing loan amount was paid in full, whichever date is applicable." 24 C.F.R. § 3500.21(e)(2)(ii).

Importantly, if a servicer designates that a qualified written request must be mailed to a specific address, the servicer's duty to respond is not triggered by a qualified written request sent to an alternative address, even if the servicer receives the qualified written request. *See Steele v. Green Tree Servicing, LLC*, 3:09-CV-0603-D, 2010 WL 3565415 (N.D. Tex. Sept. 7, 2010), *aff'd sub nom.*, 453 F. App'x 473 (5th Cir. 2011). Moreover, a written request must meet certain statutory requirements to be classified as a qualified written request; otherwise, the lender is under no duty to respond pursuant to RESPA. *See* 12 U.S.C. § 2605(e)(1)(B).

§ 10.17:2 Required Responses to a Qualified Written Request

Under RESPA—

> If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 5 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.

12 U.S.C. § 2605(e)(1)(A). *See also Oden v. JPMorgan Chase Bank, N.A.*, No. H-12-0861, 2012 WL 1610782, at *2 (S.D. Tex. May 8, 2012). RESPA also provides that, "not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request," the loan servicer must make necessary corrections to the borrower's account, provide a written explanation as to why the loan servicer believes that the borrower's account is correct, or explain why the information requested is unavailable or cannot be obtained by the loan servicer. 12 U.S.C. § 2605(e)(2).

§ 10.17:3 Notice of Assignment of Loan

RESPA requires that, at the time of application, a lender must disclose to the borrower that servicing of the loan may be assigned, sold, or transferred. 12 U.S.C. § 2605(a). In addition, section 2605 "requires that the borrower be informed when a loan is transferred from one servicer to another." *Cyrilien v. Wells Fargo Bank, N.A.*, No. H-10-5018, 2012 WL 2133551, at *4 n.3 (S.D. Tex. June 11, 2012) (citing 12 U.S.C. § 2605(c)); *Akintunji v. Chase Home Finance, L.L.C.*, No. H-11-389, 2011 WL 2470709, at *2 (S.D. Tex. June 20, 2011); *see also* 12 U.S.C. § 2605(b).

§ 10.17:4 Recovery of Damages under RESPA

To recover damages under RESPA § 2605(e), a borrower must show that he made a qualified written request to a loan servicer and that he suffered actual damages as a result of the defendant's failure to comply with RESPA in responding to the qualified written request. 12 U.S.C. § 2605(f)(1)(A) ("Whoever fails to comply with any provision of this section shall be liable to the borrower for . . . any actual damages to the borrower as a result of the failure . . . ."); *see also Kareem v. American Home Mortgage Servicing, Inc.*, 479 F. App'x 619, 620 (5th Cir. 2012) (per curiam); *Holliday v. Bank of America, N.A.*, No. SA-11-CV-1133, 2013 WL 1704905, at *6 (S.D. Tex. Apr. 19, 2013); *Collier v. Wells Fargo Home Mortgage*, No. 7:04–CV–086–K, 2006 WL 1464170, at *3 (N.D. Tex. May 26, 2006). For a defendant to be liable under section 2605(e), the plain language of the statute requires that the defendant be a loan "servicer" (*see* 12 U.S.C. § 2605(e)(1)–(4)) and that the defendant receive a qualified written request. *See, e.g.*, 12 U.S.C. §§ 2605(e)(1)–(4), 2605(e)(1)(A) ("If any servicer . . . receives a qualified written request from the borrower . . . the servicer shall . . . ."); *Starnes v. J.P. Morgan Chase Bank*, No. 4:12-CV-711-A, 2013 WL 1286655, at *2–3 (N.D. Tex. Mar. 27, 2013) (dismissing RESPA claim where plaintiff failed to allege that his qualified written request complied with statutory requirements).

§ 10.18 Fair Debt Collection Practices Act

The purpose of the Fair Debt Collection Practices Act (FDCPA) is to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692. "Consumers may sue to enforce the Act's provisions and, if successful, recover actual damages, statutory damages, and attorney's fees and costs." *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 500 (5th Cir. 2008) (citing 15 U.S.C. § 1692k). See chapter 7 in this manual for further discussion of the FDCPA.

§ 10.18:1 Prohibited Acts

The FDCPA prohibits the use of "unfair or unconscionable means" by a debt collector "to collect or attempt to collect any debt." 15 U.S.C. § 1692f. Under the FDCPA, "'consumer' means any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3). A "debt collector" is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Importantly, however, the FDCPA explicitly exempts from the definition of the term *debt collector* "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was originated by such person [or] concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F); *see also Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985), *modified on other grounds*, 761 F.2d 237 (5th Cir. 1985) ("[A] debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned."); *Auriti v. Wells Fargo Bank, N.A.*, No. 3:12-CV-334, 2013 WL 2417832, at *7 (S.D. Tex. June 3, 2013) (mortgage servicer not a "debt collector" under FDCPA); *Bibolotti v. American Home Mortgage Servicing, Inc.*, No. 4:11-CV-472, 2013 WL 2147949, at *16 (E.D. Tex. May 15, 2013) (mortgage servicer not a "debt collector" because debt was not in default at time servicer began servicing loan); *Preston v. Seterus, Inc.*, 931 F. Supp. 2d 743, 765 (N.D. Tex. 2013) ("The term 'debt collector' does not include lenders.") (citing 15 U.S.C. § 1692a(6)(F)); *Evolve Federal Credit Union v. Rodriguez*, No. EP-11-CV-367-KC, 2012 WL 113691, at *4 (W.D. Tex. Jan. 12, 2012) (loan originator not a debt collector under FDCPA). Thus, to prevail on a FDCPA claim against a mortgage servicer, borrowers must demonstrate that the loan was in default at the time the mortgage servicer began servicing the loan.

§ 10.18:2 Is Foreclosure a Debt Collection?

Some federal courts have held that a nonjudicial foreclosure under a deed of trust is not "debt collection" as defined under the FDCPA. *See Brown v. Morris*, 243 F. App'x 31, 35 (5th Cir. 2007) (affirming jury's determination that initiating foreclosure did not constitute debt collection); *Bibolotti v. American Home Mortgage Servicing, Inc.*, No. 4:11-CV-472, 2013 WL 2147949, at *16 (E.D. Tex. May 15, 2013) (sending notice of default and acceleration was not "debt collection" activity); *Enis v. Bank of America, N.A.*, No. 3:12-CV-0295-D, 2013 WL 1721961, at *8 (N.D. Tex. Apr. 22, 2013) ("[A]n entity's foreclosure activities do not count as debt collection for the purposes of determining whether it is a 'debt collector' under [the FDCPA]."); *Castanon v. Wells Fargo Bank, N.A.*, No. 3:11-CV-03472-P, 2012 WL 3200869, at *3 (N.D. Tex. June 22, 2012); *Bittinger v. Wells Fargo Bank NA*, 744 F. Supp. 2d 619, 626 (S.D. Tex. 2010) ("The activity of foreclosing on a property pursuant to a deed of trust is not the collection of debt within the meaning of the FDCPA.").

§ 10.19 Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act (SCRA), codified at 50 U.S.C. §§ 3901–4043, provides "for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service." 50 U.S.C. § 3902(2). The provisions of the SCRA are to be "liberally construed" and applied in a broad spirit of gratitude toward service personnel. *Clauer v. Heritage Lakes Homeowners Ass'n*, No. 4:09-cv-560, 2010 WL 2465363, at *3 (E.D. Tex. June 3, 2010) (citing *Engstrom v. First National Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995).

§ 10.19:1 SCRA Restrictions on Collection Activities

Section 3953(c) of the SCRA prohibits the sale, foreclosure, or seizure of a servicemember's real property during or within one year after the period of the servicemember's military service, unless a court order grants approval before the sale, foreclosure, or seizure. *See* 50 U.S.C. § 3953(c). Section 3953 applies to obligations on real or personal property owned by a servicemember that: "(1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and (2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage." 50 U.S.C. §§ 3953(a)(1)–(2). Thus, section 3953 does not apply if a servicemember obtains a loan while already in military service. *See Torres v. Wells Fargo Bank, N.A.*, No. 3:13-cv-00064-DCG, slip op. at 4–5 (W.D. Tex. June 5, 2013) (holding that section 3953 of SCRA applies only to obligations that originated before military service); *Shield v. Hall*, 207 S.W.2d 997, 1000 (Tex. Civ. App.—Eastland 1948, writ ref'd n.r.e.) (stating that SCRA "has no application here for the reason that at the time defendant executed the note and mortgage he was in the Military Service").

§ 10.19:2 Damages Available under SCRA

Borrowers who assert SCRA violations seek actual, consequential, statutory, and punitive damages, as well as attorney's fees and costs. Section 4042 of the SCRA provides that any person aggrieved by a violation of the SCRA may in a civil action: "(1) obtain any appropriate equitable or declaratory relief with respect to the violation; and (2) recover all other appropriate relief, including monetary damages." 50 U.S.C. § 4042(a). A court may also award to a person aggrieved by a violation of the SCRA who prevails in a civil action the costs of the action and attorney's fees under section 4042(b). 50 U.S.C. § 4042(b). Further, under section 3953(d), any person who "knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited by subsection (c), or who knowingly attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both." 50 U.S.C. § 3953(d). Moreover, section 4043 provides that nothing in section 4041 or 4042 "shall be construed to preclude or limit any remedy otherwise available under other law, including consequential and punitive damages." 50 U.S.C. § 4043; *see also Hurley v. Deutsche Bank Trust Co. Americas*, No. 1:08-CV-361, 2009 WL 701006, at *9 (W.D. Mich. March 13, 2009) (granting servicemember's motion for summary judgment with regard to violations of section 3953(c) and holding that defendant foreclosed on his property in violation of SCRA).

See chapter 33 in this manual for further discussion of SCRA.

§ 10.20 Home Owners' Loan Act

Under the Home Owners' Loan Act (HOLA), 12 U.S.C. §§ 1461–1470, and its accompanying regulations, state law claims are preempted if they purport to impose requirements on a federal savings bank regarding "[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages." *Olaoye v. Wells Fargo Bank, N.A.*, No. 4:11-CV-772-Y, 2012 WL 1082307, at *3 (N.D. Tex. Apr. 2, 2012) (finding HOLA preemption where plaintiff asserted claims for wrongful foreclosure, trespass to try title, quiet title, and under TDCA based on defendant's alleged lack of authority to enforce note and deed of trust) (citing 12 C.F.R. § 560.2(b)(10)); *see also Morales v. Flagstar Bank, F.S.B.*, No. 4:13-CV-243-Y, slip op. at 1 (N.D. Tex. Aug. 27, 2013). HOLA preemption applies even if a loan originated by a federal savings bank is later transferred. *See Chavez v. Wells Fargo Bank, N.A.*, No. 4:11-cv-864-Y, 2013 WL 3762894, at *3–4 (N.D. Tex. July 9, 2013); *Barzelis v. Flagstar Bank, F.S.B.*, No. 4:12-CV-611-Y, 2013 WL 3762893, at *4 (N.D. Tex. Feb. 19, 2013), *aff'd in part, rev'd in part*, 784 F.3d 971 (5th Cir. 2015); *Olaoye*, 2012 WL 1082307, at *3 n.4; *see also Gorton v. Wells Fargo Bank, N.A.*, No. SACV 12-1245 JVS (MLGx), 2013 U.S. Dist. LEXIS 86006, at *9–11 (C.D. Cal. June 3, 2013); *Haggarty v. Wells Fargo Bank, N.A.*, No. C 10-02416 CRB, 2011 WL 445183, at *4 (N.D. Cal. 2011); *DeLeon v. Wells Fargo Bank, N.A.*, 729 F. Supp. 2d 1119, 1126 (N.D. Cal. 2010); *Amaral v. Wachovia Mort. Corp.*, 692 F. Supp. 2d 1226, 1237–39 (E.D. Cal. 2010); *but cf. Gerber v. Wells Fargo Bank, N.A.*, No. 11-01083-PHX-NVW, 2012 WL 413997, at *3–4 (D. Ariz. Feb. 9, 2012).

§ 10.20:1 OTS Implementation of HOLA

HOLA granted the Office of Thrift Supervision (OTS) very "broad authority to issue regulations governing thrifts." *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1005 (9th Cir. 2008) (citing 12 U.S.C. § 1464(a)). OTS regulations expressly "occup[y] the entire field of lending regulation." 12 C.F.R § 560.2(a). In *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), the Supreme Court emphasized OTS's extensive power and authority to regulate and govern "every federal saving and loan association from its cradle to its corporate grave." With respect to borrowers' claims related to loans originated before the enactment of the Consumer Financial Protection Act of 2010, signed into law on July 21, 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub L. No. 111-203, Title X, 124 Stat. 1376 (2010), HOLA field preemption applies. *Gorton v. Wells Fargo Bank, N.A.*, No. SACV 12-1245 JVS (MLGx), 2013 U.S. Dist. LEXIS 86006, at *10 (C.D. Cal. June 3, 2013) ("HOLA field preemption still applies to loans taken out before the Dodd-Frank Act's date of enactment of July 21, 2010."). State law claims are not preempted, however, if they "only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of [12 C.F.R. § 560.2]." *Mandala v. Wells Fargo Bank, N.A.*, No. 4:12-2335, 2013 WL 1828022, at *2 (S.D. Tex. Apr. 30, 2013) (citing 12 C.F.R. § 560.2(c)).

Since Dodd-Frank's enactment in 2010, the OTS has merged into the Office of the Comptroller of the Currency "to promulgate regulations providing 'for the organization, incorporation, examination, operation, and regulation' of federal savings associations and federal savings banks." *In re Thomas*, 476 B.R. 691, 695 (Bankr. D. Mass. 2012) (citing 12 U.S.C. § 1464(a)).

§ 10.20:2 HOLA Preemption of State Financial Law Claims

After Dodd-Frank, under HOLA, federal thrifts and their subsidiaries are subject to the same preemption standards as national banks and their subsidiaries, i.e., conflict preemption. *Gorton v. Wells Fargo Bank, N.A.*, No. SACV 12-1245 JVS (MLGx), 2013 U.S. Dist. LEXIS 86006, at *10 (C.D. Cal. June 3, 2013); 12 C.F.R. §§ 7.4010(a), 34.6; *see also* 12 C.F.R. § 7.4010(b). State consumer financial laws are preempted, only if—

> (A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;
>
> (B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by

> the national bank of its powers . . . ; or
>
> (C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.

12 U.S.C. § 25b(b)(1).

§ 10.21 National Bank Act

The National Bank Act (NBA) vests in federally chartered national banks "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24; *Wells Fargo Bank of Texas N.A. v. James*, 321 F.3d 488, 490 (5th Cir. 2003). Nonetheless, "[s]tates are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12 (2007). But when state laws "significantly impair the exercise of authority, enumerated or incidental under the NBA, the [s]tate's regulations must give way." *Watters*, 550 U.S. at 12 (citations omitted).

The NBA authorizes national banks to make real estate loans without regard to state limitations regarding, among other things, "terms of credit, including . . . balance, payments due," and "circumstances under which a loan may be called due and payable," and encompasses processing and servicing of, and participation in, mortgages. *See* 12 C.F.R. §§ 34.4(a)(4), (10). Where state law claims fall within the purview of the lending and servicing activities listed in section 34.4(a), they are preempted by the NBA.

§ 10.22 Fair Credit Reporting Act

Borrowers who bring wrongful foreclosure suits assert violations of section 1681s-2 of the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681–1681x, for the alleged erroneous reporting of adverse credit information to credit bureaus, as well as for the failure to conduct a reasonable investigation with respect to disputed information on their credit report.

§ 10.22:1 Furnisher of Information

Section 1681s-2(b) of the FCRA imposes duties on furnishers of information relating to a consumer to, among other things, investigate a dispute related to a consumer's credit report after receiving notice of the dispute from a credit reporting agency. A "furnisher" is "an entity which transmits information concerning a particular debt owed by a particular consumer to consumer reporting agencies." *Meisel v. USA Shade & Fabric Structures, Inc.*, 795 F. Supp. 2d 481, 484 n.1 (N.D. Tex. June 14, 2011) (quoting *Elias v. Chase Bank USA, N.A.*, No. 2:09cv250–KS–MTP, 2010 WL 384527, at *3 (S.D. Miss. Jan. 27, 2010)); *see also Alam v. Sky Recovery Services, Ltd.*, No. H–08–2377, 2009 WL 693170 at *4 (S.D. Tex. Mar. 13, 2009).

The duty of a furnisher of information relating to a consumer to investigate a dispute with respect to a borrower's credit report is only triggered upon receipt of such notice from a consumer reporting agency. 15 U.S.C. § 1681s-2(b)(1); *See Young v. Equifax Credit Information Services, Inc.*, 294 F.3d 631, 639 (5th Cir. 2002) ("Such notice is necessary to trigger the furnisher's duties under Section 1681s-2(b)."); *Manns-Rice v. Chase Home Finance LLC*, No. 4:11-CV-425, 2012 WL 2674551, at *3 (N.D. Tex. July 5, 2012). Accordingly, if the borrower never notified a consumer reporting agency of a dispute, or if the defendant was never notified of the dispute by a consumer reporting agency, the borrower cannot prove the defendant had a duty to investigate. *See Manns-Rice*, 2012 WL 2674551, at *3. Defendants may also be able to argue that the borrower's notice of dispute did not comply with section 1691s-2(a)(8)(D) by not identifying the specific information being disputed, not explaining the basis for the dispute, or failing to include all supporting documentation required by the defendant to substantiate the basis of the dispute. *See* 15 U.S.C. § 1691s-2(a)(8)(D)(i)–(iii); *see also Bashore v. Bank of America*, No. 4:11cv93, 2012 WL 629060, at *8 (E.D. Tex. Feb. 27, 2012).

Upon receiving notice of a dispute, the FCRA requires the furnisher of information to: (1) "conduct an investigation with respect to the disputed information;" (2) "review all relevant information provided by the consumer reporting agency;" and (3) "report the results of the investigation to the consumer reporting agency." 15 U.S.C. §§ 1681s-2(b)(1)(A)–(C). "[I]f the investigation finds that the information is incomplete or inaccurate, [the furnisher of information must] report those results to all other consumer reporting agencies to which the person furnished the information." 15 U.S.C. § 1681s-2(b)(1)(D). If a disputed item of information "is found to be inaccurate or incomplete or cannot be verified after any reinvestigation . . . for the purposes of reporting to a consumer reporting agency only, as appropriate," the furnisher of information must "(i) modify the item of information; (ii) delete that item of information; or (iii) permanently block the reporting of that item of information." 15 U.S.C. § 1681s-2(b)(1)(E). The limitations period under the FCRA is the earlier of "2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or 5 years after the date on which the violation that is the basis of such liability occurs." 15 U.S.C. § 1681p.

§ 10.22:2 Claims under FCRA

To state a claim under the FCRA, a consumer must allege that: (1) he notified a consumer reporting agency of inaccurate information; (2) the consumer reporting agency notified the furnisher of the information of the dispute; and (3) the furnisher of the information failed to investigate the claim, correct any inaccuracies, and notify the consumer reporting agency about the results of the investigation. *See, e.g., Hoyt v. USAA Federal Savings Bank*, No. SA-11-CV-0505-FB (NN), 2012 WL 896171, at *2 (W.D. Tex. Mar. 15, 2012). Additionally, consumers must demonstrate that they were actually damaged by the furnisher's failure to comply with the FCRA's requirements. *See Vlasek v. Wal-Mart Stores, Inc.*, No. H-07-0386, 2008 WL 2937760, at *6 (S.D. Tex. July 22, 2008) (plaintiff could not "recover under section 1681o because she has not suffered actual damages" from defendant's failure to comply with FCRA); *see also* 15 U.S.C. § 1681o(a)(1) (actual damages); 15 U.S.C. § 1681n(a)(1)(A) (punitive damages); *Pettus v. TRW Consumer Credit Service*, 879 F. Supp. 695, 697 (W.D. Tex. 1994) ("[T]he FCRA provides a remedy for consumers who are actually damaged by a failure to comply with the Act's requirements."). Moreover, "[e]ach element of damage must be linked to failure to comply with FCRA obligations." *Morris v. Trans Union LLC*, 420 F. Supp. 2d 733, 738 (S.D. Tex. 2006).

§ 10.22:3 Federal Preemption of State Claims

The Fair Credit Reporting Act preempts "all causes of action against furnishers grounded in state statutory law," as well as "tort claims arising under state common law" unless the tort claims are premised on the "furnishment of false information with malice" or "willful intent to injure." *Meisel v. USA Shade & Fabric Structures, Inc.*, 795 F. Supp. 2d 481, 487, 491 (N.D. Tex. June 14, 2011) (citing 15 U.S.C. §§ 1681t(b)(1)(F), 1681h(e)).

The FCRA has two preemption provisions: section 1681t(b)(1)(F) and section 1681h(e). *See Pachecano v. JPMorgan Chase Bank National Ass'n*, No. SA-11-CV-00805-DAE, 2013 WL 4520530, at *4 (W.D. Tex. Aug. 26, 2013); *see also* 15 U.S.C. §§ 1681t(b)(1)(F), 1681h(e). Section 1681t(b)(1)(F) "expansively preempt[s] all causes of action 'imposed under the laws of any State' pertaining to the duties of furnishers of information under the FCRA. *Pachecano*, 2013 WL 4520530, at *4, 6 (holding that plaintiff's DTPA and TDCA claims based on an alleged failure to accurately report credit information were preempted under section 1681t(b)(1)(F)). Thus, section 1681t(b)(1)(F) preempts only statutory state causes of action against furnishers. *See Meisel*, 795 F. Supp. 2d at 491.

Section 1681h(e) addresses preemption of state common law causes of action and provides that—

> no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, . . . except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C. § 1681h(e); *see also Carlson v. Trans Union LLC*, 259 F. Supp. 2d 517, 521 (N.D. Tex. 2003) ("[Section] 1681h(e) applies only to torts, while [Section] 1681t(b)(1)(F) applies only to state statutory regulation."). Thus, section 1681h(e) preempts state common law defamation, invasion of privacy, and negligence claims unless the false information was furnished with malice or willful intent to injure the consumer. *See, e.g., Manns-Rice v. Chase Home Finance LLC*, No. 4:11-CV-425-A, 2012 WL 2674551, at *3 (N.D. Tex. July 5, 2012) ("[T]he FCRA preempts state law defamation or negligent reporting claims unless the plaintiff consumer proves 'malice or willful intent to injure' him.") (quoting *Young v. Equifax Credit Information Services, Inc.*, 294 F.3d 631, 638 (5th Cir. 2002)); *see also Robinson v. EMC Mortgage Corp.*, No. 3:10-CV-2140-L, 2013 WL 1245863, at *12 (N.D. Tex. Mar. 26, 2013) (holding defamation claim was preempted under FCRA because plaintiff alleged no facts indicating malice or willful intent to injure); *O'Dea v. Wells Fargo Home Mortgage*, No. H-10-4755, 2013 WL 441461 (S.D. Tex. Feb. 5, 2013) (holding state law libel claim alleging damaging remarks to credit agency preempted by FCRA); *Carlson*, 259 F. Supp. 2d at 521–22 (holding negligence claim against credit furnisher as preempted under FCRA).

On a related note, lenders and servicers should be aware that the FCRA may preempt certain state-law claims brought by borrowers, if such claims are based on the furnishing of information to a consumer reporting agency. *See Ayers v. Aurora Loan Services, LLC*, 787 F. Supp. 2d 451, 457 (E.D. Tex. 2011). Federal courts in Texas, citing sections 1681s-2(c)(1) and 1681s-2(d), have held that there is no private right of action for inaccurate reporting of information to a credit bureau. *O'Dea*, 2013 WL 441461, at *13 ("[T]here is no private right of action for a claim under § 1681s-2(a)."); *see also Haley v. Citibank, N.A.*, No. 11-03522, 2012 WL 2403501, at *2 (S.D. Tex. June 25, 2012); *Bashore v. Bank of America*, No. 4:11cv93, 2012 WL 629060, at *8 (E.D. Tex. Feb. 27, 2012).

State common-law torts outside of defamation, invasion of privacy, and negligence may also be preempted under section 1681h(e). *See Carlson*, 259 F. Supp. 2d at 521 ("section [1681h(e)] specifically references 'any action or proceeding *in the nature of* defamation, invasion o[f] privacy, or negligence.' . . . All claims in the (non-exclusive) list are torts."); *but cf. Pachecano*, 2013 WL 4520530, at *4 (section "1681h(e) preempts only a narrow class of tort claims where a plaintiff does not meet the heightened standard of malice or willfulness").

§ 10.23 Injunctive Relief

In connection with foreclosure-related actions, borrowers routinely seek ex-parte temporary restraining orders to preclude a foreclosure sale or prevent eviction. A borrower may obtain a temporary restraining order without notice to the adverse party by showing that "immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." Tex. R. Civ. P. 680. Temporary restraining orders expire by their own terms within fourteen days of their issuance. Tex. R. Civ. P. 680. Before a temporary restraining order can become effective, the borrower must file a surety bond with the court. Tex. R. Civ. P. 684. Further, a defendant must receive notice of the temporary restraining order before the defendant can be barred from foreclosing or evicting the borrower. *In re Hudgins*, 188 B.R. 938, 946 (Bankr. E.D. Tex. 1995) (citing *Pioneer Building & Loan Ass'n v. Cowan*, 123 S.W.2d 726, 729–30 (Tex. Civ. App.—Waco 1938, writ dism'd judgm't cor.)).

To prevent foreclosure or eviction past the expiration date of the temporary restraining order, a borrower may seek a temporary injunction. A temporary injunction is an extraordinary remedy that does not issue as a matter of right. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Unlike a temporary restraining order, a temporary injunction cannot issue without notice to the defendant. Tex. R. Civ. P. 681. To obtain a temporary injunction, the borrower must plead and prove (1) a cause of action against the defendant; (2) a probable right to recovery following a trial on the merits; and (3) a probable, imminent, and irreparable injury in the interim. *See Butnaru*, 84 S.W.3d at 204; *ICON Benefit Administrators II, L.P. v. Abbott*, 409 S.W.3d 897, 902 (Tex. App.—Austin 2013, pet. filed); *Primary Health Physicians, P.A. v. Sarver*, 390 S.W.3d 662, 664 (Tex. App.—Dallas 2012, no pet.); *Galindo v. Border Federal Credit Union*, No. 04-08-676-CV, 2009 WL 700836, at *1 (Tex. App.—San Antonio Mar. 18, 2009, no pet.) (mem. op.); *see also Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987); *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974) (en banc); *Miranda v. Wells Fargo Bank, N.A.*, No. 3:13-CV-2217-L, 2013 WL 3230672, at *1 (N.D. Tex. June 27, 2013). The "probable, imminent, and irreparable injury" element must be established by competent evidence at an evidentiary hearing. *See Galindo*, 2009 WL 700836, at *1 (citing *Goldthorn v. Goldthorn*, 242 S.W.3d 797, 798 (Tex. App.—San Antonio 2007, no pet.).

§ 10.24 Res Judicata and Judicial Estoppel

To continuously delay or prevent foreclosure, it is not uncommon for a borrower to bring successive lawsuits for the same foreclosure-related claims. In such cases, the borrower's claims may be barred by the doctrine of res judicata. Under res judicata, a final judgment on the merits of an action precludes parties from relitigating issues that were or could have been raised in the prior action. *See Oreck Direct, LLC v. Dyson, Inc.*, 560 F.3d 398, 401 (5th Cir. 2009). The purpose of the res judicata doctrine is to preclude parties from contesting matters that they have had a full and fair opportunity to litigate with the goal of conserving judicial resources, minimizing the possibility of inconsistent decisions, and protecting parties from the expense and vexation of attending to multiple lawsuits. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

§ 10.24:1 Elements of Res Judicata

The application of the res judicata doctrine requires satisfaction of four elements: "(1) the parties must be identical in the two actions; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must be a final judgment on the merits; and (4) the same claim or cause of action must be involved in both cases." *In re Ark-La-Tex Timber Co.*, 482 F.3d 319, 330 (5th Cir. 2007); *see also Citizens Insurance Co. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007). In effect, res judicata applies in a later lawsuit between identical parties who appeared in a prior lawsuit if the cause of action asserted in the later lawsuit was decided with finality by a court of competent jurisdiction. *See Williams v. National Mortgage Co.*, 903 S.W.2d 398, 402 (Tex. App.—Dallas 1995, writ denied) (citing *Texas Water Rights Commission v. Crow Iron Works*, 582 S.W.2d 768, 771–72 (Tex. 1979)). Res judicata also bars a party from litigating matters in a later lawsuit that it could have raised, but did not raise in a previous lawsuit. *See Williams*, 903 S.W.2d at 402 (citing *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985)).

§ 10.24:2 Elements of Judicial Estoppel

Under federal law, judicial estoppel has three elements: (1) the party against whom it is sought has asserted a legal position that is plainly inconsistent with a prior position, (2) a court accepted the prior position, and (3) the party acted inadvertently. *See In re Flugence*, 738 F.3d 126, 129 (5th Cir. 2013) (citing *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011)); *see also Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012). Some Texas state courts rely on federal judicial estoppel law as developed by the Fifth Circuit when judicial estoppel is raised based on a position taken in a prior bankruptcy proceeding. *See, e.g., Baxter v. Contreras*, No. 10-12-00085-CV, 2013 WL 2399110, at *1 (Tex. App.—Waco May 30, 2013, no pet.) (mem. op.) (applying federal law of judicial estoppel where appellant took an inconsistent position in a previous bankruptcy filing); *Siller v. LPP Mortgage, Ltd.*, No. 04-11-00496-CV, 2013 WL 1484506, at *4 (Tex. App.—San Antonio Apr. 10, 2013, pet. denied) (applying federal law regarding judicial estoppel because prior proceeding was in bankruptcy court); *Dallas Sales Co. v. Carlisle Silver Co.*, 134 S.W.3d 928, 931 (Tex. App.—Waco 2004, pet. denied) ("[T]he federal law of judicial estoppel applies in a case in which the prior proceeding was in federal bankruptcy court."); *but cf. Ferguson v. Building Materials Corp. of America*, 295 S.W.3d 642, 643–44 (Tex. 2009).

The Fifth Circuit has noted that judicial estoppel is "particularly appropriate where . . . a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset." *Love*, 677 F.3d at 261–62 (quoting *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005)). A debtor's claims that are property of the bankruptcy estate may have value and once liquidated be available to pay creditors. Generally, the failure by the debtor to disclose claims that would be property of the bankruptcy estate is viewed as a legal position that such claims do not exist. *See, e.g., Abreu v. Zale Corp.*, No. 3:12-CV-2620-D, 2013 WL 1949845, at *2 (N.D. Tex. May 13, 2013) ("By not disclosing . . . her claim against Zale for unpaid overtime, and instead stating that she had no property within the category of 'contingent and unliquidated claims of every nature,' . . . Abreau clearly represented to the bankruptcy court that she had no such claim."). The debtor's position is viewed as being accepted by the court when the individual debtor obtains relief in his bankruptcy case, such as a discharge or confirmation of a Chapter 13 plan, without the required disclosure or dedication of the proceeds of the claim to creditors. *Abreu*, 2013 WL 1949845, at *3 ("Courts have consistently held that a bankruptcy court accepts a debtor's position when it relies on her asset schedules and confirms her bankruptcy plan."). Notably, the failure to disclose assets is "inadvertent" only when the borrower/debtor lacks knowledge of the undisclosed claims or has no motive for their concealment. *See In re Flugence*, 738 F.3d at 130–31; *Love*, 677 F.3d at 262.

Judicial estoppel is usually applied to claims asserted by the debtor. Several courts have chosen to not apply that defense, however, to the trustee of the debtor's bankruptcy estate. *See In re Flugence*, 738 F.3d at 132 ("[W]here a debtor is judicially estopped from pursuing a claim he failed to disclose to the bankruptcy court, the trustee . . . may pursue the claim without any limitation not otherwise imposed by law."); *Reed*, 650 F.3d at 579 ("Absent unusual circumstances, an innocent bankruptcy trustee may pursue for the benefit of creditors a judgment or cause of action that the debtor—having concealed that asset during bankruptcy—is himself estopped from pursuing.").

§ 10.24:3 Bankruptcy and Judicial Estoppel

When a borrower commences a case under the U.S. Bankruptcy Code (codified as amended in various sections of 11 U.S.C., 18 U.S.C., and 28 U.S.C.), the borrower, as a debtor, benefits from certain protections, including an automatic stay. Generally, the filing of a bankruptcy petition automatically stays foreclosure proceedings. *See* 11 U.S.C. § 362(a)(4) (filing for bankruptcy protection operates as a stay of "any act to . . . enforce a lien against property of the estate"). The purpose of the automatic stay is "to protect the debtor's assets, provide temporary relief from creditors, and further equity of distribution among the creditors by forestalling a race to the courthouse." *Reliant Energy Services, Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825 (5th Cir. 2003) (internal quotation mark omitted). "The automatic stay 'shall not go into effect,' however, where a debtor files a bankruptcy petition after having two or more bankruptcy cases dismissed within the previous year." *Bennett v. Chase Home Finance LLC*, No. H-10-4623, 2010 WL 5342827, at *1 (S.D. Tex. Dec. 21, 2010) (quoting 11 U.S.C. § 362(c)(4)(A)(i)); *see also Capital One Auto Finance v. Cowley*, 374 B.R. 601, 607 (W.D. Tex. 2006). Also, if "a debtor files a second bankruptcy case within one year of the pendency of a first, dismissed case, a stay pursuant to the first case automatically terminates 30 days after filing the second." *Wilmoth v. Federal Home Loan Mortgage Corp.*, No. 4:11-CV-4613, 2013 WL 4040375, at *2 (S.D. Tex. Aug. 6, 2013) (citing 11 U.S.C. § 362(c)(3)(A)).

The Bankruptcy Code, however, imposes various duties on a debtor. For example, the Bankruptcy Code imposes upon debtors "an express, affirmative duty to disclose all assets, including contingent and unliquidated claims." *See Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012) (quoting *Browning Manufacturing v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 207–08 (5th Cir. 1999)). "The obligation to disclose pending and unliquidated claims in bankruptcy proceedings is an ongoing one." *Love*, 677 F.3d at 261; *see also In re Flugence*, 738 F.3d 126, 129 n.1 (5th Cir. 2013). The duty applies, at a minimum, to claims that accrue before the bankruptcy case is commenced and that are property of the bankruptcy estate. *See* 11 U.S.C. § 521(a)(1); *see also Kane v. National Union Fire Insurance Co.*, 535 F.3d 380, 385 (5th Cir. 2008) ("Section 541 of the Bankruptcy Code provides that virtually all of a debtor's assets, including causes of action belonging to the debtor at the commencement of the bankruptcy case, vest in the bankruptcy estate upon the filing of a bankruptcy petition."). At least in the context of a Chapter 13 bankruptcy case in the Fifth Circuit, the duty to disclose may apply to claims based, in part, on events occurring after the bankruptcy case is commenced, but before a plan is confirmed or a discharge is granted. *See In re Flugence*, 738 F.3d at 129–30.

If a debtor is required to disclose claims against a third party by the Bankruptcy Code, but fails to do so, in some cases, courts have applied the judicial estoppel doctrine to preclude the debtor from pursuing the claim for his own benefit. *See Love*, 677 F.3d at 261 (citing *In re Coastal Plains, Inc.*, 179 F.3d at 207–08); *see also*

Jethroe v. Omnova Solutions, Inc., 412 F.3d 598, 600 (5th Cir. 2005). Judicial estoppel is a common law doctrine that "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *Reed v. City of Arlington*, 650 F.3d 571, 573–74 (5th Cir. 2011). "The purpose of the doctrine is to protect the integrity of the judicial process, by preventing parties from playing fast and loose with the courts to suit the exigencies of self interest." *In re Coastal Plains, Inc.*, 179 F.3d at 205 (internal quotation marks and brackets omitted).

§ 10.25 Recovery of Attorney's Fees

Under Texas law, attorney's fees are generally recoverable only if authorized by statute or contract. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006); *see also Hancock v. Chicago Title Insurance Co.*, No. 3:07-CV-1441-D, 2013 WL 2391500, at *6 (N.D. Tex. June 3, 2013); *Mustapha v. HSBC Bank, USA*, No. 4:12-CV-01924, 2013 WL 2338198, at *1 (S.D. Tex. May 28, 2013); *Wilhoite v. Sims*, 401 S.W.3d 752, 761 (Tex. App.—Dallas 2013, no pet.).

In foreclosure-related actions, the deed of trust typically provides for the recovery of attorney's fees incurred to protect the defendant's interest in the property at issue and rights under the deed of trust if there is a legal proceeding that might significantly affect the defendant's interest in the property and/or rights under the deed of trust. For example, a typical deed of trust provision authorizing attorney's fees might include language similar to the following:

> If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect [defendant's] interest in the Property and/or rights under this Security Instrument . . . then [defendant] may do and pay for whatever is reasonable or appropriate to protect [its] interest in the Property and rights under this Security Instrument . . . . [Defendant's] actions can include, but are not limited to: . . . (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument.

Additionally, the note sometimes provides language similar to the following:

> [Defendant] will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

The Fifth Circuit has held that provisions similar to the above entitle the mortgage servicer to recover attorney's fees incurred to protect its rights under the subject deed of trust. *See Velazquez v. Countrywide Home Loans Servicing, L.P.*, 660 F.3d 893, 900 (5th Cir. 2011) (determining that where a deed of trust authorizes recovery of attorney's fees to servicer or mortgagee such are recoverable); *see also Chan v. Wells Fargo Bank, N.A.*, No. 7:12-cv-516, 2013 WL 4805518, at *2–3 (S.D. Tex. Sept. 6, 2013) (citing *Velazquez*, 660 F.3d at 899–900); *Williams v. Wells Fargo Bank, N.A.*, No. 3:11-cv-1253-0, slip op. at 3–7 (N.D. Tex. Jan. 30, 2013); *King v. Wells Fargo Bank, N.A.*, No. 3:11-cv-0945-M-BD, 2012 WL 3283473, at *1–2 (N.D. Tex. July 10, 2012) (finding that deed of trust authorized recovery of attorney's fees and costs), *rec. adopted*, 2012 WL 3289961 (N.D. Tex. Aug. 13, 2012); *Chan v. Wells Fargo Bank, N.A.*, No. 7:11-cv-00381, slip op. at 4–5 (S.D. Tex. Nov. 14, 2012).

§ 10.26 Statutes of Limitation

§ 10.26:1 Overview

Statutes of limitation bar claims that are brought after a certain prescribed time period has expired. Borrowers and lenders should be aware of the various statutes of limitation applicable to common foreclosure-related litigation claims, such as the following:

- A person must bring an action for judicial foreclosure or sale of real property under a power of sale in a deed of trust not later than four years after the date the cause of action accrues (i.e., the date of acceleration). *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001) (stating cause of action accrues upon acceleration of maturity date of debt). On the expiration of the four-year limitations period, the real property lien and power of sale to enforce the real property lien become void (Tex. Civ. Prac. & Rem. Code § 16.035).
- An action for recovery on a promissory note must be commenced within six years after the maturity date, or if the maturity date is accelerated, within six years after the accelerated maturity date (Tex. Bus. & Com. Code § 3.118(a)). Notably, Texas courts have held the parties may abandon acceleration, which will reset the statute of limitations. *See Khan v. GBAK Properties, Inc.*, 371 S.W.3d 347, 356 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("It has been the law of Texas at least since 1901 that the parties can abandon acceleration and restore the contract to its original terms by the parties' agreement or actions."); *see also Clawson v. GMAC Mortgage, LLC*, No. 3:12-CV-00212, 2013 WL 1948128, at *4 (S.D. Tex. May 9, 2013) (lender abandoned acceleration by filing unilateral notice of rescission of acceleration, and accordingly, cause of action for default did not accrue until lender again exercised its option of acceleration); *Rosas v. America's Servicing Company*, No. SA-12-CA-819-FB, slip op. at 5–7 (W.D. Tex. Aug. 19, 2013) (finding notice of sale alone is insufficient to prove acceleration, but even if note was accelerated, it was abandoned by parties' actions); *Santibanez v. Saxon Mortgage Inc.*, No. 11-10-00227-CV, 2012 WL 3639814, at *2 (Tex. App.—Eastland Aug. 23, 2012, no pet.) (mem. op.) (holding statute of limitations did not expire because acceleration had been abandoned by parties where mortgage company accepted additional payments).
- Actions for fraud or breach of fiduciary duty are governed by the four-year statute of limitations (Tex. Civ. Prac. & Rem. Code § 16.004(a)(4), (5)).
- Breach of contract actions are governed by a four-year statute of limitations (Tex. Civ. Prac. & Rem. Code § 16.004(a)(3)).
- Suits for specific performance of a contract for the conveyance of real property are governed by the four-year statute of limitations (Tex. Civ. Prac. & Rem. Code § 16.004(a)(1)).
- Tort actions, including negligence, gross negligence, and negligent misrepresentation must be brought within two years of the day the cause of action accrued (Tex. Civ. Prac. & Rem. Code § 16.003(a)). *See Hendricks v. Thornton*, 973 S.W.2d 348, 364 (Tex. App.—Beaumont 1998, pet. denied)).
- DTPA claims must be brought within two years of the false, misleading, or deceptive act or practice, or within two

years after the claimant discovered or in the exercise of reasonable diligence should have discovered the false, misleading, or deceptive act or practice (Tex. Bus. & Com. Code § 17.565).

- The statute of limitations for TILA claims depends on the relief sought. Claims for damages must be brought within one year of the alleged violation (15 U.S.C. § 1640(e)), whereas claims for rescission are subject to a three-year statute of limitations (15 U.S.C. § 1635(f)).
- Actions brought pursuant to RESPA's disclosure requirements or the requirements related to loan servicers' responses to qualified written requests must be brought within three years (12 U.S.C. § 2614).
- Claims based on the FDCPA are governed by a one-year statute of limitations (15 U.S.C. § 1692k(d)).
- The limitations period under the FCRA is the earlier of two years after the date of discovery by the plaintiff of the violation that is the basis for such liability, or five years after the date on which the violation that is the basis of such liability occurs (15 U.S.C. § 1681p).
- For causes of action for which no other statute of limitations is expressly applicable, a four-year residual statute of limitations applies (Tex. Civ. Prac. & Rem. Code § 16.051).

See also chapter 4 in this manual.

§ 10.26:2 New Developments in Notice of Acceleration Invoking Statute of Limitations

Beginning in 2014 and escalating thereafter, borrowers in foreclosure began invoking the four-year statute of limitations under section 16.035 of the Texas Civil Practice and Remedies Code, which bars enforcement of a mortgagee's lien if the property is not nonjudicially foreclosed or in a suit for judicial foreclosure filed within four years after a notice of acceleration is given to the borrower and the notice of acceleration has not been revoked or rescinded.

It has been the law of Texas at least since 1901 that the parties can abandon acceleration and restore the contract to its original terms by the parties' agreement or actions. *Clawson v. GMAC Mortgage, LLC*, No. 3:12-CV-00212, 2013 WL 1948128, at *3 (S.D. Tex. May 9, 2013); *see also Martinez v. JPMorgan Chase Bank, N.A.*, No. H-14-1431, 2015 WL 1956439, at *3 (S.D. Tex. Apr. 29, 2015) ("A note holder who exercises its option to accelerate may abandon acceleration before the limitations period expires, restoring the contract to its original condition, including the note's original maturity date."); *San Antonio Real-Estate, Building & Loan Ass'n v. Stewart*, 61 S.W. 386, 389 (Tex. 1901) (holding that abandonment could be "inferred from the conduct and declarations of the parties as well as evidenced by their express stipulations"); *Denbina v. City of Hurst*, 516 S.W.2d 460, 463 (Tex. Civ. App.—Tyler 1974, no writ) (explaining that an option to accelerate may be withdrawn or revoked after it is exercised by the noteholder, effectively restoring the note's original maturity date).

If acceleration is abandoned, the statute of limitations resets and the original maturity date is restored. *See, e.g., Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566–67 (Tex. 2001); *Deutsche Bank National Trust Co. v. Ketmayura*, No. A-14-CV-00931-LY-ML, 2015 WL 3899050, at *5 (W.D. Tex. June 11, 2015) (citing *In re Rosas*, 520 B.R. 534, 539 (W.D. Tex. 2014)); *Khan v. GBAK Properties, Inc.*, 371 S.W.3d 347, 353 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("Abandonment of acceleration has the effect of restoring the contract to its original condition, including restoring the note's original maturity date.").

Mortgagees may abandon acceleration by their unilateral actions alone. *Santibanez v. Saxon Mortgage Inc.*, No. 11-10-00227-CV, 2012 WL 3639814, at *3 (Tex. App.—Eastland Aug. 23, 2012, no pet.) (mem op.); *see also Murphy v. HSBC Bank USA*, No. H-12-3278, 2015 WL 1392789, at *11 (S.D. Tex. Mar. 25, 2015) ("There is authority clearly establishing that the lender's or loan servicer's action constituting abandonment of acceleration can be unilateral."); *Factor v. JPMorgan Chase Bank, N.A.*, No. 3:13-CV-266, 2014 WL 3735569, at *2 (S.D. Tex. Jul. 28, 2014) ("[U]nder Texas law, the creditor retains the ability to abandon acceleration and does not need the borrower's consent."); *DTND Sierra Investments LLC v. Bank of New York Mellon Trust Co.*, 958 F. Supp. 2d 738, 749–50 (W.D. Tex. 2013) (holding that unilateral notices of rescission were sufficient to abandon acceleration); *Clawson*, 2013 WL 1948128, at *4 (stating that "a noteholder may abandon acceleration 'without express agreement from the borrower'" and concluding that the lender abandoned acceleration when it filed a notice of rescission); *Biedryck v. U.S. Bank Nat'l Ass'n*, No. 01-14-00017-CV, 2015 WL 2228447, at *5 (Tex. App.—Houston [1st Dist.] May 12, 2015, no pet.) (rejecting borrower's argument that to abandon acceleration the parties were required to enter into a written extension of the statute of limitations or other agreement).

There is authority, however, holding that acceleration "may not be abandoned unilaterally where the borrower has detrimentally relied upon the acceleration." *In re Rosas*, No. 13-52402-CAG, 2014 WL 1779437, at *10 (Bankr. S.D. Tex. May 5, 2014); *see also Callan v. Deutsche Bank Trust Co. Americas*, 11 F. Supp. 3d 761, 770–71 (S.D. Tex. 2014) (holding lender may not unilaterally rescind an optional acceleration where debtor acted in reliance on the acceleration); *In re Rosas*, 520 B.R. at 544 ("Texas law and the principles of equity also do not recognize unilateral abandonment to circumvent the statute of limitations when the borrower detrimentally relied on the acceleration."); *Swoboda v. Wilshire Credit Corp.*, 975 S.W.2d 770, 776–77 (Tex. App.—Corpus Christi 1998, pet. denied), *disapproved on other grounds by Holy Cross Church of God in Christ*, 44 S.W.3d at 566 ("Even if a creditor exercises the option to accelerate and makes a declaration to that effect, the election to accelerate can be revoked or withdrawn at any time, so long as the debtor has not detrimentally relied on the acceleration.").

Actions that may abandon acceleration and stop the limitations clock include—

- sending written notice of rescission of acceleration pursuant to section 16.038 of the Texas Civil Practice and Remedies Code (as added by Acts 2015, 84th Leg., R.S., ch. 2067, § 1 (H.B. 2067), eff. June 15, 2015);
- sending subsequent default or intent-to-accelerate notices and account statements requesting less than the full amount of the accelerated debt;
- continued acceptance of payments less than the full amount of the debt;
- forbearance agreements;
- loan modifications;
- voluntary dismissal of expedited non-judicial foreclosure action; and
- recording a rescission of acceleration.

Unilateral Rescission: Recently, the Fifth Circuit and several Texas federal courts applying Texas law have held that unilateral actions such as sending subsequent notices of default and intent to accelerate or providing account statements requesting less than the full amount of the accelerated debt are sufficient to show abandonment of acceleration. *See Leonard v.*

Ocwen Loan Servicing, L.L.C., No. 14-20611, 2015 WL 3561333, at *3–4 (5th Cir. June 9, 2015) (holding district court did not err in concluding that servicer unilaterally abandoned acceleration by sending account statements requesting payment on less than the full amount of the loan); *Cline v. Deutsche Bank National Trust Co.*, No. 3:14-CV-1565-D, 2015 WL 4041791, at *5 (N.D. Tex. July 2, 2015) ("[A] noteholder may also abandon acceleration by other actions, including providing account statements seeking less than the full accelerated amount and mailing new notice-of-intent-to-accelerate letters."); *Murphy*, 2015 WL 1392789, at *11–12 (denying borrowers' summary judgment motion because lender's second notice of intent to accelerate stating the default could be cured by paying only the past-due amounts rather than the full amount that would be due if the loan were accelerated raised a genuine issue of material fact about whether the notice abandoned prior acceleration); *Meachum v. Bank of New York Mellon Trust Co. N.A.*, No. 3:13-CV-2322-N, 2015 WL 765982, at *1 (N.D. Tex. Feb. 20, 2015) (holding that subsequent notice of default listing an amount less than the full amount of the note as due and subsequent notice of intent to accelerate were sufficient to abandon prior acceleration); and *Boren v. U.S. National Bank Ass'n*, No. H-13-2160, 2014 WL 5486100, at *2 (S.D. Tex. Oct. 29, 2014) (relying on *Leonard* and holding that a lender may unilaterally abandon acceleration by sending subsequent default notices requesting less than the accelerated amount).

Abandonment by Acceptance of Payments: Numerous federal courts applying Texas law and Texas state courts have held that abandonment of acceleration may occur when the lender or servicer accepts payments without exercising any of the remedies available to it upon acceleration. *See, e.g.*, *Rivera v. Bank of America, N.A.*, 607 F. App'x. 358, 361 (5th Cir. 2015) (lender abandoned January 2004 acceleration by accepting payments from borrower in 2006); *Wells v. Bank of America, N.A.*, No. 3:13-CV-3658-M, 2015 WL 4269089, at *6–7 (N.D. Tex. July 14, 2015) ("Because it is undisputed that Defendant abandoned the 2005 acceleration by continuing to accept payments from Plaintiff, he has failed to meet his burden to show that Defendant's right to foreclose on the Property is barred by the four-year statute of limitations."); *Martinez*, 2015 WL 1956439, at *3 (lender was not barred by limitations from foreclosing because prior acceleration was abandoned by acceptance of payments less than the full amount of the debt under a partial repayment plan); *Stewart v. U.S. Bank National Ass'n*, No. H-13-3197, 2015 WL 3448722, at *5 (S.D. Tex. Jan. 23, 2015) (accepting payments for less than the accelerated amount without seeking remedies available upon acceleration constituted abandonment of acceleration); *Biedryck*, 2015 WL 2228447, at *5 (lender abandoned acceleration on multiple occasions when it accepted payments from borrower); *Santibanez*, 2012 WL 3639814, at *2 (statute of limitations did not expire because acceleration had been abandoned when the mortgage company accepted additional payments).

However, accepting payments via a bankruptcy plan or forbearance plan (where the parties explicitly agree that acceptance does not abandon acceleration) likely does not constitute abandonment. But if the lender accepts any payments after the bankruptcy or repayment plans conclude, the lender may have a good abandonment argument. *See, e.g.*, *Khan*, 371 S.W.3d at 353.

Forbearance Agreements: "A forbearance agreement that provides the full amount of the loan is not due immediately, rather, establishes monthly payments in exchange for not foreclosing, constitutes an agreement to abandon acceleration." *Stewart*, 2015 WL 3448722, at *3 (citing *In re Rosas*, 520 B.R. at 539 (finding a forbearance agreement constitutes abandonment)).

In *Stewart*, the court held that acceleration was abandoned because the borrower entered into a forbearance agreement that did not state that the full amount of the note was due and permitted monthly payments less than the accelerated amount. *Stewart*, 2015 WL 3448722, at *3. The forbearance agreement in *Stewart* stated that over two years of payments were due and allowed Stewart to make three monthly payments of $779.15 in September, October, and November 2010, but it did not state that the full amount due and owing under the note was due. "[S]o long as Stewart made these three monthly payments, U.S. Bank agreed to not foreclose on the Property and to review the loan for a loan modification." *Stewart*, 2015 WL 3448722, at *3. The court explained that, by signing the forbearance agreement, "Stewart affirmed the full amount of the Note was no longer due immediately" and held that "acceleration of the note had been abandoned." *Stewart*, 2015 WL 3448722, at *3.

Loan Modifications: Although no Texas court has held that entering into a loan modification abandons acceleration, loan modifications, like forbearance agreements, fit squarely within the commonly stated test for abandonment: "the parties' agreement or actions can 'have the effect of obviating the default and restoring the contract to its original condition as if it had not been broken.'" *Holy Cross Church of God in Christ*, 44 S.W.3d at 567 (quoting *San Antonio Real-Estate, Building & Loan Ass'n*, 61 S.W. at 388).

A mere offer of a loan modification, however, absent more, is not sufficient to abandon acceleration. *See Swoboda v. Ocwen Loan Servicing, LLC*, No. 4:13-CV-2986 (S.D. Tex. Aug. 10, 2015), ECF Doc. 100, at *3 (holding that an offer of a loan modification did not constitute unilateral abandonment of the prior acceleration and explaining that, "absent more, an offer of a loan modification agreement is at most a *conditional* abandonment: if the borrower does not accept the loan modification, then the status of the loan does not change and the prior acceleration remains intact" (emphasis in original)).

Voluntary Dismissal of Rule 736 Expedited Nonjudicial Foreclosure Applications: Another "way lenders have sought to show abandonment in the absence of express notice is dismissal of an initial application for foreclosure, either voluntary . . . or involuntary for want of prosecution." *Callan v. Deutsche Bank Trust Co. Americas*, 93 F. Supp. 3d 725, 736 (S.D. Tex. 2015). At least one Texas federal court has held that prior notices of acceleration were abandoned when a lender voluntarily dismissed its state court application for expedited foreclosure without prejudice. *See Bitterroot Holdings, LLC v. MTGLQ Investors, LP*, No. 5:14-CV-862-DAE, 2015 WL 363196, at *6 (W.D. Tex. Jan. 27, 2015) ("Here, the prior Notices of Acceleration issued by Citimortgage, MTGLQ's predecessor in interest, were abandoned when Citimortgage dismissed its claims without prejudice in state court."); *see also Martinez*, 2015 WL 1956439, at *4 ("note holder can effectively withdraw or revoke its option, i.e., abandon acceleration, by, for example, taking a non-suit in an action on the note"); *Denbina*, 516 S.W.2d at 463 (noteholder can abandon acceleration by taking a voluntary nonsuit in an action on the note).

But an application for expedited foreclosure that is dismissed on procedural grounds, not at the lender's election, has been found insufficient to abandon acceleration. *See Burney v. Citigroup Global Markets Realty Corp.*, 244 S.W.3d 900, 903 (Tex. App.—Dallas 2008, no pet.). "[T]here is a difference between intentional litigation conduct that evidences a lender's intent to abandon acceleration of the debt, and mere litigation procedure that does not commit the lender to abandonment of acceleration." *Ketmayura*, 2015 WL 3899050, at *6 (holding that automatic dismissal of expedited foreclosure action when borrowers filed independent lawsuit was not sufficient to indicate that the lender was abandoning acceleration).

Recording Rescission of Acceleration: Abandonment of acceleration may also occur when the lender or servicer unilaterally records a rescission of the acceleration. *See, e.g., Factor*, 2014 WL 3735569, at *2 ("This Court has previously held that filing a notice of rescission serves as an effective abandonment to the acceleration of the mortgage note and deed of trust, restoring the note to its original terms."); *Clawson*, 2013 WL 1948128, at *3 ("GMAC abandoned its attempted acceleration, and accordingly reset the statute of limitations, when it recorded the notice of rescission in January 2009."); *In re Rosas*, 520 B.R. at 539 ("'Other actions' considered by courts to determine abandonment include, but are not limited to . . . filing a unilateral notice of rescission of acceleration.").

§ 10.27 Miscellaneous Claims

In addition to the above commonly asserted state and federal law claims, borrowers have occasionally hinged their claims on a variety of other factual circumstances, including, but not limited to the following:

- *Appointment of substitute trustee.* Occasionally, borrowers have claimed that the defendant, usually a mortgage servicer, lacked the authority to appoint the substitute trustee. However, the deed of trust typically allows a loan servicer to appoint a substitute trustee. Furthermore, section 51.0075 of the Texas Property Code provides, "[a] mortgage servicer may authorize an attorney to appoint a substitute trustee or substitute trustees on behalf of a mortgagee . . . ." Tex. Prop. Code § 51.0075(d). See chapter 11 in this manual.
- *Failure to record assignment.* Borrowers have also attempted to nullify assignments on the ground that the assignment was never recorded. However, "Texas courts have consistently held that recordation is not necessary for liens, deeds, or deeds of trust to be enforceable against the parties to those instruments." *Broyles v. Chase Home Finance*, No. 3:10-CV-2256, 2011 WL 1428904, at *2 (N.D. Tex. Apr. 13, 2011) (citing *Denson v. First Bank & Trust of Cleveland*, 728 S.W.2d 876, 877 (Tex. App.—Beaumont 1987, no writ) and *Shaw v. Jackson*, 227 S.W. 520, 522 (Tex. Civ. App.—Beaumont 1920, no writ)).
- *Usury.* Borrowers have claimed that defendants charged usurious interest rates in violation of Texas law. These claims sometimes arise when borrowers have made payments pursuant to a forbearance plan or modification agreement, or when borrowers have been charged additional fees after the property was sold at a foreclosure sale. Borrowers should note, however, that sections 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85–86, completely preempt state-law usury claims against national banks. *See Beneficial National Bank v. Anderson*, 539 U.S. 1, 9–11 (U.S. 2003); 12 U.S.C. §§ 85–86. Additionally, borrowers sometimes fail to plead the amount of the alleged usurious interest rate and that the defendant knowingly charged the usurious rate. *See Orcasitas v. Wells Fargo Home Mortgage Inc.*, No. 3:12-CV-2549-P slip op. at 8–9 (N.D. Tex. Apr. 10, 2013) (dismissing usury claim because borrower failed to plead actual interest rate and how defendant intentionally collected a rate greater than allowed by law). Further, usury claims only lie against creditors (i.e., the entity who

loaned money or extended credit to the borrower). *Niera v. Frost National Bank*, No. SA-10-CV00907, 2010 WL 5186734, at *8 (W.D. Tex. Nov. 19, 2010). Moreover, usury claims must be brought "within four years after the date on which the usurious interest was contracted for, charged, or received." Tex. Fin. Code § 305.006(a).

Chapter 11

Trustees and Substitute Trustees

Forms

Chapter 11

Trustees and Substitute Trustees

§ 11.1 Introduction

The process for appointing a substitute trustee has radically changed with the adoption of House Bill 2063 during the 84th legislative session. *See* Acts 2015, 84th Leg., R.S., ch. 653, § 2 (H.B. 2063), eff. Sept. 1, 2015 (adding Tex. Prop. Code § 51.0076). Now, a foreclosure professional may document the appointment of a substitute trustee by adding information to a legacy notice-of-sale form required by Property Code section 51.002(b). The appointment of substitute trustee is accomplished under this new provision if it is signed by an attorney or agent of the mortgagee or mortgage servicer and contains the statutory disclosure found in section 51.0076(3). *See* Tex. Prop. Code § 51.0076. The effective date of the appointment is the date of the notice. Notice of the appointment may be permanently documented by recording the modified notice of sale in the real property records. *See* Acts 2015, 84th Leg., R.S., ch. 653, § 1 (H.B. 2063), eff. Sept. 1, 2015 (adding Tex. Prop. Code § 12.0012).

Most foreclosure practitioners believe that the power of the trustee to conduct a foreclosure sale is derived wholly from the terms of the deed of trust and that a trustee's duties are fulfilled by complying with the terms of the deed of trust. *Winters v. Slover*, 251 S.W.2d 726, 728 (Tex. 1952); *Peterson v. Black*, 980 S.W.2d 818, 822 (Tex. App.—San Antonio 1998, no pet.). One of the purposes of this chapter is to alert foreclosure practitioners that much of the familiar case law dealing with trustees in a foreclosure context is now obsolete because of legislative changes. For convenience, unless the context dictates otherwise, the word *trustee* in this chapter means both "trustee" and "substitute trustee," though in most foreclosures the person actually exercising the power to foreclose will be a substitute trustee.

Beginning in 2003, the Texas legislature recognized that the origination and servicing of mortgage loans secured by real estate were radically changing due to securitization. Lending institutions no longer kept loans in their own portfolio but sold the loans they originated into the secondary market to be pooled with similar loans as collateral for mortgage-backed securities. In addition, the valuable mortgage servicing rights for these securitized loans were sold to the highest bidder. Consequently, the originating lender was no longer the owner or holder of the note, the beneficiary of the deed of trust, or the mortgage servicer in charge of administering the foreclosure process if the loan went into default.

Texas was the first state to recognize the systemic changes in mortgage lending caused by securitization and amend its foreclosure statutes to allow the mortgage servicer of a borrower's loan agreement to conduct a foreclosure if the loan went into default. *See* Tex. Prop. Code §§ 51.0001(3); 51.0025. This change from owner to mortgage servicer made sense because in the new era of loan securitization, the mortgage servicer was the only entity that dealt with the borrower and managed all the loan-level activities related to the borrower's account and loan agreement.

Along with the foreclosure administration change, the legislature effectively preempted much of long-standing case law that dealt with the trustee or substitute trustee who exercised the "power of sale" found in the security instrument if there was a breach of the borrower's loan agreement. *See* Tex. Prop. Code §§ 51.007(f), 51.0074, 51.0075.

Starting in January 2004, the legislature used the definition section in Texas Property Code section 51.0001 to adjust foreclosure law to match changing business practices resulting from securitization. For example, *substitute trustee* was defined as "a person appointed by the current mortgagee or mortgage servicer under the terms of the security agreement to exercise the power of sale." Tex. Prop. Code § 51.0001(7). Two legislative sessions later, *trustee* was defined as "a person or persons authorized to exercise the power of sale under the terms of the security agreement in accordance with Section 51.0074." Tex. Prop. Code § 51.0001(8).

The duties of trustee listed in Texas Property Code section 51.0074 effectively preempted much of the old case law related to responsibilities and duties of a trustee and settled whether more than one substitute trustee could be appointed to exercise the power of sale. *See* Tex. Prop. Code § 51.0074(a).

Further, Texas Property Code section 51.0074(b) provided: "a trustee may not be: (1) assigned a duty under a security instrument other than to exercise the power of sale in accordance with the terms of the security instrument; or (2) held to the obligations of a fiduciary of the mortgagor or mortgagee." Tex. Prop. Code § 51.0074(b). Accordingly, if read in conjunction with Texas Property Code section 51.0025 that authorizes a mortgage servicer to "administer the foreclosure of the property under Section 51.002," a trustee's sole statutory responsibility in a foreclosure context is to conduct the public auction of the property and distribute the sale's proceeds. *See* Tex. Prop. Code §§ 51.002, 51.0025, 51.0074. Section 51.0074 also made clear that, contrary to case law, the trustee is not a fiduciary of the mortgagor or mortgagee. Tex. Prop. Code § 51.0074(b)(2).

The subject of innumerable appellate court opinions is the method and process for appointing a substitute trustee to exercise the power of sale found in a deed of trust or security instrument.

The legislature, however, has preempted all case law that holds a substitute trustee must be appointed according to the terms of the deed of trust with the phrase *notwithstanding any agreement to the contrary* in section 51.0075. Tex. Prop. Code § 51.0075(c). This phrase was first used in section 51.002(d) requiring the notice of default be sent according to subsection (b) and not the terms of the security instrument. Tex. Prop. Code § 51.002(d). The legislature, by enacting section 51.0075(c) and (d), determined how a substitute trustee could be appointed, not the deed of trust. See *Wylie v. Hays*, 263 S.W. 563 (Tex. 1924), often quoted for the proposition that statutory law overrides contract terms; *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), holding that an implied term in any contract is that the contract complies with statutory law; and *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), noting that a state may impair contractual obligations when the impairment is reasonable and necessary to serve an important public purpose.

Because a substitute trustee is now appointed pursuant to Texas Property Code section 51.0075(c) and (d), the mortgagee, which means a grantee, beneficiary, holder, book entry system, last person assigned of record, or the last person to whom a security instrument has been assigned, can appoint or authorize a mortgage servicer to appoint a substitute trustee. *See* Tex. Prop. Code §§ 51.0001(4), 51.0075(c). The mortgage servicer can then authorize an attorney to appoint a substitute trustee on behalf of the mortgagee to succeed to all the title powers and duties of the original trustee named in the security instrument. Tex. Prop. Code § 51.0075(d).

In the past, the appointment of a substitute trustee was the subject of much litigation because case law contained many nuances as to who could appoint, who had authority to appoint, and how an appointment was evidenced. This is no longer the case—statutory law now applies, regardless of the terms of the security instrument. The current mortgagee has the authority to appoint a trustee and a mortgagee can be the grantee, beneficiary, owner, or holder of a security instrument or note, or the holder or transferee of the note secured by the deed of trust. *See* Tex. Prop. Code §§ 51.0001, 51.0075; Tex. Bus. & Com. Code §§ 3.203, 3.301. A substitute trustee is properly appointed and succeeds to all the title, powers, and duties of the original trustee so long as the mortgagee appoints the substitute trustee or authorizes the appointment of a substitute trustee by power of attorney, corporate resolution, or other written instrument to the mortgage servicer. The mortgage servicer can then authorize an attorney to appoint the trustee. Tex. Prop. Code § 51.0075(c), (d).

§ 11.1:1 Ratification

Several legal developments lessen the benefit of filing a wrongful foreclosure lawsuit based on challenges to the appointment of substitute trustee process.

For example, acts related to the appointment of a trustee and the acts and omissions of a trustee during foreclosure can be ratified after the fact to cure most irregularities or defects. *Benser v. G.E. Capital Mortgage Services Inc.*, No. 05-93-00995-CV, 1994 WL 156245, at *4 (Tex. App.—Dallas Apr. 25, 1994, writ denied). In *Benser*, the court made two points: (1) "when a party appoints the substitute trustee . . . his later acts under the appointment ratify and affirms his prior acts as substitute trustee" (citing *Chandler v. Guaranty Mortgage Co.*, 89 S.W.2d 250, 254 (Tex. Civ. App.—San Antonio 1935, no writ)) and (2) minor irregularities in the conduct of a foreclosure sale will not invalidate the sale unless "the irregularities caused injury to the mortgagor" (citing *Charter National Bank—Houston v. Stevens*, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied)). *Benser*, 1994 WL 156245, at *4.

The holding in *Benser* was followed in *Bernal-Bell v. Saxon Mortgage Services, Inc.*, No. 04-10-00099-CV, 2010 WL 3250115, at *2 (Tex. App.—San Antonio, Aug. 18, 2010, no pet.) (mem. op.), where the court found that a trustee could ratify and affirm any act made before the trustee was appointed, citing *Chandler*, 89 S.W.2d 250, and *Wilson v. Armstrong*, 236 S.W. 755, 760 (Tex. Civ. App.—Beaumont 1921, no writ).

§ 11.1:2 Trustee's Acts Are Ministerial

The ratification argument is supported by the proposition that acts of a trustee are ministerial and a trustee's duties can be performed by the trustee personally or by a representative with the requisite authority from the trustee. *Hart v. Estelle*, 34 S.W.2d 665, 670 (Tex. Civ. App.—Austin 1930), *aff'd*, 55 S.W.2d 510 (Tex. Comm'n App. 1932, judgm't adopted).

The Texas Supreme Court has proclaimed that "minor defects in an otherwise valid foreclosure sale do not void it." *Kourosh Hemyari v. Stephens*, 355 S.W.3d 623, 628 (Tex. 2011). In a successful wrongful foreclosure suit, a foreclosure defect must cause the foreclosed property to be sold for a "grossly inadequate sales price." *Sauceda v. GMAC Mortgage Corp.*, 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.). The exception to this rule is if the acts of the mortgagee or trustee "chilled" the bidding. *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 727 (5th Cir. 2013). Therefore, any minor defect in the appointment or performance of a trustee will not be the cause of a wrongful foreclosure, unless the appointment or acts or omissions of the trustee chilled the bid or caused the property to be sold for a grossly inadequate sale price.

§ 11.1:3 Retroactive Application of New Statute

It is clear the new trustee-related statutes apply to all loan agreements and deeds of trust executed after the effective date of the statute. The question arises, however, whether the new statutes preempt or have retroactive effect on deeds of trust executed before the effective date of the new statutes.

So long as the new trustee statutes are deemed to be remedial in nature and do not disturb a vested right, they do not violate Tex. Const. art. I, § 16, which prohibits retroactive laws from impairing the obligations of contracts. *Rey v. Acosta*, 860 S.W.2d 654, 656–57 (Tex. App.—El Paso 1993, no writ); *Pratt v. Story*, 530 S.W.2d 325, 328 (Tex. Civ. App.—Tyler 1975, no writ).

Analyzing whether Texas Property Code sections 51.002 and 51.0075 could be applied retroactively, the court found that these were remedial statutes that did not disturb vested contract rights. *G4 Trust v. Consolidated Gasoline, Inc.*, No. 02-10-0404-CV, 2011 WL 3835656, at *2–3 (Tex. App.—Fort Worth, Aug. 31, 2011, pet. denied) (mem. op.). As long as a new statute does not "take away or impair vested rights acquired under existing law," a new statute cannot be "said to be retroactive law prohibited by the constitution." *McCain v. Yost*, 284 S.W.2d 898, 900 (Tex. 1955).

However, to lessen litigation risk—especially from pro se litigants using Internet pleadings—a foreclosure practitioner should try to comply with all the terms and conditions of the deed of trust unless the deed of trust was executed after the effective date of the new trustee statute.

Regardless of all the statutory changes dealing with trustees, it is still good law that a trustee should act with "absolute impartiality and with fairness to all concerned . . . to achieve the objective of the trust." *First Federal Savings & Loan Ass'n v. Sharp*, 359 S.W.2d 902, 904 (Tex. 1962) (citation omitted); *see also Hammonds v. Holmes*, 559 S.W.2d 345, 347 (Tex. 1997).

§ 11.2 "Trustee's Shield"

Usually, when a borrower files a wrongful foreclosure lawsuit, the trustee is made a party to the suit even though the trustee (1) generally has nothing to do with the administration of the borrower's loan, (2) has no duty under the security agreement other than to exercise the power of sale, (3) has no fiduciary obligation to the mortgagor or mortgagee, and (4) is not a debt collector. *See* Tex. Prop. Code § 51.0074.

When the real dispute is between the borrower and the mortgagee or mortgage servicer, Texas Property Code section 51.007 allows a trustee to file a verified denial stating "the basis for the trustee's reasonable belief that the trustee was named as a party solely in the capacity as trustee under the deed of trust, contract, lien or security instrument." Tex. Prop. Code § 51.007(a). See form 11-1 in this manual.

Contrary to common practice, the trustee must plead sufficient facts to support the reasons why he believes that he is not a necessary party to the suit. Simply quoting the "reasonable belief" language from the statute is not enough. *Marsh v. Wells Fargo Bank, N.A.*, 760 F. Supp. 2d 701, 707 (N.D. Tex. 2011).

After the verification is filed, the trustee is to be dismissed as a party without prejudice unless all other parties to the suit file a verified response within thirty days after the verified denial is filed setting forth all matters, whether in law or in fact, that rebut the trustee's verified denial. *See* Tex. Prop. Code § 51.007.

If a timely response is filed, the court must hold a hearing. If the court determines a trustee is not a necessary party, the trustee is dismissed without prejudice. Tex. Prop. Code § 51.007(d). If the court later determines that the trustee is a necessary party, the trustee is made a defendant.

One reason why a trustee's verified denial should liberally state the facts, reasons, and justification for the trustee's belief that the trustee was made a party solely in the capacity as trustee is so the court has something in writing to point to should there be a future challenge to the trustee's dismissal.

The dismissal of the trustee does not prejudice a party's right to seek injunctive relief or prevent the trustee from proceeding with the foreclosure sale. Tex. Prop. Code § 51.007(e).

One of the most important trustee protections is that a trustee is not "liable for any good faith error resulting from reliance on any information in law or fact provided by the mortgagor or mortgagee or their respective attorney, agent, or representative or other third party." Tex. Prop. Code § 51.007(f).

§ 11.3 Appointment of Trustee

One of the collateral effects of Texas Property Code section 51.0075 is that much of the case law related to the appointment of a substitute trustee is now obsolete. (See section 11.1:3 above discussing whether the appointment statute has retroactive effect on loan agreements and deeds of trust executed before September 1, 2005.)

The appointment of a substitute trustee is straightforward:

> (c) Notwithstanding any agreement to the contrary, a mortgagee may appoint or may authorize a mortgage servicer to appoint a substitute trustee or substitute trustees to succeed to all title, powers, and duties of the original trustee. A mortgagee or mortgage servicer may make an appointment or authorization under this subsection by power of attorney, corporate resolution, or other written instrument.
>
> (d) A mortgage servicer may authorize an attorney to appoint a substitute trustee or substitute trustees on behalf of a mortgagee under Subsection (c).
>
> (e) The name and a street address for a trustee or substitute trustees shall be disclosed on the notice required by Section 51.002(b).

Tex. Prop. Code § 51.0075(c)–(e). See form 11-2 in this manual. The question often arises whether the appointment of a substitute trustee is valid if the appointment was dated before the person who signed the appointment acquired the lien. Even though the transfer of lien was executed after the appointment, if the "effective date" of the transfer—as expressly stated in the transfer document—was before the appointment, the appointment is valid. *See Crowell v. Bexar County*, 351 S.W.3d 114, 117 (Tex. App.—San Antonio 2011, no pet.) (assignment with effective date that preceded execution date had retroactive effect).

§ 11.4 Recording an Appointment

There is no statutory requirement that the appointment of a substitute trustee be recorded in the real property records. However, most appointments are recorded as an accommodation to title industry examiners who want some assurance that the person who signed the trustee's deed was in fact appointed to conduct the sale. Recording an appointment in the real property records eliminates an inquiry from a title examiner months and even years after a sale seeking proof that the substitute trustee had the authority to conduct a sale.

There is old case law that holds if the deed of trust requires an appointment to be recorded, the appointment must be recorded. *See, e.g., Faine v. Wilson*, 192 S.W.2d 456, 459 (Tex. Civ. App.—Galveston 1946, no writ); *Chandler v. Guaranty Mortgage Co.*, 89 S.W.2d 250, 254 (Tex. Civ. App.—San Antonio 1935, no writ). However, in *University Savings Ass'n v. Springwoods Shopping Center*, 644 S.W.2d 705, 706 (Tex. 1982), the Texas Supreme Court held that as long as the failure to record the appointment was not unfair to the mortgagor, there was no wrongful foreclosure.

§ 11.5 Appointment of Substitute Trustee after Property Is Posted for Sale

Conventional wisdom, based on case law, is that there is no necessity to repost and send new notices of the scheduled foreclosure sale date if a new trustee is appointed after the original notice of sale was mailed to the obligor of the debt, filed with the county clerk, and posted at the courthouse. *See Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965); *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.); *Koehler v. Pioneer American Insurance Co.*, 425 S.W.2d 889, 891 (Tex. Civ. App.—Fort Worth 1968, no writ). However, under Texas Property Code section 51.0075(e), failure to provide the borrower with twenty-one days' notice of the name and address of the newly appointed trustee who will conduct the sale may create an unwanted litigation risk if the property is sold for a grossly inadequate sales price. *See* Tex. Prop. Code § 51.0075(e). To prevent litigation risks, new foreclosure sale notices with the name and address of the newly appointed trustee should be mailed and reposted so as to give the borrower twenty-one days' notice of the newly appointed trustee.

§ 11.6 "A" Street Address

A street address for the trustee who is to conduct the foreclosure sale must be contained in the Texas Property Code section 51.002(b) foreclosure sale notice giving the date, time, and place of the foreclosure sale. Tex. Prop. Code § 51.0075(e).

"A" street address—instead of "the" street address—was intentionally used in section 51.0075(e) so that the foreclosure professional actually handling the foreclosure process could be the point of contact should anyone need to communicate with the trustee. See *Moore v. Brown*, No. SA-89-CA-0714, (W.D. Tex. May 1, 1991) for a discussion of the use of "a" as an indefinite article that denotes an unspecified person or thing. *See also Black's Law Dictionary*, (7th ed. 1999).

As indicated in *Moore*, at one time, there was a controversy whether one or more trustees could be appointed to conduct a sale. It is now clear that "one or more persons may be authorized to exercise the power of sale under a security instrument." Tex. Prop. Code § 51.0074(a).

§ 11.7 Trustee—Natural Person or Entity

Person, as defined in the Texas Code Construction Act, includes a "corporation, business trust, estate, trust, partnership, association, or any other business entity." Tex. Gov't Code § 311.005(2). Any of these entities may serve as a trustee. However, since only a natural person can conduct the foreclosure sale, a business entity is rarely named as the trustee.

Effective September 1, 2015, if the notice of sale will be used to document the appointment of a substitute trustee under Property Code section 51.0076, the notice of sale must be signed by an attorney or agent of the mortgagee or mortgage servicer. *See* Tex. Prop. Code § 51.0076(2).

§ 11.8 Power of Sale

The right to sell a borrower's property at a foreclosure sale is not an inherent right of the creditor. If there is no power of sale language found in the security instrument, foreclosure must be by a judicial sale, not a nonjudicial sale. *Slaughter v. Qualls*, 162 S.W.2d 671 (Tex. 1942); *Hart v. McClusky*, 118 S.W.2d 1077 (Tex. App.—Amarillo 1964, writ ref'd).

§ 11.9 Delegation of Duties

A trustee may delegate ministerial duties to another person so long as the person is under the trustee's supervision or the delegation is authorized by the terms of the deed of trust. *American Savings & Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581, 587 (Tex. 1976); *Todd v. Hunt*, 127 S.W.2d 340 (Tex. Civ. App.—El Paso 1939, writ ref'd); *Wilson v. Armstrong*, 236 S.W. 755 (Tex. Civ. App.—Beaumont 1921, no writ). See form 11-3 in this manual for a letter employing a local attorney to post the notice of foreclosure sale and forms 11-4 through 11-7 for various affidavits.

§ 11.10 Failure to Name Trustee

If the security instrument fails to name a trustee, the current mortgagee may appoint a substitute trustee. See *In re Bisbee*, 754 P.2d 1135, 1138 (Ariz. 1988), where the Arizona Supreme Court cited *Mid City Management Corp. v. Loewi Realty Corp.*, 643 F.2d 386, 388 (5th Cir. 1981), for the proposition that a failure to name a trustee in the deed of trust was not fatal if a substitute trustee was properly appointed and conducted the sale.

§ 11.11 Appointment in Writing

In the past, old case law indicated a written appointment of trustee was not required, only a manifest intent to appoint a particular trustee was necessary. *See, e.g., FDIC v. Bodin Concrete Co.*, 869 S.W.2d 372 (Tex. App.—Dallas 1993, writ denied). However, Texas Property Code section 51.0075(c) makes clear that the appointment or authorization to appoint a trustee must be in writing. *See* Tex. Prop. Code § 51.0075(c). If a substitute trustee is appointed in writing, the effective date for the appointment is the date the appointment is signed, not the date the appointment is acknowledged. *Martin v. Skelton*, 567 S.W.2d 585 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

§ 11.12 Acknowledgment of Appointment

There is no requirement that the trustee's appointment be acknowledged by a notary. *Onwuteaka v. Cohen*, 846 S.W.2d 889, 895 (Tex. App.—Houston [1st Dist.] 1993, writ denied). However, if the appointment is to be recorded in the real property records, the appointment instrument must be acknowledged in accordance with Texas Property Code section 12.001. *See* Tex. Prop. Code § 12.001.

§ 11.13 Mortgagee as Trustee

Though the mortgagee of record usually designates a third party to act as the trustee, the mortgagee can be named the trustee. *Valley International Properties v. Ray*, 586 S.W.2d 898, 901 (Tex. Civ. App.—Corpus Christi 1979, no writ).

§ 11.14 More Than One Trustee

More than one person can be appointed as a substitute trustee. Tex. Prop. Code § 51.0074(a).

§ 11.15 Delegation by Corporate Resolution

A board of directors can delegate the power to appoint a substitute trustee to a person with administrative authority by means of a corporate resolution. In *Helms v. Home Owners' Loan Corp.*, 103 S.W.2d 128, 134 (Tex. 1937), the Texas Supreme Court found that the regional manager for the lender had the administrative authority to appoint a trustee. Therefore, the court concluded, "[u]ndoubtedly, the board of directors can appoint agents, whether in the form of committees or as single agents, to transact the ordinary business of the corporation." *Helms*, 103 S.W.2d at 133. Texas Property Code section 51.0075(c) removes all doubt that a mortgagee or mortgage servicer can appoint or authorize the appointment of a trustee by a corporate resolution. *See* Tex. Prop. Code § 51.0075(c).

§ 11.16 Irregularity Causing Bad Sale

The following factors seem to influence a court's determination whether an irregularity in the appointment of a substitute trustee constitutes an invalid foreclosure:

- Whether the debtor seeks rescission or monetary damages. *University Savings Ass'n v. Springwoods Shopping Center*, 644 S.W.2d 705 (Tex. 1982).
- If the failure to appoint the trustee affected the fairness of the foreclosure sale. *American Savings & Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581 (Tex. 1975); *Charter National Bank—Houston v. Stevens*, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied).
- If the foreclosure caused the borrower to lose a substantial amount of equity. *Delley v. Unknown Stockholders of Brotherly & Sisterly Club of Christ, Inc.*, 509 S.W.2d 709 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).

§ 11.17 Signature on Notice of Sale

In *Wilson v. Armstrong*, 236 S.W. 755, 760 (Tex. Civ. App.—Beaumont 1921, no writ), the court held that a notice of sale (now Texas Property Code section 51.002(d)) did not require a trustee's signature and that an error in the date of the notice of sale was immaterial.

Effective September 1, 2015, if the notice of sale will be used to document the appointment of a substitute trustee under Property Code section 51.0076, the notice of sale must be signed by an attorney or agent of the mortgagee or mortgage servicer. *See* Tex. Prop. Code § 51.0076(2).

§ 11.18 Sale by Person Other Than Designated Trustee

A foreclosure sale conducted by anyone other than a person properly authorized to do so is void. *Miller v. Boone*, 23 S.W. 574 (Tex. 1893); *Sullivan v. Hardin*, 102 S.W.2d 1110, 1113 (Tex. Civ. App.—Amarillo 1937, no writ).

The failure to include the name and an address for the trustee or substitute trustee who will conduct the sale in the foreclosure notice required by Texas Property Code section 51.002(b) may create litigation risks. Without a name and address, a borrower has no means to contact the trustee before the scheduled sale. However, in *University Savings Ass'n v. Springwoods Shopping Center*, 644 S.W.2d 705 (Tex. 1982), the Texas Supreme Court articulated what appears to be the true test of whether strict compliance is required in the appointment of a trustee. The court found that failure to record an appointment of trustee as required by the deed of trust did not unfairly affect the mortgagor or the fairness of the sale. *University Savings Ass'n*, 644 S.W.2d at 706.

§ 11.19 Trustee's Duties

It is no longer good law that the trustee is the special representative of both the mortgagor and mortgagee. *See, e.g., Peterson v. Black*, 980 S.W.2d 818 (Tex. App.—San Antonio 1998, no writ). Beginning in 2007, "a trustee may not be held to the obligations of a fiduciary of the mortgagor or mortgagee." Tex. Prop. Code § 51.0074(b)(2).

In addition, no longer can a trustee 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." Tex. Prop. Code § 51.0074(b)(1).

Unless the trustee has been engaged to perform all the foreclosure tasks required under Texas Property Code chapter 51 and the security instrument—which is generally the case in most commercial property foreclosures—the only duty a trustee must perform is conducting the public auction. The mortgage servicer may administer all the other foreclosure tasks on behalf of the mortgagee pursuant to section 51.0025 of the Texas Property Code. *See* Tex. Prop. Code § 51.0025.

Texas Property Code section 51.007(f) provides, "[a] trustee shall not be liable for any good faith error resulting from reliance on any information in law or fact provided by the mortgagor or mortgagee or their respective attorney, agent, or representative or other third party." Tex. Prop. Code § 51.007(f). This provision should be incorporated into any verified denial a trustee makes in seeking to be dismissed as an unnecessary party under section 51.007. See section 11.2 above.

As of the publication date of this manual, there appears to be no guidance from the appellate courts on how to construe the statutory provisions of Texas Property Code section 51.0074(b)(1) and (2) with respect to a trustee's duties. Until an opinion is rendered, the following cases are cited as background information on the duties and responsibilities of a trustee.

A trustee's duty is to obtain the highest possible price for the foreclosure property while acting with impartiality and fairness. *Hammonds v. Holmes*, 559 S.W.2d 345 (Tex. 1977); *First Federal Savings & Loan Ass'n v. Sharp*, 359 S.W.2d 902 (Tex. 1962); *Stephenson v. LeBoeuf*, 16 S.W.3d 829 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

The trustee does not owe a fiduciary duty to the mortgagor. Tex. Prop. Code § 51.0074(b)(2); *FDIC v. Myers*, 955 F.2d 348, 350 (5th Cir. 1992). *Myers* follows the principle that there is no fiduciary relationship between a borrower and the lender. *FDIC v. Claycomb*, 945 F.2d 853, 859 (5th Cir. 1991).

The trustee is not required to take any affirmative action beyond what is required by statute and the security instrument. *First State Bank v. Keilman*, 851 S.W.2d 914 (Tex. App.—Austin 1993, writ denied). A trustee is not responsible for providing the borrower with payoff or reinstatement information. *Sanders v. Shelton*, 970 S.W.2d 721 (Tex. App.—Austin 1998, no writ).

A trustee is authorized to accept a credit bid from the mortgagee that is equal to or less than the amount owed on the debt. Cash is not required. *Thomason v. Pacific Mutual Life Insurance Co. of California*, 74 S.W.2d 162 (Tex. Civ. App.—El Paso 1934, writ ref'd).

A mortgagee who is also the trustee can bid for the mortgagee's own account, so long as the sale is conducted fairly. *Skeen v. Glenn Justice Mortgage Co.*, 526 S.W.2d 252, 256 (Tex. Civ. App.—Dallas 1975, no writ). However, see *Casa Monte Co. v. Ward*, 342 S.W.2d 812, 813 (Tex. Civ. App.—Austin 1961, no writ), that held—based on specific terms contained in the deed of trust—a sale made by a trustee to himself is voidable at the election of the maker of the note.

A trustee may delegate ministerial duties connected with a foreclosure sale. *Natali v. Witthaus*, 135 S.W.2d 969 (Tex. 1940); *Titterington v. Deutsch*, 179 S.W. 279 (Tex. Civ. App.—Dallas 1915, no writ); *Roe v. Davis*, 142 S.W. 950 (Tex. Civ. App.—Texarkana 1911), *aff'd*, 172 S.W. 708 (Tex. 1915).

All issues related to trustees' duties in conducting a foreclosure are considered questions of law, not fact. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195 (Tex. 1995).

A two-year statute of limitations applies for claims questioning the authority of the trustee. *See* Tex. Civ. Prac. & Rem. Code § 16.033(a)(7).

The amount of fees a trustee may collect for conducting a foreclosure is discussed in *Edwards v. Holleman*, 893 S.W.2d 115 (Tex. App.—Houston [1st Dist.] 1995, writ denied), where a bank president collected $18,061.31 in trustee's fees on a $120,000.00 loan made by the bank. The Houston court of appeals held that a trustee's fees must be reasonable based on the amount of time spent, tasks performed, and other attending circumstances. *Holleman*, 893 S.W.2d at 118–19.

See form 11-8 in this manual for a letter employing a local attorney to conduct the foreclosure sale, form 11-9 for an agreement indemnifying the substitute trustee for acting under the deed of trust, and form 11-10 on resignation of the trustee.

§ 11.20 Conducting Foreclosure Sale

If the trustee encounters problems while conducting the public sale, the trustee should consider recessing the sale to obtain advice and new instructions. A short recess or even canceling the sale can prevent litigation risks; however, a recess or cancellation may be prevented by using a carefully worded script that announces the conditions that will apply to the sale. *See* Tex. Prop. Code § 51.0075(a).

These conditions must be reasonable and must be announced before the trustee starts the bidding on the first property the trustee will sell. *See* Tex. Prop. Code § 51.0075(a).

The foreclosure sale transcript should expressly state that if a successful bidder fails to accept the conditions of sale, which includes signing a document acknowledging the conditions of sale, the trustee will reconvene the sale.

See form 14-2 in this manual.

A condition precedent for reconvening any sale is that all the original bidders be advised of the new time the sale will be reconvened. *Mitchell v. Texas Commerce Bank-Irving*, 680 S.W.2d 681, 693 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

A trustee sometimes faces the dilemma of whether to accept "official checks" issued by a lending institution instead of cashier's checks for the foreclosure bid price. Official checks are not considered good funds because payment can be refused by the issuing bank based on a stop-pay order. Cashier's checks are guaranteed funds and consequential damages can be imposed if the issuer refuses to pay the cashier's check. *See* Tex. Bus. & Com. Code § 3.411; *Guaranty Federal Savings Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652 (Tex. 1990).

If a trustee accepts cash for the bid, the trustee must report the receipt of U.S. currency in the amount of $10,000 or more to the IRS on IRS Form 8300. Instructions for completing IRS Form 8300 are found in IRS Publication 1544 (rev. Sept. 2012).

§ 11.21 Foreclosure Bid

At the time of sale, the mortgagee can apply a credit bid in an amount equal to or less than the amount owed on the debt, including fees and costs, corporate advances, and expenses of collection, to include attorney's fees allowed by the loan agreement. *Habitat, Inc. v. McKanna*, 523 S.W.2d 787 (Tex. Civ. App.—Eastland 1974, no writ). Cash for the mortgagee's bid is not required because it would be "an idle ceremony" for the trustee to receive the bid price and then return it to the mortgagee. *Intertex, Inc. v. Cowden*, 728 S.W.2d 813, 816 (Tex. App.—Houston [1st Dist.] 1986, no writ) (citing *Thomason v. Pacific Mutual Life Insurance Co. of California*, 74 S.W.2d 162 (Tex. Civ. App.—El Paso 1934, writ ref'd)).

If acceptable arrangements have been made with the trustee before the sale, it may not be necessary for a bidder to attend the sale, and the sale may be on credit even if the security instrument requires cash. *Merrimac Properties, Inc. v. Combined Financial Corp.*, No. 10-02-00298-CV, 2004 WL 1126307, at *1 (Tex. App.—Waco May 19, 2004, pet. denied) (mem. op.).

One bid is acceptable for two separate tracts of land, so long as the mortgagee apportions the bid price fairly between each individual tract. *See Provident National Assurance Co. v. Stephens*, 910 S.W.2d 926 (Tex. 1995).

§ 11.22 Bidder's Peril

Purchasers of foreclosure property buy at their peril. *Henke v. First Southern Properties, Inc.*, 586 S.W.2d 617, 620 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.). All warranties of title in a trustee's deed come from the borrower, not the mortgagee. *In re Niland*, 825 F.2d 801 (5th Cir. 1987); *Sandel v. Burney*, 714 S.W.2d 40, 41 (Tex. App.—San Antonio 1986, no writ); *Diversified, Inc. v. Walker*, 702 S.W.2d 717, 723 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

A purchaser at a foreclosure sale acquires the foreclosed property "as is" without any expressed or implied warranties, except as to warranties of title, at the purchaser's own risk. Tex. Prop. Code § 51.009(1). For a definition of "as is," see *Bynum v. Prudential Residential Services, Ltd. Partnership*, 129 S.W.3d 781, 788–89 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

For the purposes of the Texas Deceptive Trade Practices–Consumer Protection Act, a foreclosure sale purchaser is not a consumer. Tex. Prop. Code § 51.009(2).

§ 11.23 "Chilled" Foreclosure Bid

"Chilling the bid" refers to instances where the acts of the mortgagee or trustee prevented an orderly disposition of the secured property or deterred third parties from bidding under a theory that the wrong committed resembles that of conversion. *Pentad Joint Venture v. First National Bank of La Grange*, 797 S.W.2d 92, 96 (Tex. App.—Austin 1990, writ denied).

Over time, the "chilling the bid" cause of action has evolved so that it only arises when the mortgagee or trustee's deliberate and affirmative acts interfered with the bidding process and were the cause of the property being sold for a grossly inadequate price. *See, e.g., Ashton v. BAC Home Loans Servicing LP*, No. 4:13-cv-810, 2013 WL 3807756, at *2 (S.D. Tex. July 19, 2013); *Veldekens v. GE HFS Holdings Inc.*, No. H-06-3296, 2008 WL 4425363, at *22 (S.D. Tex. Sept. 24, 2008). The fact that the property was sold for inadequate consideration alone does not render the foreclosure sale void. *Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965).

§ 11.24 Trustee's Deed

In a trustee's deed, a foreclosure sale purchaser only obtains title to property the trustee had authority to convey. *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex.

1976); *American Savings & Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581 (Tex. 1976). A trustee's deed serves as a prima facie source of common title in a trespass to try title lawsuit. *See Temple Lumber Co. v. Arnold*, 14 S.W.2d 926 (Tex. Civ. App.—Beaumont 1929, writ dism'd w.o.j.).

Since the deed of trust signed by the borrower or mortgagor is simply a contract that allows the encumbered property to serve as security for payment of the debt, neither the mortgagee or trustee has title to the property, only a lien. *Slay v. Gose*, 233 S.W. 348, 349 (Tex. Civ. App.—Fort Worth 1921, no writ). Therefore, a trustee's deed does not convey title from the trustee or the mortgagee at a foreclosure sale because neither had title to the property. A trustee's deed merely transfers title from the mortgagor to the foreclosure sale purchaser. As a result, all warranties contained in a trustee's deed come from the mortgagor. *Sandel v. Burney*, 714 S.W.2d 40, 41 (Tex. App.—San Antonio 1986, no writ). For the proposition that "there is no precedent in the law that would support any theory of warranty on the part of a noteholder" running to the purchaser at a void foreclosure sale, see *In re Niland*, 825 F.2d 801, 811 (5th Cir. 1987) (quoting *Diversified, Inc. v. Walker*, 702 S.W.2d 717, 723 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)).

A mortgagee who acquires title by a trustee's deed that proves to be irregular or void as to the mortgagor may retain possession of the property in any suit by the mortgagor, or one holding under the mortgagor, until the underlying debt is paid. *Jasper State Bank v. Braswell*, 111 S.W.2d 1079, 1083 (Tex. 1938).

A bidder who pays cash at a foreclosure sale obtains equitable title to the property, and failure to deliver or record a trustee's deed does not divest the foreclosure sale purchaser of title. *Peterson v. Black*, 980 S.W.2d 818, 822 (Tex. App.—San Antonio 1998, no pet.); *Pioneer Building & Loan Ass'n v. Cowan*, 123 S.W.2d 726 (Tex. Civ. App.—Waco 1938, writ dism'd judgm't cor.).

If a trustee's deed contains facts related to the conduct of the foreclosure sale, such recitals are prima facie evidence of the facts stated. *Adams v. Zellner*, 183 S.W. 1143, 1144 (Tex. 1916); *Birdwell v. Kidd*, 240 S.W.2d 488, 491 (Tex. Civ. App.—Texarkana 1951, no writ). However, a challenge to any of the recitals in the trustee's deed must be brought within two years after the deed was recorded. Tex. Civ. Prac. & Rem. Code § 16.033(a)(7).

§ 11.25 Excess Proceeds

After a foreclosure sale, the trustee must distribute the sale proceeds in accordance with the terms of the loan agreement. Under standard deed of trust forms, after paying the trustee's fees, attorney's fees, and the amount due to the mortgagee, any excess proceeds remaining must be paid to inferior lienholders in the order of lien priority. Excess proceeds always flow down to inferior lienholders in the chain of title, never up to superior lienholders. *Conversion Properties, L.L.C. v. Kessler*, 994 S.W.2d 810, 813 (Tex. App.—Dallas 1999, pet. denied). Accordingly, excess proceeds from a junior lien foreclosure are not applied to satisfy a senior lien, and the successful bidder takes subject to all superior liens. *Conversion Properties, L.L.C.*, 994 S.W.2d at 813. If no inferior liens encumber the foreclosed property, the surplus proceeds belong to the mortgagor. *Grant v. U.S. Department of Veterans' Affairs*, 827 F. Supp. 418 (S.D. Tex. 1993).

A helpful roadmap on how a Texas trustee should distribute excess proceeds is *Hanley v. Pearson*, 61 P.3d 29 (Ariz. Ct. App. 2003), with the caveat that the opinion was based on an analysis of Arizona statutes dealing with excess proceeds. Regrettably, there is no excess proceeds statute under Texas law that gives guidance to a trustee on how to distribute excess proceeds.

Bankruptcy may affect how the excess proceeds are distributed. *In re Keener*, 268 B.R. 912 (Bankr. N.D. Tex. 2001). In *Keener*, the bankruptcy trustee filed suit against the foreclosing bank because the bank applied $200,590 in excess proceeds to other debts owed by the borrower that were not secured by the foreclosed property. The court found the bank breached the terms of the deed of trust because the excess proceeds represented merely a change in the form of the collateral. The other debts were not secured by the foreclosed property; therefore, the excess proceeds could not be used to pay the other debts.

When distributing excess proceeds, the trustee should determine whether the alleged recipient is a person on the "Specially Designated Nationals List" who is prohibited from receiving such funds. The list can be obtained from the U.S. Department of the Treasury, Office of Foreign Assets Control at **https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx**.

§ 11.26 Trustee Presumptions

Based on the rebuttable presumption that a foreclosure sale is conducted properly and the trustee's duties and responsibilities were performed correctly (see *Roland v. Equitable Trust Co.*, 584 S.W.2d 883 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.)), most foreclosure professionals attach an affidavit to the trustee's deed averring the foreclosure was procedurally correct, to include the proper appointment of a trustee. This affidavit accommodates the concerns of title examiners as to whether a foreclosure was conducted properly.

In addition, if the deed of trust provides that all prerequisites to the sale are presumed performed correctly, any recitations as to the conduct of the sale in the trustee's deed will be considered prima facie evidence of the truth of the matter stated. *Cunningham v. Paschall*, 135 S.W.2d 293, 296 (Tex. Civ. App.—Fort Worth 1939 writ dism'd judgm't cor.).

A trustee does not owe a duty of good faith and fair dealing to the obligor of the debt or mortgage, even if the trustee makes mistakes in handling the foreclosure, such as misrepresenting the amount due under the note and deed of trust. *See Powell v. Stacy*, 117 S.W.3d 70 (Tex. App.—Fort Worth 2003, no pet.).

[Reserved]

Chapter 12

Notice of Foreclosure Sale

Forms

[Reserved]

Chapter 12

Notice of Foreclosure Sale

The editors gratefully acknowledge David Tomek for his contribution to this chapter.

§ 12.1 Introduction

After the noteholder has decided to proceed with a nonjudicial foreclosure sale of the Texas collateral (usually after the note has matured by its terms or the maturity date has been validly accelerated; see chapter 8 in this manual) and has engaged the deed of trust trustee (or a properly appointed substitute trustee) to conduct the sale (see chapter 11), the noteholder and its counsel (who may also be serving as the substitute trustee) must then give the requisite notices of the foreclosure sale in accordance with the governing loan documents (predominantly, the deed of trust) and applicable law (predominantly, chapter 51 of the Texas Property Code).

§ 12.2 Contractual Requirements of Notice of Sale

If the mandatory notice of sale required by Texas Property Code section 51.02 will be used to document the appointment of a substitute trustee, a foreclosure professional must ensure that modification of a legacy notice of sale conforms to the specific requirements found in Property Code section 51.0076 for appointing a substitute trustee. *See* Acts 2015, 84th Leg., R.S., ch. 653, § 2 (H.B. 2063), eff. Sept. 1, 2015 (adding Tex. Prop. Code § 51.0076).

Similar to the establishment of a default and acceleration of the secured debt, notice of a proposed foreclosure sale, to be effective, must comply with all of the requirements set forth in the governing loan documents, including the deed of trust. The most common instance where the deed of trust might impose procedural requirements in addition to the minimum statutory requirements in chapter 51 of the Texas Property Code (although by now mostly a vestige of decades ago) involves where notice of the sale is to be posted. If the deed of trust requires that the notice be posted in three public places, the notice must both satisfy the current requirements of chapter 51 of the Texas Property Code and be posted in three public places as required by the deed of trust. *Harwath v. Hudson*, 654 S.W.2d 851, 853–54 (Tex. App.—Dallas 1983, writ ref'd n.r.e.). If the deed of trust requires that the notice be published in a newspaper, the notice must be so published in addition to being posted as required by the Property Code. *See Rudolph v. Hively*, 188 S.W. 721, 723 (Tex. Civ. App.—Amarillo 1916, writ ref'd) (sheriff's sale voided; if mortgage required notice by publication in county newspaper, it was no excuse that county had no newspaper, and mortgagee's only resort was to a court of equity). However, a provision in a deed of trust requiring that the notice of foreclosure sale be filed of record "in the deed records in the county in which the mortgaged property is located as required by law" may be disregarded as imposing no duty to take any action beyond that required by Property Code section 51.002. *Thompson v. Chrysler First Business Credit Corp.*, 840 S.W.2d 25, 31–32 (Tex. App.—Dallas 1992, no writ).

§ 12.3 Statutory Requirements to Post, File, and Serve (Mail) Notice of Sale

In addition to contractual requirements, section 51.002(b) of the Texas Property Code requires that notice properly posted at the courthouse door, filed with the county clerk, and served on the debtor (as discussed below) must be performed "at least 21 days before the date of the sale" in order for proper notice of a foreclosure sale to be given. Tex. Prop. Code § 51.002(b). The day on which the notice of sale is given is included, and the day of the foreclosure sale is excluded, in computing the twenty-one-day notice period. Tex. Prop. Code § 51.002(g). As a result, notice properly posted, filed, and mailed on the Tuesday three weeks before the foreclosure sale date is timely (even if not the most risk-averse timing).

§ 12.3:1 Posting at Courthouse Door

The notice of sale must be posted at the courthouse door of each county in which the property is located. Tex. Prop. Code § 51.002(b)(1). The term *courthouse door* is defined in Tex. R. Civ. P. 648 as meaning "either of the principal entrances to the house provided by the proper authority for the holding of the district court." The customary bulletin boards, located near the courthouse door for posting notices of sheriff's execution sales, have been approved for posting. *Howard v. Fulton*, 14 S.W. 1061, 1062 (Tex. 1891); *Micrea, Inc. v. Eureka Life Insurance Co. of America*, 534 S.W.2d 348, 358 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.); *Matson v. Federal Farm Mortgage Corp.*, 151 S.W.2d 636, 640 (Tex. Civ. App.—Waco 1941, no writ); *Heiner v. Homeland Realty Co.*, 100 S.W.2d 793, 794–95 (Tex. Civ. App.—Waco 1936, no writ). As practices and procedures vary across Texas counties as to where and by what means a foreclosure sale notice is to be posted, counsel for the mortgage servicer should determine the proper location in advance so as to be able to direct an agent handling the filing and posting accordingly. In that regard, satisfaction of the requirement to post at the courthouse door and file with the county clerk a notice of sale can be accomplished by someone designated by the trustee or substitute trustee, provided, however, that if the trustee or substitute trustee does not personally accomplish that task, an affidavit should be obtained from the individual posting the notice that includes a certification as to the time, date, place, and manner of the posting. If the courthouse or county clerk's office is closed because of inclement weather, natural disaster, or other act of God, the notice may be posted or filed up to forty-eight hours after the courthouse or county clerk's office reopens for business. Tex. Prop. Code § 51.002(b–1).

The notice of sale posted at the courthouse door does not have to remain intact and visible during every one of the days of the posting period. The trustee is not required to ensure that the notices are kept posted or are visible on the posting board. *First State Bank v. Keilman*, 851 S.W.2d 914, 923 (Tex. App.—Austin 1993, writ denied); *Chambers v. Lee*, 566 S.W.2d 69, 73 (Tex. Civ. App.—Texarkana 1978, no writ). A substitute trustee does not need to repost the notice after the original trustee has already done so. *Koehler v. Pioneer American Insurance Co.*, 425 S.W.2d 889, 891 (Tex. Civ. App.—Fort Worth 1968, no writ); *see also In re Davis Chevrolet, Inc.*, 135 B.R. 29, 34 (N.D. Tex. 1992).

§ 12.3:2 Filing with County Clerk

A copy of the notice of sale must be filed in the office of the county clerk in which the property is located. Tex. Prop. Code § 51.002(b)(2). The county clerk is required to keep all such notices in a convenient file available to the public for examination during normal business hours until after the date of sale specified in the notice has passed. Tex. Prop. Code § 51.002(f). These notices are typically disposed of by the county clerk following the date of the sale stated in the notices; therefore, the receipt for payment given by the county clerk and a file-stamped copy of the notice of sale should be retained as evidence of filing. Additionally, the person who files the notice with the county clerk should sign an affidavit as to the date and time of filing the notice. See form 11-4 in this manual for an affidavit of filing and posting of the notice of foreclosure sale.

In an effort to provide the public with greater access to notices of foreclosure sales, the legislature added a new section 51.002(f–1) to the Texas Property Code, effective September 1, 2013, that requires a county that maintains an Internet Web site to post notices of sale filed with its county clerk on that Web site on a page that is publicly available for viewing without charge or registration (as many larger Texas counties already do). *See* Tex. Prop. Code § 51.002(f–1).

Practice Tip: The attorney for the mortgage servicer, as soon as practicable before filing and posting a notice of foreclosure sale, should check with the mortgage servicer to verify that (1) the loan has not been paid and (2) reinstatement has not been granted or other forbearance arrangements have not been made by the mortgage servicer. Publicly posting the mortgagor's property in error or contrary to an enforceable agreement by the mortgage servicer may expose the mortgage servicer to liability.

Practice Tip: Especially in a case where the collateral to be foreclosed is in a county or counties geographically remote from the person handling the foreclosure for the mortgage servicer (usually the attorney for the mortgage servicer) and a foreclosure posting service is being used for the filing and posting, it is advisable to arrange for the filing and posting to be accomplished no later than the Monday that is twenty-two days before the foreclosure sale date, leaving the mailing of the notice (preferably a file-stamped copy) to the debtor to be accomplished as early as possible the next day (but no later than the Tuesday twenty-one days prior to the foreclosure sale date).

§ 12.3:3 Serving Notice on Debtor

Notice of the sale must be served by certified mail on each *debtor* who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt. Tex. Prop. Code § 51.002(b)(3). Neither the term *debtor* nor the phrase each *debtor who . . . is obligated to pay the debt* is defined in chapter 51 of the Texas Property Code, and neither appears to have been the subject of a reported case as of the publication date of this manual. Although the party who signs the promissory note as a maker and a party who assumes liability to pay the promissory note as an assumptor indisputably are "obligated to pay the debt," a guarantor of the debt has been held not to be entitled to the statutory notice of a nonjudicial foreclosure sale. *See Bishop v. National Loan Investors, L.P.*, 915 S.W.2d 241, 245 (Tex. App.—Fort Worth 1995, writ denied), citing *Long v. NCNB–Texas National Bank*, 882 S.W.2d 861, 866 (Tex. App.—Corpus Christi 1994, no writ). Notwithstanding the case authority cited above, it is advisable to serve a notice of foreclosure sale on a guarantor in the same fashion as the notice is served on the debtor(s) who, according to the records of the mortgage servicer, is obligated to pay the debt.

Other parties held *not* entitled to the statutory notice of a nonjudicial foreclosure sale (absent a contractual agreement to do so) include (1) a junior lienholder (*see Hampshire v. Greeves*, 143 S.W. 147, 150 (Tex. 1912); *Chandler v. Orgain*, 302 S.W.2d 953, 956 (Tex. Civ. App.—Fort Worth 1957, no writ)); (2) an owner of the property who is not the borrower, including an owner who purchases subject to the debt (*see Lawson v. Gibbs*, 591 S.W.2d 292, 295 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.)); (3) a purchaser who assumes a secured seller's debt in an agreement with the seller but does not obtain the mortgagee's approval in violation of a due-on-sale clause (*Saravia v. Benson*, 433 S.W.3d 658 (Tex. App.—Houston [14th Dist.] 2014, no pet.));

(4) a maker of a separate note that is cross-defaulted and cross-collateralized with the defaulted note (*see National Commerce Bank v. Stiehl*, 866 S.W.2d 706, 708 (Tex. App.—Houston [1st Dist.] 1993, no writ)); and (5) a purchaser under contract for deed with the mortgagor (*see In re Riviera*, 358 B.R. 688, 693 (Bankr. S.D. Tex. 2007)). There may, however, be good reasons for the mortgage servicer's counsel to serve the notice of sale on parties without a legal or contractual right to receive the notice, in case any such party, especially a junior lienholder, would be motivated to purchase the property at foreclosure.

Service of a foreclosure notice by certified mail is complete when the notice is deposited in the U.S. mail, postage prepaid, and addressed to the debtor at the debtor's last known address. Tex. Prop. Code § 51.002(e); *Stanley v. CitiFinancial Mortgage Co.*, 121 S.W.3d 811, 817–18 (Tex. App.—Beaumont 2003, pet. denied). For property other than a debtor's residence, "debtor's last known address" means the debtor's last known address as shown by the records of the mortgage servicer unless the debtor provided the current mortgage servicer a written change of address before the date the mortgage servicer mailed the notice of foreclosure sale. *See* Tex. Prop. Code § 51.0001(2). A debtor is obligated to inform the mortgage servicer in a reasonable manner of any change of the debtor's address. Tex. Prop. Code § 51.0021. If properly mailed, the fact that a debtor did not actually receive notice does not render the notice of sale invalid. *Hausmann v. Texas Savings & Loan Ass'n*, 585 S.W.2d 796, 799–800 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.). If not properly mailed, actual notice may be sufficient if timely received. *See Forestier v. San Antonio Savings Ass'n*, 564 S.W.2d 160, 163 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.); *contra Mitchell v. Texas Commerce Bank-Irving*, 680 S.W.2d 681 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.). If the mortgage servicer's records indicate husband and wife debtors have the same residence, a single letter to both spouses is sufficient. *Martinez v. Beasley*, 616 S.W.2d 689 (Tex. Civ. App.—Corpus Christi 1981, no writ). Separate enclosures containing the required statutory notice need not be sent to obligors having the same address. *Hausmann*, 585 S.W.2d at 799–800; *Forestier*, 564 S.W.2d at 163.

The affidavit of a person knowledgeable of the facts to the effect that service of notice was completed is prima facie evidence of service. Tex. Prop. Code § 51.002(e). This statute probably has contributed to the widespread use of and requirement for (especially by title companies being asked to insure title at or after foreclosure) affidavits on various aspects of the foreclosure posting and noticing procedures being prepared contemporaneously (and, in some cases, attached to the foreclosure sale deed). See form 11-5 in this manual for an affidavit of mailing of the notice of foreclosure sale. See also 2 State Bar of Tex., *Texas Real Estate Forms Manual* §§ 28.5:6, 28.5:7, forms 28-8, 28-9 (2d ed. 2011), for forms for an affidavit of filing and posting and an affidavit of mailing, respectively. In *Ackley v. FDIC*, 981 F. Supp. 457, 460 (S.D. Tex. 1997), the court held that affidavits of the mortgagee's employee and attorney who actually mailed notice of acceleration and notice of foreclosure sale established proof of notice being given.

Practice Tip: See chapter 8 for recommended procedures to follow in mailing notices. These procedures are useful to counter the argument that notice was never received by the debtor. *See Hensley v. Lubbock National Bank*, 561 S.W.2d 885, 891 (Tex. Civ. App.—Amarillo 1978, no writ) (sworn denial of receipt of notice is some evidence of non-notification of sale); *see also WTFO, Inc. v. Braithwaite*, 899 S.W.2d 709, 720 (Tex. App.—Dallas 1995, no writ).

See form 12-1 for a letter to the debtor that advises of the maturity of the secured indebtedness and transmits the notice of foreclosure sale. See form 12-2 for a letter to the debtor that advises the debtor that the maturity of the secured indebtedness has been accelerated and transmits the notice of foreclosure sale.

§ 12.4 Contents of Notice of Sale

The cases construing the relevant sections of chapter 51 of the Texas Property Code and its predecessor statutes tend to impose only general descriptive requirements and have upheld notices of sale deemed to have sufficiently informed the public of the nature and condition of the property so as to attract bidders. *See Hutson v. Sadler*, 501 S.W.2d 728, 732 (Tex. Civ. App.—Tyler 1973, no writ); *Stone v. Watt*, 81 S.W.2d 552, 555 (Tex. Civ. App.—Eastland 1935, writ ref'd).

With the foregoing case law latitude and the express requirements of chapter 51 of the Texas Property Code in mind, it is recommended that the notice of sale should, at a minimum, contain the following: (1) a description of the security instrument, including recording information, the matured debt, and the property to be sold at foreclosure, including any personal property in which a security interest is granted in the deed of trust; (2) a statement that a default under the secured debt exists; (3) a statement that the mortgage servicer has authorized the enforcement of the power of sale granted in the deed of trust; (4) a statement of the earliest time and date for, and the location of, the foreclosure sale; (5) the name and street address (and signature) of the trustee or substitute trustee; (6) a statement that the described property will be sold by public auction to the highest bidder for cash; (7) for any security instrument that also constitutes a security agreement, a statement that, under the authority of section 9.604(a) of the Texas Business and Commerce Code, the foreclosure sale will cover both real property and personal property in which a security interest is granted under the security instrument; (8) if the security instrument is being serviced by a mortgage servicer, disclosure of the existence of a servicing agreement between the mortgagee and the mortgage servicer, the name of the mortgagee, and either the address of the mortgagee or the address of the mortgage servicer if there is a servicing agreement for the security instrument; (9) the military rights disclosure; and (10) if the property to be foreclosed is located in the covered area along the Gulf Coast, an open-beach disclosure.

See form 12-3 in this manual for a notice of foreclosure sale (which is designed to be used whether the sale is being administered by the mortgagee or by the mortgage servicer pursuant to a written servicing agreement with the mortgagee). See also 2 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 28, forms 28-12 (no servicing agreement), 28-13 (servicing agreement) (2d ed. 2011), for other forms for notice of foreclosure (trustee's) sale.

§ 12.4:1 Descriptions of Security Instrument, Secured Debt, and Property to Be Sold

Practice in Texas varies as to how fulsome a description of the security instrument to be foreclosed is advisable to be included in the notice of sale. Some drafters of notices include not only a description of the security instrument by title, date, parties, and recording information, but also a description of at least some of any modifications thereof, recorded or not (which is the approach contemplated in form 12-3 in this manual). Description of the security instrument merely by reference to the applicable recording information has been upheld. *See Miller v. Gibraltar Savings & Building Ass'n*, 132 S.W.2d 606, 608 (Tex. Civ. App.—Beaumont 1939, writ dism'd). An earlier case found that setting forth the recording data of the deed of trust was not mandatory if the notice otherwise sufficiently described the lien. *See Mortimer v. Williams*, 262 S.W. 123, 125 (Tex. Civ. App.—Dallas 1924, no writ). A Houston court of appeals held a notice of sale sufficient because it identified the trustee and the land, even though the notice identified the deed of trust with a wrong date and recording data. *See Mercer v. Bludworth*, 715 S.W.2d 693, 700 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.), *disapproved on other grounds*, *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991).

A description of the secured debt merely by reference to the deed of trust was also upheld. *See Mortimer*, 262 S.W. at 125. However, the balance of the debt need not be stated. *See Gooch v. Addison*, 35 S.W. 83 (Tex. Civ. App. 1896, writ ref'd).

The description in the notice of sale of the property to be sold at foreclosure is legally sufficient if it refers to records that contain information sufficient to apprise interested parties of the property that will be sold at foreclosure. *See Miller*, 132 S.W.2d at 608 (recording data on deed of trust held sufficient). Form 12-3 contemplates a complete legal description of the real property to be sold by including, in addition to recording information for the deed of trust, a sufficient legal description of the real property initially covered by the deed of trust and, if any property has subsequently been released from the deed of trust, then describing the released property, resulting in an accurate description of the real property to be sold at foreclosure. The *Myrad* case discussed in section 12.5 below is an important case for what is and isn't a sufficient description in the notice of sale of the property to be sold, and it highlights the importance of the attorney for the mortgage servicer paying careful attention to including in each notice of sale a complete and sufficient description of the property to be sold at foreclosure.

§ 12.4:2 Statement of Default

After the attorney for the mortgage servicer has verified that at least one provable default exists under the governing loan documents (that has not been waived by the mortgage servicer either expressly or by course of conduct), it is advisable to include a statement, at least broadly, that default exists and the foreclosure has been authorized by the mortgage servicer as a consequence of the default. *See Gooch v. Addison*, 35 S.W. 83 (Tex. Civ. App. 1896, writ ref'd).

§ 12.4:3 Authorization to Foreclose

After the attorney for the mortgage servicer has verified that the mortgagee or the mortgage servicer (if different) has sufficient ownership of the lien to be foreclosed and the indebtedness secured thereby or has the right to administer the foreclosure on behalf of the mortgagee, as applicable, it is advisable to include in the notice of sale a recitation of the requisite authority to direct the foreclosure. That recitation may well need to include a description of relevant transfers of the secured indebtedness and liens securing same so that constructive notice is afforded to those interested in confirming the requisite authority, especially title companies called upon to insure title to the foreclosed property.

Section 51.0001 of the Texas Property Code was enacted in 2004 and amended in 2007 to introduce much-needed definitions that enabled the recognition and functioning of Mortgage Electronic Registration Systems, Inc., and the exploding securitization of mortgages, both residential and nonresidential. Section 51.0001 added definitions for "book entry system," "debtor's last known address," "mortgage servicer," "mortgagee," "mortgagor," "security instrument," "substitute trustee," and "trustee." *See* Tex. Prop. Code § 51.0001.

A mortgage servicer may administer a foreclosure on behalf of a mortgagee if two requirements are met. First, there must be an agreement between the mortgagee and the mortgage servicer granting the current mortgage servicer authority to service the mortgage. Second, the notice of sale must disclose the information detailed in section 12.4:8 below. *See* Tex. Prop. Code § 51.0025.

§ 12.4:4 Date, Time, and Location of Sale

Section 51.002 of the Texas Property Code specifies that the sale must be on the first Tuesday of the month. *See* Tex. Prop. Code § 51.002(a). A sale not held on the first Tuesday of the month is void. *McLaren v. Jones*, 33 S.W. 849, 850 (Tex. 1896); *Durkay v. Madco Oil Co.*, 862 S.W.2d 14, 17 (Tex. App.—Corpus Christi 1993, writ denied). *But see Behrens Lofts, Ltd. v. Martinez*, W-03-CA-176 (W.D. Tex. Feb. 12, 2004), in which the federal district court held that a foreclosure on the second Wednesday of the month, instead of the first Tuesday, was proper. The deed of trust encumbered a forty-seven-unit apartment project in Waco, Texas, and secured a loan made by a bank that was insured by the Department of Housing and Urban Development (HUD). After delinquency, the loan was assigned by the bank to HUD. Even though the deed of trust specified that the Texas Property Code would govern foreclosure proceedings, the court held that once the loan was assigned to HUD, the department could, in lieu of following the deed-of-trust procedures, follow the procedures set out in the Multifamily Mortgage Foreclosure Act, 12 U.S.C. §§ 3701–3717; 24 C.F.R. § 27.2(a); 24 C.F.R. pt. 207; *see also United States v. Victory Village, Inc.*, 662 F.2d 488, 497–98 (8th Cir. 1981). The sale may be conducted on a courthouse holiday. *Koehler v. Pioneer American Insurance Co.*, 425 S.W.2d 889, 891 (Tex. Civ. App.—Fort Worth 1968, no writ) (July Fourth); *Stewart v. Stewart*, 357 S.W.2d 492, 493–94 (Tex. Civ. App.—Texarkana 1962, no writ) (Labor Day).

The notice of sale must include a statement of the earliest time at which the sale will begin between 10:00 A.M. and 4:00 P.M. Tex. Prop. Code § 51.002(a), (b). The sale must begin at the time stated in the notice or not later than three hours after that time. Tex. Prop. Code § 51.002(c).

Historically, real estate foreclosure sales have typically taken place at the county courthouse of the county in which the real property is located. Section 51.002(a) of the Texas Property Code directs the commissioners court of each county to designate the area at the county courthouse where foreclosure sales are to take place and to record the designation in the real property records of the county. The sale is required to occur in the designated area. If no area is designated by the commissioners court, the notice of sale must designate the area at the courthouse where the sale covered by the notice is to take place, and the sale must occur in that area. Tex. Prop. Code § 51.002(a). However, a county commissioners court may designate an area for real estate foreclosure sales that is not at the county courthouse if the area designated is in a public place within reasonable proximity to the county courthouse and is as accessible to the public as the courthouse door. The commissioners court must record the designation in the real property records of the county, and real estate foreclosure sales in that county must be held at that designated area if the sales are held on or after the ninetieth day after the date the designation is recorded. *See* Tex. Prop. Code § 51.002(a), (h).

See Appendix B in this manual for designated areas for foreclosure sales in Texas counties.

The foreclosure sale must take place in the county in which the real property is located. *Wylie v. Hays*, 263 S.W. 563, 569 (Tex. 1924). If the real property is located in more than one county, the sale may occur in one of the counties designated as the place of sale in the publicly posted notice of foreclosure sale. Notice of the sale must be filed and posted in all counties in which the real property is located. Tex. Prop. Code § 51.002(a), (b). Apparently, if the deed of trust covers property that lies across county boundary lines, in contiguous counties or in noncontiguous counties, a sale of all parcels may be held in any one of the counties. *Bateman v. Carter-Jones Drilling Co.*, 290 S.W.2d 366, 370 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.) (where multiple noncontiguous tracts in Gregg and Rusk counties, which are contiguous counties, sale of land in different county from that in which land located upheld, even though land not contiguous to tract in county of sale) (interpreting language of 1915 version of foreclosure statute, Tex. Rev. Civ. Stat. art. 3759); *Dall v. Lindsey*, 237 S.W.2d 1006, 1009–1010 (Tex. Civ. App.—Amarillo 1951, writ ref'd n.r.e.) (where land in Hale County and Lubbock County, which are contiguous counties, sale in Lubbock County upheld, although deed of trust designated Hale County as place of sale); *Lewis v. Dainwood*, 130 S.W.2d 456, 457 (Tex. Civ. App.—San Antonio 1939, writ ref'd) (where part of land in Nueces County and part in Jim Wells County, which are contiguous counties, sale in either county authorized).

§ 12.4:5 Name and Street Address of Trustee; Signature of Trustee

Section 51.0075 of the Texas Property Code requires that a notice of sale contain the street address and name of the trustee. Tex. Prop. Code § 51.0075(e).

Chapter 51 of the Texas Property Code does not expressly require the notice of foreclosure to be executed by the trustee or acknowledged, but execution of the notice is and has been for years the norm in Texas. For a thought-provoking discussion about electronic filing of notices of sale and the suggestion that electronic filing may be more acceptable to county clerks in Texas if trustees quit signing notices of sale, see G. Tommy Bastian, *Texas Foreclosures: Myths and Realities*, *in* Advanced Real Estate Law Course, 2011, State Bar of Texas (2011).

§ 12.4:6 Sale at Auction for Cash

Even though the foreclosing lienholder is entitled at common law and almost certainly expressly under the deed of trust to, as purchaser at foreclosure, apply the purchase price as a credit against its secured debt (*see Thomason v. Pacific Mutual Life Insurance Co. of California*, 74 S.W.2d 162 (Tex. Civ. App.—El Paso 1934, writ ref'd)), the lienholder and its counsel may wish to apprise interested bidders through the publicly posted notice of sale of the auction nature of the sale (in accordance with section 51.002(a) of the Texas Property Code) and that the property is being sold for cash (in accordance with the deed of trust being foreclosed). Although chapter 51 of the Texas Property Code does not require that a foreclosure sale be for cash, most Texas deeds of trust require that the sale be to the "highest bidder for cash." This contractual requirement has been upheld. *See Kirkman v. Amarillo Savings Ass'n*, 483 S.W.2d 302, 308–09 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.). In any event, the foreclosure sale purchase price is due and payable without delay on acceptance of the bid or within such reasonable additional time as may be agreed upon by the purchaser and the trustee if the purchaser makes such request for additional time. Tex. Prop. Code § 51.0075(f).

§ 12.4:7 Sale of Real and Personal Property

If the deed of trust includes a security agreement for personal property, the real property foreclosure sale can include the personal property in which a security interest is granted in the deed of trust. *See* Tex. Bus. & Com. Code § 9.604(a). If personal property is sold in connection with the foreclosure sale of real property, the commercially reasonable standard of chapter 9 of the Texas Business and Commerce Code does not govern the sale. *Huddleston v. Texas Commerce Bank–Dallas*, 756 S.W.2d 343 (Tex. App.—Dallas 1988, writ denied).

§ 12.4:8 Servicing Agreement; Information about Mortgage Servicer

If the foreclosure is being administered by a mortgage servicer, section 51.0025 of the Texas Property Code requires that the notice of sale disclose (1) that the mortgage servicer is representing a mortgagee under a servicing agreement, (2) the name of the mortgagee, and (3) the address of the mortgagee or the address of the mortgage servicer if there is an agreement granting the mortgage servicer the authority to service the mortgage. Tex. Prop. Code § 51.0025(2).

§ 12.4:9 Statutory Notice of Servicemember Rights

All foreclosure notices served on a debtor under Texas Property Code section 51.002 must include a military rights disclosure that is substantially similar to the promulgated language found in subsection (i). Tex. Prop. Code § 51.002(i). Note that the 2011 legislature enacted two slightly different versions of subsection (i), one effective September 1, 2011 (this version requires that the notice include the name and address of the sender of the notice and that the military rights disclosure be printed in boldface or underlined type) and the other effective January 1, 2012. *See* Tex. Prop. Code § 51.002(i). Note that the prescribed notice is included in each of forms 12-1 through 12-3 in this manual.

§ 12.4:10 Open-Beach Disclosure

An open-beach disclosure must be included if the interest in real property to be foreclosed is located seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12′, 19″ that runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel. This disclosure is required in all executory contracts for conveyance. Tex. Nat. Res. Code § 61.025. The Texas attorney general opined that this notice requirement is applicable to foreclosure sales and requires the trustee to give the statutory notice to third-party purchasers and to mortgagee-purchasers. Tex. Att'y Gen. Op. No. JM-834 (1987). This disclosure should be included in the publicly posted notice of foreclosure sale, in the foreclosure sale deed, and in a separate written statement, the receipt of which is acknowledged by each bidder at the foreclosure sale before bidding.

§ 12.5 Immaterial Errors in Notice

Certain errors in notices of foreclosure sale have been held to be immaterial. *See RTC v. Summers & Miller Gleneagles Joint Venture*, 791 F. Supp. 653 (N.D. Tex. 1992) (transposition in notice of foreclosure sale of "save and except" clauses as to two mortgaged properties being foreclosed not defect sufficient to set aside foreclosure sale if no evidence introduced that bidding chilled or bidders misled other than evidence that less than fair market value of property bid at sale and no evidence offered causally connecting defect and bid); *Maupin v. Chaney*, 163 S.W.2d 380 (Tex. 1942) (error in data of deed incorporated by reference in describing property being sold found to be immaterial, as false part of reference could be rejected and effect given to remainder); *Alkas v. United Savings Ass'n of Texas*, 672 S.W.2d 852 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (court reformed deed of trust, notices of foreclosure sale, and foreclosure sale deed to add 2.1467-acre tract erroneously omitted from deed of trust but contained in prior deed of trust renewed by deed of trust being foreclosed); *Diversified Developers, Inc. v. Texas First Mortgage REIT*, 592 S.W.2d 43 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (notice of foreclosure sale including previously released land with property still available to be foreclosed held to be insufficient to set sale aside because trustee explained that released tract not included in sale, and nobody misled as result); *Hutson v. Sadler*, 501 S.W.2d 728 (Tex. Civ. App.—Tyler 1973, no writ) (error in mortgagee's name found to be immaterial); *Wilson v. Armstrong*, 236 S.W. 755 (Tex. Civ. App.—Beaumont 1921, no writ) (error in date of notice of sale found to be immaterial).

Underinclusion of Property in Notice: In *Myrad Properties, Inc. v. LaSalle Bank N.A.*, 300 S.W.3d 746 (Tex. 2009), the notice of substitute trustee's sale omitted one of two apartment complexes in its definition of the real property secured by the deed of trust. At the sale, the trustee read aloud the description of only one of the complexes and subsequently executed and recorded a foreclosure sale deed for only one of the complexes. The court of appeals found that the notice provided adequate notice of sale of both complexes and that the foreclosure sale foreclosed the mortgagee's lien on both complexes. *Myrad*, 252 S.W.3d 605 (Tex. App.—Austin 2008). The court of appeals based its holding in part on the fact that the notice of foreclosure sale included a statement that the mortgagee could proceed against both real and personal property described in the deed of trust:

> The Deed of Trust may encumber both real and personal property. Notice is hereby given of Holder's election to proceed against and sell both *the real property* and any personal property *described in the Deed of Trust* in accordance with the Holder's rights and remedies under the Deed of Trust and Section 9.604 of the Texas Business and Commerce Code.

Myrad, 252 S.W.3d at 616 (emphasis added). The court of appeals noted that the notice of foreclosure sale did not fail to provide any notice that both complexes would be sold but, rather, contained an internal inconsistency regarding what property would be sold. *Myrad*, 252 S.W.3d at 617.

The supreme court reversed and rendered the holding of the court of appeals. First, the supreme court held that a correction deed that purports "to convey additional, separate properties not described in the original deed" is void as a matter of law, as a correction deed is appropriate in only limited circumstances to correct defects and imperfections in the original deed. *Myrad*, 300 S.W.3d at 750–51. The supreme court went on, however, to equitably rescind the original trustee's deed for mutual mistake of the trustee and the mortgagee (but not of the borrower). While the supreme court based this rescission on the borrower's failure to present contrary evidence in the lower courts, the supreme court also noted "[w]e are not blind to the equities of this dispute[,]" and indeed the effect of the court's decision in voiding the correction deed and rescinding the original trustee's deed was to restore the *status quo ante* foreclosure and allow the lender to reforeclose on the deed of trust. *Myrad*, 300 S.W.3d at 752–53.

Prior Texas courts have not regarded inconsistencies in foreclosure sale property descriptions necessarily fatal. *See Mercer v. Bludworth*, 715 S.W.2d 693 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.), *disapproved on other grounds*, *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991). *Mercer* involved a notice of sale that "identified a different date of the deed of trust and an incorrect recording reference" but included a correct metes-and-bounds description of the property and also correctly named the trustee. The court stated that "[a]nyone interested in bidding at the sale could readily have contacted the trustee to clear up any confusion that may have been created by the notice." *Mercer*, 715 S.W.2d at 700.

In reaction to the court of appeals and supreme court decisions in the *Myrad* case, the 2011 legislature passed Senate Bill 1496, which added Texas Property Code sections 5.027 through 5.031 concerning correction deeds. *See* Acts 2011, 82d Leg., R.S., ch. 194, § 1 (S.B. 1496), eff. Sept. 1, 2011. New section 5.027(b) expressly provides:

> A correction instrument may not correct an ambiguity or error in a recorded original instrument of conveyance to transfer real property or an interest in real property not originally conveyed in the instrument of conveyance for purposes of a sale of real property under a power of sale under Chapter 51 unless the conveyance otherwise complies with all requirements of Chapter 51.

Tex. Prop. Code § 5.027(b).

Additional Resources

Bastian, G. Tommy. "Texas Foreclosures: Myths and Realities." In *Advanced Real Estate Law Course, 2011*. Austin: State Bar of Texas, 2011.

Form 12-3

Note: When preparing this form, the attorney should carefully review Tex. Prop. Code §§ 51.0001, 51.0025, and 51.0075 and Tex. Bus. & Com. Code §§ 3.203 and 3.301 to ensure any reference to a person accurately describes the role the person holds or performs in the context of a foreclosure proceeding, e.g., references to "noteholder," "beneficiary," "owner," "lender," "obligor of the debt," "mortgagor," "mortgagee," or "mortgage servicer" as appropriate.

Notice of Foreclosure Sale

[**Date**]

[**Exact title of deed of trust**] ("Deed of Trust"):

Dated:	[**date**]
Grantor:	[**name of grantor**]
Trustee:	[**name of trustee**]
Lender:	[**name of lender**]
Recorded in:	[**recording data**] of the real property records of [**county**] County, Texas [**include if applicable:** being in renewal and extension of [**exact title of deed of trust**] recorded in [**recording data**] of the real property records of [**county**] County, Texas]
Legal Description:	[**legal description of property**]
Secures:	[**exact title of promissory note**] ("Note") in the original principal amount of $[**amount**], executed by [**name of borrower**] ("Borrower") and payable to the order of Lender

[**include if applicable:** and all other indebtedness of Borrower to Lender]

Include the following if applicable.

Modifications and Renewals: [**describe most recent document(s) known to preparer, using exact title(s)**] (as used herein, the terms "Note" and "Deed of Trust" mean the Note and Deed of Trust as so modified, renewed, and/or extended)

And/Or

[Original] Property: The real property, improvements, and personal property described in and mortgaged in the Deed of Trust, including the real property described in the attached Exhibit A, and all rights and appurtenances thereto

And/Or

Released Property: The real property described in the attached Exhibit B [which should include a description of any UCC collateral previously released by the filing of a UCC-3]

And/Or

Property: The Original Property, save and except the Released Property

And/Or

Assignment: The Note and the liens and security interests of the Deed of Trust were transferred and assigned to [**name of beneficiary**] ("Beneficiary") by an instrument dated [**date**],

	recorded in [**recording data**] of the real property records of [**county**] County, Texas
	And/Or
Guaranty:	The Note [and all other indebtedness of Borrower to Lender] is guaranteed by a [**exact title of guaranty**] dated [**date**], and executed by [**name of guarantor**] in favor of Lender
	And/Or
[Substitute] Trustee:	[**name of (substitute) trustee**]
[Substitute] Trustee's Address:	[**address**]
	And/Or
Mortgage Servicer:	[**name of mortgage servicer**]
Mortgage Servicer's Address:	[**address**]
	Continue with the following.
Foreclosure Sale:	
Date:	Tuesday, [**date**]
Time:	The sale of the Property will be held between the hours of 10:00 A.M. and 4:00 P.M. local time; **the earliest time at which the Foreclosure Sale will begin is [specify earliest time] and not later than three hours thereafter.**
Place:	[**describe by street address, city, county, and any other relevant information as designated by the commissioners**

	court for sales of property under Tex. Prop. Code § 51.002 in that county; if no area has been designated by the commissioners court, then designate by street address, city, county, and any other relevant information where the Foreclosure Sale is to take place]
Terms of Sale:	The Foreclosure Sale will be conducted as a public auction and the Property will be sold to the highest bidder for cash, except that [Lender/Beneficiary]'s bid may be by credit against the indebtedness secured by the lien of the Deed of Trust.

Default has occurred in the payment of the Note and in the performance of the obligations of the Deed of Trust. Because of that default, [Lender/Beneficiary], the owner and holder of the Note, has requested [Substitute] Trustee to sell the Property.

The Deed of Trust may encumber both real and personal property. Formal notice is hereby given of [Lender/Beneficiary]'s election to proceed against and sell both the real property and any personal property described in the Deed of Trust in accordance with [Lender/ Beneficiary]'s rights and remedies under the Deed of Trust and section 9.604(a) of the Texas Business and Commerce Code.

Include the following if applicable.

Mortgage Servicer is representing [Lender/Beneficiary] in connection with the loan evidenced by the Note and secured by the Deed of Trust under a servicing agreement with [Lender/Beneficiary]. The address of Mortgage Servicer is set forth above.

Continue with the following.

Therefore, notice is given that on and at the Date, Time, and Place for the Foreclosure Sale described above, [Substitute] Trustee will sell the Property in accordance with the Terms of Sale described above, the Deed of Trust, and applicable Texas law.

If [Lender/Beneficiary] passes the Foreclosure Sale, notice of the date of any rescheduled foreclosure sale will be reposted and refiled in accordance with the posting and filing requirements of the Deed of Trust and the Texas Property Code.

The Foreclosure Sale will be made expressly subject to any title matters set forth in the Deed of Trust, but prospective bidders are reminded that by law the Foreclosure Sale will necessarily be made subject to all prior matters of record affecting the Property, if any, to the extent that they remain in force and effect and have not been subordinated to the Deed of Trust. For the avoidance of doubt, the Foreclosure Sale will not cover any part of the Property that has been released of public record from the lien and/or security interest of the Deed of Trust by [Lender/Beneficiary]. Prospective bidders are strongly urged to examine the applicable property records to determine the nature and extent of such matters, if any.

Pursuant to section 51.009 of the Texas Property Code, the Property will be sold **"AS IS," without any expressed or implied warranties, except as to the warranties (if any) provided for under the Deed of Trust**. Prospective bidders are advised to conduct an independent investigation of the nature and physical condition of the Property.

Pursuant to section 51.0075(a) of the Texas Property Code, [Substitute] Trustee reserves the right to set further reasonable conditions for conducting the Foreclosure Sale. Any such further conditions shall be announced before bidding is opened for the first sale of the day held by [Substitute] Trustee.

As required by Tex. Prop. Code § 51.002(i), include language substantially similar to the following that is conspicuously printed in bold-faced or underlined type.

Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.

Include the following if appointing a substitute trustee in this notice.

THIS INSTRUMENT APPOINTS THE SUBSTITUTE TRUSTEE(S) IDENTIFIED TO SELL THE PROPERTY DESCRIBED IN THE SECURITY INSTRUMENT IDENTIFIED IN THIS NOTICE OF SALE. THE PERSON SIGNING THIS NOTICE IS THE ATTORNEY OR AUTHORIZED AGENT OF THE MORTGAGEE OR MORTGAGE SERVICER.

____
[**Name**]
[Attorney/Authorized agent] for
[mortgagee/mortgage servicer]

Add signature for (substitute) trustee and acknowledgment, if desired. Attach exhibits.

Chapter 13
Bid Evaluation

Forms

that a purchaser taking "subject to" a prior note and lien could recover damages against the defaulting prior note maker. In *Newsom v. Starkey*, 541 S.W.2d 468 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.), a wraparound note maker recovered against the wraparound noteholder for failing to pay the underlying note payments as was provided for in the wraparound deed of trust.

§ 13.6:3 How Much Can Mortgagee Bid?

The Texas Supreme Court in *Summers v. Consolidated Capital Special Trust*, 783 S.W.2d 580, 583 (Tex. 1989), *rev'd*, 737 S.W.2d 327 (Tex. App.—Houston [14th Dist.] 1987), adopted the "outstanding balance" approach to computing the wraparound note balance at foreclosure. Under this method, the unpaid balance of the entire amount of principal of the wraparound note, including the principal of the wrapped debt and accrued interest, is owed at the foreclosure sale. The amount bid for the property at the sale, less any sale expenses, is credited to the outstanding balance of the wraparound note. If the bid exceeds the balance, a surplus results. If the unpaid balance exceeds the bid, a deficiency exists. The court chose this method over the "true debt" approach followed by the court of appeals and many lawyers. The supreme court said that the court of appeals' approach would enable a debtor to obtain a windfall profit, escape any deficiency obligation, and leave the wraparound note payee still liable on the wrapped debt. The court of appeals determined that a foreclosure sale bid by the wraparound mortgagee on a wraparound note resulted in a surplus bid to be paid to the mortgagor rather than a deficiency liability against the mortgagor.

Summers involved the foreclosure of a fifth-lien wraparound deed of trust securing a wraparound note payable to English Village Apartments (the "wrap seller"). The wraparound note had a principal balance of $6,206,952. Four prior liens were included in the wraparound note. The first three lien notes totaled $3,017,581, and the fourth lien had a balance due of $976,685. The equity financed by the wrap seller totaled $2,212,686. The fourth-lien debt had been accelerated and was due at the time of the wraparound foreclosure sale. Out of the foreclosure sale's proceeds, the trustee paid the fourth lien of $976,685 and applied the difference of $1,773,315 to the wraparound equity, leaving a deficit of $439,371.

The positions of the parties are stated below:

Financing

$3,017,581	First through third liens
976,685	Fourth lien
+2,212,686	Fifth-lien wrap-financed "equity"
$6,206,952	Wraparound note

Debtor's Position

$2,750,000	Bid
−2,212,686	Wrap equity
$ 537,314	Surplus

Wrap Seller's Position

$2,750,000	Bid
− 976,685	Fourth lien
$1,773,315	
−2,212,686	Wrap equity
($ 439,371)	Deficit

The trial court granted summary judgment in favor of the wrap seller on the wraparound deed of trust and denied the debtor's motion for summary judgment. The court of appeals reversed and rendered judgment in favor of the debtor. The court of appeals stated that the law is well established that "foreclosure of a junior lien normally has no effect on the rights of senior interest holders, even if the interests are in default." *Consolidated Capital Special Trust v. Summers*, 737 S.W.2d at 331 (citing *United States v. Sage*, 566 F.2d 1114 (9th Cir. 1977)). Absent language to the contrary in the instrument foreclosed, pre-existing interests remain unaffected. The court held that the wraparound deed of trust did not authorize the trustee to apply the foreclosure sale proceeds to the underlying debt, even though it was past due. Apparently, the court did not consider the underlying debt portion of the wraparound note to be debt secured by the wrap-around deed of trust.

The Texas Supreme Court reversed the court of appeals, stating the following:

> In adopting the "true debt" approach, the court of appeals confused the purchaser's personal liability on the seller's prior notes with the purchaser's obligation to pay for the property pursuant to the express terms of its own agreement. It is true that [the debtor] did not agree to assume liability for the balance of the underlying four prior mortgages. That is, they did not become guarantors of that debt, additional makers on those notes, or undertake any other obligation which would render them legally liable to the holders of those earlier obligations. . . . But this reservation in no way affects [the debtor's] obligation to [the wrap seller] for the entire amount of the fifth note.

Summers, 783 S.W.2d at 582. The supreme court also created an implied covenant "requiring the trustee to apply the proceeds first to the satisfaction of pre-existing debt before making any distribution to the mortgagor" unless there was an express agreement otherwise. *Summers*, 783 S.W.2d at 583.

If the wraparound mortgagee is considering or is forced to bid more than its "true principal," in light of the holding in *Summers*, it will have to be prepared to pay cash to the underlying lien-holder rather than entering a credit bid against the balance owing on the wrap note. This raises an interesting but unresolved issue as to what happens if the underlying note does not permit prepayment.

The *Summers* opinion was followed by *Beach v. RTC*, 821 S.W.2d 241, 243 (Tex. App.—Houston [1st Dist.] 1991, no writ), in which the court rejected the borrower's argument that because the foreclosing mortgagee applied no part of the bid proceeds on the wraparound foreclosure to payment of the underlying note, the "true debt" approach should have been used rather than the "outstanding balance" method. See Janet L. Hunter, Note, *Texas Adopts the "Outstanding Balance" Method of Calculating the Deficiency or Surplus After Foreclosure of a Wraparound Deed of Trust:* Summers v. Consolidated Capital Special Trust, *783 S.W.2d 580 (Tex. 1989)*, 21 Tex. Tech. L. Rev. 873 (1990).

§ 13.6:4 Does Bid at Foreclosure of Underlying Debt Affect Amount Owed on Wraparound Secured Debt?

In *Lee v. O'Leary*, the court of appeals held that the bid price at the foreclosure of an underlying and wrapped lien was immaterial in determining the balance owed on the wraparound secured debt. *Lee v. O'Leary*, 742 S.W.2d 28 (Tex. App.—Amarillo 1987), *rev'd sub nom. Lee v. Key West Towers, Inc.*, 783 S.W.2d 586 (Tex. 1989). The case involved an apartment project that had been sold and successively resold with each subsequent seller taking back a wrap-around note. Key West executed a wraparound note for $1,125,000 payable to the Lees (the Lee note). The Lee note wrapped and included the balance owed by the Lees to the O'Learys on a $1,150,000 note (the O'Leary note). Key West sure sale deed for recording with the county clerk will need to be made with the trustee. See sections 14.10:3 and 14.10:5 regarding warranties of title acquired at foreclosure, form 4-7 for a letter requesting a title search, and form 4-10 for a letter requesting a search of UCC records.

Recent Construction Activities: If there has been recent construction activity at the mortgaged property, there is a risk that an unpaid original contractor may be able to assert a superior right to remove "readily removable" fixtures from the mortgaged property. In calculating their foreclosure sale bids, bidders will need to take into account the loss in market value of the mortgaged property if there are subordinate mechanic's liens that have preferential rights to remove readily removable fixtures. *See GCI GP, LLC v. Stewart Title Guaranty Co.*, 290 S.W.3d 287 (Tex. App.—Houston [1st Dist.] 2009, no pet.). See sections 4.8 and 4.9 for a discussion of mechanic's liens.

Tenants and Parties in Possession: The mortgaged property may be occupied at the time of the foreclosure sale by tenants under written or oral leases. However, a bidder may not have access to the leases. If possible, leases should be reviewed and tenants should be interviewed to determine whether any tenants have rights that survive the foreclosure sale. Creditors of tenants may have security interests in removable, tenant-installed fixtures that have priority under Texas Business and Commerce Code section 9.334(d)–(g) over the mortgagee's lien. See sections 15.9:1 and 15.9:4 for a discussion of tenants and their rights in the premises following foreclosure; sections 10.2:6, 15.9, and 15.9:2 concerning eviction; and section 10.9 concerning trespass to try title.

§ 13.10:3 Bidding

See form 13-2 in this manual for a bid calculation worksheet.

Property Taxes: In determining its maximum bid, a bidder will need to factor in as a reduction to market value the amount of delinquent property taxes, including interest and penalties, as well as property taxes accrued on the mortgaged property for the current year. See chapter 24 regarding ad valorem tax liens, form 4-8 for a preforeclosure checklist, and form 4-9 for a letter to the taxing jurisdiction.

Prior Liens: If the lien being foreclosed is subordinate to other deed-of-trust liens, then the status of these other liens should be investigated and determined prior to bidding at the foreclosure sale. The bidder will need to determine how much equity it believes exists above the balance owing on all prior liens. It will need to determine whether it may continue making payments on the prior lien loans or will be placed in the position of being forced to pay off one or more of these liens. See sections 3.4:3 and 4.11 for a discussion of junior liens.

Attendance: The nonmortgagee bidder should contact the trustee and determine the time of sale and who will be conducting the sale. In situations where a number of foreclosure sales will be conducted by many trustees at the same location and time, the nonmortgagee bidder should make arrangements to meet the trustee in advance of the sale. Also, the nonmortgagee bidder should confirm with the trustee as to whether a substitute trustee will be appointed to conduct the sale. See form 14-2 announcing reasonable terms for a foreclosure sale.

Method of Bid Payment: Many sales are now being conducted with a trustee-imposed requirement that the successful bidder produce a cashier's check or a series of cashier's checks totaling the bid price. A nonmortgagee bidder will need to confirm with the trustee the allowable time and means of payment that will be imposed. If the sale is being conducted on a banking holiday, understanding the bid payment process in advance of the sale is critical. See section 14.4:3 regarding the terms of the foreclosure sale.

§ 13.10:4 Operations

Utilities and Telephone Numbers: Establishment of service as of foreclosure sale and continuation of telephone numbers for site management should be arranged by the bidder with the utilities prior to the foreclosure sale. See section 15.8 for a discussion of utility service.

Access and Security: In advance of its bid, both the mortgagee and nonmortgagee bidder will need to plan the steps it will take on becoming the owner of the mortgaged property to gain immediate access to the mortgaged property and to institute new means of securing the property, such as guard/security services, fire alarm services, change of locks, reissuance of keys, and change of alarm codes. If personal property is located in the mortgaged property, ownership and third-party lien claims will need to be investigated and responsibility for removal, security, or storage of personal property determined.

Tenants and Tenants' Deposits: If tenants of the former owner are in occupancy of the mortgaged property after the foreclosure sale, the bidder will need to advise each of these persons as to whether their leases have been terminated by the foreclosure or whether continued occupancy will be permitted and on what terms. (See sections 15.9:1 and 15.9:4 concerning the rights of certain residential tenants to remain on the property following foreclosure.) As to terminated tenancies that will not be permitted to continue under new leases, instructions as to removal of such tenants' personal property, removal or nonremoval of fixtures, and return of the premises to good condition will need to be issued. See also sections 15.9, 15.9:1, and 15.9:4 for a discussion of tenants; section 4.15 regarding security deposits; sections 10.9 and 15.9 for a discussion of eviction and trespass to try title; form 15-5 for a letter to a tenant accepting lease; and form 15-6 for a letter to a tenant at sufferance.

Insurance: Both the mortgagee and nonmortgagee bidder will need to have its insurance program in place to take effect immediately upon its acquisition of title to the mortgaged property. If the property is vacant or unoccupied, then this condition will be a factor in arranging proper insurance coverage. If the premises are occupied by tenants, insurance obligations by tenants to the new owner and by the new owner to the tenants will need to be established, effective as of acquisition of title at the foreclosure sale.

Management: As with security, a clear understanding as to how the property will be managed, commencing at the moment of acquisition of title at the foreclosure sale, is important.

§ 13.11 Foreclosure Sale of Property Subject to Oil or Gas Lease

The Eighty-fourth Texas Legislature adopted House Bill 2207, which addresses the effect of a foreclosure of a deed-of-trust lien on an oil or gas lease executed and recorded before a foreclosure sale. *See* Acts 2015, 84th Leg., R.S., ch. 461, § 1 (H.B. 2207), eff. Jan. 1, 2016 (adding Tex. Prop. Code ch. 66). Section 66.001(b) provides that, notwithstanding any other law, an oil or gas lease covering real property subject to a security instrument that has been foreclosed remains in effect after the foreclosure sale if the oil or gas lease has not terminated or expired on its own terms and was executed and recorded in the real property records of the county before the foreclosure sale. Section 66.001(b) further provides that an interest of the mortgagor or the mortgagor's assigns in the oil or gas lease, including a right to receive royalties or other payments that become due and payable after the date of the foreclosure, passes to the purchaser of the foreclosed property to the extent that the security instrument under which the real property was foreclosed had priority over the interest in the oil or gas lease of the mortgagor or the mortgagor's assigns. Tex. Prop. Code § 66.001(b).

Section 66.001(c) provides that, notwithstanding subsection (b), if real property that includes the mineral interest in hydrocarbons together with the surface overlying such mineral interest is subject to both an oil or gas lease and security instrument and the security interest is foreclosed, the foreclosure sale terminates and extinguishes any right granted under the oil or gas lease for the lessee to use the surface of the real property to the extent that the security instrument under which the real property was foreclosed had priority over the rights of the lessee under the oil or gas lease. Tex. Prop. Code § 66.001(c).

Section 66.001(d) provides that an agreement, including a subordination agreement, between a lessee of an oil or gas lease and a mortgagee of real property or the lessee of an oil or gas lease and the purchaser of foreclosed real property controls over any conflicting provision of this section. Section 66.001(d) further prohibits an agreement between a mortgagor and mortgagee from modifying the application of this section unless the affected lessee agrees to the modification. Tex. Prop. Code § 66.001(d).

Section 66.001(e) provides that this section does not apply to a security instrument that does not attach to a mineral interest in hydrocarbons in the mortgaged real property. Tex. Prop. Code § 66.001(e).

Additional Resources

Baggett, W. Mike. "Foreclosure Update Including Foreclosing Home Equity Loans." In *Advanced Real Estate Law Course, 2003.* Austin: State Bar of Texas, 2003.

———. "Sign of the Times: Foreclosures and Workouts." In *Residential Real Estate Construction Law, 2008.* Austin: State Bar of Texas, 2008.

Hunter, Janet L. "Texas Adopts the 'Outstanding Balance' Method of Calculating the Deficiency or Surplus After Foreclosure of a Wraparound Deed of Trust: *Summers v. Consolidated Capital Special Trust*, 783 S.W.2d 580 (Tex. 1989)." Note, *Texas Tech Law Review* 21, no. 2 (1990): 873–96.

Locke, Jr., William H. and Charles E. Cominsky. "11 Things You Wish You Had Known About Commercial Project Insurance." In *Advanced Real Estate Law Course, 2013.* Austin: State Bar of Texas, 2013.

Locke, Jr., William H. and Marilyn C. Maloney. "Insurance Issues in Distressful Times." In *Advanced Real Estate Drafting Course, 2011.* Austin: State Bar of Texas, 2011.

———. "Top Ten Insurance Tips for Mortgage Lending." In *Mortgage Lending Institute, 2011.* Austin: University of Texas School of Law, 2011.

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Weiner, David J. "Mineral Rights, Surface Damage and Title Insurance: What Is (And Isn't) Covered in a Title Policy?" In *Advanced Real Estate Law Course, 2013.* Austin: State Bar of Texas, 2013.

"Wrap-Around Financing: A Technique for Skirting the Usury Laws?" Note, *Duke Law Journal* (1972): 785–811.

TEXAS FORECLOSURE MANUAL

Third Edition

Volume 2

William H. Locke, Jr.
Ralph Martin Novak, Jr.
G. Tommy Bastian

Austin 2014

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International Standard Book Number: 978-1-938873-06-5
International Standard Book Number: 978-1-938873-34-8 (2015 Supplement)
Library of Congress Control Number: 2014935946

Printed in the United States of America

Third Edition, 2014

Chapter 14
Conducting the Sale

Forms

Chapter 14

Conducting the Sale

§ 14.1 Presale Considerations

The Eighty-fourth Texas Legislature adopted House Bill 2066, authorizing rescission of a nonjudicial foreclosure sale under certain conditions and procedures. *See* Acts 2015, 84th Leg., R.S., ch. 551, § 1 (H.B. 2066), eff. Sept. 1, 2015 (adding Tex. Prop. Code § 51.016). This provision applies to only residential foreclosures. Tex. Prop. Code § 51.016(a). Time is of the essence in completing a rescission because it must be accomplished within fifteen days after the sale. *See* Tex. Prop. Code § 51.016(b). However, the parties may agree to other means of rescinding a foreclosure sale. *See* Tex. Prop. Code § 51.016(m).

Six conditions must be met before rescinding a sale. *See* Tex. Prop. Code § 51.016(b). The procedures for giving notice of rescission are precise, and section 51.016(c) must be carefully followed to ensure the rescission process is conducted properly. *See* Tex. Prop. Code § 51.016(c).

If a third-party purchaser acquired the property at the foreclosure sale, the mortgagee must return the bid amount to the purchaser within five days of rescission, and if any excess proceeds were distributed to the obligor of the debt, the obligor must return the excess proceeds to the trustee. *See* Tex. Prop. Code § 51.016(d). The statute does not, however, stipulate a period within which the obligor must return excess proceeds to the trustee.

Once the notice procedures for rescission are accomplished under section 51.016(c) and the bid amount returned, the mortgagee, trustee, or substitute trustee must file an affidavit in the real property records, which serves as prima facie evidence that the purchase price has been returned. *See* Tex. Prop. Code § 51.016(f), (g).

The original loan agreement between the obligor of the note and the mortgagee is restored if a rescission has been completed, and a court is prohibited from awarding specific performance to a third-party purchaser. *See* Tex. Prop. Code § 51.016(h), (k).

Immediately before conducting the sale, the trustee must verify that the loan has not been brought current, late payments have not been accepted, reinstatement has not been granted, and forbearance promises have not been made by the lender and that all or a part of the mortgaged property has not been released from the lien of the deed of trust. In several instances mortgaged property has been sold at foreclosure and bought by a good-faith purchaser for value after the lender orally reinstated the loan or promised not to foreclose. *See Diversified, Inc. v. Gibraltar Savings Ass'n*, 762 S.W.2d 620, 623 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (holding that purchaser at void foreclosure sale may have cause of action against mortgagee under Texas Deceptive Trade Practices–Consumer Protection Act (DTPA)); *Diversified, Inc. v. Walker*, 702 S.W.2d 717, 723 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). The portions of the *Diversified* cases that involved causes of action brought under the DTPA are no longer applicable because of Texas Property Code section 51.009, which provides that a foreclosure sale purchaser is not a consumer and the purchaser acquires the property "as is" at the purchaser's own risk and without any express or implied warranties. *See* Tex. Prop. Code § 51.009.

§ 14.2 Place and Time of Sale

Section 51.002 of the Texas Property Code sets forth certain minimum requirements for the sale. See section 12.4 in this manual for a discussion of those requirements that must be set out in the notice. Under Texas law, a sale not held on the first Tuesday of the month is void. *McLaren v. Jones*, 33 S.W. 849, 850 (Tex. 1896); *Durkay v. Madco Oil Co.*, 862 S.W.2d 14, 17 (Tex. App.—Corpus Christi 1993, writ denied). However, federal law purports to override state law on this point if the loan comes into the possession of federal agencies under the Multifamily Mortgage Foreclosure Act. *See* 12 U.S.C. §§ 3701–3717. See section 12.4:4 for further discussion of this federal preemption.

§ 14.2:1 Place of Sale

Section 51.002(a) of the Texas Property Code directs the commissioners court of each county to designate the area at the county courthouse or a public place within reasonable proximity to the county courthouse where foreclosure sales will be held and to record the designation in the real property records of the county. Tex. Prop. Code § 51.002(a). However, should the commissioners court change the designated foreclosure sale location, a notice describing the new location must be recorded in the real property records for ninety days before the new location becomes effective. Tex. Prop. Code § 51.002(h). See section 12.4:4 and Appendix B in this manual for a list of designated places for foreclosure sales in Texas counties. Unfortunately, some designations are not drafted with as much clarity as trustees might like. The trustee should check before the sale for local interpretations of and last-minute changes in designations.

§ 14.2:2 Time of Sale

The auction must be held between the hours of 10:00 A.M and 4:00 P.M. Tex. Prop. Code § 51.002(a). These hours of sale refer to whatever time—central standard or daylight saving—is in effect. *McFarlane v. Whitney*, 134 S.W.2d 1047, 1051–52 (Tex. 1940). Section 51.002(b) requires that the notice of sale must include a statement of the earliest time at which the sale will occur. Tex. Prop. Code § 51.002(b). Additionally, the sale must begin no later than three hours after the earliest time. Tex. Prop. Code § 51.002(c); *see Bering v. Republic Bank*, 581 S.W.2d 806, 808 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (holding that trustee has no obligation to delay sale until 3:00 P.M. to afford mortgagor time to tender secured debt). However, the mortgagor must be afforded the full time promised by the mortgagee to reinstate the loan. *See Tarter v. Metropolitan Savings & Loan Ass'n*, 744 S.W.2d 926, 928 (Tex. 1988) (mortgagor awarded damages under Texas Deceptive Trade Practices–Consumer Protection Act for mortgagee's failure to honor its commitment not to foreclose if mortgagor was able to reinstate before sale; mortgagee sold secured debt and lien to second lienholder before sale, and second lienholder foreclosed).

§ 14.3 Person Conducting Sale

A sale by a person other than the designated trustee or the properly appointed substitute trustee is void. *Sullivan v. Hardin*, 102 S.W.2d 1110, 1113 (Tex. Civ. App.—Amarillo 1937, no writ). The sale will not be invalid solely because the trustee is also the holder of the secured indebtedness or because the trustee has some direct or indirect interest in the outcome of the sale. *See Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 476 (Tex. 1965); *Valley International Properties v. Ray*, 586 S.W.2d 898, 902 (Tex. Civ. App.—Corpus Christi 1979, no writ). A trustee, however, may not purchase the property for his own personal benefit absent express authorization in the deed of trust. For example, the trustee may not purchase the property through his spouse or a corporation controlled or dominated by the trustee. *See Southern Trust & Mortgage Co. v. Daniel*, 184 S.W.2d

465, 466–67 (Tex. 1944); *Casa Monte Co. v. Ward*, 342 S.W.2d 812, 813 (Tex. Civ. App.—Austin 1961, no writ).

§ 14.4 Manner of Sale

Texas Property Code section 51.002 refers to the sale as a "public sale at auction." *See* Tex. Prop. Code § 51.002(a). The predecessor statute referred to the sale as being at "public venue."

The fundamental rule concerning the manner of sale is that the mortgagee must not take affirmative steps to adversely affect the sales price at foreclosure. *Pentad Joint Venture v. First National Bank of La Grange*, 797 S.W.2d 92, 96 (Tex. App.—Austin 1990, writ denied). Conversely, the mortgagee is under no duty to take affirmative action beyond that required by statute or deed of trust to ensure a "fair" sale. *Pentad*, 797 S.W.2d at 96. Unlike a personal property foreclosure under the Uniform Commercial Code, a real property foreclosure under a deed of trust need not be "commercially reasonable," and the failure to conduct a commercially reasonable foreclosure sale of real property is not actionable. *Huddleston v. Texas Commerce Bank–Dallas*, 756 S.W.2d 343, 346 (Tex. App.—Dallas 1988, writ denied). "[A] mortgagee owes but one duty to the mortgagor, to conduct the sale *properly*." *RTC v. Westridge Court Joint Venture*, 815 S.W.2d 327, 332 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

The same principle is applicable to the trustee. The trustee does not owe a fiduciary duty or a duty of good faith and fair dealing to the borrower. Tex. Prop. Code § 51.0074(b)(2); *see also FDIC v. Myers*, 955 F.2d 348, 350 (5th Cir. 1992) (citing *University Savings Ass'n v. Springwoods Shopping Center*, 644 S.W.2d 705 (Tex. 1923); *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983); and *FDIC v. Coleman*, 795 S.W.2d 706 (Tex. 1990)). Accordingly, the lack of effort by the trustee to obtain fair market value is not grounds for relief in an action for a deficiency judgment, and the trustee is obligated only to comply with the terms of the deed of trust. *Myers*, 955 F.2d at 350.

§ 14.4:1 Language at Sale

Texas Property Code section 51.002 does not detail what the trustee must say at the auction. However, a trustee may set reasonable conditions for conducting the public sale if the conditions are announced before bidding is opened for the first sale of the day conducted by the trustee or substitute trustee. Tex. Prop. Code § 51.0075(a). It is recommended that a trustee prepare and read a script before the first sale the trustee conducts that day that describes how typical foreclosure-related issues will be handled, for example, bankruptcy, receivership, reinstatement, and excess proceeds. To avoid complaints that the trustee is chilling the bidding, the trustee should speak loudly enough to be heard at a reasonable distance. Usually the trustee reads a copy of the public notice and opens the auction for bids. See form 14-1 in this manual for a form employing a local agent to act as a bidder, form 14-2 for a foreclosure sale transcript for the trustee to use in conducting the sale, form 14-3 for an attendance registration form, and form 13-2 for a bid calculation worksheet. A transcript is useful to ensure that proper procedures are followed in case there are multiple bidders or the sale is questioned at a later date. Some trustees have court reporters record the proceeding or have it tape-recorded or videotaped. Preserving the precise language and manner of the sale may have adverse consequences, however, if the foreclosure is contested and the record reveals irregularities.

§ 14.4:2 Open-Beach Disclosures

The Open Beach Act provides that purchasers of property located seaward of the Gulf Intracoastal Waterway must be given and acknowledge receipt of a statutorily prescribed notice. Tex. Nat. Res. Code § 61.025. The Texas attorney general has opined that this notice requirement is applicable to foreclosure sales. Tex. Att'y Gen. Op. No. JM-834 (1987). See the discussion at section 12.4:10 in this manual.

§ 14.4:3 Terms of Sale

To Highest Bidder for Cash: Although section 51.002 of the Texas Property Code does not provide that the sale be for cash, most deeds of trust require that the sale be to the "highest bidder for cash." This contractual requirement has been upheld. *See Kirkman v. Amarillo Savings Ass'n*, 483 S.W.2d 302, 308–09 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.). Pursuant to Code section 51.0075(f), the purchase price for a foreclosure sale 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 trustee." Tex. Prop. Code § 51.0075(f). It should be noted that the statute that concerns time of payment for a foreclosure sale bid was amended in 2007 and 2009 and now controls over older cases on the issue.

A prospective bidder must be prepared to tender cash at the sale if cash is required by the deed of trust and the trustee. The trustee is not required to accept a credit bid but may extend credit to selected buyers. *Valley International Properties v. Ray*, 586 S.W.2d 898, 901 (Tex. Civ. App.—Corpus Christi 1979, no writ); *French v. May*, 484 S.W.2d 420, 425 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.). Absent a contractual requirement for cash, cashier's checks are acceptable. *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 572, 574 (Tex. 1973); *Humble National Bank v. DCV, Inc.*, 933 S.W.2d 224, 237–38 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

Reasonable Conditions: A trustee or substitute trustee may 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. *See* Tex. Prop. Code § 51.0075(a). An example of conditions contractually accepted by the mortgagor is the following:

> At any time during the bidding, the Trustee may require a bidding party (A) to disclose its full name, state and city of residence, occupation, and specific business office location, and the name and address of the principal the bidding party is representing (if applicable), and (B) to demonstrate reasonable evidence of the bidding party's financial ability (or, if applicable, the financial ability of the principal of such bidding party), as a condition to the bidding party submitting bids at the foreclosure sale. If any such bidding party (the "Questioned Bidder") declines to comply with the Trustee's requirement in this regard, or if such Questioned Bidder does respond but the Trustee, in Trustee's sole and absolute discretion, deems the information or the evidence of the financial ability of the Questioned Bidder (or, if applicable, the principal of such bidding party) to be inadequate, then the Trustee may continue the bidding with reservation; and in such event (1) the Trustee shall be authorized to caution the Questioned Bidder concerning the legal obligations to be incurred in submitting bids, and (2) if the Questioned Bidder is not the highest bidder at the sale, or if having been the highest bidder the Questioned Bidder fails to deliver the cash purchase price payment promptly to the Trustee, all bids by the Questioned Bidder shall be null and void. The Trustee may, in Trustee's sole and absolute discretion, determine that a credit bid may be in the best interest of Grantor and Beneficiary,

> and elect to sell the Mortgaged Property for credit or for a combination of cash and credit; provided, however, that the Trustee shall have no obligation to accept any bid except an all cash bid. In the event the Trustee requires a cash bid and cash is not delivered within a reasonable time after conclusion of the bidding process, as specified by the Trustee, but in no event later than 3:45 P.M. local time on the day of sale, then said contingent sale shall be null and void, the bidding process may be recommenced, and any subsequent bids or sale shall be made as if no prior bids were made or accepted.

John M. Nolan & Edward A. Peterson, Texas Annotated Deed of Trust 82–83, *attachment* to *"Annotated" Document Series* 111–262, *in* Advanced Real Estate Law Course, State Bar of Texas, Austin (2007). Note that these conditions permit a bidder to deliver payment within a reasonable time after its bid, but in no event later than 3:45 P.M. An issue may exist about whether the mortgagor and mortgagee may agree to this condition because, as noted below, Texas Property Code section 51.0075(f) was amended in 2007 to provide that the purchase price is payable immediately on acceptance of the bid, and then again in 2009 to provide that the purchase price "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." Tex. Prop. Code § 51.0075(f).

Time to Produce Cash: In 2007, the legislature passed Tex. Prop. Code § 51.0075(f), which provides that the purchase price is *payable immediately* on acceptance of the bid by the trustee or substitute trustee. In 2009, section 51.0075(f) was again amended to state that the purchase price was payable "without delay on acceptance of the bid or within such reasonable time as may be agreed upon by the purchaser and trustee." Under the 2007 version of the statute, "immediately" meant "without interval of time, without delay, straightway, or without any delay or lapse of time." *BACM 2001-1 San Felipe Road Ltd. Partnership v. Trafalgar Holdings I, Ltd.*, 218 S.W.3d 137, 146 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (quoting *Black's Law Dictionary* 750 (6th ed. 1990)). This addition to the foreclosure statute raises the issue of whether the sale may be adjourned to permit the bidder a reasonable time to deliver the successful bid amount. The public policy against chilling bidding and for maximizing the foreclosure bid price, the practical challenge of carrying a large amount of cash or even cash in the exact amount of the winning bid, and the public policy reflected in section 51.0075(a) support construing "acceptance of the bid" in section 51.0075(f) as permitting the trustee to follow the process set out in the Texas Annotated Deed of Trust of adjourning the sale to allow a reasonable time to produce cash. In *Kirkman*, the trustee's sale was recessed from 11:15 A.M. to 2:00 P.M. to permit the bidder to produce cash for his bid. The court upheld the validity of a sale to the second-highest bidder (which happened to be the creditor), because the highest bidder failed to produce his cash bid within the reasonable time set by the trustee. *Kirkman*, 483 S.W.2d at 308. At the time the original sale was recessed, the creditor and the high bidder were the only two bidders present. In *First Texas Service Corp. v. McDonald*, 762 S.W.2d 935 (Tex. App.—Fort Worth 1988, writ denied), *overruled on other grounds*, *Kitchen v. Frusher*, 181 S.W.3d 467 (Tex. App.—Fort Worth 2005, no pet.), the court upheld the jury's findings that the trustee failed to wait a reasonable time for the highest bidder to produce cash and that the bidder did produce cash within a reasonable time. In that case, the trustee told the bidder that he would remain at the courthouse to accept the bid for "approximately forty-five minutes." The court held that such an agreement was not governed by the statute of frauds. *McDonald*, 762 S.W.2d at 941; *see also* Tex. Bus. & Com. Code § 26.01.

The court approved the following definition of "reasonable time":

> "Reasonable time" means such time that a person of reasonable prudence and diligence would have needed under all the circumstances to perform the act contemplated; you are further instructed that the foreclosure sale had to be concluded sometime between 10:00 A.M. and 4:00 P.M. on the date in question.

McDonald, 762 S.W.2d at 939 (quoting trial court's definition).

At an execution sale of property by the sheriff, Tex. R. Civ. P. 653 provides: "When the terms of the sale shall not be complied with by the bidder the levying officer shall proceed to sell the same property again on the same day, if there be sufficient time; but if not, he shall readvertise and sell the same as in the first instance."

In execution sales, a successful bidder who fails to comply with the terms of the sale is liable for a penalty of 20 percent of the value of the property plus costs and all loss sustained if the second sale brings less. Tex. R. Civ. P. 652.

Postponements: The sale may be postponed for numerous reasons, usually by reposting the mortgaged property by the deadline for the next available sale. See form 14-4 in this manual for a notice of reposted foreclosure sale. Repeated postponements should be avoided. If a sale is repeatedly posted and rescheduled, the borrower or mortgagor may be lulled into believing the sale will not be held. A consumer could argue that repeated postings indicate the mortgagee is using the posting process to harass the consumer into paying the debt. The trustee's failure to announce the postponement might be seen as evidence of chilling the bidding, particularly if a potential bidder had come to the sale or the sale had been postponed repeatedly. In *Charter National Bank—Houston v. Stevens*, 781 S.W.2d 368 (Tex. App.—Houston [14th Dist.] 1989, writ denied), a bank officer's behavior was found to have chilled the bidding. The property had been posted for sale and the sale canceled three times. When the property was posted a fourth time, a potential bidder contacted the bank. The bank officer promised to call the potential bidder if the sale was to be held. The bank officer did not call, the sale was held, and the potential bidder did not attend. The mortgagor recovered the difference between the amount of the unpaid indebtedness and the fair market value of the property. The court held that the mortgagor need not prove that irregularities resulted in a grossly inadequate price because the facts showed bid chilling rather than technical irregularities and the suit was for damages rather than rescission. *Stevens*, 781 S.W.2d at 374–75.

The safest practice is for the trustee to appear at the appointed time and announce the postponement of the sale, inquire whether anyone is present who desires to bid on the mortgaged property, take the names of everyone who is interested in bidding, write "postponed until further notice" on the posted and filed notices, and then again follow the noticing procedure. See form 14-5 for a notice of postponement of foreclosure sale.

§ 14.4:4 Recessing Sale

All bidders at the sale must be given notice of the time at which the sale will reconvene if the highest bidder does not produce cash within the time permitted by the trustee. *Mitchell v. Texas Commerce Bank-Irving*, 680 S.W.2d 681, 683 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.). If the highest bidder does not produce the cash, the failure of the trustee to have notified all bidders of the time of the reconvened sale necessitates reposting the mortgaged property for a sale in a later month. *Intertex, Inc. v. Cowden*, 728 S.W.2d 813, 817–18 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Clearman v. Gra-*

ham, 4 S.W.2d 581, 582–83 (Tex. Civ. App.—Austin 1928, writ dism'd). See form 14-6 in this manual for a notice of recess of foreclosure sale to be posted on the notice board and filed with the county clerk.

§ 14.5 Mortgagee as Bidder

The mortgagee may bid at the sale and apply the amount of the bid as a credit to the secured debt owed the mortgagee without producing cash at the sale. *See Thomason v. Pacific Mutual Life Insurance Co. of California*, 74 S.W.2d 162, 164 (Tex. Civ. App.—El Paso 1934, writ ref'd). The mortgagee may bid even if the mortgagee is the trustee conducting the sale, as long as no fraud or unfairness is involved. *Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 476 (Tex. 1965). The mortgagee may also bid through an agent. *Valley International Properties v. Ray*, 586 S.W.2d 898, 902 (Tex. Civ. App.—Corpus Christi 1979, no writ).

§ 14.6 Chilling Bidding

The mortgagee and the trustee are obligated not to discourage bidding by acts or statements made before or during the sale. However, the mortgagee's failure to disclose to the mortgagor that the mortgagee intends to bid less than the fair market value of the collateral at the foreclosure sale is not a defect or irregularity that would invalidate a sale. *Pentad Joint Venture v. First National Bank of La Grange*, 797 S.W.2d 92, 96–97 (Tex. App.—Austin 1990, writ denied); *see also Biddle v. National Old Line Insurance Co.*, 513 S.W.2d 135, 138 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.); *Beaman v. Bell*, 352 S.W.2d 923, 924 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.) (holding that sale "was not void but voidable at most").

The type of conduct a court will hold to be chilling is not predictable. Conflicting communications with the mortgagor about whether or at what time a scheduled foreclosure sale will be held can be the basis for chilling the bidding by encouraging the mortgagor not to attend. *See Gainesville Oil & Gas Co. v. Farm Credit Bank of Texas*, 847 S.W.2d 655, 660–61 (Tex. App.—Texarkana 1993, no writ). However, the mortgagee is under no duty to take affirmative action beyond that required by statute or deed of trust to ensure a "fair" sale. *Pentad*, 797 S.W.2d at 96. The foreclosure of real property under a deed of trust does not have to be a "commercially reasonable" sale, and failure to conduct a commercially reasonable foreclosure is not actionable. *Pentad*, 797 S.W.2d at 97; *see also Huddleston v. Texas Commerce Bank–Dallas*, 756 S.W.2d 343, 347 (Tex. App.—Dallas 1988, writ denied). An endorser's discussion with the mortgagee to repurchase the property before the foreclosure sale was held not to have chilled bids in *Teas v. Republic National Bank*, 460 S.W.2d 233, 243 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.). A bank officer's failure to call a potential bidder as promised was found to have chilled the bid in *Charter National Bank—Houston v. Stevens*, 781 S.W.2d 368 (Tex. App.—Houston [14th Dist.] 1989, writ denied). The court also held that the mortgagor did not need to prove that the sale resulted in a grossly inadequate price, because the issue was bid chilling, not technical irregularities, and the suit was for damages rather than rescission. *Stevens*, 781 S.W.2d at 374–75. In *Flato Bros. v. Builders Loan Co.*, 457 S.W.2d 154 (Tex. Civ. App.—Dallas 1970, no writ), the court held that a mortgagee's bid resulting in a deficiency, contrary to the mortgagee's promise to enter a full credit bid, was not grounds to set the sale aside as there was no fraudulent intent by the mortgagee. *Flato Bros.*, 457 S.W.2d at 157. One court has interpreted a sale during the noon hour as possible evidence of a fraudulent conspiracy to chill bidding and set aside the sale. *See Reisenberg v. Hankins*, 258 S.W. 904, 909 (Tex. Civ. App.—Amarillo 1924, writ dism'd w.o.j.). The following actions were held not to constitute "chilling the bidding" in *First State Bank v. Keilman*, 851 S.W.2d 914 (Tex. App.—Austin 1993, writ denied): "advertising" the time, place, and terms of sale only by following the posting requirements of Texas Property Code section 51.002 without further placing ads in the local newspaper; the trustee's refusal to wait for an unspecified period of time to allow the mortgagor to go to the newspaper to see if the sale was advertised; and including in the posted notice UCC-type disclaimers as to merchantability, fitness for purpose, and quality even though these disclaimers were not contained in the deed of trust. *Keilman*, 851 S.W.2d at 922–24.

In *Myrad Properties, Inc. v. LaSalle Bank N.A.*, 252 S.W.3d 605 (Tex. App.—Austin 2008, reversed and rendered) (also discussed in section 14.11:3 in this manual), the notice of substitute trustee's sale omitted one of two apartment complexes in its definition of the real property secured by the deed of trust. At the sale, the trustee read aloud the description of only one of the complexes and subsequently executed and recorded a foreclosure sale deed for only one of the complexes. The court noted that the notice of foreclosure sale did not fail to provide any notice that both complexes would be sold but, rather, contained an internal inconsistency regarding what property would be sold. *Myrad*, 252 S.W.3d at 617. The court noted that this type of inconsistency might be a basis under which the mortgagor could prove that bidding had been chilled. *Myrad*, 252 S.W.3d at 617–18. The court noted that such internal inconsistency might confuse or deter prospective bidders but found that the mortgagor did not offer any evidence that the bidding had been chilled. *Myrad*, 252 S.W.3d at 618. The court held that the mere fact that no one showed up at the sale was not evidence that bidding had been chilled. *Myrad*, 252 S.W.3d at 618–19. Myrad had the burden of proving that (1) the price received at the sale was grossly inadequate and (2) such inadequacy was caused by the complained-of irregularity. *Myrad*, 252 S.W.3d at 618. The court cited the following authority in support of this conclusion: *RTC v. Summers & Miller Gleneagles Joint Venture*, 791 F. Supp. 653, 654–55 (N.D. Tex. 1992) (challenge to validity of foreclosure sale wherein notice of foreclosure erroneously transposed legal descriptions of two to-be-foreclosed properties in manner that resulted in "an offer of more land for sale than was actually the case as to one tract, and an offer of less land for sale than was actually the case as to the other tract"); *Diversified Developers, Inc. v. Texas First Mortgage REIT*, 592 S.W.2d 43, 45–46 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (upholding directed verdict against claim to invalidate foreclosure sale on basis that previously released property erroneously included in foreclosure notice; finding no evidence that erroneous property description caused grossly inadequate price or that any prospective bidder was prevented or deterred from bidding at trustee's sale). As a result of the *Myrad* case opinion, the legislature amended Texas Property Code sections 5.028 and 5.030 to tighten the rules for the correction of conveyance instruments. See the discussion of this at section 14.11 below.

§ 14.6:1 Conspiracy against Junior Lienholders

A senior lienholder is not permitted to conspire with the mortgagor against a junior lienholder to prevent the junior lienholder from discovering the time of sale or to conduct the sale at an unusual time to stifle and prevent bidding. *See Chandler v. Orgain*, 302 S.W.2d 953, 956 (Tex. Civ. App.—Fort Worth 1957, no writ).

§ 14.6:2 Mortgagor's Attempts to Secure Refinancing or Sale

The mortgagee is not required to postpone the foreclosure sale if the mortgagor is in negotiations with another lender to refinance the debt. *Sparkman v. McWhirter*, 263 S.W.2d 832, 837 (Tex. Civ. App.—Dallas 1953, writ ref'd). The mortgagee's sending notice of the foreclosure sale to prospects that were negotiating to purchase the property from the mortgagor and advertising the sale in the newspaper—a means not specified in the deed of trust for advertising the sale—did not constitute tortious interference with the contract. *Allied Capital Corp. v. Cravens*, 67 S.W.3d 486, 491–92 (Tex. App.—Corpus Christi 2002, no pet.).

§ 14.7 Sale in Parcels or as Whole

Most deeds of trust contain an express provision directing the trustee to sell "all of the property as an entirety or in such parcels as the Trustee acting may elect." State Bar of Tex., *Legal Form Manual for Real Estate Transactions* 7C (1976). The current *Texas Real Estate Forms Manual*'s form states that the trustee shall "sell and convey all or part of the Property 'AS IS.' " 1 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 22, form 22-1 (2d ed. 2011).

The court in *Bellah v. First National Bank of Hereford*, 474 S.W.2d 785 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.), upheld a sale of the property as an entirety and not in parcels. At the sale the trustee stated that he was ready to sell in parcels if that was desired, but no request was made to conduct the sale in that manner. The court found no evidence of any damage caused by selling as a whole rather than in parcels. *Bellah*, 474 S.W.2d at 788; *see also Hunt v. Jefferson Savings & Loan Ass'n*, 756 S.W.2d 762, 764 (Tex. App.—Dallas 1988, writ denied) (involved five contemporaneous deeds of trust resulting in five separate foreclosure sales).

In another case involving a challenge to a judicially directed execution sale, the Texas Supreme Court found that the sale of the property as a whole, as opposed to in parcels, was wrongful because the fair market value of each of the parcels was in excess of the foreclosed debt. *Stanglin v. Keda Development Corp.*, 713 S.W.2d 94 (Tex. 1986). The court stated: "It is reasonable to infer that any of the tracts, if sold separately or in combination with one other tract, would have satisfied the judgment. This is some evidence that the bulk sale caused or contributed to cause the grossly inadequate consideration." *Stanglin*, 713 S.W.2d at 95.

The Texas Supreme Court addressed the propriety of entering a single bid on a foreclosure sale held as a single sale on a multiple-parcel shopping center in *Provident National Assurance Co. v. Stephens*, 910 S.W.2d 926 (Tex. 1995). See section 17.7:1 in this manual for a detailed discussion of that case.

§ 14.8 Consideration Received at Sale

The issue of whether the bid at the foreclosure sale is adequate arises in a postforeclosure attack on the sale as wrongful, as a fraudulent transfer, or as a defense to a deficiency suit brought by the mortgagee. See chapter 13 in this manual for a general discussion of a bid strategy and evaluation.

§ 14.8:1 Adequate Consideration

The long-standing rule in Texas on real property foreclosure sales is that mere inadequacy of consideration bid at the foreclosure sale is not enough to render a foreclosure sale wrongful if the sale is otherwise legal and proper. *American Savings & Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975); *see also NCNB Texas National Bank v. Johnson*, 11 F.3d 1260, 1267 (5th Cir. 1994); *Savers Federal Savings & Loan Ass'n v. Reetz*, 888 F.2d 1497, 1507–08 n.14 (5th Cir. 1989); *Greater Southwest Office Park, Ltd. v. Texas Commerce Bank N.A.*, 786 S.W.2d 386, 390 (Tex. App.—Houston [1st Dist.] 1990, writ denied). Before the enactment of Texas Property Code section 51.003, if the foreclosure sale was properly conducted and without irregularity, the traditional rule was that the mortgagee was entitled to a deficiency judgment against the borrower in an amount equal to the difference between the net proceeds realized from the winning bid at the foreclosure sale and the amount of the unpaid indebtedness without regard to the fair market value of the mortgaged property. *Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965). But if an irregularity existed in the sale that contributed to a grossly inadequate highest bid and the mortgaged property was sold to a third party, the mortgagor was entitled to have the reasonable market value of the mortgaged property, rather than the foreclosure sale price, credited to the secured debt. *Tarrant Savings Ass'n*, 390 S.W.2d at 475.

Since the enactment of Property Code section 51.003, if real property is sold at a foreclosure sale for less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, an action may be brought to recover the deficiency within two years of the foreclosure sale. Any person against whom recovery is sought may request a determination of the fair market value of the real property as of the date of the foreclosure sale. The deficiency will be the difference between the fair market value and the amount of the unpaid indebtedness. If no party requests a determination of fair market value or if no competent evidence of fair market value is introduced, the sale price at the foreclosure sale will be used to compute the deficiency. *See* Tex. Prop. Code § 51.003(a)–(c). See also section 20.4 in this manual.

§ 14.8:2 Grossly Inadequate Consideration Coupled with Irregularity

Texas courts have sustained attacks on foreclosure sales in which an irregularity in the sale has been found to contribute to a grossly inadequate consideration being bid.

"Grossly inadequate consideration" has been defined as "a consideration so far short of the real value of the property as to shock a correct mind, and thereby raise a presumption that fraud attended the purchase." *Richardson v. Kent*, 47 S.W.2d 420, 425 (Tex. Civ. App.—Dallas 1932, no writ). However, "[g]ross inadequacy of consideration alone is not . . . sufficient to set aside a Trustee's Sale." *Crow v. Davis*, 435 S.W.2d 176, 178 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.). The courts found that an irregularity contributed to grossly inadequate consideration being bid at the sale in the following cases: *Gainesville Oil & Gas Co. v. Farm Credit Bank of Texas*, 847 S.W.2d 655, 661 (Tex. App.—Texarkana 1993, no writ) (misrepresentation by lender's officer that oil and gas lease would not be included in sale); *Jinkins v. Chambers*, 622 S.W.2d 614, 617 (Tex. App.—Tyler 1981, no writ) (mortgagee accepted late payments just before scheduled foreclosure sale, thereby giving false impression that sale would not go forward); *Collum v. DeLoughter*, 535 S.W.2d 390, 392–93 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.) (lot and block number inverted in notice of sale, notice sent by regular mail only, and debtor not allowed to designate order of sale of multiple tracts); *Crow v. Heath*, 516 S.W.2d 225, 228 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.) (failure to give notice of intention to accelerate); *Davis*, 435 S.W.2d at 176 (bid price .007 percent of value, deed of trust had erroneous property description, and mortgagors did not have notice of sale); and *Gandy v. Cameron State Bank*, 2 S.W.2d 971, 973 (Tex. Civ. App.—Austin 1927, writ ref'd) (bid price 20 percent of fair market value coupled with attempted simultaneous judicial and nonjudicial foreclosure sales).

The courts declined to set aside the foreclosure sale in the following cases: *American Savings & Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581, 587–88 (Tex. 1975) (irregularities in appointment of substitute trustee, alterations in deed of trust and note, lack of personal notice, and conflict of interest of party); *Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 476 (Tex. 1965) (employee of mortgagee as purchaser at sale); *Terra XXI, Ltd. v. Harmon*, 279 S.W.3d 781, 788 (Tex. App.—Amarillo 2007, pet. denied) (no evidence presented to demonstrate that irregularity in property description caused or contributed to lower bid, fewer bids, or grossly inadequate price; in addition to sales price of $20,000, property was sold encumbered by superior liens of more than $3 million while property had fair market value of $5.7 million); *First State Bank v. Keilman*, 851 S.W.2d 914, 922–24 (Tex. App.—Austin 1993, writ denied) (failure to advertise in newspaper as required by deed of trust, but posted notice as required by Property Code; failure to include property's street address in notice; failure to wait for mortgagor to attend sale); *Diversified Developers, Inc. v. Texas First Mortgage REIT*, 592 S.W.2d 43, 44–45 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (notice erroneously listed property previously released in addition to sale property, but trustee explained error at time of sale); *Bering v. Republic Bank*, 581 S.W.2d 806, 808 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (trustee refused to delay sale several hours at mortgagor's request for it to obtain funds to bid at sale); *Forestier v. San Antonio Savings Ass'n*, 564 S.W.2d 160, 163 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.) (failure to give notice of sale); *Purnell v. Follett*, 555 S.W.2d 761, 764–66 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (failure to give notice of acceleration); *Koehler v. Pioneer American Insurance Co.*, 425 S.W.2d 889, 891–92 (Tex. Civ. App.—Fort Worth 1968, no writ) (irregularities in posting and conflict of interest of trustee); *Sparkman v. McWhirter*, 263 S.W.2d 832, 837–38 (Tex. Civ. App.—Dallas 1953, writ ref'd) (failure to record power of attorney from substitute trustee to attorney-in-fact and pending negotiations for renewal of indebtedness); and *Richardson*, 47 S.W.2d at 425 (sales price of more than 50 percent of property value is not grossly inadequate as matter of law).

The issues of whether an irregularity existed, a grossly inadequate consideration was paid, and the irregularity and the grossly inadequate bid were causally connected are fact issues. Therefore, little comfort can be afforded a successful bidder at a foreclosure sale if an irregularity existed and a dispute in value arises. *See FLR Corp. v. Blodgett*, 541 S.W.2d 209, 215 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

§ 14.8:3 Bids Less Than "Reasonably Equivalent Value" and Review of Bankruptcy

If a mortgagor files a petition in bankruptcy, section 548 of the Bankruptcy Reform Act permits a foreclosure sale to be set aside as a fraudulent transfer of the mortgagor's property if the mortgagor received less than a "reasonably equivalent value." 11 U.S.C. § 548(a)(1)(B)(i).

The United States Supreme Court in *BFP v. RTC*, 511 U.S. 531 (1994), overturned the longstanding 70-percent-of-fair-market-value guideline announced in the Fifth Circuit in *Durrett v. Washington National Insurance Co.*, 621 F.2d 201, 203–04 (5th Cir. 1980). The Supreme Court held that "reasonably equivalent value" at a foreclosure sale, for purposes of section 548, means "the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure laws have been complied with." *BFP*, 511 U.S. at 545. See section 13.3:1 in this manual for further discussion of *BFP v. RTC*.

§ 14.8:4 Texas Fraudulent Conveyance Statute

The Texas Uniform Fraudulent Transfer Act (codified at Tex. Bus. & Com. Code §§ 24.001–.013) provides a safe harbor concerning regularly conducted, noncollusive foreclosure sales under deeds of trust. The statute provides that—

> a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pur-

> suant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

Tex. Bus. & Com. Code § 24.004(b).

For other dispositions of assets, the statute provides that if a transfer is made while the debtor is insolvent, or if the debtor becomes insolvent as a result of the transfer and the debtor makes the transfer "without receiving a reasonably equivalent value in exchange for the transfer," the conveyance will be deemed a fraudulent conveyance as to the present creditors of the debtor. Tex. Bus. & Com. Code § 24.005(a)(2).

A debtor is insolvent under the statute if the sum of the debtor's obligations is greater than all his assets at a fair valuation. A debtor who is generally unable to pay debts as they become due is presumed to be insolvent. Tex. Bus. & Com. Code § 24.003(a), (b).

"Reasonably equivalent value" is defined to include the range of values for which the debtor would have willfully sold the assets in an arm's-length transaction. Tex. Bus. & Com. Code § 24.004(d).

A foreclosure sale may be set aside as a fraudulent conveyance under the Texas Uniform Fraudulent Transfer Act by a junior lien creditor if at the time of the foreclosure sale the debtor was insolvent, the purchaser at the sale is an "insider" as defined in the statute for an antecedent debt, and the insider had reasonable cause to believe that the debtor was insolvent. *See* Tex. Bus. & Com. Code § 24.006(b); *United States v. Shepherd*, 834 F. Supp. 175 (N.D. Tex. 1993), *rev'd on other grounds*, 23 F.3d 923 (5th Cir. 1994). An "insider" is defined as including (1) a relative of the debtor or of a general partner of the debtor; (2) a partnership in which the debtor is a general partner; (3) a general partner in such a partnership; or (4) a corporation of which the debtor is a director, officer, or person in control. Tex. Bus. & Com. Code § 24.002(7)(A); *see also* 28 U.S.C. § 3301(5); *In re Holloway*, 955 F.2d 1008, 1010 (5th Cir. 1992); *J. Michael Putman, M.D.P.A., Money Purchase Pension Plan v. Stephenson*, 805 S.W.2d 16, 18 (Tex. Civ. App.—Dallas 1991, no writ); 2 *Collier on Bankruptcy* § 101(31) at 101-87 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 1991).

§ 14.8:5 Overbidding

A mortgagee has been compelled to pay the mortgagor cash because the mortgagee mistakenly bid more than the balance owed on the secured indebtedness. *See McClure v. Casa Claire Apartments*, 560 S.W.2d 457, 461–62 (Tex. Civ. App.—Beaumont 1977, no writ) (mortgagee failed to give notice to mortgagor of its unilateral mistake of overbidding until sued, three months after sale; court held mortgagee equitably estopped from rescinding sale).

§ 14.9 Personal Property Foreclosure Sales

Unlike real property foreclosure sales, personal property foreclosure sales are not conducted by a trustee appointed by the debtor and directed to act by the secured party. Section 9.610 of the Texas Business and Commerce Code provides that "[a]fter default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral." Tex. Bus. & Com. Code § 9.610(a). See section 15.3 in this manual for discussion of distribution of foreclosure sale proceeds.

§ 14.9:1 Notice of Disposition

Texas Business and Commerce Code section 9.611(b) requires reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made. *See* Tex. Bus. & Com. Code § 9.611(b); *see also Wright v. Interfirst Bank Tyler*, 746 S.W.2d 874, 877 (Tex. App.—Tyler 1988, no writ) (notice of public sale not notice of private sale). Former Business and Commerce Code sections did not prescribe the form and contents of the notice, the minimum notice requirement, the method of giving notice to the debtor, the place of sale, the time of sale, or the public notice requirements. However, Business and Commerce Code sections 9.611–.614 now set forth requirements concerning the timeliness, contents, and form of notification of a proposed disposition of the collateral. Former section 9.504(c) was not interpreted as requiring written notice of sale as long as the oral notice of sale was reasonable. *See, e.g., Beltran v. Groos Bank, N.A.*, 755 S.W.2d 944, 946 (Tex. App.—San Antonio 1988, no writ); *MBank Dallas v. Sunbelt Manufacturing*, 710 S.W.2d 633, 635–36 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *see also* Tex. Bus. & Com. Code § 1.201(b)(36)(B) (receipt of any timely notice has effect of proper sending); *Crest Investment Trust v. Alatzas*, 287 A.2d 261, 264 (Md. 1972). However, revised Code section 9.611 now requires that the secured party send "an authenticated notification of disposition" unless the collateral is perishable, threatens to decline speedily in value, or is of the type customarily sold on a recognized market. *See* Tex. Bus. & Com. Code § 9.611(c), (d).

Contrary to the procedure for deed-of-trust foreclosures, the Business and Commerce Code does provide for giving notice of sale to junior lienholders, except in the case of consumer goods. Section 9.611(c) provides in part that—

> the secured party shall send an authenticated notification of disposition to:
>
> (1) the debtor;
>
> (2) any secondary obligor; and
>
> (3) if the collateral is other than consumer goods:
>
> (A) any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral;
>
> (B) any other secured party or lienholder that, 10 days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:
>
> (i) identified the collateral;
>
> (ii) was indexed under the debtor's name as of that date; and
>
> (iii) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and
>
> (C) any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in Section 9.311(a).

Tex. Bus. & Com. Code § 9.611(c).

§ 14.9:2 Commercially Reasonable Sale and Bid Price

Section 9.610(b) of the Texas Business and Commerce Code requires that every aspect of the secured party's disposition of the personal property in foreclosure of its security interest be "commercially reasonable," including the method, manner, time, place, and other terms. Tex. Bus. & Com. Code § 9.610(b). The Code does not define "commercially reasonable," but this issue is a question of fact for determination by the trier of fact (the jury). *See Siboney Corp. v. Chicago Pneumatic Tool Co.*, 572 S.W.2d 4 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.). The price bid at the foreclosure sale in and of itself does not determine whether the sale is commercially reasonable. *Siboney Corp.*, 572 S.W.2d at 8. The price obtained at the sale and the adequacy of the notice are the most important factors. Section 9.627 provides the following:

> (a) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.
>
> (b) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
>
> (1) in the usual manner on any recognized market;
>
> (2) *at the price current in any recognized market* at the time of the disposition; or
>
> (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.
>
> (c) A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved:
>
> (1) in a judicial proceeding;
>
> (2) by a bona fide creditors' committee;
>
> (3) by a representative of creditors; or
>
> (4) by an assignee for the benefit of creditors.
>
> (d) Approval under Subsection (c) need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable.

Tex. Bus. & Com. Code § 9.627 (emphasis added).

As noted in the statutory language emphasized above, section 9.627 provides that the sale is commercially reasonable if the collateral is sold in a recognized market at the price current in that market. *See* Tex. Bus. & Com. Code § 9.627(b)(2).

In *Daniell v. Citizens Bank*, 754 S.W.2d 407, 409–10 (Tex. App.—Corpus Christi 1988, no writ), the court placed the burden on the creditor to prove notice of sale and commercially reasonable disposition of collateral. The court in *Huddleston v. Texas Commerce Bank–Dallas*, 756 S.W.2d 343, 347 (Tex. App.—Dallas 1988, writ denied), refused to require the mortgagee to prove that its deed-of-trust foreclosure sale on real property was conducted in a commercially reasonable manner, citing former Texas Business and Commerce Code section 9.104(10), which excludes from Chapter 9 the "creation or transfer of an interest in or lien on real estate." (Former section 9.104(10) has been amended and is recodified at Tex. Bus. & Com. Code § 9.109(d)(11).)

§ 14.9:3 Retention of Collateral in Satisfaction of Debt

Texas Business and Commerce Code section 9.620 provides for various situations in which the secured party may retain the collateral in satisfaction of the secured debt. *See* Tex. Bus. & Com. Code § 9.620.

§ 14.9:4 Deficiencies in Personal Property Foreclosures

In *Tanenbaum v. Economics Laboratory*, 628 S.W.2d 769 (Tex. 1982), the Texas Supreme Court established that in personal property foreclosure cases the secured party is entitled to obtain a deficiency judgment against the debtor only if the disposition of the collateral was commercially reasonable and after advance notification to the debtor, if required by former Texas Business and Commerce Code section 9.504, stating, "Then and only then is [the secured party] entitled to sue for a deficiency." *Tanenbaum*, 628 S.W.2d at 771. In *Tanenbaum* the debtor was not given notice of the foreclosure disposition of the collateral. The court held that the secured party's failure to give the debtor notice of the intended disposition was an election to accept the collateral in full satisfaction of the secured debt under former section 9.505. *Tanenbaum*, 628 S.W.2d at 771–72. *Tanenbaum* overruled prior cases' holdings that failure to give notice under former section 9.504 merely created a rebuttable presumption that the value of the collateral equaled the secured debt. Before *Tanenbaum*, this presumption could be overcome and did not bar recovery of a deficiency. *See Roylex, Inc. v. E.F. Johnson Co.*, 617 S.W.2d 760, 762 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ), *disapproved of by Tanenbaum*, 628 S.W.2d at 771. However, *Tanenbaum* has been legislatively overturned as to nonconsumer transactions with the adoption of section 9.626 of the Business and Commerce Code. *See* Tex. Bus. & Com. Code § 9.626.

Thus *Tanenbaum* would seem to have continued effect only as to consumer transactions involving personal property, as Texas courts have not adopted the *Tanenbaum* rule for real property foreclosures. The court in *Van Brunt v. BancTexas Quorum, N.A.*, 804 S.W.2d 117, 122 (Tex. App.—Dallas 1990, no writ), held that the penalty enunciated in *Tanenbaum* would not be extended to bar suit for a deficiency existing after a real property foreclosure sale, even though the creditor had previously held a defective personal property sale. The Business and Commerce Code foreclosure sale requirement of "commercial reasonableness" does not apply to real property foreclosure sales. *See Savers Federal Savings & Loan Ass'n v. Reetz*, 888 F.2d 1497, 1507–08 n.14 (5th Cir. 1989). In *Knights of Columbus Credit Union v. Stock*, 814 S.W.2d 427 (Tex. App.—Dallas 1991, writ denied), the court was unwilling to extend the *Tanenbaum* rule to bar suit on two of three notes even though it found that the notice of disposition of personal property securing a third note was defective and all three loans were cross-collateralized. "Cross-collateralization does not magically transform three separate loans into one loan. We determine that the adverse consequences of the insufficient notice should logically affect only [the single loan]." *Knights of Columbus Credit Union*, 814 S.W.2d at 431–32.

§ 14.9:5 Guarantors

A deficiency suit may still be maintained against a guarantor, even though the deficiency suit would be barred against the note maker after a personal property foreclosure sale if the guaranty agreement contains an enforceable waiver as to the particular defect in the foreclosure sale procedures.

Waiver of Duty to Preserve Collateral: In *FDIC v. Nobles*, 901 F.2d 477, 480 (5th Cir. 1990), the court upheld a guaranty that waived the lender's duty to preserve the collateral.

Waiver of Commercially Reasonable Disposition: In *United States v. Terrey*, 554 F.2d 685, 692–93 (5th Cir. 1977), the court found that a guarantor did not waive his commercial reasonableness defense despite giving the lender full power to dispose of the collateral, where the guaranty expressly incorporated Texas law.

§ 14.10 Warranties and Title Delivered at Sale

At the conclusion of the foreclosure sale, the trustee conveys title to the mortgaged property by executing and delivering a deed. See the foreclosure sale deed at form 14-7 in this manual and the foreclosure sale bill of sale at form 14-8. See also 2 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 28, form 28-15 (2d ed. 2011), for an alternative form for a trustee's deed. A trustee's deed transfers only the interest the mortgagor had in the property at the time the trustee's deed was executed. *Diversified, Inc. v. Walker*, 702 S.W.2d 717 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

§ 14.10:1 No Requirement to Deliver Deed at Time of Sale

The trustee is not required to execute and deliver the foreclosure sale deed concurrently with the payment of the bid at the sale, because the purchaser obtains equitable title pending execution and delivery of the deed. *Kirkman v. Amarillo Savings Ass'n*, 483 S.W.2d 302, 308–09 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.) (citing *Pioneer Building & Loan Ass'n v. Cowan*, 123 S.W.2d 726 (Tex. Civ. App.—Waco 1938, writ dism'd judgm't cor.)). But a bidder should not be required to produce cash in a substantial amount to an unbonded, unknown trustee without the trustee's delivery of the deed. *See First Federal Savings & Loan Ass'n v. Sharp*, 347 S.W.2d 337 (Tex. Civ. App.—Dallas 1961), *aff'd*, 359 S.W.2d 902 (Tex. 1962).

§ 14.10:2 Position of Foreclosure Sale Purchaser

The purchaser of real property at a deed-of-trust foreclosure sale succeeds to the position of the mortgagee. Thus, if the mortgagee took the lien in good faith for valuable consideration without notice of the equitable claims of third parties, the purchaser at the sale, regardless of its knowledge or notice of the equitable claims, takes title free of such claims. *Moran v. Adler*, 570 S.W.2d 883, 885 (Tex. 1978) (citations omitted); *Gwin v. Griffith*, 394 S.W.2d 191, 197 (Tex. Civ. App.—Corpus Christi 1965, no writ); *Ebner v. Nall*, 127 S.W.2d 506, 507 (Tex. Civ. App.—Beaumont 1939, writ dism'd judgm't cor.); *Lyday v. Federal Land Bank*, 103 S.W.2d 441, 442 (Tex. Civ. App.—Texarkana 1937, writ dism'd). The exception to this rule is that no title passes to the purchaser if the foreclosure sale was void because of the trustee's lack of authority to conduct the sale. *Phillips v. Latham*, 523 S.W.2d 19, 24 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

The claimant of equitable title seeking to set aside the trustee's deed to a foreclosure sale purchaser has the burden of proving that the mortgagee had knowledge or notice of the equitable claim. *Dillard v. Broyles*, 633 S.W.2d 636, 644 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); *Gwin*, 394 S.W.2d at 197; *Connor v. Lane*, 355 S.W.2d 223, 224 (Tex. Civ. App.—Waco 1962, no writ).

§ 14.10:3 Warranties of Title Binding Mortgagor

Most deeds of trust provide that the trustee is to convey title to the mortgaged property pursuant to the foreclosure sale "with a general warranty binding the grantor" (the mortgagor). The *Texas Real Estate Forms Manual*'s current form for deed of trust provides for "a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty" and further states that "Grantor warrants and agrees to defend the title to the Property, subject to the Other Exceptions to Conveyance and Warranty." 1 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 22, form 22-1 (2d ed. 2011). The "subject to" exception appears to be contrary to the usual representations by the mortgagor to the mortgagee at the time of the closing of the loan. It additionally provides that "[r]ecitals in any trustee's deed conveying the Property will be presumed to be true." 1 State Bar of Tex., *Texas Real Estate Forms Manual*, State Bar of Texas, ch. 22, form 22-1 (2d ed. 2011). Such recitals in the foreclosure sale deed are prima facie evidence of the regularity of the sale. *See Burnett v. Manufacturer's Hanover Trust Co.*, 593 S.W.2d 755, 758 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

The warranty of title contained in the deed of trust and the subsequent foreclosure sale deed warrants title from the mortgagor, not the mortgagee or the trustee, to the foreclosure sale purchaser. *See Sandel v. Burney*, 714 S.W.2d 40, 41 (Tex. App.—San Antonio 1986, no writ); *see also In re Niland*, 825 F.2d 801 (5th Cir. 1987) (refusing to find mortgagee had warranted to purchaser at foreclosure sale that deed of trust granted valid lien on mortgaged property). The court in *Niland* upheld the mortgagor's homestead claim even though the mortgagor had falsely designated another property as his homestead at the time of the loan. The court also refused to permit the foreclosure sale purchaser to obtain a return of its bid from the mortgagee, even though the purchaser proved that the loan officer who made the loan received a bribe from the mortgagor to make the impermissible loan. *Niland*, 825 F.2d at 810–11.

Sometimes the mortgagor negotiates an amendment to the printed form of the deed of trust to incorporate a schedule of exceptions to the general warranty of title, to limit the warranty to a "special" warranty of title as opposed to a general warranty of title, or to limit the warranty by broad categories of potential interests (for example, "any and all restrictive covenants of record"). A breach of the mortgagor's warranty of title discovered after the foreclosure sale may be of little practical value to the purchaser at the sale because the mortgagor may be insolvent. A foreclosure sale deed with warranty of title affords the purchaser the benefits of the cases and statutes that recognize certain rights of claimants holding title under a warranty deed, such as the adverse-possession statutes and in after-acquired title situations.

Some concern might be raised about drafting a foreclosure sale deed with warranties of title binding on the mortgagor if the mortgagor is a Chapter 7 bankruptcy debtor. The foreclosure sale notice and deed should recite that the sale is being held pursuant to a bankruptcy court order. This fact should be pointed out to the bidders at the sale.

§ 14.10:4 Warranties Binding Mortgagee or Trustee

Section 51.009 of the Texas Property Code provides the following:

> A purchaser at a sale of real property under Section 51.002:
>
> (1) acquires the foreclosed property "as is" without any expressed or implied warranties, except as to warranties of title, and at the purchaser's own risk; and
>
> (2) is not a consumer.

Tex. Prop. Code § 51.009.

Some cases hold that a foreclosure sale purchaser purchases at its peril and without recourse against the trustee or the mortgagee. One court has stated this position as follows:

> Purchasers of land from a substitute trustee's sale are not relieved from the necessity of inquiring whether the trustee had been empowered to sell. One who bids on property at a foreclosure sale does so "at his peril." Purchasers assume that the trustee has power to make the sale at their peril, and where he is without power, or there is other defect or irregularity that would render the foreclosure sale void, then the purchaser cannot acquire title to the property.

Diversified, Inc. v. Walker, 702 S.W.2d 717, 723–24 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (citations omitted) (holding that purchaser at void foreclosure sale not entitled to damages against foreclosing lender for purchaser's loss of benefit of bargain (no lost profits recovery)). Supporting this finding is *Peterson v. Black*, 980 S.W.2d 818, 823 (Tex. App.—San Antonio 1998, no pet.) (finding mortgagor could not, as matter of law, recover damages for loss of opportunity to do business (property management) with potential purchaser allegedly prevented from purchasing mortgaged property at foreclosure sale). *See also Sandel*, 714 S.W.2d at 41; *Bowman v. Oakley*, 212 S.W. 549, 552 (Tex. Civ. App.—Fort Worth 1919, writ ref'd).

In most instances the attorney for the lender prepares the loan documents, ultimately acts as the trustee conducting the sale, and drafts the foreclosure sale deed. In such instances, the attorney may have a duty to alert the purchaser at the foreclosure sale and to limit the warranty in the foreclosure sale deed by title exceptions contained in the mortgagee's title insurance policy or surveys delivered by the mortgagor to the mortgagee.

Inadvertent Warranties: Caution is urged for the trustee and the mortgagee. A disgruntled purchaser may be able to recover against the trustee and the mortgagee for oral or written representations and warranties made in the notice of foreclosure sale, in the foreclosure proceeding, in response to presale inquiries, and in the foreclosure sale deed. Most notices of foreclosure sale and foreclosure sale deeds contain express representations concerning the mortgagor's default and the giving of proper notice of sale. The attorney for the mortgagee may execute an affidavit attached to the foreclosure sale deed concerning the due mailing and posting of the notice of foreclosure sale or may provide to a prospective bidder copies of the mailed notices of foreclosure sale and current federal tax lien searches and notices to the Internal Revenue Service of the sale. The successful bidder might seek recourse for a defective notice to the IRS or the attorney's failure to detect a properly filed IRS lien.

Duty to Disclose Defects: Although no Texas cases have addressed the issue of the trustee's or the mortgagee's duty to disclose known defects about the condition of the mortgaged property, a California court has held that the failure of the trustee to disclose soil conditions and other defects affecting a residence being sold at foreclosure sale constituted common-law fraud, entitling the foreclosure sale purchaser to rescind the sale. *See Karoutas v. HomeFed Bank*, 232 Cal. App. 3d 767 (Cal. Ct. App. 1991) (noting under common law in California that in absence of fiduciary or confidential relationship, duty to disclose arises if material facts are known only to seller and buyer does not know or cannot reasonably discover undisclosed facts). In *Karoutas*, the mortgagor disclosed to the mortgagee the defects. Additionally, the mortgagee obtained reports that repairs would cost in excess of two times the loan balance and would not be economically feasible. The court also implied that the trustee has a duty to disclose known material facts. *Karoutas*, 232 Cal. App. 3d at 771; *see also Reed v. King*, 145 Cal. App. 3d 261, 267 (Cal. Ct. App. 1983); *Buist v. C. Dudley DeVelbiss Corp.*, 182 Cal. App. 2d 325, 331–32 (Cal. Ct. App. 1960); *Rothstein v.*

Janss Investment Corp., 45 Cal. App. 2d 64, 69 (Cal. Dist. Ct. App. 1941); *but see Sumitomo Bank v. Taurus Developers, Inc.*, 185 Cal. App. 3d 211, 221 (Cal. Ct. App. 1986) (holding that mortgagor does not have similar disclosure duty since mortgagor is not setting price or representing value of property at sale). The rule is stated as follows:

> At a sale by a trustee under a power, where the facts or means of information concerning the condition and value of the property sold are equally accessible to both parties, and nothing is said or done which tends to impose on the other, or to mislead him or her, there is no fraud of which the law can take notice; nevertheless, where material facts are accessible to the vendor, and he or she knows them not to be within the diligent attention, observation, and judgment of the other party, he or she is bound to disclose those facts and make them known to purchaser.

55 Am. Jur. 2d *Mortgages* § 871 at 451 (1996).

§ 14.10:5 UCC Warranties

The court in *First State Bank v. Keilman*, 851 S.W.2d 914, 924 (Tex. App.—Austin 1993, writ denied), held that the inclusion in the posted notice of foreclosure sale of a disclaimer of the UCC warranties of merchantability, fitness for a particular purpose, workmanship, or quality, although not contained in the deed of trust, was not as a matter of law a defect or irregularity that would give rise to a cause of action for damages and did not chill the bidding.

The foreclosure sale deed at form 14-7 in this manual contains a disclaimer by the trustee or the mortgagee that neither of them is making any UCC warranties or warranties as to title or lien priority.

§ 14.11 Reforeclosure and Correcting Defective Trustee's Deed

In the past, Texas cases have held that a corrective trustee's foreclosure sale deed may be executed to correct erroneous recitals in a previously filed trustee's deed. For example, see *Adams v. First National Bank*, 154 S.W.3d 859, 871 (Tex. App.—Dallas 2005, no pet.), which upheld a correction deed filed to correct the erroneous recital that the default on the loan was failure to pay timely installments, as opposed to violation of the due-on-sale clause. Much of the prior case law, however, is affected by the 2011 changes to Texas Property Code sections 5.027 through 5.031, which categorized corrections as "material" or "nonmaterial" and set out statutory requirements for each type of correction. See the discussion in section 14.11:3 below.

§ 14.11:1 Revival of Interests Extinguished at Foreclosure

After the foreclosure sale, the purchaser may determine that the sale extinguished a valuable interest appurtenant to the mortgaged property that was subordinate to the lien of the deed of trust. Whether the trustee and the purchaser without the joinder of the mortgagor can change the foreclosure sale deed after the sale or rescind the sale in an attempt to preserve the extinguished subordinate interest has not been definitively resolved, but the case law is generally against such a proposition. *See generally Joe T. Garcia's Enterprises v. Snadon*, 751 S.W.2d 914 (Tex. App.—Dallas 1988, writ denied).

> Where the grantor has divested himself of title, although by mistake he has not conveyed the title in the way in which he intended, he may not by a subsequent conveyance correct his mistake, there being no title remaining in him to convey except where the conveyance has been rescinded or

canceled by a mutual consent of the parties.

Joe T. Garcia's Enterprises, 751 S.W.2d at 916 (quoting 26 C.J.S. *Deeds* § 31 (1956)).

See also *Bonilla v. Roberson*, 918 S.W.2d 17, 21–22 (Tex. App.—Corpus Christi 1996, no writ), in which the court found that after a foreclosure sale at which the lender purchased the mortgaged property and a deed was delivered to the mortgagee, the trustee and mortgagee could not nonjudicially set aside the sale, file a rescission deed, and reforeclose at a lesser bid price because of the discovery after foreclosure that the mortgagor had extensively damaged the property before foreclosure (water heaters, toilets, bathtubs, gas stoves, and refrigerators discovered missing after sale). The court also found that the mortgagee bid more than the note balance, resulting in a surplus bid. *Bonilla*, 918 S.W.2d at 22–23. The court in *Peterson v. Black*, 980 S.W.2d 818, 822 (Tex. App.—San Antonio 1998, no pet.), found that no condition existed that would permit the trustee and mortgagee to rescind the sale because the sale was validly held, and the following provision did not authorize them to unilaterally set aside the sale: "[I]f any sale hereunder is not completed or is defective in the opinion of the beneficiary, such sale shall not exhaust the power of sale hereunder and beneficiary shall have the right to have a subsequent sale or sales to be made by the trustee or by any other successor or substitute trustee."

§ 14.11:2 Correction of Bid Amount

A fact issue exists as to the actual bid at a foreclosure sale if a correction deed is filed after the sale revising the amount stated as the bid in the recorded trustee's deed. *Buccaneer's Cove, Inc. v. Mainland Bank*, 831 S.W.2d 582, 584 (Tex. App.—Corpus Christi 1992, no writ).

In *Beneficial Standard Life Insurance Co. v. Trinity National Bank*, 763 S.W.2d 52, 55–56 (Tex. App.—Dallas 1988, writ denied), the court declined to follow the judgment entered in a reformation suit between the foreclosing first lienholder and its substitute trustee. In a separate court action the foreclosure sale bid had been reformed and reduced by the amount of casualty insurance proceeds overlooked by the foreclosing lender, who was unaware of the casualty loss.

§ 14.11:3 *Myrad* and Its Legislative Progeny

In *Myrad Properties, Inc. v. LaSalle Bank N.A.*, 300 S.W.3d 746 (Tex. 2009), the deed of trust being foreclosed pledged two tracts of land but the trustee inadvertently posted a foreclosure notice that described only one tract, and at the actual foreclosure sale, the trustee read the description of the one tract described in the notice. At the conclusion of the sale, the purchaser was given a trustee's deed that described the one tract actually posted in the notice and described by the trustee at the sale. After the sale, the trustee then attempted to prepare a correction trustee's deed listing *both* tracts covered by the deed of trust, and the borrower sued to stop the trustee. Both the trial court and the court of appeals ruled in favor of the trustee and purchaser, on the grounds of unilateral mistake. However, the Texas Supreme Court held that a trustee's correction deed that purports "to convey additional, separate properties not described in the original [trustee's] deed" is void as a matter of law, as a correction deed is appropriate in only limited circumstances to correct defects and imperfections in the original deed. *Myrad*, 300 S.W.3d at 750. In light of the equities involved, however, and the potential unjust enrichment of a delinquent borrower if the original trustee's deed stood, the supreme court further granted a motion to rescind the original trustee's deed, essentially putting the parties back in the status quo ante existing prior to the foreclosure. *Myrad*, 300 S.W.3d at 753.

In light of the controversy engendered by the court of appeals' decision in *Myrad* (252 S.W.3d 605 (Tex. App.—Austin 2008)) upholding the trustee's right to correct the original deed by adding significant property in a correction deed, the legislature intervened with new amendments to the correction instrument statute at Texas Property Code sections 5.027 through 5.031. The amendments define material and nonmaterial changes to an instrument by a correction instrument; expressly provide for giving notice to the parties to the instrument of nonmaterial changes and requiring execution of the correction instrument by the parties in interest when a material change is involved; and defines when ratification of a change is required from the parties in interest. *See* Tex. Prop. Code §§ 5.027–.031. With regards to trustee's deeds, section 5.027(b) now expressly provides the following:

> (b) A correction instrument may not correct an ambiguity or error in a recorded original instrument of conveyance to transfer real property or an interest in real property not originally conveyed in the instrument of conveyance for purposes of a sale of real property under a power of sale under Chapter 51 unless the conveyance otherwise complies with all requirements of Chapter 51.

Tex. Prop. Code § 5.027(b). A correction instrument recorded before September 1, 2011, that substantially complies with Texas Property Code section 5.028 or 5.029 and that purports to correct a recorded original instrument of conveyance is effective to the same extent as provided by section 5.030 unless a court of competent jurisdiction renders a final judgment determining that the correction instrument does not substantially comply with section 5.028 or 5.029. Tex. Prop. Code § 5.031. See form 14-9 in this manual.

§ 14.11:4 Equitable Remedy

If the statutes referenced above do not apply, a party can look to the court to reform a conveyance document. Reformation is an equitable remedy that a court may grant to correct a written document so that it conforms to the parties' true intent. Litigation involving title to real property is one of the most common areas for invoking the remedy of reformation and generally arises in an action for a declaratory judgment. Note, however, that a reformation action is subject to a four-year statute of limitations, which runs from the date the mistake was discovered or, in the exercise of reasonable diligence, should have been discovered.

§ 14.12 Recording Trustee's Deed

Failure to record the trustee's deed does not mean that the sale is not complete or that title has not passed to the successful bidder; rather, equitable title passes to the buyer. *Peterson v. Black*, 980 S.W.2d 818, 822 (Tex. App.—San Antonio 1998, no pet.); *Pioneer Building & Loan Ass'n v. Cowan*, 123 S.W.2d 726, 730 (Tex. Civ. App.—Waco 1938, writ dism'd judgm't cor.). The purpose for recording the trustee's deed is simply to protect the grantee under the Texas recording statutes.

§ 14.13 Enjoining Foreclosure Sale

The debtor must tender the full sum of the admitted debt in order to enjoin the foreclosure sale. *Ginther-Davis Center, Ltd. v. Houston National Bank*, 600 S.W.2d 856, 864 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). Mortgagors are not entitled to enjoin a sale merely because they have equity in the property. *Lincoln National Life Insurance Co. v. Freudenstein*, 87 S.W.2d 810, 812 (Tex. Civ. App.—San Antonio 1935, no writ).

§ 14.14 Procedure for Trustee or Substitute Trustee to Be Dismissed from Suit

Texas Property Code section 51.007 provides a procedure whereby a trustee or a substitute trustee under a deed of trust, contract lien, or security instrument can seek dismissal from a suit or proceeding where he is named solely in his capacity as trustee or substitute trustee and is not a necessary party. *See* Tex. Prop. Code § 51.007. Dismissal of the trustee or substitute trustee does not prejudice a party's right to seek injunctive relief to prevent the trustee from proceeding with a foreclosure sale. Tex. Prop. Code § 51.007(e). Section 51.007 does not, however, require a trustee defendant to file verified pleadings if the proceeding is not one in which the trustee is contending that he is not a necessary party to the proceeding. *Terra XXI, Ltd. v. Harmon*, 279 S.W.3d 781 (Tex. App.—Amarillo 2007, pet. denied) (motion for summary judgment by trustee as to validity of foreclosure sale).

§ 14.15 Rescissions of Foreclosure Sale

See the discussion in section 14.1 above regarding House Bill 2066, which authorizes rescission of a nonjudicial foreclosure sale under certain conditions and procedures. *See* Acts 2015, 84th Leg., R.S., ch. 551, § 1 (H.B. 2066), eff. Sept. 1, 2015 (adding Tex. Prop. Code § 51.016). The statute gives a foreclosure professional a means to legally rescind a foreclosure sale without a foreclosure sale buyer using the threat of litigation as a means to extract additional compensation from the mortgagee or borrower other than return of the bid price. *See* Tex. Prop. Code § 51.016.

§ 14.15:1 Rescissions Generally

Just as parties may enter into a contract, they may also rescind the contract. The effect of the agreement to rescind depends on the intent of the parties at the time the agreement was made. Rescission is an equitable remedy that operates to extinguish a contract that is legally valid but must be set aside due to fraud, mistake, or for some other reason to avoid unjust enrichment. *Martin v. Cadle Co.*, 133 S.W.3d 897, 903 (Tex. App.—Dallas 2004, pet. denied). Usually, the parties' intent when they rescind the foreclosure sale is to be returned to the status quo that existed prior to the foreclosure sale. The most efficient and practical way to rescind a foreclosure sale is by agreement. However, there are times when it is necessary to seek court assistance to accomplish a rescission.

§ 14.15:2 Rescissions by Agreement

Although the law is not entirely settled in Texas, the prudent practitioner should avoid seeking a unilateral rescission in most circumstances. In *Bonilla v. Roberson*, 918 S.W.2d 17 (Tex. App.—Corpus Christi 1996, no writ), a mortgagee attempted to rescind a foreclosure sale by advising the substitute trustee to file a cancellation deed. The court held that the cancellation deed had no effect and stated that when a party with a property interest wishes to challenge a sale's validity, the proper action is to bring a cause of action to set aside the sale and cancel the trustee's deed. *Bonilla*, 918 S.W.2d at 21–22. The party cannot simply ask the substitute trustee to cancel the deed obtained at the foreclosure sale. Therefore, to avoid looking to the court for a judicial rescission, the most effective and efficient way to rescind a foreclosure sale is by agreement. See form 14-10 in this manual.

§ 14.15:3 Judicial Rescission

Generally, title issues are determined by a trespass to try title action. However, with a rescission of a foreclosure sale, the conflict is not who has title to the land but whether or not the mortgagee or trustee had the right to conduct the foreclosure sale. In this situation, a declaratory judgment is an effective alternative to obtain a judicial rescission.

The purpose of a declaratory action is to establish existing rights, status, or other legal relationships. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370 (Tex. 2009). In 2004, the Texas Supreme Court stated that the Declaratory Judgments Act "provides an efficient vehicle for parties to seek a declaration of rights under certain instruments." *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004). Section 37.004(a) of the Texas Civil Practice and Remedies Code provides that a person under a deed, written contract, or other writing constituting a contract may have determined any question of validity arising under the instrument. Tex. Civ. Prac. & Rem. Code § 37.004(a). The trial court is duty-bound to declare the rights of the parties as to those matters and has limited discretion to refuse a declaratory judgment, and it may do so only where judgment would not remove the uncertainty giving rise to the proceedings. *SpawGlass Construction Corp. v. City of Houston*, 974 S.W.2d 876, 878 (Tex. Civ. App.—Houston 1998, pet. denied).

The question generally asked in a rescission of a foreclosure sale is: did the substitute trustee have the right to conduct a nonjudicial foreclosure sale under the power of sale included in the underlying deed of trust? Whether a trustee's deed at foreclosure sale is void or voidable depends on its effect upon the title at the time it was executed and delivered. *Diversified, Inc. v. Walker*, 702 S.W.2d 717, 721 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). If the deed is a mere nullity, passing no title and conferring no rights whatsoever to the purchaser, then it is void ab initio. *Diversified*, 702 S.W.2d at 721. In order to correct a void sale, the parties typically execute a rescission and record it in the real property records to give notice that title did not pass to the entity or person that purchased the property at the underlying foreclosure sale. However, that is not always the case.

In *Slaughter v. Qualls*, 162 S.W.2d 671 (Tex. 1942), the Texas Supreme Court found that the mortgagor was not in default under the note. As such, the trustee had no power to sell the debtor's property. *Slaughter*, 162 S.W.2d at 675. As in most security agreements, the deed of trust authorizes the sale only upon default by the debtor. Therefore, without default, there was no authority for sale. In *Slaughter*, the court stated that if the conditions for default did not arise, the trustee's power never came into being, rendering the foreclosure sale and trustee's deed void. *Slaughter*, 162 S.W.2d at 675.

In a similar situation, the Houston court of appeals found that the sale was void ab initio for failure to cancel the proposed foreclosure sale after the parties to the mortgage agreed to do so. *Diversified*, 702 S.W.2d at 721. The court held that since the conditions required to give the trustee his power to convey the land were not fulfilled, the trustee had no power, and therefore, the foreclosure sale and trustee's deed were void. *Diversified*, 702 S.W.2d at 721.

This doctrine has been taken further to include situations in which the parties specifically agreed that if the mortgagor made certain past-due payments that the loan would be reinstated and no foreclosure sale would occur. *See Henke v. First Southern Properties, Inc.*, 586 S.W.2d 617, 618 (Tex. App.—Waco 1979, writ ref'd n.r.e.). The property in *Henke* sold at a foreclosure sale, and the court found that the trustee had no power to convey because the loan was not in default, rendering the foreclosure sale void. *Henke*, 586 S.W.2d at 620.

If the foreclosure sale is voidable, the parties can look to a trespass to try title suit if an agreement to rescind cannot be reached. If the court grants the rescission, the parties may record a copy of the judgment together with the underlying substitute trustee's deed in the real property records. Recording the judgment gives notice that the substitute trustee's deed has no effect.

Additional Resources

Baggett, W. Mike. "Developments in Lender Liability." In *Advanced Real Estate Law Course, 2002*. Austin: State Bar of Texas, 2002.

———. "Foreclosure Update Including Foreclosing Home Equity Loans." In *Advanced Real Estate Law Course, 2003*. Austin: State Bar of Texas, 2003.

———. "Sign of the Times: Foreclosures and Workouts." In *Residential Real Estate Construction Law, 2008*. Austin: State Bar of Texas, 2008.

Biel, Frederick J. "Commercial Foreclosures: Selected Documentation and Procedural Issues." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

———. "Personal Property Foreclosure Sales." In *Mortgage Lending Institute, 2002*. Austin: University of Texas School of Law and Texas Mortgage Bankers Association, 2002.

Derber, David P. "Personal Property Foreclosures." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

———. "UCC Article 9—Collections Issues." In *Collections and Creditors' Rights Course, 2004*. Austin: State Bar of Texas, 2004.

Resnick, Alan N., and Henry J. Sommer, eds. *Collier on Bankruptcy*. 16th ed. New York: Matthew Bender & Co., 2011.

Weller, Philip D. "Dispositions Under Article 9 for the Real Estate Lawyer." In *Advanced Real Estate Drafting Course, 2004*. Austin: State Bar of Texas, 2004.

Form 14-7

Foreclosure Sale Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Deed of Trust

Date:

Grantor:

Original Beneficiary:

Current Beneficiary:

Trustee:

[**Include if applicable:** Substitute Trustee:]

Recording Information:

Property:

Note Secured by Deed of Trust (Note)

Date:

Maker:

Original Principal Amount:

Original Payee:

Current Holder:

Date of Sale of Property (first Tuesday of month):

Time Sale of Property Began [**state exact time of sale**]:

Place of Sale of Property [**include county and designate area of courthouse where sale took place**]:

Buyer:

Buyer's Mailing Address [**include county**]:

Amount of Sale:

By Deed of Trust, Grantor conveyed to [**name of trustee**], as Trustee, certain property for the purpose of securing and enforcing payment of the indebtedness and obligations therein described (collectively, the Obligations), including but not limited to the Note [**include if applicable:** [,/and] all renewals and extensions of the note] [**include if applicable:** , and any and all present and future indebtedness of [**name of maker**] to Beneficiary].

Include the following if applicable.

A contingency stated in the Deed of Trust as a condition precedent for the appointment of a substitute trustee occurred, and [**name of substitute trustee**] was appointed by an Appointment of Substitute Trustee executed by [**name of current beneficiary**], dated [**date**], and recorded in [**recording data**] of the real property records of [**county**] County, Texas.

Continue with the following.

Default has occurred in the payment of the Obligations when due. [**Include if applicable:** The unpaid balance of the principal of the Obligations was accelerated, and default has occurred and is continuing in the payment of the Obligations.] [**Name of current beneficiary**], the current Holder of the Obligations and the current Beneficiary of the Deed of Trust, requested [**name**], as [Trustee/Substitute Trustee], to enforce the trust of the Deed of Trust.

Pursuant to the requirements of the Deed of Trust and the laws of the state of Texas, written notice of the time, place, date, and terms of the public foreclosure sale of the Property was posted at the courthouse door of [**county**] County, Texas, the county in which the Property is situated, and a copy of the notice was also filed with the county clerk of [**county**] County, Texas, each notice having been posted and filed for at least twenty-one days preceding the date of the foreclosure sale.

Additionally, written notice of the time, date, place, and terms of the foreclosure sale was served on behalf of the current Beneficiary by certified mail on each debtor who, according to the records of the current Beneficiary, is obligated to pay any of the Obligations. The certified-mail notices were timely sent by depositing the notices in the United States mail, postage prepaid in proper amount, and addressed to each debtor at the debtor's last known address as shown by the records of the current Beneficiary at least twenty-one days preceding the date of the foreclosure.

Include the following if applicable.

Written notice of default and of the opportunity to cure the default to avoid acceleration of the maturity of the note was served on behalf of the current Beneficiary by certified mail on each debtor who, according to the records of the current Beneficiary, is obligated to pay any of the Obligations. The certified-mail notices were timely sent by depositing the notices in the United States mail, postage prepaid in proper amount, and addressed to each debtor at the debtor's last known address as shown by the records of the current Beneficiary at least twenty days preceding the date of the acceleration of the maturity of the note and the posting of the mortgaged Property for foreclosure.

Attached are affidavits for the mailing of notice of intent to accelerate the maturity of the note to debtors and posting and mailing of notice of foreclosure sale and conduct of the foreclosure sale.

Continue with the following.

In consideration of the premises and of the bid and payment [**include if applicable**: by way of credit against the unpaid balance owed on the Obligations] of the amount of $[**amount**], the highest bid by Buyer, I, as [Trustee/Substitute Trustee], by virtue of the authority conferred on me in the Deed of Trust, have granted, sold, and conveyed all of the Property to Buyer and Buyer's heirs and assigns, to have and to hold the Property, together with the rights, privileges, and appurtenances thereto belonging unto Buyer and Buyer's heirs and assigns forever.

I, as the [Trustee/Substitute Trustee], do hereby bind Grantor and Grantor's heirs and assigns to warrant and forever defend the Property to Buyer and Buyer's heirs and assigns forever, against the claim or claims of all persons claiming the same or any part thereof.

And in consideration of the premises and of the payment to the [Trustee/Substitute Trustee] of the above-referenced amount, [Trustee/Substitute Trustee] hereby grants, bargains, sells, and transfers to Buyer the following described personal property (the "Personal Property"): [**describe personal property**], to have and to hold, all and singular, the Personal Property to Buyer and Buyer's heirs and assigns to use forever.

Include the following if applicable.

The foreclosure sale has been conducted pursuant to an order lifting stay entered in Cause No. [**number**] in the [**district**] Bankruptcy Court. A certified copy of the order is being filed for record in the real property records.

Continue with the following.

No warranty or representation exists as to the merchantability or fitness for use or a particular purpose of the Personal Property. [Trustee/Substitute Trustee] is selling the Personal Property described above on an "as is" and "where is" basis and disclaims any implied or express warranties with respect to such Personal Property.

Executed on [**date**].

____

[Trustee/Substitute Trustee]

> Attach appropriate mailing, posting, or composite affidavits. See forms 11-4 through 11-7 in this manual.

STATE OF TEXAS)

COUNTY OF)

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], as [Trustee/Substitute Trustee], known to me to be the person whose name is subscribed to the foregoing instrument, and who acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office this [**specify**] day of [**month**] [**year**].

SUBSCRIBED AND SWORN TO before me on ________________ by [**name of affiant**].

____

Notary Public, State of Texas

[Reserved]

Chapter 15

Postsale Considerations

Forms

[Reserved]

Chapter 15

Postsale Considerations

§ 15.1 Introduction

The completion of the foreclosure auction does not end the foreclosure process. As discussed in this chapter, a number of matters must typically be addressed after the sale itself, such as the filing of required informational returns to the IRS and the county clerk where the property was located, the distribution of the foreclosure sales proceeds to the proper parties, the evaluation of possible claims on private mortgage insurance, the redemption rights (if any) of the mortgagor, the state and federal protections for any residential tenants of the foreclosed property, the handling of utilities serving the property, and obtaining physical possession of the property.

§ 15.2 Notices Required after Completion of Foreclosure Sale

§ 15.2:1 IRS Notices—Forms 1096 and 1099-A

The Internal Revenue Code requires that a foreclosing lender file a special return with the Internal Revenue Service and a notice with the borrower. An information return (Form 1099-A, Acquisition or Abandonment of Secured Property) must be filed with the Internal Revenue Service on or before the last day of February following the calendar year in which a foreclosure takes place. However, the due date may vary if filing electronically with the IRS. *See* 26 U.S.C. § 6050J; *see also* IRS Form 1099-A, Instructions for Lenders. The person responsible for filing the return is any person who, in connection with a trade or business conducted by that person, lends money and, in full or partial satisfaction of the debt, acquires an interest in a property that is security for the debt or has reason to know that the property has been abandoned. 26 U.S.C. § 6050J(a). Form 1099-A (copy A), along with Form 1096, Annual Summary and Transmittal of U.S. Information Returns, is transmitted to the IRS. The person filing Form 1096 is also responsible for providing the borrower with copy B of Form 1099-A on or before January 31 following the calendar year of foreclosure. *See* 26 U.S.C. § 6050J(e). These forms are reproduced at forms 15-1 and 15-2 in this manual. IRS forms and instructions are also available online at **https://www.irs.gov/**. Note that the IRS will not accept photocopies of these forms.

The penalty for failure to file the information return is $50 per failure, up to an aggregate of $250,000 per calendar year. If the failure to file is due to intentional disregard of the filing requirement, the penalty is $100 per failure and the $250,000 annual cap on the penalties is not applicable. *See* 26 U.S.C. § 6721.

§ 15.2:2 State Notices of Residential Foreclosure Sale

Effective June 14, 2013, as a result of the repeal of Tex. Prop. Code § 52.0022 by the Eighty-third Legislature (*see* Acts 2013, 83d Leg., R.S., ch. 389, § 3 (S.B. 109)), a person filing a notice of foreclosure sale of residential property under Texas Property Code section 51.002(b) is no longer required to submit to the county clerk a form that provides the zip code for the property to be foreclosed, and the trustee or sheriff is no longer required to submit to the county clerk a form stating whether the property foreclosed was residential property and the zip code of the property.

§ 15.3 Receipt and Distribution of Sale Proceeds

In 2007, section 51.0075(f) was added to the Texas Property Code, which provides that "[t]he trustee or substitute trustee shall disburse the proceeds of the sale as provided by law." Tex. Prop. Code § 51.0075(f). In 2009, section 51.0075(f) was amended to read: "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. The trustee or substitute trustee shall disburse the proceeds of the sale as provided by law." Tex. Prop. Code § 51.0075(f).

In addition to following the statutes, the trustee should also review the deed of trust itself to determine what, if any, provisions address the receipt and distribution of sales proceeds. For example, many deeds of trust require that payment at the foreclosure sale be "in cash or other good funds." In the absence of an express description of "other good funds" in the deed of trust, the cautious trustee will obtain prior written guidance from at least the mortgagee (if not also from the mortgagor, who, however, may be less than cooperative) about what types of payment are acceptable as "other good funds." Otherwise, the trustee may become liable for either accepting a form of payment that ultimately falls through or rejecting a form of payment that results in a lower winning bid. For example, many prospective bidders at a foreclosure sale bring "bank checks" or "cashier's checks" of various denominations issued payable to the bidder, which the bidder intends to endorse over to the trustee in the requisite amounts if the bidder wins the auction. However, because of the risk of fraud and forgery with such instruments, some mortgagees will not accept even "direct-issue" bank checks or cashier's checks (particularly when drawn on out-of-county or out-of-state institutions that cannot be readily contacted from the auction site), much less accept payment by endorsement from an unknown third-party bidder. Does the mortgagee have the right to instruct the trustee to reject such forms of payment if the deed of trust is unclear or silent on this point? If the trustee unilaterally accepts a form of payment not clearly authorized by either the deed of trust or the parties, is the trustee then liable to the mortgagor or mortgagee if the payment falls through? If the trustee, without clear authority under the deed of trust or from the parties, rejects a form of payment as not being "other good funds," has the trustee "chilled the bidding" to the detriment of the mortgagor? In the same circumstances, has the mortgagee been damaged by the trustee's rejection of the proffered payment if the property ultimately sells for a lower auction price and the mortgagee never realizes the position it would have achieved had the trustee accepted the proffered payment? Property Code section 51.0074 does state that a trustee cannot be held to "the obligations of a fiduciary" to the mortgagor or mortgagee, but an aggrieved mortgagor or mortgagee might argue that any of the above acts constitute either ordinary or gross negligence under the particular facts of the foreclosure sale.

Most forms for deed of trust contractually provide for the means for applying the proceeds of a foreclosure sale. The *Texas Real Estate Forms Manual*'s form for deed of trust provides for distribution of sale proceeds as follows:

> Trustee will . . .
>
> D.3. from the proceeds of the sale, pay, in this order—
>
> a. expenses of foreclosure, including a reasonable commission to Trustee;

b. to Lender, the full amount of principal, interest, attorney's fees, and other charges due and unpaid;

c. any amounts required by law to be paid before payment to Grantor; and

d. to Grantor, any balance

. . . .

1 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 22, form 22-1 (2d ed. 2011).

The language in item c. above was not listed in the trustee's duties in earlier versions of the form.

§ 15.3:1 Expenses of Foreclosure

One Texas case, *Jeffreys v. McGlamery*, 96 S.W.2d 572, 576 (Tex. Civ. App.—Amarillo 1936, no writ), held that the loan documents must specifically provide for reimbursement of attorney's fees and expenses incurred by the lender or the trustee in order to receive such reimbursement. It should be noted, however, that the *Jeffreys* case has not been cited by other Texas courts for this issue and that with respect to attorney's fees, Tex. Civ. Prac. & Rem. Code § 38.001(8) provides for recovery of attorney's fees on a contract, whether written or oral. The best practice is to precisely describe in the deed of trust the costs and expenses that constitute "the expenses of foreclosure" that may be deducted from the sales proceeds.

§ 15.3:2 Trustee's Fee as Expense of Foreclosure

The Texas Supreme Court has held that if the deed of trust provides for the recovery of fees and expenses incurred by the lender and the trustee in enforcing the covenants and agreements of the deed of trust, the lender and trustee are entitled to recover their fees and expenses of moving towards foreclosure even though the defaulting borrower pays off the loan prior to the foreclosure sale. *Edwards v. Holleman*, 862 S.W.2d 580 (Tex. 1993). No Texas Supreme Court authority exists as to whether a stipulated trustee's fee (e.g., the trustee's fee is set as specified percentage of the foreclosure sales price) is enforceable. There is, however, a court of appeals case that holds that a trustee will not be permitted to keep a 10 percent trustee's fee when the deed of trust expressly states that the trustee's fee is to be reasonable and the trustee cannot establish that such amount is reasonable. *See Edwards v. Holleman*, 893 S.W.2d 115 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (trustee did not keep records of time spent preparing for foreclosure and testified that time not factor in calculation of fee). The same court held that it is a breach of the trustee's fiduciary duty to the mortgagor if the trustee charges an unreasonable fee. *Edwards*, 893 S.W.2d at 119–20. Note that this holding about the trustee's fiduciary duty has been altered by Tex. Prop. Code § 51.0074(b)(2), which states that a trustee may not be "held to the obligations of a fiduciary of the mortgagor or mortgagee."

One very old case holds that a trustee is entitled to a reasonable fee to be deducted from the sale proceeds even if the deed of trust is silent on the issue. *Harris v. First National Bank of Springfield*, 45 S.W. 311 (Tex. Civ. App. 1898, writ ref'd). In another case, the court held that provisions in the promissory may permit payment of a trustee's fee even if there is no retention from the sale proceeds. In *Consolidated Capital Special Trust v. Summers*, 737 S.W.2d 327, 332 (Tex. App.—Houston [14th Dist.] 1987), *rev'd on other grounds*, 783 S.W.2d 580 (Tex. 1989), the court awarded the trustee a 5 percent trustee's fee out of the surplus sale proceeds, even though through a mistake of law the mortgagee and trustee believed no surplus existed.

Trustee's Fee Subject to Challenge? Few appellate court decisions address whether a trustee's fees are subject to challenge in the same manner as are attorney's fees. The court of appeals opinion in the *Edwards v. Holleman* case discussed above did address this question and accepted a challenge to the trustee's fees when the deed of trust itself required that the fee be reasonable. *See also F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce*, 578 S.W.2d 675 (Tex. 1979); *Summers*, 737 S.W.2d at 332. In *Airline Commerce Bank v. Commercial Credit Corp.*, 531 S.W.2d 171 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.), the trustee's fees were deemed to be part of the contract between the noteholder and the debtor and as such became part of the indebtedness secured by the deed of trust. However, there did not appear to have been any challenge to the contractual trustee's commission of 5 percent of proceeds of sale provided for in the deed of trust. In *Airline Commerce Bank*, the challenge was based on a federal statute extending the priority enjoyed by any lien over a federal tax lien to cover the attorney's fees incurred in enforcing the superior lien. *Airline Commerce Bank*, 531 S.W.2d at 175.

In *Realtex Corp. v. Tyler*, 627 S.W.2d 441 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ), defendants to a usury claim sought an appeal to modify the trial court's judgment on their counterclaim to include a trustee's fee. The court of appeals denied recovery of the trustee's fee because the defendants had failed to assert the claim in their pleadings before the trial court.

§ 15.3:3 Distribution of Net Proceeds to Lender

Deeds of trust invariably state that the net foreclosure sales proceeds remaining after deduction of the allowable expenses of foreclosure are to be applied to payment of the secured debt, in preference to any other claim.

§ 15.3:4 Any Amounts Required by Law to Be Paid before Mortgagor

Distribution to Prior Lienholders: No requirement exists that surplus sales proceeds be distributed to prior lienholders, and some risk is involved in paying these parties before paying junior lienholders or the mortgagors since the prior lienholders are not required by law to be paid before payment to the mortgagor.

If the deed of trust so provides, the mortgagor is generally entitled to any surplus proceeds remaining after satisfaction of a junior-lien foreclosure made subject to prior liens. *Conversion Properties, L.L.C. v. Kessler*, 994 S.W.2d 810, 813–14 (Tex. App.—Dallas 1999, pet. denied); *Mortgage & Trust, Inc. v. Bonner & Co.*, 572 S.W.2d 344, 351(Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); *Pearson v. Teddlie*, 235 S.W.2d 757, 759 (Tex. Civ. App.—Eastland 1950, no writ). However, if the debtor relinquishes his right to surplus by failing to object properly to the trustee's distribution of partial surplus proceeds to the senior lienholder that has not foreclosed, the debtor is deemed to have ratified and waived the deviation from the terms of the deed of trust.

Payment to a prior lienholder has been approved if made with the mortgagor's consent. *See Canfield v. Foxworth-Galbraith Lumber Co.*, 545 S.W.2d 583 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

Application to Wraparound Mortgages: For wraparound mortgages, in the absence of an express agreement to the contrary, Texas courts will imply a covenant of the trustee to pay sale proceeds on the prior-lien debt. *See Summers v. Consolidated Capital Special Trust*, 783 S.W.2d 580 (Tex. 1989); see also Janet L. Hunter, Note, *Texas Adopts the "Outstanding Balance" Method of Calculating the Deficiency or Surplus After Foreclosure of a Wraparound Deed of Trust*: Summers v. Consolidated Capital Special

Trust, *783 S.W.2d 580 (Tex. 1989)*, 21 Tex. Tech L. Rev. 873, 875–77, nn. 22–23 (1990).

Distribution to Junior Lienholders: The liens of junior lienholders attach to surplus sale proceeds in the same order of priority as their liens attach to the property foreclosed. *Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor*, 576 S.W.2d 794, 807–08 (Tex. 1978); *Jeffrey v. Bond*, 509 S.W.2d 563, 565 (Tex. 1974); *Baccus v. Westgate Management Corp.*, 981 S.W.2d 383, 385–86 (Tex. App.—San Antonio 1998, pet. denied) (third lienholder entitled to "leapfrog priority" over second lienholder, but only to extent of balance owing on first lien purchased and foreclosed by it, and proceeds in excess of first-lien debt belong to second-lien creditor); *Mortgage & Trust*, 572 S.W.2d at 351.

If there are conflicting demands between subordinate lienholders or between the mortgagor and a subordinate lienholder, it is recommended that the trustee interplead the sale proceeds in question into the registry of the court, rather than potentially assume personal liability for misdirection of the funds. See form 15-3 in this manual for a petition to interplead funds.

§ 15.3:5 Distribution to Mortgagors

If there are excess proceeds after payments of the expenses of sale, the secured debt, and the other claims required by law to be paid before the mortgagor, the excess belongs to the mortgagor. *Bonilla v. Roberson*, 918 S.W.2d 17, 23 (Tex. App.—Corpus Christi 1996, no writ). If there are competing mortgagor claimants to the sales proceeds, the trustee may be forced to interplead the proceeds into the registry of the court. For example, the mortgaged property may be owned by several persons as cotenants and one or more of the cotenants may have federal tax liens or judgment liens filed against them, or a cotenant may have granted deed-of-trust liens against his undivided interests subject to the lien of the foreclosing creditor. See form 15-4 in this manual, a foreclosure sales proceeds distribution agreement, which concerns the distribution by the trustee of a portion of the net sales proceeds to several cotenants and the interpleader of the balance of the proceeds with the court.

§ 15.4 Claim on Private Mortgage Insurance

If private mortgage insurance (PMI) was carried on the secured debt and a deficiency on the debt remains after foreclosure, the mortgagee should submit a claim for recovery under the PMI. While the exact claims process is obviously dependent on the precise terms of the insurance policy, in general the mortgagee will submit to the insurer documentation evidencing the debt payment history, the default on the debt, the foreclosure timeline, a current appraisal of the collateral, and a description of the mortgagee's collection efforts. The PMI insurer will then process the claim, and payment is usually made in about sixty days.

The Homeowners Protection Act of 1998, Pub. L. No. 105-126, 112 Stat. 897, effective July 29, 1999, provides for the automatic termination of PMI on loans consummated on or after July 29, 1999, that pertain to single family residences used as the borrower's principal residence once the loan-to-value on the home reaches 78 percent. The Act is not applicable to mortgage insurance issued under the National Housing Act, title 38 of the U.S. Code, or Title V of the Housing Act of 1949 (pertaining to FHA loans and Veterans Administration loan guarantees). A fuller description of the Homeowners Protection Act has been issued by the Board of Governors of the Federal Reserve at **www.federalreserve.gov/boarddocs/caletters/2004/0405/CA04-5Attach1.pdf**.

If the collateral property is covered by mortgage insurance (whether public or private), the lender should carefully examine the terms of the policy as such policies may require notice to the insurer when the lender begins the collection process against the borrower (which may be defined either in terms of giving notice of default or giving notice of foreclosure). Under a typical PMI policy, the lender is protected up to policy limits against covered losses arising from default and foreclosure of a debt, which typically include losses pertaining to delinquent interest, property taxes, homeowner's insurance, costs of collection efforts, and appraisal fees. Mortgage insurance policies typically do not cover late charges or assessments like homeowner association penalties. It is important to note that the insurer will subrogate to the position of the lender with respect to the debt, so payment by the insurer to the lender will *not* release the obligor from the debt.

§ 15.5 Evaluate Deficiency Suit against Obligor

In the event the net sales proceeds from the foreclosure that is credited to the secured debt is less than the balance of the secured debt, the mortgagee has the option of pursing collection of the deficiency from the obligors on a recourse note. Normally, the most significant consideration in this regard is whether the amount reasonably expected to be collected justifies the cost and time of pursing collection. See chapter 17 in this manual for a discussion of pursuing collection of a deficiency.

§ 15.6 Equity of Redemption after Foreclosure

The common law rule in Texas is that a regularly and validly conducted trustee's sale cuts off both junior liens and any equity or right of redemption in favor of the mortgagor. *Scott v. Dorothy B. Schneider Estate Trust*, 783 S.W.2d 26, 28 (Tex. App.—Austin 1990, no writ); *Rogers v. Fielder*, 392 S.W.2d 797, 799–800 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.). However, Texas statutes do grant the foreclosed property owner (and, in specific situations, the assignees and heirs of the property owner and junior lienholders) a statutory right of redemption in situations involving foreclosure of (1) ad valorem tax liens against residential homesteads, nonresidential property, land used for agricultural purposes, and mineral interests (see Tex. Tax Code § 34.21); (2) property owners association assessment liens (see Tex. Prop. Code § 209.011); and (3) a condominium association's assessment lien against a residential condominium that was purchased at foreclosure by the condominium association (see Tex. Prop. Code § 82.113). These statutory rights of redemption (1) are for prescribed periods that may be as short as ninety days or as long as two years, depending on the particular collateral and type of lien involved; (2) are normally conditioned on the foreclosed property owner paying to the foreclosure sale purchaser an amount that includes not only the winning bid amount, but also a redemption premium and various statutorily enumerated "carrying costs" of the property incurred by the purchaser during the interim between foreclosure and redemption; (3) often expressly address the allocation of income (e.g., rents) realized from the foreclosed property during the interim period between foreclosure and redemption; and (4) may restrict transfers of interest in the foreclosed property prior to the expiration of the redemption period.

§ 15.7 Property Tax Considerations after Foreclosure

Property foreclosed on during the first three months of the calendar year can be rendered by the foreclosure sale purchaser for the current tax year. The purchaser should confirm the proposed valuation of the property as soon as possible after the sale to permit a timely, informed decision on the steps to be taken in the appraisal process. The mortgagee is not entitled to sue the mortgagor for reimbursement for taxes paid by the mortgagee after foreclosure for a period accruing from January 1 of the year of the foreclosure sale to the date of the sale. *Jackson v. Stonebriar Partnership*, 931 S.W.2d 635, 638–39 (Tex. App.—Dallas 1996, writ denied).

§ 15.8 Utility Charges and Services Following Foreclosure

A utility cannot refuse service to a foreclosure sale purchaser merely because the former owner failed to pay for utility services. Section 25.29(d)(1) of the substantive rules of the Public Utility Commission of Texas provides: "Disconnection prohibited. Electric utility service may not be discontinued for any of the following reasons: . . . (1) delinquency in payment for electric utility service by a previous occupant of the premises." 16 Tex. Admin. Code § 25.29(d)(1) (Pub. Util. Comm'n of Tex., Disconnection of Service). It is not known if this rule would prohibit the telephone company from changing a telephone number in an attempt to force the foreclosure purchaser to pay the prior owner's bill. *See Price v. South Central Bell*, 313 So.2d 184 (Ala. 1975); *see generally City of Houston v. Lockwood Investment Co.*, 144 S.W. 685 (Tex. Civ. App.—El Paso 1912, writ dism'd). The deed of trust and the foreclosure sale deed and bill of sale should list all right, title, and interest in all telephone numbers, excess utility capacity, or other utility rights of the mortgaged property.

§ 15.9 Foreclosure Purchaser's Right of Possession

If the owner or other occupant of the mortgaged property refuses to vacate after the foreclosure sale, then (subject to the state and federal laws protecting certain tenancies and other interests discussed below) the purchaser at the foreclosure sale may bring forcible detainer proceedings to evict the occupant pursuant to chapter 24 of the Texas Property Code. The purchaser at foreclosure sale is entitled to recover possession of the mortgaged property after a foreclosure sale from a person in possession of the mortgaged property if the purchaser can show sufficient evidence of ownership to demonstrate a superior right to immediate possession. *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex. App.—Dallas 2001, no pet.); *see* Tex. Prop. Code § 22.001. Because a judgment of possession in a forcible detainer action is a determination only of the right to immediate possession, it does not determine the ultimate rights of the parties to any other issue in controversy relating to the realty in question. *AAA Free Move Ministorage, LLC v. OIS Investments, Inc.*, 419 S.W.3d 522, 528 (Tex. App.—San Antonio 2013, pet. denied).

Alleged defects in the foreclosure process or the purchaser's title to the property cannot be considered in a forcible detainer action. Those types of defects must be pursued in a wrongful foreclosure or quiet-title suit. *Williams v. Bank of New York Mellon*, 315 S.W.3d 925, 927 (Tex. App.—Dallas 2010, no pet.). The justice court and county court must assume that a foreclosure sale was proper and that a mortgagor holding over in possession is a tenant at sufferance. *Reynolds v. Wells Fargo Bank, N.A. ex rel. Freemont Investment & Loan*, 245 S.W.3d 57, 60 (Tex. App.—El Paso 2008, no pet.); *Dormady v. Dinero Land & Cattle Co.*, 61 S.W.3d 555, 557 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.) (alleged lack of foreclosure notice and opportunity to cure did not defeat jurisdiction of county court to determine immediate possession); *see also Scott v. Hewitt*, 90 S.W.2d 816, 818–19 (Tex. 1936) (determination of claim for wrongful foreclosure may be brought in district court and is independent of county court's determination in forcible detainer proceeding); *AAA Free Move Ministorage*, 419 S.W.3d at 526 (forcible detainer action is cumulative of other remedies that a party may have); *Villalon v. Bank One*, 176 S.W.3d 66, 70 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (forcible detainer action is not exclusive, but cumulative, of any other remedy a party may have in the courts, and displaced party may bring separate suit in district court to determine question of title).

During the 84th legislative session, Texas Property Code section 24.007 was amended to provide that a final judgment of a county court in an eviction suite may not be appealed on the issue of possession unless the premises in question are used for residential purposes only. *See* Acts 2015, 84th Leg., R.S., ch. 1113, § 1 (H.B. 3364), eff. Jan. 1, 2016. Before this amendment, such appeals could be taken in commercial eviction cases.

Effective January 1, 2016, new Texas Property Code sections 24.00511 and 24.00512 address the form and substance of appeal bonds in a residential eviction suit for nonpayment of rent tried in a justice court, with special procedures for determining the sufficiency of appeal bonds issued by persons that are not a corporate surety authorized by the Texas Department of Insurance to engage in business in Texas. *See* Acts 2015, 84th Leg., R.S., ch. 1027, § 1 (H.B. 1334), eff. Jan. 1, 2016. One significant provision is that if the justice court refuses to accept an appeal bond as sufficient under the statute and that decision is appealed to the county court, a writ of possession may not be issued before the county court issues a final decision on the sufficiency of the appeal bond. *See* Tex. Prop. Code § 24.00512(d)–(f). House Bill 1334 also added new Texas Property Code section 24.00521, which provides that a contest over the sufficiency of the appeal bond under section 24.00512 does not preclude a party from contesting the appeal bond in the county court once the county court has jurisdiction in the eviction suit and that the county court may modify the amount or form of the bond. *See* Acts 2015, 84th Leg., R.S., ch. 1027, § 2 (H.B. 1334), eff. Jan. 1, 2016. Finally, House Bill 1334 amended Texas Property Code section 24.0053 to provide (1) that the written court notice given to a tenant filing a pauper's affidavit must also be given in connection with the filing of an appeal bond (*see* Tex. Prop. Code § 24.0053(a–1)); (2) that within five days of filing the appeal bond to appeal an eviction for nonpayment of rent, the tenant must deposit the amount of rent to be paid in one rental pay period with the justice court (*see* Tex. Prop. Code § 24.0053(a–3)); and (3) that failure to tender such rent gives the landlord the right to obtain a writ of possession immediately and without hearing (*see* Tex. Prop. Code § 24.0053(a–3)). On sworn motion and hearing, the plaintiff in the eviction suit may withdraw money deposited in the court registry before final determination of the case. *See* Tex. Prop. Code § 24.0053(a–4)). See the related discussion at section 15.9:1 below concerning pauper's affidavits on appeal.

The Eighty-fourth Legislature also amended Texas Property Code section 24.0061 by adding subsection (d–1). *See* Acts 2015, 84th Leg., R.S., ch. 355, § 1 (H.B. 1853), eff. Sept. 1, 2015. Section 24.0061(d–1) states that a municipality may provide, without charge to the landlord or to the owner of personal property removed from a rental unit pursuant to section 24.0061(d), a portable, closed container into which the removed personal property shall be placed by the officer executing the writ or by the authorized person. The municipality may remove the container from the location near the rental unit and dispose of the contents by any lawful means if the owner of the removed personal property does not recover the property from the container within a reasonable time after the property is placed in the container. *See* Tex. Prop. Code § 24.0061(d–1).

Tenants under leases inferior to the lien of the foreclosed deed of trust may be treated as tenants at sufferance, unless they are residential tenants, whose right of possession may be protected by the state and federal statutes discussed immediately below. To remove a tenant at sufferance, the foreclosure sale purchaser must file a forcible detainer suit. *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595, 603

(Tex. App.—Houston [14th Dist.] 1994, writ denied). See form 15-5 in this manual, Letter to Tenant Accepting Lease, and form 15-6, Letter to Tenant at Sufferance.

In *Federal Home Loan Mortgage Corp. v. Pham*, 449 S.W.3d 230, 235–36 (Tex. App.—Houston [14th Dist.] 2014, no pet.), the court held the following:

> [A] new and independent cause of action for forcible detainer arises each time a person refuses to surrender possession of real property after a person entitled to possession of the property delivers a proper written notice to vacate. Accordingly, res judicata would not bar a second suit based on the commission of a subsequent forcible detainer.

§ 15.9:1 Texas Protections for Residential Tenants

Texas Property Code section 24.005(b) provides protections to certain tenants of a foreclosed property, providing in part the following:

> If a building is purchased at a . . . trustee's foreclosure sale under a lien superior to the tenant's lease and the tenant timely pays rent and is not otherwise in default under the tenant's lease after foreclosure, the purchaser must give a residential tenant of the building at least 30 days' written notice to vacate if the purchaser chooses not to continue the lease. The tenant is considered to timely pay the rent under this subsection if, during the month of the foreclosure sale, the tenant pays the rent for that month to the landlord before receiving any notice that a foreclosure sale is scheduled during the month or pays the rent for that month to the foreclosing lienholder or the purchaser at foreclosure not later than the fifth day after the date of receipt of a written notice of the name and address of the purchaser that requests payment. Before a foreclosure sale, a foreclosing lienholder may give written notice to a tenant stating that a foreclosure notice has been given to the landlord or owner of the property and specifying the date of the foreclosure.

Tex. Prop. Code § 24.005(b). *See Russell v. American Real Estate Corp.*, 89 S.W.3d 204, 208–09 (Tex. App.—Corpus Christi 2002, no pet.) (discussing rights of tenant holding in possession as tenant at sufferance after foreclosure sale and liabilities incurred by foreclosure sale purchaser exercising "self-help" repossession).

Texas Property Code section 24.0054 provides that with respect to eviction suits filed on or after January 1, 2012, if the tenant files a pauper's affidavit during the tenant's appeal of an eviction for nonpayment of rent and the tenant fails to either (1) tender the initial rent deposit into the court registry within five days of filing a pauper's affidavit under Texas Rule of Civil Procedure 749b(1) and Property Code section 24.0053 or (2) pay rent under the lease as rent comes due during the appeal period, upon application by the landlord the court shall immediately issue a writ of possession without a hearing. *See* Tex. Prop. Code § 24.0054.

Effective September 1, 2015, chapter 24A was added to the Property Code, setting forth a detailed procedure by which a person unable to enter his residence or former residence to retrieve personal property may apply to a justice court for an order to enter the residence in the company of a peace officer to retrieve specific items of personal property listed on the application. *See* Acts 2015, 84th Leg., R.S., ch. 1076, § 1 (H.B. 2486). The chapter provides that a landlord or land's agent who permits or facilitates entry into the residence in accordance with the court order cannot be held civilly or criminally liable for an act or omission arising in connection with permitting or facilitating the entry. *See* Tex. Prop. Code § 24A.004. It is a class B misdemeanor to interfere with a person or peace officer entering the residence under authority of a court order issued under chapter 24A. *See* Tex. Prop. Code § 24A.005.

§ 15.9:2 Texas Protections for Military Servicemembers

Effective January 1, 2012, Texas Property Code section 24.0051(d) provides that, in a forcible detainer suit, the first page of the citation must provide the defendant tenant a statutorily prescribed notice (in both English and Spanish) advising that if the tenant or the tenant's spouse is serving on active military duty, the tenant and spouse may have special rights with regard to the eviction action under federal law (such as the Servicemembers Civil Relief Act) and Texas law (such as Property Code section 92.017 regarding the tenant's right to vacate the premises and avoid liability for subsequent rent). *See* Tex. Prop. Code § 24.0051(d); *see also* Tex. Prop. Code § 92.017.

§ 15.9:3 Texas Law Concerning Person in Possession under Contract for Deed

If the foreclosure sale purchaser has a common source of title with the party in possession, such as in the case of a contract-for-deed purchaser and a mortgage lien granted by the title holder, the foreclosure sale purchaser may prevail if it can establish that the mortgage lienholder acquired its lien as a bona fide lienholder for value and without notice of the contract-for-deed purchaser's claim. *See, e.g., United Savings Ass'n of Texas v. Villanueva*, 878 S.W.2d 619, 622 (Tex. App.—Corpus Christi 1994, no writ). Section 22.021(d) of the Texas Property Code limits a prevailing foreclosure sale purchaser's damages for injuries or for the value of the use and occupation of the mortgaged property to the two-year period before the filing of the trespass-to-try-title action. *See* Tex. Prop. Code § 22.021(d).

§ 15.9:4 Federal Protections for Residential Tenants

The Protecting Tenants at Foreclosure Act (PTFA), which is Title VII of The Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632, codified at 12 U.S.C. § 5220 note, protects certain classes of tenants from immediate eviction following foreclosure of the properties they occupy. The PTFA took effect on May 20, 2009, and was originally scheduled to expire on December 31, 2012, but section 1484 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at scattered sections of 12 U.S.C. and 15 U.S.C.), extended the expiration date to December 31, 2014.

The tenant protection provisions apply in the case of any foreclosure on a "federally related mortgage loan" (which is given the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2602) or on any dwelling or residential real property. *See* PTFA § 702(a). They provide that "any immediate successor in interest" in such a foreclosed property, including a bank that takes title to a house upon foreclosure, will assume the interest subject to the rights of any bona fide tenant and will need to comply with certain notice requirements. *See* PTFA § 702(a). The protections of this law apply to tenants under a bona fide lease or tenancy. A lease or tenancy is bona fide only if: (1) the mortgagor or a child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the product of an arm's-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent or the rent is reduced or subsidized due to a federal, state, or local subsidy. *See* PTFA § 702(b).

Under this law, the immediate successor in interest of a dwelling or residential real property must provide the tenants with a notice to vacate at least ninety days before the effective date of such notice. Residential tenants must also be permitted to stay in the residence until the end of their leases, with two exceptions: (1) when the property is sold after foreclosure to a purchaser who will occupy the property as a primary residence or (2) when there is no lease or the lease is terminable at will under state law. *See* PTFA § 702(a). (Even when these exceptions apply, the tenants must still be given the ninety-day notice to vacate.)

See section 29.15 in this manual for further discussion of the PTFA.

Additional Resources

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Form 15-1

Acquisition or Abandonment of Secured Property
IRS Form 1099-A

Attention:

This form is provided for informational purposes only. Copy A appears in red, similar to the official IRS form. Do **not** file copy A downloaded from this website. The official printed version of this IRS form is scannable, but the online version of it, printed from this website, is not. A penalty may be imposed for filing forms that can't be scanned. See part O in the current General Instructions for Certain Information Returns for more information about penalties.

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8080 ☐ VOID ☐ CORRECTED

LENDER'S name, street address, city or town, state or province, country, ZIP or foreign postal code, and telephone no.		OMB No. 1545-0877 2015 Form 1099-A	**Acquisition or Abandonment of Secured Property**
LENDER'S federal identification number | BORROWER'S identification number	1 Date of lender's acquisition or knowledge of abandonment	2 Balance of principal outstanding $	**Copy A** **For Internal Revenue Service Center** **File with Form 1096.**
BORROWER'S name	3	4 Fair market value of property $	For Privacy Act and Paperwork Reduction Act Notice, see the **2015 General Instructions for Certain Information Returns.**
Street address (including apt. no.)	5 If checked, the borrower was personally liable for repayment of the debt . . . . ▶ ☐		
City or town, state or province, country, and ZIP or foreign postal code	6 Description of property		
Account number (see instructions)			

Form **1099-A** Cat. No. 14412G www.irs.gov/form1099a Department of the Treasury - Internal Revenue Service

Do Not Cut or Separate Forms on This Page — Do Not Cut or Separate Forms on This Page

☐ CORRECTED (if checked)

LENDER'S name, street address, city or town, state or province, country, ZIP or foreign postal code, and telephone no.			OMB No. 1545-0877 2015 Form 1099-A	**Acquisition or Abandonment of Secured Property**
LENDER'S federal identification number	BORROWER'S identification number	1 Date of lender's acquisition or knowledge of abandonment	2 Balance of principal outstanding $	**Copy B** **For Borrower** This is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction may be imposed on you if taxable income results from this transaction and the IRS determines that it has not been reported.
BORROWER'S name		3	4 Fair market value of property $	
Street address (including apt. no.)		5 If checked, the borrower was personally liable for repayment of the debt . . . . ▶ ☐		
City or town, state or province, country, and ZIP or foreign postal code		6 Description of property		
Account number (see instructions)				

Form **1099-A** (keep for your records) www.irs.gov/form1099a Department of the Treasury - Internal Revenue Service

Instructions for Borrower

Certain lenders who acquire an interest in property that was security for a loan or who have reason to know that such property has been abandoned must provide you with this statement. You may have reportable income or loss because of such acquisition or abandonment. Gain or loss from an acquisition generally is measured by the difference between your adjusted basis in the property and the amount of your debt canceled in exchange for the property, or, if greater, the sale proceeds. If you abandoned the property, you may have income from the discharge of indebtedness in the amount of the unpaid balance of your canceled debt. The tax consequences of abandoning property depend on whether or not you were personally liable for the debt. Losses on acquisitions or abandonments of property held for personal use are not deductible. See Pub. 4681 for information about your tax consequences.

Property means any real property (such as a personal residence); any intangible property; and tangible personal property that is held for investment or used in a trade or business.

If you borrowed money on this property with someone else, each of you should receive this statement.

Borrower's identification number. For your protection, this form may show only the last four digits of your social security number (SSN), individual taxpayer identification number (ITIN), adoption taxpayer identification number (ATIN), or employer identification number (EIN). However, the issuer has reported your complete identification number to the IRS.

Account number. May show an account or other unique number the lender assigned to distinguish your account.

Box 1. For a lender's acquisition of property that was security for a loan, the date shown is generally the earlier of the date title was transferred to the lender or the date possession and the burdens and benefits of ownership were transferred to the lender. This may be the date of a foreclosure or execution sale or the date your right of redemption or objection expired. For an abandonment, the date shown is the date on which the lender first knew or had reason to know that the property was abandoned or the date of a foreclosure, execution, or similar sale.

Box 2. Shows the debt (principal only) owed to the lender on the loan when the interest in the property was acquired by the lender or on the date the lender first knew or had reason to know that the property was abandoned.

Box 4. Shows the fair market value of the property. If the amount in box 4 is less than the amount in box 2, and your debt is canceled, you may have cancellation of debt income. If the property was your main home, see Pub. 523 to figure any taxable gain or ordinary income.

Box 5. Shows whether you were personally liable for repayment of the debt when the debt was created or, if modified, when it was last modified.

Box 6. Shows the description of the property acquired by the lender or abandoned by you. If "CCC" is shown, the form indicates the amount of any Commodity Credit Corporation loan outstanding when you forfeited your commodity.

Future developments. For the latest information about developments related to Form 1099-A and its instructions, such as legislation enacted after they were published, go to *www.irs.gov/form1099a*.

☐ VOID ☐ CORRECTED

LENDER'S name, street address, city or town, state or province, country, ZIP or foreign postal code, and telephone no.		OMB No. 1545-0877 **2015** Form **1099-A**	**Acquisition or Abandonment of Secured Property**
LENDER'S federal identification number / BORROWER'S identification number	1 Date of lender's acquisition or knowledge of abandonment	2 Balance of principal outstanding $	**Copy C** **For Lender**
BORROWER'S name	3	4 Fair market value of property $	For Privacy Act and Paperwork Reduction Act Notice, see the **2015 General Instructions for Certain Information Returns.**
Street address (including apt. no.)	5 If checked, the borrower was personally liable for repayment of the debt . . . . ▶ ☐		
City or town, state or province, country, and ZIP or foreign postal code	6 Description of property		
Account number (see instructions)			

Form **1099-A** www.irs.gov/form1099a Department of the Treasury - Internal Revenue Service

Instructions for Lender

To complete Form 1099-A, use:

- the 2015 General Instructions for Certain Information Returns, and
- the 2015 Instructions for Forms 1099-A and 1099-C.

To order these instructions and additional forms, go to *www.irs.gov/form1099a* or call 1-800-TAX-FORM (1-800-829-3676).

Caution. Because paper forms are scanned during processing, you cannot file Forms 1096, 1097, 1098, 1099, 3921, 3922, or 5498 that you print from the IRS website.

Due dates. Furnish Copy B of this form to the borrower by February 1, 2016.

File Copy A of this form with the IRS by February 29, 2016. If you file electronically, the due date is March 31, 2016. To file electronically, you must have software that generates a file according to the specifications in Pub. 1220, Specifications for Electronic Filing of Forms 1097, 1098, 1099, 3921, 3922, 5498, and W-2G. The IRS does not provide a fill-in form option.

Need help? If you have questions about reporting on Form 1099-A, call the information reporting customer service site toll free at 1-866-455-7438 or 304-263-8700 (not toll free). Persons with a hearing or speech disability with access to TTY/TDD equipment can call 304-579-4827 (not toll free).

Form 15-2

Annual Summary and Transmittal of U.S. Information Returns
IRS Form 1096

Attention:

This form is provided for informational purposes only. Copy A appears in red, similar to the official IRS form. Do **not** file copy A downloaded from this website. The official printed version of this IRS form is scannable, but the online version of it, printed from this website, is not. A penalty may be imposed for filing forms that can't be scanned. See part O in the current General Instructions for Certain Information Returns for more information about penalties.

To order official IRS forms, call 1-800-TAX-FORM (1-800-829-3676) or Order Information Returns and Employer Returns Online, and we'll mail you the scannable forms and other products.

See IRS Publications 1141, 1167, 1179 and other IRS resources for information about printing these tax forms.

Do Not Staple 6969

Form **1096**

Department of the Treasury
Internal Revenue Service

Annual Summary and Transmittal of U.S. Information Returns

OMB No. 1545-0108

2015

FILER'S name

Street address (including room or suite number)

City or town, state or province, country, and ZIP or foreign postal code

Name of person to contact	Telephone number	For Official Use Only
Email address	Fax number	

1 Employer identification number	2 Social security number	3 Total number of forms	4 Federal income tax withheld	5 Total amount reported with this Form 1096
			$	$

6 Enter an "X" in only one box below to indicate the type of form being filed.

7 If this is your **final return**, enter an "X" here . . . . . ▶ ☐

W-2G 32	1097-BTC 50	1098 81	1098-C 78	1098-E 84	1098-Q 74	1098-T 83	1099-A 80	1099-B 79	1099-C 85	1099-CAP 73	1099-DIV 91	1099-G 86	1099-INT 92
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
1099-K 10	1099-LTC 93	1099-MISC 95	1099-OID 96	1099-PATR 97	1099-Q 31	1099-R 98	1099-S 75	1099-SA 94	3921 25	3922 26	5498 28	5498-ESA 72	5498-SA 27
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐

Return this entire page to the Internal Revenue Service. Photocopies are not acceptable.

Under penalties of perjury, I declare that I have examined this return and accompanying documents, and, to the best of my knowledge and belief, they are true, correct, and complete.

Signature ▶ Title ▶ Date ▶

Instructions

Future developments. For the latest information about developments related to Form 1096, such as legislation enacted after it was published, go to *www.irs.gov/form1096*.

Reminder. The only acceptable method of filing information returns with Internal Revenue Service/Information Returns Branch is electronically through the FIRE system. See Pub. 1220, Specifications for Electronic Filing of Forms 1097, 1098, 1099, 3921, 3922, 5498, and W-2G.

Purpose of form. Use this form to transmit paper Forms 1097, 1098, 1099, 3921, 3922, 5498, and W-2G to the Internal Revenue Service. Do not use Form 1096 to transmit electronically. For electronic submissions, see Pub. 1220.

Caution. If you are required to file 250 or more information returns of any one type, you must file electronically. If you are required to file electronically but fail to do so, and you do not have an approved waiver, you may be subject to a penalty. For more information, see part F in the 2015 General Instructions for Certain Information Returns.

Who must file. The name, address, and TIN of the filer on this form must be the same as those you enter in the upper left area of Forms 1097, 1098, 1099, 3921, 3922, 5498, or W-2G. A filer is any person or entity who files any of the forms shown in line 6 above.

Enter the filer's name, address (including room, suite, or other unit number), and TIN in the spaces provided on the form.

When to file. File Form 1096 as follows.

- With Forms 1097, 1098, 1099, 3921, 3922, or W-2G, file by February 29, 2016.
- With Forms 5498, file by May 31, 2016.

Where To File

Send all information returns filed on paper with Form 1096 to the following.

If your principal business, office or agency, or legal residence in the case of an individual, is located in	Use the following three-line address
Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, West Virginia	Department of the Treasury Internal Revenue Service Center Austin, TX 73301

For more information and the Privacy Act and Paperwork Reduction Act Notice, see the 2015 General Instructions for Certain Information Returns. Cat. No. 14400O Form **1096** (2015)

Form 1096 (2015) Page **2**

Alaska, California, Colorado, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Washington, Wisconsin, Wyoming	Department of the Treasury Internal Revenue Service Center Kansas City, MO 64999

If your legal residence or principal place of business is outside the United States, file with the Department of the Treasury, Internal Revenue Service Center, Austin, TX 73301.

Transmitting to the IRS. Group the forms by form number and transmit each group with a separate Form 1096. For example, if you must file both Forms 1098 and 1099-A, complete one Form 1096 to transmit your Forms 1098 and another Form 1096 to transmit your Forms 1099-A. You need not submit original and corrected returns separately. Do not send a form (1099, 5498, etc.) containing summary (subtotal) information with Form 1096. Summary information for the group of forms being sent is entered only in boxes 3, 4, and 5 of Form 1096.

Box 1 or 2. Make an entry in either box 1 or 2; not both. Individuals not in a trade or business must enter their social security number (SSN) in box 2; sole proprietors and all others must enter their employer identification number (EIN) in box 1. However, sole proprietors who do not have an EIN must enter their SSN in box 2. Use the same EIN or SSN on Form 1096 that you use on Forms 1097, 1098, 1099, 3921, 3922, 5498, or W-2G.

Box 3. Enter the number of forms you are transmitting with this Form 1096. Do not include blank or voided forms or the Form 1096 in your total. Enter the number of correctly completed forms, not the number of pages, being transmitted. For example, if you send one page of three-to-a-page Forms 1098 with a Form 1096 and you have correctly completed two Forms 1098 on that page, enter "2" in box 3 of Form 1096.

Box 4. Enter the total federal income tax withheld shown on the forms being transmitted with this Form 1096.

Box 5. No entry is required if you are filing Form 1098-T, 1099-A, or 1099-G. For all other forms, enter the total of the amounts from the specific boxes of the forms listed below.

Form W-2G	Box 1
Form 1097-BTC	Box 1
Form 1098	Boxes 1 and 2
Form 1098-C	Box 4c
Form 1098-E	Box 1
Form 1098-Q	Box 4
Form 1099-B	Boxes 1d and 13
Form 1099-C	Box 2
Form 1099-CAP	Box 2
Form 1099-DIV	Boxes 1a, 2a, 3, 8, 9, and 10
Form 1099-INT	Boxes 1, 3, 8, 10, 11, and 13
Form 1099-K	Box 1a
Form 1099-LTC	Boxes 1 and 2
Form 1099-MISC	Boxes 1, 2, 3, 5, 6, 7, 8, 10, 13, and 14
Form 1099-OID	Boxes 1, 2, 5, 6, and 8
Form 1099-PATR	Boxes 1, 2, 3, and 5
Form 1099-Q	Box 1
Form 1099-R	Box 1
Form 1099-S	Box 2
Form 1099-SA	Box 1
Form 3921	Boxes 3 and 4
Form 3922	Boxes 3, 4, and 5
Form 5498	Boxes 1, 2, 3, 4, 5, 8, 9, 10, 12b, 13a, and 14a
Form 5498-ESA	Boxes 1 and 2
Form 5498-SA	Box 1

Final return. If you will not be required to file Forms 1097, 1098, 1099, 3921, 3922, 5498, or W-2G in the future, either on paper or electronically, enter an "X" in the "final return" box.

Corrected returns. For information about filing corrections, see the 2015 General Instructions for Certain Information Returns. Originals and corrections of the same type of return can be submitted using one Form 1096.

[Reserved]

Form 15-3

Petition to Interplead Funds

I.

Nature of Case

This case involves claims for excess proceeds left over as a result of a foreclosure sale on [**date**] of [**address**] ("Property"), and more particularly described as follows: [**legal description**].

II.

Parties and Jurisdiction

Plaintiff/Interpleader, [**name of substitute trustee**], appears in his capacity as Substitute Trustee for [**name of entity**].

Repeat the following paragraph for each defendant.

Defendant, [**name of person claiming an interest in the excess proceeds of the foreclosure sale**], claims an interest in the funds sought to be interpleaded because [**state reason why defendant claims an interest in the funds**] and [**select one of the following**: may be served at [**address**]/does not maintain a registered agent for service of process in the state of Texas and may be served with process at [**address**]].

Continue with the following.

This Court has subject matter jurisdiction over this controversy because the cause of action involves real property.

Venue is proper in this county because the real property made subject of this lawsuit is located in [**county**] County, Texas.

III.

Facts

Plaintiff/Interpleader is or may be subject to liability with respect to the excess proceeds from a [Substitute Trustee/Trustee]'s sale of the Property pursuant to the terms of a deed of trust recorded at [**recording information**]. The sale was held on [**date**]. The sales price of the Property was $[**amount**], of which $[**amount**] was delivered to the mortgagee in accordance with the terms of the deed of trust, with Interpleader holding the remaining excess foreclosure sales proceeds in the amount of $[**amount**] ("Excess Funds"). Plaintiff/Interpleader has been contacted by the [Defendants/Defendants' agents/Defendants' representatives], each of whom claims to have an interest in the Excess Funds. However, Plaintiff/Interpleader has not been able to confirm this information with certainty. Because of potential rival claims by Defendants, Interpleader/Plaintiff hereby desires to tender the Excess Funds into the registry of the Court for determination of who is entitled to those funds.

IV.

Argument and Authority

A party is entitled to relief by interpleader if the party is subject to or has reasonable grounds to anticipate rival claims to the same funds or property. *Heggy v. American Trading Employee Retirement Account Plan*, 123 S.W.3d 770, 775 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Olmos v. Pecan Grove Municipal Utility District*, 857 S.W.2d 734, 741 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Plaintiff/Interpleader is subject to or reasonably anticipates the rival claims of the Defendants to the Excess Funds.

Each Defendant may claim a portion of the Excess Funds based on his alleged interest in the Property subject to the foreclosure. These claims are adverse and conflicting, and Plaintiff/Interpleader is unable to determine which Defendant is entitled to the Excess Funds or any portion thereof. With respect to the Excess Funds, Plaintiff/Interpleader therefore is in the position of an innocent stakeholder faced with the possibility of multiple liability and incidental costs if it pays out Excess Funds on the claims of the Defendants.

Plaintiff/Interpleader neither has, nor claims, any interest in the Excess Funds, which Plaintiff/Interpleader, at all times, has been willing to deliver to the person or persons legally entitled to possession thereof.

On the filing of this petition, Plaintiff/Interpleader is prepared to make an unequivocal tender of the Excess Funds to the Court upon the Court's order.

V.

Costs and Attorney's Fees

When an interpleader is a disinterested stakeholder with no interest of its own in the property, the interpleader can recover its costs and attorney's fees from the interpleaded funds. *U.S. v. Ray Thomas Gravel Co.*, 380 S.W.2d 576, 581 (Tex. 1964). Interpleader is a disinterested stakeholder and should be awarded costs and reasonable attorney's fees. It was necessary for Plaintiff/Interpleader to hire [**name of attorney**] to prepare this Petition to Interplead Funds.

The reasonable and necessary attorney's fees incurred in filing this petition are $[**amount**], which is established by the affidavit of [**name of attorney**] attached hereto as Exhibit A.

VI.

Conclusion

For the reasons stated, Plaintiff/Interpleader requests that Defendants appear and answer, asserting their respective claims to the Excess Funds from the sale, which Plaintiff/ Interpleader is ready to deposit with the Court, and that, on final hearing, Plaintiff/Interpleader have the following:

1. That Plaintiff/Interpleader be released and discharged from all liability as to each Defendant and any other third party that may make a claim to the Excess Funds from the sale.

2. That Plaintiff/Interpleader have and recover a reasonable fee for the services of its attorney, together with all costs of Court and expenses incurred by Plaintiff/Interpleader in this suit, with all such fees, costs, and expenses to be paid out of the Excess Funds from the sale prior to any award to the prevailing party.

3. Such other and further relief to which Interpleader may be justly entitled.

Respectfully submitted,

____

[**Name of attorney**]
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach affidavit.

Form 15-4

This sample agreement resulted from conflicting claims to surplus sale proceeds in a foreclosure of a lien on mortgaged property owned by cotenants. Some of the cotenants made claims to proceeds of other cotenants on grounds of having advanced funds to pay other cotenants' share of the note. Also, federal tax liens and abstracts of judgment were filed against some of the cotenants.

Note: When preparing this form, the attorney should carefully review Tex. Prop. Code §§ 51.0001, 51.0025, and 51.0075 and Tex. Bus. & Com. Code §§ 3.203 and 3.301 to ensure any reference to a person accurately describes the role the person holds or performs in the context of a foreclosure proceeding, e.g., references to "noteholder," "beneficiary," "owner," "lender," "obligor of the debt," "mortgagor," "mortgagee," or "mortgage servicer" as appropriate.

Foreclosure Sales Proceeds Distribution Agreement

STATE OF TEXAS)

COUNTY OF)

This Foreclosure Sales Proceeds Distribution Agreement (the "Distribution Agreement") is executed by and between the undersigned persons who at the time of the herein-referenced foreclosure sale were respectively the owner (such of the cotenants who execute a Distribution Agreement are referred to as the "Undersigned Property Interest Owners") of the herein-identified interest (the "Property Interest") in the Property herein described and the undersigned person as the Substitute Trustee under the Deed of Trust (as such terms are herein defined) for good and valuable consideration.

A. Recitals

1. *Original Lender.* By a Deed of Trust (the "Deed of Trust") dated **[date]**, recorded in **[recording data]** of the real property records of **[county]** County, Texas, **[name]** (together with heirs, successors, and assigns called the "Mortgagors") conveyed to **[name]**, as Trustee, certain Property hereinafter described, for the purpose of securing and enforcing payment of the indebtedness and obligations therein described (collectively the "Obligations") including but not limited to a note described in the Deed of Trust, which was in the original

principal sum of $[**amount**] executed by [**name**] (the "Note Makers") and is payable to the order of [**name**] (the "Original Lender").

2. *Current Lender.* [**Name**] (the "Noteholder") is the current owner and holder of the Obligations and is the beneficiary under the Deed of Trust. The note, together with all renewals and extensions, is referred to as the "Note." The loan transaction and all subsequent dealings between the Original Lender, its successors and assigns, including the Noteholder, is referred to as the "Loan." All documents (including the Note, the Deed of Trust, the Modifications Agreements, and this Distribution Agreement) executed by all or any of the Original Lender, the Noteholder, Note Makers, the Mortgagors, and/or their respective heirs, successors, and assigns are collectively called the "Loan Documents."

3. *Co-ownership of Mortgaged Property.* By deed dated [**date**], filed for record in [**recording data**], [**name**] conveyed to Property Interest Owners such Property Interests encumbered by the lien of the Deed of Trust, and by such instrument the Property Interest Owner assumed the obligation to pay the Obligations. The deed conveyed the Property to the following persons (the "Cotenants") in the following undivided shares:

Name	Fractional Share
______________________	________%
______________________	________%
______________________	________%
______________________	________%
______________________	________%
______________________	________%
______________________	________%
______________________	________%
	100%

4. *Foreclosure Sale.* On [**date**], the Substitute Trustee at the direction of the Noteholder conducted a Foreclosure Sale of the lien of the Deed of Trust. The property sold included the land described in the Deed of Trust (together with the rights and appurtenances related thereto referred to as the "Property"). [**Name**] (the "Foreclosure Sale Purchaser") purchased the Property for a cash bid of $[**amount**] (the "Gross Sales Proceeds"). The Substitute Trustee executed and delivered to the Foreclosure Sale Purchaser the Foreclosure Sale Deed dated [**date**], which is recorded in [**recording data**] of the real property records of [**county**] County, Texas.

5. *Surplus Proceeds.* At the time of the Foreclosure Sale, the unpaid balance of principal and interest owing on the Obligations was $[**amount**] (the "Loan Balance"). The Deed of Trust provides that the Substitute Trustee shall apply the Gross Sales Proceeds as follows: (a) first, to pay the reasonable expense of making the sale including a fee to the Substitute Trustee of 5 percent (the "Stipulated Percentage Trustee's Fee") of the amount received in cash (the "Trustee's Fees and Expenses"); (b) the Loan Balance as far as possible, paying first any portion thereof not evidenced by the Note, and the attorney's fees and expenses incurred by the Noteholder in seeking payment of the obligations and the enforcement of the Noteholder's rights and remedies (the "Attorney's Fees of the Noteholder"); and (c) then any remainder (the "Net Sales Proceeds") to the Mortgagors, including their heirs, successors, and assigns.

6. *Payment into Registry of Court.* The Undersigned Property Interest Owners have requested the Substitute Trustee to pay to each Property Interest Owner's pro rata share (the "Undersigned Property Interest Owner's Share") of the Net Sales Proceeds into the Registry of the District Court for determination of who is entitled to such funds.

B. Agreements

To induce the Substitute Trustee to pay such amount to the Undersigned Property Interest Owners, the Undersigned Property Interest Owners make the following representations, warranties, agreements, and indemnities:

1. *Title.* Each Undersigned Property Interest Owner makes the following representations and warranties to the Substitute Trustee as to each person's respective Property Interest. At the time of the foreclosure sale, each Undersigned Property Interest Owner owned the undivided fee simple title interest to the Property (the "Property Interest") set forth in the chart above.

The Undersigned Property Interest Owner represents and warrants that at the time of the foreclosure sale, the Undersigned Property Interest Owner owned both record and beneficial title to the Property Interest free and clear of all claims by third parties, including the other Cotenants and lien holders.

The Undersigned Property Interest Owner represents and warrants to the Substitute Trustee that there are no outstanding judgments against the Undersigned Property Interest Owner and that the Undersigned Property Interest Owner has received no notice of any claim of entitlement to the Undersigned Property Interest Owner's Share to be distributed to the Undersigned Property Interest Owner.

The Undersigned Property Interest Owner represents and warrants that as of the foreclosure sale the Undersigned Property Interest Owner had not granted, created, or authorized the undertaking of any work, services, or improvements to the Property by any mechanic or materialman, and there exists no choate or inchoate lien against the Property arising from the actions of the Undersigned Property Interest Owner.

2. *Distribution of Foreclosure Sales Proceeds.* Pursuant to the Loan Documents, the Substitute Trustee is making the following distributions:

   a. *Trustee's Fees and Expenses.* $[**Amount**] will be distributed to the Substitute Trustee to pay for the expenses incurred by the Substitute Trustee in making the sale, including the preparation of this Distribution Agreement, and that are accepted by the Substitute Trustee in full payment of the Trustee's Fee and Expenses. Substitute Trustee releases as to the Undersigned Property Interest Owner any claim apportioned to the share of the Undersigned Property Interest Owner for the payment of the Stipulated Percentage Trustee's Fee, provided, however, such claim is not released as to any Cotenant who does not execute a Distribution Agreement with the Substitute Trustee, or as to whom, at Substitute Trustee's election, Net Sales Proceeds are tendered into the Registry of the District Court.

   b. *Loan Balance and Attorney's Fees.* $[**Amount**] will be distributed to Noteholder as the Loan Balance owing on the Note and $[**amount**] to [**name**] for the Attorney's Fees of the Noteholder.

   c. *Distributed Net Proceeds.* The following amounts will be distributed to the Undersigned Property Interest Owners as the Undersigned Property Interest Owner's Share of the Net Sales Proceeds:

Name	Share
____________________	$________
____________________	$________
____________________	$________
____________________	$________

The Undersigned Property Interest Owner agrees that the amounts paid as Trustee's Fees and Expenses and Attorney's Fees out of the Gross Sales Proceeds are just, fair, and reasonable.

3. *Release.* The Undersigned Property Interest Owner hereby compromises, settles, waives, acquits, fully releases, and forever discharges the Substitute Trustee, the Noteholder, and the Foreclosure Sale Purchaser and any and all agents, representatives, employees, servants, directors, officers, shareholder's assigns, predecessors, and successors thereof, as well as all other persons in privity with same including the firm of [**name of firm**] and its attorneys, shareholders, and employees (the "Attorney Representing Noteholder") (collectively the "Released Parties") of and from any and all claims, demands, controversies, actions, or causes of action that the Undersigned Property Interest Owner has held or may now or in the future own or hold for damages, costs, expenses, offsets, breach of any duty, usury, or any other loss, whether known or unknown, arising from the Obligations or any loan of any moneys or other dealings or actions between the Noteholder, its predecessors, with the Note Makers, the Mortgagors, their successors and assigns, including the Undersigned Property Interest Owner, including the actions taken by the attorneys representing Noteholder in the collection of the amounts owing on the Loan, the actions of the Substitute Trustee in the foreclosure sale proceedings and the distribution of the foreclosure sale proceeds.

The Undersigned Property Interest Owner acknowledges that the lien of the Deed of Trust was, as of the foreclosure sale, a valid and first lien against the Property, and Noteholder as the Beneficiary of the Deed of Trust was entitled to foreclose its lien on the Property.

The Undersigned Property Interest Owner understands and agrees that the Share of the Net Sales Proceeds paid by the Substitute Trustee to the Undersigned Property Interest Owner is in full satisfaction of any and all claims for damages arising on account of the above-described occurrences, and the Undersigned Property Interest Owner will receive no further sums of money or other consideration from any of the Released Parties and agrees not lie for a prior void foreclosure sale (which was conducted in violation of a temporary restraining order) if the mortgagor does not contest a subsequent foreclosure by the same mortgagee.

§ 16.4 Remedy of Rescission to Recover Title

If there is a defect in the foreclosure process, instead of pursuing damages a mortgagor may seek to have the foreclosure sale equitably rescinded and the foreclosure sale deed canceled. The effect of rescission is to return the parties to the status quo ante, with both the debt and lien revived. *See Shearer v. Allied Live Oak Bank*, 758 S.W.2d 940 (Tex. App.—Corpus Christi 1988, writ denied), where the court held:

> Because the foreclosure sale was void, this debt is revived and considered outstanding.
>
> Because the foreclosure sale of the real property was set aside, both parties assumed their original positions as debtor and creditor. Therefore, we hold that the trial court did not err in finding the bank's lien on the real property to be valid.

Shearer, 758 S.W.2d at 943.

Payment of Debt as Condition to Rescission: Since rescission is an equitable remedy, the mortgagor seeking rescission must do equity itself: "In order to set aside the foreclosure sale, however, the mortgagor must tender the amount owed on the mortgage. Setting aside a trustee sale is an equitable remedy which requires the mortgagor to make a valid tender of the amount due to receive equity." *Galvan v. Centex Home Equity Co., L.L.C.*, No. 04–06–00820–CV, 2008 WL 441773, at *4 (Tex. App.—San Antonio Feb. 20, 2008, no pet.) (mem. op.) (citing *Lambert v. First National Bank of Bowie*, 993 S.W.2d 833, 835 (Tex. App.—Fort Worth 1999, pet. denied); *Fillion v. David Silvers Co.*, 709 S.W.2d 240, 246 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)). Consequently, a mortgagor must come to the court with clean hands to seek the equitable remedy of setting aside the foreclosure sale. *See Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988). Under application of this maxim, before a plaintiff would be entitled to equitable relief, the plaintiff must do equity and tender the amount due and owing under the promissory note. *White v. BAC Home Loans Servicing, LP*, No. 3:09-CV-2484-G, 2010 WL 4352711, at *5 (N.D. Tex. Nov. 2, 2010) ("to the extent [plaintiff] seeks equitable relief to avoid foreclosure, he cannot state a claim for such relief because he has not tendered the amount due on the loan"); *Fillion*, 709 S.W.2d at 246 ("a necessary prerequisite to the . . . recovery of title . . . is tender of whatever amount is owed on the note"); *Grella v. Berry*, 647 S.W.2d 15, 18 (Tex. App.—Houston 1982, no writ) ("In a suit seeking equitable relief to avoid foreclosure, where the appellants allege they can pay the full amount of the note, we are of the opinion that the appellants must affirmatively demonstrate their ability to pay the full amount due on the note if they are to obtain equity.").

In *Fillion*, the court held not only that the defaulting mortgagor was required to tender the secured debt but also that the tender was required to be "an unconditional offer by a debtor or obligor to pay another, in current coin of the realm, a sum on a specified debt or obligation." *Fillion*, 709 S.W.2d at 246 (quoting *Baucum v. Great American Insurance Co. of New York*, 370 S.W.2d 863, 866 (Tex. 1963)); *see also Pachter v. Woodman*, 534 S.W.2d 940, 945–46 (Tex. Civ. App.—Tyler 1976), *rev'd on other grounds*, 547 S.W.2d 954 (Tex. 1977); *Phillips v. Latham*, 523 S.W.2d 19, 24–25 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) (mortgagor need pay purchaser at sale only fair market value of mortgaged property, not full amount of sale proceeds); *Price v. Reeves*, 91 S.W.2d

862, 865 (Tex. Civ. App.—Fort Worth 1936, writ dism'd).

Because a mortgagor who lacks assets to pay the debt before foreclosure is rarely in a better financial situation after the foreclosure, rescission is often not a practical remedy for the mortgagor. If, however, the property has increased significantly in value after the foreclosure sale, an attack on a wrongful foreclosure sale by the mortgagor may be more feasible.

§ 16.5 Remedy of Action to Quiet Title

As an alternative to rescission, if the defect in the foreclosure sale is of such a degree that the sale is determined by the court to be void as opposed to voidable, the mortgagor may sue to regain title and possession of the mortgaged property under the legal remedy known as a trespass-to-try-title action. *Slaughter v. Qualls*, 162 S.W.2d 671, 674–75 (Tex. 1942); *Henke v. First Southern Properties, Inc.*, 586 S.W.2d 617, 620 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

§ 16.5:1 Elements of Trespass to Try Title

To prevail in a trespass-to-try-title action, a "plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitation, or (4) prove title by prior possession coupled with proof that possession was not abandoned." *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004) (citations omitted). An adverse claim, to constitute a cloud on the title removable by the court, must be one that is valid on its face but is proved by extrinsic evidence to be invalid or unenforceable. *Sadler v. Duvall*, 815 S.W.2d 285, 293, n.2 (Tex. App.—Texarkana 1991, writ denied). Note, however, a trespass to try title action is unavailable where a mortgagee's interest in the property is valid and enforceable and the purchaser at the foreclosure sale is a bona fide purchaser. *Sgroe v. Wells Fargo Bank, N.A.*, 941 F. Supp. 2d 731, 751 (E.D. Tex. 2013).

§ 16.5:2 Tender of Debt Not Required

Although Texas courts have found tender of the unpaid debt to be a necessary condition for a rescission action to recover title based on the principle that a party seeking an equitable remedy must do equity (as discussed in section 16.4 above), there does not appear to be, at this time, any authority that such tender is a necessary condition for an action to quiet title under Texas law on a trespass to try title action. *Warren v. Bank of America, N.A.*, No. 3:11-CV-3603-M, 2012 WL 3020075, at *3 (N.D. Tex. Jun. 19, 2012) (citing *Giles v. Bank of America, N.A.*, 2012 WL 1038581, at *4 (W.D. Tex. Mar. 27, 2012)).

§ 16.6 Effect of Subsequent Sale of Collateral on Mortgagor's Recovery

In a rescission suit by the mortgagor, the purchaser at a foreclosure sale is not able to claim the protection of being a good-faith purchaser for value without notice of any defect in the sale. Bidders at foreclosure sales do so at their own peril. *Henke v. First Southern Properties, Inc.*, 586 S.W.2d 617, 620 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.). However, a good-faith purchaser for value from the purchaser at the foreclosure sale takes title free of foreclosure sale defects unknown to the subsequent purchaser. *White v. Lakewood Bank & Trust Co.*, 438 S.W.2d 129, 134 (Tex. Civ. App.—Dallas 1969, no writ); *Slaughter v. Qualls*, 149 S.W.2d 651 (Tex. Civ. App.—Amarillo 1941), *aff'd*, 162 S.W.2d 671 (Tex. 1942). The rationale is that the mortgagor, by executing the deed of trust, puts the trustee in the position to "create the appearance of good title in the original purchaser at the trustee's sale." *Phillips v. Latham*, 523 S.W.2d 19, 24 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.). Thus, the subsequent purchaser, if a good-faith purchaser for value, acquires good title not on the theory that good title actually passes by the foreclosure sale deed but rather by estoppel against the mortgagor for having executed the deed of trust in the first place. The mortgagor has the burden to prove that the subsequent purchaser is not an innocent purchaser. *See Connor v. Lane*, 355 S.W.2d 223, 224 (Tex. Civ. App.—Waco 1962, no writ). A sale to a subsequent purchaser with notice of the defect in the sale is void. *Slaughter*, 149 S.W.2d at 657.

§ 16.7 Statute of Limitations

See the discussion regarding the statute of limitations in section 10.26 in this manual.

§ 16.7:1 Damages

A suit for damages must be filed within four years of the wrongful foreclosure. Tex. Civ. Prac. & Rem. Code § 16.004(a); *Gonzales v. Lockwood Lumber Co.*, 668 S.W.2d 813, 815 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). A wrongful foreclosure "cause of action for any deficiency exists on the date of foreclosure." *Trunkhill Capital, Inc. v. Jansma*, 905 S.W.2d 464, 468 (Tex. App.—Waco 1995, writ denied).

§ 16.7:2 Rescission

A suit for rescission must be filed within four years of the foreclosure sale. Tex. Civ. Prac. & Rem. Code § 16.051.

§ 16.7:3 Trespass to Try Title

The mortgagor may bring an action in trespass to try title at any time before the applicable adverse possession statute of limitations has matured in the purchaser. *See* Tex. Civ. Prac. & Rem. Code §§ 16.021–.037. Section 16.025 provides for a five-year limitations period, provided the possessor has paid ad valorem taxes on the property and claims the property under deed or deeds duly recorded. *See* Tex. Civ. Prac. & Rem. Code § 16.025. Section 16.026 provides for a ten-year limitations period of continuous possession. *See* Tex. Civ. Prac. & Rem. Code § 16.026.

§ 16.7:4 Attorney Malpractice

The statute of limitations for attorney malpractice in representing a foreclosing lender is tolled until all appeals are exhausted in a wrongful foreclosure suit of the mortgagor. *Gulf Coast Investment Corp. v. Brown*, 821 S.W.2d 159, 160 (Tex. 1991) (attorney accused of failing to send notice of intent to accelerate a note before the foreclosure sale). *See also Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 156 (Tex. 1991); *Aduddell v. Parkhill*, 821 S.W.2d 158 (Tex. 1991). The discovery rule applies to malpractice claims in the foreclosure context so that the limitations statute begins to run only when the facts establishing a cause of action are discovered or should have been, in the exercise of reasonable care and diligence, discovered by the plaintiff. *Independent Life & Accident Insurance Co. v. Childs, Fortenbach, Beck & Guyton*, 756 S.W.2d 54, 55 (Tex. App.—Texarkana 1988, no writ).

A settlement reached in a suit by a maker for wrongful foreclosure against the mortgagee, wherein the mortgagee had assigned its malpractice claim against its attorney and had stipulated that it had wrongfully failed to send notice of acceleration to the maker, did not constitute collateral estoppel in the suit against the attorney. *See Phillips v. Allums*, 882 S.W.2d 71, 74–75 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

[Reserved]

Chapter 17

Suits for Deficiency

Forms

Chapter 17

Suits for Deficiency

§ 17.1 Introduction

In the event that the foreclosure sale proceeds are insufficient to pay the secured obligation, the mortgagee must evaluate whether to proceed with a deficiency suit against the obligors on the debt. This chapter discusses how one calculates the deficiency, the parties who may be liable for payment of the deficiency, the statutes governing (and in some cases, limiting) the recovery of a deficiency, the bringing of the deficiency suit, and the recovery of the costs and expenses of the deficiency suit.

§ 17.2 Suit on Deficiency

In the event that the nonjudicial foreclosure sale of the deed of trust collateral does not generate sufficient proceeds to pay off the entirety of the secured debt, one of the options that the holder of a recourse debt has is to bring suit against the obligors on the debt for the remaining unpaid balance—the deficiency. A deficiency is the amount of the secured debt remaining unpaid after payment of the allowable expenses and fees of foreclosure from the proceeds received at foreclosure. An important point to remember in evaluating action to collect the deficiency, however, is that the amount of the deficiency is not necessarily the amount that the lender may actually enforce against individual obligors of the debt. First, Texas statutes provide that under appropriate circumstances the deficiency is calculated by crediting payment of the secured debt with the fair market value of the collateral rather than merely with the net sales proceeds. (See section 17.4 below.) Second, a deficiency action is limited to the portion of the deficiency for which recourse lies against a potential obligor. (See section 17.6 below.) Finally, the practicality of bringing a deficiency action may be limited in whole or in part by the expense, time, and likelihood of success associated with pursuing and collecting a deficiency judgment against the obligor. Accordingly, the person holding a deficiency and desiring to sue on the debt must carefully evaluate (1) the amount of the deficiency for which each potential defendant (whether as maker, assumptor, or guarantor) remains personally liable under law following the foreclosure; (2) whether such defendant owns sufficient nonexempt, unpledged assets to justify the collection effort against the defendant; and (3) whether it is commercially feasible to pursue collection in light of the time, expense, and likelihood of obtaining and enforcing collection of a judgment.

§ 17.3 Statute of Limitations

Texas Property Code section 51.003 provides that the creditor must bring suit to recover a deficiency within two years following the date of the foreclosure sale. Tex. Prop. Code § 51.003(a). Accordingly, the determination as to whether a deficiency exists, whether the potential defendants have both liability for the deficiency and assets worth pursuing, and the cost and likelihood of success in pursuing the deficiency must be made and action initiated during this two-year period.

§ 17.4 Calculation of Deficiency

As noted above, the deficiency is the unpaid balance that remains owing on the secured debt once the net foreclosure proceeds remaining after payment of the allowable fees and expenses of sale have been applied to the secured debt. If the collateral has been damaged by casualty, see also section 13.4 in this manual concerning how the application of the insurance proceeds can affect the lender's bid, and thus indirectly the amount of the potential deficiency.

In *PlainsCapital Bank v. Martin*, 459 S.W.3d 550 (Tex. 2015), the lender attempted to argue that because Property Code section 51.003(a) uses the phrase "the deficiency" rather than "a deficiency," the statutory requirement that the borrower, following proper request, be given credit for at least the fair market value of the collateral at the time of sale when calculating a deficiency applied to only a deficiency calculated using the exact foreclosure sale price and did not apply when the deficiency was calculated using a different method. *PlainsCapital Bank*, 459 S.W.3d at 555. In this case, the lender sought to calculate the deficiency using the price recovered from the lender's resale of the property following foreclosure, which was lower than the actual sales price. The court refused to accept this argument.

§ 17.4:1 Force-Placed Insurance Premiums and Escrow Funds

In determining whether a deficiency or a surplus bid exists, credit is to be given by the mortgagee to premiums on force-placed insurance refunded to the mortgagee after the foreclosure sale that were included as part of the secured debt. Likewise, interest that would have been earned on the mortgagor's escrow accounts had the mortgagee followed the deed-of-trust requirements for interest-bearing escrow accounts is to be credited against the balance of the secured debt. *See Myrad Properties, Inc. v. LaSalle Bank N.A.*, 252 S.W.3d 605 (Tex. App.—Austin 2008, pet. filed), *rev'd on other grounds*, 300 S.W.3d 746 (Tex. 2010); *see also* Tex. Ins. Code ch. 549.

§ 17.4:2 Private Mortgage Insurance Payments

Section 51.003(d) of the Texas Property Code provides the following:

> Any money received by a lender from a private mortgage guaranty insurer shall be credited to the account of the borrower prior to the lender bringing an action at law for any deficiency owed by the borrower. Notwithstanding the foregoing, the credit required by this subsection shall not apply to the exercise by a private mortgage guaranty insurer of its subrogation rights against a borrower or other person liable for any deficiency.

Tex. Prop. Code § 51.003(d).

The failure of the mortgagee to apply payments received from the mortgagor to private mortgage insurance premiums will not prevent the mortgagee from collecting on the resulting deficiency. *See Shields v. Atlantic Financial Mortgage Corp.*, 799 S.W.2d 441 (Tex. App.—El Paso 1990, no writ) (mortgagee applied payments to loan balance, resulting in cancellation of private mortgage insurance). However, the lender cannot unilaterally change private mortgage insurance coverage to the detriment of the debtor. *See Fort Worth Mortgage Corp. v. Abercrombie*, 835 S.W.2d 262 (Tex. App.—Houston [14th Dist.] 1992, no writ).

§ 17.4:3 Trustee's Fees

If the deed of trust contractually limits the manner of collecting the trustee's fees to a deduction from sales proceeds, a trustee's fee may not be recovered in the deficiency action. *Richardson v. Raby*, 376 S.W.2d 422, 427 (Tex. Civ. App.—Tyler 1964, no writ).

§ 17.5 Credit for Fair Market Value in Deficiency Action

Texas Property Code section 51.003 allows any person against whom an action is brought to recover a deficiency to request that the court determine the fair market value of the real property as of the date of the sale. *See* Tex. Prop. Code § 51.003.

§ 17.5:1 Request for Determination of Fair Market Value

If the court determines that the fair market value of the collateral sold at foreclosure exceeds the amount of the successful bid at the foreclosure sale, the obligors are entitled to an offset in the amount of the excess against the remaining indebtedness. *See* Tex. Prop. Code § 51.003(b), (c). Section 51.003 thus regulates the calculation of the deficiency remaining after a foreclosure sale, although it does not affect the mechanics of the foreclosure process itself. However, the obligors are not entitled under section 51.005 to offset the mortgaged property's unrealized fair market value in a suit by a second lienholder, whose lien was cut off by the first lienholder's foreclosure. *Mays v. Bank One, N.A.*, 150 S.W.3d 897, 898–900 (Tex. App.—Dallas 2005, no pet.). "The language of section 51.005(c) makes it clear that the calculation of a 'deficiency' includes only a lien or encumbrance on mortgaged property 'that was not extinguished by the foreclosure.' " *Mays*, 150 S.W.3d at 900.

Although not defined by statute, "fair market value" is determined as of the date of the sale by the finder of fact after the introduction by the parties of competent evidence of the value. *See* Tex. Prop. Code § 51.003(b). Competent evidence of value may include, but is not limited to, expert opinion testimony, comparable sales, anticipated marketing time and holding costs, and the necessity and amount of any discount to be applied to the future sale price or the cash flow generated by the property to arrive at a current fair market value. Tex. Prop. Code § 51.003(b). Although section 51.003 refers to both the court and the finder of fact in discussing the determination of fair market value, it states, "The fair market value shall be determined by the finder of fact after the introduction by the parties of competent evidence of the value." Tex. Prop. Code § 51.003(b). In spite of the statute's inconsistency, this provision apparently gives the debtor the opportunity to have fair market value determined by a jury. See form 17-1 in this manual for a petition for fair market value after nonjudicial foreclosure.

§ 17.5:2 No Request for Determination of Fair Market Value

The foreclosure sale price will be used to compute the deficiency if "no party requests the determination of fair market value or if such a request is made and no competent evidence of fair market value is introduced." Tex. Prop. Code § 51.003(c). See section 17.4 above for a discussion of the application of private mortgage insurance to the deficiency.

§ 17.5:3 No Affirmative Right of Recovery

Texas Property Code section 51.003 does not provide that the debtor is entitled to an affirmative recovery if the fair market value exceeds the amount of the debt. The statute provides for an offset only. *See* Tex. Prop. Code § 51.003. Under case law, however, the debtor may be entitled to such a recovery if there were technical defects in the foreclosure proceedings that led to an inadequate price. See chapters 10 and 16 in this manual concerning typical borrower challenges to foreclosure and the consequences of wrongful foreclosure.

§ 17.5:4 Use of Fair Market Value after Judicial Foreclosure

Texas Property Code section 51.004, a more or less parallel statute to section 51.003, similarly regulates the calculation of any deficiency resulting after a judicially ordered foreclosure sale. *See* Tex. Prop. Code § 51.004. See chapter 20 in this manual concerning judicial foreclosures.

§ 17.5:5 Third-Party Purchasers

In calculating a deficiency, Texas Property Code section 51.003 does not distinguish between foreclosure sales at which the lender is the purchaser and sales at which a third party is the purchaser. If a third party buys the property, the person against whom a deficiency judgment is sought is entitled to prove and receive an offset equal to the excess of the fair market value over the bid price and the lender will be required to reduce the amount of the deficiency without the benefit of receiving the full value of the property. The lender, however, may be in a better position to argue that the sale price equaled the fair market value if an unrelated party bought the property.

§ 17.6 Continued Liability of Obligors under Recourse and Nonrecourse Loans

An important question to resolve in evaluating whether to pursue a deficiency action is whether the maker and any other obligors (such as a guarantor) are personally liable for the deficiency. A recourse loan "allows the lender, if the borrower defaults, not only to attach the collateral but also to seek judgment against the borrower's (or guarantor's) personal assets." *Black's Law Dictionary* 1021 (9th ed. 2009). Conversely, the maker of a nonrecourse loan "does not personally guarantee repayment of the note and will, thus, have no personal liability." *Fein v. R.P.H., Inc.*, 68 S.W.3d 260, 266 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). "A nonrecourse note has the effect of making a note payable out of a particular fund or source, namely, the proceeds of the sale of the collateral securing the note." *Fein*, 68 S.W.3d at 266. In other words, under a fully nonrecourse loan, the borrower has no personal liability beyond the loss of the collateral securing the note. However, the nonrecourse nature of the note does of itself destroy the negotiability of the note. *See* Tex. Bus. & Com. Code § 3.106(b)(ii), cmt. 1.

§ 17.6:1 Springing Recourse Provisions in Nonrecourse Loans

Most nonrecourse loans include a set of "nonrecourse carveout" covenants, referred to as "bad-boy" covenants, the violation of which results in the loan, either in whole or in part, becoming ("springing into") recourse, to the borrower and guarantor. These covenants focus on preventing or inhibiting the borrower or its principals from taking actions that constitute fraud, gross negligence, willful misconduct, waste, or misapplication or conversion of operating funds or insurance or condemnation proceeds, or that interfere with the mortgagee's pursuit of its rights and remedies under the loan documents. *See* Sanford A Weiner, *Springing Guarantees: No, It Can't Mean What It Actually Says, Can It?, in* Advanced Real Estate Law Course, State Bar of Texas (2012); James A. Wallenstein, *Negotiating Loan Documents to Avoid Inadvertent Recourse, in* Advanced Real Estate Drafting Course, State Bar of Texas (2013). However, see also *Rampart Capital Corp. v. Egmont Corp.*, 18 S.W.3d 318 (Tex. Civ. App.—Beaumont 2000, no pet.), where a broadly worded nonrecourse provision was held to bar an action against the mortgagor for breach of the warranty of good title.

§ 17.6:2 Types of Nonrecourse Carveouts

There are generally two types of carveouts: (1) limited recourse carveouts, which limit the borrower's and guarantor's recourse liability to damages resulting from the triggering event (for example, misappropriation of insurance proceeds, security deposits, or prepaid rents), and (2) springing full recourse carveouts. Many times nonrecourse loans require the mortgagor to be a single purpose entity (SPE) and to comply with bankruptcy-remote requirements designed to isolate and protect the mortgaged property from unrelated obligations of affiliates of the borrower. Especially in secured transactions in which the borrower is an SPE, the springing recourse liability is guaranteed by a separate guaranty. As to SPEs and commercial mortgage-backed security transactions, see generally Jonathan Thalheimer, *Commercial Mortgage-Backed Securities 2013, in* Advanced Real Estate Law Course, State Bar of Texas (2013); Patrick C. Sargent, *CMBS 3.0: An Updated Overview, in* Advanced Real Estate Law Course, State Bar of Texas (2012); and Thomas A. Hauser, *CMBS 2.0: Things to Consider from a Borrower's Perspective, in* Advanced Real Estate Strategies Course, State Bar of Texas (2011).

§ 17.6:3 Examples of Nonrecourse Loan Carveouts

Violation of Covenant against Loans; Expansions of Entity Purpose: In *LaSalle Bank N.A. v. Mobile Hotel Properties, LLC*, 367 F. Supp. 2d 1022 (E.D. La. 2004), a borrower's and guarantor's conduct intended to aid a distressed project resulted in springing recourse for the borrower and guarantor. The guarantor made multiple interest-free loans to the borrower in violation of loan covenants restricting against additional debt. Additionally, the borrower modified its articles of incorporation to expand its stated purpose. The court held that these actions triggered full recourse liability for the borrower and guarantor despite the fact that the guarantor acted to preserve the property and the borrower never engaged in any business activity other than ownership and operation of the property. *LaSalle Bank*, 367 F. Supp. 2d at 1029–31; *see also Blue Hills Office Park LLC v. J.P. Morgan Chase Bank*, 477 F. Supp. 2d 366, 382 (D. Mass. 2007). However, some courts have entertained an argument that a springing recourse liability is an unenforceable penalty in circumstances in which the mortgagee has not suffered damage or loss. *See ING Real Estate Finance (USA) LLC v. Park Avenue Hotel Acquisition LLC*, No. 601860-2009, 2010 WL 653972 (N.Y. Sup. Ct. Feb. 24, 2010) (recourse liability not triggered as tax lien discharged during cure period).

Permitting Prohibited Mechanic's Liens: In *Pineridge Associates, L.P. v. Ridgepine, LLC*, 337 S.W.3d 461 (Tex. App.—Fort Worth 2011, no pet.), the court held that even though mechanic's liens were cut off by the mortgagee's foreclosure, the mortgagor's failure to obtain a "release of record" triggered full recourse liability for the loan deficiency, which included liability for the prepayment premium and for accrued but unadvanced property taxes that had accrued to the date of foreclosure sale. "Appellants argue that the mechanic's liens were released of record when they were extinguished by the June 2007 foreclosure sale. . . . Rather, they assume that 'extinguished' and 'released of record' are synonymous. We disagree . . . ." *Pineridge Associates*, 337 S.W.3d at 466. Similarly, in *Heller Financial, Inc. v. Lee*, No. 01 C 6798, 2002 WL 1888591 (N.D. Ill. Aug. 16, 2002), the court found that the borrower's failure to have mechanic's liens removed from the property in violation of the covenant prohibiting subordinate liens triggered full recourse liability. The fact that management had been delegated to a lender-approved management company, which failed to resolve the lien filing, was irrelevant. Also, in *CSFB 2001-*

CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC, 980 A.2d 1 (N.J. Super. Ct. App. Div. 2009), the court held that full recourse liability was triggered by violation of a covenant against second-lien financing even though at time of foreclosure of the first-lien mortgage the second lien had been paid and released.

Interference with Creditor's Realization on the Collateral: In *FDIC v. Prince George Corp.*, 58 F.3d 1041 (4th Cir. 1995), defensive actions taken by the borrower against the lender (injunction and involuntary bankruptcy petition filed by general partner, which delayed foreclosure) were found to violate the no-interference covenants and triggered springing recourse liability. *See also First Nationwide Bank v. Brookhaven Realty Associates*, 223 A.D.2d 618 (N.Y. App. Div. 1996) (borrower's filing voluntary bankruptcy petition triggered springing recourse liability on guarantor); *111 Debt Acquisition LLC v. Six Ventures, Ltd.*, No. C2-08-768, 2009 WL 414181 (S.D. Ohio Feb. 18, 2009). Some courts have been faced with the argument that in this circumstance triggering recourse liability should be deemed a penalty or against public policy. The following courts have upheld springing recourse liability over such arguments: *UBS Commercial Mortgage Trust 2007-FL1 v. Garrison Special Opportunities Fund L.P.*, 33 Misc.3d 1204(A), 2011 N.Y. Slip Op. 51774(U) (N.Y. Sup. Ct. 2011); and *Bank of America, N.A. v. Lightstone Holdings, LLC*, No. 601853/2009 (N.Y. Sup. Ct. 2009).

A deficiency note executed by a maker pursuant to a plan of reorganization in Chapter 11 proceedings is neither an accord and satisfaction nor a payment in full of the maker's prior debt such that a guarantor will be discharged on its guaranty. *See NCNB Texas National Bank v. Johnson*, 11 F.3d 1260, 1266 (5th Cir. 1994).

§ 17.7 Deficiency Liability of Guarantors

As a general rule a guarantor will be liable for the deficiency established by a foreclosure sale, even if the borrower has been discharged in bankruptcy proceedings or if the borrower's liability has been reduced in accordance with an approved Chapter 11 plan. As provided in 11 U.S.C. § 524(e), the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *See NCNB Texas National Bank v. Johnson*, 11 F.3d 1260, 1266 (5th Cir. 1994); *United States v. Stribling Flying Service, Inc.*, 734 F.2d 221, 223 (5th Cir. 1984); *R.I.D.C. Industrial Development Fund v. Snyder*, 539 F.2d 487, 494 (5th Cir. 1976). For additional discussion, see Charles A. Guerin, *A Nonrecourse Lending Carveout Checklist, in* Advanced Real Estate Drafting Course, State Bar of Texas, Austin (2003); and Lorin Williams Combs et al., *Annotated Guaranty, in* Mortgage Lending Institute, University of Texas, Austin (2011).

§ 17.7:1 Allocation of Bid Proceeds to Preserve Guaranty of Deficiency

The Texas Supreme Court addressed the propriety of entering a single bid on a foreclosure sale held as a single sale on a multiple-parcel shopping center in *Provident National Assurance Co. v. Stephens*, 910 S.W.2d 926 (Tex. 1995). The court upheld the mortgagee's allocation four months after the foreclosure sale of $8,000,000 between portions of the center that were encumbered by separate deeds of trust, respectively securing separate notes of $5,025,000 (supported by a $1,256,250 guaranty) and $6,000,000 (supported by a $1,500,000 guaranty). The allocation of the bid by the mortgagee between the separate parcels resulted in a deficiency of $1,526,000 on one note and deed of trust on the first parcel (triggering in full the guarantor's liability on its $1,256,250 guaranty) and a deficiency of $1,473,900 on the other note and deed of trust as to the other parcel (triggering in full the guarantor's liability on its $1,500,000 guaranty). The court agreed that the single sales price may be reasonably allocated between the two properties by using a ratio derived from a comparison of the individual fair market values of the separately secured parcels. *See Stephens*, 910 S.W.2d at 929.

One way to meet these obligations is to routinely provide the client with copies of all pertinent correspondence, documents, and file memoranda; to advise the client in writing of risks involved with the transaction; and to document the business decisions made by the client.

§ 17.7:2 Guarantor's Right to Fair Market Value Determination

Entitlement to an offset under section 51.003 of the Property Code is not limited to the mortgagor or the original debtor. Subsection (b) states, "Any person against whom such a recovery is sought by motion may request that the court in which the action is pending determine the fair market value of the real property as of the date of the foreclosure sale." Tex. Prop. Code § 51.003(b). The phrase *such a recovery* refers to the language in subsection (a): "If the price at which real property is sold . . . is less than the unpaid balance of the indebtedness secured by the real property . . . any action brought to recover the deficiency . . . is governed by this section." Tex. Prop. Code § 51.003(a). Subsection (c) refers to "the persons against whom recovery of the deficiency is sought," and subsection (d) preserves the subrogation rights of the private mortgage guaranty insurer against "a borrower or other person liable for any deficiency." Tex. Prop. Code § 51.003(c), (d). Moreover, the guarantor may bring an independent action for determination of the fair market value not later than the ninetieth day after the date of the foreclosure sale or the date the guarantor receives actual notice of the sale, whichever is later. Tex. Prop. Code § 51.005(b). Accordingly, a mortgagee should always give a guarantor notice of any foreclosure sale.

§ 17.7:3 Guarantor's Request for Determination of Fair Market Value

Section 51.005 of the Texas Property Code permits a guarantor against whom a prior judgment on its guaranty has been obtained to bring an action not later than the ninetieth day after the date of a foreclosure sale or the date the guarantor receives actual notice of the foreclosure, whichever is later, for a determination of the fair market value of the foreclosed real property. If the finder of fact finds that the fair market value exceeds the foreclosure bid price, the guarantor is entitled to an offset against the debt equal to the fair market value of the property rather than the foreclosure bid price. *See* Tex. Prop. Code § 51.005(a)–(c).

§ 17.7:4 Waiver of Texas Property Code Protections

The Texas Supreme Court in *Moayedi v. Interstate 35/Chisam Road, L.P.*, 438 S.W.3d 1, 6 (Tex. 2014), held that a guarantor who had waived "all rights and remedies of surety" waived the protections of section 51.003 of the Texas Property Code. The court held that "all" was clear and specific, meaning "all of them." *Moayedi*, 438 S.W.3d at 8. Previously, the Fifth Circuit and a Texas court of appeals have upheld contractual waiver in advance by a guarantor of the protections of section 51.003 of the Texas Property Code. *See LaSalle Bank N.A. v. Sleutel*, 289 F.3d 837, 839–41 (5th Cir. 2002); *Segal v. Emmes Capital, LLC*, 155 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2004, pet. abated). The waiver in *Segal* stated, "To the maximum extent permitted by applicable law, the [Guarantor] waives all rights, remedies, claims and defenses based upon or related to Sections 51.003, 51.004 and 51.005 of the Texas Property Code, to the extent the same pertain or may pertain to any enforcement of this Guaranty." *Segal*, 155 S.W.3d at 278. The courts found that the policy behind these sections was not so fundamental that they could not be waived. *See Sleutel*, 289 F.3d at 841–42; *Segal*, 155 S.W.3d at 278–79. Thus the courts found that the guarantors had waived their right to challenge the foreclosure sale price in a deficiency suit. The *Segal* court further found that if the fair-notice test applied to the waiver, the waiver was conspicuous because it appeared immediately above the signature lines and the Property Code sections that were being waived were underlined. *See Segal*, 155 S.W.3d at 283–84.

§ 17.8 Impact of Conflict-of-Law and Choice-of-Law Provisions

Conflict-of-law rules and contractual choice of a particular state's law as being applicable to the loan transaction can significantly impact a lender's ability to collect on a deficiency after foreclosure on mortgaged property in Texas.

§ 17.8:1 General Conflict-of-Law Principles Absent Contractual Choice of Laws

In the absence of an express choice-of-law provision in the loan documents, courts in Texas will generally follow the *Restatement (Second) of Conflict of Laws* "most significant relationship" test to determine which state's laws are to apply to the determination of whether the lender is entitled to collect a deficiency after a foreclosure on Texas mortgaged property. *Maxus Exploration Co. v. Moran Bros.*, 817 S.W.2d 50, 53 (Tex. 1991); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 679 (Tex. 1990); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420 (Tex. 1984); *Restatement (Second) of Conflict of Laws* § 188 (1971).

The *Restatement* sets forth the following general rules if the parties have not themselves chosen what law governs their agreement: "The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties." *Restatement (Second) of Conflict of Laws* § 188(1) (1971).

Section 188(2) lists the contacts comprising the relationship between transactions and locale ordinarily to be taken into account in applying this test, including—

(a) the place of contracting,

(b) the place of negotiation,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Restatement (Second) of Conflict of Laws § 188(2) (1971).

Section 6 of the *Restatement* provides that absent a statutory directive concerning the law to be applied in a case, the following seven factors are relevant:

> The factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6 (1971).

§ 17.8:2 Express Choice-of-Law Provisions

The Texas Supreme Court has adopted the principles set forth in section 187 of the *Restatement (Second) of Conflict of Laws* (1971) to determine if a choice-of-law provision is to be enforced by a Texas court. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 680–81 (Tex. 1990); Sanford A. Weiner & John C. Ale, *Making Choice of Law a Contact Sport: Contractual Choices of Law in Texas*, 54 Tex. B.J. 262 (1991).

Under the *Restatement* rule, the choice-of-law provision will be upheld unless all the factors in *Restatement* section 187(2)(b) are met; namely, (1) some other state's law would apply had the parties not made a choice, (2) that other state has a materially greater interest than does the chosen state in the enforceability of the contractual provisions at issue, and (3) the contractual provisions at issue violate a fundamental policy of that other state. *See Restatement (Second) of Conflict of Laws* § 187(2) (1971).

In *Chase Manhattan Bank, N.A. v. Greenbriar North Section II*, 835 S.W.2d 720 (Tex. App.—Houston [1st Dist.] 1992, no writ), the court required compliance with New York foreclosure procedures as a condition to collecting a deficiency following a Texas foreclosure sale. The note and the guaranty provided that they would "be construed and enforced in accordance with the laws of the State of New York." The lender foreclosed on the Texas mortgaged property in accordance with section 51.002 of the Texas Property Code. However, the court denied the lender the right to collect on the resulting deficiency because the lender failed to comply with the New York Real Property Actions and Proceedings Law, which requires obtaining an order within ninety days after the foreclosure and a judicial determination of appraised value as a condition to collecting a deficiency. The court held that the New York law should be applied to bar the deficiency for the following reasons: (1) the court decided that New York had a substantial relationship to the parties and the transaction, (2) Texas did not have a more significant relationship with the parties and the transaction than New York, (3) Texas did not have a materially greater interest than New York in determining whether the holder could recover a deficiency judgment because the mortgaged property had already been foreclosed on and there was not an issue whether the foreclosure was proper, and (4) the application of New York law to the recovery of the deficiency did not violate a fundamental public policy of the state of Texas. *Chase Manhattan*, 835 S.W.2d at 726–27.

See also *SBKC Service Corp. v. 1111 Prospect Partners*, No. 97-3193, 1998 WL 436579 (10th Cir. July 30, 1998), analyzing whether California or Kansas law applied to a post-nonjudicial foreclosure deficiency collection action.

§ 17.9 Costs and Attorney's Fees in Collecting Deficiency

Attorney's fees are recoverable if provided for by the contract between the parties or by statute. *See* Tex. Civ. Prac. & Rem. Code § 38.001. In a deficiency suit following foreclosure, the provisions of the real estate lien note usually govern the collection of attorney's fees.

If the deed of trust so provides, the beneficiary may deduct from the proceeds of the foreclosure sale all attorney's fees that are (1) reasonable, (2) necessary to enable the trustee to properly execute the power of sale, and (3) actually rendered to and incurred by the beneficiary. *Airline Commerce Bank v. Commercial Credit Corp.*, 531 S.W.2d 171, 175–76 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.). It is a potential violation of the Texas Deceptive Trade Practices–Consumer Protection Act for the mortgagee to charge its attorney's fees incurred in a foreclosure against the borrower's escrow account if the loan documents do not provide for such offset. *Wieler v. United Savings Ass'n of Texas, FSB*, 887 S.W.2d 155, 160 (Tex. App.—Texarkana 1994), *writ denied per curiam*, 907 S.W.2d 454 (1995).

§ 17.9:1 Stipulated Percentages

Stipulated-percentage attorney's fee clauses are not regarded as absolute promises to pay the contractual amount but as contracts to indemnify the noteholder for attorney's fees actually incurred in collection. *F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce*, 578 S.W.2d 675, 676 (Tex. 1979); *Kuper v. Schmidt*, 338 S.W.2d 948, 950 (Tex. 1960); *Gardner v. Associates Investment Co.*, 171 S.W.2d 381, 384 (Tex. Civ. App.—Amarillo 1943, writ ref'd w.o.m.). Therefore the unreasonableness of contractual attorney's fees, including stipulated percentages, may be challenged, and the holder of the note is not entitled to recover the full contractual amount that is unreasonable under the circumstances. *F.R. Hernandez Construction & Supply Co.*, 578 S.W.2d at 676–77; *Keenan v. Gibraltar Savings Ass'n*, 754 S.W.2d 392, 395 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Spring Branch Bank v. Mengden*, 628 S.W.2d 130, 134 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). Attorney's fees will be limited to the contractually fixed percentage even if a greater amount is found to be a reasonable fee. *Beltran v. Groos Bank, N.A.*, 755 S.W.2d 944, 951 (Tex. App.—San Antonio 1988, no writ).

The *Texas Real Estate Forms Manual*'s form for promissory note provides: "Borrower also promises to pay reasonable attorney's fees and court and other costs if this note is placed in the hands of an attorney to collect or enforce the note." 1 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 21, form 21-1 (2d ed. 2011).

§ 17.9:2 Prima Facie Only

The legal owner and holder of the note is prima facie entitled to recover the attorney's fees stipulated in the note, which if unchallenged shall be awarded. *F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce*, 578 S.W.2d 675, 677 (Tex. 1979).

§ 17.9:3 Fees Challenged

One challenging the reasonableness of the attorney's fees contractually stipulated in a note must affirmatively plead and prove that (1) the contractual fee is unreasonable and (2) a lesser fee is reasonable under the circumstances. *F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce*, 578 S.W.2d 675, 677 (Tex. 1979).

§ 17.9:4 Actual Expenses

A noteholder may be denied any recovery of expenses if it appears that no expense has been incurred as a result of the maker's default. *F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce*, 578 S.W.2d 675, 677 (Tex. 1979) (citing *Kuper v. Schmidt*, 338 S.W.2d 948 (Tex. 1960)).

§ 17.9:5 Fees to Collect Attorney's Fees

Attorney's fees expended to collect attorney's fees provided for under a promissory note are not recoverable unless the contract between the parties so states. *F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce*, 578 S.W.2d 675, 677 (Tex. 1979) (citing *Southwest National Bank v. Employers' Indemnity Corp.*, 12 S.W.2d 189 (Tex. Comm'n App. 1929, judgm't adopted)); *Miller v. Bush*, 42 S.W.2d 156, 159 (Tex. Civ. App.—Waco 1931, writ ref'd).

§ 17.10 Reimbursement between Jointly Liable Parties

The rights and obligations between joint obligors on a secured debt subject of a deficiency action are implied by common law; however, it is a better practice for joint obligors to enter into a reimbursement agreement. Form 17-2 in this manual is a sample reimbursement agreement regarding guarantors that are jointly and severally liable to a creditor for a secured debt and providing for security supporting the reimbursement obligation.

Additional Resources

Combs, Lorin Williams, et al. "Annotated Guaranty." In *Mortgage Lending Institute, 2011*. Austin: University of Texas School of Law and Texas Mortgage Bankers Association, 2011.

Guerin, Charles A. "A Nonrecourse Lending Carveout Checklist." In *Advanced Real Estate Drafting Course, 2003*. Austin: State Bar of Texas, 2003.

Hauser, Thomas A. "CMBS 2.0: Things to Consider from a Borrower's Perspective." In *Advanced Real Estate Strategies Course, 2011*. Austin: State Bar of Texas, 2011.

Sargent, Patrick C. "CMBS 3.0: An Updated Overview." In *Advanced Real Estate Law Course, 2012*. Austin: State Bar of Texas, 2012.

Thalheimer, Jonathan. "Commercial Mortgage-Backed Securities 2013." In *Advanced Real Estate Law Course, 2013*. Austin: State Bar of Texas, 2013.

Wallenstien, James A. "Negotiating Loan Documents to Avoid Inadvertent Recourse." In *Advanced Real Estate Drafting Course, 2013*. Austin: State Bar of Texas, 2013.

Weiner, Sanford A. "Springing Guarantees: No, It Can't Mean What It Actually Says, Can It?" In *Advanced Real Estate Law Course, 2013*. Austin: State Bar of Texas, 2013.

§ 20.3:9 Trustee

The trustee named in a deed of trust is not a necessary party in a judicial foreclosure suit. Tex. Prop. Code § 51.007; *Vela v. Shacklett*, 1 S.W.2d 672, 675 (Tex. Civ. App.—San Antonio 1927), *aff'd*, 12 S.W.2d 1007 (Tex. 1929). If sued, a trustee should file a verified denial and claim the protections provided in Tex. Prop. Code § 51.007.

§ 20.4 Jurisdiction and Venue

Original jurisdiction in a judicial foreclosure suit generally lies with a district court. Tex. Const. art. V, § 8; Tex. Gov't Code § 24.007.

Based on the opinion in *In re Allied Chemical Mangesias Corp.*, 206 S.W.3d 114 (Tex. 2006), it appears that pre-2006 case law requiring judicial foreclosure suits be brought in the county of the defendant's residence or principal place of business under Tex. Civ. Prac. & Rem. Code § 15.002 and § 15.035 may be obsolete. In *Allied Chemical*, the Texas Supreme Court found the mandatory venue provision of Tex. Civ. Prac. & Rem. Code § 15.011 "to be more inclusive regarding the type of real property suits subject to the mandatory venue provision" that must be brought in the county where the property is located. *Allied Chemical*, 206 S.W.3d at 118. Following *Allied Chemical*, the Houston court of appeals traced the evolution of venue in the county of the defendant's residence to venue in the county where the property sought to be foreclosed is located in *Poock v. Washington Mutual Bank, F.A.*, No. 01-08-00415-CV, 2009 WL 2050905 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.) (mem. op.).

§ 20.5 Burden of Proof

When a mortgagee's motion for summary judgment establishes a prima facie case that there was no irregularity or unfairness in the preforeclosure process, the burden shifts to the defendants to avoid a judgment for foreclosure. *Forest Park Lanes, Ltd. v. Keith*, 441 S.W.2d 920, 928–29 (Tex. Civ. App.—Fort Worth 1969, no writ).

§ 20.6 Limitations

All actions for foreclosure of real property encumbered by a security instrument must be instituted within four years after the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.035. However, see *Hoarel Sign Co. v. Dominion Equity Corp.*, 910 S.W.2d 140 (Tex. App.—Amarillo 1955, writ denied) with respect to "removables" that do not become a part of the real property. For an installment note, the cause of action accrues when the mortgagee exercises its option to accelerate. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 574 (Tex. 2001). Limitations, however, may be extended under Tex. Civ. Prac. & Rem. Code § 16.036.

§ 20.7 Attorney's Fees

Attorney's fees are recoverable by the mortgagee but only if provided for in the deed of trust or in the note. *Jeffreys v. McGlamery*, 96 S.W.2d 572, 576 (Tex. Civ. App.—Amarillo 1936, no writ).

§ 20.8 Enforcement of Judgment

A foreclosure judgment does not pass title. The mortgagor retains title until the property is sold at a foreclosure sale. *Paddock v. Williamson*, 9 S.W.2d 452, 454 (Tex. Civ. App.—Beaumont 1928, writ ref'd).

Judicial foreclosure of real property by a sheriff or constable is made in much the same manner as an execution sale under Tex. R. Civ. P. 646a–648. A sheriff sale that is held on any day other than the first Tuesday of the month is void. *Durkay v. Madco Oil Co.*, 862 S.W.2d 14, 17 (Tex. App.—Corpus Christi 1993, writ denied).

The time and place of the sheriff's sale must be posted in three public places beginning not less than twenty days before the scheduled sale date and also published once a week for three consecutive weeks in a newspaper in the county where the property is located. Tex. R. Civ. P. 647. The sheriff must give the defendant or the defendant's attorney written notice of sale in accordance with Tex. R. Civ. P. 21(a), which modifies rule 647. *Collum v. DeLoughter*, 535 S.W.2d 390, 392 (Tex. App.—Texarkana 1976, writ ref'd n.r.e.).

A sheriff's deed should be prepared and delivered to the purchaser at the foreclosure sale; however a deed is not necessary to pass title. Proof of the passing of title is established by a valid judgment, a proper order of sale, and the sheriff's return showing sale of the property to the highest bidder. *Jackson v. First National Bank*, 290 S.W. 276, 277 (Tex. Civ. App.—Amarillo 1927, writ dism'd w.o.j.).

A valid judgment is the prerequisite for a judicial foreclosure. The judgment must award the mortgagee a sum of money representing the debt, with attorney's fees and court costs if authorized by contract or law, and an order for foreclosure of the property described in the security instrument. The best practice is to ensure the property sought to be foreclosed is specifically described by street address and legal description.

See form 20-2 in this manual for a judicial foreclosure judgment.

A judgment for judicial foreclosure should state that it is enforceable under Tex. R. Civ. P. 309 so that there is no question what statutory requirements are imposed on the clerk of the court and the sheriff or constable with respect to preparing an order of sale and conducting the sale.

Most clerks of the court and sheriff and constable offices have in-house versions of judicial foreclosure forms necessary to comply with their duties and responsibilities under the law and will prefer to use their own forms. However, it is a good practice to always vet these forms.

§ 20.8:1 Order of Sale

An order of sale is prepared by the clerk of the court in which the suit was filed. The order is directed to the sheriff or constable in the county where the property sought to be foreclosed is located, even when venue was proper in a county other than where the property is located. Tex. R. Civ. P. 646a. There are old cases that hold an order of sale is not void if directed to any sheriff regardless of whether the sheriff holds office in a county other than where the suit was filed or the property is located. *See, e.g., Fitzgerald v. LeGrande*, 187 S.W.2d 155, 157 (Tex. Civ. App.—El Paso 1945, no writ); *De Guerra v. De Gonzalez*, 232 S.W. 896, 898–99 (Tex. Civ. App.—San Antonio 1921, no writ). These cases are probably no longer valid.

See form 20-3 in this manual for an order of sale.

It is critical that a foreclosure professional obtain a judgment for the underlying debt, interest, attorney's fees, and court costs; otherwise, the order of sale will contain only the costs of court reflected on the clerk's cost sheet or docket. If so, the mortgagee's credit bid at the sale will be limited to only the docket sheet costs of court.

The mortgagee or its authorized representative must attend the foreclosure sale to tender its credit bid. Sheriffs and constables do not recognize a silent credit bid based on the order of sale, only a credit bid made in person by an authorized representative of the judgment creditor.

§ 20.8:2 Sheriff's Forms

Tex. R. Civ. P. 309 specifically states that a sheriff or constable can sell the property sought to be

Form 20-6

Sheriff's Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

STATE OF TEXAS)

COUNTY OF)

By virtue of a certain execution issued by the clerk of the [**designation**] Court of [**county**] County, Texas, which was delivered to me as [Sheriff/Constable] of [**county**] County, Texas, I was commanded to seize and sell the property of Defendant, [**name of defendant**].

The real property described in this deed ("Premises") was pointed out to me as being subject to sale under execution.

On [**date**] at [**time**] [A.M/P.M.], I levied on all estate, right, title, claim, and interest that the Defendant, [**name of defendant**], had in the Premises.

On [**date**], the first Tuesday of that month, between the hours of 10:00 A.M. and 4:00 P.M., as prescribed by law, I sold the Premises at public auction in [**county**] County, at the door of the [**designation**] Courthouse, in [**city**], Texas, having first given public notice of the authority under which the sale was to be made, the time of levy, the time and place of sale, and a description of the Premises to be sold.

At the sale, the Premises were sold to the highest bidder, [**name of buyer**], for the amount of $[**amount**], subject, however, to any superior lien indebtedness on the Premises.

[**Name of buyer**] has paid the amount of $[**amount**], the receipt of which is acknowledged.

Therefore, in consideration of the Premises in the judgment and execution, and in further consideration of the payment of the amount of $[**amount**], I, [Sheriff/Constable] of [**county**] County, Texas, do grant, sell, and convey unto [**name of buyer**] all the estate, right, title, interest, and claim that [**name of defendant**] had on [**date**], or at any time afterward, in the Premises described in the execution, and further described as follows: [**describe property**].

To have and to hold the above-described Premises unto [**name of buyer**], and [its/his/her] assigns forever, as fully and absolutely as I, [Sheriff, Constable] can convey.

In testimony whereof, I hereunto set my hand this [**date**] day of [**month**] [**year**].

____
[**Name**], [Sheriff/Constable]
[**County**] County, Texas

STATE OF TEXAS)

COUNTY OF)

Before me, the undersigned authority, on this day personally appeared [**name of affiant**], [Sheriff/Constable] of [**county**] County, Texas, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

SUBSCRIBED AND SWORN TO before me on ________________ by [**name of affiant**].

____
Notary Public, State of Texas

Chapter 21

Residential Foreclosure Process

The editors gratefully acknowledge Robert D. Forster, II and S. Lee Stevenson, Jr. for their contribution to this chapter.

§ 21.1 Introduction

This chapter addresses the nonjudicial foreclosure process involving residences of the borrower. Other types of foreclosures are addressed as follows in this manual: chapter 20, judicial foreclosures; chapter 22, commercial foreclosures; chapter 24, ad valorem tax lien foreclosures; chapter 25, property tax loan lien foreclosures; chapter 27, condominium foreclosures; chapter 28, home equity loan foreclosures; chapter 29, manufactured housing unit foreclosures; chapter 30, property owner's association foreclosures; and chapter 31, reverse mortgage foreclosures.

§ 21.2 Presale Considerations

The attorney should review the deed of trust or security instrument to obtain the information necessary to evaluate the options for collection of the debt (see chapters 2, 3, and 4 in this manual) and prepare proper demand and notice letters (see chapters 5, 6, 7, and 8).

§ 21.2:1 Unique Requirements in Loan Documents

The attorney must always determine whether there are any unique or specific foreclosure requirements in the loan agreement documents. Failure to comply with a unique requirement may lead to a wrongful foreclosure if the failure to perform caused the property to be sold for grossly inadequate consideration. If the loan agreement is evidenced by standard forms commonly used in the residential mortgage industry, this is not a problem.

See chapter 6 in this manual for discussion of the deed of trust documents and chapters 8 and 12 for a discussion of notices to a borrower.

§ 21.2:2 Verification of Addresses

The attorney should ascertain if the borrowers have sent to the lender or servicer a change of address. If so, then the demand and notice communications should go to the new address. Failure to send the notices to the new address may make the foreclosure voidable. *See* Tex. Prop. Code §§ 51.0001(1), 51.0021. See also chapter 8 in this manual.

The attorney needs to know if the foreclosure notices and correspondence are being sent to a mailing address instead of the physical address.

It is recommended that the attorney have the client verify that the street address/property address listed in the referral for legal services is actually the correct physical location of the property. If the notices are sent to the wrong address, the foreclosure may be fatally defective. This can also become important in the event that the client commences eviction proceedings after the foreclosure is completed.

§ 21.2:3 Verification of Default

In several instances, mortgaged property has been sold at foreclosure after the lender orally reinstated the loan or promised not to foreclose.

See Diversified, Inc. v. Gibraltar Savings Ass'n, 762 S.W.2d 620, 623 (Tex. App.—Houston [14th Dist.] 1988, writ denied); *Diversified, Inc. v. Walker*, 702 S.W.2d 717, 723 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). The *Diversified* cases that were brought under the Texas Deceptive Trade Practices–Consumer Protection Act are no longer applicable because of Texas Property Code section 51.009, which provides that a foreclosure sale purchaser is not a consumer and the purchaser acquires the property "as is" at the purchaser's own risk and without any express or implied warranties. *See* Tex. Prop. Code § 51.009.

§ 21.2:4 Applicability of Consumer Statutes to Notices

Most loan situations will dictate that a notice of default, a notice of intent to accelerate, and a subsequent notice of acceleration be sent to the debtor before the statutorily required notice of foreclosure sale is sent. See chapters 8 and 12 in this manual. In the case of consumer debt, the initial communication with the debtor must contain the Miranda-style warning and the statutorily dictated notices provided by the federal Fair Debt Collection Practices Act. The attorney should review the loan payment history to verify that the demand being made to cure the loan default is correct. See chapter 7 for a discussion of both the Texas and federal Fair Debt Collection Practices Act.

The attorney should review the promissory note to obtain the information necessary to prepare proper demand and notice letters and verify the amount of time that the borrower is given before the loan can be accelerated. Texas statutes require that a residential borrower be given at least twenty days' notice of default and opportunity to cure. *See* Tex. Prop. Code § 51.002. See also section 21.3 below. Many residential notes and deeds of trust afford the borrower a longer period of thirty days to cure a default as a prerequisite to accelerating the loan. In this event, the attorney should make sure that the demand and notice of default letters afford the borrower thirty days rather than twenty days to cure the loan default as required by Texas Property Code section 51.002.

Effective September 1, 2011, all foreclosure notices required by Property Code section 51.002 must include a military rights disclosure that is the same as or similar to the promulgated language found in subsection (i). *See* Tex. Prop. Code § 51.002(i). See chapter 33 and form 8-2.

§ 21.2:5 Mortgagee Counseling Programs

It should also be noted that many investors, including Fannie Mae and Freddie Mac, now require that additional investor-specific notices be provided to defaulting debtors. These notices generally relate to loan modification, forbearance, loan counseling, or other default mitigation alternatives. Since these additional requirements are constantly changing, it would be prudent to search the investor's Web site for such changes. See chapter 36 in this manual for a discussion of homeowner assistance programs.

§ 21.3 Notice of Default

If the mortgaged property is the debtor's homestead or the debtor's residence, consideration should be given to cure rights, consumer debt-collection laws, and limitations on enforcement of the secured debt. Section 51.002(d) of the Texas Property Code requires that the debtor be given twenty days to cure the default before notice of foreclosure sale is given:

> Notwithstanding any agreement to the contrary, the mortgage servicer of the debt shall serve a debtor in default under a deed of trust or other contract lien on real property used as the debtor's residence with written notice by certified mail stating that

> the debtor is in default under the deed of trust or other contract lien and giving the debtor at least 20 days to cure the default before notice of sale can be given under Subsection (b).

Tex. Prop. Code § 51.002(d). The notice of default given by the mortgage servicer to a residential debtor as required by section 51.002(d) of the Property Code does not literally have to use the word *default* as long as the notice puts the debtor on notice of the delinquency and gives the debtor twenty days to cure. *Herrington v. Sandcastle Condominium Ass'n*, 222 S.W.3d 99, 101 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The debtor is entitled to this notice even if the loan originated before the passage of the statute. *Rey v. Acosta*, 860 S.W.2d 654, 657–58 (Tex. App.—El Paso 1993, no writ). Section 51.002(d) of the Property Code is a procedural requirement for accelerating a debt and therefore can be applied retroactively. The notice requirement raises numerous questions that unfortunately may have to be answered through litigation or legislative amendment. The following is a discussion of some of the questions that have already been raised by commentators.

See also chapter 8 in this manual.

§ 21.3:1 What Is "Real Property Used as Debtor's Residence"?

Texas Property Code section 51.002(d) does not specify when the mortgaged property is to be classified as the debtor's residence. The mortgaged property could be so classified as of the execution of the deed of trust, as of the default, as of the foreclosure sale, or anytime in between. Nor does the statute define what types of properties can constitute the debtor's residence. Second homes and rent properties, such as houses, apartment projects, small self-operated motels, high-rise hotels, office buildings with or without a penthouse, or time-shares, could all possibly be defined as residences.

Other questions are raised by this statutory phrase as well. Suppose the owner of a rent house is the sixth owner after the loan was closed. If the term *debtor* includes all persons who have personal liability on the note, is the notice requirement triggered if any one of the five previous owners used the property as his residence at any time during the term of the loan?

§ 21.3:2 Who Is the Debtor in Section 51.002(d)?

Usually the maker or obligor of a note secured by the mortgaged property is also the property owner and the owner at the time of foreclosure. See *National Commerce Bank v. Stiehl*, 866 S.W.2d 706, 707–08 (Tex. App.—Houston [1st Dist.] 1993, no writ), involving multiple notes with different makers. Section 51.002(b)(3) provides that the notice of the date, time, and place of the foreclosure sale must be given to each debtor "who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt." Tex. Prop. Code § 51.002(b)(3).

§ 21.3:3 When Does Twenty-Day Curative Period Begin?

Does the twenty-day curative period begin when the certified-mail notice is deposited in the mail or when it is received by the debtor? Texas Property Code section 51.002(d) provides the following:

> The entire calendar day on which the notice required by this subsection is given, regardless of the time of day at which the notice is given, is included in computing the 20-day notice period required by this subsection, and the entire calendar day on which notice of sale is given under Subsection (b) is excluded in computing the 20-day notice period.

Tex. Prop. Code § 51.002(d). In a situation in which there are multiple debtors because the mortgaged property has changed hands and the loan has been assumed several times, there may be more than one twenty-day cure period. *See Newman v. Woodhaven National Bank*, 762 S.W.2d 374, 375–76 (Tex. App.—Fort Worth 1988, no writ) (involving twenty-day notice sent to debtor after loan ballooned).

§ 21.3:4 How Is Address of Debtor Determined?

The address of the debtor for purposes of Texas Property Code section 51.002(d) is the debtor's last known address as provided in section 51.0001(2). The debtor has a statutory duty to provide a new change of address if the debtor expects to receive foreclosure notices at a new address. Tex. Prop. Code § 51.0021.

§ 21.4 Homeownership Counseling

A number of state and federal statutes provide for counseling and refinance programs for delinquent homeowners, and some of these programs mandate that many large mortgage servicers offer homeowners the opportunity to participate in these programs. For example, all mortgagees that service conventional mortgage loans and home loans insured by the U.S. Department of Housing and Urban Development (HUD) are subject to the requirement that an "eligible" mortgagor who is past due on his payments shall be notified of the availability of homeownership counseling. See chapter 36 in this manual for a further discussion of these programs.

HUD has taken the position that the notification of the availability of homeownership counseling should be made before the forty-fifth day after any eligible homeowner fails to pay any amount by the date the amount is due under a home loan. HUD requires that the notification be made within forty-five days from the date that payment was due. *See* 12 U.S.C. § 1701x(c)(5)(B)(ii). A list of HUD-approved housing counseling agencies can be found at HUD's Web site at **www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm**. HUD may be contacted by telephone at 202-708-1112 or by writing to U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0001.

If the loan is guaranteed by the U.S. Department of Veterans Affairs (VA), the VA is required to follow the procedures outlined at 38 U.S.C. § 3732(a)(4). The VA is similarly required to provide homeownership counseling, including information on alternatives to foreclosure, possible methods of curing the default, and deeds in lieu of foreclosure. Additional information regarding VA-guaranteed loans in Texas is available from the VA Regional Loan Center, 6900 Alameda Road, Houston, TX 77030-4200, telephone 1-888-232-2571, or at its Web site at **www.benefits.va.gov/houston/regional-loan-center.asp**.

§ 21.5 Residential Foreclosure Consultants

Texas Business and Commerce Code chapter 21, added by the Texas legislature in 2011, regulates the business operations of residential foreclosure consulting services. Foreclosure consultants are defined as persons who make a representation, a solicitation, or an offer to a homeowner to perform services for a fee that involve seeking to prevent or postpone foreclosure, obtaining a forbearance agreement, curing or reinstating a delinquent mortgage, advancing or lending funds to prevent foreclosure, or ameliorating the impairment of a borrower's credit rating. *See* Tex. Bus. & Com. Code § 21.001(a). See sections 36.6 and 37.3 in this manual for a discussion of residential foreclosure consulting.

Chapter 22

Commercial Foreclosure Process

Forms

[Reserved]

Chapter 22

Commercial Foreclosure Process

The editors gratefully acknowledge Charles Kramer for his contribution to this chapter.

§ 22.1 Introduction

Commercial real property foreclosures do not operate under a different set of state laws or statutes from residential foreclosures. All nonjudicial foreclosures, whether commercial or residential, must strictly adhere to the standards and requirements of chapter 51 of the Texas Property Code, and, as applicable, other state and federal statutes referenced in this chapter and throughout this manual.

However, commercial loan documents and foreclosure considerations can still vary from residential in several ways:

1. Commercial loan documentation is frequently dense, complex, wordy, and encompasses many more types and styles of documents than a typical residential mortgage. In addition, the original loan agreement documents are often modified or amended over the life of the loan. All of the loan documents and public records need to be examined to guide the borrower's or lender's counsel as to their client's rights regarding the collateral, such as personal property and fixtures, construction issues, tenants and lease matters, rentals, and management of the property. To ensure full use of the real property serving as collateral that is being foreclosed, additional legal remedies may need to be pursued or protected during the foreclosure process with respect to personal property and intangibles related to the real property.

2. Consumer debtor collector notices are conspicuously absent in commercial foreclosure forms because federal and state debt collection statutes only apply to consumer or household debt. In addition, there is no need to check the military status of any individual borrower or guarantor of a commercial loan for purposes of giving the military servicemember notice required by Tex. Prop. Code § 51.002(i) because the property is not used as that individual's residence.

3. Environmental liability for commercial property in foreclosure is a frequent concern that is not present in a residential foreclosure. Good due diligence procedures at loan inception may mean an environmental problem is not an issue to worry about if the loan was originated by the mortgagee that is foreclosing. However, if the mortgaged loan was purchased or otherwise originated from a source that is not the attorney's client, a careful due diligence review for any environmental concerns is warranted.

4. Liability for faulty or defective foreclosure proceedings is greater simply because commercial property owners have greater or easier access to lawyers and can more easily afford to legally challenge the process than a typical residential consumer.

§ 22.2 Preforeclosure Considerations

§ 22.2:1 Identification of All Loan Documents

As mentioned above, commercial loan documentation can be voluminous. It is important to obtain and review all of the constituent loan documents for compliance with various internal notice and opportunity to cure deadlines. All the documents evidencing the loan agreement, not just the note and deed of trust, constitute a contract between the mortgagor and the mortgagee, and if a rider or ancillary document changes the minimum notice requirements required by law, the loan document terms apply. *See Ford v. Emerich*, 343 S.W.2d 527 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.); *Faine v. Wilson*, 192 S.W.2d 456 (Tex. Civ. App.—Galveston 1946, no writ). Additionally, if any of the loan documents conflict, or appear to do so, the attorney should adopt the interpretation or clause most favorable to the other party.

Typical commercial loan documentation will usually include—

- a note;
- a deed of trust;
- ancillary loan performance agreements;
- environmental indemnity agreements;
- guaranty agreements;
- subordination, nondisturbance, and attornment agreements;
- assignments and pledges of various contracts and agreements (such as construction contracts, architect's contracts, and property management contracts);
- UCC-1 and UCC-1 addendum filings; and
- separate assignments of rents and leases (sometimes not separate but within the deed of trust).

Compiling a detailed foreclosure checklist is recommended to review the various loan documents, as well as check on other matters such as title, notices, and correspondence from the parties, and payment history. See form 2-4 in this manual. See also Niles W. Holmes, *Preforeclosure Documentation*, *in* Advanced Real Estate Drafting Course, State Bar of Texas (2003).

§ 22.2:2 Title Concerns

A proper review and update of the mortgagee's title policy, now called a Loan Title Policy to mirror American Land Title Association policy names, is important.

As promulgated by the Texas Department of Insurance, the foreclosing lender may purchase a "Limited Pre-Foreclosure Policy" (Form T-98) and a "Limited Pre-Foreclosure Policy Downdate Endorsement" (Form T-99). In practice, most attorneys do not order or obtain such coverage. The premium cost of the policy, compared to the coverages provided, is why most attorneys prefer to engage a title company to perform a basic title search to update the title from the date of the title policy, forward. Procedural Rule P-43 sets forth the terms, conditions, and requirements for the issuance of a Limited Pre-Foreclosure Policy and Limited Pre-Foreclosure Policy Downdate Endorsement. Procedural Rule P-43 is found in section IV, "Procedural Rules," of the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas issued by the Texas Department of Insurance. The Basic Manual, forms, and endorsements can be found at the Texas Department of Insurance Web site at **www.tdi.texas.gov/title/titleman.html**.

It is important to note, however, that any non-title insurance product or service from a title company will almost invariably have a disclaimer or limitation of liability, often limiting damages for errors and omissions to zero or the cost charged for the product. Title searches, unlike the Limited Pre-Foreclosure Policy, are not policies of insurance and provide little recourse in the case of error.

As with residential foreclosures, one of the primary purposes of a title update is to ensure there are no filings or encumbrances recorded in the real property records after the date of the loan policy that could survive foreclosure sale. *Mortgage & Trust, Inc. v. Bonner & Co.*, 572 S.W.2d 344 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). The liens, filings, and encumbrances that have special status and by law are not automatically extinguished by the foreclosure are described below.

Federal Tax Liens: If the foreclosing lender discovers that a federal tax lien has been filed in the name of the borrower or mortgagor, the foreclosing lender must carefully review the lien and give the Internal Revenue Service (IRS) notice twenty-five days prior to the conduct of any sale. *See* 26 U.S.C. § 7425. After properly giving such notice, the property will remain subject to a right of redemption in favor of the Service for a period of 120 days after the date of foreclosure sale. *See* 26 C.F.R. § 301.7425–4. However, the property will no longer be encumbered by the IRS lien against the borrower or mortgagor. These issues and procedures are set forth in greater detail in section 4.9 in this manual.

Note: A federal lien securing the payment of a criminal fine is treated as if it was a federal tax lien. *See* 18 U.S.C. § 3613. In order to extinguish such a lien, a lender foreclosing a superior lien must make the United States a party to a judicial foreclosure or provide the United States with written notice of a nonjudicial foreclosure sale in the same manner as required for federal tax liens. 18 U.S.C. § 3613(c).

Ad Valorem Taxes: Along with an updated title search, a search of the current ad valorem tax records and payment status is important. The statutory lien for ad valorem taxes is superior to all other recorded liens and filings and is not extinguished by foreclosure of a first lien. Tex. Tax Code § 32.05(c). The lender's counsel should obtain tax certificates to confirm if there are any delinquent taxes or other assessments owed on the property. These reports and searches can take the form of a tax certificate from a third-party tax reporting service, usually obtained through or with the assistance of a title agent, or they can be ordered directly from the taxing authorities pursuant to Tex. Tax Code § 31.08, with a statutory fee of $10 for each certificate issued. Great care must be taken in reviewing such certificates to ensure that all of the property being foreclosed has been searched and disclosed by the tax certificates. It is not unusual for contiguous real property to be represented by several tax accounts, some representing very small parcels that have a historical basis in title resulting in their creation. See also chapter 24.

Additionally, taxes and assessments owed to water, flood control, or similar quasi-municipal or special utility districts also have superlien priority under Tex. Water Code § 55.604 and Tex. Tax Code § 32.01. If the subject property is located within any of these types of districts, the lender's counsel should check with the district to see if taxes are owed.

Tax Liens on Personal Property: Because personal property often serves as additional collateral for a commercial loan, to the extent such personal property is not deemed attached or a fixture to the real estate, personal property may have its own tax account that should be examined. A careful review of the collateral may reveal business personal property the lender wishes to seize and sell, which may have delinquent tax liabilities separate and distinct from the real estate. Manufactured housing and mobile home units are often initially taxed as personal property by local tax assessors before they are converted to real property and thus may have pre-attachment personal property tax liabilities not revealed by a real property tax search. See also chapter 29.

Local Government Liens: Certain liens in favor of governmental entities are entitled to superior lien status over a previously recorded deed of trust, such as for paving and street repairs (Tex. Transp. Code §§ 313.042, 313.054), water and sewer improvements (Tex. Loc. Gov't Code §§ 402.065, 402.0067, 552.065), demolition of structures (Tex. Loc. Gov't Code §§ 214.001, 214.0015), and abatement of hazards such as trash and weeds (Tex. Health & Safety Code §§ 342.001–.008). Additionally, some municipal lien authority can sometimes be found in certain city charters that purport to be superior to prior filed deeds of trust, so any lien in favor of a municipality should be treated with caution and thoroughly investigated.

Texas Workforce Commission Liens: Pursuant to chapter 61 of the Texas Labor Code, certain liens of the Texas Workforce Commission are superior to all other liens except ad valorem taxes. Tex. Lab. Code § 61.0825. However, these liens are less common and limited to those liens imposed by the commission against employers for unpaid wages to employees. All other types and varieties of labor liens under the Texas Labor Code, such as those for nonpayment of unemployment taxes, are ordinary liens with no superlien priority.

Federal Abstracts of Judgment: A judgment in favor of the United States creates a lien on all real property of a judgment debtor upon the filing of a certified copy of the abstract of judgment in the same way a recorded federal tax lien encumbers real property under the Internal Revenue Code. *See* 28 U.S.C. § 3201(a). The statute of limitations for enforcing this type of lien is twenty years from the date of assessment, not recording. 28 U.S.C. § 3201(c). It is superior to "any other lien or encumbrance perfected later in time." 28 U.S.C. § 3201(b). Under the first-in-time rule, a federal abstract of judgment does not have superior lien status over a superior deed of trust filed before the abstract of judgment.

Mechanic's Liens for Removables: A mechanic's and materialman's lien filed for "removables" has priority over a previously recorded deed of trust. *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974). Whether an improvement is a removable depends on whether "the improvements made can be removed without material injury to the land and pre-existing improvements." *Whirlpool*, 517 S.W.2d at 269. Greater discussion of removables can be found in section 4.9.

§ 22.2:3 Waiver of Notice and Other Waiver Clauses

One of the most important questions in a commercial foreclosures is: if the note and other loan documents have clear, unequivocal waivers of demand, presentment, payment, acceleration, intent to accelerate—which they invariably do—is any notice of default and opportunity to cure required at all before accelerating the debt and posting the property for sale?

Texas Property Code section 51.002(d), requiring a notice of default and demand to cure be sent by certified mail to the borrower, does not appear to apply to commercial transactions, and one court has essentially held the same. *See Parker v. Frost National Bank of San Antonio*, 852 S.W.2d 741, 744–45 (Tex. App.—Austin 1993, writ dism'd by agr.). However, some commentators have scrutinized section 51.002(d) and declared that it is not expressly limited to residential transactions. To lessen litigation risks, since acceleration is still a harsh remedy under common law, which is strictly construed as to its waivers and limitations (*see Motor &*

Industrial Finance Corp. v. Hughes, 302 S.W.2d 386 (Tex. 1957)), and due to concerns of equity and fairness, it is recommended that lender's counsel comply with the same notice and time-line requirements that apply to a residential foreclosure prior to acceleration of the debt and posting of the sale.

The same twenty-day notice period set forth in Tex. Prop. Code § 51.002(d) could be employed in commercial foreclosures and, absent any longer cure period in the loan documents, might be considered safe harbor. Indeed, it is hard to imagine Texas courts would impose a longer cure period on a commercial mortgagee, which has often negotiated the loan documents with the borrower's counsel, than a residential loan.

Two courts have held cure periods of ten days or less to be reasonable. *See Hammond v. All Wheel Drive Co.*, 707 S.W.2d 734, 737–38 (Tex. App.—Beaumont 1986, no writ) (relying on presentation requirements of former Texas Business and Commerce Code section 3.504 (now section 3.501) requiring payment by close of next business day following presentment); *Investors Realty Trust v. Carlton Corp.*, 541 S.W.2d 289, 290–91 (Tex. Civ. App.—Dallas 1976, no writ) (finding ten-day period sufficient under circumstances).

Additionally, for the same reasons of prudence, caution, and litigation risk set forth above, any guarantors on the note, even if the guarantor waived the foreclosure notice rights in the guaranty agreement, ought to be given the same minimal notices and opportunity to cure as the borrower, especially if the guarantor does not control the borrower and does not share the same address for notice with the borrower. *See Carroll v. General Electric Credit Corp.*, 734 S.W.2d 153, 154–55 (Tex. App.—Houston [1st Dist.] 1987, no writ); *see also Hernandez v. Bexar County National Bank*, 710 S.W.2d 684 (Tex. App.—Corpus Christi), *writ ref'd n.r.e. per curiam*, 716 S.W.2d 938 (Tex. 1986); *Peck v. Mack Trucks, Inc.*, 704 S.W.2d 583 (Tex. App.—Austin 1986, no writ).

See chapters 8 and 12 in this manual for further discussion of these issues.

§ 22.2:4 Types of Default

In a residential mortgage loan, the lender will typically default the borrower for failure to pay the loan, failure to pay property taxes, or failure to keep the collateral insured as required by the deed of trust.

However, commercial loan agreements, notes, and deeds of trust often have a wider avenue of default possibilities—the credit and business health of the borrower may be critical to the lender, and the credit and business health of wealthy guarantors may also be of vital importance.

Commercial loan documents may provide for any of the following to constitute default of the loan (some after notice and opportunity to cure, and some immediately with notice):

- the failure of borrower (or guarantor) to pay when due any part of the loan;
- the failure by borrower to maintain a contractually specified debt service coverage ratio in its business operations (typically a ratio of total cash flow to debt service on the loan, such as, for example, a total cash flow of 1.25x the debt service);
- the failure of borrower (or guarantor) to timely and properly observe, keep, or perform any covenant, agreement, warranty, or condition required in the note, deed of trust, or any renewal, modification, rearrangement, amendment or extension thereof, or in any other loan document (other than covenants to pay any sum of money in accordance with the note);

- the breach of any representation, covenant, or warranty contained in the deed of trust, loan agreement, or any of the other loan documents or any other document ever delivered by the borrower to the lender in connection with the note, or if the same is false, misleading, erroneous, or breached in any material respect;
- if borrower (or guarantor) becomes insolvent, or makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors, or admits in writing its inability to pay its debts as they become due or is generally not paying its debts as such debts become due;
- if borrower (or guarantor) has a receiver, trustee, or custodian appointed for, or take possession of, all or substantially all of the assets of borrower (or guarantor);
- if borrower (or guarantor) files a petition for relief for bankruptcy or an involuntary petition for relief is filed against borrower (or guarantor);
- if borrower (or guarantor) fails to have discharged within a period of thirty days any attachment, sequestration, or similar writ levied upon any property of borrower (or guarantor);
- if borrower (or guarantor) fails to pay within thirty days any final money judgment against borrower (or guarantor);
- if there is a levy against the collateral or any part thereof or against any material portion of borrower's (or guarantor's) other property or any execution, garnishment, attachment, sequestration, or other writ or similar proceeding;
- the abandonment of any portion of the collateral or any material portion of any of the other property of borrower (or guarantor);
- the dissolution, liquidation, termination, or forfeiture of borrower's right to do business, or, if borrower (or guarantor) is an individual, the death or disability of borrower (or guarantor);
- the filing by borrower (or guarantor) of either a petition, complaint, answer, or other instrument that seeks to effect a suspension of, or which has the effect of suspending, any of the rights or powers of beneficiary or trustee granted in the note, the deed of trust, or in any loan document;
- the failure to commence construction of improvements or, after commencement of construction of improvements, the cessation of the construction of improvements;
- a failure of the construction of improvements or of any of the materials, articles, or fixtures supplied for incorporation into the construction of improvements to comply with the plans, any governmental requirement, or the requirements of any lease;
- an inability of borrower to satisfy any condition specified in the loan agreement as precedent to the obligation of lender to make an advance after an application for advance has been submitted by borrower to lender;
- a failure by the borrower to achieve completion of improvements by a determined completion date or a determination by lender that construction of improvements will not be completed on or before such completion date;
- if borrower (or guarantor) (1) conceals, removes, or permits to be concealed or removed any part of its property with the intent to hinder, delay, or defraud

any of its creditors; or (2) makes or suffers a transfer of any of its property that may be fraudulent under any bankruptcy, fraudulent conveyance, or similar law; or (3) suffers or permits while insolvent (under any applicable definition of the term) any creditor to obtain a lien upon any of its property through legal proceedings;

- the occurrence of a "material adverse change" in borrower or guarantor, as defined by the loan documents; or

- the occurrence of any default under any lease covering any portion of the collateral property or the repudiation, termination, or attempted repudiation or termination of any such lease.

As previously mentioned, the loan documents will specify whether such defaults have a cure period, or not, before the lender may pursue its remedies for the default.

§ 22.2:5 Letter of Strict Compliance

In reviewing the files of the mortgagee or mortgage servicer, counsel may discover that the lender or its agents have accepted late payments, failed to impose late fees or other charges, or permitted other defaults as defined by the loan documents. In such instances, it is important to send a letter of strict compliance to the borrower to state that in the future the terms of the loan documents will be strictly observed, and that the lender expects full and complete compliance with the same, before sending out any formal notices of default or other foreclosure notices. Such actions will help reduce or prevent claims or waiver and estoppel by the borrower and generally allow for a clean default, which occurs after receipt of the letter, to serve as the basis for the foreclosure activity. See form 22-1 in this manual for an example letter of strict compliance.

§ 22.3 Demand to Cure

Once the loan documents have been reviewed and evaluated, the title policy reviewed and brought to date, the loan file reviewed for prior correspondence and actions of the lender, and the payment history reviewed, it is time to make demand to cure the default of the borrower.

It is long-standing common law that the holder of an installment note has the right to accelerate the maturity of the debt upon default by first presenting a demand for payment of the delinquent amounts, prior to exercising the acceleration right. *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232 (Tex. 1982) (citing *Brown v. Hewitt*, 143 S.W.2d 223 (Tex. Civ. App.—Galveston 1940, writ ref'd)); *Allen Sales & Servicenter, Inc. v. Ryan*, 525 S.W.2d 863 (Tex. 1975); *Lockwood v. Lisby*, 476 S.W.2d 871 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.); *Jernigan v. O'Brien*, 303 S.W.2d 515 (Tex. Civ. App.—Austin 1957, no writ); *Parker v. Mazur*, 13 S.W.2d 174 (Tex. Civ. App.—San Antonio 1928, writ dism'd).

In commercial loan transactions, some defaults are of such nature that no cure can be effected primarily if misrepresentations by the borrower were made in the loan documents. These cases are rare, and in most default situations, a commercial lender will want the problem that triggered the default cured so that it may resume receiving the scheduled loan payments. To rectify the problem, demand to cure must be given to the borrower.

§ 22.4 Notice of Intent to Accelerate

The Texas Supreme Court has clarified that, unless waived, acceleration of the debt at common law requires two separate notices—a notice of intent to accelerate and then a separate notice that acceleration has occurred. *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232, 233 (Tex. 1982).

The court revisited this issue in *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893–94 (Tex. 1991) and reaffirmed that *notice* of acceleration, and notice of *intent* to accelerate were different notice rights under common law and that they required separate waivers if waiver was to be effective. In *Shumway*, the court was quick to strike down an ambiguous waiver of notice of intent to accelerate and held that any waiver of such notice must be "clear and unequivocal." *Shumway*, 801 S.W.2d at 893.

§ 22.5 Acceleration

See the discussion in section 10.26 of this manual regarding the statute of limitations accruing after a notice of sale has been given to the obligor of a loan agreement.

Because of the harsh effect of acceleration—total debt is now due—courts insist that acceleration be accomplished in strict accordance with all requirements established under both the loan documents and at common law. A right of acceleration must be stated in "clear and unequivocal" terms to be enforceable. *Motor & Industrial Finance Corp. v. Hughes*, 302 S.W.2d 386, 394 (Tex. 1957). The "clear and unequivocal" standard found in *Hughes* formed the basis that the Texas Supreme Court used when it decided on the standards to be used for a waiver of intent to accelerate in *Shumway*. *See Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991) (citing *Hughes*, 302 S.W.2d at 394).

Generally a notice of default and demand to cure and a separate notice of intent to accelerate are given in the same notice. If the borrower fails to cure the default, the mortgagee is authorized to accelerate maturity and begin foreclosure proceedings under the deed of trust. *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232, 233 (Tex. 1982) (citing *Natali v. Witthaus*, 135 S.W.2d 969 (1940)).

Under common law, absent any waivers, a mortgage lender must present the following notices to a borrower:

1. Demand for payment of the delinquency. (Technically, presentment of the note precedes demand, but in modern practice demand for payment is usually the first step, as formal presentment is almost invariably waived in most notes.)
2. Notice of intent to accelerate.
3. Notice that the debt has been accelerated.

A notice of foreclosure sale pursuant to chapter 51 of the Texas Property Code has been held to be sufficient notice of acceleration. *McLemore v. Pacific Southwest Bank, FSB*, 872 S.W.2d 286 (Tex. App.—Texarkana 1994, writ dism'd by agr.); *see also Meadowbrook Gardens, Ltd. v. WMFMT Real Estate Ltd. Partnership*, 980 S.W.2d 916, 919 (Tex. App.—Fort Worth 1998, pet. denied); *Phillips v. Allums*, 882 S.W.2d 71, 74 (Tex. App.—Houston [14th Dist.] 1994, writ denied). However, because this issue has not been well discussed in other cases, prudent practice dictates a separate notice to the borrower of the acceleration, accompanied by any filed or unfiled notice of trustee's sale.

Note: In modern practice and in the forms provided in this manual, demand for payment and notice of intent to accelerate are usually combined into a single notice and demand when done by lender's counsel.

In commercial practice, because of the extensive litigation over these issues in prior decades, and because it is the standard practice in residential foreclosure, most commercial foreclosure practitioners do not rely on all of the numerous waivers given by the borrower in the loan documents, which, if read and followed literally, suggest that no notice of default, nor intent to accelerate, nor acceleration is required whatsoever. In practice, most commercial foreclosures follow the same basic two-step process as a residential foreclosure:

1. Give the borrower notice of the default and demand payment or other action (if not a monetary default) to cure the same, allowing a fair and reasonable cure period (ten to twenty days are suggested for monetary default, thirty days for other default) if no such cure period is otherwise specified in the loan documents. In this same notice, even if waived, give notice of the lender's intent to accelerate the note for such default if not cured within such deadline.
2. If the cure period passes without full cure, give the borrower notice that the default remains uncured and that the note has been accelerated, accompanied by a notice of trustee's or substitute trustee's sale, which notice must follow the requirements of Tex. Prop. Code § 51.002.

Form 8-3 in this manual is a sample letter giving notice of the default to the borrower in step 1 above.

Form 12-2 is a sample letter giving notice of acceleration and the posting of the property for sale.

§ 22.6 Notice of Sale

The statutory procedures in chapter 51 of the Texas Property Code concerning contents, service on debtors, delivery, posting, and filing of a notice of sale are the same for commercial as for residential foreclosures. See chapter 12 in this manual for additional discussion; see also section 2.1 in this manual regarding the notice of sale serving as the appointment of a substitute trustee under Texas Property Code section 12.002.

§ 22.6:1 Contents of Notice of Sale

Section 51.002 of the Texas Property Code provides that the notice of the sale must include the time of the sale and the location if none has been designated by the commissioners court. Notice of the sale must include a statement of the earliest time at which the sale will begin and must be given at least twenty-one days before the date of the sale. *See* Tex. Prop. Code § 51.002(a), (b). Exceptions, however, are made if the courthouse or county clerk's office is closed because of inclement weather, natural disaster, or other act of God. *See* Tex. Prop. Code § 51.002(b–1).

Additionally, pursuant to Tex. Prop. Code § 51.002(i), the notice of sale must conspicuously contain the following proviso in boldface or underline type:

> Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the national guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.

See form 12-3 in this manual for a notice of foreclosure sale.

§ 22.6:2 Service of Notice

Just as in residential foreclosures, a notice of sale must be served by certified mail on each debtor who, according to the records of the lender, is obligated to pay the debt. Tex. Prop. Code § 51.002(b)(3).

§ 22.6:3 Notice to Guarantors

Loan guaranties in commercial practice invariably waive any duty to notify the guarantor of any segment of the foreclosure or collection process, and Texas Property Code chapter 51 imposes no requirement to give notice to guarantors.

A number of cases have upheld waivers of notice to guarantors. *Goff v. Southmost Savings & Loan Ass'n*, 758 S.W.2d 822, 824–25 (Tex. App.—Corpus Christi 1988, writ denied) (waiver in guaranty upheld); *Micrea, Inc. v. Eureka Life Insurance Co. of America*, 534 S.W.2d 348, 357 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (notice to guarantor of acceleration waived and not properly pleaded). One court has specifically held that guarantors are not entitled to notice of a real property foreclosure sale under Property Code section 51.002. *Long v. NCNB–Texas National Bank*, 882 S.W.2d 861, 866 (Tex. App.—Corpus Christi 1994, no writ); *see also Bishop v. National Loan Investors, L.P.*, 915 S.W.2d 241, 245 (Tex. App.—Fort Worth 1995, writ denied).

However, the lack of notice to guarantors has been held to affect personal property foreclosures. A guarantor is a debtor within the meaning of sections 9.102(a)(28), (61) and 9.611 of the Texas Business and Commerce Code. *See Carroll v. General Electric Credit Corp.*, 734 S.W.2d 153 (Tex. App.—Houston [1st Dist.] 1987, no writ) (failure to notify guarantor of nonjudicial foreclosure sale of personal property bars assertion of deficiency claim on behalf of creditor); *Peck v. Mack Trucks, Inc.*, 704 S.W.2d 583 (Tex. App.—Austin 1986, no writ); *Hernandez v. Bexar County National Bank*, 710 S.W.2d 684, 687 (Tex. App.—Corpus Christi), *writ ref'd per curiam*, 716 S.W.2d 938 (Tex. 1986).

The Fifth Circuit, after noting a split among Texas courts of appeals, has upheld a guarantor's contractual waiver of notice of disposition of collateral by a secured party. In *Steinberg v. Cinema N' Drafthouse Systems, Inc.*, 28 F.3d 23, 25 (5th Cir. 1994), the Fifth Circuit held that the restriction on waivers of former Business and Commerce Code section 9.501 is inapplicable to guarantors. The court noted that the Texas Supreme Court had reserved judgment on this issue.

Accordingly, sending a notice of sale under section 51.002 of the Texas Property Code remains prudent practice until this issue is settled.

§ 22.6:4 Service on Debtor

As with residential foreclosures, a notice of sale must be served on each maker or current direct obligor of the note at least twenty-one days before the date of sale. Tex. Prop. Code § 51.002(b). Service is deemed made when deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address. Tex. Prop. Code § 51.002(e). The entire calendar day on which the notice is deposited in the mail is included in the twenty-one-day calculation, and the entire calendar day of the sale is excluded in such calculations. Tex. Prop. Code § 51.002(g). See also chapter 12 in this manual.

§ 22.6:5 Posting and Filing

The notice of sale must be posted at the "courthouse door" of each county in which the property is located at least twenty-one days before the date of sale. Tex. Prop. Code § 51.002(b)(1). Additionally, the notice of sale must be filed in the office of the county clerk for each county in which the property is located. Tex. Prop. Code § 51.002(b)(2). The same rules for calculating the twenty-one days used for service of notice also apply to the posting and filing deadlines. *See* Tex. Prop. Code § 51.002(g).

§ 22.7 Conducting Sale

The legal procedures for commercial foreclosure sales are the same as for residential—compliance with the loan documents and compliance with statutory law. See chapter 14 in this manual for additional discussion.

In practice, a commercial foreclosure sale is usually the only auction the trustee or substitute trustee will conduct on the day of foreclosure; therefore, greater attention to details of sale can be given because there is no rush for time.

Pursuant to Texas Property Code section 51.0075(a), the trustee or substitute trustee may "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." Tex. Prop. Code § 51.0075(a). A list of some typical conditions of sale is contained in form 22-2 and may be incorporated into the script used at auction or may simply be offered by the trustee to be reviewed and read by any interested party before bidding is opened.

Use of a foreclosure sale transcript, while not required by law, is good practice, as it is written record that can be preserved in the file of how the sale was conducted. A sample form of script is contained in form 14-2.

As part of documenting the sale in case of later legal challenge, a written registration of all interested bidders should be considered. This registration would have to be set forth as part of the "reasonable conditions of sale" and serves an additional purpose for the lender client—it is a short list (including contact information) of parties who may be interested in purchasing the collateral as a real estate-owned property in the event the collateral is struck back to the lender. See form 14-3 for a sample bidder registration form.

§ 22.8 Excess Proceeds

The Texas Property Code provides that "[t]he trustee or substitute trustee shall disburse the proceeds of the sale as provided by law." Tex. Prop. Code § 51.0075(f).

A careful review of the deed of trust and the loan agreement should be undertaken to determine what, if any, provisions address the distribution of sales proceeds. In determining whether a deficiency or a surplus bid exists, credit is to be given by the mortgagee to premiums on force-placed insurance refunded to the mortgagee after the foreclosure sale that were included as part of the secured debt; also, interest that would have been earned on the mortgagor's escrow accounts had the mortgagee followed the deed-of-trust requirements for interest-bearing escrow accounts is to be credited against the balance of the secured debt. *See Myrad Properties, Inc. v. LaSalle Bank N.A.*, 252 S.W.3d 605, 621 (Tex. App.—Austin 2008); *rev'd on other grounds*, 300 S.W.3d 746 (Tex. 2009); *see also* Tex. Ins. Code ch. 549.

Most commercial forms for deed of trust contractually provide for the means for applying the proceeds of a foreclosure sale. The following is a typical provision in a commercial deed of trust for application of proceeds:

> **Application of Proceeds.** The proceeds from any sale, lease or other disposition made pursuant to this Article, or the proceeds from the surrender of any insurance policies pursuant to Subsection 3.02(i) hereof, or any rental collected by Beneficiary from the Property, or the reserves required by Section 6.03 hereof, or sums received pursuant to Section 6.01 hereof, or proceeds from insurance which Beneficiary elects to apply to the Obligation pursuant to Section 6.02 hereof, shall be applied by Trustee, or by Beneficiary, as the

> case may be, as follows: first, to the payment of all expenses of advertising, selling and conveying the Property or part thereof, including reasonable attorneys' fees; second, to accrued interest on the Obligation; third, to principal on the matured portion of the Obligation; fourth, to prepayment of the unmatured portion, if any, of the Obligation applied to installments of principal in inverse order of maturity; and fifth, the balance, if any, remaining after the full and final payment and performance of the Obligation, to the person or persons legally entitled thereto.

§ 22.9 Distribution of Net Sales Proceeds

§ 22.9:1 Lienholders

Junior lienholders' liens attach to surplus sale proceeds in the same order of priority as their liens attach to the property foreclosed. *Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor*, 576 S.W.2d 794, 807–08 (Tex. 1978); *Jeffrey v. Bond*, 509 S.W.2d 563, 565 (Tex. 1974); *Baccus v. Westgate Management Corp.*, 981 S.W.2d 383, 385–86 (Tex. App.—San Antonio 1998, pet. denied) (third lienholder entitled to "leapfrog priority" over second lienholder, but only to extent of balance owing on first lien purchased and foreclosed by it, and proceeds in excess of first-lien debt belong to second-lien creditor); *Mortgage & Trust, Inc. v. Bonner & Co.*, 572 S.W.2d 344, 351 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

Surplus foreclosure proceeds are not payable to prior lienholders; however, payment to a prior lienholder has been approved if made with the consent of the grantor of the foreclosed deed of trust. *See Canfield v. Foxworth-Galbraith Lumber Co.*, 545 S.W.2d 583 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). For wraparound mortgages, in the absence of an express agreement to the contrary, Texas courts will imply a covenant of the trustee to pay sale proceeds on the prior-lien debt. *See Summers v. Consolidated Capital Special Trust*, 783 S.W.2d 580 (Tex. 1989).

The trustee should interplead surplus sale proceeds into the registry of the court if there are conflicting demands between subordinate lienholders or between the mortgagor and a subordinate lienholder.

If the deed of trust so provides, the foreclosed debtor is entitled to any surplus proceeds remaining after satisfaction of a junior-lien foreclosure made subject to prior liens. *Conversion Properties, L.L.C. v. Kessler*, 994 S.W.2d 810, 813–14 (Tex. App.—Dallas 1999, pet. denied); *Mortgage & Trust*, 572 S.W.2d at 351; *Pearson v. Teddlie*, 235 S.W.2d 757, 759 (Tex. Civ. App.—Eastland 1950, no writ). However, if the debtor relinquishes his right to surplus by failing to object properly to the trustee's distribution of partial surplus proceeds to the senior lienholder that has not foreclosed, the debtor is deemed to have ratified and waived the deviation from the terms of the deed of trust.

§ 22.9:2 Mortgagors

If there are excess proceeds, after payment of all inferior liens in order of lien priority, the excess belongs to the mortgagor of the deed of trust foreclosed. *Bonilla v. Roberson*, 918 S.W.2d 17, 23 (Tex. App.—Corpus Christi 1996, no writ). If there are competing claimants to the sales proceeds, the trustee should interplead the proceeds into the registry of the district court. For example, the mortgaged property may be owned by several persons as cotenants. One or more of the cotenants may have federal tax liens or judgment liens filed against them, or a cotenant may have granted deed-of-trust liens against his undivided interests subject to the lien of the foreclosing creditor.

Additional Resources

Holmes, Niles W. "Preforeclosure Documentation." In *Advanced Real Estate Drafting Course, 2003*. Austin: State Bar of Texas, 2003.

[Reserved]

Chapter 23

Tax Consequences of the Foreclosure Process

§ 23.1 Introduction

This chapter provides a general overview of the federal income tax consequences to the taxpayer who receives an IRS Form 1099-A or 1099-C from the mortgagee because the taxpayer's property was foreclosed or all or part of the taxpayer's debt was canceled by the mortgagee's forbearance agreement with the taxpayer. These forms are reproduced at forms 15-1 and 23-1 in this manual. For income tax purposes, the foreclosure or cancellation of a debt by the mortgagee is generally considered ordinary income because gross income means "all income from whatever source derived, including…income from discharge of indebtedness," and there is no distinction between voluntary and involuntary dispositions of property by the Internal Revenue Service. *See* 26 U.S.C. § 61(a)(3), (12).

But for the Mortgage Forgiveness Debt Relief Act of 2007 (MFDRA), Pub. L. No. 110-142, 121 Stat. 1803, any phantom income reported on IRS Form 1099-A or 1099-C from the foreclosure sale of the taxpayer's residence would be taxable. The MFDRA allows the taxpayer to exclude the income reported on IRS Form 1099-A or 1099-C from the taxpayer's annual tax return. The MFDRA is further discussed in section 23.7 below. Several bills are currently pending before Congress that propose to extend the Act to December 31, 2015, or 2016, but there is no assurance Congress will extend the Act.

Because of the uncertainty of the continuation of the MFDRA, this chapter will focus on the tax consequences to a taxpayer as if the Act was no longer operative.

Therefore, because of the complexity of the income tax rules and the uncertainty of what law will be in effect in the future, a taxpayer is advised to consult with an experienced tax attorney, certified public accountant, or enrolled IRS agent (see Treasury Department Circular 230) when preparing a taxpayer's tax return after receiving IRS Form 1099-A or 1099-C from the taxpayer's lender.

§ 23.2 Foreclosure Is a Taxable Event

The IRS treats a foreclosure as a taxable sale or exchange that requires a determination of whether the foreclosure sale resulted in income to the taxpayer obligated for the debt based on whether there was a taxable gain or loss to the taxpayer obligated for the underlying debt. A recognized gain must be included in gross income and a recognized loss is deductible from gross income. To calculate ordinary income from a foreclosure sale, see Part 1 of Table 1-2, Worksheet for Foreclosures and Repossessions, in IRS Publication 544, "Sales and Other Dispositions of Assets," available online at **https://www.irs.gov/publications/index.html**. To calculate the loss or gain from a foreclosure sale, see Part 2 of Table 1-2. To determine the adjusted basis of the property used in the Table 1-2 calculations, see IRS Publication 551, "Basis of Assets," available online at **https://www.irs.gov/publications/index.html**. A gain occurs when the foreclosure sales price exceeds the taxpayer's adjusted basis in the property and a loss occurs when the adjusted basis is more than the foreclosure sale price. If the loan balance was more than the fair market value of the property at the time of the foreclosure sale, the difference is treated as income to the taxpayer for tax purposes.

§ 23.3 Determining Gain or Loss and Income

If a taxpayer is personally liable for the debt, the gain or loss of income resulting from the foreclosure sale is based on (1) the outstanding debt immediately before the sale, reduced by any amount that remains a personal liability of the mortgagor immediately after the sale (i.e., the deficiency as determined under Texas Property Code sections 51.003 and 51.004), and (2) the fair market value of the foreclosed property at the time of sale.

However, if the fair market value of the foreclosed property that was used as the taxpayer's principal residence is less than the amount owed on the debt secured by the property, the difference is treated as ordinary income to the taxpayer. However, if the foreclosure sale resulted in a capital loss, the taxpayer cannot deduct the loss from the taxpayer's return for income tax purposes. *See* IRS Publication 544, "Sales and Other Dispositions of Assets," available at **https://www.irs.gov/publications/index.html**.

The IRS simplifies the task of calculating gain or loss and income by providing Table 1-2, Worksheet for Foreclosures and Repossessions, in IRS Publication 544, which is a simple, fill-in-the-blank form using the information received by the taxpayer on IRS Form 1099-A or 1099-C.

§ 23.4 IRS Forms 1099-A and 1099-C

The best source of information concerning the nuances of Forms 1099-A and 1099-C is the IRS Instructions for Forms 1099-A and 1099-C, which is reproduced as form 23-2 in this manual.

The taxpayer's lender is responsible for providing a taxpayer with IRS Form 1099-A or 1099-C. The lender must send one of these forms to the taxpayer after a foreclosure sale if the lender made a loan to the taxpayer in connection with the lender's trade or business and acquired an interest in the taxpayer's property that secured the taxpayer's debt in full or in part.

Form 1099-A contains the date the lender acquired the secured property, which is the earlier of the date title was transferred to the lender or the date the lender obtained possession of the property. See form 15-1. In addition, Form 1099-A contains the balance of the taxpayer's debt that was outstanding at the time the lender acquired the secured property. This amount includes the unpaid principal but not accrued interest or foreclosure costs. The fair market value of the foreclosed property is also included on Form 1099-A, which for tax purposes is the gross foreclosure sales price. If the property was conveyed to the lender voluntarily, such as by a deed in lieu of foreclosure, the fair market value for tax purposes is the property's appraised value. Whether the taxpayer was personally liable for the debt and whether the debt was modified is also noted on Form 1099-A.

Any financial institution, credit union, federal government agency, or entity that is in the business of lending money that cancels or forgives more than $600 of a taxpayer's debt, must provide IRS Form 1099-C to the taxpayer upon foreclosure. See form 23-1. Form 1099-C is used only for cancellation of a debt the taxpayer actually incurred and not if the debt was canceled due to identity theft. Form 1099-C must be provided to the taxpayer even if the taxpayer will not be required to report any income for tax purposes because of the foreclosure sale.

The debt reported on Form 1099-C is the stated principal, stated interest, fees, penalties, administrative costs, and fines. A debt is considered canceled due to foreclosure when the lender is barred by law, including local law, from pursuing additional debt collection efforts against the taxpayer. A guarantor or surety is not considered a debtor for the purposes of a Form 1099-C.

The amount considered discharged on Form 1099-C does not include any amount the lender received in satisfaction of the debt by means of a settlement agreement. As in Form 1099-A, the lender must report in Form 1099-C whether the taxpayer was personally liable for the debt. The fair market value of the foreclosed property for Form 1099-C purposes is the purchase price received at the foreclosure sale.

If the taxpayer receives a Form 1099-A or Form 1099-C from the lender, it means the lender filed a report with the IRS regarding the underlying debt. If two or more taxpayers are jointly or severally liable for the debt, all taxpayers will receive a Form 1099-C showing the entire amount of the canceled debt that is considered income. The amount of income each taxpayer must realize, however, depends on state law, the amount of the debt each person received, the interest amount deduction claimed by each person, the basis of the co-owned property, and if the canceled debt qualifies for an exception or exclusion. For example, any pay-for-performance success payment that reduces the principal balance of a home mortgage under the Home Affordable Modification Program is nontaxable. *See* IRS Publication 4681, "Cancelled Debts, Foreclosure, Repossessions, and Abandonments," available at **https://www.irs.gov/publications/index.html**.

§ 23.5 Reductions of Tax Attributes

If a foreclosure sale results in income to the taxpayer, the taxpayer must report the income on IRS Form 982 and attach it to the taxpayer's income tax return. This form is reproduced at form 23-3 in this manual. Part I of the form requires the amount the taxpayer claims should be excluded for income tax purposes and why the income received from foreclosure should be excluded. If income is attributed to a "qualified principal residence" debt, income reported on IRS Form 982 will be excluded from the taxpayer's Form 1040.

Part II of Form 982 is used to reduce the taxpayer's basis in the taxpayer's "qualified principal residence" if income is being excluded from the taxpayer's return. "Qualified principal residence" is discussed in the following section. IRS Publication 523, which includes worksheets on how to determine the adjusted basis for a taxpayer's main home, is user-friendly and written in plain English.

§ 23.6 Qualified Principal Residence Indebtedness

"Qualified principal residence indebtedness" is any mortgage used to buy, build, or substantially improve the taxpayer's principal residence or to refinance the mortgage, but only up to the amount of unpaid principal at the time of the refinance. The qualified principal residence indebtedness exclusion does not apply if the debt was canceled in a Chapter 11 bankruptcy. See IRS Publication 4681 for information related to a taxpayer's principal residence.

§ 23.7 Mortgage Forgiveness Debt Relief Act of 2007

The MFDRA, enacted December 20, 2007, applies to any homeowner who would have owed taxes on a foreclosure sale or cancellation of the taxpayer's debt secured by the homeowner's principal residence. Although set to expire in 2009, the MFDRA was extended for an additional three years under the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765, and further extended to December 31, 2013, under the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313.

The MFDRA only applies to mortgage debt incurred to buy, build, or substantially improve the taxpayer's principal residence. For the calendar years 2007 through 2013, the maximum amount of the exclusion is $1,000,000 for a married person filing separately or $2,000,000 for a joint tax return. A debt attributed to a second home does not qualify for exclusion under the MFDRA. A mortgage debt used to refinance a prior debt against the principal residence qualifies under the MFDRA, but only to the extent of the unpaid balance on the prior debt. After a foreclosure sale, the gain or loss and income resulting from the foreclosure sale for tax purposes must be reported on IRS Form 982, and the form must be attached to a taxpayer's return. The amount deemed forgiven is the amount stated in box 2 of IRS Form 1099-C and will generally be the amount the taxpayer enters on line 2 on Part I of Form 982.

§ 23.8 Taxpayer Assistance

The IRS has initiated a program manned by volunteers who provide income tax assistance and tax counseling for the elderly and free tax return preparation to certain qualified individuals with low to moderate income. To obtain this assistance, the taxpayer can contact the IRS at (800) 829-1040 or AARP Tax Aide at (888) 227-7669.

Almost all questions related to the tax consequences of a foreclosure sale can be obtained from the IRS Web site at **https://www.irs.gov/**; IRS Publications 544 and 4681; and the instructions for Forms 982, 1099-A, and 1099-C.

Form 23-1

Cancellation of Debt
IRS Form 1099-C

Attention:

This form is provided for informational purposes only. Copy A appears in red, similar to the official IRS form. Do **not** file copy A downloaded from this website. The official printed version of this IRS form is scannable, but the online version of it, printed from this website, is not. A penalty may be imposed for filing forms that can't be scanned. See part O in the current General Instructions for Certain Information Returns for more information about penalties.

To order official IRS forms, call 1-800-TAX-FORM (1-800-829-3676) or Order Information Returns and Employer Returns Online, and we'll mail you the scannable forms and other products.

See IRS Publications 1141, 1167, 1179 and other IRS resources for information about printing these tax forms.

8585 ☐ VOID ☐ CORRECTED

CREDITOR'S name, street address, city or town, state or province, country, ZIP or foreign postal code, and telephone no.	1 Date of identifiable event	OMB No. 1545-1424	**Cancellation of Debt**
	2 Amount of debt discharged $	2015	
	3 Interest if included in box 2 $	Form 1099-C	
CREDITOR'S federal identification number / DEBTOR'S identification number	4 Debt description		**Copy A For Internal Revenue Service Center**
DEBTOR'S name			**File with Form 1096.**
Street address (including apt. no.)	5 Check here if the debtor was personally liable for repayment of the debt . . . . ▶ ☐		For Privacy Act and Paperwork Reduction Act Notice, see the **2015 General Instructions for Certain Information Returns.**
City or town, state or province, country, and ZIP or foreign postal code			
Account number (see instructions)	6 Identifiable event code	7 Fair market value of property $	

Form **1099-C** Cat. No. 26280W www.irs.gov/form1099c Department of the Treasury - Internal Revenue Service

Do Not Cut or Separate Forms on This Page — Do Not Cut or Separate Forms on This Page

☐ CORRECTED (if checked)

CREDITOR'S name, street address, city or town, state or province, country, ZIP or foreign postal code, and telephone no.	1 Date of identifiable event	OMB No. 1545-1424	**Cancellation of Debt**
	2 Amount of debt discharged $	**2015**	
	3 Interest if included in box 2 $	Form **1099-C**	
CREDITOR'S federal identification number / DEBTOR'S identification number	4 Debt description		**Copy B For Debtor**
DEBTOR'S name			This is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction may be imposed on you if taxable income results from this transaction and the IRS determines that it has not been reported.
Street address (including apt. no.)	5 If checked, the debtor was personally liable for repayment of the debt . . . . ▶ ☐		
City or town, state or province, country, and ZIP or foreign postal code			
Account number (see instructions)	6 Identifiable event code	7 Fair market value of property $	

Form **1099-C** (keep for your records) www.irs.gov/form1099c Department of the Treasury - Internal Revenue Service

Instructions for Debtor

You received this form because a Federal Government agency or an applicable financial entity (a creditor) has discharged (canceled or forgiven) a debt you owed, or because an identifiable event has occurred that either is or is deemed to be a discharge of a debt of $600 or more. If a creditor has discharged a debt you owed, you are required to include the discharged amount in your income, even if it is less than $600, on the "Other income" line of your Form 1040. However, you may not have to include all of the canceled debt in your income. There are exceptions and exclusions, such as bankruptcy and insolvency. See Pub. 4681, available at IRS.gov, for more details. If an identifiable event has occurred but the debt has not actually been discharged, then include any discharged debt in your income in the year that it is actually discharged, unless an exception or exclusion applies to you in that year.

Debtor's identification number. For your protection, this form may show only the last four digits of your social security number (SSN), individual taxpayer identification number (ITIN), adoption taxpayer identification number (ATIN), or employer identification number (EIN). However, the creditor has reported your complete identification number to the IRS.

Account number. May show an account or other unique number the creditor assigned to distinguish your account.

Box 1. Shows the date the earliest identifiable event occurred or, at the creditor's discretion, the date of an actual discharge that occurred before an identifiable event. See the code in box 6.

Box 2. Shows the amount of debt either actually or deemed discharged. **Note.** If you do not agree with the amount, contact your creditor.

Box 3. Shows interest if included in the debt reported in box 2. See Pub. 4681 to see if you must include the interest in gross income.

Box 4. Shows a description of the debt. If box 7 is completed, box 4 also shows a description of the property.

Box 5. Shows whether you were personally liable for repayment of the debt when the debt was created or, if modified, at the time of the last modification. See Pub. 4681 for reporting instructions.

Box 6. Shows the reason your creditor has filed this form. The codes in this box are described in more detail in Pub. 4681. A—Bankruptcy; B—Other judicial debt relief; C—Statute of limitations or expiration of deficiency period; D—Foreclosure election; E—Debt relief from probate or similar proceeding; F—By agreement; G—Decision or policy to discontinue collection; H—Expiration of nonpayment testing period; or I—Other actual discharge before identifiable event.

Box 7. If, in the same calendar year, a foreclosure or abandonment of property occurred in connection with the cancellation of the debt, the fair market value (FMV) of the property will be shown, or you will receive a separate Form 1099-A. Generally, the gross foreclosure bid price is considered to be the FMV. For an abandonment or voluntary conveyance in lieu of foreclosure, the FMV is generally the appraised value of the property. You may have income or loss because of the acquisition or abandonment. See Pub. 4681 for information about foreclosures and abandonments. If the property was your main home, see Pub. 523 to figure any taxable gain or ordinary income.

Future developments. For the latest information about developments related to Form 1099-C and its instructions, such as legislation enacted after they were published, go to *www.irs.gov/form1099c*.

☐ VOID ☐ CORRECTED

CREDITOR'S name, street address, city or town, state or province, country, ZIP or foreign postal code, and telephone no.		1 Date of identifiable event	OMB No. 1545-1424	**Cancellation of Debt**
		2 Amount of debt discharged $	**2015**	
		3 Interest if included in box 2 $	Form **1099-C**	
CREDITOR'S federal identification number	DEBTOR'S identification number	4 Debt description		**Copy C** **For Creditor**
DEBTOR'S name				For Privacy Act and Paperwork Reduction Act Notice, see the **2015 General Instructions for Certain Information Returns.**
Street address (including apt. no.)		5 Check here if the debtor was personally liable for repayment of the debt . . . . ▶ ☐		
City or town, state or province, country, and ZIP or foreign postal code				
Account number (see instructions)		6 Identifiable event code	7 Fair market value of property $	

Form **1099-C** www.irs.gov/form1099c Department of the Treasury - Internal Revenue Service

Instructions for Creditor

To complete Form 1099-C, use:

- the 2015 General Instructions for Certain Information Returns, and
- the 2015 Instructions for Forms 1099-A and 1099-C.

To order these instructions and additional forms, go to *www.irs.gov/form1099c* or call 1-800-TAX-FORM (1-800-829-3676).

Caution. Because paper forms are scanned during processing, you cannot file Forms 1096, 1097, 1098, 1099, 3921, 3922, or 5498 that you print from the IRS website.

Due dates. Furnish Copy B of this form to the debtor by February 1, 2016.

File Copy A of this form with the IRS by February 29, 2016. If you file electronically, the due date is March 31, 2016. To file electronically, you must have software that generates a file according to the specifications in Pub. 1220, Specifications for Electronic Filing of Forms 1097, 1098, 1099, 3921, 3922, 5498, and W-2G. The IRS does not provide a fill-in form option.

Need help? If you have questions about reporting on Form 1099-C, call the information reporting customer service site toll free at 1-866-455-7438 or 304-263-8700 (not toll free). Persons with a hearing or speech disability with access to TTY/TDD equipment can call 304-579-4827 (not toll free).

Form 23-2

2015

Instructions for Forms 1099-A and 1099-C

Department of the Treasury
Internal Revenue Service

Acquisition or Abandonment of Secured Property and Cancellation of Debt

Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

For the latest information about developments related to Forms 1099-A and 1099-C and their instructions, such as legislation enacted after they were published, go to www.irs.gov/form1099a and www.irs.gov/form1099c.

What's New

At the time these instructions went to print Proposed Regulations (REG-136676-13) were issued concerning the 36-month non-payment testing period. See, www.irs.gov/form1099a for further developments.

Reminder

In addition to these specific instructions, you should also use the 2015 General Instructions for Certain Information Returns (Forms 1097, 1098, 1099, 3921, 3922, 5498, and W-2G). Those general instructions include information about the following topics.

- Who must file (nominee/middleman).
- When and where to file.
- Electronic reporting requirements.
- Corrected and void returns.
- Statements to recipients.
- Taxpayer identification numbers.
- Backup withholding.
- Penalties.
- Other general topics.

You can get the general instructions from www.irs.gov/form1099a or www.irs.gov/form1099c or by calling 1-800-TAX-FORM (1-800-829-3676).

Specific Instructions for Form 1099-A

File Form 1099-A, Acquisition or Abandonment of Secured Property, for each borrower if you lend money in connection with your trade or business and, in full or partial satisfaction of the debt, you acquire an interest in property that is security for the debt, or you have reason to know that the property has been abandoned. You need not be in the business of lending money to be subject to this reporting requirement.

Coordination With Form 1099-C

If, in the same calendar year, you cancel a debt of $600 or more in connection with a foreclosure or abandonment of secured property, it is not necessary to file both Form 1099-A and Form 1099-C, Cancellation of Debt, for the same debtor. You may file Form 1099-C only. You will meet your Form 1099-A filing requirement for the debtor by completing boxes 4, 5, and 7 on Form 1099-C. However, if you file both Forms 1099-A and 1099-C, do not complete boxes 4, 5, or 7 on Form 1099-C. See the instructions for Form 1099-C, later.

Property

Property means any real property (such as a personal residence), any intangible property, and tangible personal property except:

- No reporting is required for tangible personal property (such as a car) held only for personal use. However, you must file Form 1099-A if the property is totally or partly held for use in a trade or business or for investment.
- No reporting is required if the property securing the loan is located outside the United States and the borrower has furnished the lender a statement, under penalties of perjury, that the borrower is an exempt foreign person (unless the lender knows that the statement is false).

Who Must File

In addition to the general rule specified above, the following rules apply.

Multiple owners of a single loan. If there are multiple owners of undivided interests in a single loan, such as in pools, fixed investment trusts, or other similar arrangements, the trustee, record owner, or person acting in a similar capacity must file Form 1099-A on behalf of all the owners of beneficial interests or participations. In this case, only one form for each borrower must be filed on behalf of all owners with respect to the loan. Similarly, for bond issues, only the trustee or similar person is required to report.

Governmental unit. A governmental unit, or any of its subsidiary agencies, that lends money secured by property must file Form 1099-A.

Subsequent holder. A subsequent holder of a loan is treated as a lender and is required to report events occurring after the loan is transferred to the new holder.

Multiple lenders. If more than one person lends money secured by property and one lender forecloses or otherwise acquires an interest in the property and the sale or other acquisition terminates, reduces, or otherwise impairs the other lenders' security interests in the property, the other lenders must file Form 1099-A for each of their loans. For example, if a first trust holder forecloses on a building, and the second trust holder knows or has reason to know of such foreclosure, the second trust holder must file Form 1099-A for the second trust even though no part of the second trust was satisfied by the proceeds of the foreclosure sale.

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Abandonment

An abandonment occurs when the objective facts and circumstances indicate that the borrower intended to and has permanently discarded the property from use. You have "reason to know" of an abandonment based on all the facts and circumstances concerning the status of the property. You will be deemed to know all the information that would have been discovered through a reasonable inquiry when, in the ordinary course of business, you become aware or should become aware of circumstances indicating that the property has been abandoned. If you expect to commence a foreclosure, execution, or similar sale within 3 months of the date you had reason to know that the property was abandoned, reporting is required as of the date you acquire an interest in the property or a third party purchases the property at such sale. If you expect to but do not commence such action within 3 months, the reporting requirement arises at the end of the 3-month period.

Statements to Borrowers

If you are required to file Form 1099-A, you must provide a statement to the borrower. Furnish a copy of Form 1099-A or an acceptable substitute statement to each borrower. For more information about the requirement to furnish a statement to the borrower, see part M in the 2015 General Instructions for Certain Information Returns.

Truncating Borrower's identification number on statements. Pursuant to Treasury Regulations section 301.6109-4, all filers of Form 1099-A may truncate a borrower's identification number (social security number (SSN), individual taxpayer identification number (ITIN), adoption taxpayer identification number (ATIN), or employer identification number (EIN)) on payee statements. Truncation is not allowed on any documents the filer files with the IRS. A lender's identification number may not be truncated on any form. See part J in the 2015 General Instructions for Certain Information Returns.

Account Number

The account number is required if you have multiple accounts for a borrower for whom you are filing more than one Form 1099-A. Additionally, the IRS encourages you to designate an account number for all Forms 1099-A that you file. See part L in the 2015 General Instructions for Certain Information Returns.

Box 1. Date of Lender's Acquisition or Knowledge of Abandonment

For an acquisition, enter the date you acquired the secured property. An interest in the property generally is acquired on the earlier of the date title is transferred to the lender or the date possession and the burdens and benefits of ownership are transferred to the lender. If an objection period is provided by law, use the date the objection period expires. If you purchase the property at a sale held to satisfy the debt, such as at a foreclosure or execution sale, use the later of the date of sale or the date the borrower's right of redemption, if any, expires.

For an abandonment, enter the date you knew or had reason to know that the property was abandoned unless you expect to commence a foreclosure, execution, or similar action within 3 months, as explained earlier. If a third party purchases the property at a foreclosure, execution, or similar sale, the property is treated as abandoned, and you have reason to know of its abandonment on the date of sale.

Box 2. Balance of Principal Outstanding

Enter the balance of the debt outstanding at the time the interest in the property was acquired or on the date you first knew or had reason to know that the property was abandoned. Include only unpaid principal on the original debt. Do not include accrued interest or foreclosure costs.

Box 3. Reserved

Box 4. Fair Market Value (FMV) of Property

For a foreclosure, execution, or similar sale, enter the FMV of the property. See Temporary Regulations section 1.6050J-1T, Q/A-32. Generally, the gross foreclosure bid price is considered to be the FMV. If an abandonment or voluntary conveyance to the lender in lieu of foreclosure occurred and you placed an "X" in the checkbox in box 5, enter the appraised value of the property. Otherwise, make no entry in this box.

Box 5. Was Borrower Personally Liable for Repayment of the Debt

If the borrower was personally liable for repayment of the debt at the time the debt was created or, if modified, at the time of the last modification, enter an "X" in the checkbox.

Box 6. Description of Property

Enter a general description of the property. For real property, generally you must enter the address of the property, or, if the address does not sufficiently identify the property, enter the section, lot, and block.

For personal property, enter the applicable type, make, and model. For example, describe a car as "Car—2011 Honda Accord." Use a category such as "Office Equipment" to describe more than one piece of personal property, such as six desks and seven computers. Enter "CCC" for crops forfeited on Commodity Credit Corporation loans.

Specific Instructions for Form 1099-C

CAUTION *The creditor's phone number must be provided in the creditor's information box. It should be a central number for all canceled debts at which a person may be reached who will insure the debtor is connected with the correct department.*

CAUTION *Do not file Form 1099-C when fraudulent debt is canceled due to identity theft. Form 1099-C is to be used only for cancellations of debts for which the debtor actually incurred the underlying debt.*

File Form 1099-C, Cancellation of Debt, for each debtor for whom you canceled a debt owed to you of $600 or more if:

1. You are an entity described under *Who Must File*, below, and

2. An identifiable event has occurred. It does not matter whether the actual cancellation is on or before the date of the identifiable event. See *When Is a Debt Canceled*, later.

CAUTION *Form 1099-C must be filed regardless of whether the debtor is required to report the debt as income.*

The debtor may be an individual, corporation, partnership, trust, estate, association, or company.

Do not combine multiple cancellations of a debt to determine whether you meet the $600 reporting requirement unless the separate cancellations are under a plan to evade the Form 1099-C requirements.

Coordination With Form 1099-A

If, in the same calendar year, you cancel a debt of $600 or more in connection with a foreclosure or abandonment of secured property, it is not necessary to file both Form 1099-A, Acquisition or Abandonment of Secured Property, and Form 1099-C for the same debtor. You may file Form 1099-C only. You will meet your Form 1099-A filing requirement for the debtor by completing boxes 4, 5, and 7 on Form 1099-C. However, you may file both Forms 1099-A and 1099-C; if you do file both forms, do not complete boxes 4, 5, or 7 on Form 1099-C. See the instructions for Form 1099-A, earlier, and *Box 4, Box 5*, and *Box 7*, later.

Who Must File

File Form 1099-C if you are:

1. A financial institution described in section 581 or 591(a) (such as a domestic bank, trust company, building and loan or savings and loan association).

2. A credit union.

3. Any of the following, its successor, or subunit of one of the following:

a. Federal Deposit Insurance Corporation,

b. Resolution Trust Corporation,

c. National Credit Union Administration,

d. Any other federal executive agency, including government corporations,

e. Any military department,

f. U.S. Postal Service, or

g. Postal Rate Commission.

4. A corporation that is a subsidiary of a financial institution or credit union, but only if, because of your affiliation, you are subject to supervision and examination by a federal or state regulatory agency.

5. A Federal Government agency including:

a. A department,

b. An agency,

c. A court or court administrative office, or

d. An instrumentality in the judicial or legislative branch of the government.

6. Any organization whose significant trade or business is the lending of money, such as a finance company or credit card company (whether or not affiliated with a financial institution). The lending of money is a significant trade or business if money is lent on a regular and continuing basis. Regulations section 1.6050P-2(b) lists three safe harbors under which reporting may not be required for the current year. See *Safe harbor rules* next.

Safe harbor rules. The three safe harbor rules in which an entity will not be considered to have a significant trade or business of lending money are:

1. No prior year reporting required. An organization will not have a significant trade or business of lending money for the current year if the organization was not required to report in the prior year and if its gross income from lending money in the most recent test year (see item 3 below) is less than both 15% of the organization's gross income and $5 million.

2. Prior year reporting requirement. An organization that had a prior year reporting requirement will not have a significant trade or business of lending money for the current year if, for each of the 3 most recent test years, its gross income from lending money is less than both 10% of the organization's gross income and $3 million.

3. No test year. Newly formed organizations are considered not to have a significant trade or business of lending money even if the organization lends money on a regular and continuing basis. However, this safe harbor does not apply to an entity formed or availed of for the principal purpose of holding loans acquired or originated by another entity. In this instance, the transferee entity (including real estate mortgage investment conduits (REMICs) and pass-through securitized indebtedness arrangements) may be required to report cancellation of indebtedness on Form 1099-C. See Regulations section 1.6050P-1(e)(5).

Test year defined. A test year is a tax year of the organization that ends before July 1 of the previous calendar year. For example, X, a calendar year taxpayer who has a significant trade or business of lending money, is formed in year one. X will not have a test year in year one or year two. However, for year three, X's test year will be year one. In year three, year one is the only year that ended before July 1 of the previous calendar year (in this example, year two).

Penalties. There are penalties for failure to file correct information returns by the due date and for failure to furnish correct payee statements. See part O in the 2015 General Instructions for Certain Information Returns for details.

Exceptions. Until further guidance is issued, no penalty will apply for failure to file Form 1099-C, or provide statements to debtors, for amounts:

- Discharged in nonlending transactions, or
- Forgiven pursuant to the terms of a debt obligation.

Multiple creditors. If a debt is owned (or treated as owned for federal income tax purposes) by more than one creditor, each creditor that is described under *Who Must File*, earlier, must issue a Form 1099-C if that creditor's part of the canceled debt is $600 or more. A creditor will be deemed to have met its filing requirements if a lead bank, fund administrator, or other designee of the creditor complies on its behalf. The designee may file a single

Form 1099-C reporting the aggregate canceled debt or may file Form 1099-C for that creditor's part of the canceled debt. Use any reasonable method to determine the amount of each creditor's part of the canceled debt.

Debt owned by a partnership is treated as owned by the partners and must follow the rules for multiple creditors.

Pass-throughs and REMICs. Until further guidance is issued, no penalty will apply for failure to file Form 1099-C, or provide statements to debtors, for a canceled debt held in a pass-through securitized debt arrangement or held by a REMIC. However, see item 3 under *Safe harbor rules*, earlier.

A pass-through securitized debt arrangement is any arrangement in which one or more debts are pooled and held for 20 or more persons whose interests in the debt are undivided co-ownership interests that are freely transferable. Co-ownership interests that are actively traded personal property (as defined in Regulations section 1.1092(d)-1) are presumed to meet these requirements.

Debt Defined

A debt is any amount owed to you, including stated principal, stated interest, fees, penalties, administrative costs, and fines. The amount of debt canceled may be all or only part of the total amount owed. However, for a lending transaction, you are required to report only the stated principal. See *Exceptions*, later.

When To File

Generally, file Form 1099-C for the year in which an identifiable event occurs. See *Exceptions*, later. If you cancel a debt before an identifiable event occurs, you may choose to file Form 1099-C for the year of cancellation. No further reporting is required even if a later identifiable event occurs with respect to an amount previously reported. Also, you are not required to file an additional or corrected Form 1099-C if you receive payment on a prior year debt.

When Is a Debt Canceled

A debt is deemed canceled on the date an identifiable event occurs or, if earlier, the date of the actual discharge if you choose to file Form 1099-C for the year of cancellation. An identifiable event is one of the following.

1. A discharge in bankruptcy under Title 11 of the U.S. Code. For information on certain discharges in bankruptcy not required to be reported, see *Exceptions*, later. Enter "A" in box 6 to report this identifiable event.

2. A cancellation or extinguishment making the debt unenforceable in a receivership, foreclosure, or similar federal nonbankruptcy or state court proceeding. Enter "B" in box 6 to report this identifiable event.

3. A cancellation or extinguishment when the statute of limitations for collecting the debt expires, or when the statutory period for filing a claim or beginning a deficiency judgment proceeding expires. Expiration of the statute of limitations is an identifiable event only when a debtor's affirmative statute of limitations defense is upheld in a final judgment or decision of a court and the appeal period has expired. Enter "C" in box 6 to report this identifiable event.

4. A cancellation or extinguishment when the creditor elects foreclosure remedies that by law extinguish or bar the creditor's right to collect the debt. This event applies to a mortgage lender or holder who is barred by local law from pursuing debt collection after a "power of sale" in the mortgage or deed of trust is exercised. Enter "D" in box 6 to report this identifiable event.

5. A cancellation or extinguishment making the debt unenforceable under a probate or similar proceeding. Enter "E" in box 6 to report this identifiable event.

6. A discharge of indebtedness under an agreement between the creditor and the debtor to cancel the debt at less than full consideration (for example, short sales). Enter "F" in box 6 to report this identifiable event.

7. A discharge of indebtedness because of a decision or a defined policy of the creditor to discontinue collection activity and cancel the debt. A creditor's defined policy can be in writing or an established business practice of the creditor. A creditor's established practice to stop collection activity and abandon a debt when a particular nonpayment period expires is a defined policy. Enter "G" in box 6 to report this identifiable event.

8. The expiration of non-payment testing period. This applies only to entities described in numbers 1, 2, 3, or 4 under *Who Must File*, earlier. This event occurs when the creditor has not received a payment on the debt during the testing period. The testing period is a 36-month period ending on December 31, plus any time when the creditor was precluded from collection activity by a stay in bankruptcy or similar bar under state or local law. Enter "H" in box 6 to report this identifiable event.

The creditor can rebut the occurrence of this identifiable event if:

a. The creditor (or a third party collection agency on behalf of the creditor) has engaged in significant bona fide collection activity during the 12-month period ending on December 31, or

b. Facts and circumstances that exist on January 31 following the end of the 36-month period indicate that the debt was not canceled.

Significant bona fide collection activity does not include nominal or ministerial collection action, such as an automated mailing. Facts and circumstances indicating that a debt was not canceled include the existence of a lien relating to the debt (up to the value of the security) or the sale or packaging for sale of the debt by the creditor.

9. Other actual discharge before identifiable event. Enter "I" in box 6 if there is an other actual discharge before one of the identifiable events listed above.

Exceptions

You are not required to report on Form 1099-C the following.

1. Certain bankruptcies. You are not required to report a debt discharged in bankruptcy unless you know from information included in your books and records that the debt was incurred for business or investment purposes. If

you are required to report a business or investment debt discharged in bankruptcy, report it for the later of:

a. The year in which the amount of discharged debt first can be determined, or

b. The year in which the debt is discharged in bankruptcy.

A debt is incurred for business if it is incurred in connection with the conduct of any trade or business other than the trade or business of performing services as an employee. A debt is incurred for investment if it is incurred to purchase property held for investment (as defined in section 163(d)(5)).

2. Interest. You are not required to report interest. However, if you choose to report interest as part of the canceled debt in box 2, you must show the interest separately in box 3.

3. Nonprincipal amounts. Nonprincipal amounts include penalties, fines, fees, and administrative costs. For a lending transaction, you are not required to report any amount other than stated principal. A lending transaction occurs when a lender loans money to, or makes advances on behalf of, a borrower (including revolving credit and lines of credit). For a nonlending transaction, nonprincipal amounts are included in the debt. However, until further guidance is issued, no penalties will be imposed for failure to report these amounts in nonlending transactions.

4. Foreign debtors. Until further guidance is issued, no penalty will apply if a financial institution does not file Form 1099-C for a debt canceled by its foreign branch or foreign office for a foreign debtor, provided all the following apply.

a. The financial institution is engaged in the active conduct of a banking or similar business outside the United States.

b. The branch or office is a permanent place of business that is regularly maintained, occupied, and used to carry on a banking or similar financial business.

c. The business is conducted by at least one employee of the branch or office who is regularly in attendance at the place of business during normal working hours.

d. The indebtedness is extended outside the United States by the branch or office in connection with that trade or business.

e. The financial institution does not know or have reason to know that the debtor is a U.S. person.

5. Related parties. Generally, a creditor is not required to file Form 1099-C for the deemed cancellation of a debt that occurs when the creditor acquires the debt of a related debtor, becomes related to the debtor, or transfers the debt to another creditor related to the debtor. However, if the transfer to a related party by the creditor was for the purpose of avoiding the Form 1099-C requirements, Form 1099-C is required. See section 108(e)(4).

6. Release of a debtor. You are not required to file Form 1099-C if you release one of the debtors on a debt as long as the remaining debtors are liable for the full unpaid amount.

7. Guarantor or surety. You are not required to file Form 1099-C for a guarantor or surety. A guarantor is not a debtor for purposes of filing Form 1099-C even if demand for payment is made to the guarantor.

8. Seller financing. Organizations whose principal trade or business is the sale of non-financial goods or non-financial services, and who extend credit to customers in connection with the purchase of those non-financial goods and non-financial services, are not considered to have a significant trade or business of lending money, with respect to the credit extended in connection with the purchase of those goods or services, for reporting discharge of indebtedness on Form 1099-C. See Regulations section 1.6050P-2(c). But the reporting applies if a separate financing subsidiary of the retailer extends the credit to the retailer's customers.

Multiple Debtors

For debts of $10,000 or more incurred after 1994 that involve debtors who are jointly and severally liable for the debt, you must report the entire amount of the canceled debt on each debtor's Form 1099-C. Multiple debtors are jointly and severally liable for a debt if there is no clear and convincing evidence to the contrary. If it can be shown that joint and several liability does not exist, a Form 1099-C is required for each debtor for whom you canceled a debt of $600 or more.

For debts incurred before 1995 and for debts of less than $10,000 incurred after 1994, you must file Form 1099-C only for the primary (or first-named) debtor.

If you know or have reason to know that the multiple debtors were husband and wife who were living at the same address when the debt was incurred, and you have no information that these circumstances have changed, you may file only one Form 1099-C.

Recordkeeping

If you are required to file Form 1099-C, you must retain a copy of that form or be able to reconstruct the data for at least 4 years from the due date of the return.

Requesting TINs

You must make a reasonable effort to obtain the correct name and taxpayer identification number (TIN) of the person whose debt was canceled. You may obtain the TIN when the debt is incurred. If you do not obtain the TIN before the debt is canceled, you must request the debtor's TIN. Your request must clearly notify the debtor that the IRS requires the debtor to furnish its TIN and that failure to furnish such TIN subjects the debtor to a $50 penalty imposed by the IRS. You may use Form W-9, Request for Taxpayer Identification Number and Certification, to request the TIN. However, a debtor is not required to certify his or her TIN under penalties of perjury.

Statements to Debtors

If you are required to file Form 1099-C, you must provide a statement to the debtor. Furnish a copy of Form 1099-C or an acceptable substitute statement to each debtor. In the 2015 General Instructions for Certain Information Returns, see:

- Part M for more information about the requirement to furnish a statement to the debtor, and
- Part J for specific procedures to complete Form 1099-C for debtors in bankruptcy.

Truncating Debtor's identification number on payee statements. Pursuant to Treasury Regulations sections 301.6109-4, all filers of Form 1099-C may truncate a debtor's identification number (social security number (SSN), individual taxpayer identification number (ITIN), adoption taxpayer identification number (ATIN), or employer identification number (EIN)) on payee statements. Truncation is not allowed on any documents the filer files with the IRS. A creditor's identification number may not be truncated on any form. See part J in the 2015 General Instructions for Certain Information Returns.

Account Number

The account number is required if you have multiple accounts for a debtor for whom you are filing more than one Form 1099-C. Additionally, the IRS encourages you to designate an account number for all Forms 1099-C that you file. See part L in the 2015 General Instructions for Certain Information Returns.

Box 1. Date of Identifiable Event

Enter the date of the identifiable event. See *When Is a Debt Canceled*, earlier. However, if you actually cancel a debt before an identifiable event and you choose to report that cancellation, enter the date that you actually canceled the debt.

Box 2. Amount of Debt Discharged

Enter the amount of the canceled debt. See *Debt Defined* and *Exceptions*, earlier. The amount of the canceled debt cannot be greater than the total debt less any amount the lender receives in satisfaction of the debt by means of a settlement agreement, foreclosure sale, a short sale that partially satisfied the debt, etc.

Box 3. Interest if Included in Box 2

Enter any interest you included in the canceled debt in box 2. You are not required to report interest in box 2. But if you do, you must also report it in box 3.

Box 4. Debt Description

Enter a description of the origin of the debt, such as student loan, mortgage, or credit card expenditure. Be as specific as possible. If you are filing a combined Form 1099-C and 1099-A, include a description of the property.

Box 5. Check Here if the Debtor was Personally Liable for Repayment of the Debt

If the debtor was personally liable for repayment of the debt at the time the debt was created or, if modified, at the time of the last modification, enter an "X" in the checkbox.

Box 6. Identifiable Event Code

Enter the appropriate code to report the nature of the identifiable event. For more information about the code to use when reporting each identifiable event, see *When Is a Debt Canceled*, earlier, and Regulations section 1.6050P-1(b)(2). Also see Publication 4681, Canceled Debts, Foreclosures, Repossessions, and Abandonments.

Box 7. Fair Market Value (FMV) of Property

TIP *FMV should include the appraised value of the property if the property is sold in a short sale.*

If you are filing a combined Form 1099-C and 1099-A for a foreclosure, execution, or similar sale, enter the FMV of the property. Generally, the gross foreclosure bid price is considered to be the FMV. If an abandonment or voluntary conveyance to the lender in lieu of foreclosure occurred, enter the appraised value of the property.

§ 24.4:4 Limited Ability to Waive Statutory Penalties and Interest

The ability to challenge, dispute, or negotiate the accrual of any of the statutory penalties or interest is extremely limited. As a general proposition, the Texas Constitution article III, section 55, forbids the legislature from releasing or extinguishing all or part of any person's indebtedness, liability, or obligation to the state, a county, political subdivision, or municipal corporation. Article III, section 55, has been construed to forbid any county, political subdivision, or municipal corporation from likewise releasing or extinguishing an indebtedness or liability without constitutional authority. *Corpus Christi People's Baptist Church, Inc. v. Nueces County Appraisal District*, 904 S.W.2d 621 (Tex. 1995); Tex. Att'y Gen. Op. No. GA-0134 (2004); Tex. Att'y Gen. LO-96-099 (1996). For these reasons, both the practitioner and the taxing unit will be limited in their efforts to negotiate or compromise the amounts due and owing as reflected in the records of the respective taxing unit.

There is a limited exception for the waiver of penalties and interest outlined in section 33.011 of the Tax Code. If an act or omission caused by the taxing unit prevented the taxpayer from timely paying the tax before the delinquency date, a basis for the request may exist. *See* Tex. Tax Code § 33.011. However, the request must be made within the time constraints outlined, and the taxes must be paid within twenty-one days after the date the taxpayer knows or should have known about the delinquency. Tex. Tax Code § 33.011(a)(1). For most taxpayers who have a legitimate error on which they could rely, they most often lose that right by not tendering payment timely. If such a payment is tendered, it should be made with a notation of "made under protest with reservation of rights" so that it is not legally construed as a voluntary payment.

§ 24.5 Lawsuit Process to Collect Delinquent Ad Valorem Taxes

§ 24.5:1 Time to File

At any time after its tax on property becomes delinquent, a taxing unit may file suit to foreclose the lien securing the payment of the tax, to enforce personal liability for the tax, or both. The suit must be filed in a court of competent jurisdiction for the county in which the tax is imposed. Tex. Tax Code § 33.41(a). The tax lawsuit takes precedence over all other suits pending in appellate courts. Tex. Tax Code § 33.41(b). Other liens owed by the taxpayer in favor of the taxing unit may be added to the lawsuit, such as weed and paving liens. *See* Tex. Tax Code § 33.41(c). Under limited circumstances, injunctive relief is available to the taxing units. *See* Tex. Tax Code § 33.41(d).

§ 24.5:2 Pleadings

The petition that is generally filed by taxing units throughout the state is fairly generic and straightforward. See form 24-1 in this manual. The Tax Code mandates only general terms and allegations to be contained in the petition. The property that is the subject of the tax and the amount due and owing as of the date of filing is usually identified by attaching a copy of the tax bill or similar document. *See* Tex. Tax Code § 33.43(a)(1)–(11). Occasionally the taxpayer's attorney will seek to object to the petition or seek more specifics, which are generally never granted because the Tax Code does not require it. For example, in one case the court held that a general property description of "FURN FIXT EQPT" (abbreviation for furniture, fixtures, and equipment) read in conjunction with a very broad all inclusive description in the petition was in substantial conformity of the requirements of the Code. *Castillo v. State*, 733 S.W.2d 560, 562 (Tex. App.—San Antonio 1987, no writ).

§ 24.5:3 Necessary Parties

All persons having an ownership interest, lien interest, or any equitable interest should be added as a necessary party. While most practitioners understand the inclusion of a lienholder who filed a mechanic's lien against the property, most cannot fathom why a distant heir who has no interest in the property is often added. However, if during its due diligence the taxing unit or its attorney identifies a person or party through a public filing, such as a probate record or affidavit of heirship, that person will often be added as a party.

§ 24.5:4 Other Taxing Units

The taxing unit that filed the suit must also join other taxing units that have claims for delinquent taxes against all or part of the same property. Tex. Tax Code § 33.44(a). While this is statutorily required, it does not always occur. As such, special attention should be noted when advising a prospective client about whether payment of the amounts due to the taxing unit filing the suit constitutes full payment of all taxes due and owing. In many instances, the remaining taxing units may not have been added as of the time a payment to satisfy the lawsuit is proffered.

Practice Tip: If a practitioner has a client who has not owned the property (i.e., not in the direct deed conveyances) and the client has no interest in the property at all, it is recommended that he offer a disclaimer of interest to the taxing unit's lawyer and request a dismissal of his respective client. See form 24-2 in this manual.

§ 24.5:5 Answering the Lawsuit

"A party to the suit must take notice of and plead and answer to all claims and pleadings filed by other parties that have been joined or intervened, and each citation must so state." Tex. Tax Code § 33.45.

§ 24.5:6 Tax Lien Lenders

A recent addition to the ad valorem tax landscape is a growing industry of lenders commonly known as tax lien transferees. These lenders make loans to taxpayers so that their respective tax lien to the taxing unit is satisfied and, in turn, take a transfer of the tax lien (with the owner's authorization) unto itself. As such, the tax lien itself is not extinguished and simply transferred. Under the applicable provisions of the Tax Code, the tax lien transferee retains a lien of equal standing with all future tax liens that may accrue and become due.

If the taxing unit files the suit, it must add the tax lien transferee as a party to the lawsuit. Tex. Tax Code § 33.445(a). The tax lender can then join the foreclosure suit and have a lien of equal standing that seeks recovery of the amounts due and owing under its legal documents as permitted by law. Alternatively, the lender may pay all the taxes, penalties, interest, court costs, and attorney's fees owing to the taxing unit that filed the foreclosure suit and each other taxing unit joined, and take control of the litigation in the manner it deems most appropriate to protect its respective interest. *See* Tex. Tax Code § 33.445(a).

Practice Tip: The practitioner should closely scrutinize the loan documents, tax lien transfers, payment history, and all related documents to ascertain that the charges, fees, and assessments made by the tax lender are both (1) permitted by the Texas Tax Code and the Texas Finance Code and (2) permitted by the underlying legal documents, themselves. Often the charges, fees, and assessments are considered standard but differ under the terms of the documents.

The tax lending industry has come under recent attack for some of its practices from both business and private interests. In 2013, the Texas legislature passed legislation to curb certain deceptive practices and place significant restric-

Chapter 25

Property Tax Loan Foreclosure Process

The editors gratefully acknowledge Brian S. Bellamy for his contribution to this chapter.

Note: At the time of this manual's publication, the Texas Supreme Court, pursuant to Acts 2013, 83d Leg., R.S., ch. 1044 (H.B. 2978) and section 22.018 of the Texas Government Code, had recently issued a set of promulgated forms for use in expedited foreclosure proceedings under rule 736 of the Texas Rules of Civil Procedure. (See Misc. Docket No. 14-9047.) The comments in this chapter are based on rule 736 of the Texas Rules of Civil Procedure, which remains in effect, but the reader is advised to use the forms promulgated by the Texas Supreme Court (some of which, but not all, are referenced in this chapter). The new forms can also be found on the Texas Supreme Court Web site at **www.supreme.court.state.tx.us**. For additional information on the use of the promulgated forms, see G. Tommy Bastian, *Rule 736 Promulgated Forms*, *in* State Bar of Tex., Advanced Real Estate Drafting Course (2014).

§ 25.1 Introduction

A property owner may authorize a *transferee*, as defined in Tex. Tax Code § 32.06(a)(1), or a *property tax lender*, as defined in Tex. Fin. Code § 351.002, to pay the taxes imposed by a taxing unit on the taxpayer's real property based on a sworn authorization document prepared in accordance with Tex. Tax Code § 32.06(a–1). Once the transferee or property tax lender pays the taxes and all penalties and interest imposed on the taxpayer's property, the tax collector issues a certified statement and a receipt for payment of the taxes that transfers the taxing unit's lien to the person paying the taxpayer's taxes. *See* Tex. Tax Code § 32.06(b). The transferee must send a copy of the certified statement within ten business days of receipt to the first lienholders pursuant to Tex. Tax Code § 32.06(b–1).

In consideration for the property tax loan, a taxpayer executes a note and contract secured by the taxpayer's property. This contract is usually in the form of a deed of trust or contract for foreclosure of the tax lien or a similar security lien instrument executed by the property owner and filed in the real property records, along with the sworn authorization and certified statement, of each county in which the property encumbered by the lien is located.

If the taxpayer fails to pay the property tax loan lien, the transferee of the tax lien (or any successor in interest) is entitled to judicially foreclose the lien pursuant to Tex. Tax Code ch. 33 or nonjudicially foreclose pursuant to Tex. Prop. Code § 51.002 and Tex. Tax Code § 32.065 if the property tax loan contract contains a power of sale and was executed before May 29, 2013, and the transferee or its successor in interest obtains a court order for foreclosure under rule 736 of the Texas Rules of Civil Procedure.

Because of the superpriority lien status afforded to a transferred tax lien pursuant to Tex. Tax Code § 32.05, a preexisting mortgage lienholder could have its security interest extinguished by a foreclosing transferred tax lender without receiving any prior notice.

May 29, 2013, is an important date because any property tax or transferred tax lien loan originated after this date must be judicially foreclosed in accordance with Texas Tax Code chapter 33. *See* Acts 2013, 83d Leg., R.S., § 8

(S.B. 247), eff. May 29, 2013 (amending Tex. Tax Code § 32.06(c)).

The amendment to Tex. Tax Code § 32.06(c), which previously allowed property tax lenders to nonjudicially foreclose, terminated the applicability of Tex. Tax Code § 32.065, which provided the framework for conducting a nonjudicial foreclosure of a transferred tax lien under Tex. Prop. Code § 51.002.

Because a property tax loan cannot be foreclosed without an order pursuant to Tex. R. Civ. P. 736, and noting that the comment to the 2011 rule changes states, "Rule 735.2 makes clear that Rule 736 is a procedural only and does not affect other contractual or legal rights or duties," it could be argued that the new version of Tex. Tax Code § 32.06(c) requiring judicial foreclosure could have retroactive effect on all property tax loans regardless of the date originated. *See G4 Trust v. Consolidated Gasoline, Inc.*, No. 02-10-00404-CV, 2011 WL 3835656, at *2 (Tex. App.—Fort Worth, Aug. 31, 2011, pet. denied); *see also McCain v. Yost*, 284 S.W.2d 898, 900 (Tex. 1955).

As a practical matter, since nonjudicial foreclosure of a transferred tax lien originated before May 29, 2013, is generally slower, more expensive, and burdensome, and subject to more litigation risk than a judicial foreclosure, most property tax loans will probably be judicially foreclosed under chapter 33 of the Texas Tax Code.

See chapter 20 in this manual for an overview of the judicial foreclosure process and chapter 24 for an overview of the ad valorem tax lien foreclosure process.

§ 25.2 Property Tax Loan Foreclosures after May 29, 2013

The 2013 amendments to Texas Tax Code section 32.06(c), resulting from S.B. 247, eliminated the ability of a property tax loan or transferred tax lender to nonjudicially foreclose a property tax loan made on or after May 29, 2013. The bill eliminated certain provisions of section 32.06, primarily sections 32.06(c)(2) and (c–1), and effectively killed section 32.065 in its entirety. As a result, there is no longer any need for a transferred tax lender and a borrower to enter into a contract, unless the parties want to waive the one-year foreclosure abatement governed by section 32.06(j). Furthermore, there will be no need for a power of sale clause in a property tax loan security instrument or deed of trust since Texas Tax Code chapter 33 does not allow a trustee or substitute trustee to conduct a foreclosure sale under Texas Property Code chapter 51.

§ 25.3 Foreclosures of Property Tax Loans after September 1, 2007, and before May 29, 2013

If a person seeks to foreclose a property tax loan lien originated after September 1, 2007, and before May 29, 2013, the mortgagee must comply with the amendments to Texas Rules of Civil Procedure 735 and 736 and Texas Tax Code sections 32.06 and 32.065 that were applicable at that time.

§ 25.3:1 Rule 736.1 Application

Texas Rules of Civil Procedure rule 736.1, Application, reads as follows:

> (a) *Where Filed.* An application for an expedited order allowing the foreclosure of a lien listed in Rule 735 to proceed must be filed in a county

Chapter 26

Deceased Mortgagor Foreclosure Process

Forms

Chapter 26

Deceased Mortgagor Foreclosure Process

The editors gratefully acknowledge Robert D. Forster, II for his contribution to this chapter. In addition, Mr. Forster would like to recognize Selim Taherzadeh and Joseph Vacek for their assistance.

§ 26.1 Introduction

This chapter addresses the challenges and issues faced by lenders when attempting to foreclose after the death of the borrower. A number of legal and procedural questions remain unresolved concerning the mortgagee's rights to enforce its promissory note and deed of trust during probate and the interim period between the mortgagor's death and the opening of the mortgagor's probate. Not only is the Texas Estates Code vague on key points, but much of the older probate case law is misleading in that cases that were once good law have been legislatively set aside during the last thirty years, a fact not readily apparent unless one looks past the mere case writ histories. Thus, when enforcing a promissory note secured by a deed of trust after the mortgagor's death, the attorney should proceed cautiously and would be well advised to consult with a probate specialist.

Note: Effective January 1, 2014, the Texas Estates Code replaced the Texas Probate Code. While the section numbers of the various statutes in the Probate Code were changed, the prior statutes were not materially changed by the codification process itself. However, during the 2011 and 2013 legislative sessions, amendments were made to the statutes separate and apart from the codification process, so the attorney should not assume that the substance of the prior Probate Code was brought forward completely unchanged.

It is important to note that if a probate proceeding is opened or pending in any county with a statutory probate court, the statutory probate court will have exclusive or dominant jurisdiction over all causes of action even if a pending suit was previously filed in another court with exclusive or concurrent jurisdiction. *See King v. Deutsche Bank National Trust Co.*, No. 01-13-01091-CV, 2015 WL 4929992, *4 (Tex. App.—Houston [1st Dist.] Aug. 18, 2015, no pet. h.); *see also* Tex. Est. Code § 32.005(a). (Note that as of the publication date of this manual, *King* had not been released for publication and was subject to revision or withdrawal, but it has a thorough discussion of court jurisdiction.) This situation typically arises when an application for an expedited order under rule 736 on a home equity loan is pending or contemplated against the personal representative of the estate.

The jurisdiction issue can be raised by a plea in abatement or for the first time on appeal because jurisdiction can never be presumed and cannot be waived or conferred by consent, waiver, estoppel, or agreement. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000).

§ 26.2 Probate Overview

When a person dies, beneficial title to all the decedent's property immediately passes to (1) the decedent's heirs-at-law, if there is no will, or (2) the devisees (also called legatees in the Estates Code) named in a valid will of the decedent. See section 26.2:2 below. The rights of the heirs or devisees as beneficial owners of the decedent's property are subject to the interests and claims of third parties (such as creditors) existing against the decedent's property at time of death and the statutory rights granted the estate representative in a probate proceeding to dispose of property of the estate as necessary to pay validly established claims against the estate and the costs of administering the estate. The purpose of probate is to provide for (1) an orderly handling of the interests and claims of third parties against the decedent and the decedent's property, and (2) following disposition of the third-party claims against the decedent's estate, the orderly transfer of the decedent's property to the heirs or devisees that hold the beneficial title to the respective items of the decedent's property.

The Eighty-fourth Texas Legislature passed the Texas Real Property Transfer on Death Act, codified at Texas Estates Code chapter 114, which authorizes the use of revocable deeds that transfer title to real property at the transferor's death outside of the probate process. *See* Acts 2015, 84th Leg., R.S., ch. 841, § 1 (S.B. 462), eff. Sept. 1, 2015. Before the transferor's death, the transferor may deal with the subject real property without regard to the prospective rights of the transferee and may, for example, pledge the property for loans or terminate the rights of the transferee by conveying the property to a third party during the transferor's lifetime. To be effective, the transfer on death deed (TOD deed) must (1) contain the same legal requirements as a recordable deed, (2) state that the transfer of interest in real property to the designated beneficiary shall occur upon the transferor's death, and (3) be recorded in the applicable real property records before the transferor's death. *See* Tex. Est. Code § 114.055. While revocable in several different ways by the transferor, the TOD deed cannot be revoked by a will. *See* Tex. Est. Code § 114.057.

Under the chapter, the TOD deed is a deed without warranty regardless of the actual language in the deed. *See* Tex. Est. Code § 114.103(d). Section 114.104 provides that the beneficiary of a TOD deed takes title to the real property subject to all matters of record and other interests existing at the time of the transferor's death and addresses the right of any lienholder of the real property that is subject to the TOD deed to elect to treat its claim as a matured secured claim or preferred debt and lien claim. *See* Tex. Est. Code § 114.104(a), (b). For the purposes of evaluating creditor's claims, a TOD deed is deemed to have been recorded at the transferor's death, regardless of when it is actually recorded. *See* Tex. Est. Code § 114.104(a). Section 114.106 addresses situations where the transferor's estate is insufficient to pay claims or expenses and the right to a personal representative of the estate to enforce liability against the real property subject to a TOD deed. *See* Tex. Est. Code § 114.106. Section 114.151 provides a sample form to create a TOD deed. *See* Tex. Est. Code § 114.151.

Chapter 114 expressly provides that real property transferred by a TOD deed is not considered property of the probate estate for any purpose, including Texas Government Code section 531.077, the Medicaid Estate Recovery Program implementation statute. *See* Tex. Est. Code § 114.106(b). Some commentators have indicated that the Act's intent is to allow indigent persons to pass title to real property without the cost of a will and the expenses of probate. The express reference to section 531.077 also indicates that the statute may provide a mechanism for transferring assets outside of probate that might otherwise be subject to the state's right of recovery of Medicaid payments.

Because a TOD deed must comply with chapter 114; because it does not have the same exact legal effect as an enhanced life estate deed, or "Lady Bird" deed; and because it may have implications under both the state Medicaid Estate Recovery Program statute and federal tax law, the practitioner would be well advised to consult with probate counsel concerning the intricacies of chapter 114 when considering the use of a TOD deed to avoid probate.

§ 26.2:1 Probate Defined

Pursuant to the Texas Estates Code, *probate proceeding* means a matter or proceeding related to the estate of a decedent and includes (1) the probate of a will, (2) the issuance of letters testamentary and of administration, (3) an heirship determination or small estate affidavit, (4) an application regarding the probate of a will or an estate administration, (5) a claim arising from an estate administration, (6) the settling of a personal representative's account for an estate, and (7) a will construction suit. *See* Tex. Est. Code § 31.001. The most frequently quoted definition of *will* is "An instrument by which a person makes a disposition of his property to take effect after his death, and which is . . . revocable during his lifetime." *Williams v. Noland*, 32 S.W. 328, (Tex. Civ. App.—Dallas 1895, writ ref'd).

Note that in many older Texas cases, "probate" was more narrowly defined than under the current statutes and was often said to be the act or process of proving a will. *See, e.g., Ross' Estate v. Abrams*, 239 S.W. 705, 707 (Tex. Civ. App.—San Antonio 1922), *aff'd, Abrams v. Ross' Estate*, 250 S.W. 1019 (Tex. Comm'n App. 1923).

§ 26.2:2 Testate Succession

Tex. Est. Code § 101.001(a) provides that if a person dies leaving a lawful will, all of the property bequeathed in the will immediately vests in the named devisees or legatees in the manner mandated by the testator of the will, and any property of the decedent not devised in the will vests immediately in the decedent's heirs at law. Tex. Est. Code § 256.001 further provides, however, that a will is not effective to prove title to, or the right of possession in, the devisees or legatees until the will is admitted to probate. *See also Taylor v. Martin's Estate*, 3 S.W.2d 408 (Tex. 1928).

In the event the devisees or heirs of the decedent attempt to thwart or delay a foreclosure by refusing to probate a will, the creditor may file a sworn written complaint in probate court to compel the devisees or heirs to produce the decedent's will. *See* Tex. Est. Code §§ 252.202–.204. See section 26.6 below.

§ 26.2:3 Intestate Succession

Tex. Est. Code § 201.001 provides that if a person dies intestate without a spouse, all of the decedent's property vests immediately in the decedent's heirs-at-law, in the order provided by law. If the decedent is a trustee of property, the trustee's heirs have no proprietary interest in property held in the trust because the trustee is merely the depositary of the legal title. *Parrish v. Looney*, 194 S.W.2d 419 (Tex. Civ. App.—Galveston 1946, no writ).

A surviving spouse is not an heir of the decedent because the spouse is not a blood relative. *Farrell v. Cogley*, 146 S.W. 315, 318 (Tex. Civ. App.—San Antonio 1912, writ ref'd n.r.e.). The rights, if any, of the surviving spouse in the decedent's property will be established under the community property and homestead statutes.

§ 26.2:4 Types of Estate Administration

Probate administrations are either dependent or independent. Dependent administrations are so named because essentially all actions by the estate representative are "dependent" upon obtaining approval of the probate court after notice and hearing. Independent administrations are not subject to such close court supervision, and once letters testamentary are issued by the probate court, normally the only significant contact the independent administrator has with the probate court thereafter is the filing with the court of an inventory of the estate's assets and liabilities. Otherwise, the independent administrator is free to collect assets, resolve claims against the estate, and transfer estate assets to the devisees in accordance with the terms of the will and applicable law, all without the necessity of court approval.

§ 26.2:5 Types of Creditor Claims in Probate

In probate, the secured creditor may elect to have its claim treated as either a "matured secured claim" or a "preferred debt and lien." (See generally section 26.7 below for a more detailed discussion of matured secured claims and preferred debt and lien.) If the secured creditor elects to have its claim treated as matured secured claim, it will forgo the right to foreclose on the mortgagee's deed of trust collateral (unless otherwise consented to by the independent administrator or the probate court) but preserve a deficiency claim against the estate in the event the value of the collateral is not sufficient to pay the debt owed the mortgagee. If the secured creditor elects to file its claim as a preferred debt and lien, the secured creditor retains the right to foreclose on the collateral pledged under the creditors' deed of trust or security agreement, but must look solely to that collateral for repayment of the debt and gives up any claim to a deficiency against the mortgagor's estate. The great majority of mortgagees elect preferred debt and lien over matured secured claim, as generally a mortgagee prefers to look to its deed of trust collateral for repayment of the decedent's debt.

§ 26.3 Notice of Mortgagor's Death

Before the opening of probate and the receipt of notice from the estate administrator, a creditor such as a mortgagee is essentially left to its own devices to learn of the decedent's death. This can be a particular problem with regard to securitized residential loans, as typically the mortgagee and the mortgage servicer have little if any contact with the mortgagor other than for the receipt of monthly installment payments on the debt, which a spouse or relative of the decedent may continue to make for some period after the mortgagor's death.

Because a foreclosure conducted after the mortgagor's death but prior to the opening of probate can be set aside in a dependent administration opened within four years of the mortgagor's death (see section 26.5:3 below), immediately prior to conducting a foreclosure sale the mortgagee should seek to confirm that the mortgagor is still living. An indirect—but certainly not fool-proof—method of running such a check is to determine if a claim for Social Security death benefits has been filed with respect to the mortgagor. For example, the Social Security Administration's Death Master File (which lists reports of death submitted to the Social Security Administration) may be searched, for a fee, at **www.ssdmf.com**.

If a probate proceeding is opened for the decedent, then within one month after receiving letters of appointment, the representative of the mortgagor's estate (whether an independent or dependent administration) must notify the general creditors of the estate of the appointment and the opening of probate by publishing notice to such effect in a newspaper "printed in the county where the letters were issued." Tex. Est. Code § 308.051(a)(1). Within two months after appointment, the estate representative must also send notice to any creditor whose debt is known to the representative to be secured by a lien on real property or a security interest in personal property of the decedent. *See* Tex. Est. Code §§ 308.053(a), 403.052. If the personal representative does not learn of the secured creditor until after this two-month period, the representative must send the notice within a reasonable time after discovering the secured creditor. Tex. Est. Code § 308.053(b). If the administrator fails to give notice to a known secured creditor, the administrator (and the sureties on the administrator's bond, if there is a bond) is liable for any damage that the creditor suffers by reason of such neglect, unless the creditor otherwise had notice of the mortgagor's probate. Tex. Est. Code § 308.056.

§ 26.4 Effect of Mortgagor's Death on Other Comortgagors

Texas courts have held that, notwithstanding the death of a comortgagor, the mortgagee can proceed under the deed of trust and other loan documents against the interests of other, still-living comortgagors. *Wiley v. Pinson*, 23 Tex. 486 (Tex. 1859); *Martin v. Harrison,* 2 Tex. 456 (Tex. 1847); *Albiar v. Arguello*, 612 S.W.2d 219, 220 (Tex. Civ. App.—Eastland 1980, no writ); *see also Kruger v. Taylor*, 27 S.W.2d 130 (Tex. Comm'n App. 1930, holding approved).

§ 26.5 Death as a Title Issue

When a mortgagor dies, beneficial title to the decedent's interest in the property pledged under the deed of trust is immediately vested in the mortgagor's heirs-at-law if the mortgagor died intestate and in the mortgagor's devisees if the mortgagor died testate. Tex. Est. Code §§ 101.001(a), 201.001, 201.002, 201.003. The Texas Estates Code defines *heir* as "a person who is entitled under the statutes of descent and distribution to a part of the estate of a decedent who dies intestate" and *devisee* is included in the definition of *legatee* and defined as "a person who is entitled to a legacy under a will." Tex. Est. Code §§ 22.009, 22.015, 22.021. While the decedent mortgagor's property remains subject to all liens, security interests, and claims in effect at the time of the mortgagor's death, the heirs or devisees often take prompt physical control of the decedent's property (i.e., the mortgagee's collateral) and yet in their handling of the property have no personal liability for either the decedent's debts or the breach of the covenants and obligations set out in the decedent's loan documents. *See Potts v. W.Q. Richards Memorial Hospital*, 558 S.W.2d 939 (Tex. Civ. App.—Amarillo 1977, no writ); Tex. Est. Code §§ 101.001, 101.051, 201.003; *see also Jackson v. Hubert*, 234 S.W.2d 414 (Tex. 1950); *Van v. Webb*, 215 S.W.2d 151 (Tex. 1948).

Although under appropriate circumstances the probate court can require that the heirs or devisees return physical control of the decedent's property to the estate representative (or be liable to the estate for the value of such property, if return is not practicable), the change of physical control of the collateral puts the safety and security of the lender's collateral in potential jeopardy, but a lender that proceeds with a foreclosure sale to obtain control of the collateral prior to the opening of the decedent's probate runs the risk—even if the decedent had a will providing for an independent administration—that the foreclosure will be later set aside by the heirs or devisees opening a dependent administration within four years of the date of death. Moreover, the foreclosing lender will find few title companies willing to insure title for any resale of the property by the lender because of the risk of the resale of the property being set aside with the subsequent opening of a dependent administration.

§ 26.5:1 Mortgagor's Death after Foreclosure Sale

The death of the mortgagor after a nonjudicial foreclosure sale will not affect the validity of the foreclosure because the mortgagor did not own an interest in the mortgaged property at the time of death and thus the foreclosed property was never part of the mortgagor's probate estate. *Smith v. San Antonio Joint Stock Land Bank*, 130 S.W.2d 1070 (Tex. Civ. App.—Eastland 1939, writ ref'd); *see also Taylor v. Williams*, 108 S.W. 815 (Tex. 1908); *Estrada v. Reed*, 98 S.W.2d 1042 (Tex. Civ. App.—Amarillo 1936, writ ref'd).

§ 26.5:2 Foreclosure after Death, Followed by No Estate Administration

A properly conducted nonjudicial foreclosure sale will pass good title if no probate proceeding is subsequently opened within four years after the decedent's death. *Wiener v. Zweib*, 147 S.W. 867 (Tex. 1912). In *Natali v. Witthaus*, 135 S.W.2d 969 (Tex. 1940), a foreclosure sale took place within four years of the death of the mortgagor, but a probate administration was never opened for the mortgagor's estate. Ten years later, the widow and the children filed a trespass to try title suit claiming that the foreclosure sale was void because it took place within four years of the mortgagor's death. The court held that since a probate administration had not been opened within the time allowed by law, the trustee's deed became absolute four years after the mortgagor's death. *Natali*, 135 S.W.2d at 973.

§ 26.5:3 Foreclosure after Death, before Subsequent Dependent Administration

Texas law is clear that if a dependent administration is opened within four years after the death of the mortgagor, a foreclosure sale conducted in the interim between the mortgagor's death and the opening of a dependent administration will be voided on the request of the dependent administrator to the probate court. *See Pearce v. Stokes*, 291 S.W.2d 309, 310–11 (Tex. 1956); *Hury v. Preas*, 673 S.W.2d 949, 951 (Tex. App.—Tyler 1984, writ ref'd n.r.e.); *Bozeman v. Folliott*, 556 S.W.2d 608, 613 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *see also Shell Oil Co. v. Howth*, 159 S.W.2d 483 (Tex. 1942); *Rivera v. Morales*, 733 S.W.2d 677 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.) (vendor's cancellation of contract for deed for default in payment by deceased vendee set aside and vendor required to submit proposed cancellation of contract as claim in deceased vendee's probate). Moreover, a foreclosing mortgagee (and presumably any third-party purchaser) that takes possession of the collateral property pursuant to a foreclosure sale that is subsequently voided by the opening of a dependent administration can be held liable for the value of the use of the property during the time it is in the mortgagee's possession, together with simple interest thereon at the judgment rate. *See American Savings & Loan Ass'n of Houston v. Jones*, 482 S.W.2d 62, 63–64 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). However, if a dependent administration is not commenced within four years of the decedent's death, a nonjudicial foreclosure conducted during or after that four-year period cannot be overturned. *Freece v. Truskett*, 106 S.W.2d 675 (Tex. 1937); *Wiener v. Zweib*, 141 S.W. 771 (Tex. 1911); *Rogers v. Watson*, 17 S.W. 29 (Tex. 1891).

§ 26.5:4 Foreclosure after Death, during Dependent Administration

The opening of a dependent administration suspends the power of sale in a deed of trust, and a nonjudicial foreclosure sale conducted without the probate court's permission while a dependent administration is open will be void unless the mortgagee complies with all applicable provisions of the Texas Estates Code. *Pearce v. Stokes*, 291 S.W.2d 309, 310–11 (Tex. 1956); *Robertson's Administratrix v. Paul*, 16 Tex. 472 (1856); *Hury v. Preas*, 673 S.W.2d 949 (Tex. App.—Tyler 1984, writ ref'd n.r.e.); *Bozeman v. Folliott*, 556 S.W.2d 608, 613 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *see also Shell Oil Co. v. Howth*, 159 S.W.2d 483 (Tex. 1942); *Rivera v. Morales*, 733 S.W.2d 677 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.). As noted above, in addition to setting aside the foreclosure sale, the personal representative can also sue for conversion damages if the mortgagee knew or should have known the mortgagor was deceased. *American Savings & Loan Ass'n of*

Houston v. Jones, 482 S.W.2d 62 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

The administration of the intestate mortgagor's estate is opened when (1) the probate judge signs an order that grants administration and appoints an administrator and (2) the appointed administrator files the required bond and makes and files the oath. To proceed with a nonjudicial foreclosure in a dependent administration, the mortgagee must comply with the procedures set forth in the Texas Estates Code by filing an application to foreclose the mortgaged property. *See* Tex. Est. Code § 356.201. See form 26-1 in this manual for an application for foreclosure of mortgaged property, form 26-2 for an affidavit of mortgagee, and form 26-3 for an order authorizing foreclosure of mortgaged property.

§ 26.5:5 Foreclosure after Death, before Subsequent Independent Administration

Under older Texas case law, a nonjudicial foreclosure conducted after the mortgagor's death but before the start of probate would be deemed valid if an independent administration was subsequently opened for the deceased mortgagor. *Fischer v. Britton*, 83 S.W.2d 305 (Tex. 1935); *Taylor v. Williams*, 108 S.W. 815 (Tex. 1908). It is not clear that the result would be the same today. Legislative changes to former Probate Code section 146 in 2011 (now codified at Texas Estates Code sections 403.001 and 403.051 through 403.0585) provide that (1) a secured creditor must make an election about how to have its claim treated in an independent administration, (2) a secured creditor may not proceed with nonjudicial foreclosure during the six months after the opening of the independent administration, and (3) an independent executor has the right to pay the secured claim in accordance with the contract. *See* Tex. Est. Code §§ 403.001, 403.051–.0585. At least one commentator has questioned whether these statutory changes constitute a legislative policy change that sets aside the prior case law. *See* Lisa H. Jamieson, *Creditors' Claims and Allowances in Decedents' Estates*, *in* Building Blocks of Wills, Estates and Probate Course, State Bar of Texas (2011).

§ 26.5:6 Foreclosure after Death, during Independent Administration

Before 2011, Texas case law held that the trustee under a deed of trust could exercise the nonjudicial power of sale at any time during the independent administration of the mortgagor's estate if the secured debt was in default. *Pearce v. Stokes*, 291 S.W.2d 309, 310 (Tex. 1956); *Freece v. Truskett*, 106 S.W.2d 675, 677 (Tex. 1937); *Fischer v. Britton*, 83 S.W.2d 305, 306 (Tex. 1935); *Robertson's Administratrix v. Paul*, 16 Tex. 472 (1856); *Bozeman v. Folliott*, 556 S.W.2d 608, 613 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). However, the 2011 legislative changes now expressly provide that secured creditors are prohibited from conducting collection actions or nonjudicial foreclosure during the six-month period following the issuance of letters testamentary in an independent administration. *See* Tex. Est. Code §§ 403.052–.054.

If a secured creditor elects to have its claim treated as a preferred debt and lien in the probate proceeding, once the six-month period for the independent administrator to collect and inventory the deceased's property has passed, the secured creditor is free to exercise any judicial or nonjudicial collection rights it has (including nonjudicial foreclosure) for default in payment of the debt, in accordance with the applicable provisions of the deed of trust and Texas Property Code section 51.002. *See* Tex. Est. Code § 403.054. The independent administrator must be served with all the notices that would be given to a living mortgagor under the loan documents and the applicable provisions of the Texas

Property Code. *See Fenimore v. Gonzalez County Savings & Loan Ass'n*, 650 S.W.2d 213 (Tex. Civ. App.—San Antonio 1983, writ ref'd n.r.e.) (foreclosure sale invalid for failure to send notice to executor).

As noted above in this chapter, a secured creditor that elects to have its claim treated as a matured secured claim in the probate proceeding may not exercise any contractual collection rights (such as nonjudicial foreclosure) without the approval of the court or the independent executor.

§ 26.5:7 Accelerating Note after Death, before Probate

There is only limited statutory and case law guidance for situations in which the mortgagee proceeds with notice of default and acceleration of the maturity of the debt during the interim period between the mortgagor's death and the start of probate proceedings, without actually going to foreclosure. While such situations undoubtedly arise (especially today in connection with securitized residential loans, where the mortgage servicer is unlikely to get prompt notice of a mortgagor's death), few cases have been prosecuted to the appellate level on whether the acceleration will be valid. What law there is, however, indicates that there may be little practical advantage for a mortgagee to knowingly proceed with acceleration of the debt during the interim between death and probate.

Dependent Administration: As already discussed, a prudent mortgagee will not want to proceed to acceleration and foreclosure as long as the risk exists of a dependent administration being later opened. Once a dependent administration is opened, the mortgagee will not be allowed to proceed with foreclosure of the deed of trust without the permission of the probate court, regardless of whether and when the maturity of the debt has been accelerated. However, the debt is normally treated as mature and owing for most practical purposes (regardless of the actual maturity of the debt) because the probate court will generally not allow a dependent administration to remain open simply to administer any sort of lengthy payout of the promissory note. The court will pressure the dependent administrator to either let the collateral property go to foreclosure or pay the debt in full by using other estate assets to pay the mortgagor's debt, getting the court's permission to sell the property for the purpose of paying the mortgagee and realizing any equity for the estate, or having the heirs or devisees refinance the mortgagor's debt. Thus, there seems to be little practical advantage to accelerating the loan if the mortgagee knows probate proceedings will be initiated in the near future (whether by kin of the deceased or the mortgagee—see section 26.12 below).

Independent Administration: Because secured creditors are prohibited from conducting collection actions or nonjudicial foreclosure during the six-month period following the issuance of letters testamentary in an independent administration (*see* Tex. Est. Code §§ 403.052–.054), even if the debt is already mature, there is no significant advantage to accelerating the debt before probate is opened. A further consideration in the area of residential foreclosures (especially in light of the widespread use of standard federal loan forms to facilitate the securitization of residential mortgages) is that the creditor may well find that the estate representative has in any case a contractual right under the deed of trust to cure default and reinstate the promissory note at any time up to the fifth day before foreclosure.

§ 26.6 Efforts by Survivors to Thwart Foreclosure by Delaying Probate

Because of the effect of opening a dependent administration after a nonjudicial foreclosure, the heirs or devisees of the decedent mortgagor may attempt to delay, thwart, or even overturn a mortgagee's foreclosure by (1) delaying or refusing to initiate probate proceedings for the deceased mortgagor, (2) refusing to file a will providing for independent administration and filing for a dependent administration instead, or (3) convincing the named independent executors to decline to serve, thus forcing a dependent administration. (Note that persons declining to serve as independent executors are not disqualified from serving as dependent administrators appointed by the court.) In such circumstances, the mortgagee may file application in probate court for the appointment of an administrator and the initiation of probate proceedings for the decedent under Texas Estates Code sections 256.051 and 301.051. *See* Tex. Est. Code §§ 256.051, 301.051; *see also Humane Society of Austin & Travis County v. Austin National Bank*, 531 S.W.2d 574 (Tex. 1975). Alternatively, the mortgagee may file a sworn written complaint in probate court to compel the heirs to produce and probate the decedent's will. *See* Tex. Est. Code §§ 252.201–.204. See section 26.12 below and form 26-4 in this manual for a petition to compel the decedent's heirs to produce a will to initiate probate proceedings.

§ 26.7 Probate Proceedings with Administrations

The purpose of a probate administration is to satisfy the claims of the creditors of the decedent and to distribute the remainder of the estate among the heirs, devisees, and legatees. With respect to creditors, an administration is for the benefit of all creditors and not just for those with a secured debt. *Runnels v. Kownslar*, 27 Tex. 528 (Tex. 1864). The estate of a decedent is not a legal entity and cannot sue or be sued. *Miller v. Estate of Self*, 113 S.W.3d 554, 556 (Tex. App.—Texarkana 2003, no pet.) (citing *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex.1975)).

The statute of limitations for opening a probate proceeding is four years from the date of the mortgagor's death. *See* Tex. Est. Code § 256.003.

§ 26.7:1 Secured Creditor's Election and Notice of Claim in Dependent and Independent Administrations

The Texas Estates Code provides the secured creditor with the opportunity to file its election with the estate administrator as to whether the secured creditor wishes its claim to be classified as a matured secure claim or as a preferred debt and lien. *See* Tex. Est. Code §§ 355.151–.160, 403.001, 403.051–.0585. Before the 2011 amendments to former sections 306 and 146, the predecessor provisions of the Probate Code, the Probate Code did not state whether this election applied to both dependent and independent administrations, but the Texas Supreme Court so ruled in *Geary v. Texas Commerce Bank*, 967 S.W.2d 836 (Tex. 1998).

The secured creditor is supposed to give notice of its election to the estate administrator by the later of (1) six months after the opening of probate or (2) four months after the secured creditor's receipt of notice from the administrator under Texas Estates Code section 308.053. If the secured creditor makes no claim or does not affirmatively elect otherwise within six months after the original grant of letters testamentary, the secured creditor's claim will by statute be treated as an election for preferred debt and lien status. Tex. Est. Code §§ 355.152; 403.001, 403.051–.0585; *see also* Tex. Est. Code §§ 355.001, 355.060; *Texas Commerce Bank N.A. v. Geary*, 938 S.W.2d 205, 212 (Tex. App.—Dallas 1997), *rev'd on other grounds*, 967 S.W.2d 836 (Tex. 1998) (mortgagee was deemed to have elected preferred debt and lien status as a result of its failure to elect otherwise within six months after original grant of letters testamentary); *Cessna Finance Corp. v. Morrison*, 667 S.W.2d 580, 583–84 (Tex. App.—Houston [1st Dist.] 1984, no writ).

In addition to giving notice within this period, a creditor with a claim for money secured by real property must also record a notice of this election in the deed records in which the real property is located. *See* Tex. Est. Code § 403.052.

§ 26.7:2 Matured Secured Claims

If the secured creditor elects to have its claim treated as matured secured claim, it will be paid in due course of administration of the estate, but without the written approval of the independent executor or (in a dependent administration) the probate court, the secured creditor will not be allowed to exercise any other remedies (such as foreclosure) that interfere with the payment of claims and allowances in accordance with the Texas Estates Code. Tex. Est. Code §§ 355.151, 355.156–.160. In essence, by electing matured secured claim status, the lien or security interest of the secured creditor against its collateral is released and the secured creditor only has a third-class preferential payment right with respect to proceeds from the estate's sale of the security creditor's collateral. See Sara E. Dysart, *Texas Probate Code Redefines Secured Creditor's Rights and Remedies*, Real Prop. Prob. & Tr. L. Rept. 39 (Jan. 2007). However, if the secured creditor's entire claim is not satisfied through the estate's disposition of the collateral, the secured creditor can seek payment of the deficiency out of the other assets (if any) of the decedent's estate. *See* Tex. Est. Code §§ 355.102, 355.103–.106, 355.151–.160, 403.001, 403.051–.0585; *see also Wyatt v. Morse*, 102 S.W.2d 396, 398–99 (Tex. 1937).

While the secured creditor cannot foreclose on its collateral, the secured creditor's claim is sometimes said to be secured by the collateral because the secured creditor has a third-class priority claim to the proceeds arising from the estate's disposition of the secured creditor's collateral under Estates Code sections 355.151 through 355.160 and section 403.051. However, it is important to note the holder of a matured secured claim loses priority in his collateral as against first and second class claims. *See* Tex. Est. Code §§ 355.151–.160, 403.051; *Dallas Joint-Stock Land Bank in Dallas v. Maxey*, 112 S.W.2d 305 (Tex. Civ. App.—Dallas 1937, no writ). This means that the estate administrator may use proceeds from the disposition of the secured party's collateral to pay all class 1 claims (funeral and last-illness expenses not exceeding $15,000) and class 2 claims (estate administration expenses) if there are not enough other estate assets to pay these higher-class claims. *See* Tex. Est. Code §§ 355.102, 403.051.

A possible additional advantage to the secured creditor is that the due date of the underlying debt can be accelerated by electing matured secured claim status. See M. K. Woodward & Ernest E. Smith III, 18 Texas Practice Series, *Probate and Decedents' Estates* § 916 (1st ed. 1971); *Dunn v. Sublett*, 14 Tex. 521 (Tex. 1855).

Mortgagees of real property typically elect to choose preferred debt and lien status rather than matured secured claim status.

§ 26.7:3 Preferred Debt and Lien

If the secured creditor elects to file its claim as a preferred debt and lien, the secured creditor must look solely to its collateral for payment of the debt; in the case of a mortgagee, this generally means foreclosure of its deed of trust collateral. Because the holder of a preferred debt and lien has elected to look solely to its collateral for payment, no deficiency can be sought if the collateral proves to be insufficient to pay the claim in full. *Wyatt v. Morse*, 102 S.W.2d 396 (Tex. 1937).

A preferred debt and lien claim is to be paid by the estate according to the terms of the contract, and thus the outstanding balance of the claim may increase during the period of probate in accordance with the terms of the loan documents. In the event payments on the debt are not made in accordance with the underlying contract, the secured creditor can seek foreclosure. *See* Tex. Est. Code §§ 355.151, 355.156–.160. The personal representative of the estate may pay the preferred debt and lien claim before maturity if it is in the best interest of the estate. *See* Tex. Est. Code § 355.151(b).

A mortgagee that has preferred debt and lien status in its deed of trust collateral has priority over all other classes of claims in the probate against such collateral, including first- and second-class claims. *See* Tex. Est. Code §§ 355.001, 355.004, 355.059–.061, 355.153, 403.052, 403.054; *Wyatt*, 102 S.W.2d at 398–99; *Dallas Joint-Stock Land Bank in Dallas v. Maxey*, 112 S.W.2d 305, 307–08 (Tex. Civ. App.—Dallas 1937, no writ); *but see San Antonio Savings Ass'n v. Beaudry*, 769 S.W.2d 277, 280 (Tex. App.—Dallas 1989, writ denied) (holding that expenses directly related to preserving, maintaining, and selling collateral may be paid out of sales proceeds of property).

Any election of the secured creditor's claim as a preferred debt and lien sent to the personal representative should also advise that the creditor will foreclose if the loan is or goes into default and no cure is made. *See Bozeman v. Folliott*, 556 S.W.2d 608 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

See form 26-5, Notice of Lien and Election of Preferred Status.

§ 26.7:4 Notice of Claim against Estate

Claims may be presented directly to the administrator of the estate, as well as deposited with the clerk of the probate court. The clerk is required to notify the estate administrator of the creditor's filing. See form 26-6, Authenticated Preferred and Secured Claim, form 26-7, Memorandum of Allowance, and form 26-8, Order Approving Claim. The claim of a creditor must be authenticated by a supporting affidavit stating the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed. *See* Tex. Est. Code §§ 355.004, 355.059. The justification for the authentication requirement is "to afford protection to estates of deceased persons against unjust demands and to save the expense of litigation over those that are just and should be paid." *Anderson v. Oden*, 780 S.W.2d 463, 465 (Tex. App.—Texarkana 1989, no writ). Defects in the form of the claim are waived by the estate administrator unless written objection has been made within thirty days of presentment and filed with the court clerk. Tex. Est. Code § 355.007.

Texas courts have consistently held that creditors are not obligated to attach copies of supporting documentation to claims. *See, e.g.*, *Parrish v. Johnson*, 88 S.W.2d 1066 (Tex. Civ. App.—San Antonio 1935, writ ref'd). However, while not expressly required, it is useful to attach copies of relevant loan documents or evidence in an effort to allow the estate administrator a better opportunity to evaluate the claim and mitigate unnecessary further litigation that may result as an objection to the claim.

§ 26.7:5 Estate Administrator's Failure to Allow Claim

In a dependent administration, the estate administrator must allow or reject a creditor's claim within thirty days after the creditor's notice of claim and election is presented to the administrator. Tex. Est. Code § 355.051; *see also* Tex. Est. Code § 355.002. If the estate administrator does not affirmatively allow the creditor's claim within the thirty-day period by filing a memorandum of allowance with the probate court, the creditor's claim is deemed rejected under section 355.051. (This is contrary to the rule in an independent administration.) After allowing a claim, the estate administrator cannot subsequently reject the claim. *Hensel v. International Building & Loan Ass'n*, 20 S.W. 116 (Tex.

1892). If the claim is not allowed, within ninety days after rejection the creditor must bring suit in the probate court to establish its claim and preserve its right to payment; otherwise the claim is barred. Tex. Est. Code §§ 355.064, 355.066. Once a claim is rejected, it is rejected and cannot subsequently be approved by a court. *Russell*, 354 S.W.2d 373 (Tex. 1962); *Small v. Small*, 434 S.W.2d 940, 942 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.).

It is common for dependent administrators to fail to take action within the thirty-day window for approving claims, even though they may provide oral or written assurance to the creditor that the claim will be approved at a later date. In *Russell*, 354 S.W.2d at 376, the assurances of the estate's administrator and lawyers that the creditors' claim would be allowed were not sufficient to save the claim when the creditors failed to timely file suit after the deemed rejection of claim, as the creditors "were charged with knowledge that the same would be deemed rejected by operation of law if no action was taken by the Administratrix within thirty days. They also should have known the claim would be barred in the event suit was not instituted within ninety days after such rejection." However, in *Albiar v. Arguello*, 612 S.W.2d 219, 220 (Tex. Civ. App.—Eastland 1980, no writ), the claim was rejected by operation of law and the holders of the note did not file suit within ninety days thereafter. While the claim against the estate was lost, the estate administrator (who was comaker and husband of the decedent) remained liable for the full amount of the note in his individual capacity as comaker.

If the estate administrator fails to approve the claim or any part thereof (for example, the representative approves the unpaid principal balance of the note but rejects the unpaid interest and costs of collection incurred by the creditor), the creditor must file suit to establish the rejected part of its claim within ninety days. Tex. Est. Code § 355.064. In *Klutts v. Newbury*, 453 S.W.2d 243, 247 (Tex. Civ. App.—Fort Worth 1970, no writ), the court held that when a claim was only partially allowed, the creditor may either accept the amount allowed or file suit on the entire amount of the claim.

In the event an administrator's inactivity results in a rejected claim and the claim is proved in a subsequent suit, the claimant can recover its costs of the suit. Tex. Est. Code § 355.052.

The administrator's "rejection by inaction" during the initial thirty-day period and the subsequent running of the ninety-day period for suit is limited to dependent administrations and is not applicable to claims in an independent administration.

§ 26.8 Administrator's Authority Lost

Removing the personal representative of the decedent's estate, either as executor or administrator, deprives the personal representative of the authority to do anything further with respect to the administration of the estate. *See Bozeman v. Folliott*, 556 S.W.2d 608, 614 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *Felton v. Birchfield*, 110 S.W.2d 1022, 1026 (Tex. Civ. App.—Fort Worth 1937, writ dism'd).

§ 26.9 Change of Estate Administration

Removing the estate from the control of the independent executor and subjecting the estate to a dependent administration does not invalidate the acts of the independent executor or change any applicable rules while the independent executor had independent control of the estate. *Taylor v. Williams*, 108 S.W. 815, 817 (Tex. 1908); *Bozeman v. Folliott*, 556 S.W.2d 608, 613 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). However, if the mortgagee has not actually foreclosed under the independent administration, once the probate is converted to a dependent administration the mortgagee will have to follow the dependent administration rules concerning permission to foreclose.

§ 26.10 Statute of Limitations in Probate

The mortgagee's claim in probate can be barred by the running of the statute of limitations on the debt itself. *See* Tex. Est. Code § 355.061 (no claim for money barred by the statute of limitations can be either allowed or approved). Section 16.062 of the Texas Civil Practice and Remedies Code tolls the general statutes of limitation that might otherwise be applicable to the creditor's claim for a period ending on the earlier of twelve months after the mortgagor's death or the qualification of a personal representative. *See* Tex. Civ. Prac. & Rem. Code § 16.062.

§ 26.10:1 Limitations in Dependent Administrations

Texas Estates Code section 355.008, applicable to dependent administrations, provides that the running of the general statute of limitations is tolled on the date (1) a claim for money is filed or deposited with the clerk or (2) suit is brought against the estate representative with respect to a claim not required to be presented to the estate representative. Tex. Est. Code § 355.008. Note that the claim is tolled when "filed or deposited with the clerk," not when "presented." If a claim is close to being barred by limitations, the creditor might desire to present its claim by filing rather than presenting it directly to the personal representative. Filing suit to establish a claim that is required to be presented, but has not been properly presented, does not toll the running of the statute of limitations. *Furr v. Young*, 578 S.W.2d 532, 536 (Tex. Civ. App.—Fort Worth 1979, no writ).

§ 26.10:2 Limitations in Independent Administrations

Texas Estates Code section 403.057 provides that for independent administrations, the running of the statute of limitations is tolled only by a written approval of a claim signed by the independent executor, a pleading filed in a suit pending at the time of the decedent's death, or a suit brought by the creditor against the independent executor. Tex. Est. Code § 355.008. The mere presentment of a claim or notice does not toll the running of the statute of limitations.

§ 26.11 Probate Proceedings without Administrator

A number of mechanisms are available to a creditor to address title concerns in probate without going through a full probate administration.

§ 26.11:1 Muniment of Title

The court's order admitting the will to probate is legal authority for all persons concerned with the decedent's estate to settle all claims related to the assets and liabilities of the estate in accordance with the will. *See* Tex. Est. Code ch. 257. After a will has been probated as a muniment of title, the devisees acquiring the property under the will become the owners of the property and are obligated for a pro rata share of the debt in accordance with the share of the property received. In many cases involving simple debt-free estates, practitioners use this proceeding even when an independent executor has been named in the will. This procedure gets the decedent's property into the hands of the beneficiaries named in the will without the need for an executor or an administration of any kind and avoids much of the expenses of estate administration.

§ 26.11:2 Small Estate Collection Proceedings

If certain statutory requirements are met, Texas Estates Code chapter 205 (formerly Texas Probate Code sections 137 through 144) provides for a simple method for the heirs of an intestate estate to receive the assets of the decedent. These requirements include: (1) the value of the entire gross estate, excluding homestead and exempt property, must not exceed $50,000; (2) thirty days must have elapsed since the death of the decedent; and (3) no petition for the appointment of a personal representative can be pending or have been granted. Tex. Est. Code § 205.001(1)–(3).

If a decedent's homestead is the only real property in the decedent's estate, title to the homestead can be transferred by the affidavit described in section 205.002. *See* Tex. Est. Code §§ 205.002, 205.006. The affidavit, once filed in the real property records in the county where the property is located, is sufficient title evidence of the transfer.

§ 26.11:3 Determination of Heirship

A judgment declaring heirship rendered by a constitutional or statutory probate court is a valuable tool in clearing title issues related to a deceased mortgagor's property. If properly prepared, the judgment establishes the name, place of residence, and share each heir of the decedent holds with respect to the decedent's property.

An heir must be alive at the time of the decedent's death to inherit any portion of the decedent's estate. *Lee v. Smith*, 18 Tex. 141 (Tex. 1856). A judgment declaring heirship is conclusive as between the rights of an heir omitted from the judgment and a bona fide purchaser, as any omitted heir may seek relief only from the other heirs who received a distribution from the decedent's estate. Once a certified copy of the judgment declaring heirship is recorded in the county where the decedent's real property is located, the judgment serves as constructive notice of the ownership of the property. *See* Tex. Est. Code § 202.206; *see also* Tex. Est. Code ch. 202.

Note that Texas Estates Code section 202.206 eliminates limitations for bringing actions to determine heirships, thus reversing a 2010 Texas Supreme Court ruling that applied the residual four-year limitations period to an heirship proceeding.

§ 26.12 No Probate Opened

Title companies recognize the risk that a dependent administration could be opened within four years of the decedent's death. Consequently, few title companies will issue title policies without a probate exception, if at all. Even though all the heirs may have reached an agreement concerning the disposition of the decedent's estate and agreed that a dependent administration would not be opened, an interested person, as that term is defined in Texas Estates Code section 22.018, can open a dependent administration. Therefore, any creditor, in addition to the heirs or spouse, could seek to open probate any time within four years of the decedent's death. Tex. Est. Code § 22.018(1).

§ 26.12:1 Mortgagee Options

If a deceased borrower's loan is in default and no probate proceeding has been opened, the options generally available to the mortgagee are: (1) open a creditor's administration; (2) acquire title and possession to the property by rescission of the vendor's lien; or (3) wait four years and if a dependent administration is not opened, foreclose. However, if the mortgagee waits too long, the note secured by the deed of trust may be unenforceable if the statute of limitations for enforcing the note has run. Tex. Civ. Prac. & Rem. Code § 16.004. See section 5.12:1 in this manual. Assuming the mortgagee cannot or does not desire to wait four years to foreclose, the alternatives are discussed below.

§ 26.12:2 Creditor's Administration

Texas Estates Code section 301.051 provides that "an interested person may file an application with the court . . . for the appointment of an administrator." Tex. Est. Code § 301.051(2). If no administration is pending, a creditor may file an application for the appointment of a dependent administration to avoid the potential for having unmarketable title after a foreclosure sale or, worse, a voiding of the sale and suit for conversion by a subsequently appointed administrator. In addition, courts have found that a secured creditor's proper remedy when a borrower dies and no estate is pending is to force the opening of an administration. *See Pearce v. Stokes*, 291 S.W.2d 309 (Tex. 1956). These situations are typically referred to as a creditor's administration.

When bringing an application, the creditor must comply with Texas Estates Code section 301.052, which covers the information that must be included. *See* Tex. Est. Code § 301.052. The necessity for an administration can be usually shown by the existence of unpaid debts of the estate. *See Nelson v. Neal*, 787 S.W.2d 343 (Tex. 1990).

Texas Estates Code section 304.001 lists the priority of those persons qualified to serve as administrator. *See* Tex. Est. Code § 304.001. If the creditor is not disqualified from serving, it may be in its best interest to nominate an experienced probate attorney to serve as the estate administrator as the attorney will be more familiar with the intricacies and responsibilities of serving as the administrator.

Once the application is filed and letters are issued, the creditor's administration process is procedurally similar to a dependent administration. See form 26-9 in this manual, Application for Letters of Administration.

However, by initiating a creditor's administration, the creditor may become responsible for managing all of the affairs of the decedent's estate until the probate proceeding is closed, which may take years.

§ 26.12:3 Rescission of Vendor's Lien

Rescission of the vendor's lien is an alternative to a creditor's administration, if the loan is in default and the mortgagor is deceased. *See Walton v. First National Bank of Trenton*, 956 S.W.2d 647, 652 (Tex. App.—Texarkana 1997, pet. denied); *Lusk v. Mintz*, 625 S.W.2d 774 (Tex. App.—Houston [14th Dist.] 1981, no writ). Before 1996, this right to rescind the contract could apparently be exercised even after the claim was presented to, and rejected by, the estate administrator. *See Walton*, 956 S.W.2d at 652. However, Texas Estates Code section 355.153 prevents this option once the holder has elected to have its claim treated in probate as a matured secured claim. *See* Tex. Est. Code § 355.153. A mortgagee holding a vendor's lien and superior title can thus avoid probate court proceedings by bringing suit to rescind the vendor's lien in district court rather than proceeding in probate court. *Walton*, 956 S.W.2d at 652. The reservation clause pertaining to the vendor's lien is usually found in the warranty deed and many times in a paragraph above the signature line of the deed of trust.

Since the mortgagee could rescind the vendor's lien and obtain title and possession of the property while the mortgagor was living, neither the decedent's estate nor heirs can prevent rescission of the vendor's lien if the loan remains in default after the mortgagor's death. *See Hudson v. Norwood*, 147 S.W.2d 826 (Tex. Civ. App.—Eastland 1941, writ dism'd judgm't corr.). Because enforcement of a vendor's lien requires a lawsuit, all the heirs who acquired a title interest upon the death of the intestate borrower must be made a party to the suit. Property is subject to payment of the debts of the decedent even though title is vested immediately in the heirs or devisees on the decedent's death. *See Casey v. Kelly*, 185 S.W.2d 492 (Tex. Civ. App.—Fort Worth 1945, writ ref'd n.r.e.). As the Texas Supreme Court held in *Estes v. Browning*, 11 Tex. 237 (1853), "no man shall claim title to the land of another without payment of the price agreed upon." As long as the purchase price for the property remains unpaid, the mortgagee has superior title to the property secured by a vendor's lien.

Until the debt used to acquire the decedent's property is paid, any comaker of the note and the decedent's heirs have only equitable title to the property, that is the use, benefit, and enjoyment of the property—not legal title, which is held by the holder of the vendor's lien. By exercising its right to rescind the vendor's lien, the mortgagee is not making a claim for money against the decedent or decedent's putative estate; therefore, there is no necessity of administration of lender's claim under the Texas Estates Code. *Walton*, 956 S.W.2d at 652; *see also Skelton v. Washington Mutual Bank, F.A.*, 61 S.W.3d 56 (Tex. App.—Amarillo 2001, no pet.). For due process purposes, the suit to rescind the vendor's lien should allege that the foreclosure procedures in Texas Property Code section 51.002 will be used as the legal means to convert title from the decedent and heirs into the lender. See G. Tommy Bastian, *Texas Foreclosures: Myths and Reality*, *in* Advanced Real Estate Law Course, State Bar of Texas (2011).

§ 26.13 Bona Fide Purchaser

Since an heir is vested with title upon the decedent's death, the heir can sell inherited property, but the heir cannot convey greater title than was inherited. *See Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978). However, if a bona fide purchaser does not have notice of the heirship, it is possible for such purchaser to acquire fee simple title even though the heir only possessed an undivided interest with other heirs. If a person for value, in good faith and without knowledge of the existence of a will, purchases property from the heirs of the decedent more than four years after the decedent's death, the purchaser has good title as against the claims of any devisee under the will. *See* Tex. Est. Code § 256.003(c).

If a bona fide purchaser, in good faith and for valuable consideration, acquires title from an executor or administrator of an estate without notice of a defect in title, title is good regardless of whether the acts of the administrator of the estate are later set aside, annulled, or declared invalid. Tex. Est. Code § 307.001(b).

§ 26.14 On the Horizon

During the 2013 legislative session, House Bill 2795 was introduced, which sought to establish an efficient process by which a lender could proceed with foreclosure of a lien on certain decedents' interests in real property in an effort to eliminate litigation risks to consumers, title companies, and lenders. *See* H.B. 2795, 83d Leg., R.S. (2013). The idea behind the legislation was to create a hybrid judicial proceeding, comprising a determination of heirship and Texas Rules of Civil Procedure rule 736 proceeding. While ultimately unsuccessful, it is likely that a similar bill will eventually pass and enhance the efficiency of the process in the future.

Additional Resources

Bastian, G. Tommy. "Texas Foreclosures: Myths and Reality." In *Advanced Real Estate Law Course, 2011.* Austin: State Bar of Texas, 2011.

Jamieson, Lisa H. "Creditors' Claims and Allowances in Decedents' Estates." In *Building Blocks of Wills, Estate and Probate Course, 2011.* Austin: State Bar of Texas, 2011.

[Reserved]

submitted, which releases any prior personal property lien, or documentation must be submitted showing the lien has been paid in full or has been released. In addition, TDHCA Form 1076, Statement from Tax Assessor-Collector, or a "Paid in Full" tax receipt must be submitted showing no personal property taxes are due on the home. Also, a TXDOT moving permit must be submitted to TDHCA. *See* SOL Instructions.

Neither the owner of record of the manufactured home nor the lienholder may convert the designation of the home from personal property to real property or from real property to personal property without the consent of both parties. See section 29.11 below for a discussion of converting an MHU from personal property to real property.

In a secured transaction where all or a portion of the collateral is real property as well as a manufactured home, the home should be adequately described in the security instruments (manufacturer, model, year, and serial number) so that the lien on the home may be foreclosed in any real property foreclosure proceeding, nonjudicial or judicial, even if the home is designated as personal property. *See* Tex. Bus. & Com. Code § 9.604.

§ 29.6 Notice of Default

Before a creditor may commence repossession, foreclosure, or acceleration in a transaction involving an obligation secured by a manufactured home, the regulations of the Office of Thrift Supervision (OTS) require a thirty-day notice of default to be sent to the debtor by registered or certified mail with return receipt requested, except in extreme circumstances, including abandonment or voluntary surrender of the manufactured home. *See* 12 C.F.R. § 590.4(h); Tex. Fin. Code § 347.356. As provided by paragraph (h)(2) of 12 C.F.R. section 590.4, the form of the notice must include the nature of the default, the action the debtor must take to cure the default, the creditor's intended actions upon failure of the debtor to cure the default, and the debtor's right to redeem under state law, if applicable. *See* 12 C.F.R. § 590.4(h)(2). It should be noted that the notice provisions in the Texas Business and Commerce Code still apply even if the home is personal property and is abandoned or voluntarily repossessed. *All Valley Acceptance Co. v. Durfey*, 800 S.W.2d 672 (Tex. App.—Austin 1990, writ denied) (holding that abandonment or voluntary repossession does not constitute waiver of debtor's right to notice of repossession and intent to sell as required by Texas Business and Commerce Code).

If a manufactured home is real property and is included in a nonjudicial or judicial foreclosure proceeding, the creditor should review its notice of default to confirm that it complies with the notice requirements of the regulations of the OTS. If the debtor cures the default within thirty days of the postmark date of the notice and subsequently defaults a second time, the creditor is again required to give the notice. However, a debtor is not entitled to be notified more than twice in any one-year period. 12 C.F.R. § 590.4(h).

§ 29.7 Acceleration and Computation of Charges

A creditor may accelerate the maturity of all or a part of the amount owed under a credit transaction for the purchase of a manufactured home only if the consumer is in default on the performance of an obligation under the credit transaction. Tex. Fin. Code § 347.352. In computing the amount that is owed under a credit transaction, the creditor must grant to the consumer a refund of the finance charge computed under Finance Code section 347.155. Tex. Fin. Code § 347.353. If payment of a debt is accelerated, interest accrues on the amount owed under the credit transaction, including expenses for reasonable attorney's fees, court costs, and disbursements, and on the charge and collection of actual and reasonable out-of-pocket expenses incurred in connection with repossession or foreclosure of the manufactured home that secures the payment of the credit transaction, including the costs of storing, reconditioning, and reselling the manufactured home, subject to the standards of good faith and commercial reasonableness set by the Texas Business and Commerce Code. Tex. Fin. Code §§ 347.354, 347.307.

§ 29.8 Repossession on Default

If a consumer is in default, the creditor who possesses the first recorded perfected security interest may repossess the manufactured home if it is personal property. Tex. Fin. Code § 347.355(a). A lien on a manufactured home is defined as—

(A) a security interest created by a lease, conditional sales contract, deed of trust, chattel mortgage, trust receipt, reservation of title, or other security agreement if an interest other than an absolute title is sought to be held or given in a manufactured home; or

(B) a lien on a manufactured home created by the constitution or a statute.

Tex. Occ. Code § 1201.201(6). A security interest in a manufactured home is defined as an interest in the home as personal property or a fixture which secures payment or performance of an obligation. Tex. Occ. Code § 1201.201(10); Tex. Bus. & Com. Code § 1.201(b)(35).

A security interest in a manufactured home will be recorded on the document of title or SOL. As defined in Texas Occupations Code section 1201.201, a document of title means a written instrument issued by TDHCA before September 1, 2003, that provides the information contained in the SOL form under section 1201.205 as that section existed before September 1, 2003. Beginning September 1, 2003, a document of title is considered to be an SOL and may be exchanged for an SOL as provided by Occupations Code section 1201.214. Tex. Occ. Code § 1201.201(2).

A security interest in a manufactured home is perfected only by filing with TDHCA the notice of lien on a form provided by the TDHCA. The TDHCA shall disclose on its Web site the date of each lien filing. A lien recorded with the TDHCA has priority, according to the chronological order of recordation, over another lien or claim against the manufactured home. Tex. Occ. Code § 1201.219(b).

If the manufactured home has been converted to real property, the creditor, after notice, may remove the manufactured home from the real property in accordance with the applicable provisions of the Business and Commerce Code as if it were personal property. Tex. Fin. Code § 347.355(b).

§ 29.9 Foreclosure of MHU as Real Property

Texas Occupations Code chapter 1201 governs the issuance of an SOL for manufactured homes in the state of Texas. In completing an application for the issuance of an SOL, an owner of a manufactured home must indicate whether the owner elects to treat the home as personal property or real property. Tex. Occ. Code § 1201.2055(a). An owner may elect to treat a manufactured home as real property only if the home is attached to—

(1) real property that is owned by the owner of the home; or

(2) land leased to the owner of the home under a long-term lease, as defined by TDHCA rule.

Tex. Occ. Code § 1201.2055(a). If an owner elects to treat a manufactured home as real property, TDHCA must issue to the owner a certified copy of the SOL that on its face reflects that the owner has elected to treat the manufactured home as real property at the location listed on the SOL. Tex. Occ. Code § 1201.2055(d). A real property election for a manufactured home is not considered to be perfected until a certified copy of the SOL has been filed within sixty days of issuance in the real property records of the county in which the home is located and TDHCA and the chief appraiser of the appraisal district where the home is located have been notified of the filing. Tex. Occ. Code § 1201.2055(d), (e). After the real property election is perfected, the manufactured home is considered to be real property for all purposes. Tex. Occ. Code § 1201.2055(g)(1).

To determine whether or not the owner of the manufactured home has elected to treat the home as real property or personal property, the first step is to access the TDHCA Web site, **www.tdhca.state.tx.us/mh/index.htm**, and select the "Search Our Database" link under the "Manufactured Housing Division" tab. Thereafter, select "View home ownership records" to access the certificate of detail for the manufactured home made subject of the real property foreclosure. If the real property election has been perfected on the home, the following statement will appear in bold at the top of the certificate of detail:

> The owner of this home has elected to treat the home as real property; and except as provided by Section 1201.2055(h) of the Occupations Code, the department no longer considers the home to be a manufactured home for the purposes of regulation under Chapter 1201 of the Occupations Code.

Once the manufactured home has been converted to real property, as evidenced by the SOL filed in the real property records or confirmed by TDHCA, foreclosure of the real property under the terms of the deed of trust also includes the manufactured home—without the necessity of the home being specifically described in the security instrument.

§ 29.10 Foreclosure on MHU as Personal Property

If the real property election has not been perfected on a manufactured home, it may still be possible to conduct a foreclosure on the real property and home at the same time. If the deed of trust on the real property contains a security agreement encumbering personal property that is specifically described and located on real property, a secured party may concurrently foreclose both the personal property and the real property under the deed of trust, in accordance with Tex. Prop. Code ch. 51, Tex. Bus. & Com. Code § 9.604(a)(2), and the terms of the deed of trust.

If the manufactured home is personal property but *not* described in the security agreement, after default, a secured party may reduce its claim to judgment on the note or enforce the claim or security interest by any available judicial procedure. *See* Tex. Bus. & Com. Code § 9.601(a)(1). These rights may be modified by agreement of the parties except as otherwise provided in Business and Commerce Code sections 9.602 and 9.624. *See* Tex. Bus. & Com. Code §§ 9.602, 9.624. After default, a secured party may proceed to take possession of a home designated as personal property pursuant to judicial process or without judicial process, if it proceeds without breach of the peace. Tex. Bus. & Com. Code § 9.609(a), (b). If the secured party chooses self-help repossession, it runs the risk that the repossession may breach the peace, which could result in the secured party being held liable in tort. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 152 (Tex. 1992). A duty is imposed on secured creditors pursuing a nonjudicial repossession to take precautions for public safety, and a secured creditor is prohibited from delegating this duty to an independent contractor. *Sanchez*, 836 S.W.2d at 153.

§ 29.11 Conversion of MHU from Personal Property to Real Property

After a manufactured home is acquired by self-help repossession, execution sale, or foreclosure sale, the purchaser may elect to convert the manufactured home from personal property to real property if the real property election has not already been perfected. In order for a home to be converted from personal property to real property, each lien on the home must be released by the lienholder or each lienholder must give written consent of the conversion, which shall be placed on file with TDHCA. Tex. Occ. Code § 1201.2075(a). The conversion may be completed before the release of any liens or the consent of any lienholders if TDHCA releases a certified copy of the SOL to a licensed title insurance company that has issued a commitment to issue a title insurance policy covering all prior liens on the home in connection with a loan that the title company has closed or to a federally insured financial institution or licensed attorney who has obtained from a licensed title insurance company a title insurance policy covering all prior liens on the home. Tex. Occ. Code § 1201.2075(b).

The purchaser must complete an SOL application, which may be filled out and printed from the TDHCA Web site, **www.tdhca.state.tx.us/mh/ownership-location.htm**, and submit the required documentation together with the appropriate SOL issuance fee to perfect the conversion from personal property to real property. If a mortgage lien exists, TDHCA Form B, Release of Lien or Repossession, must be completed by the lienholder of record for the release of the personal property lien or documentation submitted identifying the home and verifying that the lien has been paid in full or released. *See* SOL Instructions. In lieu of a release of lien, a statement by a title company, attorney, or federally insured financial institution that a title commitment covering all prior liens on the home has been issued may be submitted or written consent from the lienholder authorizing the conversion. Tex. Occ. Code § 1201.2075(b).

Once the application is approved, TDHCA must issue to the owner a certified copy of the SOL that on its face reflects that the owner has elected to treat the manufactured home as real property at the location listed on the SOL. Tex. Occ. Code § 1201.2055(d). A real property election for a manufactured home is not considered to be perfected until a certified copy of the SOL has been filed in the real property records of the county in which the home is located and TDHCA and the chief appraiser of the appraisal district where the home is located have been notified of the filing of a certified copy of the SOL in the real property records of the county in which the home is located. Tex. Occ. Code § 1201.2055(e); Tex. Prop. Code § 2.001(b). After the real property election is perfected, the manufactured home is considered to be real property for all purposes. Tex. Occ. Code § 1201.2055(g). Additionally, if there is a personal property lien on the home when the home is converted to real property, the lien on the home is converted to a purchase money lien on the real property by operation of law and exists independently of any existing lien on the real property to which the home is permanently attached. Tex. Prop. Code § 63.003.

§ 29.12 Conversion of MHU from Real Property to Personal Property

After a manufactured home is acquired by self-help repossession, execution sale, or foreclosure sale, the purchaser may also elect to convert the manufactured home from real property to personal property if the real property election on the home has been perfected. In order for a home to be converted from real to personal property, each lien on the home must be released by the lienholder or each lienholder, including a taxing unit, must give written consent of the conversion, which must be placed on file with TDHCA. Tex. Occ. Code § 1201.2076(a). To determine the existence of any liens on the real property and whether or not they have been or should be released, a title commitment for title insurance, a title insurance policy, or a lawyer's title opinion on the real property must be obtained by the purchaser and submitted to TDHCA. Tex. Occ. Code § 1201.2076(b). TDHCA also cannot issue an SOL for a manufactured home that is being converted from real property to personal property until the home has been inspected and determined to be habitable. Tex. Occ. Code § 1201.2076(a).

The purchaser must complete an SOL application, which may be filled out and printed from the TDHCA Web site, **www.tdhca.state.tx.us/mh/ownership-location.htm**, and submit the required documentation, which includes proof that all real property taxes have been paid, together with the appropriate fee for the habitability inspection and the SOL issuance fee to perfect the conversion from personal property to real property. *See* SOL Instructions. Once the application is approved and the home passes the habitability inspection, TDHCA shall issue to the owner an SOL that on its face reflects that the owner has elected to treat the manufactured home as personal property. The issuance of the SOL is evidence of ownership of the home. Tex. Occ. Code § 1201.2055(c). A lien, charge, or other encumbrance on a home treated as personal property may be made only by filing the appropriate documentation with TDHCA. Tex. Occ. Code § 1201.2055(c).

§ 29.13 Abandonment

If a vacant manufactured home is located on real property that was foreclosed, but the security instrument that was foreclosed did not encumber the manufactured home, it may be possible to obtain title to the vacant manufactured home through abandonment.

The owner of real property on which a vacant manufactured home is located but is titled in the name of another may declare the home abandoned if the home has been continuously unoccupied for at least four months and any indebtedness secured by the home or related to a lease agreement between the owner of the real property and the owner of the home is considered delinquent. Tex. Occ. Code § 1201.217(a).

Before the manufactured home is declared abandoned, the owner of the real property on which the vacant home is located must send a notice of intent to declare the home abandoned to the record owner of the home, all lienholders at the addresses listed on the home's SOL on file with TDHCA, the tax collector for each taxing unit that imposes ad valorem taxes on the real property where the home is located, and any intervening owners of liens or equitable interests. Tex. Occ. Code § 1201.217(b). If the person giving such notice knows that a person to whom the notice is being given no longer resides and is no longer receiving mail at a known address, a reasonable effort shall be made to locate the person and give the person notice at an address where the person is receiving mail. Tex. Occ. Code § 1201.217(b). Mailing of the notice by certified mail, return receipt requested, postage prepaid, to the persons required to be notified constitutes conclusive proof of the notice requirement to declare the home abandoned. Tex. Occ. Code § 1201.217(b).

On receipt of a notice of intent to declare the manufactured home abandoned, the record owner of the home, a lienholder, a tax assessor-collector for a taxing unit that imposes ad valorem taxes on the real property on which the home is located, or an intervening owner of a lien or equitable interest may enter the real property on which the home is located to remove the home. Tex. Occ. Code § 1201.217(c). The real property owner must disclose the location of the home to the record owner, lienholder, tax assessor-collector, or intervening owner of liens or equitable interests in the home and grant the person reasonable access to the home. Tex. Occ. Code § 1201.217(c). A person removing the home is responsible to the real property owner for any damage to the real property resulting from the removal of the home. Tex. Occ. Code § 1201.217(c).

If the manufactured home remains on the real property for at least forty-five days after the date the notice of intent to declare the manufactured home abandoned is postmarked, all liens on the home are extinguished, and the real property owner may then apply for a new SOL listing the real property owner as the owner of the manufactured home. Tex. Occ. Code § 1201.217(d).

It should be noted that obtaining title to a manufactured home through the abandonment process is not permitted if the person who owns the real property on which the manufactured home is located and who is declaring that the home is abandoned, or any person who is related or affiliated with that person, has ever owned an interest in the manufactured home. Tex. Occ. Code § 1201.217(f).

§ 29.14 Rental Charges

Texas Finance Code section 347.402 provides that the owner of the real property on which a manufactured home is located shall have possessory lien for all rental charges accruing after the fifteenth day after the creditor receives written notice of unpaid land lease charges, if the manufactured home has been abandoned or voluntarily surrendered by the consumer. *See* Tex. Fin. Code § 347.402(b)(1). If the manufactured home is not abandoned or voluntarily surrendered, the possessory lien secures rent after the fifteenth day following (1) the expiration of all notice and grace periods that the creditor is required to give the consumer and (2) the notice of unpaid charges. *See* Tex. Fin. Code § 347.402(b)(2). The maximum daily rate of rent charges that is secured by the possessory lien is equal to the consumer's monthly rent divided by thirty. *See* Tex. Fin. Code § 347.402(c). Chapter 94 of the Texas Property Code contains extensive provisions regulating manufactured home tenancies, including sections 94.051 through 94.109, regarding the provisions in the lease and the relationships and liabilities between the owner of the manufactured home community and its tenants, and sections 94.201 through 94.206, regarding the termination, nonrenewal, and eviction of the tenant. *See* Tex. Prop. Code ch. 94.

§ 29.15 Eviction

After foreclosure, a forcible detainer suit may be filed by the purchaser of the property to recover possession of the manufactured home if the occupant will not voluntarily vacate. If the purchaser prevails in the eviction suit, a writ of possession may be issued, but not before the sixth day after the date on which the judgment for possession is rendered unless a possession bond has been filed and approved under the Texas Rules of Civil Procedure and judgment for possession is thereafter granted by default. Tex. Prop. Code § 24.0061(b). The forcible detainer process is set forth in Texas Property Code chapter 24.

§ 29.16 Protecting Tenants at Foreclosure Act of 2009

The Protecting Tenants at Foreclosure Act (PTFA), which is title VII, sections 701–704 of the Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632, protects tenants from eviction when a home they occupy is foreclosed. These provisions took effect on May 20, 2009, and originally were scheduled to expire on December 31, 2012.

Chapter 30

Property Owners Association Foreclosure Process

Forms

Chapter 30

Property Owners Association Foreclosure Process

The editors gratefully acknowledge Brady E. Ortego for his contribution to this chapter.

Note: At the time of this manual's publication, the Texas Supreme Court, pursuant to Acts 2013, 83d Leg., R.S., ch. 1044 (H.B. 2978) and section 22.018 of the Texas Government Code, had recently issued a set of promulgated forms for use in expedited foreclosure proceedings under rule 736 of the Texas Rules of Civil Procedure. (See Misc. Docket No. 14-9047.) The comments in this chapter are based on rule 736 of the Texas Rules of Civil Procedure, which remains in effect, but the reader is advised to use the forms promulgated by the Texas Supreme Court (some of which, but not all, are referenced in this chapter). The new forms can also be found on the Texas Supreme Court Web site at **www.supreme.court.state.tx.us**. For additional information on the use of the promulgated forms, see G. Tommy Bastian, *Rule 736 Promulgated Forms*, *in* State Bar of Tex., Advanced Real Estate Drafting Course (2014).

§ 30.1 Introduction

Property owners associations (POAs), also known as homeowners associations, began to appear in the 1950s and 1960s as civic clubs or civic associations. Liens for assessments were sometimes created in the initial deeds of conveyance from the developer to the first owner of the lot. As time progressed, the assessment liens were placed in the deed restrictions or declaration for the POA. Today, any new residential development, whether it is a master planned community, townhome community, or other single family development, most likely will be subject to set deed restrictions that may be enforced by the POA.

To secure payment of assessments, dues, or other community-oriented charges, a declaration creates lien rights for the POA secured by owners' lots within the community. Some declarations create the authority of the POA to exercise a power of sale, while other declarations are devoid of power of sale language. Those POAs with a power of sale have the option of using an expedited foreclosure process under rule 736 of the Texas Rules of Civil Procedure. If the POA does not have a specific power of sale, the traditional judicial foreclosure process should be used.

Lawyers practicing in this area should be aware that certain statutory prerequisites apply before a POA may initiate the foreclosure process. The prerequisites include certain statutory notices prior to turnover for collection, an opportunity to cure, and an opportunity to enter into a payment plan with the POA. Conditions precedent may also exist within the POA declaration and those must be satisfied prior to any foreclosure action or proceeding.

Additional statutory notice requirements apply after foreclosure. Foreclosed owners have a right of redemption whether a third party purchases the property, whether the POA purchases the property, or whether the sale was conducted judicially or pursuant to rule 736 of the Texas Rules of Civil Procedure.

§ 30.2 Prerequisites to a POA Foreclosure

§ 30.2:1 Alternative Payment Schedule

The Texas Property Code requires a POA composed of more than fourteen lots to adopt reasonable guidelines establishing an alternative payment schedule for assessments by which an owner may make partial payments to the POA without incurring monetary penalties. *See* Tex. Prop. Code § 209.0062(a). Monetary penalties do not include reasonable costs associated with administering the payment plan or interest. *See* Tex. Prop. Code § 209.0062(a). POAs are required to file the alternative payment schedule guidelines in the real property records of each county in which the subdivision is located. Tex. Prop. Code § 209.0062(d). Notwithstanding a POA's failure to file these guidelines, owners have a statutory right to an alternative payment schedule. Tex. Prop. Code § 209.0062(e).

POAs must offer owners at least three months to make partial payments, but POAs are not required to offer a plan that extends for more than eighteen months from the date of the owner's request for a payment plan. Tex. Prop. Code § 209.0062(b)–(c). POAs are not required to enter into a payment plan with an owner who failed to honor the terms of a previous payment plan during the two years following the owner's default under the previous payment plan. Tex. Prop. Code § 209.0062(c). Additionally, POAs are not required to offer a payment plan to an owner after the period for cure described in section 209.0064(b)(3) of the Texas Property Code expires. *See* Tex. Prop. Code § 209.0062(c). POAs are not required to allow an owner to enter into a payment plan more than once in any twelve-month period. Tex. Prop. Code § 209.0062(c).

Any payments received by the POA from an owner shall be applied in accordance with the following priority: (1) delinquent assessment; (2) current assessment; (3) attorney's fees or third-party collection costs related to assessments, or other charges that could provide the basis for foreclosure; (4) attorney's fees incurred by the association unrelated to assessments; (5) fines assessed by the POA; and (6) any other charges. Tex. Prop. Code § 209.0063(a). If the owner is in default of the alternative payment schedule, the POA is not required to apply a payment in accordance with this priority. Tex. Prop. Code § 209.0063(b)(1). However, a fine assessed by the POA may not be given priority over any other amount owed to it. Tex. Prop. Code § 209.0063(b)(2).

§ 30.2:2 Opportunity to Cure

A POA may not hold an owner liable for fees of a collection agent (the definition of which includes lawyers and law firms) without first providing certain notice by certified mail. Tex. Prop. Code § 209.0064(a)–(b). The notice must (1) specify each delinquent amount and the total amount due; (2) if the POA is subject to Property Code section 209.0062 or the POA's dedicatory instruments contain a requirement to offer a payment plan, describe the options the owner has to avoid having the account turned over to a collection agent, including the availability of a payment plan; and (3) provide a period of at least thirty days to cure the arrears before further collection action. Tex. Prop. Code § 209.0064(b).

§ 30.2:3 Foreclosure Prohibited in Certain Circumstances

Under section 209.009 of the Texas Property Code, a POA may not foreclose a POA's assessment lien if the debt securing the lien consists of solely the following:

1. fines assessed by the POA;

2. attorney's fees incurred by the POA solely associated with fines assessed by the POA; or

3. amounts added to the owner's account as an assessment under Property Code section 209.005(i) or 209.0057(b–4). *See* Tex. Prop. Code § 209.009. Section 209.005(i) allows a POA to add an owner's assessment account charges for the production of POA records. Tex. Prop. Code § 209.005(i). Section 209.0057(b–4) allows a POA to add to an owner's assessment account any additional costs related to a recount of election votes beyond the initial amount paid by the owner to fund the recount process pursuant to section 209.0057(b–1). *See* Tex. Prop. Code § 209.0057(b–4).

§ 30.2:4 Lienholder Notice and Conditions Precedent

A POA may file an application for an expedited foreclosure of the POA's assessment lien or a petition for judicial foreclosure unless the POA has provided notice and opportunity to cure to subordinate or inferior lienholders. Tex. Prop. Code § 209.0091(a). The written notice must be sent certified mail to the address for the lienholder as shown in the deed records. Tex. Prop. Code § 209.0091(b). The notice must state the total amount of the delinquency giving rise to the foreclosure to any inferior or subordinate holder of a lien that is evidenced by a deed of trust. Tex. Prop. Code § 209.0091(a)(1). The lienholder is entitled to cure the delinquency before the sixty-first day after the POA mails the notice. Tex. Prop. Code § 209.0091(a)(2). Notwithstanding any other law, a POA may provide notice under section 209.0091 to any holder of a lien of record on the property. Tex. Prop. Code § 209.0091(c).

Practice Tip: Some POA declarations require notice to senior lienholders prior to the commencement of the foreclosure of the POA lien. Read the POA declaration carefully to ensure that this and other possible conditions precedent to foreclosure were satisfied.

Practice Tip: Poorly drafted subordination provisions often lead to questions as to whether or not certain liens are inferior or subordinate to the POA's lien. If in doubt, send notice to the lienholder. Best case scenario: the lienholder pays the POA and its foreclosure is moot. Alternatively, the statutory requirements have been satisfied.

§ 30.3 POA Foreclosure Using Application for Expedited Foreclosure under Texas Rules of Civil Procedure 735 and 736

§ 30.3:1 Introduction

Before September 1, 2015, section 209.0092 of the Texas Property Code could have been interpreted to mean that a POA could not foreclose its assessment lien unless the POA first obtained a court order in an application for expedited foreclosure under Texas Rules of Civil Procedure 735 and 736. Tex. Prop. Code § 209.0092(a). With the passage of Senate Bill 1168, the Eighty-fourth Legislature made it clearer that a POA can use the expedited foreclosure process or pursue a judicial foreclosure. *See* Acts 2015, 84th Leg., R.S., ch. 1183, § 22 (S.B. 1168), eff. Sept. 1, 2015 (amending Tex. Prop. Code § 209.0092(a)). A POA whose dedicatory instruments grant a right of foreclosure is considered to have any power of sale required by law as a condition of using the procedure described by section 209.0092(a) of the Texas Property Code. *See* Tex. Prop. Code § 209.0092(a). Expedited foreclosure is not required if the owner agrees in writing at the time the foreclosure is sought to waive expedited foreclosure; a waiver may not be required as a condition of the transfer of title. Tex. Prop. Code § 209.0092(c).

Practice Tip: Waiver of the expedited foreclosure process saves money for both the owner and the POA. Consider adding a waiver provision to a payment agreement between the POA and owner. Note, however, that the waiver may only be agreed upon "at the time the foreclosure is sought."

The only issue to be determined in a rule 736 proceeding is whether a party may obtain an order to proceed with foreclosure under applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed. Tex. R. Civ. P. 735.2.

Rule 736 provides the procedure for obtaining a court order, when required, to allow foreclosure of a lien containing a power of sale in the security instrument, dedicatory instrument, or declaration creating the lien, including a lien securing a POA assessment under section 209.0092 of the Property Code. Tex. R. Civ. P. 735.1.

The expedited foreclosure first created by section 209.0092 became effective January 1, 2012. With less than two years to acclimate to the new foreclosure process for POAs, the Eighty-third Legislature adopted House Bill 2978. This bill implemented changes and additions to the expedited foreclosure process affecting methods of service, mediation before entry of an order for foreclosure, and promulgation of forms by the Texas Supreme Court. *See* Acts 2013, 83d Leg., R.S., ch. 1044 (H.B. 2978), eff. June 14, 2013.

§ 30.3:2 Location and Style

An application for an expedited order allowing the foreclosure of a lien listed in rule 735 must be filed in the county where all or part of the real property encumbered by the loan agreement, contract, or lien sought to be foreclosed is located or in a probate court with jurisdiction over proceedings involving the property. Tex. R. Civ. P. 736.1(a). An application must be styled "In re: Order for Foreclosure Concerning [state: property's mailing address] under Tex. R. Civ. P. 736." Tex. R. Civ. P. 736.1(b).

Practice Tip: Rule 736.1(a) allows the application to be filed in a probate court that has jurisdiction. A quick search of probate filings may save time and money in the event the property sought to be foreclosed is in probate.

§ 30.3:3 Contents of Application for POA Expedited Foreclosure

Rule 736.1(d) is detailed and specific as to the contents of an application for expedited foreclosure. Tex. R. Civ. P. 736.1. The name and last known address of both the petitioner and the respondent are required. Tex. R. Civ. P. 736.1(d)(1). A POA application must include each person obligated to pay the contract or lien sought to be foreclosed who has a current ownership interest in the property. Tex. R. Civ. P. 736.1(d)(1)(B)(iii).

Practice Tip: A spouse that is a grantor under a deed of trust should be included as a respondent within an application for expedited foreclosure. Even if the spouse is not a record title holder, a community property interest may exist given that the spouse is a grantor under a recorded deed of trust. The spouse should only be included as a respondent for this limited purpose, and the application should be clear in that the spouse does not have an obligation to pay the debt sought to be foreclosed through the application.

The application must—

1. include both the commonly known street address and legal description (Tex. R. Civ. P. 736.1(d)(2));
2. state that the lien to be foreclosed is a POA lien and include a statutory refer-

ence to section 209.0092 of the Texas Property Code (Tex. R. Civ. P. 736.1(d)(3)(A));

3. state the provision within the POA declaration creating the lien for assessments and any related charges secured by the lien (Tex. R. Civ. P. 736.1(d)(3)(B));

4. identify each person obligated to pay the lien sought to be foreclosed (Tex. R. Civ. P. 736.1(d)(3)(C));

5. state the number of unpaid scheduled payments, the amount required to cure the default, and the total amount required to pay off the lien, as of a date that is not more than sixty days prior to the date the application is filed (Tex. R. Civ. P. 736.1(d)(3)(E));

6. state that the requisite notice or notices to cure the default has or have been mailed to each person as required under applicable law and the lien sought to be foreclosed and that the opportunity to cure has expired (Tex. R. Civ. P. 736.1(d)(3)(F)) (This statement pertains to the statutory notice to junior lienholders under section 209.0091 of the Property Code and notice to the owner under section 209.0064 of the Property Code);

7. state that before the application was filed, any other action required under applicable law and the declaration of the POA was performed (Tex. R. Civ. P. 736.1(d)(3)(G)) (Any condition precedent contained within the POA declaration would be pertinent here);

8. conspicuously state that legal action is not being sought against the occupant of the property unless the occupant is also named as a respondent in the application (Tex. R. Civ. P. 736.1(d)(5)(A)) (If the petitioner obtains a court order, the petitioner will proceed with a foreclosure of the property in accordance with applicable law and the terms of the POA declaration. Tex. R. Civ. P. 736.1(d)(5)(B)); and

9. include an affidavit of material facts in accordance with rule 166a(f), signed by the petitioner, describing the basis for foreclosure, and attach a legible copy of (a) the pertinent part of the POA declaration or dedicatory instrument establishing the lien and (b) each notice required to be mailed to any person under applicable law and the loan agreement, contract, or lien sought to be foreclosed before the application was filed and proof of mailing of each notice (Tex. R. Civ. P. 736.1(d)(6)).

See form 30-1 in this manual, Application for an Expedited Order Under Rule 736 on a Property Owners' Association Assessment, as promulgated by the Texas Supreme Court. See also form 30-2, Affidavit in Support of Petitioner's Application for an Expedited Order Under Rule 736, or, alternatively, the practitioner may use form 30-3, Declaration in Support of Petitioner's Application for an Expedited Order Under Rule 736, both promulgated by the Texas Supreme Court.

Practice Tip: Failing to include all required contents will result in a denial of the application. Lawyers should create a checklist for the application to ensure that all required contents are included in satisfaction of rule 736.1(d).

Practice Tip: A certified copy of both the vesting deed and the POA declaration creating the lien must be attached to the application or affidavit of material facts under rule 736.1(d)(6).

§ 30.3:4 Service of Citation

Before the Eighty-third Legislature, rule 736.3 solely governed the service and return of citation by the clerk of the court through regular and certified mail. Tex. R. Civ. P. 736.3(b)(1). A citation directed to a respondent must be mailed to the respondent's last known address that is stated in the application. Tex. R. Civ. P. 736.3(b)(1). A citation directed to the occupant of the property sought to be foreclosed must be mailed to the occupant of the property at the address of the property sought to be foreclosed. Tex. R. Civ. P. 736.3(b)(1).

Beginning June 14, 2013, as a result of House Bill 2978, POAs now have the option of completing service in accordance with rule 736, rule 106, or in any other manner provided for petitions under the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 17.031. Note that House Bill 2978 and Tex. Gov't Code § 22.018 only required the supreme court to promulgate forms related to Tex. Const. art XVI, § 50(a)(6) loans (i.e., home equity, home equity line of credit, and reverse mortgages), but the supreme court's rule 736 task force recommended and the supreme court adopted a promulgated rule 736 POA application form.

Practice Tip: Rule 736.3(b)(1) requires service not only to the respondent but also to the occupant. A standard two-owner household requires three citations: one for each owner/respondent and a third citation for the occupant.

§ 30.3:5 Response

If the application for expedited foreclosure is served through the mail via the court clerk, any response to the application is due the first Monday after the expiration of thirty-eight days from the date the citation was placed in the custody of the U.S. Postal Service in accordance with the clerk's standard mailing procedures. Tex. R. Civ. P. 736.5(b). If the application is served pursuant to another method under the Texas Rules of Civil Procedure, then the response deadline will be in accordance with the service method utilized. By way of example, if personal service under rule 106(a) is chosen, then the response deadline will be the Monday next following the expiration of twenty days after service. Tex. R. Civ. P. 106(a); Tex. R. Civ. P. 99(b). If service of citation by publication is utilized, then the response deadline is on or before the Monday after expiration of forty-two days from the date of issuance. Tex. R. Civ. P. 114.

Practice Tip: When considering POA foreclosures, be aware that many judges prefer personal service rather than service through the mail by the court clerk. While service through the mail remains an option, check local rules or with court personnel prior to relying solely on service through the mail by the court clerk. Some courts may prefer to see personal service in addition to or in lieu of mail service.

A response must be signed in accordance with rule 57; pro se respondents must sign the pleadings and state an address, telephone number, and, if available, telecopier number. Tex. R. Civ. P. 736.5(c); Tex. R. Civ. P. 57. The response may be in the form of a general denial except that the respondent must affirmatively plead—

1. why the respondent believes a respondent did not sign a loan agreement document, if applicable, that is specifically identified by the respondent;
2. why the respondent is not obligated to payment of the lien;
3. why the number of months of alleged default or the reinstatement or pay-off amounts are materially incorrect;
4. why any document attached to the application is not a true and correct copy of the original; or
5. proof of payment under rule 95.

Tex. R. Civ. P. 736.5(c).

Respondents are prohibited from stating an independent claim for relief within their response. Tex. R. Civ. P. 736.5(d). Rule 736.5(d) mandates a court to strike and dismiss any counterclaim, cross claim, third-party claim, intervention, or cause of action filed by any person in a rule 736 proceeding. Tex. R. Civ. P. 736.5(d).

§ 30.3:6 Mediation

Effective June 14, 2013, Texas Civil Practice and Remedies Code section 154.028 created a process for court-mandated mediation applicable in expedited foreclosure proceedings. Tex. Civ. Prac. & Rem. Code § 154.028. If a response is filed, the court may order the parties to mediate, but only after a hearing is held. Tex. Civ. Prac. & Rem. Code § 154.028(a). A court may not order mediation without conducting a hearing. Tex. Civ. Prac. & Rem. Code § 154.028(a). Either the petitioner or respondent may request a hearing to determine whether mediation is necessary or whether an application is defective. Tex. Civ. Prac. & Rem. Code § 154.028(a). If the parties cannot agree on a mediator, the court will appoint one. Tex. Civ. Prac. & Rem. Code § 154.028(g). The parties share the cost of the mediator. Tex. Civ. Prac. & Rem. Code § 154.028(h). The parties can agree not to mediate. Tex. Civ. Prac. & Rem. Code § 154.028(i).

Practice Tip: If the POA is cost conscious, an appearance by telephone is permitted by Tex. Civ. Prac. & Rem. Code § 154.028. The court must send out a ten-day notice stating whether the hearing will be conducted via telephone and any instructions for contacting the court and attending by telephone. Cost savings should be weighed against the value of appearing before the court.

§ 30.3:7 Hearing

The court must not conduct a hearing on an application for expedited foreclosure unless a response is filed. Tex. R. Civ. P. 736.6. If a response to the application is filed, the court must hold a hearing after reasonable notice to the parties. Tex. R. Civ. P. 736.6. The hearing on the application must not be held earlier than twenty days or later than thirty days after a request for a hearing is made by any party. Tex. R. Civ. P. 736.6. At the hearing, the petitioner has the burden to prove by affidavits on file or evidence presented the grounds for granting the order sought in the application. Tex. R. Civ. P. 736.6.

§ 30.3:8 Default

If no response to the application is filed by the due date, the petitioner may file a motion and proposed order to obtain a default order. Tex. R. Civ. P. 736.7(a). See form 30-4 in this manual, Default Order, as promulgated by the Texas Supreme Court. All facts alleged in the application and supported by the affidavit of material facts constitute prima facie evidence of the truth of the matters alleged. Tex. R. Civ. P. 736.7(a). The court must grant the application by default order no later than thirty days after a motion is filed if the application complies with the requirements of rule 736.1 and was properly served in accordance with rule 736.3. Tex. R. Civ. P. 736.7(b). The petitioner need not appear in court to obtain a default order. Tex. R. Civ. P. 736.7(b). The return of service must be on file with the clerk of the court for at least ten days before the court may grant the application by default. Tex. R. Civ. P. 736.7(c).

§ 30.3:9 Order

The court must issue an order granting the application if the petitioner establishes the basis for the foreclosure. Tex. R. Civ. P. 736.8(a). Otherwise, the court must deny the application. Tex. R. Civ. P. 736.8(a).

An order granting the application must describe (1) the material facts establishing the basis for foreclosure, (2) the property to be foreclosed by commonly known mailing address and legal description, (3) the name and last known address of each respondent subject to the order, and (4) the recording or indexing information of each lien to be foreclosed. Tex. R. Civ. P. 736.8(b).

An order granting or denying the application is not subject to a motion for rehearing, new trial, bill of review, or appeal. Tex. R. Civ. P. 736.8(c). Any challenge to a rule 736 order must be made in a suit filed in a separate, independent, original proceeding in a court of competent jurisdiction. Tex. R. Civ. P. 736.8(c).

An order is without prejudice and has no res judicata, collateral estoppel, estoppel by judgment, or other effect in any other judicial proceeding. Tex. R. Civ. P. 736.9. After an order is obtained, a person may proceed with the foreclosure process under applicable law and the terms of the POA declaration. Tex. R. Civ. P. 736.9.

§ 30.3:10 Bankruptcy

If a respondent provides proof to the clerk of the court that the respondent filed bankruptcy before an order is signed, the proceeding under rule 736 must be abated so long as the automatic stay is effective. Tex. R. Civ. P. 736.10.

Practice Tip: A suggestion of bankruptcy will prevent the rule 736 proceeding from being dismissed for want of prosecution during the pending bankruptcy.

§ 30.3:11 Independent Suit against POA

A proceeding or order under rule 736 is automatically stayed if a respondent files a separate, original proceeding in a court of competent jurisdiction that puts in issue any matter related to the enforcement of the contract or lien sought to be foreclosed prior to 5:00 P.M. on the Monday before the scheduled foreclosure sale. Tex. R. Civ. P. 736.11(a). The respondent must give prompt notice of the filing of the suit to the petitioner or the petitioner's attorney and the foreclosure trustee or substitute trustee by any reasonable means necessary to stop the scheduled foreclosure sale. Tex. R. Civ. P. 736.11(b).

Within ten days of filing suit, the respondent must file a motion and proposed order to dismiss or vacate with the clerk of the court in which the application was filed, giving notice that the respondent has filed an original proceeding contesting the right to foreclose in a court of competent jurisdiction. Tex. R. Civ. P. 736.11(c). If no order has been signed, the court must dismiss a pending application for expedited foreclosure. Tex. R. Civ. P. 736.11(c). If an order granting the application for expedited foreclosure has been signed, the court must vacate the rule 736 order. Tex. R. Civ. P. 736.11(c).

If the automatic stay under this rule is in effect, any foreclosure sale of the property is void. Tex. R. Civ. P. 736.11(d). Within ten business days of notice that the foreclosure sale was void, the trustee or substitute trustee must return to the buyer of the foreclosed property the purchase price paid by the buyer. Tex. R. Civ. P. 736.11(d). The court may enforce the rule 736 process under chapters 9 and 10 of the Texas Civil Practice and Remedies Code. Tex. R. Civ. P. 736.11(d).

Practice Tip: Frivolous pleadings and claims cannot be used as a basis for an independent suit against the POA that would otherwise result in the dismissal or the vacating of an order under rule 736.

§ 30.3:12 Sale

A rule 736 order does not alter any foreclosure requirement or duty imposed under applicable law or the terms of the lien sought to be foreclosed. After obtaining the order granting foreclosure, the sale must occur in accordance with the POA declaration and chapter 51 of the Texas Property Code. Tex. R. Civ. P. 735.2. A conformed copy of the order must be attached to the trustee or substitute trustee's foreclosure deed. Tex. R. Civ. P. 736.12.

§ 30.4 Judicial Foreclosure of POA Assessment Lien

§ 30.4:1 Introduction

The plain language of rule 735.1 states that rule 736 may only be utilized to allow foreclosure of a lien "containing a power of sale" in the declaration creating the lien. Tex. R. Civ. P. 735.1. Rule 735.1 makes the expedited procedures of rule 736 available only when the lienholder has a power of sale but a court order is nevertheless required by law to foreclose the lien. Tex. R. Civ. P. 735.3, cmt. to 2011 change.

A rule 736 order is not a substitute for a judgment for judicial foreclosure, but any loan agreement, contract, or lien that may be foreclosed using rule 736 procedures may also be foreclosed by judgment in an action for judicial foreclosure. Tex. R. Civ. P. 735.3.

House Bill 2928, submitted during the Eighty-third Legislature, attempted to amend section 209.0092 of the Texas Property Code and make it clear that by acquiring a lot in a subdivision, an owner granted the POA a power of sale to foreclose any lien. *See* H.B. 2928, 83d Leg., R.S. (2013). However, House Bill 2928 did not become law. The Eighty-fourth Legislature, with the adoption of Senate Bill 1168, amended section 209.0092 to create a power of sale for any POA whose dedicatory instruments grant a right of foreclosure. *See* Acts 2015, 84th Leg., R.S., ch. 1183, § 22 (S.B. 1168), eff. Sept. 1, 2015 (amending Tex. Prop. Code § 209.0092). A POA authorized to use the procedure described by section 209.0092(a) may, in its discretion, elect not to use that procedure and instead foreclose the POA's assessment lien under court judgment foreclosing the lien and ordering the sale, pursuant to rules 309 and 646a, Texas Rules of Civil Procedure. *See* Tex. Prop. Code § 209.0092(d). Section 209.0092 does not affect any right a POA that is not authorized to use the procedure described by section 209.0092(a) may have to judicially foreclose the POA's lien as described by section 209.0092(d). *See* Tex. Prop. Code § 209.0092(e).

With a few exceptions, the judicial foreclosure process for POAs is substantially similar to that for a note, mortgage, or other security instrument allowing for judicial foreclosure. See chapter 20 in this manual for general principles that may also be applicable to the judicial foreclosure process for POA assessment liens.

§ 30.4:2 Foreclosure on Homestead

As an inherent part of the property interest, the purchase of a lot in a subdivision with deed restrictions carries the obligation to pay association fees for maintenance and ownership of common facilities and services. *Inwood North Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 636 (Tex. 1987). The remedy of foreclosure is an inherent characteristic of that property right. *Inwood*, 736 S.W.2d at 636.

In the *Inwood* case, the court noted that, while the remedy of foreclosure may seem harsh, especially when a small sum is due, the court is bound to enforce the agreements homeowners enter into concerning the payment of assessments. *Inwood*, 736 S.W.2d at 637. The court found that the POA is entitled to foreclose on homesteads of owners who have not paid their POA assessments. *Inwood*, 736 S.W.2d at 637. Even more so, the POA is entitled to foreclose when the property does not have the homestead protections. *Inwood*, 736 S.W.2d at 636.

§ 30.4:3 Secured Charges per POA Declaration

The POA declaration is the road map for which charges may be included in a suit for judicial foreclosure. The Texas Supreme Court ruled that late fees and interest on unpaid assessments not covered by the POA declaration at issue, although charges supported by chapter 204 of the Texas Property Code, were not secured by the assessment lien established in the POA declaration and thus were not foreclosable. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 170 (Tex. 2004). Thus, practitioners should analyze the POA declaration to see if all charges related to the failure to pay assessments are secured by the lien within the POA declaration.

§ 30.4:4 Failure to Grant Foreclosure Is Abuse of Discretion

The *Cottonwood Valley* case is an appeal of a trial court ruling that failed to grant foreclosure of an assessment lien. In *Cottonwood Valley Home Owners Ass'n v. Hudson*, 75 S.W.3d 601, 603 (Tex. App.—Eastland 2002, no pet.), the trial court entered a default judgment in favor of the POA but failed to grant foreclosure and denied the POA's subsequent motion to modify the judgment. The appellate court noted that the POA's declaration provided for recovery of interest, collection costs, attorney's fees, and expenses in collecting delinquent assessments. *Cottonwood Valley*, 75 S.W.3d at 603. Upon analysis of the POA's declaration and citing the *Inwood* case, the court found that the trial court abused its discretion when it did not grant the POA's foreclosure of its lien. *Cottonwood Valley*, 75 S.W.3d at 603.

§ 30.4:5 Attorney's Fees

The *Candlewood Creek* case supports the notion that assessments and attorney's fees incurred in the collection of assessments may not be arbitrarily reduced by a trial court. In *Candlewood Creek v. Gashaye*, No. 05-11-00380-CV, 2012 WL 3135721 (Tex. App.—Dallas Aug. 2, 2012, no pet.) (mem. op.), the POA's covenants provided that the assessment obligation was secured by a lien. Additionally, the covenants provided for recovery of attorney's fees, late fees, and interest. The owner fell into arrears with the POA and the POA filed a motion for summary judgment, seeking $1,545 in assessments and late fees and $2,500 in attorney's fees and expenses. The owner failed to file an adequate response. The trial court declined to provide an order for foreclosure and awarded the POA $50 in assessments and no attorney's fees, despite the owner's failure to file an adequate response to the motion for summary judgment. The POA appealed. *Candlewood Creek*, 2012 WL 3135721, at *1.

The *Candlewood Creek* court noted that the covenants provided for payment of a monthly assessment, a foreclosure of the lien if the assessment was not paid, and recovery of attorney's fees for such action. The court stated that "the trial court's award of $50 under these circumstances was so contrary to the overwhelming weight of the evidence that the award is clearly wrong and unjust." *Candlewood Creek*, 2012 WL 3135721, at *2. Further, the court reaffirmed the notion that a POA covenant is a contract between the parties, and Texas law permits the recovery of attorney's fees on a breach of contract action. *Candlewood Creek*, 2012 WL 3135721, at *2.

§ 30.5 Postforeclosure Requirements

§ 30.5:1 Redemption Rights of Owner and Lienholder

In addition to the normal statutory notices and procedures to conduct an expedited foreclosure of the POA lien, after the foreclosure of an assessment lien the POA must send written notice to the lot owner and lienholders of record in accordance with Texas Property Code section 209.010. Tex. Prop. Code § 209.010. This notice must be sent within thirty days after the sale, providing such parties with basic information concerning the right of the lot owner and lienholders to redeem the property. Tex. Prop. Code § 209.010.

Under section 209.011(b), the lot owner may redeem the property not later than 180 days after the date the POA mailed notice of the sale. A lienholder of record may not redeem the property before ninety days after the date the POA mailed notice of the sale and only if the lot owner has not previously redeemed the property. *See* Tex. Prop. Code § 209.011(b). To redeem property sold to the POA at foreclosure, the lot owner or lienholder must pay to the POA all amounts and costs listed in section 209.011(d). Tex. Prop. Code § 209.011(d). To redeem property sold to a third party other than the POA at foreclosure, the lot owner or lienholder must pay to both the POA and the third party all amounts and costs listed in section 209.011(e). Tex. Prop. Code § 209.011(e).

Practice Tip: When preparing the redemption notice to the lienholder(s), include the servicer of the mortgage. Mortgage servicers may be searched on MERS's Web site at **https://www.mers-servicerid.org/sis/index.jsp**.

§ 30.5:2 Extension of Redemption Period

If a lot owner or lienholder sends by certified mail, return receipt requested, a written request to redeem the property on or before the last day of the redemption period, the lot owner's or lienholder's right of redemption is extended until the tenth day after the date the POA and any third-party foreclosure purchaser provides written notice to the redeeming party of the amounts that must be paid to redeem the property. Tex. Prop. Code § 209.011(m).

§ 30.5:3 Redeemed Property Subject to Liens; Leases Subject to Redemption

Property that is redeemed remains subject to all liens and encumbrances on the property before foreclosure. Tex. Prop. Code § 209.011(k). Any lease entered into by the purchaser of property at a sale foreclosing an assessment lien of a POA is subject to the right of redemption provided by section 209.011 and the lot owner's right to reoccupy the property immediately after redemption. Tex. Prop. Code § 209.011(k).

§ 30.5:4 Affidavit of Nonredemption

After the redemption period and any extended redemption period provided by section 209.011(m) expires without a redemption of the property, the POA or third-party foreclosure purchaser must record an affidavit in the real property records of the county in which the property is located, stating that the lot owner or a lienholder did not redeem the property during the redemption period or any extended redemption period. Tex. Prop. Code § 209.011(n).

Practice Tip: The affidavit required by section 209.011(n) is easily overlooked. Create the affidavit immediately after the foreclosure sale with a reminder to execute and record upon the expiration of the redemption period.

§ 30.5:5 Partial Payments during Redemption

If a lot owner makes partial payment of amounts due the POA at any time before the redemption period expires but fails to pay all amounts necessary to redeem the property before the redemption period expires, the POA must refund any partial payments to the lot owner by mailing payment to the owner's last known address as shown in the POA's records not later than the thirtieth day after the expiration date of the redemption period. Tex. Prop. Code § 209.011(*l*).

§ 30.5:6 Constable or Sheriff Sales

The redemption rights of the property owner and the lienholder also apply if the sale of the lot owner's property is conducted by a constable or sheriff as provided by a judgment obtained by the POA. Tex. Prop. Code § 209.011(p).

Practice Tip: Foreclosure sales of POA liens conducted by constables or sheriffs are also subject to the lot owner's and lienholder's rights of redemption. Statutory notice of the right to redeem under section 209.011 must be sent to the lot owner and lienholder even if a constable or sheriff conducted the sale. The statute does not require these officers to send the notice; the POA is required to comply.

§ 30.5:7 Limits on Right to Transfer during Redemption Period

Any person who purchases the property at foreclosure may not transfer ownership of the property to anyone other than a redeeming property owner during the redemption period. Tex. Prop. Code § 209.011(c).

§ 30.5:8 Bona Fide Purchasers

If before the end of the redemption period the property owner or lienholder fails to record a deed from the foreclosing purchaser stating that the property has been redeemed, the right of redemption is thereafter defeated by sale of the property to a bona fide purchaser or lender for value. Tex. Prop. Code § 209.011(g).

A third party buying the property at the foreclosure sale or from the person who bought at the foreclosure sale may "presume conclusively" that the property was not redeemed by the original property owner or lienholder unless the property owner or lienholder filed a deed from the foreclosing purchaser or affidavit evidencing the redemption in the public records, in accordance with the requirements of section 209.011(h). Tex. Prop. Code § 209.011(h).

§ 30.5:9 Rental Income during Redemption

All rent and other income collected by the POA or a third-party purchaser from the date of the foreclosure sale to the date of redemption shall be credited toward the amount owed to the respective party to effectuate redemption in either section 209.011(d) or 209.011(e) of the Texas Property Code. Tex. Prop. Code § 209.011(i). In either instance, if there are excess proceeds, those proceeds shall be refunded to the lot owner. Tex. Prop. Code § 209.011(i).

Additional Resources

Cagle, Gregory S. "HOA Assessment Liens: Everything You Need to Know to Figure Out Your Head from Your Assessment Lien." In *Advanced Real Estate Law Course, 2012*. Austin: State Bar of Texas, 2011.

Jackson, Rosemary B. "Drafting Covenants, Conditions and Restrictions Under the New Laws for Property Owners Associations." In *Advanced Real Estate Drafting Course, 2013*. Austin: State Bar of Texas, 2013.

Quade, Stephanie L., and Brady Ortego. "Beyond the Forms: Complying with the New Laws and Resolutions to Make Them Work." In *Advanced Real Estate Drafting Course, 2012*. Austin: State Bar of Texas, 2012.

[Reserved]

Chapter 33

Servicemembers Civil Relief Act

[Reserved]

Chapter 33

Servicemembers Civil Relief Act

The editors gratefully acknowledge Lawrence Young for his contribution to this chapter. In addition, Mr. Young would like to recognize Roswill Mejia for her assistance.

§ 33.1 Introduction

Because military service can interfere with the ability of servicemembers to fulfill their financial obligations or assert their legal rights, the United States Congress has implemented special laws protecting the rights and obligations of military personnel. The Servicemembers Civil Relief Act of 2003 (SCRA), 50 U.S.C. §§ 3901–4043, previously known as the Soldiers' and Sailors' Civil Relief Act of 1940, insulates individuals called to active military duty, and up to one year after their return from duty, from foreclosure actions arising from loan defaults that can be attributed to their military service and that pertain to obligations or liabilities entered into prior to the start of their military service. See section 33.7 below. Texas has extended all of the SCRA's provisions to state servicemembers who are called to active duty by the governor.

The SCRA operates by suspending the enforcement of pre-enlistment liabilities against a servicemember and the servicemember's dependents while the servicemember is on active duty. It does not extinguish or discharge the servicemember-borrower's debt but merely temporarily defers the creditor's collection rights in order to ease the financial burdens of active duty servicemembers. Specifically, the Act intends—

> (1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and
>
> (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

50 U.S.C. § 3902.

The SCRA is unique in that it offers debtors anticipatory relief without requiring them to file, and often sparing them from, bankruptcy. The Act is frequently amended to accommodate the changing needs of servicemembers. This chapter provides an overview of the SCRA and its most significant provisions as they relate to foreclosure proceedings.

§ 33.2 Persons Covered

The protective provisions of the SCRA apply to servicemembers who are:

1. active-duty members in all of the uniformed military services (Army, Navy, Air Force, Marine Corps, and Coast Guard);
2. National Guardsmen called to active duty for more than thirty consecutive days by the President or the secretary of defense in order to respond to a national emergency declared by the President and supported by federal funds; and

3. commissioned officers of the Public Health Service and the National Oceanic and Atmospheric Administration.

See 50 U.S.C. § 3911(1), (2).

§ 33.2:1 "Military Service" and "Active Duty"

The Act uses "military service" contingently with "active duty" to indicate the period for which the servicemember is covered. Under the SCRA, "active duty" is defined as—

> full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.

50 U.S.C. § 3911(2)(A)(i); 10 U.S.C. § 101(d)(1).

Texas has also extended all of the SCRA's provisions to state servicemembers who are called to active duty by the governor. Additionally, any period for which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause is considered to be "military service" for the purposes of the SCRA. 50 U.S.C. § 3911(2)(C).

The Act also extends rights to members of reserve components ordered to report for military service and individuals ordered to report for induction under the Military Selective Service Act. 50 U.S.C. § 3917. Reservists and new inductees are covered from the receipt of their orders until they report for military service or induction, or the order is revoked. The SCRA even goes as far as to extend protections to citizens of the United States who serve in the armed forces of ally-nations and whose service is against a common enemy, until they are discharged from service. 50 U.S.C. § 3914.

§ 33.2:2 Protection for Dependents

Additionally, the SCRA provides coverage for the dependents of servicemembers. Dependents include the servicemember's spouse, child, and individuals for whom the servicemember provides over half of their support for the 180 days immediately preceding an application for relief. 50 U.S.C. § 3911(4). A dependent would be entitled to SCRA protections upon application to a court if their ability to comply with a lease, contract, bailment, or other obligation is materially affected by the servicemember's military service. 50 U.S.C. § 3959.

§ 33.3 Military Status

For obligations covered by the SCRA, the Act forbids foreclosure actions against servicemember-borrowers on active duty and even up to one year after their return from duty. *See* 50 U.S.C. § 3953(c). A person who knowingly makes or causes to make a prohibited sale, foreclosure, or seizure of property during this period commits a federal misdemeanor. 50 U.S.C. § 3953(d). To maintain SCRA compliance, it is important to first determine and then verify the military status of all borrowers. The easiest and most precise way to do so is to obtain a certificate of service or nonservice through the Defense Manpower Data Center (DMDC) Web site at **www.dmdc.osd.mil/appj/scra/**, which verifies the current active military status of an individual free of charge. The certificate, which is a record authenticating the military status of an individual in furtherance of the SCRA, can also be acquired through the individual military branches by sending correspondence directly to the points of contact for the individual services.

Similarly, it is just as important to determine when a servicemember's protection ends under the SCRA. Typically, the SCRA's coverage terminates when the servicemember is released from military service or dies while in service. The DMDC Web site provides the servicemember's last date of active duty military service by accessing **www.dmdc.osd.mil/appj/scra/single_record.xhtml**. However, some specific sections of the SCRA modify the term for which a servicemember is covered by the protections they grant. For example, servicemembers are protected from mortgage foreclosures during, and up to one year after, their active duty military service. *See* 50 U.S.C. § 3953.

Therefore, it is essential to review the applicable section to definitively determine how long a servicemember is covered.

§ 33.4 Jurisdiction of SCRA

The SCRA is applicable in all states and territories of the United States, including any courts, administrative agencies, or political subdivisions thereof. 50 U.S.C. § 3912. Essentially, the Act is applicable to any proceedings commenced in any geographical area in which the United States has jurisdiction. The Act, however, only applies to civil and administrative proceedings, not to any criminal proceedings against the servicemember. Additionally, despite having federal jurisdiction, the Act does not automatically present a federal question that must be decided by federal courts. *See* Administrative & Civil Law Department of the Judge Advocate General's Legal Center & School, U.S. Army, The Servicemembers Civil Relief Act Guide § 2-6 (JA 260, 2006), available at **www.justice.gov/crt/military/documents/jag_article.pdf.**

§ 33.5 Creditors' Rights

Though the SCRA is designed to benefit servicemember-debtors, it only seeks to equitably account for the undue burden and material effect that military service has on their ability to meet obligations entered into prior to active duty. Section 4011 of the SCRA is designed to emphasize the equitable nature of the Act and its intent to promote fairness for servicemembers, not abuse of creditors. Specifically, this section prevents the transfer of a property to a servicemember with the purpose of incurring SCRA protections against creditor obligations. *See* 50 U.S.C. § 4011.

Additionally, the SCRA does not eliminate a debtor's obligation to its creditors; it merely attempts to defer the obligation until the servicemember's ability to repay the obligation is no longer *materially affected* by his military service. *See* 50 U.S.C. § 3953(b). A creditor may seek relief from several SCRA provisions, including the 6 percent interest rate cap provided in section 3991, by showing a court that the servicemember's military status does *not* materially affect his ability to meet the obligation.

Various sections of the SCRA include statutes of limitation that limit a servicemember's ability to evoke the protections and benefits granted under that particular section after a certain period. (The limitations vary and are specific to particular sections/protections granted to the SCRA. Each section discussed below includes a discussion of its applicable limitations.) Other sections require servicemembers to give their creditors notice before the SCRA protections provided by that particular section can apply. Courts are also instructed by the Act, especially when granting a stay of proceedings, to evoke relief equitably to *all* the parties involved. Essentially, the SCRA attempts to equalize the playing field so that servicemembers are not unduly disadvantaged by the commitment they made to serve their country.

§ 33.6 Materially Affected

Many of the SCRA's provisions require that a servicemember's relevant rights or legal standing be *materially affected* by his military service. However, this does not mean that a servicemember is required to show that his active duty status affects his ability to *pay* a creditor.

In a frequently cited opinion, the Supreme Court noted that, instead, the SCRA is "always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). The court cautioned, however, that discretion is specifically vested in the judicial system to assure that the relief provided in the Act is not abused or overextended beyond protecting servicemembers unable to manage their affairs *because of* their military service. By requiring a showing of material effect, the Act bars protection on bases where a servicemember is not prejudiced or disadvantaged by their military service. To satisfy the "materially affects" provision of the SCRA, a servicemember's inability to comply with the terms of the obligations must be by reason of his commitment to military service.

In determining materiality, courts look to whether a servicemember's ability to prosecute or defend a civil suit is impaired by the carrying out of his military duties. Essentially, courts form an opinion as to whether the individual's military service affects his ability to meet the financial obligations and responsibilities he had incurred and assented to prior to entering active duty.

The SCRA does not specify who bears the burden of proving a material effect. Consequently, both parties should be prepared to demonstrate the existence or nonexistence of a material effect. Texas courts have found no evidence of prejudice by reason of military service where a servicemember defendant was sued and then failed to demonstrate *how* or *why* his military service *materially affected* his ability to respond to or defend the suit. *In re K.B.*, 298 S.W.3d 691, 694 (Tex. App.—San Antonio 2009, no pet.); *Winship v. Garguillo*, 754 S.W.2d 360, 364 (Tex. App.—Waco 1988), *writ denied per curiam*, 761 S.W.2d 301 (Tex. 1988). Generally, courts expect to be provided with a servicemember's financial information before and during military service so that they may evaluate the financial constraints military service places on the servicemember-debtor.

For further treatment on how courts interpret the SCRA, see Mark E. Sullivan, A Judge's Guide to the Servicemember Civil Relief Act, available at **http://apps.americanbar.org/family/military/scrajudgesguidecklist.pdf**.

§ 33.7 Mortgage Foreclosures—Section 3953

Section 3953 of the SCRA expressly grants protections to servicemembers against mortgage foreclosures of obligations governed by the Act. *See* 50 U.S.C. § 3953. This section applies to only obligations on real or personal property owned by the servicemember that are secured by a mortgage, trust deed, or other security interest that originated before the period of military service. 50 U.S.C. § 3953(a).

§ 33.7:1 Covered Obligations

To be covered by section 3953, the servicemember, or his dependents, must have owned the property, and the obligations against the property must have been incurred prior to the commencement of the servicemember's military service. 50 U.S.C. § 3953(a)(1). Additionally, the servicemember must still own the property, with the obligations still in existence against the property, at the time the benefits and protections of the SCRA are sought.

Specifically, the SCRA insulates servicemembers from any action filed during, or even within one year after, their active duty military service seeking to enforce the obligations described above against them. The Act explicitly invalidates any sale, foreclosure, or seizure of property resulting from the breach of these obligations if such action is taken during, or within one year after, the period of the servicemember's military service. 50 U.S.C. § 3953(c). Persons who knowingly conduct or attempt to conduct a foreclosure in violation of section 3953(c) may be fined and imprisoned for up to one year. 50 U.S.C. § 3953(d). However, such actions will be allowed and considered valid via court order or if expressly agreed as provided by a section 3918 waiver of rights agreement. *See* 50 U.S.C. § 3953(c). For additional discussion, see section 33.8 below.

§ 33.7:2 Court Stay of Enforcement

The Act authorizes courts to stay proceedings for any period required by justice and equity and to adjust the obligation in order to preserve the interests of all the parties. A court may take such action on its own motion after a hearing, and is obligated to take such action at the request of a servicemember, when it finds a servicemember's ability to comply with the obligation is *materially affected* by military service. *See* 50 U.S.C. § 3953(b).

§ 33.7:3 Period of Protection

On August 6, 2012, Congress decided to briefly extend the period of protection for servicemembers relating to mortgages, mortgage foreclosures, and evictions. These sunset provisions extend the protective period following military service during which a creditor cannot file an action to enforce an obligation, sell, foreclose, or seize a property for a breach of an obligation from a ninety-day period to a one-year period. This extension, which affects subsections (b) and (c) of section 3953, expires on December 31, 2014. This means that effective January 1, 2015, the SCRA provisions that went into effect on July 29, 2008, will be revived and thus reduce the protective period following military service from one year back to ninety days.

For more information regarding the SCRA's sunset provisions, see Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, 126 Stat. 1165, eff. Aug. 6, 2012; *but c.f.* H.R. 821, 113th Cong. § 1 (2013) (proposed amendment extending this period from December 2014 to December 2017).

§ 33.8 Waiver of SCRA Rights—Section 3918

To forgo protections and benefits under the SCRA, a servicemember must expressly waive his SCRA rights in writing. *See* 50 U.S.C. § 3918. The written waiver must be executed as an instrument entirely separate from the applicable obligation or liability. *Engstrom v. First National Bank of Eagle Lake*, 47 F.3d 1459, 1463 (5th Cir. 1995).

Rights requiring a waiver in writing include the modification, termination, or cancellation of an obligation secured by a mortgage, trust, deed, lien, or any other similar security interest, and the repossession, retention, foreclosure, sale, forfeiture, or taking possession of property that is security for any obligation. *See* 50 U.S.C. § 3918(b). Waiver of these rights will be effective *only* if it was made in a written agreement executed *during* or *after* the servicemember's period of military service. *See* 50 U.S.C. § 3918(a). Waivers prior to military service are ineffective.

§ 33.9 Stay of Proceedings—Section 3932

Section 3932 of the SCRA allows a court to stay civil actions or proceedings for a period of not less than ninety days. *See* 50 U.S.C. § 3932(b)(1). The court may issue the stay on its own motion and is required to issue the stay upon application by the servicemember. 50 U.S.C. § 3932(b)(1). The Act authorizes a stay at any stage before a final judgment against the servicemember as long as the servicemember has successfully received notice of the action while in military service or within ninety days after the termination or release from service. 50 U.S.C. § 3932(a). If a servicemember did not receive any notice, however, section 3931 on default judgments, discussed in section 33.10 below, would apply in lieu of section 3932.

Pursuant to section 3932, a servicemember's application for a stay must (1) state the manner in which current military duty requirements materially affect his ability to *appear* before the court and (2) provide a date when the servicemember will be available to appear. 50 U.S.C. § 3932(b)(2)(A). Recently, a Texas court of appeals found that there is no requirement under this section for a servicemember to specifically show that military service affects his ability to *prosecute* or *defend* an action. *In re H.S.J.*, No. 03-10-00007-CV, 2010 WL 4670564, at *3 n.4 (Tex. App.—Austin Nov. 16, 2010, no pet.) (mem. op.) (citing former 50 U.S.C. app. § 522(b), now 50 U.S.C. § 3932(b)).

Additionally, a servicemember's request must include a statement from his commanding officer, stating that the servicemember's current military responsibilities prevent an appearance in court and that no military leave is authorized at that time. 50 U.S.C. § 3932(b). A request for a stay under this section will not constitute an appearance for jurisdictional purposes or a waiver of any defenses. 50 U.S.C. § 3932(c).

If a servicemember is granted a stay under this section, he may apply for an additional stay based upon a continuing material effect military service has on the ability to appear. This application for an additional stay may be made concurrently with a servicemember's initial application for stay or when it appears that the servicemember is unavailable to prosecute or defend civil actions or proceedings. To request an additional stay, the servicemember must provide the same documents attesting to the material effect of his duties that were required in the initial application for stay. 50 U.S.C. § 3932(d)(1).

A court has discretion to refuse a grant of an additional stay of proceedings, even at the request of the servicemember. If, however, a court refuses an additional stay, it must then appoint counsel to represent the servicemember in the action or proceeding. 50 U.S.C. § 3932(d)(2).

The protections provided under this section do not apply to evictions and distress, which are covered by section 3951 of the SCRA. *See* 50 U.S.C. § 3932(f). Additionally, if a servicemember applies for a stay of proceedings under this section and is ultimately unsuccessful, then the servicemember is barred from seeking the protection against default judgments provided under section 3931. *See* 50 U.S.C. § 3932(e).

§ 33.10 Default Judgments—Section 3931

Section 3931 of the SCRA protects servicemembers from default judgments against them if they fail to make an appearance in any civil action or proceeding. 50 U.S.C. § 3931(a). Essentially, it provides that before a court is able to enter a default judgment against a servicemember, it must first require that the plaintiff-creditor file an affidavit stating whether the defendant is in military service and provide necessary supporting facts. 50 U.S.C. § 3931(b)(1)(A). If the plaintiff is unable to make such a determination, then the plaintiff is required to file an affidavit stating that they were unable to determine whether or not the defendant is in military service. 50 U.S.C. § 3931(b)(1)(B).

The affidavit required may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury. 50 U.S.C. § 3931(b)(4). Anyone who makes or uses such an affidavit knowing it to be false will be subject to fines under title 18 of the United States Code, or imprisoned for not more than one year, or both. 50 U.S.C. § 3931(c).

If the court cannot determine whether or not the defendant is in military service based on the affidavits filed, then, prior to entering judgment, it may require the plaintiff to file a bond. The bond would be available to indemnify the defendant against any loss or damage resulting from any judgment in favor of the plaintiff, if the defendant is later found to be in military service and the judgment is subsequently set aside in whole or in part. The bond would remain in effect until the applicable time for appeal and setting aside of a judgment has expired. *See* 50 U.S.C. § 3931(b)(3).

If it appears that, in fact, the defendant is in military service, the court is required to appoint an attorney to represent the defendant before it can enter a judgment. If the appointed attorney is unable to locate the servicemember, then actions by the attorney in the proceedings will not waive any defense of, or otherwise bind, the servicemember. *See* 50 U.S.C. § 3931(b)(2).

If the court determines that there may be a defense to the action that cannot be presented without the presence of a defendant in military service, or if, after due diligence, defendant's counsel has been unable to contact the defendant or determine whether a meritorious defense exists, the court must grant a stay of proceedings for a minimum of ninety days. The stay may be granted on the request of defendant's counsel or on the court's own motion. *See* 50 U.S.C. § 3931(d).

A stay of proceedings under these circumstances is different from, and thus not controlled by, the procedures or requirements required under section 3932, which provide a stay with the successful receipt of *notice*. *See* 50 U.S.C. §§ 3931(e); 3932. If, however, a servicemember has indeed successfully received notice of the action while in military service or within ninety days after the termination or release from service, then the servicemember may request a stay of proceeding under section 3932 of the SCRA. *See* 50 U.S.C. §§ 3931(f); 3932.

If a default judgment is entered against a servicemember-defendant during the servicemember's period of military service or within sixty days after the termination of or release from service, there are provisions for setting aside the default judgment. If the servicemember can show that a meritorious or legal defense to the action or some part of the action was materially affected by military service, then the court entering the judgment must, upon application by or on behalf of the servicemember, reopen the judgment. *See* 50 U.S.C. § 3931(g)(1).

Texas courts have found that the wording of this section clearly indicates that a servicemember must show more than mere active military duty in order to be entitled to the reopening of a judgment. *In re K.B.*, 298 S.W.3d 691, 694 (Tex. App.—San Antonio 2009, no pet.) (citing former 50 U.S.C. app. § 521(g)(1)(A), (B), now 50 U.S.C. § 3931(g)(1)(A), (B)). The purpose of reopening a judgment under these circumstances is to preclude a servicemember's military service from interfering with his ability to defend any civil action or proceeding against him.

The SCRA requires that any application to vacate or set aside a judgment be filed no later than ninety days after the servicemember's termination or release from military service. 50 U.S.C. § 3931(g)(2). Even if the court vacates, sets aside, or reverses a default judgment against a servicemember under these provisions, however, any actions taken under this section will not impair any right or title acquired by a bona fide purchaser for value under the default judgment. 50 U.S.C. § 3931(h).

§ 33.11 Other Relevant SCRA Provisions

§ 33.11:1 Notification of Benefits

Section 3915 provides that the secretary concerned with a particular branch of the armed services is responsible for ensuring that notice of SCRA benefits and protections is provided to all persons in or entering into military service. 50 U.S.C. § 3915.

§ 33.11:2 SCRA Protection Not to Affect Certain Future Financial Transactions

Section 3919 insulates servicemembers from creditor discrimination by prohibiting the exercise of any rights under the SCRA from affecting certain future financial transactions. *See* 50 U.S.C. § 3919.

§ 33.11:3 Fines and Penalties under Contracts

Section 3933 provides that when an action to enforce the terms of a contract is stayed by a court under the SCRA, no penalty or fine shall be imposed for failure to comply with the contract during the stay period. 50 U.S.C. § 3933(a). A court may even go so far as to reduce or waive any fine or penalty incurred if the servicemember was in military service when it was incurred and the ability to perform the obligation imposed by such contract was materially affected by his service. 50 U.S.C. § 3933(b).

§ 33.11:4 Statute of Limitations

Section 3936 of the SCRA tolls statutes of limitation. It provides that the period of a servicemember's military service cannot be included in computing any time period for the bringing of any action or proceeding in a court, or for the redemption of real property sold or forfeited to enforce an obligation, by or against the servicemember, their heirs, executors, administrators, or assignees. *See* 50 U.S.C. § 3936.

§ 33.11:5 Protection under Installment Contracts for Purchase or Lease

Section 3952 grants protections under installment contracts for purchases or leases of real and personal property. If a servicemember has already entered military service, any contract by him for the purchase, lease, or bailment of property cannot be rescinded or terminated for a breach occurring before or during the servicemember's military service without a court order. Nor may the property, under these same terms, be repossessed. However, this section only applies to contracts for which a deposit or installment has been paid by the servicemember prior to entering military service. *See* 50 U.S.C. § 3952(a).

Additionally, if a hearing is conducted based on the protections granted in this section, the court may (1) order repayment to the servicemember as a condition of terminating the contract and resuming possession of the property, (2) stay the proceedings on its own motion or as required by the request of the servicemember, or (3) make any other equitable disposition to preserve the interests of the parties. *See* 50 U.S.C. § 3952(c). Anyone who knowingly resumes or attempts to resume possession of property in violation of section 3952 or 3918 (waiver of rights pursuant to a written agreement) may be fined and imprisoned for up to one year. *See* 50 U.S.C. § 3952(b).

§ 33.11:6 Enforcement of Storage Liens

Section 3958 of the SCRA addresses the enforcement of storage liens. This section provides that any person holding a lien on property of a servicemember may not foreclose or enforce the lien during the servicemember's period of military service and for a period of ninety days thereafter, unless the lienholder has a court order granted prior to enforcement. *See* 50 U.S.C. § 3958(a). If the servicemember's ability to comply with the obligation is materially affected by military service, the court in a proceeding to foreclose or enforce a lien may, on its own motion, stay the proceeding or adjust the obligation to preserve the interests of all parties. *See* 50 U.S.C. § 3958(b). The court is required to take such action if requested by the servicemember. *See* 50 U.S.C. § 3958(b). A creditor who knowingly takes or attempts to take any action contrary to this section may be fined and imprisoned for up to one year. *See* 50 U.S.C. § 3958(c). The federal remedies are in addition to any other available remedy of the servicemember, such as wrongful conversion, specifically including consequential and punitive damages. *See* 50 U.S.C. § 3958(c).

§ 33.11:7 Taxes Respecting Personal Property, Money, Credits, and Real Property

Section 3991 covers taxes respecting personal property, money, credits, and real property. This section applies to a tax, other than on personal income, which falls due and remains unpaid before or during the servicemember's period of military service. It applies to a servicemember's personal or real property occupied for dwelling, professional, business, or agricultural purposes by the servicemember or his dependents or employees. *See* 50 U.S.C. § 3991(a).

Under this section, such property may not be sold in order to enforce the collection of a tax or assessment unless by court order and upon the court's determination that the military service did not materially affect the servicemember's ability to pay. Under these circumstances, a court may also choose to stay a proceeding to enforce the collection of the tax or assessment, or sale of the property, during the servicemember's period of military services but for no more than 180 days following the end of such military service. *See* 50 U.S.C. § 3991(b).

If the property is sold or forfeited to enforce the collection of a tax or assessment, the servicemember has the right to redeem or commence an action to redeem the property while in military service or within a 180-day window after the end of military service. This section, however, may not be construed to shorten any period for redemption provided by state law. *See* 50 U.S.C. § 3991(c). In Texas, the period of redemption is generally two years. *See* Tex. Tax Code § 34.21.

Additionally, any unpaid tax or assessment due will bear interest at 6 percent annually until paid. Under this subsection, no additional penalty or interest may be incurred for nonpayment. *See* 50 U.S.C. § 3991(d). Moreover, a creditor is expected to forgive interest in excess of this rate and reduce payments during the period of military service plus one year by the amount of interest forgiven. The reductions apply from the date the servicemember *entered* active duty, rather than the date notice was received.

§ 33.12 Texas Legislation Protecting Servicemembers

Section 51.002 of the Texas Property Code contains additional protections for servicemembers in providing notice of sale or default. The written notice of sale and of default served on a debtor must not only state the name and address of the notice sender, but also contain a statement, printed in bold-faced or underlined type, substantially similar to the following:

> Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.

Tex. Prop. Code § 51.002(i).

The Texas Property Code, like section 3953 of the SCRA, specifically addresses the foreclosure of properties owned by active duty military members. Section 51.015 of the Texas Property Code protects the dwellings owned by servicemembers from obligations secured by a deed of trust or other contract lien, including a lien securing payment of an assessment, originating before the servicemember's active duty. *See* Tex. Prop. Code § 51.015. "Dwelling" is defined as a residential structure or manufactured home that contains one to four family housing units. *See* Tex. Prop. Code § 51.015(a)(2).

Specifically, section 51.015 prohibits a sale, foreclosure, or seizure of property under the obligation during the servicemember's period of active duty or during the nine months after the conclusion of such active duty. *See* Tex. Prop. Code § 51.015(d). Under the Property Code, a foreclosure sale may still be conducted by court order, if issued prior to the sale, and via a waiver agreement signed by the servicemember during or after his period of active duty. *See* Tex. Prop. Code § 51.015(d), (e).

The Property Code gives servicemembers the right to either stay foreclosure proceedings or adjust their obligations under the contract. *See* Tex. Prop. Code § 51.015(c). It does not release servicemembers from all mortgage and contractual obligations, but it does give them an opportunity to fulfill their obligations on a timeline better suited to their particular situation.

The Property Code even provides these same protections for a servicemember's dependents if their ability to comply with the obligation is materially affected by the servicemember's military service. *See* Tex. Prop. Code § 51.015(g). Additionally, a court has the discretion to extend any action it takes to a surety, grantor, endorser, accommodation maker, comaker, or any other person who might be primarily or secondarily subject to the obligation. *See* Tex. Prop. Code § 51.015(h). Violating the rights of the servicemember or the other persons protected under these provisions is a class A misdemeanor. *See* Tex. Prop. Code § 51.015(f).

Additional Resources

Administrative & Civil Law Department of the Judge Advocate General's Legal Center & School, U.S. Army. The Servicemembers Civil Relief Act Guide (2006).

Sullivan, Mark E. A Judge's Guide to the Servicemember Civil Relief Act, *available at* **http://apps.americanbar.org/family/military/scrajudgesguidecklist.pdf**.

[Reserved]

Chapter 34
MERS

[Reserved]

Chapter 34

MERS

The editors gratefully acknowledge Leslie S. Johnson for her contribution to this chapter.

§ 34.1 Introduction

"MERS" is an acronym for Mortgage Electronic Registration Systems, Inc., which is a wholly-owned subsidiary of MERSCORP Holdings, Inc. MERSCORP is a privately-held corporation whose shareholders include many of the leading residential lenders such as Bank of America, CitiMortgage, Wells Fargo, Fannie Mae, and Freddie Mac, among others. It owns and operates the MERS System (discussed more fully in section 34.2 below) and is supported by its member entities that pay a fee to use the MERS System.

The purpose of MERS is to serve as the electronic, book entry loan registration system for loans secured by real property, as well as serve as the mortgagee of record for liens filed in the real property records. In Texas, MERS is the "national book entry system for registering a beneficial interest in a security instrument that acts as a nominee for the grantee, beneficiary, owner, or holder of the security instrument and its successor and assigns," referred to in section 51.0001(1) of the Texas Property Code. *See* Tex. Prop. Code § 51.0001(1). MERS has no right to retain any mortgage payments or exercise any servicing rights over loans. For those loans originated in the MERS System, the uniform deed of trust describes MERS as a "separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns" and a "beneficiary under this Security Instrument . . . (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS." The deed of trust also provides the following:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

MERS System Procedures Manual, 194 (Release 28.0, eff. May 18, 2015), **www.mersinc.org/join-mers-docman/978-mers-system-procedures-final/file**. (Note: This was the latest version of the document as of the publication date of this manual.) As the express nominee for the lender, MERS has authority to act on behalf of the lender and its assigns. As the mortgagee of record, MERS enables the beneficial interests in the loan and its servicing rights to be sold and transferred without filing an assignment of the deed of trust on each transfer. MERS holds the deed of trust as mortgagee and agent for the lender and its successors and assigns, whoever that may be. MERS will remain the mortgagee of record for the life of the loan or until the loan is transferred to a non-MERS member or the mortgage servicer of the loan before a foreclosure is initiated against the secured property. *See* MERS System Rules of Membership, Rule 8, § 1 (eff. Sept. 1, 2015), **www.mersinc.org/join-mers-docman/979-mers-system-rules-final-1/file**; *see also Knighton v. Merscorp Inc.*, 304 Fed. App'x 285, 286 (5th Cir. 2008) ("With MERS as the permanent record mortgagee, rights to the mortgage loan can be bought and sold without any changes to the public land records.").

MERS's many benefits include facilitating the operation of the secondary mortgage market and streamlining the origination, purchase, sale, and servicing of mortgages secured by real property by using electronic commerce to eliminate paper. *See* About Us, MERS, **www.mersinc.org/about-us/about-us**. The use of the MERS System significantly reduces the need for security instrument assignments, which in turn reduces county recording fees and helps to eliminate breaks in the chain of title to real property. A mortgage identification number assigned to each loan for the life of the loan allows borrowers to more easily identify the servicers for their loans.

§ 34.2 Registering Loans on the MERS System

§ 34.2:1 Electronic Book Entry System

The MERS System is an electronic database and book entry registration system that tracks changes in servicing rights and beneficial ownership interests in residential mortgage loans registered on the System. All loan-level data related to a loan registered on the MERS System is electronically input into the System by the mortgage servicer servicing the loan. Loans registered on the MERS System include (1) "MERS as the Original Mortgagee" loans (MOM), in which MERS is named as the beneficiary of the deed of trust, as nominee for the lender and its assigns, and (2) mortgages that have been assigned to MERS. Assignment of a deed of trust into MERS is discussed in section 34.5 below. MOM loans must be registered within seven days from the date of the note, regardless of whether the loan is sold during that time. MERS System Procedures Manual, at 51. Likewise, a non-MOM loan must be registered within seven days of the assignment date. MERS System Procedures Manual, at 51. Once a loan is registered on the MERS System, the MERS member registering the loan has seven calendar days to make changes to the registration information. After that time, only the current servicer can change the registration information. MERS System Procedures Manual, at 50.

§ 34.2:2 MERS as Mortgagee of Record

For each loan registered on the MERS System, MERS must be listed in the real property records as the mortgagee of record "as nominee for the lender and the lender's successors and assignees." MERS only tracks the assignments of the servicing rights and ownership interests in each loan in the MERS database for its members and is not involved with any aspect of the actual transfer of the note and security instrument between its members. MERS System Procedures Manual, at 86. Because MERS remains the mortgagee of record, assignments of the deed of trust in the real property records is not necessary upon any transfer of a beneficial interest in the bundle of rights connected with the loan between members. *See* MERS System Procedures Manual, at 86. However, if a loan is sold or transferred to a non-MERS member or the loan is being prepared for foreclosure, an assignment of the security instrument from MERS into the non-MERS member or the mortgage servicer initiating the foreclosure is necessary. *See* MERS System Procedures Manual, at 93–94, 132–33; MERS System Rules of Membership, Rule 8, § 1.

§ 34.2:3 MERS Registration Is Not Recordation

Mortgages and deeds of trust are not "recorded" with MERS, and registration of loans on the MERS System does not perfect a security interest in the real property serving as collateral for the loan. MERS does not own, hold, or service any of the loans registered on the MERS System. The MERS System simply electronically tracks nonrecordable events. All information pertaining to the loans registered on the MERS System is communicated to MERS and input into the System by noteholders and mortgage servicers.

§ 34.3 Mortgage Identification Number

Each loan registered on the MERS System is assigned a unique, eighteen-digit mortgage identification number (MIN). MERS System Procedures Manual, at 32. The first seven digits of the MIN is the member's organization identification number, the next ten digits are selected by the member, and the last digit is a security check digit calculated by using a security protection algorithm. MERS System Procedures Manual, at 32.

For MOM loans, the MIN is assigned at loan origination and stamped on the deed of trust. MERS System Procedures Manual, at 191. For those mortgages assigned to MERS after closing, the MIN must be obtained before the loan can be registered on the MERS System. The MIN must then be stamped on the assignment of the deed of trust to MERS. MERS System Procedures Manual, at 191. Any instrument recorded in the real property records that pertains to a loan registered on MERS should have the MIN prominently displayed on the first page of the document, usually in conjunction with a bar code. By using the MIN, a borrower can search for the servicer of his loan at **www.mers-servicerid.org**.

The mortgage servicer—not the noteholder, investor, or MERS—administers mortgage servicing activities for the loan and works with the borrower on all issues of payment, modification, and default. From a practical standpoint, MERS serves the purpose for which the recording statutes were created, which is that it enables the general public to obtain the contact information for the person who has all the loan-level information related to a lien filed in the land title records. *See* Tex. Prop. Code §§ 13.001, 13.002.

§ 34.4 Signing Officers

MERS does not act through its own employees but rather through its "signing officers." Signing officers are employees of MERS members who are appointed as officers of MERS through a MERS corporate resolution. Signing officers have limited authority to take certain actions on behalf of MERS, including executing lien releases, mortgage assignments, and any other document necessary to foreclose; endorsing mortgage payment checks improperly made out to MERS; and taking other actions to fulfill a member's servicing duties. *See* MERS System Rules of Membership, Rule 3, § 3. To be appointed as a signing officer, an individual must (1) read the current MERS Signing Officer Primer, (2) complete the signing officer attestation, and (3) pass an annual certifying examination from MERS. MERS System Procedures Manual, at 176–78. MERS maintains a list of signing officers employed by each of its members. Pursuant to the MERS System Rules of Membership, each member also agrees to indemnify MERSCORP and MERS against all loss and liability they sustain as a result of any actions taken by a signing officer. *See* MERS System Rules of Membership, Rule 13, § 1(d).

§ 34.5 MERS as Assignee

If a loan is not originated as a MOM loan, the deed of trust must be assigned to MERS in order to register the loan on the MERS System. The assignment must state that MERS is "the nominee for the Lender and the Lender's successors and assigns" and include the MIN on the face of the assignment. If the loan is sold to a non-MERS member whose servicer is also not a MERS member, an assignment from MERS, as the nominee for the Lender, to the non-MERS member must be filed in the real property records. MERS System Procedures Manual, at 93–94, 132–33.

§ 34.6 Assignment by MERS

MERS insists that an assignment of a deed of trust on behalf of MERS should not purport to also assign the promissory note. MERS is never the owner or holder of the note; MERS is only a book entry system. *See* Tex. Prop. Code § 51.0001(1). Therefore, any language in the assignment stating that MERS is assigning its interest in the deed of trust as well as MERS's interest in the note to the assignee is erroneous. *See Connell v. CitiMortgage, Inc.*, No. 11-0443-WS-C, 2012 WL 5511087, at *9 (S.D. Ala. Nov. 13, 2012) ("The point is straightforward: MERS never owned an interest in the Connells' debt, so the Assignment of Mortgage . . . could not have transferred from MERS to Citi any right of ownership to the Note or the debt obligation."). However, inclusion of such language in an assignment does not invalidate an otherwise valid assignment of MERS's interest in the deed of trust. The language purporting to assign the note is mere surplusage. *Connell*, 2012 WL 5511087, at *10 ("Simply put, then, the portion of the Assignment of Mortgage in which MERS purported to assign its nonexistent interest in the Note to Citi is 'superfluous' and 'inoperative' under Alabama law."); *In re Lopez*, 446 B.R. 12, 19 n.34 (Bankr. D. Mass. 2011) ("Although the Assignment contains language purporting to assign both the Note and mortgage, MERS lacked an assignable interest in the Note. While this surplusage evidences poor drafting, it does not affect the validity of MERS's assignment of the Mortgage."). Based on MERS's role as nominee for the lender and its assigns, several Texas courts have also found that MERS has inherent authority to assign the deed of trust and the note. *See, e.g., Coleman v. Bank of New York Mellon*, No. 3:12-CV-4783-M-BH, 2013 WL 1187158, at *3 (N.D. Tex. Mar. 4, 2013); *Lamb v. Wells Fargo Bank, N.A.*, No. 3:12-CV-00680-L, 2012 WL 1888152, at *5 (N.D. Tex. May 24, 2012). In *Coleman*, the court reasoned that because MERS was the beneficiary of the deed of trust, it "held legal title to the Property and had the right to foreclose and sell the Property upon default" and thus "MERS had the inherent authority to assign the note and deed of trust." *Coleman*, 2013 WL 1187158, at *3. Likewise, in *Lamb*, the court relied on MERS's right stated in the deed of trust to sell and foreclose the property as the basis to transfer or assign the note and deed of trust. *Lamb*, 2012 WL 1888152, at *5.

§ 34.7 Mail Center

As mortgagee of record, MERS often receives original loan documents and payment checks that should be sent to the lender or servicer. To assist with these misdirected mailings, MERSCORP has established the "MERSCORP Holdings Mail Center." MERS System Procedures Manual, at 157. If the mail center can determine that the postal or electronic mail is urgent, the MERS System Rules of Membership require MERSCORP to forward the mail to the relevant servicer within two business days of receipt. MERS System Procedures Manual, at 157; MERS System Rules of Membership, Rule 3, § 1. Nonurgent mail is forwarded to the servicer within five days. MERS System Procedures Manual, at 157. MERSCORP also scans all physical mail received, indexes it by MIN (if possible), and e-mails it to the proper servicer. MERS System Procedures Manual, at 157. The mail center also forwards lawsuits naming MERS and/or MERSCORP to the mortgage servicer listed in the MERS System for that loan for representation of MERS. *See* MERS System Rules of Membership, Rule 14, § 3(a).

§ 34.8 Customer Service

MERSCORP offers a help desk for its members to address issues regarding the MERS System, technical support, and communications with MERSCORP. The help desk maintains a toll-free number to assist members and borrowers with servicer contact information. MERS members may also send inquiry transactions through a system-to-system interface seeking information on loans based on specified search criteria. MERS System Procedures Manual, at 160. The MERS System provides members with online monthly reports, daily activity-based mismatch and confirmation reports, and on-request reports, including portfolio analysis reports detailing information about the specified MINs. MERS System Procedures Manual, at 150–56. Additionally, local governments can subscribe to the "MERS Link" service at no cost, which allows governments to identify those entities with responsibility for maintaining vacant properties and handling code compliance issues. MERS System Procedures Manual, at 3, 148.

§ 34.9 Foreclosure

Texas courts have approved of MERS's role in the foreclosure process. Beginning with *Athey v. Mortgage Electronic Registration Systems, Inc.*, 314 S.W.3d 161, 166 (Tex. App.—Eastland 2010, pet. denied), the court of appeals affirmed MERS's authority to proceed with nonjudicial foreclosures. *See also Richardson v. CitiMortgage, Inc.*, No. 6:10cv119, 2010 WL 4818556, at *5 (E.D. Tex. Nov. 22, 2010) ("Under Texas law, where a deed of trust, as here, expressly provides for MERS to have the power of sale, then MERS has the power of sale."). Because of adverse rulings in other states, MERS amended its Rules of Membership in July 2011 to prohibit foreclosures conducted in MERS's name. Now, a MERS signing officer must execute and record an assignment of the deed of trust from MERS to the mortgage servicer before initiating foreclosure proceedings. *See* MERS System Rules of Membership, Rule 8.

§ 34.9:1 Assignment of Deed of Trust by MERS

MERS also has the right to assign the power of sale in a deed of trust, even though that right is not explicitly stated in the standard MOM deed of trust. *Casterline v. OneWest Bank, F.S.B.*, 537 Fed. App'x 314, 317–18, (5th Cir. 2013); *DeFranceschi v. Wells Fargo Bank, N.A.*, 837 F. Supp. 2d 616, 623 (N.D. Tex. 2011); *Richardson v. CitiMortgage, Inc.*, No. 6:10cv119, 2010 WL 4818556, at *5 (E.D. Tex. Nov. 22, 2010). Some courts in other jurisdictions have disputed MERS's authority to assign a mortgage. *See In re Agard*, 444 B.R. 231, 250 (Bankr. E.D.N.Y. 2011) (finding that "nominee" status and language in deed of trust are "insufficient to empower MERS to effectuate a valid assignment of the mortgage"); *Mortgage Electronic Registration Systems, Inc. v. Saunders*, 2 A.3d 289, 295 (Me. 2010) ("MERS's only right is to record the mortgage. Its designation as the 'mortgagee of record' in the document does not change or expand that right."). However, the weight of authority in Texas holds that MERS may assign its interest in mortgages. *Wigginton v. Bank of New York Mellon*, No. 3:10-CV-2128-G, 2011 WL 2669071, at *3 (N.D. Tex. July 7, 2011); *Athey v. Mortgage Electronic Registration Systems, Inc.*, 314 S.W.3d 161, 166 (Tex. App.—Eastland 2010, pet. denied).

The majority of courts interpreting Texas law have found that borrowers have no standing to contest assignments by MERS because they are not a party to those assignments. *Bircher v. Bank of New York Mellon*, No. 4:12-CV-171-Y, 2012 WL 3245991, at *5 (N.D. Tex. Aug. 9, 2012); *Eskridge v. Federal Home Loan Mortgage Corp.*, No. W-10-CA-285, 2011 WL 2163989, at *5 (W.D. Tex. Feb. 24, 2011); but see *Miller v. Homecomings Financial, LLC*, 881 F. Supp. 2d 825, 831–32 (S.D. Tex. 2012) (finding that borrower can assert against assignee of deed of trust any ground that renders the assignment void or invalid, not merely voidable).

§ 34.9:2 Rejection of "Show-Me-the-Note" Theory

In an effort to avoid foreclosure, borrowers have contested the ability of a mortgagee or mortgage servicer to foreclose without demonstrating possession of the original note (the "show-me-the-note" theory). Texas courts, including the federal Fifth Circuit, reject this argument. *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 253–54 (5th Cir. 2013); *Wells v. BAC Home Loans Servicing, L.P.*, No. W-10-CA-350, 2011 WL 2163987, at *2 (W.D. Tex. Apr. 26, 2011). In *Wells*, the district court explained:

> This claim—colloquially called the "show-me-the-note" theory—began circulating in courts across the country in 2009. Advocates of this theory believe that only the holder of the original wet-ink signature note has the lawful power to initiate a non-judicial foreclosure. The courts, however, have roundly rejected this theory and dismissed the claims, because foreclosure statutes simply do not require possession or production of the original note. The "show me the note" theory fares no better under Texas law.

Wells, 2011 WL 2163987, at *2 (internal citations and quotation marks omitted). As explained by the Fifth Circuit, the existence of a note may be proved by a photocopy of the note attached to an affidavit in which the affiant swears that the photocopy is a true and correct copy of the original note. *Martins*, 722 F.3d at 254 (citing *Blankenship v. Robins*, 899 S.W.2d 236, 238 (Tex. App.—Houston [14th Dist.] 1994, no writ)). "The original, signed note need not be produced in order to foreclose." *Martins*, 722 F.3d at 254.

There is no authority requiring a foreclosing party to demonstrate possession of the original note where the mortgagee has authorized the mortgage servicer to administer the foreclosure process. *See* Tex. Prop. Code §§ 51.002, 51.0025; *Mortgage Electronic Registration Systems, Inc. v. Khyber Holdings, L.L.C.*, No. 01-11-00045-CV, 2012 WL 3228717, at *4 (Tex. App.—Houston [1st Dist.] Aug. 9, 2012, no pet.) (mem. op.); *Islamic Ass'n of DeSoto, Texas, Inc. v. Mortgage Electronic Registration Systems, Inc.*, No. 3:12-CV-0613-D, 2012 WL 2196040, at *2 (N.D. Tex. June 15, 2012). A "mortgage servicer" is defined as the last person to whom a mortgagor has been instructed by the current mortgagee to send payments for the debt secured by a security instrument and can include the mortgagee. Tex. Prop. Code § 51.0001(3). Consequently, federal and state courts in Texas have "roundly rejected" the show-me-the-note theory. *Islamic Ass'n of DeSoto*, 2012 WL 2196040, at *2; *Bierwirth v. BAC Home Loans Servicing, L.P.*, No. 03-11-0064-CV, 2012 WL 3793190, *3 (Tex. App.—Austin Aug. 30, 2012, no pet.) (mem. op.).

For additional discussion, see section 10.3:3 in this manual.

§ 34.9:3 Rejection of "Split-the-Note" Theory

Texas courts have also rejected a similar but related argument that a transfer of the deed of trust by MERS improperly "splits" or "bifurcates" the note from the deed of trust, rendering both null and void. *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 254–55 (5th Cir. 2013); *Wigginton v. Bank of New York Mellon*, 488 Fed. App'x 868, 869 (5th Cir. Sept. 14, 2012) (per curiam); *Campbell v. Mortgage Electronic Registration Systems, Inc.*, No. 03-11-00429-CV, 2012 WL 1839357, at *4 (Tex.

App.—Austin May 18, 2012, pet. denied) (mem. op.). A minority of courts in Texas and other jurisdictions have disagreed. *See McCarthy v. Bank of America, N.A.*, No. 4:11-CV-356, 2011 WL 6754064, at *3 (N.D. Tex. Dec. 22, 2011) ("If the holder of the deed of trust does not own or hold the note, the deed of trust serves no purpose, is impotent, and cannot be a vehicle for depriving the grantor of the deed of trust of ownership of the property described in the deed of trust."); *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo. Ct. App. 2009) (holding that because "MERS never held the promissory note, . . . its assignment of the deed of trust . . . separate from the note had no force"). However, the weight of authority in Texas rejects the "split-the-note" theory. The transfer of a note includes the deed of trust, and vice versa; thus, the note and deed of trust are never truly separated. *See Robeson v. Mortgage Electronic Registration Systems, Inc.*, No. 02-10-00227-CV, 2012 WL 42965, at *5 n.6 (Tex. App.—Fort Worth Jan. 5, 2012, pet. denied) (mem. op.); *DeFranceschi v. Wells Fargo Bank, N.A.*, 837 F. Supp. 2d 616, 623 (N.D. Tex. 2011).

Regardless, section 51.0025 of the Texas Property Code allows a mortgage servicer to conduct a foreclosure sale on behalf of the mortgagee where the servicer and mortgagee have entered into an agreement granting the servicer authority to service the mortgage and the section 51.002(b) notices of sale disclose that the servicer is representing the mortgagee under a servicing agreement. *See* Tex. Prop. Code § 51.0025. If an entity qualifies as a mortgage servicer under chapter 51 of the Texas Property Code, the entity has authority to foreclose, regardless of whether it is in possession of the note. *Wells v. BAC Home Loans Servicing, L.P.*, No. W-10-CA-350, 2011 WL 2163987, at *3 (W.D. Tex. Apr. 26, 2011) ("Under Texas law, a mortgage servicer can foreclose under a deed of trust, regardless of whether it is a holder [of the promissory note]."). The note and the deed of trust are separate obligations that afford distinct remedies. *Martins*, 722 F.3d at 255 (citing *Bierwirth v. BAC Home Loans Servicing, L.P.*, No. 03-11-0064-CV, 2012 WL 3793190, at *3 (Tex. App.—Austin Aug. 30, 2012, no pet.)). Therefore, both the lender and the beneficiary have the right to invoke the power of sale under a deed of trust, even though they both cannot hold the note. *Martins*, 722 F.3d at 255 (citing *Robeson*, 2012 WL 42965, at *6).

For additional discussion, see section 10.3:4 in this manual.

§ 34.10 Attacks on MERS by Counties and Clerks

§ 34.10:1 Counties' Claims against MERS and Its Members

Recently, counties and government entities around the country have filed suits against MERSCORP, MERS, and MERS members and shareholders, including Bank of America, CitiMortgage, and Wells Fargo, among others. *See Nueces County, Texas v. MERSCORP Holdings, Inc.*, No. 2:12-CV-00131, 2013 WL 3353948 (S.D. Tex. July 3, 2013); *El Paso County, Texas v. Bank of New York Mellon*, No. A-12-CA-705-SS, 2013 WL 285705 (W.D. Tex. Jan. 22, 2013); *Dallas County, Texas v. MERSCORP, Inc.*, Civil Action No. 3:11-cv-02733-O (N.D. Tex. May 23, 2012); *Bexar County, Texas v. Mortgage Electronic Registration Systems, Inc.*, Civil Action No. 5:12-CV-586 (W.D. Tex. June 14, 2012); *see also Union County, Illinois v. MERSCORP, Inc.*, 920 F. Supp. 2d 923 (S.D. Ill. 2013); *Jackson County, Missouri v. MERSCORP, Inc.*, 915 F. Supp. 2d 1064 (W.D. Mo. 2013); *Welborn v. Bank of New York Mellon*, No. 12-220-JJB, 2013 WL 149707 (M.D. La. Jan. 14, 2013); *Brown v. Mortgage Electronic Registration Systems, Inc.*, 903 F. Supp. 2d 723 (W.D. Ark. 2012); *Montgomery County, Pennsylvania v. MERSCORP, Inc.*, 904 F. Supp. 2d 436 (E.D. Pa. 2012); *Fuller v. Mortgage Electronic Regis-*

tration Systems, Inc., 888 F. Supp. 2d 1257 (M.D. Fla. 2012); *Plymouth County, Iowa v. MERSCORP, Inc.*, 886 F. Supp. 2d 1114 (N.D. Iowa 2012); *Christian County Clerk v. Mortgage Electronic Registration Systems, Inc.*, No. 5:11-CV-00072-M, 2012 WL 566807 (W.D. Ky. Feb. 21, 2012), *aff'd*, 2013 WL 565198 (6th Cir. Feb. 15, 2013).

Individual plaintiffs have also filed qui tam suits against MERS on behalf of counties. *See Bates v. Mortgage Electronic Registration Systems, Inc.*, No. 49D12-0911-CT-051734 (Marion Co. Super. Ct. 12 Ind. June 22, 2012); *Bates v. Mortgage Electronic Registration Systems, Inc.*, No. 2010 CA 002993 B, 2012 WL 7062620 (D.C. Super. May 7, 2012); *Bates v. Mortgage Electronic Registration Systems, Inc.*, No. MCRE-10-10 (Montgomery Co. Chancery Ct. Tenn. Apr. 4, 2012); *Bates v. American Lending Alliance Inc.*, No. 10-1-0160-01 (1st Cir. Ct. Haw. Mar. 12, 2012); *Bates v. Mortgage Electronic Registration Systems, Inc.*, No. 3:10-cv-00407-RCJ-VPC, 2011 WL 1304486 (D. Nev. Mar. 30, 2011), *aff'd*, 493 Fed. App'x 872 (9th Cir. 2012); *Bates v. Mortgage Electronic Registration Systems, Inc.*, No. 2:10-cv-01429-GEB-CMK, 2011 WL 892646 (E.D. Cal. Mar. 11, 2011), *aff'd*, 694 F.3d 1076 (9th Cir. 2012).

These plaintiff counties and county representatives claim that MERS and the named lenders must record assignments of the mortgage or deed of trust each time interests in the related note are transferred, and by failing to do so, they have cost the counties lost revenue from recording fees. In the Texas cases, the counties assert the same theory, alleging violations of Texas Local Government Code section 192.007 ("Records of Releases and Other Actions") and Texas Civil Practice and Remedies Code section 12.002 ("Liability Related to a Fraudulent Court Record or a Fraudulent Lien or Claim Filed Against Real or Personal Property"), as well as fraudulent misrepresentation and unjust enrichment, among other claims. The majority of these cases have held that under each state's recording laws, there is no requirement to record mortgages or assignments of mortgages in the real property records. *See Brown*, 903 F. Supp. 2d at 727 ("The Court thus finds that, under Arkansas law, there is no duty to record a mortgage."); *Plymouth County*, 886 F. Supp. 2d at 1123 ("[I]t could not be plainer that none of the statutes upon which the County relies imposes a *requirement* on a party assigning a mortgage or receiving such an assignment to record the assignment." (emphasis in original)); *but see Montgomery County*, 904 F. Supp. 2d at 445 (holding that 21 Pa. Stat. § 351 "means that all conveyance shall be recorded"). Some courts also held that the plaintiffs lacked a private right of action under the statutes they alleged required mortgage and assignment recording. *See Fuller*, 888 F. Supp. 2d at 1271; *Christian County*, 2012 WL 566807, at *4–5.

§ 34.10:2 Recent Texas County Cases against MERS

The majority of the Texas cases have generally followed suit. In *Dallas County*, the court dismissed the counties' claims under Local Government Code section 192.007 for lack of a private cause of action. *See Dallas County, Texas v. MERSCORP, Inc.*, Civil Action No. 3:11-cv-02733-O (N.D. Tex. May 23, 2012), ECF Doc. 66, 77:18–78:14. The court also dismissed plaintiffs' Texas Civil Practice and Remedies Code section 12.002 claim for alleged false representations in the real property records that MERS is the "beneficiary" under a deed of trust, finding that there was no intent by MERS and its members to cause financial injury to the counties. *See Dallas County*, Civil Action No. 3:11-cv-02733-O, ECF Doc. 66, 76–77. However, the court preserved the plaintiffs' claims for declaratory judgment and injunctive relief based on the alleged violations of section 192.007. *Dallas County*, Civil Action No. 3:11-cv-02733-O, ECF Doc. 66, 81:10–19. Ultimately, all of the plaintiffs' claims were denied.

See Dallas County, 2 F. Supp. 3d 938 (N.D. Tex. 2014). On appeal, the Fifth Circuit court of appeals affirmed the judgment of the district court. *Harris County, Texas v. MERSCORP, Inc.*, 791 F.3d 545 (5th Cir. 2015).

In *Bexar County*, the plaintiffs asserted the same causes of action as those in *Dallas County*. *See Bexar County, Texas v. Mortgage Electronic Registration Systems, Inc.*, Civil Action No. 5:12-CV-586 (W.D. Tex. June 4, 2012), ECF Doc. 4. Relying heavily on *Dallas County*, Magistrate Judge Primomo recommended that all of the plaintiffs' claims, including those for declaratory relief, be dismissed. *Bexar County*, Civil Action No. 5:12-CV-586, ECF Doc. 36. Due to the appeal of the *El Paso County* case, discussed below, the district judge administratively closed the case on August 8, 2013, pending a ruling from the Fifth Circuit.

Using a different theory, the plaintiff counties in *El Paso County* alleged that the federal Trust Indenture Act of 1939 (TIA)—not Local Government Code section 192.007—required the defendant MERS members to record every assignment of a deed of trust when an associated note was transferred. *El Paso County, Texas v. Bank of New York Mellon*, No. A-12-CA-705-SS, 2013 WL 285705, at *1 (W.D. Tex. Jan. 22, 2013). According to the plaintiffs, the TIA required defendants to "perfect and maintain the priority of mortgages securing the mortgage-backed securities Defendants created." *El Paso County*, 2013 WL 285705, at *1. The alleged TIA violation served as the basis for plaintiffs' Racketeer Influenced and Corrupt Organizations Act (RICO) cause of action, the sole claim asserted in the lawsuit. *El Paso County*, 2013 WL 285705, at *2–3. Relying heavily on *Welborn v. Bank of New York Mellon*, No. 12-220-JJB, 2013 WL 149707 (M.D. La. Jan. 14, 2013), which addressed the same TIA claim, the court dismissed the case under Federal Rule of Civil Procedure 12(b)(6), holding that the counties had no private right of action under the TIA, and they could not use RICO to enforce a regulatory scheme without a private right of action. *El Paso County*, 2013 WL 285705, at *3–4. On appeal, the Fifth Circuit affirmed the judgment of the district court. *Welborn v. Bank of N.Y. Mellon*, 557 F. App'x 383 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 106 (2014).

Conversely, the Southern District Court in *Nueces County* refused to dismiss plaintiffs' claims of Civil Practice and Remedies Code section 12.002 violations, unjust enrichment, and fraudulent misrepresentation. *Nueces County, Texas v. MERSCORP Holdings, Inc.*, Civil Action No. 2:12-CV-00131, 2013 WL 3353948 (S.D. Tex. July 3, 2013). According to the court, while Texas Property Code section 51.0001(4) defines a mortgagee as a "book entry system" (e.g., MERS) and sections 51.0025 and 51.0075 authorize mortgagees to conduct nonjudicial foreclosures, there is no statutory authority permitting MERS to serve as a beneficiary of a deed of trust or to be listed as a grantee of a deed of trust in the real property records. *Nueces County*, 2013 WL 3353948, at *4–6. The court refused to equate MERS's status as a mortgagee under section 51.0001(4) with its role as the beneficiary of a deed of trust, despite the clear language in the standard MERS deeds of trust. *Nueces County*, 2013 WL 3353948, at *4–6. Additionally, the court found sufficient intent under Civil Practice and Remedies Code section 12.002 based on defendants' intent to establish their own recording system in order to avoid recording transfers or assignments with the county and paying the associated filing fees. *Nueces County*, 2013 WL 3353948, at *9. However, the court, citing to *El Paso County*, agreed with defendants that there was no private right of action under Local Government Code section 192.007. *Nueces County*, 2013 WL 3353948, at *17–18. The case is still pending before the district court.

§ 34.11 Helpful Hints

The following suggestions will facilitate the foreclosure of a loan registered on the MERS System:

- Prior to foreclosure, ensure that all information on the MERS System regarding the loan has been updated and is correct.
- Ensure that the promissory note is transferred with all required endorsements to the proper entity, if necessary.
- Ensure that an assignment of the deed of trust from MERS to the entity conducting the foreclosure has been filed of record in the proper county and that the assignment does not purport to assign the promissory note.
- Ensure that the individual executing the assignment of the deed of trust is properly and currently certified as a MERS signing officer.

§ 34.12 Drafting Considerations

If MERS is the current mortgagee of record, the following language should be helpful in preparing foreclosure notices or pleadings based on the premise that if the role and the relationships between the borrower, mortgagor, mortgage servicer, MERS, and the investor are properly described in foreclosure notices and pleadings, MERS's involvement should pass reasonable judicial scrutiny:

1. **[Name of person obligated for the debt]** ("Obligor") is the maker of the promissory note related to the borrower or Obligor's loan agreement, as the term "loan agreement" is defined in Tex. Bus. & Com. Code § 26.02, that evidences Obligor's promise to repay the loan proceeds advanced on Obligor's behalf.

2. **[Name of grantor of the deed of trust]** ("Mortgagor") is the grantor of a security instrument or deed of trust encumbering the property that serves as the collateral for Obligor's loan agreement. If there is a material breach of any covenant of the deed of trust, Mortgagor's signature evidences Mortgagor's agreement to allow a trustee or a substitute trustee to sell the encumbered property at a foreclosure sale and credit sales proceeds to the balance due on Obligor's note.

3. **[Name of mortgage servicer]** ("Mortgage Servicer") administers the foreclosure of Mortgagor's encumbered property pursuant to Tex. Prop. Code § 51.0025. As the duly authorized agent for loan servicing administration for its principal, **[name of investor]** ("Investor"), Mortgage Servicer manages the day-to-day loan level activities related to Obligor's loan agreement account; keeps documents and electronic records of communications to and from Mortgage Servicer, Obligor, and any third party; debits and credits Obligor's account according to monies received and paid out in accordance with generally accepted accounting practices and keeps electronic records of the same; remits the principal and interest received from Obligor's scheduled loan payments to Investor's account; and maintains custody and control of the physical possession of Obligor's note.

4. **[Name of investor]** ("Investor") is the person who corporeally (a) suffers the risk of loss if Obligor's loan agreement is securitized and Obligor defaults, (b) is the person to whom Mortgage Servicer remits the principal and interest received from Obligor's scheduled loan payments, and (c) is

the legal, beneficial, or equable owner of Obligor's loan agreement that may be held in trust.

5. **[Derivation of the MERS name recited in the security agreement]** ("MERS") is (a) the mortgagee of record of Mortgagor's security instrument filed in the official real property records, (b) an entity that acts solely as the nominee of the lender and lender's successors and assigns, (c) the beneficiary named in the deed of trust, and (d) the book entry system referred to in Tex. Prop. Code § 51.0001(1). Obligor expressly granted to MERS the right to take any action required of the originating lender.

If the parties involved in a foreclosure are properly described as to their role and function, many of the problems related to a MERS foreclosure should be resolved.

[Reserved]

Chapter 36

Federal and State Foreclosure Assistance Programs

The editors gratefully acknowledge Dominique Marshall Varner for her contribution to this chapter.

§ 36.1 Introduction

This chapter describes the different types of state and federal assistance programs created to help homeowners facing difficulties in servicing their loans.

§ 36.2 Federal Loss Mitigation Programs

Various federal agencies and government-sponsored enterprises such as Fannie Mae, Freddie Mac, the U.S. Department of Housing and Urban Development (HUD), and the U.S. Department of Veterans Affairs (VA) have adopted homeowners assistance programs for debtors whose loans are in default or at risk. These programs, however, are constantly changing as the agencies and government-sponsored enterprises develop new strategies and program methodologies. Therefore, the best source of information for what program might be in effect at any given time is the Web site of the investor or servicer. Generally these sites are informative and user-friendly. The primary HUD Web site is **www.hud.gov**, the VA Web site is **www.va.gov**, the Fannie Mae Web site is **www.fanniemae.com**, and the Freddie Mac Web site is **www.freddiemac.com**.

§ 36.3 Federal Homeownership Counseling

The Housing and Community Development Act of 1987, title I, subtitle B, section 170, amended section 106 of the Housing and Urban Development Act of 1968 (codified at 12 U.S.C. §§ 1701–1750g) so that all mortgagees that service conventional mortgage loans and home loans insured by HUD are subject to the requirement that an "eligible" mortgagor who is past due on his payments shall be notified of the availability of homeownership counseling.

§ 36.3:1 Eligibility Requirements

Homeownership counseling is available if (1) the home loan is secured by property that is the principal residence of the homeowner; (2) the home loan is not assisted under title V of the Housing Act of 1949 (42 U.S.C. §§ 1471–1490t); and (3) the homeowner is or is expected to be unable to make payments, correct a home loan delinquency within a reasonable time, or resume full home loan payments due to a reduction in the income of the homeowner because of (a) an involuntary loss of or reduction in the employment of the homeowner, the self-employment of the homeowner, or income from the pursuit of the occupation of the homeowner; or (b) any similar loss or reduction experienced by any person who contributes to the income of the homeowner. *See* 12 U.S.C. § 1701x(c)(4).

The creditor holding a delinquent home loan shall notify the eligible homeowner of the availability of counseling by informing the homeowner—

1. of the name of nonprofit organizations approved by HUD,
2. that a list of nonprofit organizations approved by HUD can be obtained by calling a toll-free telephone number operated by HUD, or

3. that homeownership counseling is provided by the Administrator of Veterans Affairs for loans insured or guaranteed under chapter 37 of title 38 of the United States Code (U.S. Department of Veterans Affairs guaranteed loans).

See 12 U.S.C. § 1701x(c)(5)(A).

§ 36.3:2 Notice to Homeowner

HUD has taken the position that the notification of the availability of homeownership counseling must be made before the forty-fifth day after any eligible homeowner fails to pay any amount by the date the amount is due under a home loan. *See* 12 U.S.C. § 1701x(c)(5)(B)(ii). A list of HUD-approved housing counseling agencies can be found at HUD's Web site at **www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm**. HUD may be contacted by telephone at 202-708-1112 or by writing to U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0001.

If the loan is guaranteed by the VA, the VA is required to follow the procedures outlined at 38 U.S.C. § 3732(a)(4). The VA is similarly required to provide homeownership counseling, including information on alternatives to foreclosure, possible methods of curing the default, and deeds in lieu of foreclosure. Additional information regarding VA-guaranteed loans in Texas is available from the VA Regional Loan Center, 6900 Alameda Road, Houston, TX 77030-4200, telephone number 1-888-232-2571, or at its Web site at **www.benefits.va.gov/houston/regional-loan-center.asp**.

§ 36.4 Short Sale

A short sale occurs when a mortgage holder allows the property owner to sell the collateral property through the normal real estate market rather than go through foreclosure, even if the proceeds of the property owner's sale will not cover the full amount due on the mortgage. A short sale may help the mortgage holder lessen its potential losses compared to those anticipated in foreclosing and then holding and reselling the property, and many of the carrying costs (utilities, landscape maintenance, etc.) are borne by the property owner during the marketing period. The short sale benefits the property owner in that the short sale does not result in a foreclosure notation on the property owner's credit report and may potentially achieve a greater pay-down of the debt. Since a short sale does not discharge the property owner's debt (it merely results in a release of the lien), the property owner may wish to bargain with the mortgage holder for a release of any deficiency in exchange for the property owner's cooperation in realizing the best sales price possible. If the lender forgives the deficiency remaining after closing the short sale, however, the deficiency may be imputed as taxable income for the property owner, particularly if the mortgagee paid cash to the property owner as additional incentive for the property owner's cooperation. *See* Federal Housing Finance Agency, Office of the Inspector General, *An Overview of the Home Foreclosure Process*, 17–18 (2012). See also chapter 23 in this manual concerning the tax consequences of the foreclosure process.

§ 36.4:1 Junior Lienholders

If there are junior liens on a property, all junior lienholders must approve the sale and release their liens at closing; otherwise, the junior liens will survive and remain of record after the first lienholder applies the short sales proceeds to its debt, since there is no "foreclosure" to cut off the junior liens. Without the cooperation of the junior lienholders, prospective purchasers are highly unlikely to want to close on a short sale of an already "underwater" property that leaves junior liens in place.

§ 36.4:2 Cash Incentives for a Short Sale

In situations where foreclosure makes little sense for the mortgage holder because of the anticipated bid results and estimated costs to the mortgage holder of holding and reselling the property, the mortgagee may provide incentives for the property owner to participate in a short sale. For example, HUD's short sale program allows a mortgage holder to make payments (up to $1000) to a residential homeowner to encourage a short sale. Under Fannie Mae's short sale option, residential homeowners are eligible for cash relocation assistance. Mortgage holders typically do not volunteer this information, so the property owner should inquire about the possibility of a cash payment if a short sale process appears economically feasible for the parties.

§ 36.4:3 Short Sales on Fannie Mae Loans

Under Fannie Mae's guidelines for a preforeclosure short sale, the borrower must have experienced some permanent involuntary loss in income and all other workout options must be considered before a short sale may be considered. There must be no other relief options that will succeed in order to proceed with a short sale.

§ 36.4:4 Short Sales on Freddie Mac Loans

Under Freddie Mac's short sale payoff program, the borrower must have the property listed for sale at the current market price and show an eligible hardship. If the homeowner does not have an eligible hardship, but Freddie Mac will be made whole through mortgage insurance proceeds, a cash contribution, a promissory note from the borrower, or a combination of all three options, the servicer may recommend allowing a short sale of property under contract for less than what is owed on the mortgage. This option may also be considered if the borrower has defaulted on a previous loan modification plan. Approval from Freddie Mac and the mortgage insurer is required, unless the sale proceeds plus the mortgage insurance claim proceeds payment or a borrower contribution results in Freddie Mac receiving all sums owed on the mortgage.

§ 36.5 Federal Home Loan Assistance Programs

As noted in section 36.2 above, a variety of federal programs exist to help borrowers on troubled home loans. These programs, however, are constantly changing as the agencies and government-sponsored enterprises develop new strategies and program methodologies, and many of these programs will wind down in the near future. Always check for new developments with these programs when exploring these options.

§ 36.5:1 Home Affordable Refinance Program

The Home Affordable Refinance Program (HARP) helps borrowers to refinance their Fannie Mae or Freddie Mac home loans and take advantage of lower interest rates. HARP was established in 2009 by the Federal Housing Finance Agency to help underwater and near-underwater homeowners refinance their mortgages. *See* What is HARP?, HarpProgram.org, **http://harpprogram.org/index.php**.

To be eligible for HARP, the following requirements must be met: (1) the loan must be owned or guaranteed by Fannie Mae or Freddie Mac; (2) the loan must have been sold to Fannie Mae or Freddie Mac on or before May 31, 2009; (3) the loan cannot have been previously refinanced under HARP unless it was a Fannie Mae loan that was refinanced under HARP from March–May 2009; (4) the current loan-to-value ratio must be greater than 80 percent; (5) the borrower must be current on the mortgage at the time of the refinance, with no late payments in the past six months and no more than one late payment in the past twelve months; (6) the borrower must have a reasonable ability or sufficient income to pay the new loan payment; and (7) the refinance improves the long-term affordability or stability of the borrower's loan. *See* Questions and Answers, Q: How do I know if I'm eligible for The H.A.R.P. Program?, HarpProgram.org, **http://harpprogram.org/faq.php**.

The application deadline for HARP is December 16, 2016. *See* When Does it End?, HarpProgram.org, **http://harpprogram.org/index.php**.

§ 36.5:2 Home Affordable Unemployment Program

The Home Affordable Unemployment Program (UP) provides temporary assistance to homeowners with hardships resulting from unemployment by reducing mortgage payments to 31 percent of the homeowner's gross income or suspending the payments altogether for up to twelve months. *See* Home Affordable Unemployment Program (UP), MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-up.aspx**. An unemployed homeowner who requests assistance under the Home Affordable Modification Program (HAMP, see section 36.5:3 below) must first be considered for UP.

To be eligible for UP, the following basic requirements must be met: (1) the borrower is struggling to make his mortgage payments because of unemployment; (2) the borrower is delinquent or in danger of falling behind on his mortgage; (3) the borrower obtained the mortgage on or before January 1, 2009; (4) the borrower's property has not been condemned; and (5) the borrower owes only up to $729,750 on his primary residence or one- to four-unit rental property (loan limits are higher for two- to four-unit properties). *See* Home Affordable Unemployment Program (UP), Eligibility, MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-up.aspx**.

To determine if the borrower's mortgage servicer participates in UP, see Home Affordable Unemployment Program (UP), Availability, MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-up.aspx**. If it is available at the time that the UP forbearance period ends, a homeowner can be evaluated for a HAMP mortgage modification. *See* Home Affordable Unemployment Program (UP), Complementary MHA Programs, MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-up.aspx**.

The application deadline for UP is December 31, 2016. *See* Home Affordable Unemployment Program (UP), MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-up.aspx**.

§ 36.5:3 Home Affordable Modification Program

For homeowners that are not unemployed but are struggling to make mortgage payments, HAMP is an option to lower monthly mortgage payments to make them more affordable and sustainable. *See* Home Affordable Modification Program, MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-hamp.aspx**.

To determine if the borrower's mortgage servicer participates in HAMP, see Home Affordable Modification Program, Availability, MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-hamp.aspx**.

To be eligible for HAMP, the following basic requirements must be met: (1) the borrower is struggling to make his mortgage payments because of financial hardship; (2) the borrower is delinquent or in danger of falling behind on his mortgage; (3) the borrower obtained the mortgage on or before January 1, 2009; (4) the borrower's property has not been condemned; and (5) the borrower owes only up to $729,750 on his primary residence or one- to four-unit rental property (loan limits are higher for two- to four-unit properties). *See* Home Affordable Modification Program, Eligibility, Making HomeAffordable.gov, **https://www.making homeaffordable.gov/steps/Pages/step-2 -program-hamp.aspx**.

The application deadline for HAMP is December 31, 2016. *See* Home Affordable Modification Program, MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/ steps/Pages/step-2-program-hamp.aspx**.

HAMP Protections Against Foreclosure: Servicers participating in HAMP may not refer a homeowner to foreclosure until the homeowner is determined to be ineligible for HAMP, the homeowner declines HAMP, or contact efforts have failed. *See* Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages, ch. II, § 3.1.1 (version 4.5, eff. June 1, 2015). The servicer's attorney or trustee cannot conduct a foreclosure sale without written certification that a homeowner is not HAMP-eligible. Handbook for Servicers of Non-GSE Mortgages, ch. II, § 3.4.3. In most cases, if not approved for HAMP, the homeowner benefits from the thirty-day waiting period before a foreclosure sale. Handbook for Servicers of Non-GSE Mortgages, ch. II, § 2.3.2.

HAMP Help for Homeowners in Bankruptcy: Servicers must consider homeowners in active bankruptcies for HAMP if a request is received from the homeowner, the homeowner's counsel, or the bankruptcy trustee. Handbook for Servicers of Non-GSE Mortgages, ch. II, § 1.2. Homeowners in trial period plans who subsequently file for bankruptcy may not be denied a HAMP modification because of the bankruptcy filing. Handbook for Servicers of Non-GSE Mortgages, ch. II, § 8.5. Servicers may accept copies of the bankruptcy schedules and tax returns in lieu of the RMA and Form 4506T-EZ, and may use this information to determine borrower eligibility. Handbook for Servicers of Non-GSE Mortgages, ch. II, § 5.2.

§ 36.5:4 Second Lien Modification Program

If a homeowner qualifies for HAMP and also has a second mortgage, the homeowner may also qualify for a modification or principal reduction on the second mortgage through the Second Lien Modification Program (2MP). 2MP works in conjunction with HAMP to help homeowners with second mortgages to increase long-term affordability and sustainability. *See* Second Lien Modification Program (2MP), Making HomeAffordable.gov, **https://www.making homeaffordable.gov/steps/Pages/step-2 -program-2mp.aspx**.

To be eligible for 2MP, the following basic requirements must be met: (1) the homeowner's mortgage was modified under HAMP; (2) the homeowner obtained his second mortgage on or before January 1, 2009; and (3) the homeowner owes $5,000 or more and pays $100 or more per month toward the second lien. *See* Second Lien Modification Program (2MP), Eligibility, MakingHomeAffordable.gov, **https://www.making homeaffordable.gov/steps/Pages/step-2 -program-2mp.aspx**.

The servicers that participate in 2MP are (1) Bank of America, NA; (2) Bayview Loan Servicing, LLC; (3) CitiMortgage, Inc.; (4) Green Tree Servicing LLC; (5) iServeResidential Lending/iServeServicing, Inc.; (6) J.P.Morgan-Chase Bank, NA; (7) Nationstar Mortgage LLC; (8) OneWestBank (sold entire volume to Ocwen); (9) PennyMacLoan Services, LLC;

(10) PNC; (11) Residential Credit Solutions; (12) ServisOne Inc., d/b/a BSI Financial Services, Inc.; and (13) Wells Fargo Bank, NA. *See* Second Lien Modification Program (2MP) Servicers, MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-2mp-servicers.aspx**.

The application deadline for 2MP is December 31, 2016. *See* Second Lien Modification Program (2MP), MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-2mp.aspx**.

§ 36.5:5 Home Affordable Foreclosure Alternatives Program

The Home Affordable Foreclosure Alternatives Program (HAFA) was designed to give homeowners the opportunity to exit their homes and be relieved of their remaining mortgage debt through a short sale or deed in lieu of foreclosure. HAFA also provides $10,000 in relocation assistance to program participants. *See* Home Affordable Foreclosure Alternatives Program (HAFA), MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-hafa.aspx**.

To be eligible for HAFA, the following basic requirements must be met: (1) the borrower is struggling to make his mortgage payments because of financial hardship; (2) the borrower is delinquent or in danger of falling behind on his mortgage; (3) the borrower obtained the mortgage on or before January 1, 2009; (4) the borrower's property has not been condemned; and (5) the borrower owes only up to $729,750 on his primary residence or one- to four-unit rental property (loan limits are higher for two- to four-unit properties). *See* Home Affordable Foreclosure Alternatives Program (HAFA), Eligibility, MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-hafa.aspx**.

To determine if the homeowner's mortgage servicer participates in HAFA, see Home Affordable Foreclosure Alternatives Program (HAFA), Availability, MakingHomeAffordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-hafa.aspx**.

The application deadline for HAFA is December 31, 2016. *See* Home Affordable Foreclosure Alternatives Program (HAFA), MakingHome-Affordable.gov, **https://www.makinghomeaffordable.gov/steps/Pages/step-2-program-hafa.aspx**.

§ 36.5:6 Federal Housing Administration Home Affordable Modification Program

The Federal Housing Administration Home Affordable Modification Program (FHA-HAMP) allows borrowers to modify their FHA-insured mortgages to reduce monthly mortgage payments and avoid foreclosure. The program is available to borrowers with (1) FHA-insured mortgages that do not qualify for other loss mitigation programs and (2) adequate debt-to-income ratios. Borrowers must successfully complete a three-month trial payment plan and make each scheduled payment on time before becoming a full participant in the program. *See* FHA Home Affordable Modification Program (FHA-HAMP), U.S. Department of Housing and Urban Development, **http://portal.hud.gov/hudportal/HUD?src=/hudprograms/fhahamp**.

Additional information regarding the FHA-HAMP is available from the FHA's National Servicing Center at (877) 622-8525.

§ 36.5:7 Department of Veterans Affairs Home Affordable Modification Program

The Department of Veterans Affairs offers mortgage modification programs designed to lower monthly mortgage payments to no more than 31 percent of the homeowner's verified monthly gross (pre-tax) income. *See* U.S. Department of Veterans Affairs, Circular 26-10-6, Revised VA Making Home Affordable Program, at 1 (2010).

The Department of Veterans Affairs Home Affordable Modification Program (VA-HAMP) modification can be used only if the following three requirements are met: (1) the borrower does not qualify for traditional home retention or loss mitigation programs, (2) the property is the borrower's primary residence, and (3) the VA-HAMP modification is agreed upon before the HAMP expiration date. *See* U.S. Department of Veterans Affairs, Circular 26-10-6, Revised VA Making Home Affordable Program, at 1–2 (2010).

While HAMP modifications are restricted to loans that originated on or before January 1, 2009, the VA allows servicers to use HAMP-style modifications on any VA-guaranteed loans, subject to the requirement that prior VA approval is obtained if less than twelve payments have been made since the loan closed. *See* U.S. Department of Veterans Affairs, Circular 26-10-6, Revised VA Making Home Affordable Program, at 2 (2010).

Additional information regarding VA-HAMP is available from the VA Regional Loan Center at (877) 827-3702 or online at **www.benefits.va.gov/homeloans/**.

§ 36.5:8 Federal Housing Finance Agency Streamlined Modification Initiative

As of July 1, 2013, Fannie Mae and Freddie Mac (under the conservatorship of the Federal Housing Finance Agency) offer the new Streamlined Modification Initiative (SMI), a simplified modification initiative to minimize losses and to help troubled borrowers avoid foreclosure. Servicers are required to offer eligible borrowers who are at least ninety days delinquent on their mortgage an easy way to lower their monthly payments and modify their mortgage *without* requiring financial or hardship documentation. This is the key difference between the SMI and other Fannie Mae or Freddie Mac mortgage modification options. Although documenting income and financial hardship is not required, it could result in a modification with additional savings. The SMI expires on December 30, 2015. *See* News Release, FHFA Announces New Streamlined Modification Initiative 1 (Federal Housing Finance Agency, Mar. 27, 2013) (hereinafter, FHFA News Release), available at **www.fhfa.gov/webfiles/25068/StreamlinedModInit32713Final.pdf**. Like other federal foreclosure help programs, borrowers must first demonstrate an ability to pay by making three on-time trial payments, after which the mortgage will be permanently modified. The dollar amount of the new mortgage payment is based on a fixed interest rate, extends payment terms to forty years, and provides principal forbearance for certain underwater borrowers. *See* FHFA News Release, at 1–2.

The eligibility requirements for the SMI are the following: (1) the loan must be owned or guaranteed by Fannie Mae or Freddie Mac, (2) the homeowner must be ninety days to twenty-four months delinquent, (3) the homeowner must have a first-lien mortgage that is at least twelve months old with a loan-to-value ratio equal to or greater than 80 percent, and (4) the loan must not have been previously modified two or more times. *See* FHFA News Release, at 2. It is noteworthy that delinquent borrowers with Fannie Mae or Freddie Mac mortgages secured by second homes or investment properties are eligible to participate in the SMI, provided they also meet other eligibility criteria. *See* FHFA News Release, at 5.

Difference between SMI and HAMP: The difference between SMI and HAMP is that borrowers can look to take advantage of the HAMP or SMI as soon as they run into financial trouble, however only HAMP requires borrowers to provide financial or hardship documentation. Since HAMP enables servicers to evaluate the borrower for modification terms based on an affordable payment that is 31 percent of the borrower's gross monthly income, HAMP may provide a more affordable monthly payment than the SMI. Further, borrowers may be eligible for financial incentive payments under HAMP. *See* FHFA News Release, at 3.

§ 36.6 Texas Foreclosure Consultants

Texas Business and Commerce Code chapter 21 regulates the business operations of residential foreclosure consulting services. Foreclosure consultants are defined as persons who make a representation, a solicitation, or an offer to a homeowner to perform services for a fee that involve seeking to prevent or postpone foreclosure, obtaining a forbearance agreement, curing or reinstating a delinquent mortgage, advancing or lending funds to prevent foreclosure, or ameliorating the impairment of a borrower's credit rating. *See* Tex. Bus. & Com. Code § 21.001(a). For purposes of the statute, "foreclosure" commences with the filing of notice of sale under Tex. Prop. Code § 51.002(b) or commencement of a judicial foreclosure action. *See* Tex. Bus. & Com. Code § 21.001(b).

See section 37.3 in this manual for additional discussion.

§ 36.6:1 Contract Requirements

All residential foreclosure consulting contracts involving compensation to the consultant must be in writing and contain mandatory contractual notice provisions that, among other matters, provide that (1) the consultant cannot ask the homeowner to transfer any interest in the home to the consultant or the consultant's associates, (2) the consultant cannot take a power of attorney from the homeowner for any purpose other than to inspect documents, (3) the consultant cannot take an assignment of wages to secure his compensation, and (4) the homeowner can cancel or rescind the contract at any time without penalty. *See* Tex. Bus. & Com. Code §§ 21.051, 21.052, 21.102. Section 21.101 prohibits a consultant from charging or receiving compensation until the consultant has fully performed each service that the consultant contracted to perform or represented he could perform, unless the consultant has obtained a surety bond or established a surety account for each location in which the consultant conducts business. *See* Tex. Bus. & Com. Code § 21.101. A foreclosure consultant must retain records for at least three years. *See* Tex. Bus. & Com. Code § 21.103. A violation of chapter 21 is a class C misdemeanor. *See* Tex. Bus. & Com. Code § 21.151.

§ 36.6:2 Exceptions

There are limited exceptions to the chapter's scope that allow enumerated persons to provide consultant services and not be subject to the statute. These exceptions expressly include licensed attorneys who negotiate the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client, as long as the attorney does not both take the residential mortgage loan application and offer or negotiate the terms of the residential mortgage loan. *See* Tex. Bus. & Com. Code § 21.002.

Additional Resources

Federal Housing Finance Agency, Office of the Inspector General. *An Overview of the Home Foreclosure Process*. 2012.

Rao, John, Tara Twomey, Geoff Walsh, Odette Williamson, Emily Green Caplan, and John W. Van Alst. *Foreclosures: Mortgage Servicing, Mortgage Modification, and Foreclosure Defense*, 4th ed. National Consumer Law Center, 2012.

Tomlinson, Richard. "Alternative Defenses to Foreclosure: HAMP, HOEPA, Private Loan Mods and Ch. 13." In *Advanced Consumer Law Course, 2011*. Austin: State Bar of Texas, 2011.

[Reserved]

Appendix A

IRS Collections Advisory Group Addresses and Counties by Areas

Address correspondence to

Internal Revenue Service
Attn: Collections Advisory Group Manager
1100 Commerce Street
Mail Code 5028 DAL
Dallas, TX 75242

phone number: 214-413-5349
fax number: 877-477-9223

for property in the following counties in northern Texas:

Anderson
Andrews
Angelina
Archer
Armstrong
Bailey
Baylor
Borden
Bowie
Briscoe
Brown
Callahan
Camp
Carson
Cass
Castro
Cherokee
Childress
Clay
Cochran
Coke
Coleman
Collin
Collingsworth
Comanche
Concho
Cooke
Cottle
Crane
Crockett
Crosby
Dallam
Dallas
Dawson
Deaf Smith
Delta
Denton
Dickens
Donley
Eastland
Ector
Ellis
Erath
Fannin
Fisher
Floyd
Foard
Franklin
Gaines
Garza
Glasscock
Gray
Grayson
Gregg
Hale
Hall
Hansford
Hardeman
Harrison
Hartley
Haskell
Hemphill
Henderson
Hockley
Hood
Hopkins
Houston
Howard
Hunt
Hutchinson
Irion
Jack
Johnson
Jones
Kaufman
Kent
King
Knox
Lamar
Lamb
Lipscomb
Loving
Lubbock
Lynn
Marion
Martin
Menard
Midland
Mills
Mitchell
Montague
Moore
Morris
Motley
Nacogdoches
Navarro
Nolan
Ochiltree
Oldham
Palo Pinto
Panola
Parker
Parmer
Potter
Rains
Randall
Reagan
Red River
Roberts
Rockwall
Runnels
Rusk
Sabine
San Augustine
Schleicher
Scurry
Shackelford
Shelby
Sherman
Smith
Stephens
Sterling
Stonewall
Sutton

Swisher	Titus	Ward	Wise
Tarrant	Tom Green	Wheeler	Wood
Taylor	Upshur	Wichita	Yoakum
Terry	Upton	Wilbarger	Young
Throckmorton	Van Zandt	Winkler	

Address correspondence to

Internal Revenue Service
Attn: Collections Advisory Group Manager
1919 Smith Street
Mail Code 5021 HOU
Houston, TX 77002

phone number: 713-209-4399
fax number: 713-209-3877

for property in the following counties in southern Texas:

Aransas	El Paso	Kerr	Presidio
Atascosa	Falls	Kimble	Real
Austin	Fayette	Kinney	Reeves
Bandera	Fort Bend	Kleberg	Refugio
Bastrop	Freestone	Lampasas	Robertson
Bee	Frio	La Salle	San Jacinto
Bell	Galveston	Lavaca	San Patricio
Bexar	Gillespie	Lee	San Saba
Blanco	Goliad	Leon	Somervell
Bosque	Gonzales	Liberty	Starr
Brazoria	Grimes	Limestone	Terrell
Brazos	Guadalupe	Live Oak	Travis
Brewster	Hamilton	Llano	Trinity
Brooks	Hardin	Madison	Tyler
Burleson	Harris	Mason	Uvalde
Burnet	Hays	Matagorda	Val Verde
Caldwell	Hidalgo	Maverick	Victoria
Calhoun	Hill	McCulloch	Walker
Cameron	Hudspeth	McLennan	Waller
Chambers	Jackson	McMullen	Washington
Colorado	Jasper	Medina	Webb
Comal	Jeff Davis	Milam	Wharton
Coryell	Jefferson	Montgomery	Willacy
Culberson	Jim Hogg	Newton	Williamson
DeWitt	Jim Wells	Nueces	Wilson
Dimmit	Karnes	Orange	Zapata
Duval	Kendall	Pecos	Zavala
Edwards	Kenedy	Polk	

[Reserved]

Appendix B

The information in this appendix is based on data provided by the county clerk of each specific county and is current as of the publication date of this manual. Before using this information, the attorney should verify its currency by visiting individual appraisal district and county Web sites or by contacting district and county representatives directly.

Texas County Foreclosure Resources

County/County Seat	***Designated Sale Site and Web Site Information***
	A
ANDERSON—Palestine	
Designated sale site	Steps on east side of courthouse
Appraisal district Web site	**www.andersoncad.net/**
County Web site	**www.co.anderson.tx.us/**
ANDREWS—Andrews	
Designated sale site	East door of courthouse
Appraisal district Web site	**www.andrewscad.org/**
County Web site	**www.co.andrews.tx.us/**
ANGELINA—Lufkin	
Designated sale site	Commissioners courtroom in annex building
Designated sale site on holidays	Front steps of main entrance to courthouse
Appraisal district Web site	**www.angelinacad.org/**
County Web site	**www.angelinacounty.net/**
ARANSAS—Rockport	
Designated sale site	Front steps to east lobby entrance of courthouse
Appraisal district Web site	**www.aransascad.org/**
County Web site	**www.aransascountytx.gov/main/**
ARCHER—Archer City	
Designated sale site	North entrance of courthouse annex
Appraisal district Web site	**www.archercad.org/**
County Web site	**www.co.archer.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
ARMSTRONG—Claude	
Designated sale site	Stairs in lobby of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/armstrong/**
County Web site	**www.co.armstrong.tx.us/**
ATASCOSA—Jourdanton	
Designated sale site	West porch of courthouse
Appraisal district Web site	**www.atascosacad.com/**
County Web site	**http://atascosacountytexas.net/**
AUSTIN—Bellville	
Designated sale site	Lobby of courthouse
Appraisal district Web site	**www.austincad.net/**
County Web site	**www.austincounty.com/**

B

BAILEY—Muleshoe	
Designated sale site	East door of courthouse
Appraisal district Web site	**www.bailey-cad.org/**
County Web site	**www.co.bailey.tx.us/**
BANDERA—Bandera	
Designated sale site	Southwest front courthouse door (either inside or outside) that faces Main Street
Appraisal district Web site	**www.banderaproptax.org/**
County Web site	**www.banderacounty.org/**
BASTROP—Bastrop	
Designated sale site	North door of courthouse
Appraisal district Web site	**www.bastropcad.org/**
County Web site	**www.co.bastrop.tx.us/**
BAYLOR—Seymour	
Designated sale site	West entrance to courthouse
Appraisal district Web site	**http://baylorcad.org/**
County Web site	**www.baylorcountytexas.com/**

County/County Seat	*Designated Sale Site and Web Site Information*
BEE—Beeville	
Designated sale site	North side courthouse steps, facing West Corpus Christi Street
Appraisal district Web site	**www.beecad.org/**
County Web site	**www.co.bee.tx.us/**
BELL—Belton	
Designated sale site	County Clerk's alcove, Bell County Justice Complex, 1201 Huey Dr., Belton, TX 76513
Appraisal district Web site	**www.bellcad.org/**
County Web site	**www.bellcountytx.com/**
BEXAR—San Antonio	
Location for filing notice	County Clerk's Office, 100 Dolorosa, Suite 104, San Antonio, TX 78205-3083
Location for posting notice	Public notice board at south entrance of courthouse
Filing/posting notice on holidays	No special procedure in place
Designated sale site	Federal Reserve Bank Building (former), 3rd Floor, 126 East Nueva
Designated sale site on holidays	Same
Person responsible for posting	Person filing notice
Hours bulletin board accessible	Accessible at all times
County clerk's office hours	Monday–Friday, 8:00 A.M.–5:00 P.M., except holidays
Appraisal district Web site	**www.bcad.org/**
County Web sites	**www.bexar.org/** **https://gov.propertyinfo.com/TX-Bexar/** **http://map.bexar.org/foreclosure/**
BLANCO—Johnson City	
Designated sale site	South (main) entrance of courthouse, within 12 feet of front door
Appraisal district Web site	**www.blancocad.com/**
County Web site	**www.co.blanco.tx.us/**
BORDEN—Gail	
Designated sale site	District courtroom in courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/borden/**
County Web site	**www.co.borden.tx.us**
BOSQUE—Meridian	
Designated sale site	Front (east) door of courthouse
Appraisal district Web site	**www.bosquecad.com/**
County Web site	**www.bosquecounty.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
BOWIE—New Boston	
Designated sale site	Front (north) entrance of courthouse
Appraisal district Web site	**www.bowieappraisal.com/**
County Web site	**www.co.bowie.tx.us/**
BRAZORIA—Angleton	
Designated sale site	Corridor outside room 108 of courthouse
Appraisal district Web site	**www.brazoriacad.org/**
County Web site	**www.brazoria-county.com/**
BRAZOS—Bryan	
Designated sale site	Atrium on the first floor of the county administration building, 200 South Texas Avenue
Appraisal district Web site	**www.brazoscad.org/**
County Web site	**www.brazoscountytx.gov/**
BREWSTER—Alpine	
Designated sale site	Front (east) door of courthouse
Appraisal district Web site	**www.brewstercotad.org/**
County Web site	**http://brewstercountytx.com/**
BRISCOE—Silverton	
Designated sale site	Steps on west side of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/briscoe/**
County Web site	**www.co.briscoe.tx.us/**
BROOKS—Falfurrias	
Designated sale site	Steps on east side of courthouse
Appraisal district Web site	**http://brookscad.org/**
County Web site	**www.co.brooks.tx.us/**
BROWN—Brownwood	
Designated sale site	South hallway of first floor of courthouse
Appraisal district Web site	**www.brown-cad.org/**
County Web site	**www.browncountytx.org/**
BURLESON—Caldwell	
Designated sale site	South steps of courthouse
Appraisal district Web site	**www.burlesonappraisal.com/**
County Web site	**www.co.burleson.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
BURNET—Burnet	
Designated sale site	East side of courthouse (outside county clerk's office)
Appraisal district Web site	**www.burnet-cad.org/**
County Web site	**www.burnetcountytexas.org/**

C

CALDWELL—Lockhart	
Designated sale site	Outside main entrance of Caldwell County Justice Center, 1703 South Colorado Street
Appraisal district Web site	**www.caldwellcad.org/**
County Web site	**www.co.caldwell.tx.us/**
CALHOUN—Port Lavaca	
Designated sale site	Front steps of courthouse, 211 South Ann Street
Appraisal district Web site	**www.calhouncad.org/**
County Web site	**www.calhouncotx.org/**
CALLAHAN—Baird	
Designated sale site	Front steps on south side of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=callahancad**
County Web site	**www.co.callahan.tx.us/**
CAMERON—Brownsville	
Designated sale site	Area in front of entrances to judicial section of courthouse located in 900 block of East Harrison Street
Appraisal district Web site	**www.cameroncad.org/**
County Web site	**www.co.cameron.tx.us/**
CAMP—Pittsburg	
Designated sale site	South door of courthouse
Appraisal district Web site	**www.campcad.org/**
County Web site	**www.co.camp.tx.us/**
CARSON—Panhandle	
Designated sale site	Front steps on east side of courthouse
Appraisal district Web site	**www.carsoncad.org/**
County Web site	**www.co.carson.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
CASS—Linden	
Designated sale site	North door of courthouse
Appraisal district Web site	**www.casscad.org/**
County Web site	**www.co.cass.tx.us/**
CASTRO—Dimmitt	
Designated sale site	Foyer of courthouse
Appraisal district Web site	**www.castrocad.org/**
County Web site	**www.co.castro.tx.us/**
CHAMBERS—Anahuac	
Designated sale site	East steps, second level of courthouse
Appraisal district Web site	**www.chamberscad.org/**
County Web site	**www.co.chambers.tx.us/**
CHEROKEE—Rusk	
Designated sale site	Immediate area (either inside or outside) of north entrance of courthouse
Appraisal district Web site	**www.cherokeecad.com/**
County Web site	**www.co.cherokee.tx.us/ips/cms**
CHILDRESS—Childress	
Designated sale site	Front steps of courthouse
Appraisal district Web site	**http://childresscad.org/**
County Web site	**www.co.childress.tx.us/ips/cms**
CLAY—Henrietta	
Designated sale site	West door of courthouse
Appraisal district Web site	**www.claycad.org/**
County Web site	**www.co.clay.tx.us/**
COCHRAN—Morton	
Designated sale site	East door and foyer of courthouse
Appraisal district Web site	**www.cochrancad.com/**
County Web site	**www.co.cochran.tx.us/**
COKE—Robert Lee	
Designated sale site	Porch and steps in front of north door of courthouse, fronting 7th Street
Appraisal district Web site	**http://cokecad.org/**
County Web site	**www.co.coke.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
COLEMAN—Coleman	
Designated sale site	Front porch of courthouse (south side of courthouse, on north end of Commercial Avenue)
Appraisal district Web site	**www.colemancountycad.com/Appraisal/PublicAccess/**
County Web site	**www.co.coleman.tx.us/**
COLLIN—McKinney	
Location for filing notice	County Clerk's Office, Jack Hatchell Collin County Administration Building, 2300 Bloomdale Rd., Suite 2104, McKinney, TX 75071
Location for posting notice	East foyer of courthouse
Filing/posting notice on holidays	Filing must occur on Thursday if holiday is on a Friday
Designated sale site	Southwest entrance of the Jack Hatchell Collin County Administration Building
Designated sale site on holidays	Same
Person responsible for posting	Person filing notice
Hours bulletin board accessible	Monday–Friday, 8:00 A.M.–5:00 P.M.
County clerk's office hours	Monday–Friday, 8:00 A.M.–4:30 P.M.
Appraisal district Web site	**www.collincad.org/**
County Web site	**www.collincountytx.gov/Pages/default.aspx**
COLLINGSWORTH—Wellington	
Designated sale site	East door of courthouse
Appraisal district Web site	**www.collingsworthcad.org/**
County Web site	**www.co.collingsworth.tx.us/**
COLORADO—Columbus	
Designated sale site	Foyer inside main entrance of the Colorado County Annex building
Appraisal district Web site	**www.coloradocad.org/**
County Web site	**www.co.colorado.tx.us/**
COMAL—New Braunfels	
Designated sale site	First floor lobby of the Comal County Courthouse, 100 Main Plaza, New Braunfels, TX 78130
Appraisal district Web site	**www.comalad.org/**
County Web site	**www.co.comal.tx.us/**
COMANCHE—Comanche	
Designated sale site	South door of courthouse
Appraisal district Web site	**www.comanchecad.org/**
County Web site	**www.comanchecountytexas.net/**

County/County Seat	*Designated Sale Site and Web Site Information*
CONCHO—Paint Rock	
Designated sale site	Front steps, on south side of courthouse
Appraisal district Web site	**www.conchocad.org/**
County Web site	**www.co.concho.tx.us/**
COOKE—Gainesville	
Designated sale site	Steps on east side of courthouse
Appraisal district Web site	**www.cookecad.org/**
County Web site	**www.co.cooke.tx.us/**
CORYELL—Gatesville	
Designated sale site	North door of courthouse
Appraisal district Web site	**www.coryellcad.org/**
County Web site	**www.coryellcounty.org/**
COTTLE—Paducah	
Designated sale site	Commissioners courtroom on first floor of courthouse
Appraisal district Web site	**http://cottlecad.org/**
County Web site	**www.co.cottle.tx.us/**
CRANE—Crane	
Designated sale site	North door of courthouse
Appraisal district Web site	**www.cranecad.org/**
County Web site	**www.co.crane.tx.us/**
CROCKETT—Ozona	
Designated sale site	Front steps of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/crockett/**
County Web site	**www.co.crockett.tx.us/**
CROSBY—Crosbyton	
Designated sale site	Steps on east side of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/crosby/**
County Web site	**www.co.crosby.tx.us/**
CULBERSON—Van Horn	
Designated sale site	Sidewalk within 40-foot radius of west door of courthouse, facing LaCaverna
Appraisal district Web site	**http://culbersoncad.org/**
County Web site	**www.co.culberson.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*

D

DALLAM—Dalhart

Designated sale site	South steps of courthouse
Appraisal district Web site	**www.dallamcad.org/**
County Web site	**www.dallam.org/county/**

DALLAS—Dallas

Location for filing notice	County Clerk's Office, 509 Main Street, Suite 200, Dallas, TX 75202
Location for posting notice	George Allen Courthouse, 600 Commerce Street
Filing/posting notice on holidays	No special procedure in place
Designated sale site	North side of courthouse facing Commerce Street below the overhang
Designated sale site on holidays	Same
Person responsible for posting	Person filing notice
Hours bulletin board accessible	Accessible at all times
County clerk's office hours	Monday–Friday, 8:00 A.M.–4:30 P.M.
Appraisal district Web site	**www.dallascad.org/**
County Web sites	**www.dallascounty.org/** **www.dallascounty.org/department/pubworks/div-prop-faq.php**

DAWSON—Lamesa

Designated sale site	South entrance of courthouse
Appraisal district Web site	**www.dawsoncad.org/**
County Web site	**www.co.dawson.tx.us/**

DEAF SMITH—Hereford

Designated sale site	South, second-floor entrance (balcony area) of courthouse or inside doors in entrance hall in case of inclement weather
Appraisal district Web site	**www.deafsmithcad.org/**
County Web site	**www.co.deaf-smith.tx.us/**

DELTA—Cooper

Designated sale site	East steps of courthouse
Appraisal district Web site	**www.delta-cad.org/**
County Web site	**www.deltacountytx.com/index.html**

County/County Seat	*Designated Sale Site and Web Site Information*
DENTON—Denton	
Location for filing notice	County Clerk's Office, 1450 E. McKinney Street, Denton, TX 76209
Location for posting notice	Bulletin board in lobby of courthouse
Filing/posting notice on holidays	No special procedure in place
Designated sale site	Courtyard area of southwest corner of Denton County Courts Building
Designated sale site on holidays	Same
Person responsible for posting	Person filing notice
Hours bulletin board accessible	Monday–Friday, 8:00 A.M.–5:00 P.M.
County clerk's office hours	Monday, Tuesday, Thursday, Friday, 8:00 A.M.–5:00 P.M., Wednesday, 8:00 A.M.–4:30 P.M.
Appraisal district Web site	**www.dentoncad.com/**
County Web sites	**www.co.denton.tx.us/**
	http://dentoncounty.com/Departments/County-Clerk/Foreclosure-Information.aspx
DeWITT—Cuero	
Designated sale site	Patio area in front of west door of courthouse, facing Gonzales Street (building at 307 N. Gonzales Street)
Appraisal district Web site	**www.dewittcad.org/**
County Web site	**www.co.dewitt.tx.us/**
DICKENS—Dickens	
Designated sale site	Front steps on west side of courthouse
Appraisal district Web site	**http://dickenscad.org/**
County Web site	**www.co.dickens.tx.us/**
DIMMIT—Carrizo Springs	
Designated sale site	Front steps at west entrance of courthouse
Appraisal district Web site	**www.dimmit-cad.org/**
County Web site	**www.dimmitcounty.org/**
DONLEY—Clarendon	
Designated sale site	East steps of courthouse
Appraisal district Web site	**http://donleycad.org/**
County Web site	**www.co.donley.tx.us/**
DUVAL—San Diego	
Designated sale site	North door of courthouse
Appraisal district Web site	**www.duvalcad.org/**
County Web site	**http://courthouse.duval-county.net/defaultIE.htm**

County/County Seat	*Designated Sale Site and Web Site Information*
	E
EASTLAND—Eastland	
Designated sale site	Front steps at south entrance of courthouse (sometimes referred to as Commerce Street entrance)
Appraisal district Web site	**http://eastlandcad.org/**
County Web site	**www.eastlandcountytexas.com/**
ECTOR—Odessa	
Designated sale site	Front door (west entrance) of courthouse
Appraisal district Web site	**www.ectorcad.org/**
County Web site	**www.co.ector.tx.us/**
EDWARDS—Rocksprings	
Designated sale site	South door of courthouse, facing Main Street
Appraisal district Web site	**http://propaccess.trueautomation.com/clientdb/?cid=12**
County Web site	**www.edwardscountytexas.us/**
ELLIS—Waxahachie	
Designated sale site	Southeast porch of courthouse
Appraisal district Web site	**www.elliscad.org/**
County Web site	**www.co.ellis.tx.us/**
EL PASO—El Paso	
Location for filing notice	County Courthouse, County Clerk's Office, 500 E. San Antonio, Suite 105, El Paso, TX 79901
Location for posting notice	County courthouse, lobby bulletin board
Filing/posting notice on holidays	No special procedure in place
Designated sale site	Interior lobby of courthouse
Designated sale site on holidays	Same: courthouse lobby open on weekends and holidays
Person responsible for posting	County clerk personnel
Hours bulletin board accessible	Monday–Friday, 7:00 A.M.–6:00 P.M. (lobby hours)
County clerk's office hours	Monday–Friday, 8:00 A.M.–5:30 P.M.
Appraisal district Web site	**www.epcad.org/**
County Web sites	**www.co.el-paso.tx.us/** **www.co.el-paso.tx.us/clerk/** **www.epcounty.com/publicrecords/foreclosure-records/map.aspx**

County/County Seat	*Designated Sale Site and Web Site Information*
ERATH—Stephenville	
Designated sale site	South steps of courthouse
Appraisal district Web site	**www.erathcad.org/**
County Web site	**http://co.erath.tx.us/**

F

FALLS—Marlin	
Designated sale site	South side steps of courthouse or inside south side entrance in case of inclement weather
Appraisal district Web site	**www.fallscad.net/**
County Web site	**www.txdirectory.com/online/county/detail.php?id=73**
FANNIN—Bonham	
Designated sale site	North door of courthouse
Appraisal district Web site	**www.fannincad.org/**
County Web site	**www.co.fannin.tx.us/**
FAYETTE—La Grange	
Designated sale site	Edge of courthouse square just west of where straight sidewalk from north entrance of courthouse building meets West Colorado Street
Appraisal district Web site	**www.fayettecad.org/**
County Web site	**www.co.fayette.tx.us/**
FISHER—Roby	
Designated sale site	North door of courthouse
Appraisal district Web site	**www.fishercad.org/**
County Web site	**www.co.fisher.tx.us/**
FLOYD—Floydada	
Designated sale site	Outside steps at west entrance of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=floydcad**
County Web site	**www.co.floyd.tx.us/**
FOARD—Crowell	
Designated sale site	South side steps of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/foard/**

County/County Seat	*Designated Sale Site and Web Site Information*
FORT BEND—Richmond	
Location for filing notice	County Clerk's Office, 301 Jackson Street, Richmond, TX 77469
Location for posting notice	Lighted kiosk at southeast corner of county clerk's office building (3rd at Liberty)
Filing/posting notice on holidays	No special procedure in place
Designated sale site	First floor meeting room, Fort Bend County Travis Building, 301 Jackson Street, Richmond, TX 77469
Designated sale site on holidays	Same
Person responsible for posting	County clerk personnel
Hours bulletin board accessible	Accessible at all times
County clerk's office hours	Monday and Thursday, 8:00 A.M.–5:00 P.M. Tuesday, Wednesday, and Friday, 8:00 A.M.–4:00 P.M.
Appraisal district Web site	**www.fbcad.org/**
County Web sites	**www.fortbendcountytx.gov/** **www.fortbendcountytx.gov/index.aspx?page=115**
FRANKLIN—Mount Vernon	
Designated sale site	South steps of courthouse
Appraisal district Web site	**www.franklincad.com/**
County Web site	**http://co.franklin.tx.us/**
FREESTONE—Fairfield	
Designated sale site	Front steps at south entrance of courthouse
Appraisal district Web site	**www.freestonecad.org/**
County Web site	**www.co.freestone.tx.us/**
FRIO—Pearsall	
Designated sale site	Steps of north door of courthouse
Appraisal district Web site	**www.friocad.org/**
County Web site	**www.co.frio.tx.us/**

G

GAINES—Seminole	
Designated sale site	Area between west edge of courthouse's west porch and middle landing of inside stairs leading into courthouse from west door
Appraisal district Web site	**www.gainescad.org/**
County Web site	**www.co.gaines.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
GALVESTON—Galveston	
Designated sale site	Commissioners court room, first floor of courthouse, 722 Moody
Appraisal district Web site	**www.galvestoncad.org/Appraisal/PublicAccess/**
County Web site	**www.co.galveston.tx.us/**
GARZA—Post	
Designated sale site	West door foyer leading to the Law Enforcement Annex
Appraisal district Web site	**www.taxnetusa.com/texas/garza/**
County Web site	**www.garzacounty.net/**
GILLESPIE—Fredericksburg	
Designated sale site	Main front courthouse door facing Main Street
Appraisal district Web site	**www.gillespiecad.org/**
County Web site	**www.gillespiecounty.org/**
GLASSCOCK—Garden City	
Designated sale site	North door of courthouse
Appraisal district Web site	**www.glasscockcad.org/**
County Web site	**www.co.glasscock.tx.us/**
GOLIAD—Goliad	
Designated sale site	Hallway at north entrance of courthouse
Appraisal district Web site	**http://goliadcad.org/**
County Web site	**www.co.goliad.tx.us/**
GONZALES—Gonzales	
Designated sale site	Southeast corner of courthouse downtown
Appraisal district Web site	**www.gonzalescad.org/**
County Web site	**www.co.gonzales.tx.us/**
GRAY—Pampa	
Designated sale site	South entrance of courthouse
Appraisal district Web site	**www.graycad.org/**
County Web site	**www.co.gray.tx.us/**
GRAYSON—Sherman	
Designated sale site	West door of courthouse
Appraisal district Web site	**www.graysonappraisal.org/**
County Web site	**www.co.grayson.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
GREGG—Longview	
Designated sale site	Front door/patio area of courthouse
Appraisal district Web site	**www.gcad.org/**
County Web site	**www.co.gregg.tx.us/**
GRIMES—Anderson	
Designated sale site	Front door of courthouse
Appraisal district Web site	**www.grimescad.org/**
County Web site	**www.co.grimes.tx.us/**
GUADALUPE—Seguin	
Designated sale site	North porch of courthouse
Appraisal district Web site	**www.guadalupead.org/**
County Web site	**www.co.guadalupe.tx.us/**

H

HALE—Plainview	
Designated sale site	First floor of courthouse, west entrance, in front of commissioners' bulletin board
Appraisal district Web site	**http://halecad.org/**
County Web site	**www.halecounty.org/**
HALL—Memphis	
Designated sale site	North end of courthouse, adjacent to sheriff's office
Appraisal district Web site	**www.hallcad.org/**
HAMILTON—Hamilton	
Designated sale site	West center steps of courthouse
Appraisal district Web site	**www.hamiltoncad.org/**
County Web site	**http://hamiltoncountytx.org/**
HANSFORD—Spearman	
Designated sale site	Within 30 feet of front door of Main Street middle-floor entrance of courthouse, either in interior hallway or on exterior steps and entrance of courthouse
Appraisal district Web site	**www.hansfordcad.org/**
County Web site	**www.co.hansford.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
HARDEMAN—Quanah	
Designated sale site	Old county courtroom inside the south entrance, first floor of the courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/hardeman/**
County Web site	**www.hardemancountytexas.us/**
HARDIN—Kountze	
Designated sale site	Commissioners courtroom, first floor of courthouse
Appraisal district Web site	**http://hardincountycad.com/**
County Web site	**www.co.hardin.tx.us/**
HARRIS—Houston	
Location for filing notice	County Administration Building, 1001 Preston, 4th Floor, Window 4, Houston, TX 77002
Location for posting notice	Lobby of Harris County Family Law Center, 1115 Congress Avenue
Filing/posting notice on holidays	No special procedure in place
Designated sale site	Harris County Family Law Center, 1115 Congress, Houston, Texas, per Commissioners' Court Order dated 3/18/2003, Clerk's File No. W516820, or as further designated by County Commissioners
Designated sale site on holidays	Same
Person responsible for posting	County clerk to post notice required to be filed with county clerk; person filing to post notice at site of sale
Hours bulletin board accessible	Accessible at all times
County clerk's office hours	Monday–Friday, 8:00 A.M.–4:30 P.M.
Appraisal district Web site	**www.hcad.org/**
County Web sites	**www.co.harris.tx.us/** **www.cclerk.hctx.net/**
HARRISON—Marshall	
Designated sale site	Immediately outside easternmost entrance to courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=harrisoncad**
County Web site	**http://harrisoncountytexas.org/**
HARTLEY—Channing	
Designated sale site	Front door of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=hartleycad**
County Web site	**www.co.hartley.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
HASKELL—Haskell	
Designated sale site	South entrance of courthouse
Appraisal district Web site	**http://haskellcad.com/**
County Web site	**www.co.haskell.tx.us/**
HAYS—San Marcos	
Designated sale site	South door of Hays County Government Center, 712 South Stagecoach Trail
Appraisal district Web site	**www.hayscad.com/**
County Web site	**www.co.hays.tx.us/**
HEMPHILL—Canadian	
Designated sale site	Front door of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/hemphill/**
County Web site	**www.co.hemphill.tx.us/**
HENDERSON—Athens	
Designated sale site	South entrance porch of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=hendersoncad**
County Web site	**www.henderson-county.com/**
HIDALGO—Edinburg	
Location for filing notice	1st Floor, Hidalgo Courthouse—County Clerk's Office, 100 N. Closner, Edinburg, TX 78539
Location for posting notice	Courthouse bulletin board—first floor, immediately to right of main entrance
Filing/posting notice on holidays	No special procedure in place
Designated sale site	South side under covered space of County Clerk Records Management Facility, 317 N. Closner
Designated sale site on holidays	Same
Person responsible for posting	If walk-in, person filing; if received by mail, county clerk personnel
Hours bulletin board accessible	Monday–Friday, 8:00 A.M.–5:00 P.M.
County clerk's office hours	Monday–Friday, 7:30 A.M.–5:30 P.M.
Appraisal district Web site	**www.hidalgoad.org/**
County Web sites	**www.co.hidalgo.tx.us/**

County/County Seat	***Designated Sale Site and Web Site Information***
HILL—Hillsboro	
Designated sale site	Steps outside east door of courthouse or interior of courthouse near east door in case of inclement weather
Appraisal district Web site	**www.hillcad.org/**
County Web site	**www.co.hill.tx.us/**
HOCKLEY—Levelland	
Designated sale site	North door of courthouse
Appraisal district Web site	**www.hockleycad.org/**
County Web site	**www.co.hockley.tx.us/**
HOOD—Granbury	
Designated sale site	Steps at front entrance on south side of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=hoodcad**
County Web site	**www.co.hood.tx.us/**
HOPKINS—Sulphur Springs	
Designated sale site	Southwest entrance to first floor of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=hopkinscad**
County Web site	**www.hopkinscountytx.org/**
HOUSTON—Crockett	
Designated sale site	East side of courthouse or first-floor lobby of courthouse in case of inclement weather
Appraisal district Web site	**www.houstoncad.org/**
County Web site	**www.co.houston.tx.us/**
HOWARD—Big Spring	
Designated sale site	North door of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=howardcad**
County Web site	**www.co.howard.tx.us/**
HUDSPETH—Sierra Blanca	
Designated sale site	Front steps of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/hudspeth/**

County/County Seat	*Designated Sale Site and Web Site Information*
HUNT—Greenville	
Designated sale site	The common area at the base of the central stairway on the second floor inside the courthouse or the base of the north steps outside of the courthouse in the event the courthouse is closed
Appraisal district Web site	**www.hunt-cad.org/**
County Web site	**www.huntcounty.net/**
HUTCHINSON—Stinnett	
Designated sale site	West courthouse steps or inside west courthouse door in case of inclement weather
Appraisal district Web site	**www.hutchinsoncad.org/**
County Web site	**www.co.hutchinson.tx.us/**

I

IRION—Mertzon	
Designated sale site	Steps just inside main foyer on east side of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/irion/**
County Web site	**www.co.irion.tx.us/**

J

JACK—Jacksboro	
Designated sale site	Steps fronting doors on west side of courthouse
Appraisal district Web site	**www.jackcad.org/**
County Web site	**www.jackcounty.org/**
JACKSON—Edna	
Designated sale site	Downstairs main lobby at courthouse front door facing Main Street
Appraisal district Web site	**www.jacksoncad.org/**
County Web site	**www.co.jackson.tx.us/**
JASPER—Jasper	
Designated sale site	Steps at south entrance of courthouse annex building
Appraisal district Web site	**www.jaspercad.org/**
County Web site	**www.co.jasper.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
JEFF DAVIS—Fort Davis	
Designated sale site	South entrance of courthouse
Appraisal district Web site	**www.jeffdaviscad.org/**
County Web site	**www.co.jeff-davis.tx.us/**
JEFFERSON—Beaumont	
Designated sale site	Most northerly entrance of newest addition to courthouse
Appraisal district Web site	**www.jcad.org/**
County Web site	**www.co.jefferson.tx.us/**
JIM HOGG—Hebbronville	
Designated sale site	West side of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/jimhogg/**
County Web site	**http://jimhoggcounty.net/**
JIM WELLS—Alice	
Designated sale site	South door of courthouse
Appraisal district Web site	**www.jimwellscad.org/**
County Web site	**www.co.jim-wells.tx.us/**
JOHNSON—Cleburne	
Designated sale site	Outside west doors of courthouse
Appraisal district Web site	**www.johnsoncad.com/**
County Web site	**www.johnsoncountytx.org/**
JONES—Anson	
Designated sale site	South hall entrance on first floor of courthouse
Appraisal district Web site	**www.jonescad.org/**
County Web site	**www.co.jones.tx.us/**

K

KARNES—Karnes City	
Designated sale site	Area inside courthouse front door (east entrance, facing Panna Maria)
Appraisal district Web site	**www.karnescad.org/**
County Web site	**www.co.karnes.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
KAUFMAN—Kaufman	
Designated sale site	Front steps of courthouse
Appraisal district Web site	**www.kaufman-cad.org/**
County Web site	**www.kaufmancounty.net/**
KENDALL—Boerne	
Designated sale site	Main entrance of courthouse, 201 E. San Antonio Street
Appraisal district Web site	**www.kendallad.org/**
County Web site	**www.co.kendall.tx.us/**
KENEDY—Sarita	
Designated sale site	East door of courthouse steps
Appraisal district Web site	**www.taxnetusa.com/texas/kenedy/**
County Web site	**www.co.kenedy.tx.us/**
KENT—Jayton	
Designated sale site	Front steps of courthouse
Appraisal district Web site	**www.kentcad.org/**
KERR—Kerrville	
Designated sale site	Steps in front of courthouse
Appraisal district Web site	**www.kerrcad.org/**
County Web site	**www.co.kerr.tx.us/**
KIMBLE—Junction	
Designated sale site	Steps of west door of courthouse
Appraisal district Web site	**www.kimblecad.org/**
County Web site	**www.co.kimble.tx.us/**
KING—Guthrie	
Designated sale site	West door of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/king/**
KINNEY—Brackettville	
Designated sale site	Main courthouse entrance facing James Street, on northeast side of building
Appraisal district Web site	**www.kinneycad.org/**
County Web site	**www.co.kinney.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
KLEBERG—Kingsville	
Designated sale site	West entrance of courthouse
Appraisal district Web site	**www.klebergcad.org/**
County Web site	**www.co.kleberg.tx.us/**
KNOX—Benjamin	
Designated sale site	South steps of courthouse or inside foyer of courthouse in case of inclement weather
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=knoxcad**
County Web site	**www.knoxcountytexas.org/**

L

LAMAR—Paris	
Designated sale site	East foyer, just inside first floor east entrance of courthouse
Appraisal district Web site	**http://lamarcad.org/**
County Web site	**www.co.lamar.tx.us/**
LAMB—Littlefield	
Designated sale site	Front door on north side of courthouse
Appraisal district Web site	**www.lambcad.org/**
County Web site	**www.co.lamb.tx.us/**
LAMPASAS—Lampasas	
Designated sale site	West entrance of courthouse
Appraisal district Web site	**www.lampasascad.org/**
County Web site	**www.co.lampasas.tx.us/**
LA SALLE—Cotulla	
Designated sale site	East side of entrance of courthouse
Appraisal district Web site	**www.lasallecad.com/**
County Web site	**www.lasallecountytx.org/**
LAVACA—Hallettsville	
Designated sale site	East steps of courthouse
Appraisal district Web site	**www.lavacacad.com/**
County Web site	**www.co.lavaca.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
LEE—Giddings	
Designated sale site	Northeast corner of courthouse
Appraisal district Web site	**www.lee-cad.org/**
County Web site	**www.co.lee.tx.us/**
LEON—Centerville	
Designated sale site	Southeast doors of District Court Building
Appraisal district Web site	**www.leoncad.org/**
County Web site	**www.co.leon.tx.us/**
LIBERTY—Liberty	
Designated sale site	Front steps on south side of courthouse, 1923 Sam Houston
Appraisal district Web site	**www.libertycad.com/**
County Web site	**www.co.liberty.tx.us/**
LIMESTONE—Groesbeck	
Designated sale site	Front door of courthouse
Appraisal district Web site	**www.limestonecad.com/**
County Web site	**www.co.limestone.tx.us/**
LIPSCOMB—Lipscomb	
Designated sale site	West porch and steps of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=lipscombcad**
County Web site	**www.co.lipscomb.tx.us/**
LIVE OAK—George West	
Designated sale site	Front steps of courthouse
Appraisal district Web site	**www.liveoakappraisal.com/**
County Web site	**www.co.live-oak.tx.us/**
LLANO—Llano	
Designated sale site	South door of courthouse
Appraisal district Web site	**www.llanocad.net/**
County Web site	**www.co.llano.tx.us/**
LOVING—Mentone	
Designated sale site	100 Bell Street, east door
Appraisal district Web site	**http://lovingcad.org/**
County Web site	**www.lovingcountytexas.com/**

County/County Seat	*Designated Sale Site and Web Site Information*
LUBBOCK—Lubbock	
Designated sale site	Gazebo on front lawn of courthouse or auditorium on second floor of 916 Main Building in case of inclement weather or commissioners courtroom if auditorium is not available
Appraisal district Web site	**www.lubbockcad.org/Appraisal/PublicAccess/**
County Web site	**www.co.lubbock.tx.us/**
LYNN—Tahoka	
Designated sale site	Steps on north side of courthouse
Appraisal district Web site	**www.lynncad.org/**
County Web site	**www.co.lynn.tx.us/**

M

MADISON—Madisonville	
Designated sale site	First-floor foyer in front of county clerk's office, room 102
Appraisal district Web site	**www.madisoncad.org/**
County Web site	**www.co.madison.tx.us/**
MARION—Jefferson	
Designated sale site	Austin Street courthouse door
Appraisal district Web site	**www.marioncad.org/**
County Web site	**www.co.marion.tx.us/**
MARTIN—Stanton	
Designated sale site	At or about bulletin board inside northeast entrance of courthouse
Appraisal district Web site	**www.martincad.org/**
County Web site	**www.martincountytexas.us/**
MASON—Mason	
Designated sale site	Steps outside south entrance of courthouse or district courtroom in case of inclement weather, provided that a person is stationed at primary designated place to direct any interested person to alternate site
Appraisal district Web site	**www.masoncad.org/**
County Web site	**www.co.mason.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
MATAGORDA—Bay City	
Designated sale site	North foyer of courthouse
Appraisal district Web site	**www.matagorda-cad.org/**
County Web site	**www.co.matagorda.tx.us/**
MAVERICK—Eagle Pass	
Designated sale site	Steps at front of courthouse, on Quarry Street
Appraisal district Web site	**www.maverickcad.org/**
County Web site	**www.co.maverick.tx.us/**
McCULLOCH—Brady	
Designated sale site	South side steps/porch of courthouse
Appraisal district Web site	**www.mccullochcad.org/**
County Web site	**www.co.mcculloch.tx.us/**
McLENNAN—Waco	
Designated sale site	Top of the outside steps to the second floor in front of the McLennan County Courthouse—501 Washington Ave., Waco, TX 76701
Appraisal district Web site	**www.mclennancad.org/**
County Web site	**www.co.mclennan.tx.us/**
McMULLEN—Tilden	
Designated sale site	County commissioners courtroom in courthouse
Appraisal district Web site	**www.mcmullencad.org/**
County Web site	**www.co.mcmullen.tx.us/**
MEDINA—Hondo	
Designated sale site	Area in front of north door of courthouse
Appraisal district Web site	**www.medinacountytexas.org/**
County Web site	**www.medinacountytexas.org/**
MENARD—Menard	
Designated sale site	Outside north door of courthouse facing American Legion Park, including steps and porch
Appraisal district Web site	**www.menardcad.org/**
County Web site	**www.co.menard.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
MIDLAND—Midland	
Designated sale site	South entrance of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=midlandcad**
County Web site	**www.co.midland.tx.us/**
MILAM—Cameron	
Designated sale site	East door of courthouse
Appraisal district Web site	**http://milamad.org/**
County Web site	**www.milamcounty.net/**
MILLS—Goldthwaite	
Designated sale site	North porch of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=millscad**
County Web site	**www.co.mills.tx.us/**
MITCHELL—Colorado City	
Designated sale site	Lobby on first floor of courthouse, at east doors or front steps of courthouse if courthouse is closed for holiday
Appraisal district Web site	**www.mitchellcad.org/**
County Web site	**www.mitchellcountytexas.us/**
MONTAGUE—Montague	
Designated sale site	East entrance to courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey= montaguecad**
County Web site	**www.co.montague.tx.us/**
MONTGOMERY—Conroe	
Designated sale site	Commissioners courtroom, 501 N. Thompson, 4th Floor, Suite 402, Conroe, TX or courthouse steps, 301 N. Main, Conroe TX, in case of county holiday
Appraisal district Web site	**www.mcad-tx.org/**
County Web sites	**www.co.montgomery.tx.us/**
MOORE—Dumas	
Designated sale site	Center area of hall on first floor of courthouse
Appraisal district Web site	**www.moorecad.org/**
County Web site	**www.co.moore.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
MORRIS—Daingerfield	
Designated sale site	East door of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=morriscad**
County Web site	**www.co.morris.tx.us/**
MOTLEY—Matador	
Designated sale site	South entrance of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=motleycad**

N

NACOGDOCHES—Nacogdoches	
Designated sale site	Within 25 feet (inside or outside) of outside door of courthouse leading to county courtroom and county clerk's office (northeast side of courthouse)
Appraisal district Web site	**www.nacocad.org/**
County Web site	**www.co.nacogdoches.tx.us/**
NAVARRO—Corsicana	
Designated sale site	East entrance, Navarro Center, 800 N. Main
Appraisal district Web site	**www.navarrocad.com/**
County Web site	**www.co.navarro.tx.us/**
NEWTON—Newton	
Designated sale site	East door of courthouse
Appraisal district Web site	**www.newtoncad.org/**
County Web site	**www.co.newton.tx.us/**
NOLAN—Sweetwater	
Designated sale site	Lobby of courthouse
Appraisal district Web site	**www.nolan-cad.org/**
County Web site	**www.co.nolan.tx.us/**
NUECES—Corpus Christi	
Designated sale site	South entrance of courthouse facing Lipan Street
Appraisal district Web site	**www.ncadistrict.com/**
County Web site	**www.co.nueces.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
	O
OCHILTREE—Perryton	
Designated sale site	Main entrance to courthouse
Appraisal district Web site	**http://184.168.82.228/Ochiltreecad/Default.aspx**
County Web site	**www.co.ochiltree.tx.us/**
OLDHAM—Vega	
Designated sale site	East steps of courthouse at east entrance
Appraisal district Web site	**www.taxnetusa.com/texas/oldham/**
County Web site	**www.co.oldham.tx.us/**
ORANGE—Orange	
Designated sale site	Back door of courthouse
Appraisal district Web site	**www.orangecad.net/Appraisal/PublicAccess/**
County Web site	**www.co.orange.tx.us/**
	P
PALO PINTO—Palo Pinto	
Designated sale site	Exterior steps at south-facing courthouse door
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey= palopintocad**
County Web site	**www.co.palo-pinto.tx.us/**
PANOLA—Carthage	
Designated sale site	Steps on east side of courthouse
Appraisal district Web site	**www.panolacad.org/**
County Web site	**www.co.panola.tx.us/**
PARKER—Weatherford	
Designated sale site	Area immediately outside south door and main entrance of district court building
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=parkercad**
County Web site	**www.co.parker.tx.us/ips/cms**
PARMER—Farwell	
Designated sale site	Main front door on lower level of south side of courthouse
Appraisal district Web site	**www.parmercad.org/**
County Web site	**www.co.parmer.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
PECOS—Fort Stockton	
Designated sale site	East steps of courthouse
Appraisal district Web site	**www.pecoscad.org/**
County Web site	**www.co.pecos.tx.us/**
POLK—Livingston	
Designated sale site	Posting board inside north entrance of courthouse
Appraisal district Web site	**www.polkcad.org/**
County Web site	**www.co.polk.tx.us/**
POTTER—Amarillo	
Designated sale site	Steps of west entrance of courthouse
Appraisal district Web site	**www.prad.org/**
County Web site	**www.co.potter.tx.us/**
PRESIDIO—Marfa	
Designated sale site	Front door at steps of courthouse
Appraisal district Web site	**www.presidiocad.org/**

R

RAINS—Emory	
Designated sale site	Within 20-foot radius of east door of courthouse
Appraisal district Web site	**www.rainscad.org/**
County Web site	**www.co.rains.tx.us/**
RANDALL—Canyon	
Designated sale site	Area on first floor of courthouse south of glass doors connecting 1909 courthouse to County Square North Building
Appraisal district Web site	**www.prad.org/**
County Web site	**www.randallcounty.org/**
REAGAN—Big Lake	
Designated sale site	Vestibule area immediately inside front door on south side of courthouse
Appraisal district Web site	**www.reagancad.org/**
County Web site	**http://proagency.tripod.com/reagancounty.html**

County/County Seat	*Designated Sale Site and Web Site Information*
REAL—Leakey	
Designated sale site	Main, south, outside entrance to courthouse
Appraisal district Web site	**www.realcad.org/**
County Web site	**www.co.real.tx.us/**
RED RIVER—Clarksville	
Designated sale site	Hallway inside east door of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/redriver/**
County Web site	**www.co.red-river.tx.us/**
REEVES—Pecos	
Designated sale site	Front door at steps of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=reevescad**
County Web site	**www.reevescountytexas.net/**
REFUGIO—Refugio	
Designated sale site	Front porch of courthouse, on easterly side of courthouse facing Commerce Street
Appraisal district Web site	**www.refugiocad.org/**
County Web site	**www.co.refugio.tx.us/**
ROBERTS—Miami	
Designated sale site	South porch of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/roberts/**
County Web site	**www.co.roberts.tx.us/**
ROBERTSON—Franklin	
Designated sale site	South door of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/robertson/**
County Web site	**www.co.robertson.tx.us/**
ROCKWALL—Rockwall	
Designated sale site	Area immediately outside the south door of the Government Center, 1101 Ridge Road
Appraisal district Web site	**www.rockwallcad.com/**
County Web site	**www.rockwallcountytexas.com/**

County/County Seat	*Designated Sale Site and Web Site Information*
RUNNELS—Ballinger	
Designated sale site	Area outside front door of courthouse, which faces U.S. Highway 67 (Hutchings Avenue), including front landing and steps
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=runnelscad**
County Web site	**www.co.runnels.tx.us/**
RUSK—Henderson	
Designated sale site	Foyer at north Main Street entrance of courthouse
Appraisal district Web site	**www.ruskcad.org/**
County Web site	**www.co.rusk.tx.us/**

S

SABINE—Hemphill	
Designated sale site	Front steps on north side of courthouse
Appraisal district Web site	**www.sabine-cad.org/**
County Web site	**www.co.sabine.tx.us/**
SAN AUGUSTINE—San Augustine	
Designated sale site	Northeast corner of courthouse square at Stripling Pavilion
Appraisal district Web site	**www.sanaugustinecad.org/**
County Web site	**www.co.san-augustine.tx.us/**
SAN JACINTO—Coldspring	
Designated sale site	North end of courthouse
Appraisal district Web site	**www.sjcad.org/**
County Web site	**www.co.san-jacinto.tx.us/**
SAN PATRICIO—Sinton	
Designated sale site	First floor of courthouse, at south entrance, between glass doors in vestibule
Appraisal district Web site	**www.spcad-egov.org/**
County Web site	**www.co.san-patricio.tx.us/**
SAN SABA—San Saba	
Designated sale site	South steps of courthouse
Appraisal district Web site	**www.sansabacad.org/**
County Web site	**www.co.san-saba.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
SCHLEICHER—Eldorado	
Designated sale site	South door of courthouse
Appraisal district Web site	**http://propaccess.trueautomation.com/clientdb/?cid=5**
County Web site	**www.co.schleicher.tx.us/**
SCURRY—Snyder	
Designated sale site	North steps of courthouse
Appraisal district Web site	**www.scurrytex.com/**
County Web site	**www.co.scurry.tx.us/**
SHACKELFORD—Albany	
Designated sale site	East door of courthouse
Appraisal district Web site	**www.shackelfordcad.com/**
County Web site	**www.co.shackelford.tx.us/**
SHELBY—Center	
Designated sale site	Area within 100-foot radius of southeastern door of house provided for holding district court
Appraisal district Web site	**www.shelbycad.com/**
County Web site	**www.co.shelby.tx.us/**
SHERMAN—Stratford	
Designated sale site	Foyer at front door of courthouse
Appraisal district Web site	**www.shermancad.org/**
County Web site	**www.co.sherman.tx.us/**
SMITH—Tyler	
Designated sale site	Within 25 feet of and including outside steps and main hall of west entrance of courthouse
Appraisal district Web site	**www.smithcad.org/**
County Web site	**www.smith-county.com/**
SOMERVELL—Glen Rose	
Designated sale site	East door of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=somervellcad**
County Web site	**www.co.somervell.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
STARR—Rio Grande City	
Designated sale site	Front steps of south side entrance to courthouse
Appraisal district Web site	**www.starrcad.org/**
County Web site	**www.co.starr.tx.us/**
STEPHENS—Breckenridge	
Designated sale site	Steps at south entrance (sometimes referred to as Walker Street entrance) of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=stephenscad**
County Web site	**www.co.stephens.tx.us/**
STERLING—Sterling City	
Designated sale site	Front steps of courthouse
Appraisal district Web site	**www.sterlingcad.org/**
County Web site	**www.co.sterling.tx.us/**
STONEWALL—Aspermont	
Designated sale site	Steps on front entrance on south side of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/stonewall/**
County Web site	**www.stonewallcountytexas.us/**
SUTTON—Sonora	
Designated sale site	Front (south) courthouse steps facing Water Street
Appraisal district Web site	**http://suttoncad.com/**
County Web site	**www.co.sutton.tx.us/**
SWISHER—Tulia	
Designated sale site	Steps inside west entrance of courthouse
Appraisal district Web site	**www.swisher-cad.org/**
County Web site	**www.co.swisher.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*

T

TARRANT—Fort Worth

Location for filing notice	County Clerk's Office, 100 W. Weatherford Street, Room 130, Fort Worth, TX 76196-0401
Location for posting notice	County courthouse basement, 100 W. Weatherford Street
Filing/posting notice on holidays	No special procedure in place
Designated sale site	East steps of courthouse
Designated sale site on holidays	No special procedure in place
Person responsible for posting	Person filing notice
Hours bulletin board accessible	Monday–Friday, 8:00 A.M.–5:00 P.M.
County clerk's office hours	Monday–Friday, 8:00 A.M.–5:00 P.M.
Appraisal district Web site	**www.tad.org/**
County Web sites	**www.tarrantcounty.com/** **www.co.tarrant.tx.us/**

TAYLOR—Abilene

Designated sale site	Lobby of southeast entrance of courthouse and adjacent exterior upper porch area
Appraisal district Web site	**www.taylor-cad.org/**
County Web site	**www.taylorcountytexas.org/**

TERRELL—Sanderson

Designated sale site	Front steps on south side of courthouse
Appraisal district Web site	**www.terrellcad.org/**
County Web site	**www.co.terrell.tx.us/**

TERRY—Brownfield

Designated sale site	Outside north door of courthouse or inside north door of courthouse in case of inclement weather
Appraisal district Web site	**www.taxnetusa.com/texas/terry/**
County Web site	**www.co.terry.tx.us/**

THROCKMORTON—Throckmorton

Designated sale site	East entrance hallway of first floor of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/throckmorton/**
County Web site	**www.co.throckmorton.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*
TITUS—Mount Pleasant	
Designated sale site	North entrance of courthouse
Appraisal district Web site	**www.titus-cad.org/**
County Web site	**www.co.titus.tx.us/**
TOM GREEN—San Angelo	
Designated sale site	Foyer of the Edd B. Keyes building or south entrance of the Keyes building if the building is closed
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=tomgreencad**
County Web site	**www.co.tom-green.tx.us/**
TRAVIS—Austin	
Location for filing notice	5501 Airport Boulevard, Suite B100, Austin, TX 78751
Location for posting notice	County courthouse bulletin board, inside, first floor
Filing/posting notice on holidays	No special procedure in place
Designated sale site	West steps of courthouse
Designated sale site on holidays	No special procedure in place
Person responsible for posting	Person filing notice
Hours bulletin board accessible	Monday–Friday, 8:00 A.M.–5:00 P.M.
County clerk's office hours	Monday–Friday, 8:00 A.M.–5:00 P.M.
Appraisal district Web site	**www.traviscad.org/**
County Web site	**www.co.travis.tx.us/**
TRINITY—Groveton	
Designated sale site	Front center steps of courthouse
Appraisal district Web site	**www.trinitycad.net/**
County Web site	**www.co.trinity.tx.us/**
TYLER—Woodville	
Designated sale site	Under the stairs of the north entrance of courthouse
Appraisal district Web site	**www.tylercad.net/**
County Web site	**www.co.tyler.tx.us/**

County/County Seat	*Designated Sale Site and Web Site Information*

U

UPSHUR—Gilmer

Designated sale site	South (Highway 154) entry of courthouse
Appraisal district Web site	**www.upshur-cad.org/**
County Web site	**www.countyofupshur.com/**

UPTON—Rankin

Designated sale site	Steps of south door of courthouse
Appraisal district Web site	**http://uptoncad.org/**
County Web site	**www.co.upton.tx.us/**

UVALDE—Uvalde

Designated sale site	Steps on east side of courthouse
Appraisal district Web site	**www.uvaldecad.org/**
County Web site	**www.uvaldecounty.com/**

V

VAL VERDE—Del Rio

Designated sale site	Front steps of courthouse
Appraisal district Web site	**http://valverdecad.org/**
County Web site	**www.valverdecounty.org/**

VAN ZANDT—Canton

Designated sale site	Steps on north side of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey= vanZandtcad**
County Web site	**www.vanzandtcounty.org/**

VICTORIA—Victoria

Designated sale site	Area in front of east door of courthouse facing North Bridge Street
Appraisal district Web site	**www.victoriacad.org/**
County Web site	**www.victoriacountytx.org/**

County/County Seat	*Designated Sale Site and Web Site Information*

W

WALKER—Huntsville

Designated sale site	East entrance and adjacent areas of courthouse
Appraisal district Web site	**www.walkercountyappraisal.com/**
County Web site	**www.co.walker.tx.us/**

WALLER—Hempstead

Designated sale site	Foyer at south entrance to courthouse
Appraisal district Web site	**www.waller-cad.org/**
County Web site	**www.co.waller.tx.us/**

WARD—Monahans

Designated sale site	First-floor lobby at west front door of courthouse
Appraisal district Web site	**www.wardcad.org/**
County Web site	**www.co.ward.tx.us/**

WASHINGTON—Brenham

Designated sale site	South entrance of courthouse
Appraisal district Web site	**www.washingtoncad.org/Appraisal/PublicAccess/**
County Web site	**www.co.washington.tx.us/**

WEBB—Laredo

Designated sale site	Area just outside northwest first floor entrance to the Webb County Justice Center, 1110 Victoria Street
Appraisal district Web site	**www.webbcad.org/**
County Web site	**www.webbcounty.com/**

WHARTON—Wharton

Designated sale site	Outside front entrance of courthouse annex
Appraisal district Web site	**www.whartoncad.net/**
County Web site	**www.co.wharton.tx.us/**

WHEELER—Wheeler

Designated sale site	Intersection of north/south and east/west hallways on first floor of courthouse
Appraisal district Web site	**www.wheelercad.org/**
County Web site	**www.co.wheeler.tx.us/**

County/County Seat	***Designated Sale Site and Web Site Information***
WICHITA—Wichita Falls	
Designated sale site	South steps of courthouse
Appraisal district Web site	**www.wadtx.com/**
County Web site	**www.co.wichita.tx.us/**
WILBARGER—Vernon	
Designated sale site	West door of courthouse at top of steps
Appraisal district Web site	**www.wilbargerappraisal.org/**
County Web site	**www.co.wilbarger.tx.us/**
WILLACY—Raymondville	
Designated sale site	Front-door steps of courthouse, facing Hidalgo Avenue
Appraisal district Web site	**http://propaccess.trueautomation.com/clientdb/?cid=31**
County Web site	**www.co.willacy.tx.us/**
WILLIAMSON—Georgetown	
Designated sale site	Northeast lower-level door of Justice Center
Appraisal district Web site	**www.wcad.org/**
County Web site	**www.wilco.org/**
WILSON—Floresville	
Designated sale site	Most westerly courthouse door (faces Third Street)
Appraisal district Web site	**http://wilson-cad.org/**
County Web site	**www.co.wilson.tx.us/**
WINKLER—Kermit	
Designated sale site	Steps outside south doorway of courthouse
Appraisal district Web site	**www.taxnetusa.com/texas/winkler/**
County Web site	**www.co.winkler.tx.us/**
WISE—Decatur	
Designated sale site	Front door at southeast corner of courthouse
Appraisal district Web site	**www.isouthwestdata.com/client/webindex.aspx?dbkey=wisecad**
County Web site	**www.co.wise.tx.us/**
WOOD—Quitman	
Designated sale site	Front door on east side of courthouse
Appraisal district Web site	**www.woodcad.net/**
County Web site	**www.mywoodcounty.com/**

County/County Seat	*Designated Sale Site and Web Site Information*
	Y
YOAKUM—Plains	
Designated sale site	South front entrance of courthouse
Appraisal district Web site	**http://propaccess.trueautomation.com/clientdb/?cid=67**
County Web site	**www.co.yoakum.tx.us/**
YOUNG—Graham	
Designated sale site	Under portico at north entrance of courthouse
Appraisal district Web site	**www.youngcad.org/**
County Web site	**www.co.young.tx.us/**
	Z
ZAPATA—Zapata	
Designated sale site	Front doors of main courthouse entrance
Appraisal district Web site	**http://propaccess.trueautomation.com/clientdb/?cid=76**
County Web site	**www.co.zapata.tx.us/**
ZAVALA—Crystal City	
Designated sale site	Front doors on north side of courthouse, facing flagpoles and Uvalde Street
Appraisal district Web site	**http://zavalacad.com/**
County Web site	**www.co.zavala.tx.us/**

[Reserved]

Statutes and Rules Cited

[This index reflects only statutes and rules cited at text sections in the practice notes.]

Texas

Texas Constitution

Texas Business & Commerce Code

[Decimal numbers refer to *sections* in practice notes.]

[Decimal numbers refer to *sections* in practice notes.]

Texas Business Organizations Code

Texas Civil Practice & Remedies Code

[Decimal numbers refer to *sections* in practice notes.]

Texas Code of Criminal Procedure

Texas Estates Code

[Decimal numbers refer to *sections* in practice notes.]

Texas Family Code

Texas Finance Code

Texas Government Code

[Decimal numbers refer to *sections* in practice notes.]

Texas Health & Safety Code

Texas Insurance Code

Texas Labor Code

Texas Local Government Code

Texas Natural Resources Code

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Texas Occupations Code

Texas Property Code

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Texas Tax Code

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Texas Transportation Code

Texas Water Code

Texas Administrative Code

Texas Rules of Civil Procedure

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Texas Attorney General Opinions

State Bar Rules

Texas Disciplinary Rules of Professional Conduct

Ethics Opinions

UNITED STATES

United States Code

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Cases Cited

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LIST OF EFFECTIVE PAGES

This list shows the current version of each sheet that should be in the *Texas Foreclosure Manual*, third edition, after incorporating into it the 2015 supplement. After this supplement has been inserted, use this list to check the completeness of the manual. Only the right-hand pages are listed; next to each page number is the date of the current version of that sheet, which should be the same as the date printed in the lower right corner of the page, underneath the page number, in the manual. Pages that have not been replaced by supplementation do not bear dates. The first eight pages and the eleventh and twelfth pages in volume 1 (half-title page through State Bar of Texas officers and letter from the State Bar president) and the first four pages in volume 2 (half-title through copyright page) do not bear dates. Please note that pages xvii through xx are the List of Effective Pages and will be inserted in the manual after you have checked all other pages against this list.

It is often necessary to reprint pages with unchanged content because of the reflow of text following added, amended, or deleted text, and occasionally pages are reprinted to simplify the task of removing and replacing pages.

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* Please note that pages xvii through xx are the List of Effective Pages.

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Chapter 15