TEXAS FORECLOSURE MANUAL

Third Edition

Volume 1

William H. Locke, Jr.
Ralph Martin Novak, Jr.
G. Tommy Bastian

Austin 2014

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Third Edition, 2014

TEXAS FORECLOSURE MANUAL

Third Edition

WILLIAM H. LOCKE, JR.

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 recently retired. Formerly, he was 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.

G. Tommy Bastian

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.

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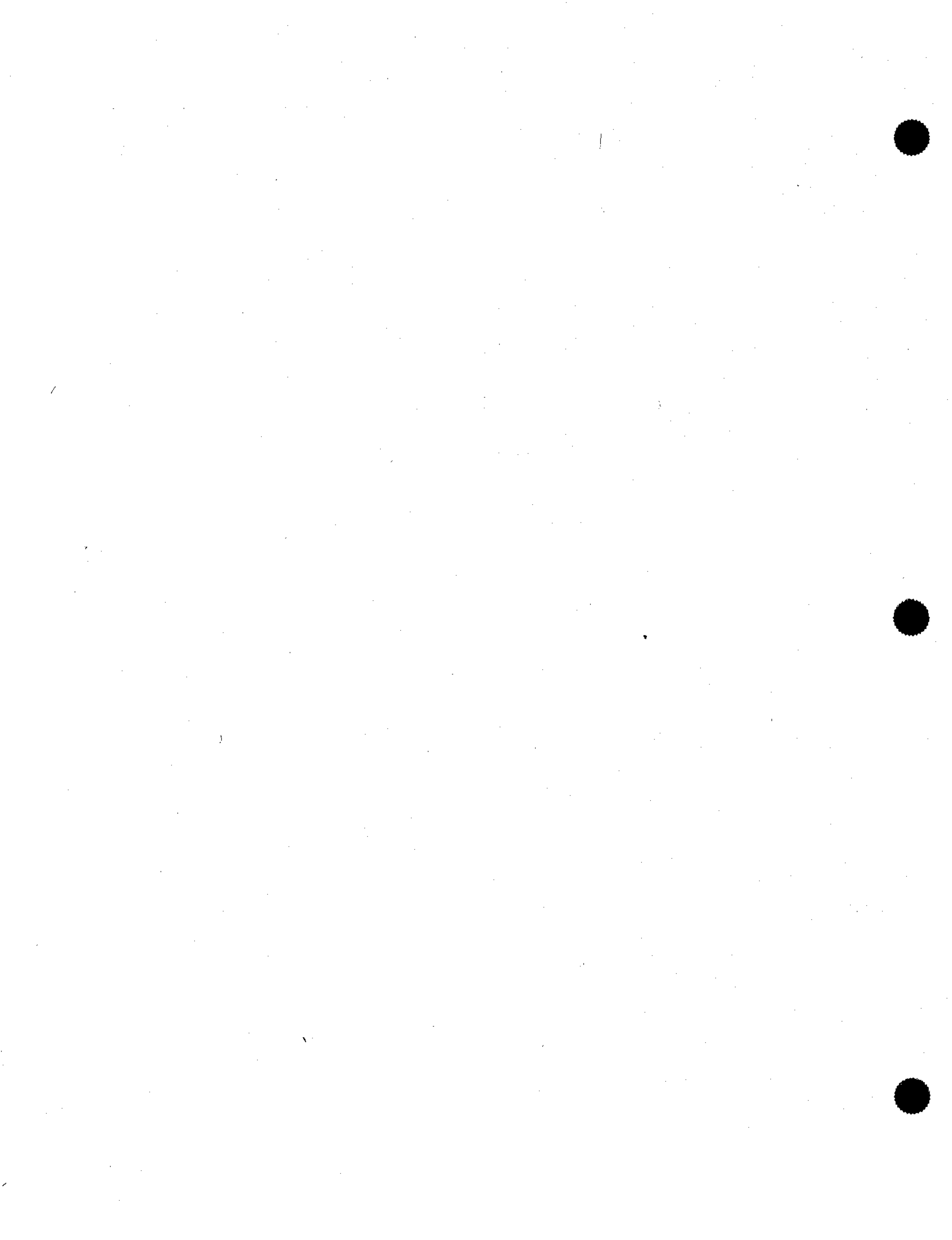
The State Bar of Texas is proud to publish this third edition of the *Texas Foreclosure Manual*. Originally published in 1991, this manual continues the tradition of being the premier resource for Texas lawyers whose practice includes foreclosures. It broadens the number of topics covered in the second edition, particularly in light of mortgage securitization.

Our sincere thanks are given to the editors, Bill Locke, Marty Novak, and Tommy Bastian, and the contributing authors who have labored diligently in bringing this expanded edition of the manual to fruition. The Bar is grateful for their generosity and commitment in producing this valuable contribution to the practice of law.

Lisa M. Tatum
President, State Bar of Texas



Preface

While representing numerous clients during the savings and loan and foreclosure crisis of the late 1980s and early 1990s, Bill Locke and Marty Novak recognized the need for a lawyers' guide to Texas foreclosure practice. For the last twenty-three years, beginning in 1991, Mr. Locke and Mr. Novak have devoted countless hours to writing, editing, and supplementing two editions of the State Bar's *Texas Foreclosure Manual.* Except from a harried lawyer who knew little about foreclosure but breathed a sigh of relief and a silent "thank you" when discovering the treasure trove of materials in the *Texas Foreclosure Manual,* Mr. Locke and Mr. Novak have worked on the manual with little fanfare or recognition.

Because securitization has radically changed mortgage banking and brought with it radical changes to foreclosure practices, Mr. Locke and Mr. Novak recognized the need for a new edition of the *Texas Foreclosure Manual* that melded the still relevant presecuritization materials from the first two editions of the manual with the new developments in foreclosure law caused by the mortgage banking meltdown and foreclosure crisis that began in 2008. The mechanics of conducting a foreclosure (that is, the demand, cure, acceleration, notice of sale, and public sale process outlined in the previous two editions) have remained the same. But the answers to questions like who has the authority to foreclose, whether the law pertaining to the note or the deed of trust controls the foreclosure process, the effect of the mortgage servicer replacing the owner or beneficiary of the note in foreclosure, the role of MERS in the foreclosure process, and the merits of new legal theories and defenses have changed significantly since the second edition of the manual was published.

This new third edition of the *Texas Foreclosure Manual* updates the current body of foreclosure law and practice and continues the tradition of serving as one of the premier guides on how to conduct a Texas foreclosure.

While Mr. Locke and Mr. Novak remain active as editors and contributors to the production of a new edition of the manual, the authorship and format of the third edition have changed significantly.

Adopting the motto that "a team that divides its tasks multiplies its success," twenty-one lawyers with hands-on, down-in-the-trenches experience in prosecuting or defending foreclosures on a daily basis agreed to contribute their foreclosure expertise by updating and drafting new chapters for the third edition of the *Texas Foreclosure Manual.* Consequently, anyone using the new edition of the manual will be guided by lawyers whose contribution to the manual is the result of actually handling hundreds of matters related to their area of foreclosure specialization.

Besides the introduction of new contributing authors to the manual, the format of the third edition has also changed. The first seventeen chapters provide a general overview of the various elements that are important to consider in conducting a foreclosure. The subsequent chapters compose the "how-to-do" section of the manual. In the final eighteen chapters, subject matter experts guide the reader through how to conduct a residential or commercial foreclosure and the more esoteric foreclosure areas like property owners association liens, reverse mortgages, and property tax loan foreclosures, and they address changes in specific areas of law, such as environmental issues affecting foreclosure, the Servicemembers Civil Relief Act, and the role of Mortgage Electronic Registrations Systems, Inc.

The objective of the third edition of the *Texas Foreclosure Manual* is to make it the best source of foreclosure expertise available. Lawyers—being lawyers—may not agree with the editors' and contributors' opinions on the law or how to handle certain aspects of a foreclosure. In this regard, we believe Thomas Jefferson's maxim: "An error in opinion can be tolerated if reason or methodology is free to correct the opinion." With this premise in mind, any reader may contact the editors with a written rejoinder so that any necessary clarification or correction can be made at TexasBarBooks, State Bar of Texas, P.O. Box 12487, Austin, Texas 78711-2487, **books@texasbar.com**.

Tommy Bastian, *General Editor*

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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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Practice notes and forms for use in a judicial foreclosure pursuant to rule 309 of the Texas Rules of Civil Procedure

21 Residential Foreclosure Process

Practice notes addressing the nonjudicial foreclosure process of residential real property

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Practice notes addressing the nonjudicial foreclosure process of commercial real property

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30 Property Owners Association Foreclosure Process

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37 Miscellaneous Topics

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Appendix A—IRS Collections Advisory Group Addresses and Counties by Areas

A listing of the three IRS Technical Service Group addresses in Texas with the counties composing each service group

Appendix B—Texas County Foreclosure Resources

Foreclosure sale sites and Internet resources for all 254 Texas counties

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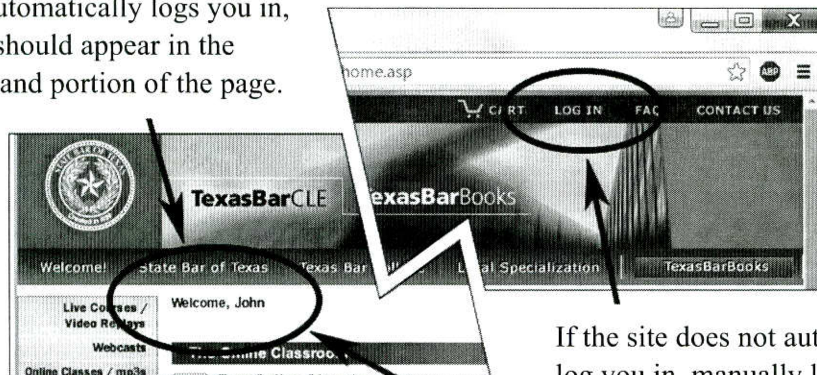

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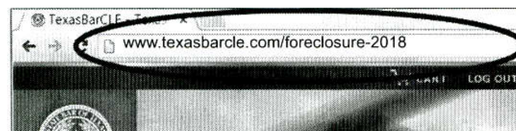

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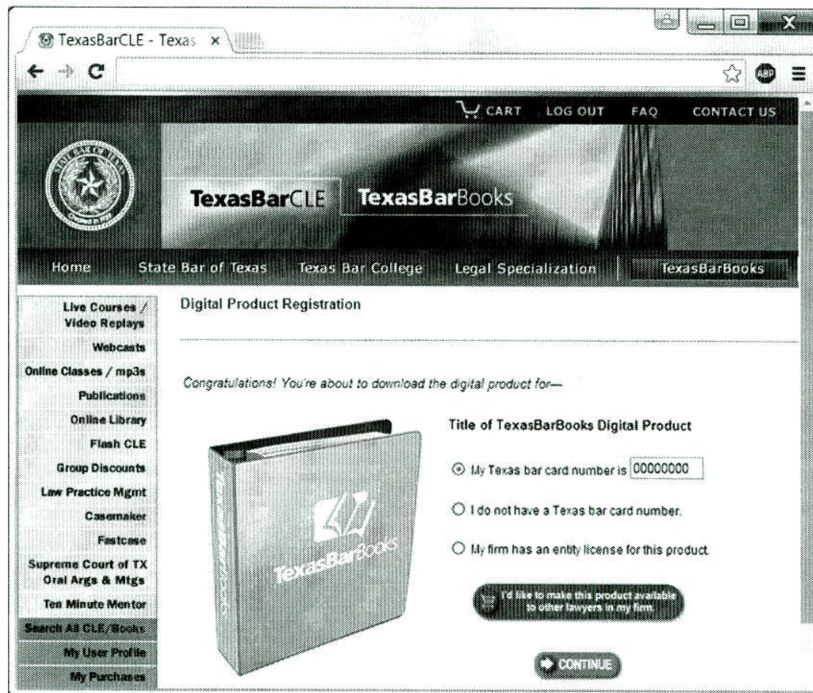

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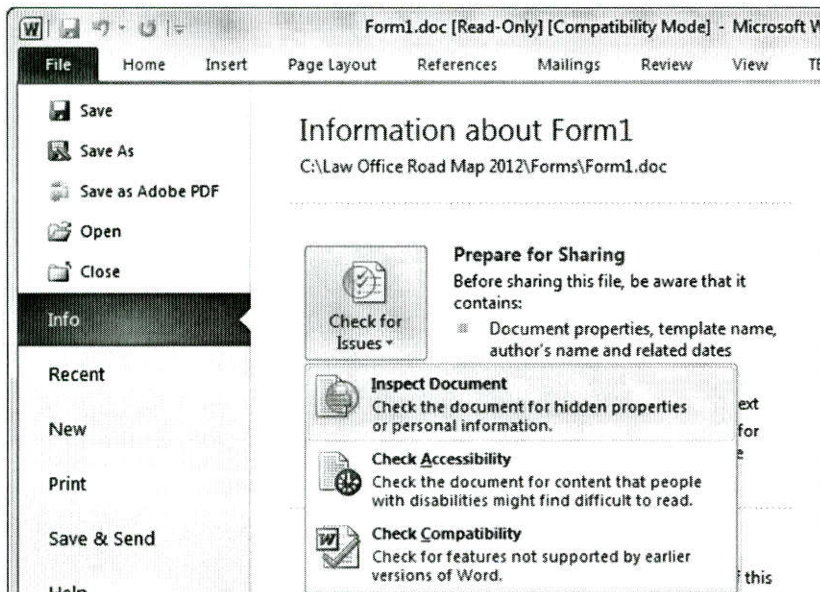

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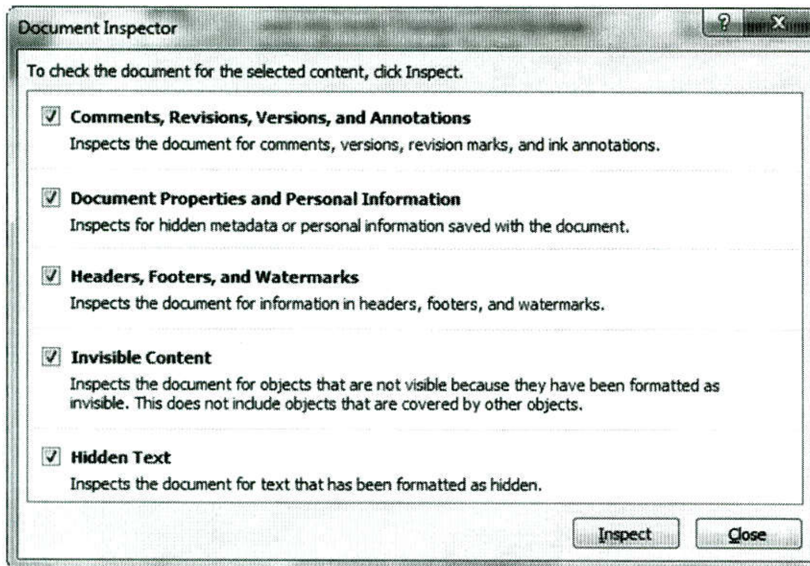

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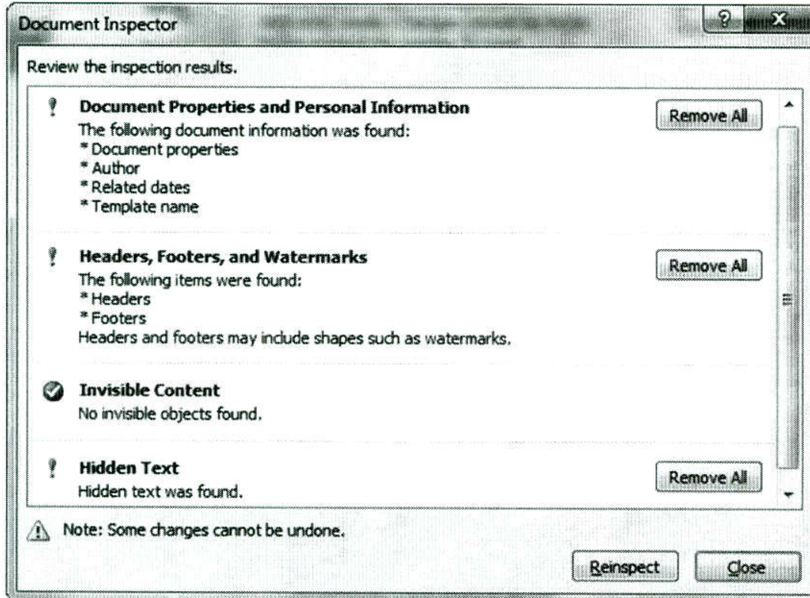

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Chapter 1

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 website 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

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refused to take the case. *See Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980). Further confusion may result if an attorney has a continuing or gratuitous relationship with a client. *Bresette v. Knapp*, 159 A.2d 329 (Vt. 1960).

§ 1.4:3 Refusing Representation

A potential client may believe that an attorney-client relationship is created by the initial interview. If the attorney decides not to represent a person, this should be made clear. The attorney should consider sending a letter to confirm that the proposed representation will not be undertaken. Form 1-1 in this manual is an example of a nonrepresentation letter. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d) requires the potential client's documents to be returned if the attorney's retaining them will prejudice the potential client. *See* Tex. Comm. on Prof'l Ethics, Op. 395 (1979). If the documents are particularly valuable, the attorney should consider having their receipt acknowledged.

§ 1.4:4 Advising Potential Client

If the attorney declines the representation, there is a question whether the attorney should advise the nonclient of any rights or statutes of limitation. Some attorneys, as a matter of policy, will advise nonclients of such matters if aware of them. Other attorneys believe that advice implies some representation of nonclients and therefore, as a matter of policy, do not offer any advice in nonrepresentation letters.

§ 1.5 Establishing Attorney-Client Relationship

§ 1.5:1 Disclosure of Conflicts

The attorney is assumed to have an adequate system to identify his clients, such as a list of all clients' names cross-indexed by case or transaction and naming all principals in each transaction. Typical fact situations raising conflict-of-interest concerns are (1) foreclosures in which the attorney represented multiple parties, typically the lender and the borrower at the time of the loan; (2) cases in which the attorney represented the lender but the borrower paid the attorney's legal fee; (3) cases in which the attorney is the trustee under the deed of trust and either (1) or (2) occurred; and (4) cases in which the attorney represented the borrower in the past and is now being asked to represent the foreclosing lender.

An attorney must disclose all potential conflicts before accepting employment and those that arise during the course of employment. Nonlitigation conflicts are addressed specifically in comments 13–16 to rule 1.06 of the Disciplinary Rules of Professional Conduct. Unfortunately, these comments merely provide examples and conclude that the question is "often one of proximity and degree." Tex. Disciplinary Rules Prof'l Conduct R. 1.06 cmt. 13. Relevant factors include the duration of the relationship and intimacy that an attorney has with a client, the duties performed, the likelihood a conflict will arise, and the likelihood of resulting prejudice.

The disclosure requirement includes all personal conflicts, conflicts with current clients, and conflicts with past clients.

§ 1.5:2 Prior Representation of Borrower and Lender

Informed Consent Necessary: A common conflict occurs when an attorney is asked by a lender to foreclose on a borrower's property after the attorney had represented both the lender and the borrower in the loan transaction. Comment 9 to rule 1.06 states:

> In certain situations, such as in the preparation of loan papers . . . a lawyer might have properly undertaken

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> multiple representation and be confronted subsequently by a dispute among those clients in regard to that matter. [Rule 1.06] forbids the representation of any of those parties in regard to that dispute unless informed consent is obtained from all of the parties to the dispute who had been represented by the lawyer in that matter.

Tex. Disciplinary Rules Prof'l Conduct R. 1.06 cmt. 9. The comments offer guidance for interpreting the rules; they do not add obligations to the rules and may not be the basis for disciplinary action.

Rule 1.07 prohibits a lawyer from acting as an intermediary unless each client consents in writing and the lawyer reasonably believes the clients can be adequately represented. Rule 1.09 states in part:

> (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
>
> (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
>
> (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
>
> (3) if it is the same or a substantially related matter.

Tex. Disciplinary Rules Prof'l Conduct R. 1.09(a). This rule applies to all members of the firm, even if the attorney who originally worked with the client is no longer with the firm.

In *Dillard v. Broyles*, 633 S.W.2d 636 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.), the same attorney represented both the buyer and the seller in a residential real estate transaction and was named the trustee in the deed of trust securing the buyer's note. The attorney, as the seller's representative, sent the notice of acceleration and notice of foreclosure sale to the buyer when the buyer defaulted. The attorney acted as the trustee and conducted the foreclosure sale. In a suit to set aside the trustee's deed, the buyer argued that the attorney was guilty of fraud by virtue of his dual representation in connection with the sale and loan closing. The court of appeals found, however, that the buyer had consented to the attorney's dual representation at the initial closing and the attorney-client relationship had terminated at the closing of the sale. *See Dillard*, 633 S.W.2d at 642–43; *see also Donaldson v. Mansel*, 615 S.W.2d 799 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (upholding attorney's right to serve as trustee under deed of trust and as attorney for mortgagee in collecting deficiency on secured debt).

These issues will be avoided if the attorney does not represent both the lender and the borrower at the time the loan originates. If the attorney represented the borrower before the lender requested representation, the attorney should obtain the borrower's written consent to represent only the lender in the loan transaction. This consent should specify that the attorney is authorized to foreclose on the deed of trust as the trustee and to represent the lender in collecting on the debt from the borrower. The attorney who continues to represent the borrower in other matters after the loan transaction, however, risks becoming aware of confidential information, creating further ethical problems. The attorney would be well advised not to represent the lender while continuing to represent the borrower.

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Mortgage Loan Broker Licensing: A licensed attorney who negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client is excluded from Finance Code chapter 156's licensing and regulation requirements, unless the attorney (1) takes a residential mortgage loan application and (2) offers or negotiates the terms of a residential mortgage loan. *See* Tex. Fin. Code § 156.202(a–1)(3). However, if the attorney is both taking the mortgage loan application on behalf of the prospective lender and negotiating the loan terms on behalf of the potential borrower, as discussed above, there is a significant potential conflict of interest between the two clients that must first be resolved by the attorney before he commences representation, separate and apart from the mortgage loan broker licensing requirement.

§ 1.5:3 Trustee as Witness

If there is a chance that the mortgagor will contest the foreclosure sale, the mortgagee's attorney who is the trustee in the deed of trust should consider having a substitute trustee (other than a member of the attorney's firm) appointed. Rule 3.08 prohibits the attorney and the attorney's firm from representing a party to the suit, if the attorney will be a material witness in the case. The attorney will not be permitted to be both a witness and an advocate in the same suit unless the testimony relates to an uncontested matter or the testimony is a matter of mere formality and there is no reason to believe substantial opposing testimony will be offered. Tex. Disciplinary Rules Prof'l Conduct R. 3.08.

§ 1.5:4 Legal Fees

Unconscionability: An attorney may not enter into an agreement for, charge, or collect an illegal or unconscionable fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a). A fee is unconscionable if a competent attorney could not form a reasonable belief that the fee is reasonable. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a). In borderline cases, the comments specify two indications of unconscionability: the attorney's overreaching with a client, especially one susceptible to such a practice, and the attorney's failing to give the client at the outset of the representation a clear explanation of how the fee will be calculated. Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 8. Rule 1.04(b) lists a number of factors that may be considered in determining the reasonableness of a fee.

Division of Fees: An attorney may not divide a fee with another attorney who is not a member or employee of the firm unless (1) the client knows of and does not object to the participation of the other attorney; (2) the division is made in proportion to services rendered, with a forwarding attorney, *or* by written agreement with the client, with an attorney who assumes joint responsibility for the representation; *and* (3) the aggregate fee is not unconscionable. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(f). An attorney may share fees with an "of counsel" attorney (Tex. Comm. on Prof'l Ethics, Op. 450 (1988)) or with a former partner or associate (Tex. Disciplinary Rules Prof'l Conduct R. 1.04(g)).

Trust Accounts: Fees paid in advance of the performance of work, as well as any of the client's other property that comes into the attorney's possession, must be held in trust by the attorney. Tex. Disciplinary Rules Prof'l Conduct R. 1.14. Attorneys must keep complete records of client account funds for at least five years after the conclusion of the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(a). If a client's funds either are of an amount or are held for a long enough time that the interest generated is likely to exceed the costs of setting up and maintaining an account, an individual account must be set up for the client. For a client's funds that are of a small amount or are likely to be held only for a short time, attorneys are required to maintain an interest-bearing

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account in which to pool the funds. Under the Interest on Lawyers' Trust Accounts (IOLTA) program, interest from these pooled accounts is paid to the Texas Access to Justice Foundation, which awards grants to organizations in Texas that serve the poor in civil legal matters. Attorneys must submit an annual IOLTA compliance statement to the foundation. Tex. State Bar R. art. XI, *reprinted* in Tex. Gov't Code Ann. tit. 2, subtit. G, app. A (West 2013). *See also* the Rules Governing the Operation of the Texas Access to Justice Program (reproduced in Texas Rules of Court—State).

§ 1.5:5 Engagement Agreements Detailing Fee Arrangements

The use of an engagement letter is encouraged. The engagement letter requires the attorney and the client to focus early in the process on the cost of foreclosure, the multiple deadlines involved in successfully getting to and through the "first Tuesday," and the background documentation and data required. All too often the attorney is hired on the twenty-fifth day before foreclosure without having been involved in the extensive workout or collection efforts attempted by the lender or even by other members of the attorney's firm. Typically, many of these matters are not discussed at the beginning of the foreclosure process because of the haste to "go post." Caution is merited, however, before exercising the remedies of acceleration without advance notification and nonjudicial foreclosure, both described by courts as the "harshest known to the law."

An engagement letter covers in general (1) a description of the scope of services; (2) a request for all loan documents, memoranda regarding the credit, and prior correspondence; (3) the basis for charging for services, including a range of fees for the initial scope of services; (4) a brief discussion of the need for a current appraisal of the mortgaged property and collateral; and (5) the transmittal of a checklist, foreclosure calendar, foreclosure questionnaire, and terms of engagement for legal services. See forms 1-2, 1-3, and 2-2 through 2-4 in this manual for examples. See also section 11.3 for a discussion of the appointment of substitute trustees. The foreclosure checklist should be established at the outset. The subject of fees should also be covered at that time. Rule 1.04(c) states, "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." Tex. Disciplinary Rules Prof'l Conduct R. 1.04(c).

§ 1.5:6 Charging for Time and Expenses

As implied in Tex. Disciplinary Rules Prof'l Conduct R. 1.04(c), the attorney's fee basis is established by an agreement between the attorney and the client. The attorney should, however, carefully outline the fee basis to avoid a client's misunderstanding later. For example, the attorney might advise the client that there will be a fee to recover time previously spent to develop a limited partnership form or to recover unbilled or unpaid time for research incurred on another matter.

§ 1.5:7 Record Retention and Destruction

Neither the rules nor Texas case law specify if, or for how long, an attorney must retain client records. To resolve the ambiguity, some attorneys adopt a record retention and destruction policy. If the existence of a policy is disclosed to the client in either the engagement letter or the closing letter, the client has the opportunity to obtain the records, and the attorney has some authority to dispose of the documents.

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§ 1.6 Representation of Client

§ 1.6:1 Duty to Keep Client Informed

Rule 1.03(a) requires an attorney to keep the client reasonably informed. In addition, the attorney has the duty to inform the client of relevant considerations and explain their legal significance to permit the client to make informed decisions. Tex. Disciplinary Rules Prof'l Conduct R. 1.03(b).

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, including the obvious; and to document the business decisions made by the client.

§ 1.6:2 Confidentiality

An attorney may not knowingly reveal a confidence or secret of a client or use such a confidence or secret to the attorney's advantage or for the advantage of a third person. Tex. Disciplinary Rules Prof'l Conduct R. 1.05(b). The ethical duty to preserve a client's confidence is much broader than the attorney-client evidentiary privilege. This duty applies even if there is not yet an established attorney-client relationship—for instance, when a client comes in for an initial interview. The obligation of confidentiality also continues after the termination of employment. Tex. Disciplinary Rules Prof'l Conduct R. 1.09(a)(2).

§ 1.6:3 Duty to Clarify Nonrepresentation

An attorney dealing on behalf of a client with a person not represented by an attorney may not imply that the attorney has no interest in the outcome of the matter. If the attorney believes an unrepresented person misunderstands the attorney's role, the attorney must correct this misunderstanding. Tex. Disciplinary Rules Prof'l Conduct R. 4.03.

§ 1.6:4 Contact with Opposing Counsel's Client

An attorney may not contact the client of opposing counsel. Tex. Disciplinary Rules Prof'l Conduct R. 4.02. The rules also prohibit an attorney from encouraging a client to talk to the opposing counsel's client, without opposing counsel's consent. *See* Tex. Disciplinary Rules Prof'l Conduct R. 4.02 cmt. 2.

There are legally required exceptions to rule 4.02, such as the sending of a foreclosure notice. Tex. Prop. Code § 51.002.

§ 1.7 Terminating Attorney-Client Relationship

§ 1.7:1 Termination by Parties

A client may always terminate the attorney-client relationship. An attorney must return any unearned portion of the fee and all pertinent papers and property. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d) & cmt. 4; Tex. Comm. on Prof'l Ethics, Op. 395 (1979). However, rule 1.15(d) specifically provides that an attorney may retain papers relating to the client to the extent permitted by law, but only if such retention will not prejudice the client in the subject matter of the representation. *See* Tex. Comm. on Prof'l Ethics, Op. 411 (1984).

An attorney also may terminate the relationship; however, the attorney has a duty to minimize any adverse effects to the client. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b), (d). It is good practice for an attorney to send a disengagement letter to record the date of the termination of the attorney-client relationship. See form 1-4 in this manual for an example of a disengagement letter.

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Mandatory Termination: Tex. Disciplinary Rules Prof'l Conduct R. 1.15(a) sets out the circumstances under which the attorney must terminate the relationship with the client. An attorney must withdraw if continued representation will result in a violation of one of the Texas Disciplinary Rules of Professional Conduct or another law or if the attorney's physical, mental, or psychological condition materially impairs the attorney's fitness to represent the client. The attorney must also withdraw when discharged. When terminating the attorney-client relationship before completing the work for which the client contracted, the attorney should review rule 1.15 to be sure that good cause for withdrawal exists.

Permissive Termination: Withdrawal is permissible under the circumstances listed in rule 1.15(b). The rule provides that an attorney may withdraw if the client fails substantially to fulfill an obligation to the attorney, including the obligation to pay the attorney's fee as agreed, *and* a reasonable warning has been given that the attorney will withdraw unless the obligation is fulfilled. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(5). See form 1-4 for an example of a letter terminating the attorney-client relationship because of nonpayment of fees. By accepting employment an attorney implicitly represents that the attorney will see the task through to conclusion. *Staples v. McKnight*, 763 S.W.2d 914 (Tex. App.—Dallas 1988, writ denied). By conditioning the commencement of work and continued performance on the payment of a fee, the attorney may avoid problems later.

§ 1.7:2 Termination Due to Other Considerations

The attorney-client relationship does not continue automatically once the purpose of the employment is completed. However, it is often difficult to determine when a matter is completed. Again, it is good practice to send a disengagement letter to record the date of the completion of employment. See form 1-5 in this manual for an example of a completion letter.

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Additional Resources

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Chapter 2

Getting Started—Information Required

The editors gratefully acknowledge S. Lee Stevenson, Jr. for his contribution to this chapter.

§ 2.1 Introduction

This chapter addresses in summary form the information the attorney should collect in connection with the client's request that the attorney enforce collection of a debt in default.

Once the attorney has established the attorney-client relationship, it is imperative that the attorney obtain copies of all the pertinent documents pertaining to the debt in default so that the attorney may fully understand the agreements between the borrower, the mortgagor, and the lender concerning the debt and the collateral. Without this understanding, it is not possible for the attorney to confirm (1) that the borrower or mortgagor is actually in breach of the loan agreement; (2) what procedures and remedies the borrower, the mortgagor, and the lender contractually agreed to in the event of a breach of the loan agreement; or (3) where and how the attorney is to communicate with the borrower or the mortgagor concerning the alleged breach. It is also essential that the attorney establish the procedures for ready contact with the client, as the attorney must anticipate that over the course of the legal representation communications from the borrower (such as a request for forbearance), challenges to the collection process (such as a usury accusation or a request for a temporary restraining order), or other unforeseen events may arise that require prompt consultation with the client.

§ 2.2 Beginning Representation

At the beginning of the representation, the attorney should define the scope of the legal services to be performed for the client so that there are no misunderstandings or disagreements about the scope and nature of the legal services that the attorney has agreed to perform for the client. At a minimum, the attorney should document the work the attorney has agreed to perform for the client and the fee the attorney will charge for the work. In many situations, the attorney may also want to document specific types of services that the attorney will *not* provide as part of the legal representation of the client, such as obtaining appraisals of the mortgaged property, obtaining environmental studies of the mortgaged property, bringing postforeclosure eviction actions, or bringing deficiency suits. Many institutional lenders and servicers (especially in the residential loan area) have software programs that manage and control foreclosure referrals and case progress. Accordingly, to prevent unexpected surprises when representing such clients, the attorney should verify early in the representation that the scope of the attorney's legal services and the means of communication between the attorney and the client conform to the client's mortgage servicing platform and computer protocols.

See chapter 1 in this manual for a discussion of establishing and documenting the attorney-client relationship, especially section 1.5:2 if the attorney has represented both the borrower and the lender.

§ 2.3 Verifying Client's Authority

A significant attorney-client issue that has come to the fore in recent years is the question of verifying that the client actually holds the authority

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to enforce the loan documents, execute the necessary appointments, and generally make the key business decisions that arise during the course of the legal representation. This issue is particularly troublesome in the area of securitized loans sold into the secondary market, where the servicing rights and the authority to enforce the loan documents are routinely separated from the actual ownership interests in the debt (see the discussion of Texas law concerning the authority of mortgage servicers in sections 2.5:6 and 6.3:7 in this manual), but the issue will also arise in connection with any loan owned (or participated in) by multiple lenders. The attorney should always make appropriate inquiry of the client to determine if any other persons "lie behind" the client and, if so, what agreements exist between the client and these third parties. As a related matter, the attorney may wish to clarify in writing with the client whether the attorney is expected to verify that all necessary assignments or transfers of liens in the chain of documents leading to the client are in proper order. Verification of the chain of transfers for loans in the Mortgage Electronic Registration Systems, Inc. (MERS) recording system can be done through the Internet, but this verification can be quite difficult for loans not in the MERS system. While Texas case law seems to hold that assignments of interest in promissory notes and liens are valid between the parties to the assignment without regard to whether the assignment instruments are recorded in the real property records, the failure to record such assignments may make it very difficult to actually reconstruct the chain of title, particularly if one or more of the persons in the chain is deceased or has ceased to do business. See sections 3.3:6, 10.3:5, and 10.27 and chapter 4 generally for further discussion of these title issues.

§ 2.4 Collecting Necessary Information

Although all major mortgage servicers and many other lenders have their own standard legal services referral forms, the attorney should have his own form instrument setting out the information the attorney desires from the client, as the attorney can use such a form as both a checklist for the information provided by the client under the client's own legal services referral form and as the operative document in the event the client does not have its own referral form. See the Loan Referral Questionnaire provided as form 2-1 in this manual for a detailed example of such a form. See also the Loan Referral Acknowledgment form provided as form 2-2, which can be used in conjunction with form 2-1.

The attorney's goal is to obtain from the client all the documents and information necessary for the attorney to plan and implement the steps necessary to enforce the loan documents. Documents and information that the attorney should review include, but are not limited to—

- executed copies of all documents evidencing the loan transaction (such as the promissory note, the deed of trust, and any notices or disclosures delivered at closing) and all subsequent amendments or modifications to such documents;
- full names and the most current contact and address information for all parties who are either currently obligated on the loan (whether as maker or as a guarantor or assumptor of the loan) or who granted a lien or security interest against the mortgaged property securing the loan;
- the information necessary to perform a Department of Defense search on each individual who is an obligor on the loan and/or a mortgagor, including either the Social Security number or birth date of each such individual (see chapter 33 in this manual concerning the Servicemembers Civil Relief Act);
- the loan payment history;

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- statements of the loan amounts in default (Note: Even if the client agrees that the attorney may rely on the statements and calculations performed by the client, it is recommended that the attorney attempt to verify the calculations, as demands for improper amounts may jeopardize the validity of the entire collection effort and expose the client to significant counterclaims. See, for example, the fair debt collection practices statutes discussed in chapter 7.);
- the loan file comments or communication record;
- the mortgagee's title insurance policy;
- lender/servicer title searches (if any) performed after the issuance of the mortgagee's title insurance policy;
- appraisals of the mortgaged property;
- all correspondence sent to the loan obligors and mortgagors prior to engagement of the attorney (especially correspondence regarding alleged defaults, demands to cure, notices of intent to accelerate, and notices of acceleration);
- all correspondence sent to the client/lender/servicer by the obligors or the mortgagors (Note: In addition to alerting the attorney to potential issues not evident on the face of the client's file, such correspondence may reveal that the obligors or the mortgagors have sent a change of address notice, and the failure to send notices to the correct addresses under the loan documents and any applicable statutes may invalidate the entire collection effort by the attorney and potentially expose the client to significant counterclaims);
- verification of who has custody of the original loan documents and physical possession of the promissory note; and
- any other information that the attorney deems helpful in light of the particular circumstances of the loan.

§ 2.5 Key Areas for Attorney Review

In reviewing the loan information, the attorney should pay particular attention to certain key areas.

§ 2.5:1 Loan Documents

The attorney should review all the original loan documents and all amendments and modifications thereto to understand the specific agreements of the parties with respect to what acts constitute a breach of the agreements, what remedies are available for breach, and what conditions, if any, must be met prior to exercise of the remedies for the breach (e.g., written notice of default and opportunity to cure). Additionally, loan documents almost invariably set out not only the respective addresses of the parties for all notices under the loan documents, but also the proper means of sending notices to a party (such as U.S. certified mail, overnight delivery by a national carrier, etc.).

While loan documents usually clearly define events of default, problems may arise when the contractual agreement of the parties in the loan documents exceeds or falls short of minimum standards established by statute. For example, the standard forms of promissory note and deed of trust used in residential loans intended for resale into the secondary market afford the borrower not less than thirty days to cure a default as a condition to the creditor's acceleration of the loan maturity. This contractual agreement for a thirty-day cure period will supersede the minimum twenty-day cure period for residential

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loans set out in Texas Property Code section 51.002. Moreover, the same forms of residential promissory note and deed of trust also provide that not only may the borrower cure the default *after* acceleration of maturity and thereby reinstate the loan, but that the borrower must also be given written notice of such right:

> Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument. . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice will result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration [under a different section of the loan document] and the right to bring a court action to assert the nonexistence of a default or any other defense of Borrower to acceleration and sale.

Commercial loans will vary much more widely than standard residential loan documents as to default, notice, and cure requirements because (unlike the residential loans) essentially every loan provision pertaining to default, notice, and cure is (at least in theory) open to negotiation by the parties to the particular transaction.

In short, the attorney must review every loan document to determine the specific requirements of the loan in question.

See chapter 5 in this manual for a discussion of promissory notes, chapter 6 for a discussion of deeds of trust, and chapter 7 for a discussion of consumer debt collection.

§ 2.5:2 Title Issues

It is essential that the attorney review both the documents in the chain of title leading up to the loan documents and any documents pertaining to the collateral that were filed after the loan closing. If the attorney merely reviews a summary or "run sheet" of instruments in the chain of title, the attorney may overlook key problems affecting the loan transaction. Common title problems affecting collection efforts include (1) discrepancies between the legal description in the deed by which the mortgagor took title to the mortgaged property and the legal description in the deed of trust executed by the mortgagor; (2) that the deed of trust omits persons owning an interest in the mortgaged property; (3) that priority liens (such as ad valorem tax liens) were filed after the loan closing; (4) that junior encumbrances requiring special notice to third parties (such as federal tax liens) were filed after the loan closing; and (5) that previously unknown prior liens are discovered through a preforeclosure title review.

Another potential title issue under Texas law is that, absent a contractual agreement to the contrary by the senior lienholder, a senior lienholder has no obligation to notify junior lienholders of a pending foreclosure sale; consequently, a junior lienholder client must constantly monitor the status of the senior lien to make sure that the client's junior lien is not extinguished by foreclosure of the prior lien. The attorney representing a junior lienholder should clarify early on whether this responsibility to monitor for senior lien postings is to be performed by the attorney or the client.

See chapter 4 in this manual for a general discussion of title matters.

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§ 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); 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.

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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):

____

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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: ____________________

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Form 2-3

The statutorily required foreclosure sale date is the first Tuesday of the month at least twenty-one days after posting of the public notice of sale and at least twenty-one days after mailing the certified mail notice to each debtor (makers and guarantors) at each debtor's last known address. Note, however, that if the first Tuesday occurs on January 1 or July 4, the sale date is the first Wednesday of the month. In counting the twenty-one days, the entire day of posting and/or mailing is counted, but the entire day of sale is excluded.

If the deed-of-trust collateral includes real property used as a residence by the debtor, by law the debtor must also be given twenty days' notice of default and opportunity to cure the default before acceleration of the maturity date of the debt, notwithstanding any agreement to the contrary in the loan documents. Note that if the promissory note or deed of trust affords the borrowers a longer time to cure the default before the loan can be accelerated, use that date. There are a number of deeds of trust that require the borrowers be given thirty days to cure the default prior to loan acceleration. The above dates are therefore subject to change if the collateral does in fact include the debtor's residence.

Foreclosure Calendar

Date	Action
[date]	Complete Attorney Engagement Letter and Terms of Engagement for Legal Services and send to the client
[date]	Send Foreclosure Referral Acknowledgment form to the client
[date]	Order a preforeclosure title report
[date]	Prepare and send the client an Appointment of Substitute Trustee form

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Date	Action
[date]	Proposed day to give notice demanding payment and giving notice of intent to accelerate loan if payment not made by proposed day to accelerate loan
[date]	Proposed day to accelerate loan; mail out the notice of acceleration if payment not made
[date]	Last day to conduct federal tax lien search
[date]	Last day to mail Notice of Foreclosure Sale to the Internal Revenue Service and any other party entitled to notice of the sale; this does not include the borrowers as they may have a different deadline for notice
[date]	Proposed day to post and file the Notice of Foreclosure Sale; send notices to the substitute trustees for posting and recording
[date]	Last day to post the Notice of Foreclosure Sale and mail the same to the borrowers and other parties such as guarantors who may be entitled to the notice
[date]	Foreclosure sale day
[date]	Prepare the deeds and send to the substitute trustees for signature and recording

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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 Com-

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merce 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-

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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.

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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);

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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*

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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.

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§ 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.

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§ 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

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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, 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

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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

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§ 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 foreclosure rather than go through the delay and expense of a trial. See the discussion of deficiencies at sections 13.7:2, 15.3, and 15.5, and the discussion of section 51.003 at sections 13.2:1, 13.7:2, 14.8:1 and 17.5 in this manual. The court

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in *Morrison* interpreted a deed in lieu of foreclosure coupled with an agreement by the lender-grantee to apply the net proceeds to be later derived from its subsequent sale of the property against the borrower's note. The court rejected the borrower's argument that it was entitled to a determination of the fair market value of the property under section 51.003 of the Texas Property Code to reduce the deficiency. The court also rejected the argument that the deed in lieu was a disguised mortgage with a power of sale. The court stated that adequate consideration existed for the deed in lieu of foreclosure sale, even though no credit was given at the time of the deed in lieu, as the mortgagor avoided the negative effect on its credit that a foreclosure would have had. *Morrison*, 266 S.W.3d at 94.

Adoption of section 51.006 of the Property Code has given additional comfort to lenders because it allows the lender to void the deed in lieu of foreclosure and proceed with foreclosure if undisclosed liens and encumbrances are subsequently discovered. *See* Tex. Prop. Code § 51.006(b). The statute further provides that the priority of the lender's deed of trust is not affected or impaired by the acceptance of the deed in lieu of foreclosure. Tex. Prop. Code § 51.006(d).

Disadvantages of Deed in Lieu: The deed in lieu of foreclosure is not free from problems. Unless voluntarily agreed to between the borrower and the lender, the transfer of the mortgaged property from the mortgagor to the lender, without a foreclosure sale, does not establish a value or determine the amount of the deficiency on the promissory note. Without an agreement about deficiency, the deed in lieu of foreclosure will probably be deemed an extinguishment of the debt. Before the revisions of the Uniform Commercial Code as adopted in the Texas Business and Commerce Code, Texas courts treated the retention by a secured party of personal property collateral without a foreclosure sale as an election to accept the collateral in full satisfaction of the debt. *See Tanenbaum v. Economics Laboratory*, 628 S.W.2d 769 (Tex. 1982). However, Texas Business and Commerce Code section 9.620 effectively supersedes the *Tanenbaum* decision. A secured party may accept the collateral in full or partial satisfaction only if the conditions of section 9.620(a) are met. *See* Tex. Bus. & Com. Code § 9.620(a). Likewise, a "purported or apparent acceptance of collateral" is ineffective unless the conditions of section 9.620(a) are met and the secured party consents to the acceptance in an authenticated record or sends the proposal to the debtor. Tex. Bus. & Com. Code § 9.620(b). Comment 5 to Texas Business and Commerce Code section 9.620 expressly provides that mere delay in collection or disposition of collateral does not constitute a "constructive" strict foreclosure. *See* Tex. Bus. & Com. Code § 9.620 cmt. 5. The State Bar committee comment to section 9.620 expressly states this "will change the result" in cases like *Tanenbaum*. See the State Bar committee comment to Texas Business and Commerce Code section 9.620.

In at least two cases, mortgagors have executed and recorded deeds without the consent of the lenders, apparently attempting to avoid foreclosures and deficiency judgments. The courts in both cases found the lenders' lack of acceptance of the deeds prevented the conveyances from being effective and allowed deficiency judgments against the borrowers. *See Martin v. Uvalde Savings & Loan Ass'n,* 773 S.W.2d 808 (Tex. App.—San Antonio 1989, no writ); *Hennessey v. Bell*, 775 S.W.2d 650 (Tex. App.—Corpus Christi 1988, writ denied).

Problem of Junior Lienholders and Other Junior Encumbrances: A deed in lieu of foreclosure is basically a sales transaction as of the date of the deed. A junior lienholder's right of redemption is not automatically extinguished as in the case of a foreclosure sale. *See Whiteside v. Bell*, 347 S.W.2d 568, 570 (Tex. 1961) (citing *R.B. Spencer & Co. v. May*, 78 S.W.2d

665 (Tex. Civ. App.—Waco 1935, writ ref'd)); *see also Jones v. Ford*, 583 S.W.2d 821, 823 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.) (citing *North Texas Building & Loan Ass'n v. Overton*, 86 S.W.2d 738, 741 (Tex. 1935)).

In *Flag-Redfern Oil Co. v. Humble Exploration Co.*, 744 S.W.2d 6 (Tex. 1987), after the date of the deed of trust, the mortgagor conveyed an undivided one-half interest in the minerals to Flag-Redfern's predecessor in title. After the mineral conveyance, the mortgagor conveyed the mortgaged property, including all the mineral estate, to the lender for the stated consideration of the satisfaction of the original debt. After Humble acquired the property from the successors in interest of the lender, Humble discovered the prior mineral conveyance and brought suit to determine ownership of the interest. The Texas Supreme Court held that the deed in lieu of foreclosure did not cut off the conveyance of the one-half interest in the mineral estate. Additionally, the court stated, "There is no such deed as a deed in lieu of foreclosure." *Flag-Redfern*, 744 S.W.2d at 8.

The court noted that "it would be unfair to allow parties to make private conveyances, although judicially efficient, to the detriment of unknowing parties by foreclosing their right to bid at a trustee sale; to redeem their interests; to insist on the marshalling of assets." The court also noted that notice is an integral part of judicial and nonjudicial foreclosure of a deed of trust. *Flag-Redfern*, 744 S.W.2d at 9.

The court further drew a distinction between cases involving a vendor's lien and those involving solely a deed-of-trust lien. The court concluded that deed-in-lieu transactions involving a vendor's lien include the right of rescission with the implied right to cut off the interests of intervening purchasers, whereas deed-of-trust transactions do not. *Flag-Redfern*, 744 S.W.2d at 9. (See also section 3.5:4 below, concerning vendor's liens.)

The court noted that the cases cited by *Humble* (*Jones*, 583 S.W.2d 821; *North Texas Building & Loan Ass'n*, 86 S.W.2d 738; and *Yett v. Houston Farms Development Co.*, 41 S.W.2d 305 (Tex. Civ. App.—Galveston 1931, writ ref'd)) would have supported a different result in *Flag-Redfern* had the "deed in lieu" been in satisfaction of a vendor's lien mortgage. The court stated that in such cases—

> [a] deed conveying land but coupled with a lien for the unpaid purchase money equates [to] an executory contract that will ripen into a title in the purchaser when the obligation to pay the purchase money is met. *Whiteside v. Bell*, 347 S.W.2d 568 (Tex. 1961). Default can lead to recission [sic] of the contract. This can be accomplished through foreclosure, or privately when the vendee executes a deed reconveying the property.

Flag-Redfern, 744 S.W.2d at 9.

But having accepted a deed in lieu of foreclosure, the lender/deed-in-lieu grantee in a deed-of-trust transaction may face an unpleasant choice, as it did in *Flag-Redfern*. Assuming the lender's right to foreclose is still legally available (as the court noted was the case in *Flag-Redfern*), to cut off the intervening interests, the lender would have to foreclose its lien and subject the property to public bidding. If the debt is not significant compared with the then-current market value of the mortgaged property, the lender may not be the high bidder, and significant surplus sales proceeds may remain that would have to be distributed to all successors to the borrower (in *Flag-Redfern*, for example, to both Humble and Flag-Redfern).

Ratification of Intervening Encumbrances: In *Kimsey v. Burgin*, 806 S.W.2d 571 (Tex. App.—San Antonio 1991, writ denied), the court held that the interest of a purchaser under a contract for deed survived a deed in lieu of fore-

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closure by its seller back to the seller's purchase-money lender. Even though *Kimsey* involved a vendor's lien with rights of rescission, the court found that the original landowner that reacquired the land by deed in lieu of foreclosure had ratified the contract. *Kimsey*, 806 S.W.2d at 574–75. Under the later adopted Texas Property Code section 51.006, the lender could arguably overturn this result by reinstating its lien and conducting a nonjudicial foreclosure.

Loans Secured by Debtor's Residence: It is unclear whether section 51.002 of the Texas Property Code requires that a certified mail notice of default be sent to the debtor on a loan secured by the debtor's residence if a deed in lieu is being proposed. Section 51.002(d) provides for such notice "[n]otwithstanding any agreement to the contrary." Tex. Prop. Code § 51.002(d).

Federal Tax Liens: A deed in lieu will be subject to any federal tax lien filed at least thirty days before the deed-in-lieu-of-foreclosure transaction. *See* 26 C.F.R. § 301.7425–2(a).

Tenants' Security Deposits: A deed in lieu of foreclosure may make the lender accountable for tenants' security deposits. Section 92.105(a) of the Texas Property Code provides that if there is a change in ownership, "the new owner is liable for the return of security deposits." Tex. Prop. Code § 92.105(a). However, section 92.105(c) provides, "Subsection (a) does not apply to a real estate mortgage lienholder who acquires title by foreclosure." Tex. Prop. Code § 92.105(c). Subsection (c) does not exempt deeds in lieu of foreclosure. *See* Tex. Prop. Code § 92.105(c). See section 4.15.

Other Problems: The lender accepting a deed in lieu of foreclosure may find itself subject to claims of fraud, duress, undue influence, misrepresentation, lack of consideration, preferential transfers by an insolvent debtor, and other attacks for which a nonjudicial foreclosure sale could also be set aside. *See Ulmer v. Ulmer*, 162 S.W.2d 944 (Tex. 1942).

Conducting Nonjudicial Foreclosure after Accepting Deed in Lieu of Foreclosure: Texas Property Code section 51.006 provides that the holder of a debt that accepts a deed in lieu of foreclosure in satisfaction of the debt may void the deed in lieu before the fourth anniversary of the date the deed in lieu is executed and foreclose under the original deed of trust if (1) the debtor failed to disclose to the holder 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 had no personal knowledge of the undisclosed lien or encumbrance. Tex. Prop. Code § 51.006(a), (b). Third parties may conclusively rely on an affidavit of the holder stating that the holder has voided the deed as provided under Property Code section 51.006. *See* Tex. Prop. Code § 51.006(c). If the holder voids the deed in lieu of foreclosure, the priority of the holder's deed of trust is not affected or impaired by the execution of the deed in lieu of foreclosure. Tex. Prop. Code § 51.006(d). The holder may both accept a deed in lieu of foreclosure and proceed with foreclosure under its deed of trust without electing to void the deed. The priority of the deed of trust is not affected or impaired by the deed in lieu of foreclosure. Tex. Prop. Code § 51.006(e).

The issues of what constitutes "disclosure" and "personal knowledge" and the relative priority of a judgment lien over the lien of a mortgagee, the security interest of a collateral assignee of the mortgagee, and title acquired by deed in lieu by the mortgagee are the subjects of the court's holding in two companion cases. *Joiner v. Pactiv Corp.*, No. 13-04-580-CV, 2005 WL 1907780 (Tex. App.—Corpus Christi Aug. 11, 2005, pet. denied) (mem. op.) (Joiner, mortgagee of DRC Distributors, accepted deed in lieu of foreclosure under deed of trust recorded before recording of abstract of judgment by Pac-

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tiv and without actual knowledge of filing of abstract of judgment at time of acceptance of deed in lieu and filing of release of its mortgage lien); *Cameron Life Insurance Co. v. Pactiv Corp.*, No. 13-05-760-CV, 2007 WL 2388906 (Tex. App.—Corpus Christi Aug. 23, 2007, pet. denied) (mem. op.) (Cameron Life, collateral assignee of Joiner, became subsequent mortgagee of Joiner after Joiner accepted deed in lieu from DRC). The court in these cases held that recording of the abstract of judgment imputed personal notice to the mortgagee.

Additionally, the mortgagee's execution of its release of the mortgagee's lien prevented it from establishing its lien as superior to the subsequently filed abstract of judgment.

Use of Undated Quitclaims and Deeds in Lieu of Deed of Trust: In the past, some Texas lenders have attempted to circumvent the time delays and procedures involved in foreclosing a deed of trust by requiring that at closing of the loan the borrower deliver a signed but undated quitclaim or deed conveying the mortgaged property to the lender. In the event of a subsequent default by the borrower, the lender would then date and file the instrument in the public records and thus acquire record title to the mortgaged property. The practitioner should review Texas Business and Commerce Code chapter 21, which regulates residential foreclosure consulting services, and chapter 21A, which regulates the execution of deeds in transactions involving residential real estate, such as expressly prohibiting a seller or lender in a *residential* real estate transaction from requiring that the purchaser or borrower execute a deed or quitclaim conveying the real estate back to the seller or lender as security. *See* Tex. Bus. & Com. Code § 21A.002(a), (c). Such instruments can be voided on an action brought within four years of the date the deed was recorded. *See* Tex. Bus. & Com. Code § 21A.002(c). The only statutory protections for third parties when such a deed is voided are for (1) successors in title to the purchaser who acquired the property without notice of the violation and (2) lenders who without notice of the violation extended credit based on a deed executed in violation of the statute. *See* Tex. Bus. & Com. Code § 21A.002(b). The statute also authorizes the attorney general to bring an action for civil penalties or injunctive relief against parties who procure such quitclaims and deeds. *See* Tex. Bus. & Com. Code § 21.003. Because of the four-year period in which to bring an action to void such instruments, if a deed or quitclaim to a lender is found in the chain of title to property, further investigation into the circumstances of that instrument is necessary to determine if the prior conveyance to the lender is subject to revocation.

Statute of Limitations: In the absence of acceleration of an installment note, a deed in lieu of foreclosure executed more than four years after the borrower stops installment payments is not barred under Tex. Civ. Prac. & Rem. Code § 16.035. *McCright v. Rodriguez*, No. 01-07-00480-CV, 2008 WL 2548814, at *2 (Tex. App.—Houston [1st Dist.] June 26, 2008, no pet.) (mem. op.).

§ 3.5 Unilateral Acts by Creditor to Take Control of All or Part of Mortgaged Property

If the parties are unable to reach an agreement for resolution of default, or if the lender believes the particular facts of the situation require immediate action, there are several unilateral actions the lender can take to seek either physical control or ownership of the mortgaged property.

§ 3.5:1 Enforcement of Assignment of Rents

The right to collect the rents and profits derived from the mortgaged property is potentially a very valuable right, and lenders routinely required that the rents and profits be pledged to

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the lender as collateral securing the loan. See chapter 9 in this manual for a discussion of the recent significant changes to Texas law concerning assignments of rent and the enforcement of such assignments.

§ 3.5:2 Mortgagee in Possession

A lender may take peaceable possession of mortgaged property prior to foreclosure only pursuant to an agreement with the mortgagor to such effect. *Wilhite v. Yount-Lee Oil Co.*, 140 S.W.2d 293, 296 (Tex. Civ. App.—Texarkana 1940, writ ref'd). In order for a lender's possession to be lawful, it must be peaceably and legally acquired; taken in good faith; free from deceit, fraud, or wrong; and without violation of any contract with the vendee. *Robinson v. Smith*, 128 S.W.2d 27, 30–31 (Tex. 1939).

The agreement to allow peaceable possession of the mortgaged property by the lender and the conditions for exercise of the right are typically set out in the deed of trust, but the agreement can be pursuant to a subsequent agreement with the mortgagor. *Pioneer Building & Loan Ass'n v. Cowan*, 123 S.W.2d 726, 730 (Tex. Civ. App.—Waco 1938, writ dism'd judgm't cor.); *see also Diversified, Inc. v. Walker*, 702 S.W.2d 717, 720 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Wilhite*, 140 S.W.2d at 296. In the absence of an agreement with the mortgagor, a mortgagee has no right to possession. *See Robinson*, 128 S.W.2d at 33.

§ 3.5:3 Nonjudicial Foreclosure

This entire manual is, of course, primarily concerned with nonjudicial foreclosure, which is the most common form of unilateral action by a lender to collect payment on a delinquent debt. The powers granted in a deed of trust to seek judicial or nonjudicial foreclosure in an event of default, and the right to commence with one remedy and before completion change to the other remedy, are extraordinarily valuable contract rights, and Texas courts do not readily let the borrower or mortgagor interfere with such rights. See for example, *Kasper v. Keller*, 466 S.W.2d 326 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.), where the court stated:

> [T]he mortgagor should not be permitted to destroy or impair the mortgagee's contractual right to foreclosure under the power of sale by the simple expedient of instituting a suit, whether groundless or meritorious, thereby compelling the mortgagee to abandon the extra-judicial foreclosure which he had a right to elect, nullifying his election, and permitting the mortgagor to control the option as to remedies.

Kasper, 466 S.W.2d at 329. See also *Stille v. Colborn*, 740 S.W.2d 42, 44 (Tex. App.—San Antonio 1987, writ denied), where the court held that the lender's failure to file a counterclaim seeking foreclosure of the deed of trust securing the note in a prior suit by the borrower/mortgagor did not preclude the lender from later seeking collection of the note and foreclosure of the liens securing the note.

§ 3.5:4 Rescission of Vendor's Lien

When an express vendor's lien is retained to secure unpaid purchase money, the vendor holds superior title and lien against the property conveyed and the vendee has a mere 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); *Lusk v. Mintz*, 625 S.W.2d 774, 776 (Tex. App.—Houston [14th Dist.] 1981, no writ). As a purchase money lien, under Texas law the vendor's lien has a priority position over and against any encumbrances created by or through the grantee under the deed. A vendor's lien retained in a deed is even superior to a previously recorded judgment lien against the purchaser. *Donie State Bank v. Parker*, 554

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S.W.2d 858 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.).

On default by the vendee, the vendor has a choice of remedies: the vendor may sue for payment of the purchase price, rescind the contract and take possession, or sue to recover title and possession. *Whiteside v. Bell*, 347 S.W.2d 568, 570 (Tex. 1961); *Lusk*, 625 S.W.2d at 775–76. The remedy of rescission of the vendor's lien is separate and distinct from and wholly independent of the other remedies available to the lender to enforce payment. *Lusk*, 625 S.W.2d at 776; *Bunn v. City of Laredo*, 245 S.W. 426, 429 (Tex. Comm'n App. 1922, judgm't adopted). Rescission can be a valuable alternative to a creditor administration if a loan enters into default. Even if there is a fatal defect with the deed of trust, the lender may still use the vendor's lien to take title to that portion of the property conveyed in the deed where the vendor's lien was retained (which may or may not be the same as the mortgaged property pledged under the deed of trust). In practice, most purchase money lenders require that they be assigned the vendor's lien at closing, to have a "fail-safe" remedy in the event that the deed of trust proves unenforceable for any reason.

A mortgagee in lawful possession can assert title to the mortgaged property against the vendee even though the vendor's lien is barred by limitations. *See, e.g.*, *Murphy v. Sills*, 268 S.W.2d 296, 311 (Tex. Civ. App.—Beaumont 1953, writ dism'd); *Myricks v. Heilbron*, 170 S.W.2d 827, 829 (Tex. Civ. App.—Texarkana 1943, no writ). However, see *Dominey v. Unknown Heirs & Legal Representatives of Lokomski*, 172 S.W.3d 67, 74 (Tex. App.—Fort Worth 2005, no pet.), where the court held that the holder of the vendor's lien was barred by the statute of limitations from seeking rescission as the statute had not been tolled because the assignee of the vendor was not a lawful mortgagee in possession.

§ 3.5:5 Involuntary Bankruptcy

The process for an involuntary bankruptcy, whereby creditors force an eligible debtor into bankruptcy proceedings, is set out at section 303 of the Bankruptcy Code and is commenced by the filing of a petition under chapter 7 or 11. *See* 11 U.S.C. § 303. (Note, however, that involuntary petitions are not allowed against farmers, banks, nonprofit groups, insurance companies, credit unions, and savings and loans; railroads are not subject to an involuntary chapter 7 filing; and stock and commodity brokers are not subject to chapter 11 filings.) If the debtor has twelve or more creditors, an involuntary petition requires the joinder of any three or more creditors whose claims (1) are not contingent as to liability or bona fide dispute as to either liability or amount and (2) total at least $15,325 if unsecured or $15,325 more than the value of any liens securing the claims if any of the claims are secured. *See* 11 U.S.C. § 303(b)(1). (Note that this dollar amount is subject to periodic adjustment.) If the debtor has fewer than twelve creditors, any one qualifying creditor can file the petition. *See* 11 U.S.C. § 303(b)(2). To support the petition, the creditors must also show that the debtor is generally not paying its debts. *See* 11 U.S.C. § 303(h)(1). Creditors can also file if a custodian or receiver took possession of the debtor's business within 120 days of the filing date. *See* 11 U.S.C. § 303(h)(2).

Unlike in a voluntary bankruptcy, the debtor is not immediately placed into bankruptcy and may continue to operate and use, acquire, or dispose of its property until the court rules on the merit of the petition filed by the creditors. *See* 11 U.S.C. § 303(f). The debtor will have twenty days to respond to the filing. *See* Fed. R. Bankr. P. 1011. If the petition is not timely controverted, the court will enter an order of relief, officially placing the debtor in bankruptcy. *See* 11 U.S.C. § 303(h). Once filed, an involuntary petition cannot be dismissed without notice and opportunity for hearing, even if the creditors and

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the debtor agree to dismissal. *See* 11 U.S.C. § 303(j). There are, of course, serious ramifications to the petitioning creditors if the involuntary bankruptcy filing fails—the creditors can be liable for the debtor's costs and attorney's fees and the bankruptcy court may award both actual and punitive damages if it finds the petition was filed in bad faith. *See* 11 U.S.C. § 303(i). Because of the complexity of the bankruptcy process and the possible penalties, it is strongly recommended that the attorney consult with a bankruptcy specialist before initiating an involuntary bankruptcy petition on behalf of a lender client.

§ 3.5:6 Receivership Proceedings

Receivership is a process by which the control of property is taken from its owner and such property is placed under the control and supervision of a court. Typically, receivership is used for the purpose of installing a neutral third party to operate a business or supervise an asset while the parties in dispute litigate ownership or control of the property subject to the receivership. Texas recognizes both equitable receiverships under the common law (where receivership is normally an ancillary proceeding to a lawsuit) and statutory receiverships under both chapter 11 of the Texas Business Organizations Code and chapter 64 of the Texas Civil Practice and Remedies Code. Texas courts have traditionally disfavored receiverships (even statutory receiverships), as taking away a person's control of his property prior to the outcome of a dispute involving the property is seen as one of the most radical remedies available through the judicial process. Because of the complexity of the receivership process and the possible penalties for losing such an action, it is strongly recommended that the attorney consult with a specialist in the field before initiating receivership proceedings on behalf of a lender client. See sections 3.4:2 above and 6.7:10 in this manual for additional discussion.

§ 3.6 Judicial Action by Lender

Most deeds of trust are written to provide the lender with maximum flexibility in deciding whether to pursue collection of a debt through nonjudicial foreclosure, judicial foreclosure, or a combination of the two. See, for example, the current version of the *Texas Real Estate Forms Manual*'s form for deed of trust, which provides:

> Proceeding under this deed of trust, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

2 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 8, form 8-1 (3d ed. 2017).

A prior version of the *Texas Real Estate Forms Manual*'s form for deed of trust provided:

> It is agreed that in the event a foreclosure hereunder should be commenced by the Trustee, or his substitute or successor, Beneficiary may at any time before the sale of said property direct the said Trustee to abandon the sale, and may then institute suit for the collection of said note, and for the foreclosure of this Deed of Trust lien; it is further agreed that if Beneficiary should institute a suit for the collection thereof, and for a foreclosure of this Deed of Trust lien, that he may at any time before the entry of a final judgment in said suit dismiss the same, and require the Trustee, his substitute or successor to sell the property in accordance with the provisions of this Deed of Trust.

State Bar of Tex., *Legal Form Manual for Real Estate Transactions* form 7C (1973, rev. 1982).

§ 3.6:1 Election of Remedies Doctrine

Notwithstanding the flexible language of most deeds of trust, the attorney and lender must be careful not to run afoul of the "election of remedies" doctrine under Texas law. Filing suit to collect the debt *coupled with a request for foreclosure* constitutes an election by the mortgagee to foreclose on the mortgaged property by legal process and constitutes an abandonment of nonjudicial foreclosure of the real property. *Coffman v. Brannen*, 50 S.W.2d 913, 914–15 (Tex. Civ. App.—Amarillo 1932, no writ). A trustee's sale conducted pending a judicial foreclosure suit is void. *Jackson v. The Praetorians*, 83 S.W.2d 740, 741 (Tex. Civ. App.—Dallas 1935, no writ); *City National Bank v. Morgan*, 29 S.W.2d 923, 927 (Tex. Civ. App.—San Antonio 1929, writ dism'd w.o.j.). A lender is, however, entitled to conduct a nonjudicial foreclosure sale while concurrently prosecuting a suit merely to collect the debt. *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. Also, as discussed below in section 3.6:4, the lender may also first obtain judgment on the debt and then commence nonjudicial foreclosure of the collateral.

§ 3.6:2 Suit on Debt Only

Suit on the debt does not require a concurrent request for judicial foreclosure of the mortgaged property or collateral. There is no legal requirement that all collateral be liquidated before entry of judgment on the debt. *Garza v. Allied Finance Co.*, 566 S.W.2d 57, 62 (Tex. Civ. App.—Corpus Christi 1978, no writ); *Melcer v. Warren*, 550 S.W.2d 760, 763 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.). If a portion of the collateral is liquidated during the pendency of the suit on the debt, the liquidation proceeds are credited to the debt to reduce the amount of the final judgment.

A lender may decide to file suit on the promissory note and not seek foreclosure of the mortgaged property for a number of reasons. For example, the mortgaged property may have casualty damage or suffer from Americans With Disabilities Act deficiencies or environmental pollution problems with remediation and cleanup costs greater than the value of the property after restoration. In such a case, the creditor may decide to seek to reduce the indebtedness to judgment and abstract it as soon as possible in order to attach its lien to other unencumbered assets of the borrower.

Suits on the debt may lead to surprising results. In *Keenan v. Gibraltar Savings Ass'n*, 754 S.W.2d 392, 395 (Tex. App.—Houston [14th Dist.] 1988, no writ), the court was called on to construe a guaranty that provided the guarantor's guaranty would cease when the principal of the note was reduced to $1,648,750. The note had an original principal balance of $2,148,750 and a principal balance of $1,680,807 at the time of suit. The court held the guaranty was unambiguous and the guarantor was liable for the full principal balance plus accrued interest and attorney's fees. *Keenan*, 754 S.W.2d at 395; *see also Western Bank—Downtown v. Carline*, 757 S.W.2d 111, 113 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (holding that limited guarantors not liable to lender for postpetition interest and attorney's fees).

§ 3.6:3 Judicial Foreclosure of Deed of Trust

Judicial foreclosure of deed-of-trust liens are quite rare in Texas because the nonjudicial foreclosure procedure is generally much quicker and less expensive than a court proceeding. However, judicial foreclosure is an available remedy to the lender in situations where there are defects or other uncertainties concerning the power of nonjudicial sale in the lender's deed of trust. See chapter 20 in this manual for a general discussion of judicial foreclosure.

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Even though the lender may have initially filed suit on the note with a request for judicial foreclosure of the mortgaged property, the lender is permitted to terminate the judicial foreclosure in favor of commencing a nonjudicial foreclosure sale as long as no judgment has been taken for judicial foreclosure. An order of dismissal may be required, since commencing a private sale alone is not deemed tantamount to abandonment of the judicial action. *See Patterson v. Shell Petroleum Corp.*, 143 S.W.2d 208, 213–14 (Tex. Civ. App.—Amarillo 1940, writ dism'd judgm't cor.); *Gandy v. Cameron State Bank*, 2 S.W.2d 971, 973 (Tex. Civ. App.—Austin 1927, writ ref'd). One advantage of judicial foreclosure is that section 51.003 of the Texas Property Code applies only to deficiency actions after nonjudicial foreclosure sales under section 51.002, and not to judicial foreclosures. *See* Tex. Prop. Code § 51.003.

§ 3.6:4 Pursuing Judgment on Debt with Subsequent Nonjudicial Foreclosure

Neither the doctrine of election of remedies nor Texas Property Code section 51.003 preclude the lender from first obtaining judgment on the note and subsequently seeking judicial or nonjudicial foreclosure of the deed-of-trust lien. The proceeds of a subsequent nonjudicial foreclosure sale are credited to the judgment 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; *see also* Tex. Prop. Code § 52.005. The court of appeals in *Stephens* rejected the mortgagor's argument that res judicata precluded the lender from bringing an action to foreclose on the deed-of-trust lien after first securing a judgment on the note in a separate, previously filed suit. *Stephens*, 316 S.W.3d at 747. The court held that the claims in the two suits were different, the remedies sought were different, and the parties were different. *Stephens*, 316 S.W.3d at 747. The court further held that until the debt is actually satisfied, the recovery of a judgment on the note secured by the deed-of-trust lien, when foreclosure has not been sought in that suit, does not merge the deed of trust in the judgment and does not preclude foreclosure on the lien in a subsequent suit instituted for the purpose. *Stephens*, 316 S.W.3d at 748.

If the borrower has other unencumbered assets or under-encumbered assets, the lender may wish to proceed to seek a judgment on the note as quickly as possible so that the mortgagee can abstract its judgment to create a general lien on real property and to levy as to personal property.

§ 3.6:5 Suit for Judicial Sequestration of Collateral

A writ of sequestration is a judicial remedy in which the court takes control of real or personal property pending the outcome of the suit on the note. Tex. Civ. Prac. & Rem. Code §§ 62.001–.063. A writ of sequestration can be issued in a suit for judicial foreclosure of the deed of trust or security agreement if there is immediate danger that the defendant or party in possession will conceal, dispose of, ill-treat, waste, or destroy the property or remove the property from the county during pendency of the suit. The lender will, however, be liable for a wrongful sequestration. Dismissal of suit after service of a writ of sequestration may render the plaintiff liable for wrongful sequestration. *See Burnett Trailers, Inc. v. Polson*, 387 S.W.2d 692, 694–95 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

Even though the secured creditor may have obtained a writ of sequestration in connection with a suit on the note and request for judicial

foreclosure of its security interest, the secured creditor may subsequently abandon seeking a judicial foreclosure and conduct a nonjudicial foreclosure sale of the collateral. *Unicut, Inc. v. Texas Commerce Bank—Chemical*, 704 S.W.2d 442, 445 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). *But see American Lease Plan v. Ben-Kro Corp.*, 508 S.W.2d 937, 943–44 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.); *Moszkowicz v. A.B. Lewis Co.*, 268 S.W.2d 548, 551 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.).

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Additional Resources

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Bernstein, Mike. "Turnovers and Receiverships." In *Collections & Creditors' Rights Course, 2016*. Austin: State Bar of Texas, 2016.

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Cassella, Stefan D. Asset Forfeiture Law in the United States, 2nd ed. New York: JURIS Publishing, 2013, Supplement 2016.

Holmes, Niles W. "Real Estate Workouts." In *Advanced Real Estate Drafting Course, 2010*. Austin: State Bar of Texas, 2010.

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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").

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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**].

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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

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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."

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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:

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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.

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[Reserved]

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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* Real Estate Law 101 Course, State Bar of Texas (2016).

Texas Property Code section 12.0012, codified in 2015, 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* 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 regard-

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less 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*

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& 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 Indus-*

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tries, 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).

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§ 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 website (**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

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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

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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.

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§ 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 judg-

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ment 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)).

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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 lien-

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holder 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

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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).

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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.—Beau-

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mont 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

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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

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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.

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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,

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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

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,

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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.

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§ 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 pre-foreclosure 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 website at **www.ffiec.gov/nicpubweb/nicweb/SearchForm.aspx**. Another useful tool for showing entity history is at the Federal Deposit Insurance Corporation website at **https://research.fdic.gov/bankfind/**.

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Additional Resources

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

Love, G. Roland. "Involuntary Liens." In *Real Estate Law 101 Course, 2016*. Austin: State Bar of Texas, 2016.

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, 2016*. Austin: State Bar of Texas, 2016.

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Form 4-1

Instructions for Preparing a

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

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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.

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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.

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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 AT91900000000X00)
   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;

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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 AT91900000000X00),
   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.

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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)

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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

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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

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Page 2

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

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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

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[Reserved]

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Form 4-4

How to Prepare an Application

Requesting the United States to Release Its Right to Redeem Property Secured by a Federal Tax Lien

There is no standard form available for an application for Requesting the United States to Release Its Right to Redeem Property Secured by a Federal Tax Lien. Prepare your request in the form of a typed letter and submit it with all accompanying documents to:

IRS, Attn: Technical Services Advisory Group Manager

(Address Application to the IRS office that filed the lien. Use ***Publication 4235****, Technical Services Advisory Group Addresses, to determine where to mail your request.)*

General Information

Section 7425(d) of the Internal Revenue Code provides that the United States may redeem real property sold in a nonjudicial proceeding when the sale is made to satisfy a lien prior to that of the government. The Technical Services Advisory Group Manager for the Internal Revenue Area in which the property is located has been delegated authority to release any right to redeem property.

The government may release its right of redemption if you pay the Internal Revenue Service an amount equal to the value of that right; or if the IRS determines that the right of redemption is valueless.

Please follow all applicable instructions in this publication when you apply for a release by the United States of its right to redeem property under IRC Section 7425(d).

General Instructions

1. Do not send any payment with your application. The Technical Services Advisory Group Manager will notify you of any amount due after your application is investigated and approved. When your payment *(if required)* is received, the Technical Services Advisory Group Manager will issue you a release of the right to redeem property.
2. Please send payment in cash, or by United States postal or bank money order, or a certified, cashier's or treasurer's check. Any payment made with uncertified funds will delay issuance of the release of the right to redeem until the funds are validated and honored. NOTE: Any questions regarding payment can be addressed with the Technical Services advisor assigned to handle the investigation.
3. JUDICIAL PROCEEDINGS – You can get an application for a release of right to redeem property from the United States Attorney's office for the judicial district in which the property subject to the right of redemption is located, if the United States has been properly named a party defendant in a judicial proceeding under Section 2410 of Title 28, United States Code.

Specific Instructions

Important: You **must** include the date of your application.

1. Please give the name and address of the person requesting the United States to release its right to redeem property under Internal Revenue Code (IRC) section 7425(d).
2. Describe the property for which you are requesting the United States to release its right of redemption. Use the description in the title or deed to the property, or attach a certified copy of the title or deed. Include street address, city and state. Indicate whether it is a personal residence, rental property, commercial property, unimproved property, etc., at the time of the nonjudicial sale.
3. Furnish the following information about the nonjudicial sale *(such as a foreclosure, execution, state or local tax sale)*:
   - Date sale was held.
   - Name and address of the Technical Services Advisory Group Manager to whom the notice of sale was sent *(if known)*.
   - Name and address of purchaser.
   - Purchase price.
4. If the property owner at the date of this application was not the purchaser at the nonjudicial sale, give the owner's name and address.

(over)

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5. List the encumbrances you want to have considered. For each encumbrance show:
   - Name and address of holder.
   - Description of the encumbrance.
   - Date it arose.
   - If the encumbrance was recorded, give the date and place.
   - The original principal amount of the encumbrance and the interest rate.
   - The principal amount due as of the date of the application, if known. *(Show costs and accrued interest separately.)*
   - Your family relationship, if any, to the holder of any other encumbrance on the property.
6. Attach a copy of each Notice of Federal Tax Lien affecting the property, or furnish the following information as it appears on each filed Notice of Federal Tax Lien:
   - Name of the Internal Revenue Area Office.
   - Name and address of the taxpayer.
   - Date and place each notice was filed.
7. Give your estimate of the fair market value of the real property with a detailed explanation of how you arrived at the estimate.
8. The Technical Services Advisory Group Manager may request you to furnish additional information.
9. Provide a daytime telephone number and E-mail address *(if available)* where you may be reached.
10. Provide the name, address, telephone number and E-mail address of your attorney or representative, if you have retained one.
11. You must make 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."

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Chapter 5
The Note in Foreclosure

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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, 775–76. 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. The obligor can be a maker, guarantor, or assumptor of the debt evidenced by the promissory note. *See, e.g.*, Tex. Bus. & Com. Code § 3.103(a)(7) (defining "maker"), § 3.103(a)(11) (defining "principal obligor"), § 3.103(a)(17) (defining "secondary obligor"). 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 592, 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).

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§ 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 § 3.102. 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). 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.)), "a deed of trust may be enforced by the mortgagee, regardless of whether the mortgagee also holds the note." *Lowery v. Bank of America, N.A.*, No. 04-12-00729-CV, 2013 WL 5762227, at *2 (Tex. App.—San Antonio Oct. 23, 2013, no pet.) (mem. op.); *accord Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 255 (5th Cir. 2013) (applying Texas law); *Bierwirth*, 2012 WL 3793190, at *3; *Hornbuckle v. Countrywide Home Loans, Inc.*, No. 02-09-00330-CV, 2011 WL 1901975, at *3 (Tex. App.—Fort Worth May 19, 2011, no pet.) (mem. op.).

§ 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 exists, (2) that the party sued signed or is the maker of 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. v. Loan Lane Master Trust IV*, 169 S.W.3d 402, 409 (Tex. App.—Fort Worth

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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

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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:

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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

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(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

Texas Civil Practice and Remedies Code 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). For instance, courts applying Texas law have held that acceleration can be unequivocally abandoned or waived by subsequently requesting payment on less than the full amount of the loan. *See, e.g.*, *Boren v. U.S. National Bank Ass'n*, 807 F.3d 99, 106 (5th Cir. 2015); *Leonard v. Ocwen Loan Servicing, L.L.C.*, 616 Fed. App'x 677, 679–80 (5th Cir. 2015) (per curiam), *cert. denied*, 136 S. Ct. 554 (2015).

Section 16.038 is retroactive, but only if the four-year statute of limitations has not run. *See*

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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 obliga-

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tion, 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

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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).

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The Deed of Trust

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Chapter 6

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§ 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 statutory provisions apply notwithstanding an agreement to the contrary, including Texas Property Code section 51.002(d) (twenty-day notice of default and right to cure for lien on property used as debtor's residence); Texas Property Code section 51.0075 (appointment of substitute trustee); Texas Property Code section 51.002(a-1), Texas Civil Practice and Remedies Code section 34.041(c), and Texas Tax Code sections 34.01(r-1) and 34.01(r-2) (relating to the date of the foreclosure sale on the first Tuesday or first Wednesday of the month, depending on whether the first Tuesday is January 1 or July 4); and Texas Business and Commerce Code chapter 22 (relating to the public sale of residential real property under a power of sale). In addition, section 51.002 of the Property Code 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 prop-

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erty 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*

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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

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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).

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§ 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 indorsement 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 indorsed 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 indorsed 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 indorsement, 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

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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.

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

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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. One-West 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. 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. July 3, 2017), *available at* **http://mersinc.org/join/1273-rom-09012015/file**.

§ 6.3:6 Trustee

Texas Property Code section 51.0076, codified in 2015, 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.*

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Sharp, 359 S.W.2d 902, 904 (Tex. 1962). A trustee, however, "does not owe a fiduciary duty to the mortgagor." *Stephenson v. LeBoeuf*, 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*,

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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

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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.—

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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

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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

A 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 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 copy of the statement of ownership 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

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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 statement of ownership 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 statement of ownership 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. *See* Tex. Occ. Code §§ 1201.003(30), 1201.205. If the owner desires to elect for the home to be real property, a copy of the statement of ownership 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 regis-

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tered 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, 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 website at **www.tdhca.state.tx.us/mh/ownership - location.htm**.

See the website 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 discus-

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sion 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 fore-

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closure 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.

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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 websites 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 8-9-10 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 8-9-10 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.

2 State Bar of Tex., *Texas Real Estate Forms Manual*, ch. 8, form 8-9, clause 8-9-10 (3d ed. 2017). 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 8-9-10 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." 2 State Bar of Tex., *Texas Real Estate Forms Manual*, ch. 8, form 8-9, clause 8-9-10 (3d ed. 2017).

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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

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§ 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. *Al Gailani 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 prop-

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erty 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.

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§ 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

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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.*

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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

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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

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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, codified 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.

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Chapter 7
Consumer Debt Collection Laws

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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

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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

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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

Section 343.103 of the Texas Finance Code 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. The requirements for the surviving spouse to prove his status are set out in section 343.103(c), and section 343.103(d) requires notice in the request letter that reads, "THIS REQUEST IS MADE PURSUANT TO TEXAS FINANCE CODE SECTION 343.103. SUBSEQUENT DISCLOSURE

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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 asso-

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ciate 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 dis-

possession 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.

15 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).

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Additional Resources

Mayer, John. "Fair Debt Collection." In *Texas Bar College Summer School, 2016*. Austin: State Bar of Texas, 2016.

Spector, Mary. "FDCPA Update 2016." In *Advanced Consumer & Commercial Law Course, 2016*. Austin: State Bar of Texas, 2016.

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Chapter 8

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

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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), section 16.038 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* 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 sections 5.12 and 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 home-owner 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,

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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 Savings 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

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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

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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 acceler-

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ation 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. Accel-

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eration 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

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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 limita-

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tions 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).

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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).

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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.

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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]

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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

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[Reserved]

© STATE BAR OF TEXAS

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]

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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.

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> 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.

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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. 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.

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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]

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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**]

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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-**

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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.

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[**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.

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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. 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.

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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**]

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

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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-**

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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**]

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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. 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

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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.

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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**]

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[Reserved]

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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 the property described in the 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.

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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.

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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.

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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.

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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)

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Chapter 10

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Chapter 10

Borrower Challenges to Foreclosure and Lender Responses

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§ 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. However, where a defendant is never formally served, courts have held that the removal deadline begins on the date the defendant voluntarily waived service by filing an answer. *George–Baunchand v. Wells Fargo Home Mortgage, Inc.*, No. H-10-3828, 2010 WL 5173004, at *3–4 (S.D. Tex. Dec. 14, 2010); *Cerda v. 2004–EQRI, LLC*, No. SA-07-CV-632-XR, 2007 WL 2892000, at *3 (W.D. Tex. Oct. 1, 2007), *aff'd sub nom.*, *Cerda v. 2004–EQR1 L.L.C.*, 612 F.3d 781 (5th Cir. 2010); *Prescott v. Memorial*

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Medical Center–Livingston, No. 9:00CV–00025, 2000 WL 532035, at *2–3 (E.D. Tex. Mar. 25, 2000).

§ 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)

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(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").

Shareholders/Beneficiaries/Certificateholders in Mortgage-Backed Securities Trust: In March 2016, the U.S. Supreme Court decided *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012 (2016), attempting to resolve confusion among the courts of appeals in determining the citizenship of a trust for purposes of diversity jurisdiction. Since then, borrowers, relying on *Americold*, have regularly sought to remand cases back to state court that trustees of mortgage-backed securities trusts (MBSTs) have removed to federal court. Borrowers argue the citizenship of every shareholder/beneficiary/certificateholder of the MBST must be considered for purposes of diversity jurisdiction, not solely the citizenship of the trustee of the MBST.

In *Americold*, the Supreme Court considered whether the citizenship of the trustee or the shareholders/beneficiaries/certificateholders of the trust mattered in determining diversity jurisdiction for a real estate investment trust organized under Maryland law. *Americold*, 136 S. Ct. at 1016. The court clarified that the rule established in *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980), regarding jurisdiction only applies where a trustee files suit or is sued in its own name. *Americold*, 136 S. Ct. at 1016. The Supreme Court stated that "*Navarro* had nothing to do with the citizenship of [a] 'trust.'" *Americold*, 136 S. Ct. at 1016 (internal citations omitted). Rather, "*Navarro* reaffirmed a separate rule that when a trustee files a lawsuit in her name, her jurisdictional citizenship is the State to which she belongs—as is true of any natural person." *Americold*, 136 S. Ct. at 1016. Because the real estate investment trust in *Americold* was sued in its own name (instead of the suit being filed against the trustee), the Supreme Court declined to apply the rule from *Navarro* that a federal court looks only at the trustee's citizenship and instead applied the rule that an unincorporated entity (the trust in that case) possessed the citizenship of its members. *Americold*, 136 S. Ct. at 1017.

"Grappling with the language of *Americold* and *Navarro*, federal courts in Texas have taken different paths to determine whether a trustee, or the trust itself, is the real party to the controversy." *Lewis v. Deutsche Bank National Trust Co.*, No. 3:16-CV-133, 2017 WL 1354098, at *3 (S.D. Tex. Apr. 13, 2017) (collecting cases). However, the Fifth Circuit recently clarified the proper path to take to make this determination. *See Bynane v. Bank of New York Mellon*, 866

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F.3d 351, 357 (5th Cir. 2017); *Justice v. Wells Fargo Bank National Ass'n*, 674 F. App'x 330, 332 (5th Cir. 2016) (per curiam). In *Bynane*, relying on its earlier unpublished opinion in *Justice*, the Fifth Circuit held that "*Navarro*'s rule is still good law: 'Where a trustee has been sued or files suit in her own name, the only preliminary question a court must answer is whether the party is an "active trustee[ ] whose control over the assets held in [its] name[ ] is real and substantial."'" *Bynane*, 866 F.3d at 357 (quoting *Justice*, 674 F. App'x at 332 (alterations in original) (quoting *Carden v. Arkoma Associates*, 494 U.S. 185, 191 (1990))).

When analyzing whether a trustee's control over the assets held in its name is real and substantial, the Fifth Circuit and federal district courts in Texas have looked to the document that governs the power of the trustee over the trust assets, e.g., the pooling and servicing agreement (PSA) of the MBST. *See, e.g., Bynane*, 866 F.3d at 357–58 (holding that only the citizenship of the trustee should be considered for purposes of diversity jurisdiction because trustee had "real and substantial" control under the PSA considering "all right, title, and interest in and to the Initial Mortgage Loans" were transferred to the trustee and, in contrast, the certificateholders had only limited rights to vote or otherwise control the operation of the trust under the PSA); *Justice*, 674 F. App'x at 332 (looking only to trustee's citizenship to determine diversity jurisdiction because the trustee wielded "real and substantial" control over the assets held in its name under the trust's PSA and the trust's beneficiaries had no power to control the operation and management of the trust fund).

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).

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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

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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.).

If a nonjudicial foreclosure sale of residential real property conducted under section 51.002 of the Texas Property Code was wrongful, the sale may be rescinded within fifteen days if the borrower cured the default before the sale, statutory requirements were not satisfied, or other specific issues occurred. *See* Tex. Prop. Code § 51.016.

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*

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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,

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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*. Borrowers have also contended that mortgagees or assignees cannot foreclose because such entities are not the "lender" as defined by the applicable deed of trust. Courts have outright rejected this contention when the party attempting to foreclose was the mortgagee based on an assignment of the deed of trust. *See Cisneros v. U.S. Bank, N.A.*, No. 3:14-CV-4140-D, 2015 WL 685990, at *3 (N.D. Tex. Feb. 18, 2015); *Jones v. Deutsche Bank National Trust Co.*, No. 3:12-CV-3929-L, 2014 WL 3375032, at *6 (N.D. Tex. July 10, 2014).

§ 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"

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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").

§ 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, N.A.*, 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, N.A.*, 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–

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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).

However, the economic loss rule does not apply to DTPA claims under certain circumstances. *See, e.g.*, *SCS Builders, Inc. v. Searcy*, 390 S.W.3d 534, 541–42 (Tex. App.—Eastland 2012, no pet.) (holding the DTPA duty not to engage in unconscionable business practices was not barred by economic-loss rule because it arose independently from the contract). "[A]n allegation of a mere breach of contract, without more, does not constitute a false, misleading or deceptive act in violation of the DTPA." *BCC Merchant Solutions, Inc. v. Jet Pay, LLC*, 129 F. Supp. 3d 440, 469 (N.D. Tex. 2015) (citing *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14 (Tex. 1996) (quoting *Ashford Development, Inc. v. USLife Real Estate Services*, 661 S.W.2d 933, 935 (Tex. 1983))). "It is only when a statutory claim is premised upon nothing more than a claim of nonperformance of a promised contractual obligation that it is barred." *Shellnut v. Wells Fargo Bank, N.A.*, No. 02-15-00204-CV, 2017 WL 1538166, at *13 (Tex. App.—Fort Worth Apr. 27, 2017, pet. filed) (mem. op.); *see also Crawford*, 917 S.W.2d at 14–15 (holding that misrepresentations alleged under DTPA were nothing more than promises to perform under the contract).

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).

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However, this older law is likely no longer good. In holding the economic loss rule does not bar TDCA claims, the Fifth Circuit stated "if a particular duty is defined both in a contract and in a statutory provision, and a party violates the duty enumerated in both sources, the economic loss rule does not apply." *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 475 (5th Cir. 2015) ("A statutory offender will not be shielded from liability simply by showing its violation also violated a contract."). The Fort Worth court of appeals recently reached the same conclusion. *Shellnut*, 2017 WL 1538166, at *14 ("Thus, we conclude and hold that Shellnut's TDCA-violation claims—except his claim that Lender wrongfully threatened foreclosure in violation of the TDCA—are not barred by the economic-loss rule.").

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 fore-

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close 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

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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. However, foreclosure of the loan for deferred taxes due may not be initiated if the borrower provides documentary proof the borrower properly deferred taxes under the Texas Tax Code. In essence, the mortgagee has a discretionary choice to wait until the property is sold or transferred to collect the deferred taxes.

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 pay-

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ments 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).

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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

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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,

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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).

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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

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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

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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,

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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

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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,*

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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).

Forfeiture of Principal and Interest: The Texas Constitution was amended in 1997 to allow "homestead liens to secure home-equity loans, but, consistent with Texas's long tradition of protecting the homestead, the amendments clearly prescribed very specific and extensive limitations on those encumbrances." *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 544 (Tex. 2016) (citing Tex. Const. art. XVI, § 50(a)(6)(A)–(Q)). A homestead in Texas is protected from "forced sale . . . except for" a home-equity loan that includes the terms in section 50(a)(6)(A)–(P) and "is made on the condition that" it also include the provisions in section 50(a)(6)(Q)(i)–(xi). *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474, 477 (Tex. 2016). Thus, section 50(a) of the Texas Constitution "describes what a home-equity loan must look like if a lender wants the option to foreclose on a homestead upon borrower default." *Garofolo*, 497 S.W.3d at 478.

One of the several terms and conditions that must be included in a home-equity loan to be foreclosure-eligible is that it be "made on the condition that forfeiture of all principal and interest is available if the loan is constitutionally noncompliant and the lender fails to cure within 60 days of being given notice by the borrower." *Wood*, 505 S.W.3d at 545 (citing Tex. Const. art. XVI, § 50(a)(6)(Q)(x)).

In *Garofolo*, the Texas Supreme Court held that the terms in section 50(a)(6)(A)–(P) and conditions in section 50(a)(6)(Q)(i)–(xi) of the Texas Constitution, which are required to be included in a foreclosure-eligible home-equity loan, "are not substantive constitutional rights, nor does a constitutional forfeiture remedy exist to enforce them." *Garofolo*, 497 S.W.3d at 484 ("The constitution guarantees freedom from forced sale of a homestead to satisfy the debt on a home-equity loan that does not include the required terms and provisions—nothing more."). The court also noted:

> Those terms and conditions are not constitutional rights unto themselves. They only assume constitutional significance when their absence in a loan's terms is used as shield from foreclosure. . . . But just as the terms and conditions in section 50(a)(6) are not constitutional rights unto themselves, nor is the forfeiture remedy a constitutional remedy unto itself. Rather, it is just one of the terms and conditions a home-equity loan must include to be foreclosure-eligible.

Garofolo, 497 S.W.3d at 478–79; *see also Wood*, 505 S.W.3d at 551 ("A declaratory-judgment action based on a constitutional right to forfeiture is not available to access the forfeiture remedy."). Thus, a "lender that includes the terms and conditions in the loan at origination but subsequently fails to honor them might have broken its word, but it has not violated the constitution." *Garofolo*, 497 S.W.3d at 478 (section 50(a) "does not constitutionally guarantee a lender's post-origination performance of a [home-equity] loan's terms and conditions").

The court in *Garofolo* further observed and explained the following:

> A borrower may seek forfeiture through a breach-of-contract claim when the constitutional forfeiture provision is incorporated into the terms of a home-equity loan, but forfeiture is available only if one of the six specific constitutional corrective measures would actually correct the lender's failure to comply with its obligations under the terms of the loan, and the lender nonetheless fails to timely perform the corrective measure following proper notice from the borrower.

Garofolo, 497 S.W.3d at 484. "If performance of none of the corrective measures would actually correct the underlying deficiency, forfeiture is unavailable to remedy a lender's failure to comply with the loan obligation at issue." *Garofolo*, 497 S.W.3d at 484.

§ 10.15:1 Limitations for Home Equity Loan Claims

Limitations: The Fifth Circuit previously held that Texas's residual four-year statute of limitations applied to quiet-title claims based on alleged noncompliance with section 50(a)(6) of article XVI of the Texas Constitution. *See Priester v. JP Morgan Chase Bank*, 708 F.3d 667, 674 (5th Cir. 2013). However, the Texas Supreme Court in *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016), recently abrogated the holding in *Priester* relating to limitations and held that there is no statute of limitations for quiet-title claims based on constitutional infirmities. The primary issue decided in *Wood* was "whether a statute of limitations applies to an action to quiet title where a lien securing a home-equity loan does not comply with constitutional parameters." *Wood*, 505 S.W.3d at 544. The court held that "a lien securing a constitutionally noncompliant home-equity loan is not valid before the defect is cured. We therefore conclude that no statute of limitations applies to an action to quiet title on an invalid home-equity lien." *Wood*, 505 S.W.3d at 547; *see also Ocwen Loan Servicing, L.L.C. v. Berry*, 852 F.3d 469, 473 (5th Cir. 2017) ("In *Wood*, the Texas Supreme Court directly addressed whether a statute of limitations applies to a quiet title action alleging violations of section 50(a)(6) . . . [and] held that constitutionally noncompliant home equity liens are invalid (before the defect is cured) and that no statute of limitations applied to a quiet title action alleging such violations.").

Accrual of Limitations: The court in *Wood*, however, did not address when a quiet-title action based on alleged noncompliance with section 50(a)(6) accrued, and as a result, "the

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accrual portion of *Priester* remains binding law." *Feuerbacher v. Wells Fargo Bank, N.A.*, No. 4:15-CV-59, 2016 WL 3669744, at *6 (E.D. Tex. July 11, 2016). *Wood* "does not grant a plaintiff a free pass to ignore statutes of limitations when challenging a constitutionally defective instrument via other causes of action." *Johnson v. Citigroup Mortgage Loan Trust Inc.*, No. 5:16-CV-1114-RCL, 2017 WL 3337268, at *9–10 (W.D. Tex. Aug. 3, 2017) ("While *Wood* makes clear that no statute of limitations applies to quiet title actions, it does not similarly excuse other substantive causes of action from their respective statutes of limitations. Thus, unless a plaintiff asserts a quiet title claim, a court must apply the applicable statute of limitations."); *Ventura v. Wells Fargo Bank, N.A.*, No. 4:17-CV-075-A, 2017 WL 1194370, at *2 (N.D. Tex. Mar. 30, 2017) ("A breach of contract claim for failure to comply with section 50(a)(6) of the Texas Constitution is bound by a four-year limitations period. . . . The period runs when the legal injury occurs, which, in actions challenging the creation of unconstitutional liens, takes place at the creation of the lien." (citing *Priester*, 708 F.3d at 673–76)).

Compliance with the Texas Constitution is "measured at origination and that a lien securing a constitutionally noncompliant home-equity loan is invalid and unenforceable (i.e., not foreclosure-eligible) at the moment the loan originates and remains invalid and unenforceable unless subsequently cured." *Feuerbacher*, 2016 WL 3669744, at *6 (citing *Wood*, 505 S.W.3d at 549 ("A lien that was invalid from origination remains invalid until it is cured."); *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474, 478 (Tex. 2016) ("From a constitutional perspective, compliance is measured by the loan as it exists at origination and whether it includes the terms and conditions required to be foreclosure-eligible.")); *see also Sims v. Carrington Mortgage Services, L.L.C.*, 440 S.W.3d 10, 17 n.28 (Tex. 2014) ("[N]othing in Section 50 suggests that a loan's compliance is to be determined at any time other than when it is made.").

Tolling: In Texas, home-equity lenders are required to first obtain a court order allowing them to proceed with a foreclosure sale. *See* Tex. Const. art. XVI, § 50(a)(6)(D) (home equity loan may be foreclosed upon only by court order); *Curry v. Ocwen Loan Servicing LLC*, No. H-15-3089, 2016 WL 3920375, at *5 (S.D. Tex. 2016). Rule 736 of the Texas Rules of Civil Procedure provides lenders an expedited "procedure for obtaining a court order . . . to allow foreclosure of a lien containing a power of sale in the security instrument . . . including a lien securing . . . a home equity loan." Tex. R. Civ. P. 735.1(a).

The filing of a separate, independent lawsuit in response to an application for a court order allowing foreclosure pursuant to the power of sale in a deed of trust under Texas Rule of Civil Procedure 736 operates as a tolling of the statute of limitations to foreclose during the pendency of that lawsuit, but it does not toll the statute of limitations for judicial foreclosure, as the right to seek judicial foreclosure and the right to foreclose under the power of sale in a deed of trust are separate and distinct remedies, either of which a trustee may elect to pursue. *See Curry*, 2016 WL 3920375, at *6 ("A Rule 736 proceeding cannot be brought as a counterclaim in a borrowers suit against the lender. Defendants were thus prevented from obtaining the constitutionally required court order they need to exercise their contractually granted power of sale" and therefore "the statute of limitations for exercising such power was thus tolled during the pendency" of the borrower's action. (citations omitted)); *Murphy v. HSBC Bank USA*, No. H-12-3278, 2017 WL 393595, at *20 (S.D. Tex. Jan. 30, 2017) ("HSBC is not precluded from foreclosing on the Property because the limitations period was tolled while Plaintiffs' first lawsuit was pending. . . . That suit to stop foreclosure was filed on November 13, 2008, stayed

in the trial court until March 29, 2011, was appealed to the appellate court and then to the Texas Supreme Court, which ultimately dismissed Plaintiffs' claims on February 6, 2015. During that period, limitations was tolled on HSBC's foreclosure cause of action . . . ."); *Murphy v. HSBC Bank USA*, No. H-12-3278, 2016 WL 6885323, at *2 n.1 (S.D. Tex. Sept. 26, 2016) ("[T]he Murphys first state court lawsuit, which effectively prevented Defendant from seeking an expedited foreclosure under Rule 736 of the Texas Rule of Civil Procedure, operated to toll the limitations period."); *Devdara, L.L.C. v. Wells Fargo Bank, N.A.*, No. H-15-2614, 2017 WL 3288552, at *3 (S.D. Tex. July 3, 2017) ("Again, Devdara's pleadings show that Wells Fargo sought to foreclose on the Property in August 2015—before the statute of limitations would have expired—and were only prevented from doing so by the filing of this case, with the pendency of this case operating as a tolling of that limitations period."); *but see PNC Bank National Ass'n v. Fisher*, No. 4:15-CV-01217, 2017 WL 2819893, at *4 (S.D. Tex. June 28, 2017) ("Under Texas law, however, the automatic dismissal of a Rule 736 application does not toll the statute of limitations for judicial foreclosure. The right to seek judicial foreclosure and the right to exercise the power of sale granted in a mortgage or deed of trust are separate and distinct remedies. . . . As a Rule 736 proceeding is no impediment to a suit for judicial foreclosure, a suit automatically dismissing a Rule 736 proceeding does not toll the statute of limitations for judicial foreclosure." (citations omitted)).

§ 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.").

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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).

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§ 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 com-

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petitively 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). In *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1724 (2017), the U.S. Supreme Court held that a party who purchases debt originated by another that is in default and thereafter seeks to collect the debt on its own behalf does not constitute a debt collector under the 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); *Iroh v. Bank of America, N.A.*, No. 4:15-CV-1601, 2015 WL 9243826, at *4 (S.D. Tex. Dec. 17, 2015); *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

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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."); *but see Turner v. Nationstar Mortgage LLC*, No. 3:14-cv-1704-L, 2015 WL 9918693, at *5 (N.D. Tex. Nov. 13, 2015) (stating that whether foreclosure and foreclosure activities constitute collecting a debt under the FDCPA is an open question).

§ 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

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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)).

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§ 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)

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(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

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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

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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. denied); *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 succes-

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sive 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).

In *Feuerbacher v. Wells Fargo Bank, N.A.*, No. 4:15-CV-59, 2016 WL 3669744, at *1 (E.D. Tex. July 11, 2016), the Eastern District of Texas held that the doctrine of judicial estoppel barred the plaintiffs' various claims based on their allegations that their home-equity loan was void because those claims accrued prior to the filing of bankruptcy proceedings. The plaintiffs contended that their claims did not accrue until after the lender failed to cure the alleged noncompliance with the Texas Constitution after receiving notice of the defects. *Feuerbacher*, 2016 WL 3669744, at *4.

Relying on *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016) and *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474 (Tex. 2016), the court noted that compliance with the Texas Constitution is "measured at origination and that a lien securing a constitutionally noncompliant home-equity loan is invalid and unenforceable (i.e., not foreclosure-eligible) at the moment the loan originates and remains invalid and unenforceable unless subsequently cured." *Feuerbacher*, 2016 WL 3669744, at *6 (citing *Wood*, 505 S.W.3d at 549 ("A lien that was invalid from origination remains invalid until it is cured."); *Garofolo*, 497 S.W.3d at 478 ("From a constitutional perspective, compliance is measured by the loan as it exists at origination and whether it includes the terms and conditions required to be foreclosure-eligible.")). The court also recognized that *Garofolo* differentiated between the "failure to comply" and when a lender "fails to correct the failure to comply." *Feuerbacher*, 2016 WL 3669744, at *5 (citing *Garofolo*, 497 S.W.3d at 477–78 (quoting Tex. Const. art. XVI, § 50(a)(6)(Q)(x))). The failure to comply, as the court explained, is "the lender's original transgression: its 'fail[ure] to comply with the lender's or holder's obligations under the extension of credit.'" *Feuerbacher*, 2016 WL 3669744, at *5 (citing *Garofolo*, 497 S.W.3d at 482 (quoting Tex. Const. art. XVI, § 50(a)(6)(Q)(x))). "The unquestionably harsh forfeiture penalty is triggered when, following adequate notice, a lender fails to correct the complained-of deficiency." *Feuerbacher*, 2016 WL 3669744, at *5 (quoting *Garofolo*, 497 S.W.3d at 481).

The court determined that the breach of contract claim based on the alleged failures to comply with the Texas Constitution was the type of breach that occurred at origination and could have been brought immediately after the loan originated, and therefore, if the alleged defects did in fact occur, plaintiffs did not have to wait until the remedy of forfeiture became available because a breach would have already occurred and an injury would have already been sustained, i.e., an invalid lien. *Feuerbacher*, 2016 WL 3669744, at *5. The court also noted that since "the lien was allegedly invalid from its origination, all of the elements of a quiet-title claim were satisfied on the date of the inception of the loan." *Feuerbacher*, 2016 WL 3669744, at *7. Consequently, the court held that the doctrine of judicial estoppel barred the breach of contract and quiet-title claims, among others, because the causes of action accrued before the commencement of bankruptcy proceedings.

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§ 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 did not act 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

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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 *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.

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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

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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

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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, N.A.*, 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;
- 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 nonjudicial 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

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(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.").

Reinstatement Quote: At least one federal district court has indicated that sending a letter providing notification that a loan could be reinstated by paying an amount less than the total accelerated balance within the statute of limitations to foreclose would constitute unilateral abandonment of acceleration. *See PNC Bank National Ass'n v. Fisher*, No. 4:15-CV-01217, 2017 WL 2819893, at *4 (S.D. Tex. June 28, 2017) ("[T]he September 6, 2013 Reinstatement Quote is no evidence of abandonment because it was sent almost four months after the expiration of the applicable statute of limitations. It is undisputed that sending a similar reinstatement quote within the statute of limitations would have constituted unilateral abandonment of the acceleration, however, PNC sent this document four months too late."); *but see Bank of New York Mellon v. Maniscalco*, No. 1:15-CV-35, 2016 WL 3584425, at *6 (E.D. Tex. Mar. 28, 2016) ("[T]he November 23 reinstatement quote does not unequivocally manifest an intent to abandon the previous acceleration. No where on the November 23 reinstatement quote does it state that the $27,871.13 is the total amount due for the Maniscalcos to bring their account current. Likewise, the November 23 reinstatement quote does not state that the bank would accelerate the loan if the Maniscalcos failed to pay the $27,871.13."); *Bank of New York Mellon v. Maniscalco*, No. 1:15-CV-35, 2016 WL 3584423, at *3 (E.D. Tex. Mar. 3, 2016) ("In this case, Plaintiff's evidence of abandonment is a Reinstatement Quote allegedly sent by its loan servicer to Defendants on November 22, 2010. . . . A single quote that requires payment be sent to Plaintiff's foreclosure counsel is not the kind of action that would have given Defendants notice that the acceleration was abandoned. If anything, the quote evidences only that Plaintiff allowed Defendants another chance to bring the Loan current before foreclosing on the Property. This sole quote cannot be the basis for a finding that Plaintiff unilaterally abandoned the September 30, 2010 acceleration.").

Recent Cases on Abandonment of Acceleration/Section 16.038 Rescission: "Texas appellate courts have held that the holder of a note who has exercised its option to accelerate may unilaterally abandon acceleration of the note so long as the borrower neither detrimentally relied on the acceleration nor objected to the abandonment of the acceleration." *Graham v. LNV Corp.*, No. 03-16-00235-CV, 2016 WL 6407306, at *3 (Tex. App.—Austin Oct. 26, 2016, pet. denied) (mem. op.); *see also NSL Property Holdings, LLC v. Nationstar Mortgage, LLC*, No. 02-16-00397-CV, 2017 WL 3526354, at *2 (Tex. App.—Fort Worth Aug. 17, 2017, no pet. h.) (mem. op.) ("But even when a holder has accelerated a note, the holder can later unilaterally abandon acceleration.").

"Although more recent cases refer to the rescission of acceleration as abandonment, the under-

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lying concept is based on waiver." *NSL Property Holdings*, 2017 WL 3526354, at *3 (citing *Graham*, 2016 WL 6407306, at *3; *Khan v. GBAK Properties, Inc.*, 371 S.W.3d 347, 354 n.1 (Tex. App.—Houston [1st Dist.] 2012, no pet.)). "To show abandonment—waiver—of acceleration, a party must show (1) that it holds an existing right, benefit, or advantage (2) of which it has actual knowledge and (3) either the actual intent to relinquish the right or intentional conduct inconsistent with the right." *NSL Property Holdings*, 2017 WL 3526354, at *3 (citing *Graham*, 2016 WL 6407306, at *3). "Although whether waiver has occurred is typically a question of fact, it is a question of law when the facts that are relevant to a party's relinquishment of an existing right are undisputed." *NSL Property Holdings*, 2017 WL 3526354, at *3 (citing *Motor Vehicle Board of Texas Department of Transportation v. El Paso Independent Automobile Dealers Ass'n*, 1 S.W.3d 108, 111 (Tex. 1999)).

In *NSL Property Holdings*, the Fort Worth court of appeals affirmed the trial court's grant of summary judgment in favor of a lender after determining that the undisputed summary judgment evidence indicated that the lender abandoned its right to accelerate as a matter of law. The summary judgment evidence showed that a notice of default and intent to accelerate sent to the borrowers after the maturity date of the note was accelerated requesting payment on less than the full amount of the accelerated debt was "replete with language inconsistent with the then-present right to foreclose" and "compel[led] the conclusion that the lender abandoned the acceleration." *NSL Property Holdings*, 2017 WL 3526354, at *5.

In *Graham*, the Austin court of appeals affirmed the trial court's grant of summary judgment in favor of a noteholder because the undisputed summary judgment evidence demonstrated that the noteholder expressly abandoned its acceleration of the note by sending a letter to the borrower that stated that the maturity date of the note was rescinded. The court found that the letter unequivocally manifested the noteholder's intent to abandon the previous acceleration and that the borrower presented no summary judgment evidence that she had relied to her detriment on the acceleration of the note or that she objected to the rescission of the acceleration. *Graham*, 2016 WL 6407306, at *4.

The court also observed that, while the case was pending, the Texas legislature enacted section 16.038 of the Texas Civil Practice and Remedies Code, which provides a nonexclusive "specific mechanism by which a lender can unilaterally waive its earlier acceleration." *Graham*, 2016 WL 6407306, at *4. Section 16.038(a) states that an "acceleration is deemed rescinded and waived . . . if the maturity date of . . . a note . . . payable in installments is accelerated, and the accelerated maturity date is rescinded or waived . . . before the limitations period expires." Tex. Civ. Prac. & Rem. Code § 16.038(a). Such "[r]escission or waiver of acceleration is effective if made by a written notice of a rescission or waiver served . . . by first class or certified mail and . . . addressed to the debtor at the debtor's last known address." Tex. Civ. Prac. & Rem. Code § 16.038(b)–(c); *see also Myers v. Ditech Financial LLC*, No. H-16-1053, 2017 WL 2573413, at *2 (S.D. Tex. June 14, 2017) ("Pursuant to § 16.038, an effective rescission or waiver can be made by serving a written notice by first class or certified mail."). "Section 16.038 applies to notices of acceleration and notices of rescission served before, on, or after its June 17, 2015 effective date." *Myers*, 2017 WL 2573413, at *2 n.3 (citing *Graham*, 2016 WL 6407306, at *4).

The court in *Graham* noted that "it appears that the statute would apply and, if raised, would supply an independent legal ground for the trial court to grant summary judgment . . . based on the conclusion that . . . [the] letter operated to

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rescind the previous acceleration." *Graham*, 2016 WL 6407306, at *4.

Borrowers have unsuccessfully attempted to argue that any rescission or abandonment of acceleration is not effective if not carried out pursuant to section 16.038. *See Murphy v. HSBC Bank USA*, No. H-12-3278, 2017 WL 393595, at *19 (S.D. Tex. Jan. 30, 2017) (rejecting contention that section 16.038 should be construed to require an explicit rescission of a prior acceleration); *U.S. Bank, N.A. v. Johnson*, No. 1:15-cv-788-RP, 2017 WL 598499, at *6–7 (W.D. Tex. Feb. 4, 2017) (rejecting argument that any rescission of acceleration is invalid if it does not comply with section 16.038); *Nunnery v. Ocwen Loan Servicing, L.L.C.*, 641 F. App'x 430, 434 n.3 (5th Cir. 2016) (rejecting argument that any abandonment must comply with section 16.038).

Compliance with section 16.038, however, "is irrelevant . . . because '[t]he statute does not . . . create an exclusive method for abandoning or waiving acceleration.'" *Nunnery*, 641 F. App'x at 434 n.3 (quoting *Boren v. U.S. National Bank Ass'n*, 807 F.3d 99, 106 (5th Cir. 2015)); *see also Johnson*, 2017 WL 598499, at *7 ("[W]hile the statute 'provides a specific mechanism by which a lender can waive [or rescind] its earlier acceleration,' it does not 'create an exclusive method for abandoning or wai[v]ing acceleration.'" (quoting *Boren*, 807 F.3d at 106)); *see also* Tex. Civ. Prac. & Rem. Code § 16.038(e); *LWL Construction, LLC v. Countrywide Home Loans, Inc.*, No. H-15-3379, 2017 WL 3267799, at *3 (S.D. Tex. July 31, 2017). Consequently, section 16.038 "is better construed as a 'best practice' for a lender seeking to effectuate its abandonment." *Boren*, 807 F.3d at 106.

In *Cantu v. Deutsche Bank National Trust Co.*, No. 7:15-CV-87, 2016 WL 6820930, at *5–6 (S.D. Tex. June 3, 2016), the court relied on section 16.038(c), which provides that notice of rescission of an acceleration must be addressed to the debtor at the debtor's last known address, in holding that certain notices of default that were not sent to the borrowers at their last known address after reasonable written notice of a new mailing address was provided were insufficient to serve as effective rescissions of a prior acceleration.

Applying Texas law, the Fifth Circuit and federal district courts in Texas continue to consistently hold that a lender may unilaterally abandon acceleration by sending notices of default and/or billing or account statements requesting payment on less than the full accelerated amount of the loan. *See, e.g.*, *Hernandez v. Select Portfolio Servicing, Inc.*, No. 16-41308, 2017 WL 1437279, at *3 (5th Cir. Apr. 24, 2017) (per curiam); *Martin v. Federal National Mortgage Ass'n*, No. 15-41104, 2016 WL 723263, at *2 (5th Cir. Feb. 22, 2016); *Bank of New York Mellon Trust Co. v. Millard*, No. A-15-CA-01035-SS, 2017 WL 3446033, at *4 (W.D. Tex. Aug. 10, 2017); *LWL Construction, LLC*, 2017 WL 3267799, at *3; *Curry v. Bank of New York Mellon*, No. 4:16-CV-654-ALM-KPJ, 2017 WL 3161693, at *4 (E.D. Tex. July 2, 2017); *Ihms v. Deutsche Bank National Trust Co.*, No. 3:15-cv-1078-K(BF), 2016 WL 4536578, at *3 (N.D. Tex. Aug. 9, 2016); *Meachum*, 2015 WL 765982, at *1–2, *aff'd* 636 F. App'x 510 (5th Cir. 2016).

§ 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 ser-

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vicer 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. The appointment of a substitute trustee that is made in a notice of sale is effective if signed by a mortgagee, mortgage servicer, or attorney if it contains specific statutory language in all capital, boldface letters. Tex. Prop. Code § 51.0076.

- *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).

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Chapter 11

Trustees and Substitute Trustees

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Chapter 11

Trustees and Substitute Trustees

§ 11.1 Introduction

The process for appointing a substitute trustee radically changed with the codification of Texas Property Code section 51.0076 in 2015. As a result, 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 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* 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

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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.

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§ 11.1:3 Retroactive Application

It is clear the 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 trustee-related statutes preempt or have retroactive effect on deeds of trust executed before the statutes' effective date.

So long as the 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 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

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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.

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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.

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).

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§ 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

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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.

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.

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§ 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.

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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. 2014).

Residential Real Property Sales: During the 85th legislative session, the Texas Business and Commerce Code was amended by adding chapter 22 dealing with the public sale of residential

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real property under a power of sale in a security instrument. *See* Acts 2017, 85th Leg., R.S., ch. 1012, § 1 (H.B. 1470), eff. Sept. 1, 2017.

A trustee or substitute trustee conducting a residential real property foreclosure may contract with an attorney to advise the trustee or substitute trustee and to administer or perform any of the trustee's or substitute trustee's functions or responsibilities under the deed of trust and chapter 51 of the Texas Property Code. Tex. Bus. & Com. Code § 22.003. The trustee or substitute trustee may also contract with an auction company to arrange, manage, sponsor, or advertise a residential real property foreclosure sale. Tex. Bus. & Com. Code § 22.003.

A winning bidder at a sale, other than the foreclosing mortgagee or mortgage servicer, shall provide the following information to the trustee or substitute trustee at the time the trustee or substitute trustee completes the sale:

(1) the name, address, telephone number, and e-mail address of the bidder and of each individual tendering or who will tender the sale price for the winning bid;

(2) if the bidder is acting on behalf of another individual or organization, the name, address, telephone number, and e-mail address of the individual or organization and the name of a contact person for the organization;

(3) the name and address of any person to be identified as the grantee in a trustee's or substitute trustee's deed;

(4) the purchaser's tax identification number;

(5) a government-issued photo identification to confirm the identity of each individual tendering funds for the winning bid; and

(6) any other information reasonably needed to complete the trustee's or substitute trustee's duties and functions concerning the sale.

Tex. Bus. & Com. Code § 22.004(a).

If a winning bidder required to provide information under section 22.004(a) fails or refuses to provide the information, the trustee or substitute trustee may decline to complete the transaction or deliver a deed. Tex. Bus. & Com. Code § 22.004(b).

The trustee or substitute trustee must:

(1) provide the winning bidder with a receipt for the sale proceeds tendered; and

2. except when prohibited by law, within a reasonable time:

   (A) deliver the deed to the winning bidder; or

   (B) file the deed for recording.

Tex. Bus. & Com. Code § 22.005.

The trustee or substitute trustee must ensure that funds received at the sale are maintained in a separate account until distributed. Tex. Bus. & Com. Code § 22.006(a). The trustee or substitute trustee shall cause to be maintained a written record of deposits to and disbursements from the account. Tex. Bus. & Com. Code § 22.006(a). The trustee or substitute trustee shall make reasonable attempts to identify and locate the persons entitled to all or any part of the sale proceeds. Tex. Bus. & Com. Code § 22.006(b).

In connection with the sale and related postsale actions to identify persons with legal claims to sale proceeds, determine the priority of any claims, and distribute proceeds to pay claims, a trustee or substitute trustee may receive:

(1) reasonable actual costs incurred, including costs for evidence of title;

(2) a reasonable trustee's or substitute trustee's fee; and

(3) reasonable trustee's or substitute trustee's attorney's fees

Tex. Bus. & Com. Code § 22.006(c).

A fee described by section 22.006(c):

(1) is considered earned at the time of the sale;

(2) may be paid from sale proceeds in excess of the payoff of the lien being foreclosed; and

(3) is conclusively presumed to be reasonable if the fee:

(A) is not more than the lesser of 2.5 percent of the sale proceeds or $5,000, for a trustee's or substitute trustee's fee; or

(B) is not more than 1.5 percent of the sale proceeds, for trustee's or substitute trustee's attorney's fees incurred to identify persons with legal claims to sale proceeds and determine the priority of the claims.

Tex. Bus. & Com. Code § 22.006(d).

A trustee or substitute trustee who prevails in a suit based on a claim that relates to the sale and that is found by a court to be groundless in fact or in law is entitled to recover reasonable attorney's fees necessary to defend against the claim, which may be paid from the excess sale proceeds, if any. Tex. Bus. & Com. Code § 22.006(e). Nothing in section 22.006 of the Business and Commerce Code precludes the filing of an interpleader action or the depositing of funds in a court registry. Tex. Bus. & Com. Code § 22.006(f).

§ 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

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(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).

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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

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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.).

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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 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.

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See form 11-4 in this manual for an affidavit of filing and posting of the notice of foreclosure sale.

If a county maintains an Internet website, the county must post notices of sale filed with its county clerk on that website 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

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(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* §§ 14.5:6, 14.5:7, forms 14-8, 14-9 (3d ed. 2017), 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.

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§ 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. 14, forms 14-12 (no servicing agreement), 14-13 (servicing agreement) (3d ed. 2017), 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.

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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.

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§ 12.4:4 Date, Time, and Location of Sale

Foreclosure sales must be conducted on the first Tuesday of the month unless the first Tuesday is January 1 or July 4, and then the sale must be held on the first Wednesday of the month. *See* Tex. Prop. Code § 51.002(a), (a–1); Tex. Civ. Prac. & Rem. Code § 34.041(c); Tex. Tax Code § 34.01(r–1), (r–2). A sale not held on the first Tuesday or Wednesday 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). In addition, 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 as required under Texas law at the time, was proper when the Department of Housing and Urban Development (HUD) was the mortgagee and foreclosed under 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). In *Behrens Lofts*, 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 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. Except for January 1 or July 4, 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); *Stewart v. Stewart*, 357 S.W.2d 492, 493–94 (Tex. Civ. App.—Texarkana 1962, no writ).

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 com-

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mercially 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 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

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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 added Texas Property Code sections 5.027 through 5.031 concerning correction deeds. Section 5.027(b) expressly provides:

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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.

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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

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[**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**],

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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: [**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**

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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.

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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.

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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.

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Bid Evaluation

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Chapter 13

Bid Evaluation

§ 13.1 Introduction

Any person who desires to formulate a rational strategy for bidding at a foreclosure sale should, in advance of the sale, determine not only the value of the collateral in the abstract, but should also review the particular circumstances of the collateral and lien being foreclosed to determine if other factors will influence the price the person is willing to bid at sale. These other factors include matters such as casualty damage to the mortgaged property, environmental problems, the priority of the lien being foreclosed, and the existence of wraparound debt.

§ 13.2 Appraisal

The process of formulating a rational bid strategy must necessarily begin with valuing the collateral. The mortgagee has several reasons for obtaining a preforeclosure appraisal of the mortgaged property. If the lien is a second lien, the mortgagee should determine whether there is enough equity in the property to justify the expense of foreclosing. Obviously, an inferior lienholder will not want to bid more than the market value of the property less the balance owed on prior liens, including delinquent or accrued property taxes. The mortgagee will also want to determine, in light of the property's value and anticipated "holding time" and resale costs if the mortgagee were to acquire the property, at what price the mortgagee would sell its note or stop bidding to let a third party acquire the property at a foreclosure sale. A mortgagee, however, has no duty to provide the mortgagor with a copy of the mortgagee's appraisal unless the mortgagee agrees to provide the appraisal in the loan agreement documents. *See Everson v. Mineola Community Bank, S.S.B.*, No. 12-05-334 CV, 2006 WL 2106959, at *2 (Tex. App.—Tyler July 31, 2006, pet. denied) (mem. op.).

§ 13.2:1 Importance of Appraisal for Deficiency Suit

Section 51.003 of the Texas Property Code provides additional importance to the appraisal. In a suit for deficiency following a foreclosure sale, the person against whom recovery is sought may request the finder of fact to determine the fair market value of the property, and, if the fair market value exceeds the amount of the successful bid, the defending party will be entitled to an offset in the amount of the difference. *See* Tex. Prop. Code § 51.003. Evidence of fair market value may include expert opinion testimony, prices at 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). An appraisal allows the lender to evaluate in advance whether a suit on a guaranty could be thwarted under section 51.003. However, the mortgagee runs the risk that the appraiser will appraise the mortgaged property higher than anticipated, forcing the mortgagee to bid higher than it otherwise feels is justified and thereby giving up part of its recourse in a deficiency judgment.

§ 13.2:2 Selection of Appraiser

Care should be taken in selecting the appraiser, since the appraisal will probably be discoverable in any subsequent litigation or bankruptcy pro-

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ceedings. The appraiser should be a good witness as well competent appraiser. If at all possible, the appraiser should be a member of a recognized appraisal society, such as the American Institute of Real Estate Appraisers. In some counties, the only expert available may be a real estate broker. See Tex. Occ. Code § 1101.002(1)(A)(xi), which defines "broker" to include persons who provide estimates of worth not constituting an appraisal, but which are provided in the person's ordinary course of business and are related to the actual or potential acquisition or disposition of an interest in real property. The mortgagee runs the risk that the appraiser will appraise the mortgaged property higher than anticipated, forcing the mortgagee to bid higher than it otherwise feels is justified and thereby giving up part of its recourse in a deficiency judgment. The twenty-one-day period for the foreclosure sale notice is a very short time within which to obtain an appraisal. Many times the appraisal is received on the eve of the foreclosure sale with little chance for evaluation by the mortgagee. Therefore, ordering an appraisal should be one of the first steps in the foreclosure process. See form 13-1 in this manual for a letter employing an appraiser and form 13-2 for a bid calculation worksheet.

§ 13.2:3 Effect of Mineral Interests

In reviewing any appraisal of the collateral real property, the mortgagee should keep in mind that the value of the collateral real property may be materially and adversely affected by outstanding mineral interests, as the mineral estate owners have the right to use such part of the surface as is reasonably necessary to develop the mineral estate. *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980); *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967); *Warren Petroleum Corp. v. Monzingo*, 304 S.W.2d 362, 363 (Tex. 1957). While Texas law does recognize that the mineral owner must accommodate existing surface uses,

> to obtain relief on a claim that the mineral lessee has failed to accommodate an existing use of the surface, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the mineral lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use.

Merriman v. XTO Energy Inc., 407 S.W.3d 244, 249 (Tex. 2013) (citations omitted). Some comfort as to the scope of an existing use to which the accommodation doctrine applies may be found in *Texas Genco, LP v. Valence Operating Co.*, 187 S.W.3d 118 (Tex. App.—Waco 2006, pet. denied), where the court held that a permit for use of surface as a landfill was tantamount to an "existing use," and the mineral lessee had to accommodate that use by directional drilling). See James M. Summers, *The Impact on Lenders of the Correlative and Conflicting Rights of Competing Estates and Interests: Surface, Mineral, Water, and Wind*, *in* Mortgage Lending Institute, University of Texas School of Law, Austin (2013).

Many existing mortgagee's title insurance policies exclude the mineral estate from the scope of policy coverage. Texas Insurance Code section 2703.0515 provides that a title insurance company is not required to offer or provide in connection with a title insurance policy an endorsement insuring a loss from damage resulting from the use of the surface of the land for the extraction or development of coal, lignite, oil, gas, or another mineral if the policy includes a

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general exception or exclusion from coverage a loss from damage resulting from the use of the surface of the land for the extraction or development of coal, lignite, oil, gas, or another mineral. Tex. Ins. Code § 2703.0515. For a further discussion of the protection title insurance can provide with respect to mineral interests, see David J. Weiner, *Mineral Rights and Surface Damage: An Overview of Recent Changes in the Title Insurance Industry*, *in* Advanced Real Estate Strategies Course, State Bar of Texas, Austin (2014).

§ 13.3 Effect of Postforeclosure Review on Bidding

§ 13.3:1 *BFP v. RTC* and Fraudulent Transfers

See sections 14.8:1 through 14.8:5 in this manual for a discussion of the state-law rule that mere inadequacy of consideration does not render a foreclosure sale invalid. Section 548 of the Bankruptcy Code permits transfers that occurred within two years of filing bankruptcy to be set aside if the debtor was insolvent at the time of the transfer and the debtor received "less than a reasonably equivalent value" in exchange for the transfer. 11 U.S.C. § 548(a)(1)(B)(i). Such transfers are termed "fraudulent transfers" in that they deplete the bankrupt's estate of value that otherwise might be available for the bankrupt's unsecured creditors. Concerns that a nonjudicial deed-of-trust lien foreclosure sale could be set aside based on the amount paid for the mortgagor's property partially have been eliminated by the decision of the United States Supreme Court in *BFP v. RTC*, 511 U.S. 531 (1994). Before this decision, lenders in Texas followed the "70 percent of value paid" guideline announced in *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980). In *Durrett*, the Fifth Circuit held that a foreclosure sale that yielded 57 percent of the fair market value of property was not a transfer for reasonably equivalent value and supplied a rule of thumb that 70 percent of fair market value was the level below which a transfer was subject to being set aside. *Durrett*, 621 F.2d at 202–03. *See also Matheson v. Powell (In re Matheson)*, 84 B.R. 435, 437 (Bankr. N.D. Tex. 1987) (fraudulent transfer rules of Bankruptcy Code section 548 apply only to prepetition transfers and are not applicable to postpetition transfers, such as a foreclosure sale after lifting of stay).

In *BFP*, the Supreme Court eliminated the relationship of "fair market value" from the test for "reasonably equivalent value." The court noted that section 548 does not refer to "market value." The court reasoned that fair market value is not typically obtained in a forced-sale context. The court found that section 548 did not embrace a fair market value bid test in the context of a foreclosure sale. The court also refused to substitute a "fair forced sale" test. The court held that, for purposes of section 548, "reasonably equivalent value" at a foreclosure sale 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.

However, the foreclosure sale may be avoided under section 548 if the price paid is not reasonably equivalent to its actual foreclosure sale value and if the sale was the result of irregularities under state law that would permit judicial invalidation of the sale. The court defined the property's actual value as being the price the property would have brought if the foreclosure sale had proceeded according to the state's statutory foreclosure process. *See BFP*, 511 U.S. at 545–46.

§ 13.3:2 Ninety-Day Preference Review

In *Whittle Development, Inc. v. Branch Banking & Trust Co. (In re Whittle Development, Inc.)*, 463 B.R. 796 (Bankr. N.D. Tex. 2011), the

bankruptcy court for the Northern District of Texas denied a preference defendant's motion to dismiss a mortgagor's claim that the foreclosure constituted a preference. The court found that the Supreme Court's holding in *BFP* did not apply in preference actions. The court framed the issue as follows: "whether a debtor in possession can avoid a pre-petition real property foreclosure on the grounds that the foreclosure constituted a preferential transfer, even though the foreclosure sale complied with state law and was non-collusive." *Whittle Development, Inc.*, 463 B.R. at 767. The court noted:

> Although the Code at time is "awkward, and even ungrammatical . . . that does not make it ambiguous." (citation omitted) Therefore, looking at the unambiguous language of the statute, it would seem that the only thing that must be shown is that the creditor did, in fact, receive more from the pre-petition transfer than it would have under a Chapter 7 liquidation in order for § 547(b)(5)(A) to be satisfied.

Whittle Development, Inc., 463 B.R. at 800.

In *Whittle*, the mortgaged property was sold to a subsidiary of the mortgagee at a foreclosure sale within the section 547(b)(5)(A) ninety-day preference period for $1,220,000.00, leaving a deficiency of $1,181,513.27. *See Whittle Development, Inc.*, 463 B.R. at 798. The debtor in possession alleged that the property was worth $3,300,000.00 and that Branch Banking & Trust was thus over secured by $1,100,000.00. *Whittle Development, Inc.*, 463 B.R. at 798. The court cited the following rationale for this result set out in *In re FIBSA Forwarding, Inc.*, 230 B.R. 334, 341 (Bankr. S.D. Tex. 1999), *aff'd*, 244 B.R. 94 (S.D. Tex. 1999):

> The issue posed before the Supreme Court was a wholly different quality. If the court had ruled differently in *BFP* all transfers of real estate in a foreclosure sale could be declared fraudulent since the transfer would not, as a matter of law, yielded "reasonably equivalent value in exchange." In dealing with preferential transfers, there is no such risk. If an otherwise valid foreclosure sale is found to enable a creditor to obtain more than he would in a chapter 7 liquidation, then the additional amount of benefit conferred to the creditor is simply brought back into the estate. The purchaser of the real estate at the foreclosure does not necessarily lose its property unless the purchaser is the creditor himself. This approach furthers the state's interest in maintaining the security of titles without subverting the policy of the Code of maintaining equality among the creditors.

As a matter of policy, this is probably the optimal approach to this issue. As the court in *FIBSA Forwarding, Inc.* noted, a creditor who is able to foreclose prepetition may be able to achieve a windfall unless the debtor or the other creditors file an involuntary petition before the foreclosure. *In re FIBSA Forwarding, Inc.*, 230 B.R. at 341. Such a result creates the so-called "race to the court house" that the Code tries to prevent. By allowing the trustee (or the debtor-in-possession in a chapter 11 case) to bring an avoidance action, a court risks wasting judicial resources on another evidentiary hearing to determine whether the foreclosure sale did result in a better outcome for the creditor than he might otherwise have received. Such a risk is marginal compared to the risk of a creditor is able to achieve a windfall profit at the expense of the estate by the mere vir-

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> tue that she had the prescience to foreclose before a petition could be filed.

Whittle Development, Inc., 463 B.R. at 801–02. *See also Villareal v. Showalter (In re Villarreal)*, 413 B.R. 633, 639–42 (Bankr. S.D. Tex. 2009) (court found that foreclosure resulted in a $3,250,000 windfall to lender). If the debtor in possession is successful in challenging the foreclosure sale as a preference, it may recover from the mortgagee the property subject to a lien for the amount the mortgagee has paid through its bid, or the value of the property in excess of the bid. See Alvin Arnold and Marshall Tracht, *Construction and Development Financing* § 6:141 (3d ed. 2001); Gerald L. Blanchard, *Lender Liability: Law, Practice and Prevention* § 11:19 (2013 ed.); and Joyce Palomar, *Title Insurance Law* § 14:18 (2013–14 ed.).

§ 13.4 Casualty Loss and Effect on Bid

In connection with foreclosure proceedings, the mortgagee should both confirm that the mortgaged improvements are insured and review the terms of the applicable insurance policies. If the mortgaged property is damaged by casualty before the foreclosure sale, the following questions should be answered: (1) Will the claim be settled before the foreclosure sale? (2) Who is entitled to the proceeds: the noteholder, the mortgagor, or the purchaser at the foreclosure sale? (3) Will a greater recovery be available if the proceeds are applied in reconstruction of the mortgaged property than if they are taken as a cash payment? (4) Will the insurer insist on the premises being repaired as opposed to its paying a cash settlement? (5) Do the policy and proceeds cover contents or trade fixtures not encumbered by the deed of trust? For additional information, see the following resources: William H. Locke, Jr., and Charles E. Comiskey, *11 Things You Wish You Had Known About Commercial Project Insurance, in* State Bar of Tex., Advanced Real Estate Law Course (2013); William H. Locke, Jr., and Marilyn C. Maloney, *Insurance Issues in Distressful Times, in* State Bar of Tex., Advanced Real Estate Drafting Course (2011); William H. Locke, Jr., and Marilyn C. Maloney, *Top Ten Insurance Tips for Mortgage Lending, in* Mortgage Lending Institute, University of Texas School of Law (2011); William H. Locke, Jr., and Marilyn C. Maloney, *Top 10 Insurance Tips for Lenders*, 28 Practical Real Estate Lawyer 45 (2012); and 13 *Williston on Contracts* § 37:51 (2013).

§ 13.4:1 Types of Mortgagee Clauses in Property Insurance

Absent a contractual undertaking to insure the mortgaged property and to insure the interest of the mortgagee, the mortgagor does not have an obligation to do so. However, it is customary in commercial financing to require the mortgagor to carry insurance for the joint interest of both mortgagor and mortgagee. At least three types of mortgagee clauses cover the mortgagee's interest under a hazard insurance policy and the policy's proceeds: the open mortgage clause, the standard mortgage clause, and the assignment of the mortgagor's interest clause.

Simple Loss Payee/Open Mortgage Clause: An open mortgage clause provides that any loss is payable to the lender "as its interest may appear." Courts have held that a clause that simply provides that insurance proceeds will be payable to a mortgagee "as its interest may appear" links the mortgagee's recovery to the right of the mortgagor to recover and exposes the mortgagee to risks that the insurer will be afforded a defense to payment to the mortgagee based upon inequitable conduct of the mortgagor. This type of clause exposes the lender to all the defenses and limitations that the insurer has against the insured mortgagor, such as failure to pay the premium or perform a condition for coverage under the policy. See cases and discussion at Steven Plitt et al., 4 *Couch on Insur-*

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ance § 65:8 (3d ed. 2011); Annotation, *Remedy and Measure of Damages for Wrongful Cancellation of Life Insurance*, 48 A.L.R. 107, 121 (1927); and Annotation, *Breach of Policy by Mortgagor as Affecting Mortgagee under a Loss-Payable Clause which does not Provide for that Event*, 38 A.L.R. 367 (1925). Examples of the effect of such a clause are discussed in *Commerce Bank & Trust Co. v. Centennial Insurance Co.*, 446 N.E.2d 73 (Mass. 1983) and *Pioneer Food Stores Cooperative, Inc. v. Federal Insurance Co.*, 563 N.Y.S.2d 828 (N.Y. App. Div. 1991). In *Commerce Bank*, the mortgagee claimed that it should receive the insurance proceeds regardless of whether the loss was caused by a fire set by the mortgagor. While the court did not determine the question of arson, it held that because the mortgagee was essentially merely a loss payee, it could recover only if the mortgagor would have been entitled to recover. *Commerce Bank*, 446 N.E.2d at 75. *Pioneer Food Stores* also involved suspected arson by the mortgagor; because the mortgagor would not provide financial information or submit sworn affidavits regarding the loss, the mortgagee was denied recovery. *Pioneer Food Stores*, 563 N.Y.S.2d at 830. Not all borrowers facing financial difficulty consider insurance fraud as the way out of their problems, but the mortgagee of one who has taken this path will be unprotected if it is simply named as loss payee or is covered under an "open mortgage clause" type of endorsement.

Standard Mortgage Clause: Standard commercial property policies, for example, Insurance Services Office's (ISO's) CP 00 10, automatically extend coverage to the mortgagee as an insured through the inclusion of the standard mortgage clause. *See* 4 *Couch on Insurance* § 65:48. Other property insurance forms that do not include a mortgage clause must be endorsed to provide coverage equivalent to that contained in CP 00 10.

The standard mortgage clause was developed to protect recovery by the mortgagee even though the insurance contract between the mortgagor and the insurer might be voided by the insurance company because of certain omissions or acts by the mortgagor (for example, neglect, arson, or concealment). The most significant protections afforded by the standard mortgage clause are the following:

1. Insurance proceeds are paid to the mortgagee and not to the insured or to the mortgagee and the insured jointly (see Standard Mortgage Clause section F.2.b in the ISO CP 00 10 10 12 Building and Personal Property Coverage Form).

2. Coverage applies for the benefit of the named mortgagee even if coverage is denied the insured because of some violation by the insured of the policy's conditions (see Standard Mortgage Clause section F.2.d in the ISO CP 00 10 10 12 Building and Personal Property Coverage Form).

3. The mortgagee is to be given notice of policy cancellation by the insurer: ten days' notice of cancellation for nonpayment of premium and thirty days' notice when cancellation is for other reasons (see Standard Mortgage Clause section F.2.f(1) in the ISO CP 00 10 10 12 Building and Personal Property Coverage Form).

4. The mortgagee is to be given ten days' notice on nonrenewal (see Standard Mortgage Clause section F.2.g in the ISO CP 00 10 10 12 Building and Personal Property Coverage Form).

Numerous cases uphold the standard mortgage clause's requirement that notice must be given. For example, in *Firstbank Shinnston v. West Virginia Insurance Co.*, 408 S.E.2d 777 (W. Va. 1991), the court held that a fire insurance com-

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pany could not remove the lender under a deed of trust from the owner's insurance policy without giving notice to the lender of the cancellation. In that case, a homeowner had agreed through a standard mortgage clause to maintain fire insurance on his home, which was subject to a deed of trust securing a loan from Firstbank Shinnston. After two items of correspondence sent to the bank were returned undelivered to the insurance company, the insurance company unilaterally deleted the bank as an additional insured under the policy. The house burned, and the homeowner collected $18,000 from the insurance company but did not rebuild. As a result, the insurance company canceled the policy. The homeowner also defaulted on his loan. Firstbank Shinnston sought to collect the insurance proceeds from the fire, and the insurance company refused coverage. The court held on those facts that cancellation of the policy was not effective as to Firstbank Shinnston, because the insurance company failed to notify the bank that its interest as mortgagee was being canceled. *Firstbank Shinnston*, 408 S.E.2d at 782–83.

Courts have held that a standard mortgage clause grants independent rights to the mortgagee from the insurer that can be enforced regardless of the actions of the mortgagor. A standard mortgage clause, like the open mortgage clause, provides that the loss will be payable to the mortgagee "as its interest may appear," but it goes further to provide that the insurance, as to the mortgagee, will not be invalidated by acts of the insured. 4 *Couch on Insurance* § 65:9. Examples of cases that provided payments to the mortgagee under such clauses are *National Commercial Bank & Trust Co. v. Jamestown Mutual Insurance Co.*, 334 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1972) and *Foremost Insurance Co. v Allstate Insurance Co.*, 460 N.W.2d 242 (Mich. Ct. App. 1990). In *National Commercial Bank*, the insurer claimed that material misrepresentations of the insured voided the policy. However, the court found that the standard mortgage clause created a separate contract between insurer and mortgagee that was not affected by the actions of the insured. *National Commercial Bank*, 334 N.Y.S.2d at 1001. *Foremost* involved yet another case of arson by the insured, but because the policy named the mortgagee under the standard or union clause, it was entitled to recover despite the actions of the insured. *Foremost Insurance Co.*, 460 N.W.2d at 244; *see also* John W. Steinmetz et al., *The Standard Mortgage Clause in Property Insurance Policies*, 33 Tort & Ins. L. J. 81 (1997).

§ 13.4:2 Mortgagee's Rights in Property Insurance on Bankruptcy of Mortgagor

In the context of a mortgagor's bankruptcy proceeding, the property policy's proceeds up to the mortgagee's insurable interest are not property of the mortgagor in bankruptcy. In *Paskow v. Calvert Fire Insurance Co.*, 579 F.2d 949, 951 (5th Cir. 1978), the court held, "Because the mortgagee has a contractual right to money payable under the loss payable clause, the mortgagor has no right to that money. Thus the money or right to receive the money is not property or a right to property belonging to the mortgagor."

The Uniform Commercial Code recognizes that a mortgagee loss payee's interest in mortgaged property policy proceeds takes precedence over claims of a holder of a perfected security interest in collateral that has been damaged or destroyed. Lary Lawrence, 9 *Lawrence's Anderson on the Uniform Commercial Code* § 9-306:15 (3d ed. 1981, revised 1999).

§ 13.4:3 Issues Arising before Foreclosure

Some property insurance policies require the mortgagee to notify the insurance carrier of the commencement of foreclosure. Notice is given to the insurance carrier so that it may protect its

position by purchasing the secured indebtedness or bidding at the foreclosure sale, especially if a casualty loss has occurred before the foreclosure sale. The safest practice is to notify the insurance company of a pending foreclosure sale and of the change of ownership after the foreclosure sale.

Further, if the mortgagor abandons the mortgaged property before the foreclosure sale, the mortgagee must confirm continuation of coverage. Most property insurance policies exclude or reduce coverage if the insured property is vacant for more than a certain period of time, usually sixty days. This limitation arises from the possibility that vandalism, glass breakage, theft, and other casualties may occur when the property is unprotected. Although a company may offer an endorsement to override the vacancy exclusion, these endorsements typically provide for short term coverage at a much greater cost.

§ 13.4:4 Loss to Property before Foreclosure

If the mortgaged property is damaged before the foreclosure sale, the lender will be concerned as to whether the mortgagor, the lender, or the purchaser at the foreclosure sale will receive the insurance proceeds. In addition, the lender should consider whether a greater recovery is available if the proceeds are applied in reconstruction of the mortgaged property or if they are taken as a cash payment. The greater replacement cost proceeds are payable only if the property is repaired. If proceeds are applied to the mortgage debt, the lower "actual cash value" will be paid.

§ 13.4:5 Loss after Foreclosure

If the loss occurs after a foreclosure sale, the mortgagor no longer has an insurable interest, and even though the mortgagor continues to reside on the property as a tenant at sufferance, the mortgagor does not have an insurable interest in the property and does not have a claim to the insurance proceeds payable due to a fire loss. *Rhine v. Priority One Insurance Co.*, 411 S.W.3d 651, 660–61 (Tex. App.—Texarkana 2013, no pet.); *Jones v. Texas Pacific Indemnity Co.*, 853 S.W.2d 791, 793 (Tex. App.—Dallas 1993, no writ).

§ 13.4:6 Mortgagee's Option to Repair or to Apply Proceeds to Debt

In Texas, parties may contract as to the disposition to be made of the insurance proceeds for a casualty loss. *Schultz v. Morton*, 101 S.W.2d 373, 375 (Tex. Civ. App.—Dallas 1936, writ ref'd). The mortgagee is generally given the option to apply the proceeds to the secured debt. The *Texas Real Estate Forms Manual*'s deed of trust specifies: "Lender may apply any proceeds received under the property insurance policies covering the Property either to reduce the Obligation or to repair or replace damaged or destroyed improvements covered by the policy." 2 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 8, form 8-1 (3d ed. 2017). If the mortgagee has notice that the insured damage to the mortgaged property is "fairly extensive," the mortgagee has the obligation to notify the borrower of its election "within a fairly short period after receiving the proceeds" so that the borrower may make a decision about whether and how to repair the property. *Statewide Bank & SN Servicing Corp. v. Keith*, 301 S.W.3d 776, 782 (Tex. App.—Beaumont 2009, pet. abated).

If the lender has total discretion in the use of the proceeds, in making a decision to allow rebuilding, it will consider the viability of the project, the strength of the borrower, the lender's relationship with the borrower and its affiliates, and other credit-driven factors. It should also consider the effect this decision will have on the amount of the recovery. The lender will typically require the borrower to obtain replacement value insurance. This provides more coverage

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than "actual cash value" because it provides funds necessary to replace the project, rather than taking the original cost of the insured property and then applying a reduction for physical depreciation. Because replacement value insurance provides more coverage, it is more expensive. However, receipt of replacement proceeds depends on replacement of the project. If the project is not rebuilt, the insurer will pay only the lesser actual cash value proceeds. The lender should be aware of this as it considers whether to allow rebuilding or to require repayment of its loan.

Application of Proceeds to Debt: In *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.), the court stated that it knew of no public policy reason to prevent a mortgagor from agreeing that a mortgagee may apply insurance proceeds to the secured debt. The court refused to find such an arrangement grossly inequitable, because the mortgagor actually benefits by having the proceeds applied to his debt. The landmark case of *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983), upheld the mortgagee's right to apply the proceeds to the debt and to refuse to allow the proceeds to be used to repair the mortgaged property. In *Anchor Mortgage Services, Inc. v. Poole*, 738 S.W.2d 68 (Tex. App.—Fort Worth 1987, writ denied), the court held that the mortgagors failed to show that they sustained any damages from the mortgagee's breach of its agreement to disburse a portion of the insurance proceeds to start repair work. The court reasoned that although the mortgagors may have suffered the loss of the funds because of foreclosure in accordance with the terms of the deed of trust, the mortgagors were also relieved of the obligation to make repairs. *Anchor Mortgage Services*, 738 S.W.2d at 71.

Application of Proceeds to Repair or Restoration: Unlike the issue presented in *Zidell*, the court in *Lewis v. Wells Fargo Home Mortgage, Inc.*, 248 S.W.3d 828 (Tex. App.—Texarkana 2008, no pet.), reviewed a mortgagee's conduct in applying insurance proceeds to reconstruct a home destroyed by fire. After the fire, which occurred two weeks after Lewis bought the home, Lewis made no payments on the note, and Wells Fargo foreclosed. Lewis sued to declare that the debt had been satisfied by the payment of the insurance proceeds to Wells Fargo, that as a result thereof the foreclosure was wrongful, title remained in Lewis, and that Wells Fargo had constructed the home on Lewis's land as an unencumbered improvement. Lewis also complained that the house as constructed was inferior to the house that preexisted the fire and thus Wells Fargo had not used the insurance proceeds for "restoration or repair" but instead for "reconstruction or rebuilding." The court found that Lewis's complaint about the quality of construction was a severed matter remaining to be resolved by the trial court and affirmed the trial court's granting of partial summary judgment in favor of Wells Fargo that it was the owner of the property. *Lewis*, 248 S.W.3d at 830–31.

§ 13.4:7 Relationship of Proceeds to Secured Debt

The noteholder's right to the insurance proceeds depends on the existence of an interest in the mortgaged property and in the property insurance policy, typically referred to in policies with the phrase *as their interest may appear at time of loss*.

If the mortgagee does not carry its own insurance but requires the mortgagor to carry insurance for the benefit of both parties, the mortgagee must also verify that its interests are properly reflected in the policy. There is more than one form of endorsement for this purpose, and each provides widely different protection. Both the mortgagor and mortgagee have insurable interests in mortgaged property. Either the mortgagor or mortgagee can purchase a property

insurance policy on the mortgaged property. A mortgagor may insure the mortgaged property in an amount equal to the property's value.

A mortgagee's interest in the policy is limited to the secured indebtedness due it. In *Sportsmen's Park, Inc. v. New York Property Underwriting Ass'n*, 470 N.Y.S.2d 456, 459 (N.Y. App. Div. 1983), the court noted, "The extent of a mortgagee's interest is determined, in the first instance, by the total amount of its lien, including the outstanding principal amount of the debt plus interest, plus any amounts expended to protect its security (i.e., taxes, insurance premiums, etc.), all as of the date of the fire."

The noteholder's interest will vary depending on the action taken before the insurer disburses the insurance proceeds. If the property is foreclosed on before the proceeds are distributed, the mortgagee's right to the proceeds may be reduced or extinguished, depending on the mortgagee's interest remaining after foreclosure. If the mortgagee purchases the mortgaged property for the amount of the debt outstanding, the mortgagee will have no right to the insurance proceeds. In *Helmer v. Texas Farmers Insurance Co.*, 632 S.W.2d 194, 196 (Tex. App.—Fort Worth 1982, no writ), the court succinctly stated "no mortgagee's indebtedness; no indebtedness or liability to mortgagee from the insurance company." In *Beneficial Standard Life Insurance Co. v. Trinity National Bank*, 763 S.W.2d 52 (Tex. App.—Dallas 1988, writ denied), the court refused to find that the insurer's full credit bid at the foreclosure sale should be reformed to be reduced by the amount of the insurance proceeds even though the mortgagee was unaware of the casualty loss at the time of the foreclosure sale. The insurer brought the action to determine who was entitled to the insurance proceeds. The court upheld the award of the proceeds to the second lienholder and the mortgagor as opposed to the first lienholder, who had mistakenly bid an amount equal to the balance due on the first-lien indebtedness. *Beneficial Standard Life Insurance Co.*, 763 S.W.2d at 55–56. The court refused to conform its decision to the judgment in a separate court action brought by the first lienholder against the substitute trustee to reform the bid price. The second lienholder and the mortgagor were not parties to the separate reformation suit. Additionally, because there was no agreement between the lienholders, there could be no reformation on the theory of mutual mistake of the parties. *Beneficial Standard Life Insurance Co.*, 763 S.W.2d at 56.

If the mortgagee purchases the mortgaged property for less than the balance owed on the secured debt, the mortgagee may recover from the insurer, as from the mortgagor, the deficiency (up to the policy limits). In *Helmer*, the court held that an insurer was obligated to pay only $25.70 to a mortgagee on a secured debt of $6,725.70, after the mortgagee had bid and purchased the mortgaged property at the foreclosure sale for $6,700.00. *See Helmer*, 632 S.W.2d at 195. In *Campagna v. Underwriters at Lloyd's London*, 549 S.W.2d 17 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.), the mortgagee's recovery against the insurer was $408, the difference between the $2,551 balance on the secured debt and the mortgagee's successful bid of $2,143. The court rejected the mortgagee's argument that the mortgagee's right of recovery under the policy should be the difference between the amount of the debt and the market value of the mortgaged property after the fire and that the amount bid at the foreclosure should be irrelevant. *Campagna*, 549 S.W.2d at 18–19.

In *Fireman's Fund Insurance Co. v. Jackson Hill Marina, Inc.*, 704 S.W.2d 131 (Tex. App.—Tyler 1986, writ ref'd n.r.e.), the court held that the mortgagee, which had purchased the mortgaged property at the foreclosure sale, was entitled to the insurance proceeds on the policy purchased by the mortgagor before foreclosure for a casualty occurring after the foreclosure sale. The recovery was limited to the amount of the loan deficiency. The mortgagor was held not

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to be entitled to the insurance proceeds, because the insurer had been put on notice of the change of ownership. *Fireman's Fund Insurance Co.*, 704 S.W.2d at 136.

If the deed of trust requires the mortgagor to list the mortgagee as an additional insured on its property insurance policy, the mortgagee is protected by an equitable lien on property insurance proceeds even if the mortgagee is not listed on the insurance policy as an additional insured or mortgagee. *Beneficial Standard Life Insurance Co.*, 763 S.W.2d at 55; *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 632 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.); *Fidelity & Guaranty Insurance Corp. v. Super-Cold Southwest Co.*, 225 S.W.2d 924, 927 (Tex. App.—Amarillo 1949, writ ref'd n.r.e.).

In *U.S. Bank N.A. v. Safeguard Insurance Co.*, 422 F. Supp. 2d 698 (N.D. Tex. 2006), the court held that although the mortgagee was not listed on the mortgagor's property policy as an additional insured, the mortgagee was entitled to the insurance proceeds under the equitable lien doctrine because the mortgage required the mortgagor to cause the insurance company to list the mortgagee as an additional insured. The court also held that the mortgagee's right to the proceeds could not be defeated by its subsequent foreclosure on three of the four apartment projects insured under the policy, including the two projects that sustained insured damage, as a deficiency still existed, even though the deed of trust expressly recited that the mortgage lien continued as a lien on the balance of the mortgaged property.

§ 13.4:8 Casualty Loss Bid Strategy

Liquidating Casualty-Loss Claim before Foreclosure Sale: The mortgagee should postpone the foreclosure sale until after the amount payable on the insurance policy is determined. Otherwise, the mortgagee risks overbidding by establishing a deficiency less than the amount of the insured casualty loss.

Foreclosure before Applying Insurance Proceeds to Secured Debt: The mortgagee may feel that foreclosing before the insurance proceeds are liquidated and applied to reduce the secured debt is necessary. In such situations, the mortgagee should be careful to bid low enough to establish a deficiency equal to the insurance proceeds.

The lender may be placed in a dilemma should it face competitive bidding. To be the successful bidder at the foreclosure sale and thereby be the owner of the policy and the recipient of its proceeds, the lender may be forced to bid up to its outstanding indebtedness and thereby extinguish or pro rata extinguish its claim on the insurance policy.

Assuming the lender has elected not to make the insurance proceeds available for the restoration of the mortgaged property, the best course of action appears to be to have the proceeds liquidated and applied to the secured debt before the foreclosure sale. The lender is then in the position to bid at the foreclosure sale an amount equal to the lesser of the then indebtedness or the perceived value of the mortgaged property as is.

See form 13-2 in this manual for a bid calculation worksheet.

§ 13.5 Prior Liens

A foreclosure sale does not extinguish a lien against the mortgaged property that has a higher priority than the lien being foreclosed. As a result, the debt secured by the prior lien remains against the mortgaged property, and if this prior debt is not paid or otherwise resolved, the holder of this prior lien will presumably at some point proceed with foreclosure or other collection action to enforce its rights in the mortgaged

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property. While the successful bidder at a junior lien foreclosure takes the mortgaged property subject to and not in assumption of the debt secured by the prior lien, the existence of such debt will obviously affect the amount a party is willing to bid at a junior lien foreclosure sale. If the trustee is aware that the lien being foreclosed is a junior lien, it is good practice to announce at the foreclosure sale the existence of prior liens.

§ 13.6 Wraparound Secured Debt

The foreclosure of wraparound debt involves significant issues under Texas law regarding the "true" amount of the debt being foreclosed, the position of the successful bidder following foreclosure, and the amount of any deficiency owing by the mortgagor after foreclosure. A review of the basic concept and several of the variables involved in wraparound financing is helpful in understanding the issues in the enforcement of wraparound mortgage documents.

§ 13.6:1 Wraparound Mortgage

A wraparound mortgage is essentially a junior mortgage loan. The wraparound note includes in the principal all or part of the prior or superior indebtedness plus any additional secured debt that the lender loans to the borrower. The lender pays the prior underlying debt secured by a superior lien on the mortgaged property.

The wraparound loan documents may condition the lender's payment of the underlying indebtedness on receipt of payment on the wraparound secured debt from the borrower. The wraparound loan documents may require the lender to advance all or a portion of the payments due on the underlying debt.

The periodic debt service required on the wraparound secured debt may not match the debt service on the underlying indebtedness. An extreme example of this is wraparound financing providing for interest-only payments on the wraparound secured debt and a balloon payment at the end of the term with the lender's servicing the underlying debt out of the interest payments paid by the borrower. The different relationships between the wraparound secured debt and the underlying debt can be categorized by the manner of the debt service of each as follows:

1. The debt service on the wraparound secured debt is sufficient to pay the debt service on the underlying debt and to amortize the wraparound secured debt on or before maturity of the underlying debt.
2. The debt service on the wraparound secured debt is sufficient to pay the debt service on the underlying debt, but the sum remaining will not amortize the wraparound secured debt before the maturity of the underlying debt.
3. The debt service on the wraparound secured debt is sufficient to pay the debt service on the underlying debt but is not sufficient to pay all the accruing interest on the wraparound secured debt.
4. The debt service is insufficient to pay the debt service on the underlying debt, and the lender advances the difference, which is included in the wraparound loan.

The interest rate on the wraparound note is generally higher than the interest rate provided for in the underlying debt.

A wraparound secured debt may be created either in a sales transaction between a seller and a purchaser or between the owner of the mortgaged property and a third-party creditor that is not a seller of the property. Such financing may be recourse or nonrecourse and may include separate guaranties of only the "true principal" of the wraparound secured debt (that is, the net equity financed), of the underlying debt, or of

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the entire debt. In a sales transaction, the seller–wraparound creditor may have personal liability on the underlying debt. *See Armsey v. Channel Associates, Inc.*, 229 Cal. Rptr. 509 (Cal. Ct. App. 1986); *Mitchell v. Trustees of United States Mutual Real Estate Investment Trust*, 375 N.W.2d 424 (Mich. Ct. App. 1985); *J.M. Realty Investment Corp. v. Stern*, 296 So.2d 588 (Fla. Dist. Ct. App. 1974) (did not follow net equity approach); *Mindlin v. Davis*, 74 So.2d 789 (Fla. 1954) (followed net-to-bidder equity approach).

The following is an example of wraparound financing in a sales transaction: the mortgagee (seller) contracts to convey the mortgaged property to the mortgagor (buyer) for a total purchase price of $100,000. The property is encumbered with a first lien of $50,000 at 9.75 percent interest per year. The buyer can raise only $25,000 in cash for a down payment. The mortgagor (buyer) executes a note to the mortgagee (seller) for $75,000, which is secured by a second lien on the mortgaged property and bears interest at 14.5 percent per year and pays the mortgagee a cash down payment of $25,000. In a discussion of loans governed by former chapter 5 of the Texas Consumer Credit Code (now chapter 344 of the Texas Finance Code), this example is tested for compliance with the usury laws as follows:

existing first-lien loan (underlying loan):	
outstanding balance	$50,000
interest rate	9.75%
number of remaining payments	282
monthly principal and interest (P&I) payment	$452.43
wraparound loan:	
amount of loan	$75,000
interest rate	14.50%
number of remaining payments	282
monthly P&I payment	$937.96
net loan amount:	
amount advanced	$25,000
prepaid interest (points)	$750
true principal	$24,250
number of payments	282
net monthly P&I payment	$485.53
interest rate	23.93%

The "amount advanced" is the difference between the amount of the wraparound loan and the outstanding balance of the underlying loan. The "true principal" is the difference between the "amount advanced" and any "prepaid interest (points)." The "interest rate" is the annual rate necessary to liquidate the loan by amortization; this calculation uses the "true principal" as the beginning balance, divided by the stated number of monthly payments at the stated "net monthly P&I payment."

In this example the loan is considered usurious for any rate ceiling less than 23.93 percent.

This example was used by the consumer credit commissioner in the Interpretive Letter to Secondary Mortgage Lenders and Other Interested Parties dated December 31, 1981, and predates the holdings in *Greenland Vistas, Inc. v. Plantation Place Associates*, 746 S.W.2d 923 (Tex. App.—Fort Worth 1988, no writ), *Summers v. Consolidated Capital Special Trust*, 783 S.W.2d 580 (Tex. 1989), and *Lee v. O'Leary*, 742 S.W.2d 28 (Tex. App.—Amarillo 1987), discussed at sections 13.6:2 through 13.6:4 below.

In foreclosing on wraparound secured debt, the following questions must be answered before

the lender demands payment and forecloses on the mortgaged property:

1. How much is owed to the mortgagee?
2. How much can or should the mortgagee bid at the foreclosure sale?
3. Does the amount bid at a foreclosure sale on the underlying debt affect the amount owed on the wraparound secured debt?

Discussion of these questions follows in sections 13.6:2 through 13.6:4 below.

§ 13.6:2 How Much Is Owed to Mortgagee?

In *Greenland Vistas, Inc. v. Plantation Place Associates*, 746 S.W.2d 923 (Tex. App.—Fort Worth 1988, no writ), the court of appeals reversed the trial court's finding that a mortgagee's demand for the unpaid principal balance of the wraparound note (as opposed to the true principal) constituted a charging of usurious interest. Greenland Vistas sold and financed Plantation Place Associates' purchase of an apartment project. Plantation Place Associates executed a wraparound note for $2,707,433.96 payable to Greenland Vistas. The note included in its face principal amount the balance of $2,074,830.19 owed on an underlying third lien. The trial court held that the seller was not owed the face principal amount of the wraparound note but only the equity or the balance on the true principal (that is, the difference between the balance due on the wraparound secured debt and the balance due on the underlying debt). The trial court held that demanding the payment of the underlying debt amounted to a charging of interest and a usurious loan. The court of appeals found that the full principal of the wraparound secured debt was owed by Plantation Place Associates. Since the buyer received the full benefit of the property purchased, it had the full benefit of the principal of the wraparound note. The court of appeals found the following provisions of the wraparound loan documents supported its conclusion: (1) Greenland Vistas obligated itself in the wraparound loan documents to pay the underlying debt on the condition that Plantation Place was not in default on the wraparound loan, (2) the underlying debt was to be paid out of the payments on the wraparound note, (3) the wraparound maker could obtain the mortgaged property free of the lien of the underlying debt by paying the wraparound secured debt in full, and (4) the wraparound deed of trust authorized the seller to pay the underlying debt if the buyer did not make its payments on the wraparound note. The court of appeals found that the intent of the parties expressed in the loan documents was that the full face principal was owed and that although the seller could demand the full face amount, it could retain only the difference between the face amount and the amount required to be paid on the underlying debt. *Greenland Vistas*, 746 S.W.2d at 926–27; *see also Tanner Development Co. v. Ferguson*, 561 S.W.2d 777 (Tex. 1977); *Nevels v. Harris*, 102 S.W.2d 1046 (Tex. 1937) (court seeking to find "true principal" of debt for usury-rate purposes). See also the discussions of *Summers v. Consolidated Capital Special Trust*, 783 S.W.2d 580 (Tex. 1989), *rev'g* 737 S.W.2d 327 (Tex. App.—Houston [14th Dist.] 1987), and *Lee v. O'Leary*, 742 S.W.2d 28 (Tex. App.—Amarillo 1987), in sections 13.6:3 and 13.6:4 below.

In *French v. May*, 484 S.W.2d 420 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.), the court held that an assuming wraparound note maker assumes primary liability for the obligation assumed to the underlying noteholder. The underlying note maker has a cause of action against the wraparound note maker for recovery of sums paid by the underlying note maker on the underlying note. *French*, 484 S.W.2d at 424–25.

In *Lyons v. Montgomery*, 701 S.W.2d 641, 643–44 (Tex. 1985), the Texas Supreme Court held

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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 inter-

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est 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 fore-closure 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

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and its president, Richard O. Eid, were required to guarantee the O'Leary note. The Lee note wrapped and included three prior notes including a note payable to Berney and Peters (the Berney/Peters note). Key West defaulted on the Lee note, causing a chain of defaults back to the first lienholder, Berney and Peters, who initiated foreclosure proceedings. Berney and Peters foreclosed and bid $700,000 at the foreclosure sale. The O'Learys sued the Lees on the O'Leary note and Key West and Eid on their guarantees of the O'Leary note. The Lees then sued Key West and Eid on the Lee note.

The trial court gave the O'Learys judgment against the Lees for $157,489.85 and also against Key West and Eid for $157,489.85 and gave the Lees judgment against Key West and Eid for $73,702.70. The Lees appealed, claiming they should have been awarded $348,084.82. The figures are reached as follows:

Trial Court	
$1,038,495.86	Unpaid balance (Lee note)
– 974,382.12	Unpaid balance (O'Leary note)
$64,113.74	Lees' equity
+ 9,588.96	Pretrial interest
$73,702.70	Lee's judgment against Key West and Eid
Lees	
$1,038,495.86	Unpaid balance (Lee note)
– 700,000.00	Foreclosure bid
$338,495.86	
+ 9,588.96	Pretrial interest
$348,084.82	
($439,371)	Deficit

In determining the amount owed on the Lee note, the trial court credited to the unpaid wraparound note balance of $1,038,495.86 at the time of the foreclosure the unpaid balance on the O'Leary note of $974,382.12. The trial court added to its judgment $9,588.96 in interest that had accrued on the $64,113.74 difference or equity from the foreclosure date to the time of trial.

The Lees argued that the proper method for calculating the amount owed by Key West to the Lees would be to credit the foreclosure sale bid price of $700,000.00 and not the $974,382.12 balance of the O'Leary note to the Lee note. Apparently the Lees did not claim that interest should be awarded them on the difference between the $974,382.12 balance on its note and the $700,000.00 credited to the prior debts.

The court of appeals summarized the issue as "how to calculate a deficiency judgment on a wraparound note." *See Lee*, 742 S.W.2d at 31. The court determined that this issue is resolved by answering the question, "What did the parties agree to do?" The court found the following agreements between the Lees and Key West as evidencing the parties' clear intent to exclude the balance owed on the underlying debt in calculating the amount owed on the wraparound note: (1) the deed from the Lees to Key West provided that the conveyance was "subject to," and the grantee expressly negated assumption of the underlying debt, and (2) the Lee wraparound note stated that it included within its principal amount the unpaid principal balances of the underlying debt specifically listed in the deed. Therefore, the court concluded that the bid at the foreclosure sale was immaterial. *See Lee*, 742 S.W.2d at 32. The court of appeals reformed the trial court's judgment to provide that the O'Learys' judgment against the Lees, Key West, and Eid was joint and several. The language used in the trial court's judgment appeared to have granted two separate awards of $157,489.85. *Lee*, 742 S.W.2d at 33.

The court of appeals also found the following example given by Key West and Eid as persua-

sive that adoption of the Lees' position would be inequitable:

> The question presented by this appeal is: In a suit brought by B against C for a deficiency, what is the proper computation of C's liability?
>
> The "true debt" owing to . . . the wraparound mortgagee (B) is $500,000.00, the difference between the wraparound debt ($1,500,000.00) and the included debt ($1,000,000.00). This sum represents the actual equity of B, the seller-wraparound mortgagee in the transaction.
>
> In this context, to allow the bid price as the applicable credit due to C on the wraparound debt would result in a windfall to B because the deficiency ($800,000.00) would exceed the true debt ($500,000.00).

Lee, 742 S.W.2d at 32 n.3. The court of appeals did not explain why it is not inequitable to B to have B liable to A for the $300,000 deficiency on the debt to A and not be able to recoup this loss from C as promised in the wraparound note by C.

On motion for rehearing, the court of appeals replied that its resolution of the issue was not based on a balancing of the equities but on an interpretation of the contract of the parties. The court stated it lacked the power to change the parties' contract. *Lee*, 742 S.W.2d at 34.

The Texas Supreme Court reversed *Lee v. O'Leary* and held that, under the outstanding-balance approach adopted in *Summers v. Consolidated Capital Special Trust*, 783 S.W.2d 580 (Tex. 1989), Key West and Eid were liable to the Lees for the entire amount of the Lee note less the amount bid at foreclosure. *Key West Towers, Inc.*, 783 S.W.2d at 588.

A later court of appeals decision makes it clear that a subsequent default on the wrapped note or notes does not excuse a prior default on the wraparound note or bar the wraparound note payee from obtaining a deficiency. *See Hampton v. Minton*, 785 S.W.2d 854, 859 (Tex. App.—Austin 1990, writ denied).

§ 13.7 Fair Market Value and Suits for Deficiencies

§ 13.7:1 Deficiency Actions

In deficiency suits following nonjudicial foreclosure sales, any person against whom an action to recover a deficiency is sought may request the court to determine the fair market value of the real property as of the date of the sale. If the court determines that the fair market value exceeds the amount of the successful bid at the foreclosure sale, the debtor is entitled to an offset in the amount of the excess against the remaining indebtedness. *See* Tex. Prop. Code § 51.003.

The debtor is entitled to a credit for the fair market value of the property whether a third party or the mortgagee is the successful bidder. The foreclosure sale price is not included in the factors listed for determining the fair market value of the property. The statutory list, however, is not exclusive. The mortgagee may be able to argue that the price brought at a contested sale is the fair market value.

§ 13.7:2 Effect on Bid Strategy

While Texas Property Code section 51.003 does not alter foreclosure sale procedure or bankruptcy law, it will affect the bid analysis. First, if a mortgagee foresees a contested deficiency suit, the mortgagee may choose to bid the full fair market value rather than explain the reasons for a lower bid to a jury. Second, in the event of contested bidding at the foreclosure sale, the mortgagee must be prepared to bid enough to

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prevent a third party from purchasing the collateral at a price below the fair market value, thus depriving the mortgagee of the benefits of possession of the collateral while reducing the deficiency the mortgagee can recover in a subsequent suit against the debtor.

The time limitation for bringing a deficiency suit following a foreclosure sale is two years. Tex. Prop. Code § 51.003(a). The time limitation for bringing an action in bankruptcy court to set aside a sale as a fraudulent transfer is two years. 11 U.S.C. § 548(a)(1). Before waiting to allow the two-year time limitation to run in bankruptcy court, the mortgagee will need to weigh the advantages against the concomitant disadvantages created by waiting.

The mortgagee has little guidance in making decisions. There are many potential variations on the straightforward summary judgment in a deficiency suit that were common in the past. If a state court determines that the amount bid was significantly less than the fair market value and the mortgagor later brings an action in bankruptcy court to have the sale set aside, the bankruptcy court may accept the jury finding from state court on value or the parties may have a second opportunity to litigate the value of the property. The bankruptcy court also will have to determine if the credit received as a result of the suit was received in exchange for the transfer in accordance with the phrase "received less than a reasonably equivalent value in exchange for such transfer." 11 U.S.C. § 548(a)(1)(B)(i). In those cases in which the debtor does not challenge the deficiency in state court or the court rules that the debtor failed to introduce competent evidence of fair market value, a bankruptcy court conceivably could conclude that the Texas Property Code section 51.003(c) implication that the sale price equals the fair market value is determinative of the reasonably equivalent value.

§ 13.8 Redemption Rights of Mortgagor and Lienholders

The common law rule in Texas is that a regularly and validly conducted trustee's sale cuts off both junior liens and estates in the collateral 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, specific state statutes grant the foreclosed property owner (and, in certain situations, the assignees and heirs of the property owner and junior lienholders) a right of redemption with respect to foreclosures involving ad valorem tax liens, liens against mineral interests, and liens in favor of property owner and condominium owner associations. See Tex. Tax Code §§ 34.21–.23 for ad valorem sale redemption rights; Tex. Tax Code § 32.06(k–1) for property tax lien redemption rights; and Tex. Prop. Code § 209.011 for property owners association redemption rights. The statutory redemption periods vary from as short as ninety days to as long as two years, depending on the nature of the collateral and the type of lien foreclosed, and the right of redemption is normally conditioned upon the foreclosed property owner paying, in addition to the winning bid amount, a redemption premium and other statutorily enumerated costs to the foreclosure sale purchaser. In some instances, the statutes creating the redemption right also restrict transfers of interest in the foreclosed property prior to the expiration of the redemption period (as, e.g., with property owners association assessment liens). See section 30.5 in this manual.

The existence and nature of any redemption rights that run in favor of the mortgagor (and other persons such as junior lienholders, if applicable) are obviously significant considerations in formulating a bid strategy, but the exact impact of the redemption rights on any particu-

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lar bidder will vary considerably according to both the specific redemption right in question and the bidder's reasons for purchasing the property. (For example, a bidder who hopes to acquire the mortgaged property for immediate use or a quick resale may well evaluate redemption rights differently than a bidder looking for a long-term investment.) Thus a potential bidder should determine in advance of the foreclosure sale whether any redemption rights exist and, if such rights do exist, how such affect the maximum price the bidder is willing to pay at the foreclosure sale. The mortgagee of mortgaged property subject to redemption rights may well find that such rights limit the market value of the collateral and the level of interest among potential third-party bidders.

§ 13.9 Limitations on Purchaser's Right to Possession of Property

At one time, Texas law provided that in certain limited circumstances where a statutory right of redemption existed in favor of the mortgagor (such as an ad valorem tax lien foreclosure involving a homestead), the foreclosed property owner could lawfully retain physical possession of the foreclosed property during the statutory redemption period. Thus the successful foreclosure bidder acquired legal title to the foreclosed collateral but had to wait for the running of the redemption period to take physical possession of the property. However, such statutes have been repealed, and as of 2013, there are no Texas statutes that grant the foreclosed property owner the right to remain in possession of the foreclosed property during the redemption period.

With respect to third parties, a lease or other estate (e.g., a prior easement) that was prior in time to the lien would survive foreclosure, absent a voluntary subordination by the holder of the lease or estate, and the foreclosure sale purchaser would take title subject to such lease or estate. See section 4.12 in this manual. Leases and estates junior to the foreclosed lien are (absent any nondisturbance agreement) cut off by foreclosure of a prior lien (see section 4.13), but recent federal and Texas statutes now allow nondefaulting tenants under junior residential leases to remain on the property for statutorily defined periods of time following the foreclosure. See sections 15.9:1 and 15.9:4. Thus the purchaser at a foreclosure sale is generally entitled to immediate possession of the mortgaged property against the property owner and the holders of junior leases and estates, but (1) the right of possession may be subject to certain residential leases and (2) there is always the possibility that the foreclosed property owner or other third-party occupant may wrongfully refuse to vacate the property after foreclosure, thus necessitating the cost and delay of eviction proceedings. See section 15.9. These considerations will obviously affect a party's foreclosure bid strategy, and the potential bidder should accordingly determine in advance of sale whether such issues exist or are likely to arise and how this will affect the bid price.

§ 13.10 Bidder Checklist and Considerations

This section sets out a checklist for the foreclosure bidder, with special attention to the position of a nonmortgagee bidder as compared to the mortgagee bidder.

§ 13.10:1 Mortgagee vs. Nonmortgagee Bidder

A nonmortgagee bidder usually is not as knowledgeable as to the mortgaged property as is the mortgagor and the mortgagee. A nonmortgagee bidder will be bidding cash while the mortgagee will be bidding credit against its unpaid secured loan balance. A nonmortgagee bidder does not have the benefit of title insurance on the loan being foreclosed, which may be afforded to the mortgagee bidder by the Loan Policy of Title Insurance, if obtained by the mortgagee at the

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origination of its loan. The mortgagee is in possession of title and property condition information, which it may not make available to potential foreclosure sale bidders. The mortgagee may have entered into agreements or taken actions with parties in possession of the property affecting the priority of the mortgagee's lien that are not evidenced by instruments of record as of the foreclosure sale and that may later be construed as a subordination of the mortgagee's lien. The foreclosure sale deed executed by the trustee, while foreclosing the mortgage lien, contains only such title warranty of the mortgagor as is set out in the deed and, as provided by section 51.009 of the Texas Property Code, is an "as is" conveyance. A nonmortgagee bidder may not be able to gain access to the mortgaged property prior to bidding to investigate the property's condition. At the foreclosure sale the nonmortgagee bidder, if the successful bidder, will be required to pay its bid to the trustee under circumstances where the nonmortgagee bidder may not have proof that the foreclosure has been correctly conducted and likely without the benefit of title insurance or viable representations and warranties as to the condition of the property or the title as are typically present for a buyer in a nonforeclosure sale setting. Each of the foregoing factors, as well as many others, may affect the willingness of a nonmortgagee bidder to bid market value for the mortgaged property.

§ 13.10:2 Due Diligence

Property Condition: The potential bidder will want to access the mortgaged property to determine the physical condition of the property and any improvements and to confirm that there are no environmental problems associated with the property. While the mortgagee may have a contractual right of access under its mortgage, the nonmortgagee bidder will normally not be able to access the property for such purposes without trespass unless the mortgagor or a mortgagee-in-possession grants bidders access to the mortgaged property. A nonmortgagee bidder should make written request to the mortgagee for permission to review the mortgagee's records as to the property's condition, including a request to review environmental audits and property condition reports in the mortgagee's possession, but mortgagees will typically deny such a request for reasons of debtor privacy concerns and fears that the mortgagee will in some way be held to represent or warrant the truth, accuracy, and completeness of such records. A nonmortgagee bidder can make inquiries of governmental agencies regarding the existence and current status of permits (such as building permits, certificates of occupancy, code violations history, underground storage tank registrations, and licenses). Both the mortgagee and nonmortgagee bidder should consider having an environmental assessment done, even though it may have only limited or no property access. See sections 14.10:3 and 14.10:4 in this manual regarding warranties of title and chapter 35 for a discussion of environmental issues.

Property Description and Survey: A bidder should seek to review a copy of any existing survey of the property. A survey may indicate encroachments, boundary line conflicts, overlaps, protrusions, and other due diligence information (for example, improvement square footage, parking space count, flood plain lines, appurtenant easements, location of easements and other encumbrances). The deed of trust may reference the existing survey and thus put a bidder on notice of matters reflected by this unrecorded document. See sections 14.10:3 and 14.10:5 regarding warranties of title acquired at foreclosure.

Deed and Title: The mortgagee has the benefit of its mortgagee title insurance. In Texas, the Loan Policy of Title Insurance provides at Condition 2:

> 2. Continuation of Insurance. The coverage of this policy shall

> continue in force as of Date of Policy in favor of an Insured [i.e., the mortgagee] after acquisition of the Title by an Insured or after conveyance by an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

See Texas Department of Insurance, *The Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas,* form T-2 (last updated Nov. 7, 2013), available at **www.tdi.texas.gov/title/documents/form_t-02.pdf**.

As noted in this section, the title warranty at foreclosure sale is by the mortgagor, a person in economic distress, and may be of little practical value. The same language quoted above as to the continuation of insurance is also present in the Owner's Policy of Title Insurance. The difference is that the Owner's Policy does not afford title insurance to a nonmortgagee purchaser, while the Loan Policy does afford a mortgagee purchaser title insurance. Under these circumstances, a nonmortgagee bidder should arrange, if it can, owner's title insurance coverage on its purchase at the foreclosure sale. Currently many underwriters, but not all underwriters, will not provide owner's title insurance to a foreclosure sale purchaser. A title insurance underwriter may balk at providing insurance due to concerns as to its inability to confirm the sale's compliance with the foreclosure process and its concern as to whether the mortgagee has ratified the rights of third parties by instruments not in the public record.

Nonmortgagee Bidder's Title Insurance Checklist: In the event a title underwriter is found that will issue to a nonmortgagee bidder an Owner's Policy of Title Insurance, the following checklist items will need to be addressed by the nonmortgagee bidder: (1) before bidding at the foreclosure sale, a title commitment and pro forma policy with all desired endorsements should be issued and the conditions to a policy's issuance should be thoroughly reviewed with the underwriter; (2) to the extent available, a copy of the foreclosure sale documents (for example, deed, affidavit, notices, and letters) should be obtained and furnished to the underwriter for its approval before bidding at the foreclosure sale; (3) a list and copy of all documents required by the title underwriter to issue its policy should be obtained, and arrangements should be made for their execution and delivery to the underwriter (for example, if the policy is to be issued with the "survey exception" deleted, then the underwriter will need to be provided with a copy of the existing survey and the form of survey affidavit, and the person who will execute the affidavit must be determined); (4) a representative of the title underwriter will likely need to be in attendance to witness the foreclosure sale; (5) if the exception for "parties in possession" or the "rights of lessees under unrecorded leases" is to be quantified, limited, or eliminated, arrangements will need to be made for inspection of the mortgaged property by the title underwriter's representative, and if the mortgaged property is occupied, then an interview of the occupants must be made and a rent roll obtained; (6) the means and timing of payment of the title insurance premium to the title underwriter will need to be confirmed; and (7) acceptable arrangements for timing and delivery to the title underwriter's representative of the foreclo-

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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

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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

In 2015, the Texas legislature adopted Texas Property Code chapter 66, which addressed 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* 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

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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).

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Additional Resources

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TEXAS FORECLOSURE MANUAL

Third Edition

Volume 2

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Ralph Martin Novak, Jr.
G. Tommy Bastian

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The use of the masculine gender in parts of this manual is purely for literary convenience and should, of course, be understood to include the feminine gender as well.

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Chapter 14

Conducting the Sale

§ 14.1 Presale Considerations

Texas Property Code section 51.106 authorizes rescission of a nonjudicial foreclosure sale under certain conditions and procedures. 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 must be held on the first Tuesday of the month unless the first Tuesday is January 1 or July 4, and then it must be held on the first Wednesday of the month; otherwise, the sale 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, and the sale must begin no later than three hours after the earliest time stated in the notice. 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

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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.

See section 11.20 in this manual, which describes the new duties and responsibilities placed on a trustee conducting a public sale of residential real property pursuant to Texas Business and Commerce Code chapter 22.

§ 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. Form 14-2 also documents the information required

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by Tex. Bus. & Com. Code § 22.004 if the sale is for residential real property under a power of sale.

§ 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

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> 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

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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

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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. Graham*, 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).

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§ 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.' " 2 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 8, form 8-1 (3d ed. 2017).

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,

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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 20.5 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

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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 long-standing 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*.

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§ 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 pursuant 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,

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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 compli-

ance 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 reason-

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able 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.

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§ 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. 14, form 14-15 (3d ed. 2017), 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).

However, for a public sale of residential real property under a power of sale in a security instrument, the trustee or substitute trustee must provide the winning bidder with a receipt for the sale proceeds tendered and, except when prohibited by law, within a reasonable time, deliver the deed to the winning bidder or file the deed for recording. Tex. Bus. & Com. Code § 22.005.

§ 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

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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." 2 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 8, form 8-1 (3d ed. 2017). 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." 2 State Bar of Tex., *Texas Real Estate Forms Manual*, State Bar of Texas, ch. 8, form 8-1 (3d ed. 2017). 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.

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§ 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

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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 pur-

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chaser 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

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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 Texas Property Code section 51.016, which authorizes rescission of a nonjudicial foreclosure sale under certain conditions and procedures. 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

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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 there-

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fore, 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.

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Additional Resources

Biel, Frederick J. "Commercial Foreclosures: Selected Documentation and Procedural Issues." In *Advanced Real Estate Strategies Course, 2010.* Austin: State Bar of Texas, 2010.

Derber, David P. "Personal Property Foreclosures." In *Advanced Real Estate Strategies Course, 2010.* Austin: State Bar of Texas, 2010.

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 Strategies Course, 2010.* Austin: State Bar of Texas, 2010.

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Form 14-1

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.

Letter Employing Local Agent to Act as Bidder

[**Date**]

[**Name and address of local agent**]

Re: Foreclosure pursuant to the deed of trust dated [**date**] from [**name of mortgagor**], mortgagor, to [**name of trustee**], trustee, for the benefit of [**name of lender**], lender, recorded in [**recording data**] of the real property records of [**county**] County, Texas

[**Salutation**]

[**Name of lender**], the lender, is the current owner of the deed of trust described above. The lender has instructed [**name of trustee**], as [Trustee/Substitute Trustee], to sell the property described in the deed of trust on [**date**] at the [**county**] County Courthouse.

The lender hereby appoints any employee of the law firm of [**name of firm**] to act as its agent at the foreclosure sale. The lender authorizes the agent to make an opening bid of $[**amount**] for the purchase of the property at the sale. If bids are received from third parties, the agent is instructed to continue the bidding process on behalf of lender to a maximum bid of $[**amount**].

In the event of competitive bidding in which the maximum bid is exceeded, the agent is hereby instructed to (1) request the [Trustee/Substitute Trustee] to adjourn the sale and to announce a time the sale will reconvene and (2) contact [**name of lender's representative**] at [**phone number**] at the lender's office for further bidding instructions.

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Furthermore, the agent is hereby authorized on behalf of the lender to perform such acts as he deems necessary or appropriate to carry out the provisions of this letter.

Sincerely yours,

____

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

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Form 14-2

Although not required by law, this form serves to document the sale. If the sale is for residential real property under a power of sale, this form will also document the information required by Tex. Bus. & Com. Code § 22.004.

Foreclosure Sale Transcript

The following transcript covers the foreclosure sale conducted from **[time]** [A.M./P.M.] to **[time]** [A.M./P.M.] on **[date]**, at **[location]** of the county courthouse in **[county]** County, Texas, on the foreclosure of the deed of trust. **[Name of mortgagee's representative]**, a representative of the mortgagee, accompanied the [Trustee/Substitute Trustee] to the foreclosure sale to act as bidder at the sale. Material appearing in boxes is instruction to the [Trustee/Substitute Trustee] conducting the sale.

Read in a clear and audible voice. Identify person conducting sale.

1. Good [morning/afternoon] ladies and gentlemen. We are in **[county]** County at **[time]** on **[date]**. My name is **[name]**, and I am the [Trustee/Substitute Trustee] on the foreclosures noticed for sale today under my name. Please be advised that all sales conducted by me today are held under the following terms.

Recite terms of sale.

2. All property offered for sale today will be sold to the highest bidder for cash or cashier's checks, subject to the right of the mortgagee to bid credit against the debt owed on the obligations secured by the deed of trust.

The purchase price is due and payable without delay upon acceptance of the bid unless the purchaser and I agree upon a reasonable time for the purchaser to deliver the funds, in

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which case I will adjourn the sale to a specified time later today. If the funds are not tendered upon acceptance of the bid or within the specified time period, the sale will be reconvened and the property re-auctioned. If you are not the highest bidder, you should reappear at the time of the reconvened sale to verify that the highest bidder produced the cash bid or, if the apparent highest bidder does not produce the cash, to bid again on the property being sold. You must be prepared to pay cash at any reconvened sale.

All property sold is subject to—

a. any statutory or court ordered restraint of the sale arising out of bankruptcy, pending litigation, receivership, or other legal proceedings involving any person who claims a legal or equitable interest in the property;

b. the death or initiation of a probate proceeding of debtor(s), or any person who claims a legal or equitable interest in the property;

c. reinstatement or payoff of the loan secured by the property or any other presale arrangement to satisfy the default; and

d. any matter which may affect the validity of any element of the foreclosure process or foreclosure sale or act as a defense or bar to the foreclosure process.

I specifically make no representations of any nature, either expressed or implied, about the nature or condition of the properties or the status of the title to the properties to be sold.

Successful bidders take the property subject to any matter which may affect the validity of the sale as stated before.

The properties for sale today will be sold "AS IS" in their present condition and subject to any ad valorem taxes for the current and prior years. The properties will be identified by

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legal description. Any preprinted street address appearing on the Notice of Sale or [Trustee/ Substitute Trustee]'s deed may or may not match the subject property.

A [Trustee/Substitute Trustee]'s deed will be prepared and delivered within a reasonable period of time after all have been received from the winning bidder.

In the event a defect or other problem with the sale is discovered prior to the issuance of the deed, the consideration paid will be returned to the bidder within a reasonable time after verification of the pertinent facts, and the return of the funds shall be the buyer's sole and absolute remedy. If you are the successful bidder, you will be asked to sign an acknowledgment that the sale was subject to these terms. We will not conclude any sales in which this acknowledgment is not executed. If the purchaser does not wish to execute this acknowledgment, we will reconvene the sale and re-auction the property.

3. I would now like anyone who desires to bid at this sale to complete the bidders' registration, which I will distribute.

Distribute bidders' and attendance registration form among persons at sale. Allow time for identification of potential bidders.

4. Additionally, I request that any persons observing this sale who are willing to have their attendance recorded sign the attendance registration form, which is being circulated at this time.

Take list of names of persons in attendance. Attach copy of attendance registration and bidders' registration to this transcript.

Are there any questions?

The first sale is the [**name of mortgagor**] sale.

Recite facts about the obligations secured and the property being sold.

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5. On or about [**date**], [**name of mortgagor**] executed a note and deed of trust filed for record in the real property records of [**county**] County, Texas, appearing at volume [**number**], page [**number**], covering that property known as [**legal description**].

[**Name of debtor**] has defaulted in the payment and performance of [its/her/his] obligation to the current beneficiary of the deed of trust, [**name of mortgagee**], who has requested that I, as the current [Trustee/Substitute Trustee] under the deed of trust, conduct this sale.

The interest of the mortgagor in said property and deed of trust is hereby offered to the highest bidder for cash according to the terms of sale I have just described.

This sale is now opened for bids. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made.

> Identify each person who bids and restate the bid.

Name:

Representing:

Amount bid:

> Repeat as necessary

6. On behalf of [**name of bidder**], I enter an opening bid of $[**amount**]. Are there any other bids?

> Allow bidding to occur if interest exists, making sure that if the mortgagee has supplied an opening and high bid that the high bid is reached before allowing the property to be sold to a third party. If bidding continues beyond the mortgagee's high bid, allow bidding until all interest is exhausted.

7. Are there any further bids? There being no further bids, the property is sold to [**name of high bidder**] for $[**amount of the high bid**].

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> Include the following information as required by Tex. Bus. & Com. Code § 22.004 if the sale is for residential real property under a power of sale.

Bidder submitting the highest and best bid:

Name:

Address:

Telephone number:

E-mail address:

Bidder's principal (if bidder is acting as an agent):

Name of individual or organization:

Name of organization's contact person:

Address:

Telephone number:

E-mail address:

Grantee in deed:

Name:

Address:

Taxpayer identification number:

Party tendering payment of highest and best bid:

Name:

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Address:

Telephone number:

E-mail address:

Government-issued photo identification: [attach copy]

> In the event of a successful third-party high bidder, indicate to the successful bidder when the exchange of money will take place. Also indicate that the exchange of money and receipts will be handled by either you or your assistant. In the event of a third-party sale, continue as follows with the script. If it is a sale back to the mortgagee, do nothing further except announce, "This concludes the sale."

8. To anyone interested or a bidder in the case just auctioned, please be advised that in the event the successful bidder does not exchange money and documents as agreed, I will re-auction this property at the end of all my sales today or approximately at [**time**] [A.M./P.M.].

This concludes the sale.

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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:

Security Instrument

Recording Information:

Property (including improvements):

Include the following if applicable.

The Property includes the following personal property:

Continue with the following.

Date of Sale of Property:

Time Sale of Property Began [**state exact time of sale**]:

Place of Sale of Property [**include county and area designated by commissioners court where sale took place**]:

Purchaser at Foreclosure Sale:

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

Sales Price:

Include the following if applicable.

A contingency stated in the Security Instrument 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 mortgagee**], 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 secured by the Security Instrument (the Obligations). [**Include if applicable:** A demand to cure and notice of intent to accelerate and notice of acceleration of the unpaid balance of the principal of the Obligations was made, and the default was not cured.] The duly appointed [trustee/substitute trustee] exercised the power of sale contained in the Security Instrument.

Pursuant to the requirements of the Security Instrument 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 mortgagee by certified mail on each debtor who, according to the records of the current mortgagee, 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 mortgagee at least twenty-one days preceding the date of the foreclosure.

Include the following if applicable.

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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 mortgagee by certified mail on each debtor who, according to the records of the current mortgagee, 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 mortgagee at least twenty days preceding the date of the acceleration of the maturity of the note and the posting of the 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 Purchaser, I, as [trustee/substitute trustee], by virtue of the authority conferred on me in the Security Instrument, have granted, sold, and conveyed all of the Property to Purchaser and Purchaser's [heirs/successors] and assigns, to have and to hold the Property, together with the rights, privileges, and appurtenances thereto belonging unto Purchaser and Purchaser's [heirs/successors] and assigns forever pursuant to the provisions of chapter 51 of the Texas Property Code.

I, as the [trustee/substitute trustee], do hereby bind the mortgagor and mortgagor's [heirs/successors] and assigns to warrant and forever defend the Property to Purchaser and Purchaser's [heirs/successors] and assigns forever, against the claim or claims of all persons claiming the same or any part thereof, subject to any prior liens, the right of rescission con-

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tained in section 51.016 of the Texas Property Code, and other exceptions to conveyance and warranty in the Security Instrument.

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.

The [trustee/substitute trustee] does not make any warranty or representation as to the merchantability or fitness for use or a particular purpose of the Property. [Trustee/Substitute trustee] is selling the Property described above on an "as is" and "where is" basis and disclaims any implied or express warranties with respect to such Property, except as to warranties of title, and at Purchaser's own risk.

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.

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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

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[Reserved]

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Chapter 15

Postsale Considerations

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§ 15.2 Notices Required after Completion of Foreclosure Sale—IRS Forms 1096 and 1099-A 15-1

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[Reserved]

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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—IRS 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.

§ 15.3 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

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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
>
> . . . .

2 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 8, form 8-1 (3d ed. 2017).

The language in item c. above was not listed in the trustee's duties in earlier versions of the form.

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§ 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

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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

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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

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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

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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 suit 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 res-

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idential 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

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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 pre-

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scribed 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.)

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See section 29.16 in this manual for further discussion of the PTFA.

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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.

———. "Real and Personal Property Foreclosures." In Collections Practice, 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.

Baucum, Don Michael. "Post Foreclosure Title Issues: How to Keep from Being Called after the Foreclosure." In *Advanced Real Estate Drafting Course, 1998.* Austin: State Bar of Texas, 1998.

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.

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.

Morrison, Portia Owen, and Mark A. Senn. "Carving Up the 'Carve-Outs' in Nonrecourse Loans." *Probate & Property* 9, no. 2 (1995): 8–11.

Myers, William L. "The Use of Bankruptcy-Remote Entities in Real Property Securitizations and Structured Financings." *California Real Property Journal* 15, no. 2 (1977): 24.

Stein, Joshua. "Nonrecourse Carveouts: How Far Is Enough?" *Real Estate Review* 27, no. 3 (May/June 1995): 8–12.

Sullivan, Kevin A. "A Guide to Dealing With a Conduit Lender." In *Mortgage Lending Institute, 2001.* Austin: University of Texas School of Law and Texas Mortgage Bankers Association, 2001.

Weiner, Sanford A., and John C. Ale. "Making Choice of Law a Contact Sport: Contractual Choice of Law in Texas." *Texas Bar Journal* 54 (1991): 262–65.

Weller, Philip D. "Bankruptcy in Terrorum Clauses." In *Mortgage Lending Institute, 1995.* Austin: University of Texas School of Law and Texas Mortgage Bankers Association, 1995.

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Form 15-1

Acquisition or Abandonment of Secured Property
IRS Form 1099-A

Attention:

Copy A of this form is provided for informational purposes only. Copy A appears in red, similar to the official IRS form. The official printed version of Copy A of this IRS form is scannable, but the online version of it, printed from this website, is not. Do **not** print and file copy A downloaded from this website; a penalty may be imposed for filing with the IRS information return forms that can't be scanned. See part O in the current General Instructions for Certain Information Returns, available at www.irs.gov/form1099, for more information about penalties.

Please note that Copy B and other copies of this form, which appear in black, may be downloaded and printed and used to satisfy the requirement to provide the information to the recipient.

To order official IRS information returns, which include a scannable Copy A for filing with the IRS and all other applicable copies of the form, visit www.IRS.gov/orderforms. Click on Employer and Information Returns, and we'll mail you the forms you request and their instructions, as well as any publications you may order.

Information returns may also be filed electronically using the IRS Filing Information Returns Electronically (FIRE) system (visit www.IRS.gov/FIRE) or the IRS Affordable Care Act Information Returns (AIR) program (visit www.IRS.gov/AIR).

See IRS Publications 1141, 1167, and 1179 for more information about printing these tax forms.

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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 2018 Form 1099-A	Acquisition or Abandonment of Secured Property
LENDER'S TIN	BORROWER'S TIN	1 Date of lender's acquisition or knowledge of abandonment	2 Balance of principal outstanding $	Copy A For Internal Revenue Service Center
BORROWER'S name		3	4 Fair market value of property $	File with Form 1096.
Street address (including apt. no.)		5 If checked, the borrower was personally liable for repayment of the debt . . . ▶☐		For Privacy Act and Paperwork Reduction Act Notice, see the **2018 General Instructions for Certain Information Returns.**
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

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☐ 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 2018 Form 1099-A	Acquisition or Abandonment of Secured Property
LENDER'S TIN	BORROWER'S TIN	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 IRS. 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 taxpayer identification number (TIN). For your protection, this form may show only the last four digits of your TIN (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 TIN 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*.

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LENDER'S name, street address, city or town, state or province, country, ZIP or foreign postal code, and telephone no.			OMB No. 1545-0877 2018 Form 1099-A	Acquisition or Abandonment of Secured Property
LENDER'S TIN	BORROWER'S TIN	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 **2018 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 2018 General Instructions for Certain Information Returns, and
- the 2018 Instructions for Forms 1099-A and 1099-C.

To order these instructions and additional forms, go to *www.irs.gov/Form1099A*.

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 January 31, 2019.

File Copy A of this form with the IRS by February 28, 2019. If you file electronically, the due date is April 1, 2019. To file electronically, you must have software that generates a file according to the specifications in Pub. 1220. The IRS does not provide a fill-in form option for Copy A.

Need help? If you have questions about reporting on Form 1099-A, call the information reporting customer service site toll free at 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).

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Form 15-2

Annual Summary and Transmittal of U.S. Information Returns IRS Form 1096

Attention filers of Form 1096:

This form is provided for informational purposes only. It appears in red, similar to the official IRS form. The official printed version of this IRS form is scannable, but a copy, printed from this website, is not. Do **not** print and file a Form 1096 downloaded from this website; a penalty may be imposed for filing with the IRS information return forms that can't be scanned. See part O in the current General Instructions for Certain Information Returns, available at www.irs.gov/form1099, for more information about penalties.

To order official IRS information returns, which include a scannable Form 1096 for filing with the IRS, visit www.IRS.gov/orderforms. Click on Employer and Information Returns, and we'll mail you the forms you request and their instructions, as well as any publications you may order.

Information returns may also be filed electronically. To file electronically, you must have software, or a service provider, that will create the file in the proper format. More information can be found at:

- IRS Filing Information Returns Electronically (FIRE) system (visit www.IRS.gov/FIRE), or
- IRS Affordable Care Act Information Returns (AIR) program (visit www.IRS.gov/AIR).

See IRS Publications 1141, 1167, and 1179 for more information about printing these tax forms.

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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

2017

FILER'S name

Street address (including room or suite number)

City or town, state or province, country, and ZIP or foreign postal code

For Official Use Only

Name of person to contact	Telephone number
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 Form 1099-MISC with NEC in box 7, check ▶ ☐

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-QA 1A**	**1099-R 98**	**1099-S 75**	**1099-SA 94**	**3921 25**	**3922 26**	**5498 28**	**5498-ESA 72**	**5498-QA 2A**	**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 electronically filing information returns listed on this form in box 6 with the IRS is through the FIRE system. See Pub. 1220.

Purpose of form. Use this form to transmit paper Forms 1097, 1098, 1099, 3921, 3922, 5498, and W-2G to the Internal Revenue Service.

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 2017 General Instructions for Certain Information Returns.

Forms 1099-QA and 5498-QA can be filed on paper only, regardless of the number of 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 28, 2018.

Caution: File Form 1099-MISC by January 31, 2018, if you are reporting **nonemployee compensation** in box 7. Also, check box 7 above.

- With Forms 5498, file by May 31, 2018.

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 2017 General Instructions for Certain Information Returns. Cat. No. 14400O Form **1096** (2017)

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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-E with a Form 1096 and you have correctly completed two Forms 1098-E 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 6
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-QA	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-QA	Boxes 1 and 2
Form 5498-SA	Box 1

Corrected returns. For information about filing corrections, see the 2017 General Instructions for Certain Information Returns. Originals and corrections of the same type of return can be submitted using one Form 1096.

[Reserved]

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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.

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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.

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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.

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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 before 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.

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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%

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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.

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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.

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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
______________________	$________
______________________	$________
______________________	$________
______________________	$________

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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 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 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 all claims for damages arising on account of the above-described occurrences, and the Undersigned Property Interest Owner will receive no further sums of

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money or other consideration from any of the Released Parties and agrees not to assert or prosecute any further claims or lawsuits arising therefrom against any of the Released Parties.

4. **HOLD HARMLESS.** *The Undersigned Property Interest Owner hereby agrees to indemnify, hold harmless, and defend the Released Parties from, and hold each of them harmless against, any claims, demands, cause of action, costs, losses, liabilities, damages, or expenses of any kind or nature whatsoever that may be incurred by or asserted against or involve any of the Released Parties as a result of, arising out of, or in any way related to the representations, warranties, and agreements of such Undersigned Property Interest Owner (but not as to the representations, warranties, or agreements of any of the others of the Undersigned Property Interest Owners) or the payment to such person of the Undersigned Property Interest Owner's Share of the Net Sales Proceeds.*

This instrument may be executed in multiple counterparts; the failure of any of the persons listed as an Undersigned Property Interest Owner shall not invalidate this Distribution Agreement as to the persons who execute this instrument.

Dated [**date**].

____
[**Name**]
Property Interest Owner

Repeat signature blocks as necessary.

Include the following if applicable.

____
[**Name**]
Substitute Trustee

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[Reserved]

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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

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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*,

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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).

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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

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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), *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).

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§ 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.

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§ 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.

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§ 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-*

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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

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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,

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(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.

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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 an attorney is retained to collect or enforce the note." 1 State Bar of Tex., *Texas Real Estate Forms Manual* ch. 6, form 6-1 (3d ed. 2017).

§ 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

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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.

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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.

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Chapter 20

Judicial Foreclosure

Note: This chapter does not discuss the expedited quasi-judicial foreclosure process initiated under rules 735 and 736 of the Texas Rules of Civil Procedure. That process is discussed in chapters 25 (transferred tax liens or property tax loan liens), 28 (home equity and home equity lines of credit), 30 (property owners association liens), and 31 (reverse mortgages).

§ 20.1 Introduction

Judicial foreclosure of a lien to collect a debt secured by real estate is rarely used because most loan agreements contain a power of sale allowing a trustee to nonjudicially foreclose and sell the real property securing payment of the obligor's note. Utilizing the power of sale to nonjudicially foreclose is generally quicker, cheaper, and, more importantly, better understood by the courts, borrowers, creditors, lenders, mortgagees, and other foreclosure professionals. And, unlike a judicial foreclosure sale, nonjudicial foreclosure does not require filing a lawsuit.

Note: Throughout this chapter, the terms *creditor*, *lender*, and *mortgagee* may be used interchangeably, though "mortgagee," as defined in Tex. Prop. Code § 51.0001(4), is the preferred term for "creditor" in any foreclosure-related matter.

Because a mortgagee typically prefers to have as many options as possible to enforce a real estate secured debt, judicial foreclosure should also be considered. However, because judicial foreclosure has been made almost obsolete by the nonjudicial foreclosure process, and with the paucity of recent judicial foreclosure case law, there seems to be much confusion as to the legal principles supporting a judicial foreclosure.

This chapter attempts to clarify those principles.

First, when it comes to initiating a judicial foreclosure, rule 309 of the Texas Rules of Civil Procedure is the statutory authority even though the rule has not been amended since 1966. *See* Tex. R. Civ. P. 309. Second, the mortgagee should understand that there are two separate and independent liens typically used to encumber the real property securing payment of a note—a vendor's lien and a deed of trust. A deed of trust can be enforced judicially or nonjudicially, but filing a lawsuit is the only means to enforce the vendor's lien by either rescission or foreclosure of the vendor's lien.

The vendor's lien is arguably the most powerful lien in the lender's enforcement arsenal; however, it is little understood. The vendor's lien reserves superior title to the encumbered property until the purchase money debt is paid and is typically found in the warranty deed conveying the property to the borrower. Reservation of the vendor's lien is also found in most standard deed of trust forms with language such as: "The note is primarily secured by the vendor's lien retained in the deed conveying the property to the grantor, which is assigned to the lender, and the deed of trust is additional security for the loan agreement." Consequently, whenever judicial foreclosure is considered, enforcement of the note should include foreclosure of both the vendor's lien and the deed of trust because both liens are independent of the other.

Another principle in judicial foreclosure is the rule that the note and lien are separate obligations and have separate remedies. *See Kempner v. Comer*, 11 S.W. 194, 196 (Tex. 1889). This means enforcement of the note and the security instrument are separate obligations and must be enforced by independent causes of action, even though they are intertwined in a judicial foreclosure suit. *Stephens v. LPP Mortgage, Ltd.*, 316 S.W.3d 742 (Tex. App.—Austin 2010, pet.

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denied). Enforcement of the note always requires a lawsuit seeking a personal judgment against the debtor, but foreclosure of the lien securing the note can be accomplished nonjudicially or judicially. Because suit on the note and foreclosure are severable, the mortgagee can sue and obtain a judgment on the note and later file a suit to judicially foreclose or nonjudicially foreclose.

If the borrower's debt is not paid off by the foreclosure sale proceeds, the mortgagee must file a second suit seeking a deficiency judgment to collect the difference, if any, between the foreclosure sales price and the debt owed. If the foreclosure sale was conducted nonjudicially, a deficiency suit is brought under Tex. Prop. Code § 51.003. If the property was sold pursuant to a judicial foreclosure, the deficiency suit is brought under Tex. Prop. Code § 51.004.

In a judicial foreclosure, the mortgagee can and should combine a suit on the note and foreclosure of the vendor's lien and deed of trust. However, under old law, if the final judgment is silent and fails to order the issuance of an order of sale—even if foreclosure was requested in the pleadings—foreclosure of the secured property is not authorized. *Vance v. Wilson*, 382 S.W.2d 107 (Tex. 1964).

If a mortgagee obtains a judgment for only judicial foreclosure, the mortgagee cannot seek personal liability against the obligor or guarantor of the debt in a deficiency suit until the secured property is sold and the foreclosure sales proceeds applied to the debt. *Walker v. Garland*, 235 S.W. 1078, 1080 (Tex. Comm'n App. 1922, judgm't adopted). Otherwise, the borrower's or guarantor's obligation is undeterminable.

If judicial foreclosure is chosen, it is critical that the mortgagee ensures the final judgment states the dollar amount owed by the obligor of the note. If there is no recitation of the dollar amount owed by the debtor reflected in the final judgment, when the clerk prepares the order of sale, the order of sale will be issued for collection of only court costs from the foreclosure sale proceeds. This means that, after foreclosure, the sales proceeds will be distributed first to the collection of court costs and foreclosure fees, then to inferior lienholders in order of lien priority, and then to the debtor. The mortgagee collects nothing because the foreclosure judgment and the order of sale are silent as to the amount owed to the mortgagee.

Ensuring the final judgment contains the amount owed by the debtor is almost automatically accomplished if, in the same suit, the mortgagee seeks judgment for the amount owed under the note as well as foreclosure. But if the mortgagee sues only on the note and subsequently seeks an *in rem* foreclosure of the secured property, the mortgagee must ensure the final foreclosure judgment orders a dollar sum certain be paid to the mortgagee.

The biggest point of confusion is whether it is possible to bring suit seeking judicial foreclosure while, at the same time, seeking nonjudicial foreclosure in the same suit or initiating nonjudicial foreclosure independently.

Older cases, such as *Gandy v. Cameron State Bank*, 2 S.W.2d 971 (Tex. Civ. App.—Austin 1927, writ ref'd), hold that judicial foreclosure and foreclosure under a power of sale, i.e., nonjudicial foreclosure under the terms of a deed of trust, cannot be prosecuted concurrently, and institution of a judicial foreclosure suit is deemed as an election precluding nonjudicial foreclosure at the same time. The primary issue in *Gandy* was whether the judicial foreclosure action was abandoned and, if so, whether nonjudicial foreclosure could be pursued.

Two recent cases add to the judicial and nonjudicial conflation of foreclosure remedies: *Brown v. EMC Mortgage Corp*, 326 S.W.3d 648 (Tex. App.—Dallas 2010, pet. denied) and *Woodglen Homeowners Ass'n v. Odom*, 452 S.W.3d 489 (Tex. App.—San Antonio 2014, no pet.). In *Brown*, the mortgagee pled for judicial foreclosure under Tex. R. Civ. P. 309 and obtained a judgment allowing nonjudicial foreclosure under the power of sale found in the deed of trust and Tex. Prop. Code ch. 51. In *Odom*, the mortgagee sought foreclosure of a homeowners

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association lien but failed to obtain an order of sale in the judgment in accordance with Tex. R. Civ. P. 309. In both *Brown* and *Odom*, the appellate court denied foreclosure of the property because the judgments did not contain an order of sale directing the sheriff or constable to sell the property as required by rule 309. *Brown*, 326 S.W.3d at 653–54; *Odom*, 452 S.W.3d at 490–91. Thus, if judicial foreclosure is pled under Tex. R. Civ. P. 309, the logistical means for conducting the foreclosure sale must conform to the rule.

There may be a solution to the rule 309 conundrum. Both judicial and nonjudicial foreclosures seek the same relief—sale of the secured property with the proceeds of sale applied to the debt—but the means for obtaining relief is different. Therefore, it seems a mortgagee could use the alternative cause of action pleading rule found in Tex. R. Civ. P. 48 and plead both judicial foreclosure and nonjudicial foreclosure as different alternative causes of action in the same suit. *See Santiago v. Central Mortgage Co.*, No. 05-14-00552-CV, 2015 WL 1805048 (Tex. App.—Dallas Apr. 21, 2015, pet. denied) (mem. op.). Texas Rule of Civil Procedure 48 states that "[a] party may set forth two or more statements of a claim or defense alternatively or hypothetically" and "may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal grounds or both." The mortgagee could then rely on *Santiago* for the proposition that a plaintiff can seek a judgment for relief under either judicial foreclosure under Tex. R. Civ. P. 309 or nonjudicial foreclosure under the power of sale in a declaratory judgment cause. However, the pleadings must clearly delineate the two remedies sought as being alternative remedies. In addition, the mortgagee must elect in the final judgment either judicial foreclosure or nonjudicial foreclosure. It is one or the other, but not both. Depending on the judicial or nonjudicial remedy elected, the judgment must clearly conform to the logistical method of sale, i.e., either an order of sale under Tex. R. Civ. P. 309 for a judicial foreclosure or, under the provisions of the Uniform Declaratory Judgment Act, nonjudicial foreclosure by exercising the power of sale and terms and conditions found in the deed of trust and Tex. Prop. Code ch. 51.

Though *Santiago* allows pleading judicial and nonjudicial foreclosure as alternative remedies, it is possible *Santiago* can be relied on to toll the statute of limitations if nonjudicial foreclosure is elected as the final remedy in a lawsuit. Recently, a petition for review was filed in the Texas Supreme Court by challenging whether a lawsuit seeking a judgment for nonjudicial foreclosure tolls the statute of limitations. *Metcalf v. Wilmington Savings Fund Society, FSB*, No. 17-0449, 2017 WL 3027568 (Tex. July 12, 2017). The primary point of contention was whether the term *foreclosure* in Tex. Civ. Prac. & Rem. Code § 16.035(a) (which states that an action for foreclosure must be brought no later than four years after the cause of action accrues) applies only to a suit for judicial foreclosure or also to a suit seeking nonjudicial foreclosure. The petition for review was subsequently denied. *Metcalf v. Wilmington Savings Fund Society, FSB*, No. 03-16-00795-CV, 2017 WL 1228886 (Tex. App.—Austin Mar. 29, 2017, pet. denied) (mem. op.). In *Slay v. Nationstar Mortgage, L.L.C.*, No. 2-09-052-CV, 2010 WL 670095, at *2–3 (Tex. App.—Fort Worth Feb. 25, 2010, pet. denied) (mem. op.), the court held filing a suit for nonjudicial foreclosure stays limitations.

A bankruptcy case, *In re Gayle*, 189 B.R. 914 (Bankr. S.D. Tex. 1995), addressed the unsettled question under Texas law of whether a creditor could nonjudicially foreclose on real property after obtaining a personal judgment on the obligor of the note. The court concluded that there was no double recovery for the lender if it obtained a judgment on a note and later nonjudicially foreclosed. *In re Gayle*, 189 B.R. at 921.

Enforcement of a debt by judicial foreclosure in either an original petition or counterclaim is an option if any of the following conditions are present:

- the security instrument does not contain a power of sale;

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- loan origination or title defects must be cured;
- the statute of limitations must be tolled;
- a lien priority dispute must be resolved;
- only litigation can determine if the loan agreement is in default; or
- the borrower is litigious or a "Republic of Texas" genre disciple.

Basic principles and elements of a judicial foreclosure suit include the following:

1. The debtor's execution and delivery of a note secured by delivery of a security agreement, i.e., vendor's lien and deed of trust, encumbering certain described property, creates two separate legal obligations and two separate remedies. *See Stephens*, 316 S.W.3d 742; *Miles Realty Co. v. Dodson*, 8 S.W.2d 516 (Tex. Civ. App.—Amarillo 1928, writ dism'd w.o.j.).
2. In a judicial foreclosure, only the property described in the security agreement is foreclosed. *See Mark v. Household Finance Corp. III*, 296 S.W.3d 838 (Tex. App.—Fort Worth 2009, no pet.).
3. Before a final judgment is entered, the mortgagee must elect either judicial foreclosure or nonjudicial foreclosure, describe the mechanics of the sale elected under either Tex. R. Civ. P. 309 or the Uniform Declaratory Judgment Act, and abandon the other remedy. *See Gandy*, 2 S.W.2d 971.
4. In a pending suit on the note, the mortgagee can nonjudicially foreclose if the mortgagee seeks only a personal judgment on the note. *See French v. May*, 484 S.W.2d 420, 428 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.).
5. Res judicata does not apply if the mortgagee seeks only judgment in a suit on the note and later seeks judicial foreclosure. *See Stephens*, 316 S.W.3d at 746.
6. Unless they were made a party to the suit, a foreclosure judgment will not cut off the rights of inferior lienholders. *See McDonald v. Miller*, 39 S.W. 89, 94–95 (Tex. 1897).
7. Judicial foreclosure does not have to be pled as a compulsory counterclaim to preserve the right to subsequently foreclose because the mortgagor cannot impair a mortgagee's contractual right to choose how to enforce its lien. *Kasper v. Keller*, 466 S.W.2d 326 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.).
8. If the underlying loan agreement is evidenced by an installment note, the maturity of the loan agreement must be accelerated before final judgment, which requires as a condition precedent a notice of intent to accelerate and notice of acceleration if the default is not cured. *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991).

If a harried lawyer or foreclosure professional has time to read only two opinions discussing recent judicial foreclosure issues, of the cases cited above, *Stephens* and *Santiago* should be read to gain a better understanding of recent judicial foreclosure issues. The primary focus of *Stephens*, decided in 2010, is whether res judicata cuts off foreclosure of a security agreement, but the opinion provides a thorough analysis of existing foreclosure law. *Santiago,* decided in 2015, gives a thorough discussion of the nature of relief given in a judicial foreclosure.

§ 20.2 Nature of Remedy

A judicial foreclosure requires a material breach of the note, the deed of trust, or both, and sale of only the real property and improvements described in the security agreement. All mortgagors of the deed of trust must be made a party in a judicial foreclosure suit, even if the mortgagor is not an obligor of the note. However, if a

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mortgagee has a contractual right to nonjudicially foreclose under a power of sale, it can do so without the necessity of filing a judicial foreclosure suit. *Douglas v. NCNB Texas National Bank*, 979 F.2d 1128, 1130 (5th Cir. 1992).

Though the statute of limitations for a suit on a note is six years (*see Aguero v. Ramirez*, 70 S.W.3d 372, 375 (Tex. App.—Corpus Christi 2002, pet. denied)), an action for judicial foreclosure must be brought within four years of the maturity of the debt. Tex. Civ. Prac. & Rem. Code § 16.035(a); *Palmer v. Palmer*, 831 S.W.2d 479 (Tex. App.—Texarkana 1992, no writ).

If no deed of trust or vendor's lien secures the note, judicial foreclosure is not a remedy. The remedy is a suit on the note, and once a personal judgment is obtained against the obligor of the debt, the judgment is enforced by an execution sale of the debtor's nonexempt property conducted by the sheriff or constable. *See Mark v. Household Finance Corp. III*, 296 S.W.3d 838 (Tex. App.—Fort Worth 2009, no pet.). Logistically, both a judicial foreclosure sale and an execution sale are conducted in the same manner by a sheriff or constable. *See* Tex. R. Civ. P. 646a–648.

The mortgagee is not required to file a compulsory counterclaim under Tex. R. Civ. P. 97(a) to preserve its right of foreclosure if the borrower files a lawsuit challenging the loan agreement. The reason is that a mortgagor cannot impair a mortgagee's contractual right to foreclose by "the simple expedient of instituting a suit, whether groundless or meritorious, thereby . . . permitting the mortgagor to control the option as to remedies." *Kasper v. Keller*, 466 S.W.2d 326, 329 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.).

Stated another way, a borrower cannot force a lender to waive any of its debt enforcement rights or remedies by merely filing a lawsuit attacking the collectability of the debt. "Under Texas law when a borrower files an action attacking the collectability of a secured debt, the compulsory counterclaim rule does not require the secured party to counterclaim to collect the debt if he has chosen to exercise his bargained for right to pursue extra-judicial foreclosure." *Thurman v. FDIC*, 889 F.2d 1441, 1444 (5th Cir. 1989).

In the event of a default under the note or the deed of trust securing the note, a mortgagee has the right to judicially foreclose or exercise its power of sale by nonjudicial foreclosure against the secured property, but the mortgagee must elect one or the other remedy. Election of remedies arises when a party has two or more inconsistent remedies and forces the party to choose one remedy and abandon the other. *Coffman v. Brannen*, 50 S.W.2d 913, 914 (Tex. Civ. App.—Amarillo 1937, no writ).

Even though judicial foreclosure is raised in the pleadings, a creditor may be barred from judicially foreclosing the secured property if the final judgment does not contain an order of sale for foreclosure because there is no tacit or implicit right to foreclose under a judgment. *Vance v. Wilson*, 382 S.W.2d 107, 109 (Tex. 1994). However, this rule might be contravened by the argument that any writ necessary to enforce an adjudicated right is always available as a matter of law, and the remedy would be an execution sale, not a judicial foreclosure sale. *Swafford v. Holeman*, 446 S.W.2d 75, 80 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.).

Though the mortgagee does not have to seek a personal judgment for the debt against the debtor in the judicial foreclosure suit, the mortgagee must seek an *in rem* judgment for foreclosure in the amount of the debt if the mortgagee intends to collect what is owed under the loan agreement. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 248 (Tex. 2002).

If a mortgagee sues solely on the note, it can exercise the power of sale in its deed of trust by a nonjudicial foreclosure while the suit is pending. *French v. May*, 484 S.W.2d 420, 428 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.); *Stephens v. LPP Mortgage, Ltd.*, 316 S.W.3d 742, 746 (Tex. App.—Austin 2010, pet. denied).

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Once the mortgagee nonjudicially forecloses under the power of sale in the deed of trust, it cannot sue on the note. A deficiency judgment is the mortgagee's only remedy for a money judgment. *In re Gayle*, 189 B.R. 914, 917 (Bankr. S.D. Tex. 1995) (citing *FDIC v. Dye*, 642 F.2d 837, 841 (5th Cir. 1981)).

§ 20.3 Petition

A mortgagee's petition must allege (1) execution and delivery of a note executed or assumed by the obligor; (2) the authority of the mortgagee or mortgage servicer to enforce the note and deed of trust (*see* Tex. Bus. & Com. Code § 3.203, 3.301; Tex. Prop. Code § 51.0025); (3) accomplishment of all the necessary conditions precedent required to enforce the note before final judgment, such as notice of intent to accelerate and acceleration of the maturity of the debt if the note is an installment note; (4) a valid vendor's lien or deed of trust encumbering the property securing the note; (5) a legal description of the secured property; (6) the amount due in U.S. dollars under the terms of the loan agreement; and (7) a description of the uncured material breach of the terms and conditions of the note or deed of trust. *See Starcrest Trust v. Berry*, 926 S.W.2d 343, 350 (Tex. App.—Austin 1996, no writ). See form 20-1 in this chapter.

A petition for foreclosure also should specifically state the mortgagee is seeking a judgment for judicial foreclosure and an order of sale directing the appropriate officer to sell the encumbered property under Tex. R. Civ. P. 309 or, alternatively, nonjudicial foreclosure pursuant to the Uniform Declaratory Judgment Act under the power of sale and terms and conditions of the deed of trust. In addition, the mortgagee should seek a writ of possession under Tex. R. Civ. P. 310 from the court entering the judgment. This eliminates having to file an eviction suit in justice court, trial de novo in county court, and appeal to a court of appeals.

Attorney's fees for a judicial foreclosure are not recoverable unless the security instrument provides for them. *Jeffreys v. McGlamery*, 96 S.W.2d 572, 576 (Tex. Civ. App.—Amarillo 1936, no writ). If attorney's fees are recoverable, they must be proved by competent evidence. *See Richardson v. Raby*, 376 S.W.2d 422, 427–28 (Tex. Civ. App.—Tyler 1964, no writ).

In accordance with Tex. Bus. & Com. Code § 9.601(a)–(c), if the security instrument specifically encumbers personal property, foreclosure of the real property also provides for foreclosure of the personal property. *See Hubbard v. Lagow*, 576 S.W.2d 163, 165–66 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

§ 20.4 Parties to Suit

The plaintiff in a judicial foreclosure suit should be the mortgagee of the loan agreement as defined in Tex. Prop. Code § 51.001(4); the noteholder or transferee of the note as defined in Tex. Bus. & Com. Code §§ 3.203, 3.301; or the mortgage servicer with the authority to administer foreclosure pursuant to Tex. Prop. Code § 51.0025.

A "necessary party" determination is the key to who must be served with citation in a judicial foreclosure suit and is a person whose interest in the subject matter of the litigation is so vital that a valid decree cannot be rendered without the party's presence. *Biggs v. Southland Life Insurance Co.*, 150 S.W.2d 149, 150–51 (Tex. Civ. App.—Dallas 1941, no writ) (citing numerous Texas Supreme Court opinions defining "necessary party").

It must be pointed out that most of the cases cited in this section as to who is a necessary party in a judicial foreclosure context arose in a venue dispute. As will be discussed in section 20.5 below, due to the 2006 change in the venue statute from suing all defendants in the county of their residence to suing in the county where the subject property is located, most pre-2006 opinions involving who is a necessary party may be suspect. *In re Allied Chemical Mangesias Corp.*, 206 S.W.3d 114 (Tex. 2006).

An analysis of who may be considered a necessary party is found in *Pioneer Building & Loan Ass'n v. Gray*, 125 S.W.2d 284 (Tex. 1939), in

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which the court found the appellant was a necessary party because he had purchased the property from a widow who was a comortgagor of the secured property with her deceased husband. In another case, two parties who were jointly and severally liable on a note were necessary parties because the lender could not get full satisfaction unless both notemakers were parties. *Commonwealth Bank & Trust Co. v. Heid Bros.*, 52 S.W.2d 74, 75 (Tex. 1940). However, in *Smith v. First National Bank Groveton*, 146 S.W.2d 270, 273 (Tex. Civ. App.—Galveston 1940, no writ), a guarantor was not deemed a necessary party because he held no interest in the real property and the lending bank could have full satisfaction of its note against the borrower without the joinder of the guarantor.

A foreclosure judgment will not cut off the rights of inferior lienholders unless they were made a party to the suit. *McDonald v. Miller*, 39 S.W. 89, 94–95 (Tex. 1897). Though decided in 1897, the Texas Supreme Court's opinion in *McDonald* should be reviewed by any inferior lienholder or party with a putative redemption right in the secured property. The legal nuances and results based on the various fact situations discussed in the opinion should be carefully read.

The defendants in a judicial foreclosure suit include each obligor of the debt, each mortgagor, any person acquiring rights or interests related to the subject matter of the loan agreement, inferior lienholders, the U.S. Internal Revenue Service, the Department of Justice, or any other governmental entity with a lien encumbering the secured property. *See Shaw v. Allied Finance Co.*, 337 S.W.2d 107, 110 (Tex. 1960).

A mortgagor who sells the secured property and has no interest or title in the secured property is a proper party but not a necessary party. *Pereira v. Gulf Electric Co.*, 343 S.W.2d 334, 336 (Tex. Civ. App.—Waco 1960, writ ref'd n.r.e.). The murky distinction between necessary and proper party arises because a suit to foreclose a deed of trust is *quasi in rem*, and the judgment will be binding only on the parties to the suit and their privies. *McCorkle v. Hamilton*, 150 S.W.2d 439, 442 (Tex. Civ. App.—Fort Worth 1941, writ ref'd); *see also Intertex, Inc. v. Kneisley*, 837 S.W.2d 136, 139 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

Two general principles seem to emerge when considering who is a necessary party in a judicial foreclosure context. If the suit is principally *in rem*, such as an action to foreclose the real property, any person claiming an interest in the *res* is a necessary party. If the suit is principally *in personam*, such as a suit on the note, any person obligated for the debt is a necessary party. *See Kelly v. Lobit*, 142 S.W.2d 301 (Tex. Civ. App.—Galveston 1940, no writ).

After careful consideration, if the foreclosure professional is unsure whether a person is a necessary party or a proper party, the easy answer may be to serve everyone with a putative interest in the property. *See Shaw*, 337 S.W.2d at 110; *Weaver v. Acme Finance Co.*, 407 S.W.2d 227, 231–32 (Tex. Civ. App.—Corpus Christi 1966, no writ).

§ 20.4:1 Senior Liens

A senior lienholder to a lien sought to be judicially foreclosed is not a necessary party because the foreclosing lienholder's lien was subject to the senior lien at the time of loan origination or by operation of law. If the United States holds a lien against the secured property, the United States must be made a party to any judicial foreclosure suit under 28 U.S.C. § 2410. The practitioner should carefully review 28 U.S.C. § 2410 to determine who must be served and how service is accomplished.

If a senior lienholder files a judicial foreclosure suit, a junior lienholder is not a necessary party but is a "proper party" because the junior lien will not be extinguished unless the junior lienholder is made a party to the senior lienholder's judicial foreclosure suit. *Vaughn v. Security National Mortgage Co.*, No. 14-11-00488-CV, 2012 WL 3016859, at *3 (Tex. App.—Houston [14th Dist.] July 24, 2012, no pet.) (mem. op.); *Matthews v. First State Bank*, 312 S.W.2d 571,

580–81 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.).

§ 20.4:2 Junior Liens

A junior lienholder has standing to contest the reasonableness of attorney's fees awarded to a senior lienholder when attorney's fees are recoverable from proceeds received from the senior lien foreclosure sale. *Farm Credit Bank v. Snyder National Bank*, 802 S.W.2d 709, 714–15 (Tex. App.—Eastland 1990, writ denied). In all instances, however, the attorney's fees award must conform to the terms of the deed of trust foreclosed. *See Shutters & Insulation Inc. v. Derr*, 809 S.W.2d 916, 922–23 (Tex. App.—Houston [14th Dist.] 1991, no writ).

§ 20.4:3 Subsequent Purchasers

A mortgagor who has conveyed all rights, title, and interest to a third party is not a necessary party if the mortgagor is not obligated for the debt secured by the property. *Hartfield v. Greber*, 207 S.W. 85, 86 (Tex. Comm'n App. 1918, judgm't adopted); *Citizens National Bank v. Cattleman's Production Credit Ass'n*, 617 S.W.2d 731, 735 (Tex. Civ. App.—Waco 1981, no writ); *Loveless v. Temple Trust Co.*, 59 S.W.2d 883 (Tex. Civ. App.—Austin 1933, writ ref'd). However, a person who purchases property from the obligor is a necessary party if the mortgagee has notice of the conveyance. *Bradford v. Knowles*, 25 S.W. 1117, 1118 (Tex. 1894); *Thane v. Dallas Joint Stock Land Bank*, 129 S.W.2d 795, 800 (Tex. Civ. App.—Amarillo 1939, no writ); *Pioneer Building & Loan Ass'n v. Gray*, 126 S.W.2d 995, 996 (Tex. Civ. App.—Waco 1937, no writ).

§ 20.4:4 Assignee of Leasehold Estate

In a suit to foreclose a deed of trust secured by the mortgagor's leasehold estate, both the mortgagor, as lessee, and owner of the fee are necessary parties. *National Advertising Co. v. American Bank*, 622 S.W.2d 483, 485 (Tex. Civ. App.—Waco 1981, no writ).

§ 20.4:5 Tenants

If a tenant has no equity of redemption in the encumbered property and a personal judgment is not sought against the tenant, the tenant is not a necessary party even though the tenant may be mentioned in the foreclosure pleadings. *Stroup v. Rutherford*, 238 S.W.2d 612, 613 (Tex. Civ. App.—Amarillo 1951, writ ref'd). However, if the mortgagee seeks a writ of possession in the judicial foreclosure suit, the tenant must be made a party if the writ is directed at the tenant.

§ 20.4:6 Adverse Claims

A party claiming an interest adverse to both mortgagor and mortgagee not related to the property may not be a necessary party in a foreclosure action. *Johnson v. First National Bank of Brenham*, 42 S.W.2d 870, 871–72 (Tex. Civ. App.—Waco 1931, no writ). The nonrelated adverse claim or cause of action should be severed. *Weaver v. Acme Finance Co.*, 407 S.W.2d 227, 232–33 (Tex. Civ. App.—Corpus Christi 1966, no writ). However, the litigation risk for not making the person with an adverse claim a party must be considered.

§ 20.4:7 Trust Beneficiaries

The beneficiaries of a trust are not necessary parties to a judicial foreclosure suit of property held in the name of a trust if the beneficiaries had notice of the suit and the trustee-settlor provides a defense in a manner consistent with the interests of the beneficiaries. *Starcrest Trust v. Berry*, 926 S.W.2d 343, 355 (Tex. App.—Austin 1996, no writ). If in doubt, however, make the beneficiaries a party. The trustee of a trust is always a necessary party if property of the trust is the subject of a judicial foreclosure.

§ 20.4:8 Partnerships

Because a partnership is not a legal entity with the capacity to be sued independently of its members, all partners—and their spouses if community property is involved—are proper and necessary parties in a judicial foreclosure

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suit. *Rips v. Ungerman*, 137 S.W.2d 87, 92 (Tex. Civ. App.—Fort Worth 1940, writ dism'd).

§ 20.4:9 Trustee Named in Deed of Trust

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.

§ 20.5 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; 24.008. Statutory county courts generally have concurrent civil jurisdiction with district courts for cases in which the amount in controversy is greater than $500 but does not exceed $100,000. Tex. Gov't Code § 25.0003(a). Some county courts at law in Dallas, Harris, and Tarrant counties also have concurrent jurisdiction with district courts. *See* Tex. Gov't Code §§ 25.0592, 25.1032(c)(3), 25.2222(b)(7). For additional information, see *Merit Management Partners I, L.P. v. Noelke*, 266 S.W.3d 637 (Tex. App.—Austin 2008, no pet.), which contains a general discussion of jurisdiction in cases involving real property, and *HMS Aviation v. Layale Enterprises, S.A.*, 149 S.W.3d 182 (Tex. App.—Fort Worth 2004, no pet.) discussing *in rem* jurisdiction.

Venue is generally determined under Tex. Civ. Prac. & Rem. Code § 15.002 and § 15.011. 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 is obsolete. In *Allied Chemical*, the Texas Supreme Court found the mandatory venue provision of Tex. Civ. Prac. & Rem. Code § 15.011 requires venue for judicial foreclosure suits 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 discussed the evolution of the venue provision 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.).

§ 20.6 Burden of Proof

When a mortgagee's motion for summary judgment establishes a prima facie case of no irregularity or unfairness in the preforeclosure process, the burden shifts to the defendant to challenge 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).

§ 20.7 Limitations

Any action 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," which are not considered a part of the real property. For an installment note, the cause of action accrues when the loan matures or the mortgagee exercises its option to accelerate the maturity of the debt. *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, and acceleration of the maturity of the debt may be rescinded or waived under Tex. Civ. Prac. & Rem. Code § 16.038.

§ 20.8 Attorney's Fees

Attorney's fees are recoverable by the mortgagee but only if the fees are allowed under the terms of the deed of trust or in the note. *Jeffreys v. McGlamery*, 96 S.W.2d 572, 576 (Tex. Civ. App.—Amarillo 1936, no writ).

§ 20.9 Enforcement of Judgment

A judgment for foreclosure does not pass title, and the mortgagor retains title until the property

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is sold at a foreclosure sale. *Paddock v. Williamson*, 9 S.W.2d 452, 454 (Tex. Civ. App.—Beaumont 1928, writ ref'd). Consequently, including a writ of possession cause of action under Tex. R. Civ. P. 310 should be added in any judicial foreclosure suit.

The mechanics of conducting a judicial foreclosure by a sheriff or constable is similar to an execution sale under Tex. R. Civ. P. 631 and 646a–648 and must be conducted on the first Tuesday of the month; otherwise, the sale is void. *Durkay v. Madco Oil Co.*, 862 S.W.2d 14, 17 (Tex. App.—Corpus Christi 1993, writ denied). However, effective September 1, 2017, if the first Tuesday of the month is January 1 or July 4, the sheriff's sale must be held on the first Wednesday of the month. Tex. Civ. Prac. & Rem. Code § 34.041. The sheriff or constable must strictly comply with notice of sale provisions of Tex. R. Civ. P. 647 and 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 in the pleadings and the 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 in preparing an order of sale and the sheriff or constable in conducting the sale. See form 20-2 in this chapter.

§ 20.9:1 Order of Sale

An order of sale is prepared by the clerk of the court in which the judicial foreclosure suit was filed. The order directs the sheriff or constable in the county where the property sought to be foreclosed is located, although Tex. R. Civ. P. 622 states the order can be directed to any sheriff or constable located in the state of Texas. There are old cases holding an order of sale is not void if directed to any sheriff, without regard as to 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).

Practice Tip: 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.

It is critical that a foreclosure professional ensure the judgment states the amount of the debt, interest, attorney's fees, and other costs and expenses due the mortgagee under the terms of the loan agreement; otherwise, the order of sale will contain only the costs of court reflected on the clerk's cost sheet or docket as monies to be paid from the foreclosure sale proceeds by the sheriff or constable.

Based on old judicial foreclosure law, the mortgagee or its authorized representative must attend the foreclosure sale to tender its credit bid; however, form 20-1 in this chapter gives the mortgagee the flexibility of having its credit bid tendered by written notice to the sheriff prior to the sale. Many sheriff's and constable's offices

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do not recognize a mortgagee's credit bid unless it is made in person by an authorized representative of the judgment creditor. A phone call to the sheriff's or constable's office before the sale is always advisable to ensure no surprises, especially whether the sheriff or constable charges a commission for conducting the sale, which is typically on a sliding scale depending on the sales price of the property.

In any dispute as to the property interest the sheriff has been authorized to sell, the order of sale is determinative. *McDonald v. Powell Lumber Co.*, 243 S.W.2d 192 (Tex. Civ. App.—Beaumont 1951, writ ref'd); *Milliken v. Coker*, 90 S.W.2d 902 (Tex. Civ. App.—Fort Worth 1935), *judgm't modified on other grounds*, 115 S.W.2d 620 (Tex. Comm'n App. 1938).

§ 20.9:2 Sheriff's Forms

Generally, most sheriffs or constables conducting the sale have their own forms and procedures for handling the judicial sales process; however, counsel should review the process to ensure compliance with the law. Of particular importance and concern is how the sheriff's or constable's office gives notice of sale, which must be in strict compliance with Tex. R. Civ. P. 647. The potential costs and expenses arising in a judicial sale are listed in form 20-3 in this chapter.

Despite the statutory language in Tex. Prop. Code § 5.004(a) that a conveyance of real property by an office legally authorized to sell property under a court's judgment passes absolute title to the purchaser, a sheriff's or constable's foreclosure deed passes only the interest held by the purchaser in the foreclosure action and does not convey fee simple title. *Mosby v. Post Oak Bank*, 401 S.W.3d 183, 187 n.3 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

§ 20.10 Disposition of Sale Proceeds

Proceeds from a judicial foreclosure sale are applied first to the sheriff's or constable's cost of sale and court costs, then to the underlying debt made the subject of the suit so long as the debt is specifically described in U.S. dollars in both the judgment and order of sale, and then to inferior lienholders in order of lien priority who were parties to the suit. The balance, if any, is distributed to the obligor of the debt. *Huselby v. Allison*, 25 S.W.2d 1108 (Tex. Civ. App.—Amarillo 1930, writ dism'd w.o.j.). The parties to the foreclosure suit are estopped from later seeking a readjustment of the distribution of the sale proceeds. *Freeman v. Klaerner*, 190 S.W. 543 (Tex. Civ. App.—San Antonio 1916, no writ).

§ 20.11 Deficiency Judgment after Judicial Foreclosure

If a portion of a mortgagee's debt remains unpaid after the sales proceeds are applied, the judgment creditor can bring a separate action for a deficiency judgment against the person obligated for the debt and a guarantor, if appropriate under the guarantee. A deficiency arises when the price of the property sold at the foreclosure sale is less than the unpaid balance on the loan agreement debt. A deficiency suit must be brought within two years of the foreclosure sale date. Tex. Prop. Code § 51.003(a).

An obligor or guarantor who may be the subject of a deficiency suit has the right to bring an action in the district court in the county where the foreclosed property was located for a determination of the fair market value of the property as of the date of the foreclosure sale. Tex. Prop. Code § 51.004(b) (for obligors), § 51.005(b) (for guarantors). The suit must be brought not later than ninety days after the date of the foreclosure sale. If the suit is brought by a guarantor who did not receive actual notice of the sale, the suit must be brought not later than ninety days after the guarantor received actual notice of the sale.

Fair market value is to be determined by the finder of fact after the introduction of competent evidence of the property's value, which may include (1) expert opinion testimony, (2) prices of comparable sales, (3) anticipated marketing time and holding costs, (4) the cost of the resale, and (5) the necessity and amount of any dis-

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count to be applied to the future sales price or the cash flow generated by the property to arrive at a fair market value as of the date of the foreclosure sale. Tex. Prop. Code §§ 51.004(b), 51.005(b).

If the mortgagee received any money from a private mortgage guaranty insurer, that sum must be credited to the amount owed by the obligor or guarantor before the mortgagee can bring an action for a deficiency judgment. Tex. Prop. Code §§ 51.004(d), 51.005(d).

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Form 20-1

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.

Petition for Judicial Foreclosure

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff, [**name of plaintiff**], seeks to enforce a loan agreement made by defendant(s) [**name(s) of defendant(s)**], who used the loan proceeds to acquire certain real property located in [**county**] County, Texas. Plaintiff would respectfully show the Court:

I.

Discovery Level

1. Discovery is intended to be conducted under [level 2/level 3] pursuant to rule 190 of the Texas Rules of Civil Procedure.

II.

Parties

2. Plaintiff, [**name of plaintiff**], is the original mortgagee, as that term is defined in Texas Property Code section 51.0001(4), of a loan agreement, as that term is generally defined in Texas Business and Commerce Code section 26.02, evidenced by a note and security agreement, i.e., [vendor's lien/deed of trust], encumbering the property made the subject of this proceeding as collateral for the performances of defendant's loan agreement obligations. Plaintiff also has superior title to the property secured by a vendor's lien until the pur-

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chase money advanced to defendant under the loan agreement is paid. [**Name of mortgage servicer**] is the plaintiff's current agent for loan service administration, commonly known as the mortgage servicer, as that term is defined in Texas Property Code section 51.0001(3), of the defendant's loan agreement account and, as plaintiff's virtual representative, may enforce defendant's loan agreement pursuant to Texas Business and Commerce Code sections 2.303, 3.301, or 9.604, as well as administer the foreclosure process under Texas Property Code section 51.0025. *See Sprint Communications v. APCC Services Inc.*, 554 U.S. 269 (2008). Plaintiff is generally referred to as mortgagee in this petition and includes the mortgage servicer as the context implies.

3. Defendant [**name of maker of the note**] ("obligor") is the maker or assumptor of a US $[**amount**] note and grantor, i.e., the person who executed the security agreement as the mortgagor, of a deed of trust evidencing defendant's promise and obligation to repay defendant's loan agreement debt to the mortgagee or its successor or assigns and can be served with citation at [**address, city, state, zip**].

4. Defendant [**name of mortgagor of the deed of trust who did not sign the note**] ("mortgagor") did not execute the note and is not personally obligated for the debt; however, mortgagor executed the deed of trust encumbering the property as security for performance of the obligations under the deed of trust. The mortgagor can be served with citation at [**address, city, state, zip**].

5. Defendant [**name of inferior lienholder with a lien against the property**] is the mortgagee of an inferior lien recorded in the real property records that encumbers the property and can be served with citation at [**address, city, state, zip**].

6. Defendant [**name of guarantor**] executed a guaranty of the loan agreement obligation made the subject of this proceeding and can be served at [**address, city, state, zip**].

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7. Defendant [**name of any other person who is a necessary or proper party**] is a [necessary/proper] party because [**state the reason the person is a necessary or proper party**] and can be served at [**address, city, state, zip**].

> Include the following if there is an Internal Revenue Service, Department of Justice, or other federal lien encumbering the property, as that federal entity must be made a party pursuant to 28 U.S.C. § 2410(a)(2). The same holds for any other government lien, to include ad valorem tax liens.

8. The United States of America is the holder of a [**describe the type of lien, e.g.,** federal tax lien] recorded in the real property records of the county that encumbers the property. The United States of America may be served through [**name**], U.S. Attorney for the [**district**] District of Texas at [**address**]; [**name**], U.S. Attorney, District Civil Chief and Administrative Officer at [**address**]; and [**name**], U.S. Attorney, [**division**] Division, [**district**] District of Texas at [**address**]. To complete service, a copy of the petition is sent via certified mail, return receipt requested, to the U.S. Attorney General [**name**], U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530.

III.

Property

9. Defendant agreed the real property and improvements described in the [vendor's lien/deed of trust] recorded in the real property records of [**county**] County, Texas, and commonly known as [**address**], would serve as collateral and secure repayment and performance of defendant's obligations under the loan agreement. The property is more particularly described as: [**legal description of secured property**].

IV.

Jurisdiction and Venue

10. As provided by Texas Government Code section 25.007, this Court has jurisdiction over this controversy because the amount at issue is within the jurisdictional limits of the Court.

11. Venue for this matter is proper in [**county**] County, Texas pursuant to Texas Civil Practice and Remedies Code section [15.011/15.002].

V.

Documentation

12. True and correct copies of the various documents and instruments attached to this petition are the mortgagee's business records and are made a part of this petition for all purposes:

a. Note—Exhibit A

b. Deed of Trust—Exhibit B

c. Vendor's Lien reserved in Deed—Exhibit C

d. Current Assignment—Exhibit D

e. Guaranty—Exhibit E

f. Government Lien—Exhibit F

g. Other—Exhibit G

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VI.

Factual Background

13. On or about **[date]**, defendant [**name of defendant**] jointly and severally received loan proceeds in the amount of $[**amount**] from the original mortgagee to acquire the property and entered into a loan agreement to repay the debt as evidenced by defendant's signing or assuming a note, executing a deed of trust and other loan agreement documents, reservation of the vendor's lien to the mortgagee, and delivering all loan agreement documents for the benefit of the mortgagee.

14. The mortgagee's obligation under the note was generally completed when it advanced $[**amount**] in loan proceeds to defendant to acquire the property. By accepting and having the use and benefit of the loan proceeds, defendant will obtain a windfall if defendant fails to complete the obligations under the terms and conditions of the note and deed of trust.

15. The executed and recorded deed of trust is an independent contract incident to the note and contains a power of sale authorizing a trustee or substitute trustee to foreclose the property securing defendant's loan agreement debt if defendant breaches the terms of the loan agreement. The vendor's lien reserved to mortgage in the deed conveying the property to defendant secures superior title to plaintiff until the purchase money is paid. "There is no principal better settled than that the vendor's lien secures the debt contracted for the purchase money, and not merely the note by which such debt is evidenced." *Slaughter v. Owens*, 60 Tex. 668, 670 (Tex. 1884).

16. In *Carpenter v. Logan*, 83 U.S. 271, 274 (1872), the U.S. Supreme Court gave rise to the maxim "the mortgage follows the note" and is an inseparable incident of note evidencing the defendant's promise to repay the debt secured by the property. Having custody, control, or control of physical possession of the defendant's note, the mortgagee and the mortgage

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servicer may enforce the defendant's loan agreement debt pursuant to Texas Business and Commerce Code sections 2.303, 3.301, or 9.604.

17. According to the mortgage servicing records for defendant's loan agreement account, as of [**date**] there has been a material breach of the loan agreement because at least [**number**] regular scheduled monthly loan payments have not been made in accordance with the terms of the loan agreement. The amount due and payable by defendant increases daily because of the accrual of earned interest, collection costs, taxes, and insurance paid by the mortgagee or mortgage servicer and other fees and expenses authorized by the defendant's loan agreement. At any time upon defendant's request, the precise amount due to reinstate or pay off the loan as of a certain date may be obtained from the mortgage servicer through plaintiff's undersigned counsel. As of [**date**] the amount required to cure the loan agreement default was at least $[**amount**], and the payoff, as that term is generally defined in Texas Property Code section 12.017(5), is at least $[**amount**].

18. Only the person who signed the note is personally obligated for the debt; however, a material breach of the terms and conditions of the deed of trust subjects the mortgagor to foreclosure of the property serving as the collateral and the security for payment and performance of the loan agreement debt. By filing this petition, plaintiff gives notice of its unequivocal intention to accelerate the maturity of the loan agreement if it is an installment loan and rescinds or waives any previous notice of intent to accelerate the maturity of an installment debt.

19. As required by Texas Rule of Civil Procedure 54, the conditions precedent required to enforce the loan agreement have occurred or been performed with the exception that if the note is an installment note, defendant may cure the default by reinstating the loan under the terms of the loan agreement at any time before judgment. Therefore, the mortgagee does not accelerate the maturity of the debt until the date of final judgment.

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20. The current mortgagee is a bona fide purchaser for value of the defendant's loan agreement, and defendant's material default in complying with defendant's loan agreement promises and obligations causes a financial injury to the current mortgagee.

VII.

Causes of Action

21. Plaintiff seeks a final judgment against the obligor and mortgagor of the loan agreement for repayment of the debt as determined under the terms of the loan agreement and a judgment for foreclosure and order of sale of the property encumbered by the deed of trust and vendor's lien. At the time of judgment, plaintiff seeks all lawful amounts owed by defendant, to include all unpaid principal, accrued earned interest, any taxes and insurance advanced by the mortgagee or mortgage servicer to preserve and protect property, as well as all fees, costs, and expenses allowed under the terms of the loan agreement, including attorney's fees. The judgment amount increases daily because of earned interest, fees, costs, and expenses allowed under the loan agreement and cannot be specifically determined until the date of judgment.

22. Mortgagee seeks to enforce defendant's promise to repay the loan agreement by:

a. a personal judgment in the amount legally due in accordance with the terms and conditions of the loan agreement and calculated as of the date of final judgment against the defendant executing and delivering the note and deed of trust as well as a judgment for judicial foreclosure of the property encumbered by the loan agreement debt pursuant to Texas Rule of Civil Procedure 309 with an order of sale issued to any sheriff or constable in the state of Texas;

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b. a judgment for the loan agreement debt determined in another judicial proceeding and judicial foreclosure of the property *in rem* under Texas Rule of Civil Procedure 309 with an order of sale issued to any sheriff or constable in the state of Texas;

c. a judgment for judicial foreclosure of the property encumbered by the vendor's lien with the logistical means of conducting the foreclosure sale for due-process reason in accordance with the power of sale and terms of the deed of trust and Texas Property Code chapter 51;

d. a judgment entered under the Uniform Declaratory Judgment Act, Texas Civil Practice and Remedies Code sections 37.001 through 37.011, declaring by virtue of the power of sale and other express terms found in the deed of trust that the property may be sold by nonjudicial foreclosure under the terms and conditions of the deed of trust and Texas Property Code chapter 51; and

e. beginning at least thirty days after the foreclosure sale and in accordance with Texas Rule of Civil Procedure 310, the purchaser of the property at the foreclosure sale have a writ of possession to remove defendant, occupants, and any other persons claiming under defendant from possession of the property.

23. Under Texas Rule of Civil Procedure 48, plaintiff pleads in the alternative for a final judgment for either judicial or nonjudicial foreclosure; however, plaintiff acknowledges and agrees before a final judgment is entered plaintiff must elect either a judgment for judicial foreclosure under Texas Rule of Civil Procedure 309 or nonjudicial foreclosure under the Uniform Declaratory Judgment Act in accordance with the terms and conditions of the deed of trust.

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VIII.

Foreclosure of the Lien

24. As provided in *Thompson v. Pacific Trust Life Insurance Co. of California*, 74 S.W.2d 162 (Tex. Civ. App.—El Paso 1934, writ ref'd), plaintiff seeks a final judgment acknowledging plaintiff has a credit bid for the judgment amount contained in the judgment and order of sale plus all fees and costs payable to the sheriff, constable, or trustee conducting the foreclosure sale.

25. In addition, plaintiff seeks a judgment acknowledging that plaintiff, its mortgage servicer, or their agents or representatives, may tender a written bid delivered at least three business days before the scheduled sale date to the sheriff, constable, or trustee conducting the sale, and the written credit bid must be accepted by the person conducting the sale as a valid bid for the foreclosure property as long as the credit bid is equal to or less than the judgment amount due plaintiff.

IX.

Attorney's Fees

26. As a result of the material breach of defendant's obligation under the loan agreement, plaintiff has been required to retain the undersigned legal counsel to institute and prosecute this action. Pursuant to the terms of the loan agreement, plaintiff is entitled to recover its reasonable attorney's fees for the services rendered in instituting and prosecuting this action, to include any appeal to a court of appeals or an appeal to the Texas or U.S. Supreme Court.

Prayer

WHEREFORE, PREMISES CONSIDERED, plaintiff requests that defendants each be cited to appear and answer; a personal judgment against the obligor for all unpaid amounts

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owed to plaintiff as evidenced by the loan agreement to include the unpaid principal, legal interest on the amount due until date of judgment, attorney's fees, and costs of court and foreclosure; based on plaintiff's election, final judgment against the obligor and mortgagor for either judicial foreclosure with order of sale or judgment for nonjudicial foreclosure under Uniform Declaratory Judgment Act against the property serving as collateral for defendant's loan agreement; foreclosure of the vendor's lien against the encumbered property; legally due interest on the total judgment amount from the date of judgment until paid; all writs and other processes necessary to enforce the judgment; and such other and further relief to which plaintiff may be entitled.

Respectfully submitted,

____

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

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Form 20-2

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.

Final Judgment

On this [**date**], came to be heard the above-styled and -numbered cause brought by Plaintiff, [**name of plaintiff**], Plaintiff's successor and assigns, by and through [**name of mortgage servicer**], Plaintiff's mortgage servicer and duly authorized agent for loan servicing administration for the loan agreement made the subject of this suit. Plaintiff is the current mortgagee of the loan agreement.

Plaintiff appeared by attorney and through Plaintiff's attorney of record announced ready. [**Select one of the following:** Defendant, [**name of defendant**], appeared [in person/by attorney] and announced ready/ Defendant, [**name of defendant**], having been duly cited and served with citation and a copy of Plaintiff's petition, failed to appear and answer. The Court considers Defendant's failure to file an answer or appear in this cause as Defendant's consent for the Court to grant this judgment by default].

The Court determined it had jurisdiction over the subject matter and the parties, and no Defendant is protected under the Servicemembers Civil Relief Act.

This suit concerns a loan agreement secured by real property and improvements as collateral and commonly known as [**address**] and more particularly described as: [**legal description**].

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After considering the pleadings and the papers on file in this cause, hearing the testimony and arguments of counsel, and considering the evidence, the Court is of the opinion that Judgment should be granted.

Therefore, the Court GRANTS Final Judgment against Defendant, [**name of defendant**], as obligor and mortgagor of the loan agreement secured by the property.

Accordingly, it is ORDERED as follows:

1. After allowing all just and lawful credits and offsets as of the date of judgment, Plaintiff shall recover from Defendant as obligor of the note: (a) the unpaid principal in the amount of $[**amount**]; (b) legally accrued but unpaid interest through the date of judgment in the amount of $[**amount**]; (c) all fees, charges, and costs to include reasonable attorney's fees as provided in the loan agreement until the date of judgment in the amount of $[**amount**]; and (d) all court costs.

2. All right, title, and interest in the property described above held by obligor of the note and mortgagor of the security agreement is to be foreclosed and the proceeds of a foreclosure sale applied to the debt owed to Plaintiff by Defendant.

Select one of the following options.

3. Plaintiff has elected the foreclosure remedy of judicial foreclosure under Tex. R. Civ. P. 309 with an order of sale prepared by the clerk of the court and issued to the sheriff or constable in [**county where property is located**] County in the amount of $[**total amount listed in paragraph 1 above**] plus costs of court and all foreclosure costs and expenses allowed by law.

3. Plaintiff has elected the foreclosure remedy of nonjudicial foreclosure by the mortgagee under the power of sale and the terms and conditions found in the deed of trust pursuant to the Uniform Declaratory Judgment Act.

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3. Plaintiff has elected the foreclosure remedy of foreclosure of a vendor's lien which, for due-process purposes, may be accomplished by the logistical means of a nonjudicial foreclosure process under the terms and conditions of the deed of trust and Tex. Prop. Code ch. 51; however, Plaintiff's credit bid is limited to same or less than the purchase money used to acquire the property in the amount of $[**amount**].

Continue with the following.

4. After foreclosure and if Plaintiff is the successful purchaser of the property, a writ of possession shall issue against Defendant, any person with an interest in the property arising from Defendant, or any occupant of the property in accordance with Tex. R. Civ. P. 310.

5. All relief not expressly granted is denied.

6. This judgment finally disposes of all parties and all claims and is appealable.

7. The Court orders all writs necessary to enforce this judgment be issued.

Signed this ____ day of ____________________, __________.

____

JUDGE PRESIDING

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[Reserved]

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Form 20-3

Bill of Costs

Sheriff's/Constable's Fees		*Clerk's Fees*	
Levy	$__________	Clerk's fees	$__________
Ads	$__________	Library fee	$__________
Service	$__________	Dispute fund	$__________
Commission	$__________	Judge's fee	$__________
Deeds	$__________	Sheriff's fee	$__________
Executing	$__________	Abstract fee	$__________
Return	$__________	Attorney's fee	$__________
Mileage	$__________	Venire fee	$__________
Printer	$__________	Execution fee	$__________
Clerk's fees	$__________	Other	$__________
Other	$__________		
Total:	$__________	Total:	$__________

STATE OF TEXAS)

COUNTY OF)

I, [**name of clerk**], clerk of the [County/District] Court of [**county**] County, Texas, do hereby certify that the above and foregoing is a true and correct bill of costs in the above-entitled cause up to this date.

Witness my hand and seal of office at [**city, county**] County, Texas, on [**date**].

____

Clerk of the [**designation**] Court of
[**county**] County, Texas

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Sheriff's Return

CAME TO HAND at ________ __.M. on the ______ day of ________ and executed at ________ __.M. on the ________ day of ________.

____
[**Name**], [Sheriff/Constable]
[**County**] County, Texas

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Chapter 21

Residential Foreclosure Process

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[Reserved]

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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.

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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.

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 website 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

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> 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 website 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 website at **www.benefits.va.gov/houston/regional-loan-center.asp**.

§ 21.5 Residential 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). See sections 36.6 and 37.3 in this manual for a discussion of residential foreclosure consulting.

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§ 21.6 Sales Conducted under a Power of Sale in the Security Instrument

A trustee or substitute trustee conducting a residential real property foreclosure may contract with an attorney to advise the trustee or substitute trustee and to administer or perform any of the trustee's or substitute trustee's functions or responsibilities under the deed of trust and chapter 51 of the Texas Property Code. Tex. Bus. & Com. Code § 22.003. The trustee or substitute trustee may also contract with an auction company to arrange, manage, sponsor, or advertise a residential real property foreclosure sale. Tex. Bus. & Com. Code § 22.003.

On residential real property foreclosures, a trustee or substitute trustee must also satisfy any applicable requirements of sections 22.004, 22.005, and 22.006 of the Texas Business and Commerce Code. If the successful bidder is not the mortgagee or the mortgage servicer, the trustee or substitute trustee must obtain the name, address, and other required information on certain parties submitting the highest and best bid. Tex. Bus. & Com. Code § 22.004. The trustee or substitute trustee must also provide the winning bidder a receipt for the sale proceeds tendered, deliver or record the deed, and account for and distribute the sales proceeds, including maintaining the sales proceeds in a separate account, and maintaining a written record of all deposits and disbursements from the account. Tex. Bus. & Com. Code §§ 22.005, 22.006.

A trustee or substitute trustee conducting a residential real property foreclosure may recover (1) the trustee's or substitute trustee's reasonable actual costs, (2) reasonable attorney's fees incurred by the trustee or substitute trustee, (3) a reasonable trustee's or substitute trustee's fee, and (4) the trustee's or substitute trustee's reasonable attorney's fees in a suit based on a claim related to the sale if the suit is found to be groundless, in each instance payable from the sales proceeds in excess of the amount owed on the indebtedness secured by the residential real property. Tex. Bus. & Com. Code § 22.006. Certain trustee's or substitute trustee's fees and expenses in a residential real property foreclosure are presumed to be reasonable if they do not exceed the amounts provided by law. Tex. Bus. & Com. Code § 22.006.

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Commercial Foreclosure Process

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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. Challenges for faulty or defective foreclosure proceedings are more likely 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.

5. The liability exposure for wrongful foreclosure is usually greater because commercial real estate loans tend to be

significantly larger than residential loans.

§ 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 of 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 ensure review of all the various loan documents and as a reminder to 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 Policy of Title Insurance 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 website at **www.tdi.texas.gov/title/titleman.html**.

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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. *See, e.g.*, *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 more than thirty days prior to the proposed date of sale, 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.

Criminal Fines: 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(a), (b–l). 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 not to exceed $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 from being listed under a separate tax account. See also chapter 24.

Special Districts: 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 exam-

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ined. 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 foreclosure 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

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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 timeline requirements that apply to a residential foreclosure prior to acceleration of the debt and posting of the sale.

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).

The same twenty-day notice period set forth in Tex. Prop. Code § 51.002(d), requiring notice of the date, time, and place of the foreclosure sale, must be employed in commercial foreclosures.

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); *but see Long v. NCNB—Texas National Bank*, 882 S.W.2d 861, 867 (Tex. App.—Corpus Christi 1994, no writ) (holding that, unlike transactions secured by personal property, guarantors of a note secured by real property do not enjoy the right to notice of foreclosure sale enjoyed by the note maker).

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

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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

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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 stating 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. Sending a strict compliance letter will help reduce or prevent claims or waiver and estoppel by the borrower. 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); *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

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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 (reasoning that because a provision providing an option to accelerate a note's maturity will only be effective if it is clearly and unequivocally stated, the same exacting standard is required for a waiver of the intent to accelerate to be effective). "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." *Shumway*, 801 S.W.2d at 893.

See section 8.5 in this manual for further discussion of these issues.

§ 22.5 Acceleration

See the discussion in section 10.26 of this manual regarding the statute of limitations accruing after a notice of acceleration of the maturity of the debt has been given to the obligor of a loan agreement, if the loan agreement is an installment loan.

Because of the harsh effect of acceleration—the 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, the mortgagee sends a notice of default and demand to cure with a separate notice of intent to accelerate an installment note in the same envelope or mailer. If the borrower fails to cure the default arising under an installment note, the mortgagee is authorized to accelerate the maturity of the debt. The notice of acceleration is typically included in the notice of sale giving the obligor at least twenty-one days' notice of the date, time, and place of the scheduled foreclosure sale. *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232, 233 (Tex. 1982).

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,

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pet. denied); *Phillips v. Allums*, 882 S.W.2d 71, 74 (Tex. App.—Houston [14th Dist.] 1994, writ denied). However, because the Texas Supreme Court has not addressed this issue and the 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. *Ogden*, 640 S.W.2d at 234 (stating that the court would 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").

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.

§ 22.5:1 Abandonment and Waiver of Acceleration

There are cases holding that a noteholder can waive acceleration if it accepts payments postacceleration. Thus, it is good practice to resend a notice to cure and intent to accelerate if payments were accepted postacceleration. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566–67 (Tex. 2001) ("Even when a noteholder has accelerated a note upon default, the holder can abandon acceleration if the holder continues to accept payments without exacting any remedies available to it upon declared maturity.").

If parties to a note agree to deaccelerate the debt, then it is recommended that the parties enter an agreement in writing because the prior acceleration would have started the statute of limitations. *See 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.) ("Abandonment of acceleration has the effect of restoring . . . the note's original maturity date.").

Beginning June 17, 2015, the Texas legislature amended Tex. Civ. Prac. & Rem. Code § 16.038 to allow a mortgagee to rescind the notice of acceleration of the maturity of an installment note by sending a notice by first-class and certified mail to the debtor at the debtor's last known address.

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See section 8.6 in this manual for further discussion of these issues and form 8-1 for a sample form agreement to withdraw acceleration of debt.

§ 22.5:2 Effects of Bankruptcy Filing

The filing for bankruptcy protection allows borrowers to provide for a cure of monetary defaults (e.g., payment arrearages) through a bankruptcy plan. *See Grubbs v. Houston First American Savings Ass'n*, 730 F.2d 236 (5th Cir. 1984) (citing with approval *In re Taddeo*, 685 F.2d 24 (2d Cir. 1982)). Therefore, when a borrower's bankruptcy case is dismissed, it is prudent to resend the demand to cure and notice of intent to accelerate. However, there are cases holding that if the borrower's bankruptcy case is dismissed prior to the delinquent amount being cured through the bankruptcy plan, then the lender does not have to resend a notice to cure and notice of intent to accelerate. *See Higginbotham v. Indymac Bank, F.S.B.*, No. 4:17-CV-00229, 2017 WL 2701939, at *4 (E.D. Tex. June 1, 2017).

§ 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 no location has been designated by the county 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).

The foreclosure sale "must be a public sale at auction held between 10:00 A.M. and 4:00 P.M. of the first Tuesday of a month." Tex. Prop. Code § 51.002(a). However, effective September 1, 2017, if the first Tuesday of the month falls on January 1st or July 4th, the date for nonjudicial foreclosure sales will be the first Wednesday of January or July. Tex. Civ. Prac. & Rem. Code § 34.041.

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.

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Code § 51.002(b)(3). Service of notice must be delivered to the debtor's last known address. Tex. Prop. Code § 51.002(e).

"Last known address" for foreclosures with respect to debts other than debts secured by a principal residence is the address "as shown by the records of the mortgage servicer of the security instrument unless the debtor provided the current 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)(B). In addition, section 51.0021 provides that "a debtor shall inform the mortgage servicer of the debt in a reasonable manner of any change of address of the debtor for purposes of providing notice to the debtor under Section 51.002." Tex. Prop. Code § 51.0021. As a result, it is imperative that the prudent practitioner not merely rely on the loan documents for the debtor's last known address, but also inquire as to whether there are any such notices of change of address provided to the mortgagor/mortgage servicer. If a change of address has been provided and notice is not sent to that address, there could be an issue with the foreclosure that is later subject to attack. *See Bauder v. Alegria*, 480 S.W.3d 92, 97 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding that text messages were part of the "records" of mortgage servicer and constituted notice of change of address).

§ 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.

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§ 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. See section 22.6:2 above regarding a discussion of what constitutes the "last known address."

§ 22.6:5 Notice to Owner of Property

As discussed in section 12.3:3 of this manual, an owner of the property who is not the borrower, including an owner who purchases subject to the debt, is not entitled to the statutory notice of a nonjudicial foreclosure sale, absent a contractual agreement. *See Lawson v. Gibbs*, 591 S.W.2d 292, 295 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

However, it is advisable that a courtesy notice of the foreclosure sale be sent to the owner of the property if the mortgage servicer is aware of an owner that is different from the borrower. "Any person who has an interest in the land and who would suffer a loss as a result of foreclosure holds an equity of redemption." *Scott v. Dorothy B. Schneider Estate Trust*, 783 S.W.2d 26, 28 (Tex. App.—Austin 1990, no writ). This would likely include an owner of the property. It would be prudent to send notice to the owner, who might exercise the equity of redemption and pay off the outstanding obligation.

§ 22.6:6 Notice to the IRS

Because IRS liens can arise in both commercial and noncommercial transactions, it is imperative that the prudent practitioner run the appropriate title searches to check for IRS liens and provide the required notice to the IRS and avoid any issues with IRS liens. Refer to the discussion in section 4.3 of this manual regarding federal tax liens and, specifically, section 4.3:10 regarding the twenty-five-day notice requirements to the IRS.

§ 22.6:7 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). See the discussion of posting at the courthouse door in section 12.3:1 in this manual. 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 Bid Evaluation and Determination

Careful consideration should be given to determining the bid amount at a foreclosure sale in the commercial context. Frequently, commercial transactions involve multiple items of collateral (e.g., real property, personal property, accounts receivable, etc.). It is recommended that an appraisal be obtained to provide guidance in determining a bid amount. In addition, it is recommended that some examination of title be conducted to determine if there are other liens that have priority, which when taken into consideration, impact strategy. Bidding too low in relation to the debt owed and the fair market value of the property on the date of sale could

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eliminate the right to collect a deficiency under Texas Property Code sections 51.003 or 51.004 (assuming there is no waiver of the right to challenge fair market value). See section 17.7:4 of this manual for a discussion of waivers of the antideficiency statutes.

For a more detailed discussion regarding bid evaluation, please refer to chapter 13 of this manual.

§ 22.8 Conducting the Sale

The legal procedures for conducting 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.

Pursuant to Texas Property Code section 51.002(a), the foreclosure sale "must be a public sale at auction held between 10:00 A.M. and 4:00 P.M. of the first Tuesday of a month." Tex. Prop. Code § 51.002(a). However, effective September 1, 2017, section 51.002(a–1) provides that if the first Tuesday of the month falls on January 1st or July 4th, the date and time for nonjudicial foreclosures will be between 10:00 A.M. and 4:00 P.M. on the first Wednesday of the month. See Acts 2017, 85th Leg., R.S., ch. 133, § 3 (H.B. 1128), eff. Sept. 1, 2017 (amending Tex. Prop. Code § 51.002).

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.

In some instances, it may be recommended to have another person accompany the trustee to witness the trustee conduct the sale. Some trustees will either record the conducting of the sale or photograph the conducting of the sale with a time stamp to evidence that the sale was in fact conducted at the time and place designated in the foreclosure sale notice. This evidence may prove valuable in the event a debtor later challenges that the foreclosure sale occurred in a wrongful foreclosure action.

§ 22.9 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).

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

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> 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.

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.

§ 22.10 Distribution of Net Sales Proceeds

The distribution of net sales proceeds is determined by common law absent contrary provisions in the loan documents.

§ 22.10:1 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).

Surplus foreclosure proceeds are not payable to superior lienholders; however, in a case with unique facts, payment of a portion of the excess proceeds to a superior lienholder was approved because the grantor of a second lien that was foreclosed agreed the excess proceeds could be paid to pay off the debt the grantor owed to the grantor's first lienholder. *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 superior-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 inferior liens in order of lien priority. *Conversion Properties, L.L.C. v. Kessler*, 994 S.W.2d 810, 813–14 (Tex. App.—Dallas 1999, pet. denied); *Mortgage &*

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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).

§ 22.10:2 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 a court of appropriate jurisdiction and let the competing claimholders convince a judge or jury who is entitled to the funds. For example, the mortgaged property may be owned by several persons as cotenants.

§ 22.11 Deficiencies

In the event that a foreclosure sale results in a deficiency, the mortgagee can consider a deficiency action against the debtor or any guarantors. See chapter 17 in this manual for a detailed discussion of suits for a deficiency. In addition, the mortgagee can consider proceeding against other secured collateral that was not foreclosed to attempt to collect any remaining amount owed.

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Additional Resources

Holmes, Niles W. "Preforeclosure Documentation." In *Advanced Real Estate Drafting Course, 2003*. Austin: State Bar of Texas, 2003.

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Chapter 23

Tax Consequences of the Foreclosure Process

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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).

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

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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 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 website at **https://www.irs.gov/**; IRS Publications 544 and 4681; and the instructions for Forms 982, 1099-A, and 1099-C.

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Form 23-1

Cancellation of Debt
IRS Form 1099-C

Attention:

Copy A of this form is provided for informational purposes only. Copy A appears in red, similar to the official IRS form. The official printed version of Copy A of this IRS form is scannable, but the online version of it, printed from this website, is not. Do **not** print and file copy A downloaded from this website; a penalty may be imposed for filing with the IRS information return forms that can't be scanned. See part O in the current General Instructions for Certain Information Returns, available at www.irs.gov/form1099, for more information about penalties.

Please note that Copy B and other copies of this form, which appear in black, may be downloaded and printed and used to satisfy the requirement to provide the information to the recipient.

To order official IRS information returns, which include a scannable Copy A for filing with the IRS and all other applicable copies of the form, visit www.IRS.gov/orderforms. Click on Employer and Information Returns, and we'll mail you the forms you request and their instructions, as well as any publications you may order.

Information returns may also be filed electronically using the IRS Filing Information Returns Electronically (FIRE) system (visit www.IRS.gov/FIRE) or the IRS Affordable Care Act Information Returns (AIR) program (visit www.IRS.gov/AIR).

See IRS Publications 1141, 1167, and 1179 for more information about printing these tax forms.

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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 $	2018	
		3 Interest if included in box 2 $	Form 1099-C	
CREDITOR'S TIN	DEBTOR'S TIN	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 2018 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

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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	Dallam	Henderson	Motley
Andrews	Dallas	Hockley	Nacogdoches
Angelina	Dawson	Hood	Navarro
Archer	Deaf Smith	Hopkins	Nolan
Armstrong	Delta	Houston	Ochiltree
Bailey	Denton	Howard	Oldham
Baylor	Dickens	Hunt	Palo Pinto
Borden	Donley	Hutchinson	Panola
Bowie	Eastland	Irion	Parker
Briscoe	Ector	Jack	Parmer
Brown	Ellis	Johnson	Potter
Callahan	Erath	Jones	Rains
Camp	Fannin	Kaufman	Randall
Carson	Fisher	Kent	Reagan
Cass	Floyd	King	Red River
Castro	Foard	Knox	Roberts
Cherokee	Franklin	Lamar	Rockwall
Childress	Gaines	Lamb	Runnels
Clay	Garza	Lipscomb	Rusk
Cochran	Glasscock	Loving	Sabine
Coke	Gray	Lubbock	San Augustine
Coleman	Grayson	Lynn	Schleicher
Collin	Gregg	Marion	Scurry
Collingsworth	Hale	Martin	Shackelford
Comanche	Hall	Menard	Shelby
Concho	Hansford	Midland	Sherman
Cooke	Hardeman	Mills	Smith
Cottle	Harrison	Mitchell	Stephens
Crane	Hartley	Montague	Sterling
Crockett	Haskell	Moore	Stonewall
Crosby	Hemphill	Morris	Sutton

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Swisher	Titus	Ward	Wise
Tarrant	Tom Green	Wheeler	Wood
Taylor	Upshur	Wichita	Yoakum
Terry	Upton	Wilbarger	Young
Throckmorton	Van Zandt	Winkler	

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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
Atascosa
Austin
Bandera
Bastrop
Bee
Bell
Bexar
Blanco
Bosque
Brazoria
Brazos
Brewster
Brooks
Burleson
Burnet
Caldwell
Calhoun
Cameron
Chambers
Colorado
Comal
Coryell
Culberson
DeWitt
Dimmit
Duval
Edwards
El Paso
Falls
Fayette
Fort Bend
Freestone
Frio
Galveston
Gillespie
Goliad
Gonzales
Grimes
Guadalupe
Hamilton
Hardin
Harris
Hays
Hidalgo
Hill
Hudspeth
Jackson
Jasper
Jeff Davis
Jefferson
Jim Hogg
Jim Wells
Karnes
Kendall
Kenedy
Kerr
Kimble
Kinney
Kleberg
Lampasas
La Salle
Lavaca
Lee
Leon
Liberty
Limestone
Live Oak
Llano
Madison
Mason
Matagorda
Maverick
McCulloch
McLennan
McMullen
Medina
Milam
Montgomery
Newton
Nueces
Orange
Pecos
Polk
Presidio
Real
Reeves
Refugio
Robertson
San Jacinto
San Patricio
San Saba
Somervell
Starr
Terrell
Travis
Trinity
Tyler
Uvalde
Val Verde
Victoria
Walker
Waller
Washington
Webb
Wharton
Willacy
Williamson
Wilson
Zapata
Zavala

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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 websites or by contacting district and county representatives directly.

Texas County Foreclosure Resources

County/County Seat	*Designated Sale Site and Website Information*

A

ANDERSON—Palestine

Designated sale site	Steps on east side of courthouse
Appraisal district website	**www.andersoncad.net/**
County website	**www.co.anderson.tx.us/**

ANDREWS—Andrews

Designated sale site	East door of courthouse
Appraisal district website	**www.andrewscad.org/**
County website	**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 website	**www.angelinacad.org/**
County website	**www.angelinacounty.net/**

ARANSAS—Rockport

Designated sale site	Front steps to east lobby entrance of courthouse
Appraisal district website	**www.aransascad.org/**
County website	**www.aransascountytx.gov/main/**

ARCHER—Archer City

Designated sale site	North entrance of courthouse annex
Appraisal district website	**www.archercad.org/**
County website	**www.co.archer.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
ARMSTRONG—Claude	
Designated sale site	Stairs in lobby of courthouse
Appraisal district website	**www.taxnetusa.com/texas/armstrong/**
County website	**www.co.armstrong.tx.us/**
ATASCOSA—Jourdanton	
Designated sale site	West porch of courthouse
Appraisal district website	**www.atascosacad.com/**
County website	**http://atascosacountytexas.net/**
AUSTIN—Bellville	
Designated sale site	Lobby of courthouse
Appraisal district website	**www.austincad.net/**
County website	**www.austincounty.com/**

B

BAILEY—Muleshoe	
Designated sale site	East door of courthouse
Appraisal district website	**www.bailey-cad.org/**
County website	**www.co.bailey.tx.us/**
BANDERA—Bandera	
Designated sale site	Southwest front courthouse door (either inside or outside) that faces Main Street
Appraisal district website	**www.bancad.org/**
County website	**www.banderacounty.org/**
BASTROP—Bastrop	
Designated sale site	North door of courthouse
Appraisal district website	**www.bastropcad.org/**
County website	**www.co.bastrop.tx.us/**
BAYLOR—Seymour	
Designated sale site	West entrance to courthouse
Appraisal district website	**http://baylorcad.org/**
County website	**www.baylorcountytexas.com/**

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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 $	2018	
		3 Interest if included in box 2 $	Form 1099-C	
CREDITOR'S TIN	DEBTOR'S TIN	4 Debt description		**Copy B For Debtor**
DEBTOR'S name				This is important tax information and is being furnished to the IRS. 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 taxpayer identification number (TIN). For your protection, this form may show only the last four digits of your TIN (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 TIN 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 don't 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; or H—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*.

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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 $	2018	
		3 Interest if included in box 2 $	Form 1099-C	
CREDITOR'S TIN	DEBTOR'S TIN	4 Debt description		Copy C For Creditor
DEBTOR'S name				For Privacy Act and Paperwork Reduction Act Notice, see the **2018 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 2018 General Instructions for Certain Information Returns, and
- the 2018 Instructions for Forms 1099-A and 1099-C.

To order these instructions and additional forms, go to *www.irs.gov/Form1099C*.

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 January 31, 2019.

File Copy A of this form with the IRS by February 28, 2019. If you file electronically, the due date is April 1, 2019. To file electronically, you must have software that generates a file according to the specifications in Pub. 1220. The IRS does not provide a fill-in form option for Copy A.

Need help? If you have questions about reporting on Form 1099-C, call the information reporting customer service site toll free at 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).

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Form 23-2

2018 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 *IRS.gov/Form1099A* and *IRS.gov/Form1099C*.

What's New

On-line pdf fillable Copies B and C. To ease statement furnishing requirements, Copies B and C have been made fillable on-line in a pdf format available at *IRS.gov/Form1099A* and *IRS.gov/Form1099C*. You can complete these copies on-line for furnishing statements to recipients and for retaining in your own files.

Reminder

In addition to these specific instructions, you should also use the 2018 General Instructions for Certain Information Returns. 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 (TINs).
- Backup withholding.
- Penalties.
- Other general topics.

You can get the general instructions from General Instructions for Certain Information Returns at *IRS.gov/Form1099* or go to *IRS.gov/Form1099A* or *IRS.gov/Form1099C*.

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, and 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 the following.

- 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.

Sep 27, 2017 Cat. No. 27991U

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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 2018 General Instructions for Certain Information Returns.

Truncating borrower's TIN on statements. Pursuant to Treasury Regulations section 301.6109-4, all filers of Form 1099-A may truncate a borrower's TIN (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 TIN may not be truncated on any form. See part J in the 2018 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 2018 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—2014 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

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 ensure the debtor is connected with the correct department.

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* later, and

2. An identifiable event has occurred. It does not matter whether the actual cancellation is on or before the

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date of the identifiable event. See *When Is a Debt Canceled*, later.

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, and 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 any of the following.

1. A financial institution described in section 581 or 591(a) (such as a domestic bank, trust company, building and loan association, 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. National Credit Union Administration.
   c. Any other federal executive agency, including government corporations.
   d. Any military department.
   e. U.S. Postal Service.
   f. 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 the following.

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 (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 1. X will not have a test year in year 1 or year 2. However, for year 3, X's test year will be year 1. In year 3, year 1 is the only year that ended before July 1 of the previous calendar year (in this example, year 2).

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 2018 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.

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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. Other actual discharge before identifiable event. Enter "H" 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

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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 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 2018 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 TIN on payee statements. Pursuant to Treasury Regulations section 301.6109-4, all filers of Form 1099-C may truncate a debtor's TIN (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 TIN may not be truncated on any form. See part J in the 2018 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 2018 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.

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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 Pub. 4681.

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.

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Form 23-3

Form **982**
(Rev. January 2016)
Department of the Treasury
Internal Revenue Service

Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment)

▶ Attach this form to your income tax return.
▶ Information about Form 982 and its instructions is at *www.irs.gov/form982.*

OMB No. 1545-0046
Attachment Sequence No. 94

Name shown on return | Identifying number

Part I General Information (see instructions)

1 Amount excluded is due to (check applicable box(es)):
a Discharge of indebtedness in a title 11 case ☐
b Discharge of indebtedness to the extent insolvent (not in a title 11 case) ☐
c Discharge of qualified farm indebtedness ☐
d Discharge of qualified real property business indebtedness ☐
e Discharge of qualified principal residence indebtedness ☐
2 Total amount of discharged indebtedness excluded from gross income . . . 2
3 Do you elect to treat all real property described in section 1221(a)(1), relating to property held for sale to customers in the ordinary course of a trade or business, as if it were depreciable property? . . . ☐ Yes ☐ No

Part II Reduction of Tax Attributes. You must attach a description of any transactions resulting in the reduction in basis under section 1017. See Regulations section 1.1017-1 for basis reduction ordering rules, and, if applicable, required partnership consent statements. (For additional information, see the instructions for Part II.)

Enter amount excluded from gross income:

		Line	
4	For a discharge of qualified real property business indebtedness applied to reduce the basis of depreciable real property	4	
5	That you elect under section 108(b)(5) to apply first to reduce the basis (under section 1017) of depreciable property	5	
6	Applied to reduce any net operating loss that occurred in the tax year of the discharge or carried over to the tax year of the discharge	6	
7	Applied to reduce any general business credit carryover to or from the tax year of the discharge	7	
8	Applied to reduce any minimum tax credit as of the beginning of the tax year immediately after the tax year of the discharge	8	
9	Applied to reduce any net capital loss for the tax year of the discharge, including any capital loss carryovers to the tax year of the discharge	9	
10a	Applied to reduce the basis of nondepreciable and depreciable property if not reduced on line 5. *DO NOT use in the case of discharge of qualified farm indebtedness*	10a	
b	Applied to reduce the basis of your principal residence. *Enter amount here ONLY if line 1e is checked*	10b	
11	For a discharge of qualified farm indebtedness applied to reduce the basis of:		
a	Depreciable property used or held for use in a trade or business or for the production of income if not reduced on line 5	11a	
b	Land used or held for use in a trade or business of farming	11b	
c	Other property used or held for use in a trade or business or for the production of income	11c	
12	Applied to reduce any passive activity loss and credit carryovers from the tax year of the discharge	12	
13	Applied to reduce any foreign tax credit carryover to or from the tax year of the discharge	13	

Part III Consent of Corporation to Adjustment of Basis of Its Property Under Section 1082(a)(2)

Under section 1081(b), the corporation named above has excluded $ ____________ from its gross income for the tax year beginning ____________ and ending ____________.
Under that section, the corporation consents to have the basis of its property adjusted in accordance with the regulations prescribed under section 1082(a)(2) in effect at the time of filing its income tax return for that year. The corporation is organized under the laws of ____________.
(State of incorporation)

Note: You must attach a description of the transactions resulting in the nonrecognition of gain under section 1081.

For Paperwork Reduction Act Notice, see instructions. Cat. No. 17066E Form **982** (Rev. 1-2016)

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General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

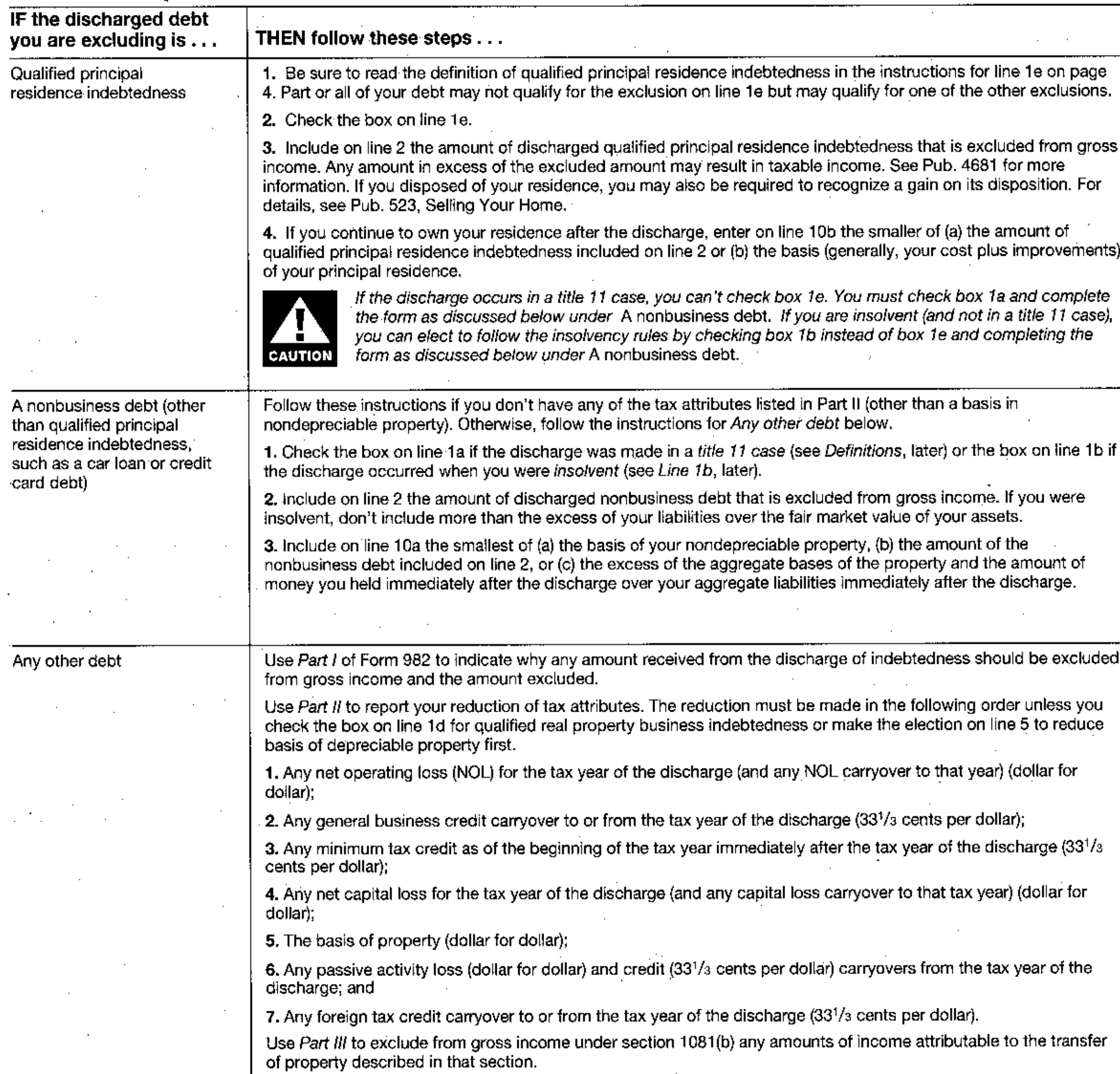
Future developments. For the latest information about developments related to Form 982 and its instructions, such as legislation enacted after they were published, go to *www.irs.gov/form982*.

Purpose of Form

Generally, the amount by which you benefit from the discharge of indebtedness is included in your gross income. However, under certain circumstances described in section 108, you can exclude the amount of discharged indebtedness from your gross income.

You must file Form 982 to report the exclusion and the reduction of certain tax attributes either dollar for dollar or $33\frac{1}{3}$ cents per dollar (as explained below).

How To Complete the Form



IF the discharged debt you are excluding is . . .	THEN follow these steps . . .
Qualified principal residence indebtedness	**1.** Be sure to read the definition of qualified principal residence indebtedness in the instructions for line 1e on page 4. Part or all of your debt may not qualify for the exclusion on line 1e but may qualify for one of the other exclusions. **2.** Check the box on line 1e. **3.** Include on line 2 the amount of discharged qualified principal residence indebtedness that is excluded from gross income. Any amount in excess of the excluded amount may result in taxable income. See Pub. 4681 for more information. If you disposed of your residence, you may also be required to recognize a gain on its disposition. For details, see Pub. 523, Selling Your Home. **4.** If you continue to own your residence after the discharge, enter on line 10b the smaller of (a) the amount of qualified principal residence indebtedness included on line 2 or (b) the basis (generally, your cost plus improvements) of your principal residence. CAUTION *If the discharge occurs in a title 11 case, you can't check box 1e. You must check box 1a and complete the form as discussed below under* A nonbusiness debt. *If you are insolvent (and not in a title 11 case), you can elect to follow the insolvency rules by checking box 1b instead of box 1e and completing the form as discussed below under* A nonbusiness debt.
A nonbusiness debt (other than qualified principal residence indebtedness, such as a car loan or credit card debt)	Follow these instructions if you don't have any of the tax attributes listed in Part II (other than a basis in nondepreciable property). Otherwise, follow the instructions for *Any other debt* below. **1.** Check the box on line 1a if the discharge was made in a *title 11 case* (see *Definitions*, later) or the box on line 1b if the discharge occurred when you were *insolvent* (see *Line 1b*, later). **2.** Include on line 2 the amount of discharged nonbusiness debt that is excluded from gross income. If you were insolvent, don't include more than the excess of your liabilities over the fair market value of your assets. **3.** Include on line 10a the smallest of (a) the basis of your nondepreciable property, (b) the amount of the nonbusiness debt included on line 2, or (c) the excess of the aggregate bases of the property and the amount of money you held immediately after the discharge over your aggregate liabilities immediately after the discharge.
Any other debt	Use *Part I* of Form 982 to indicate why any amount received from the discharge of indebtedness should be excluded from gross income and the amount excluded. Use *Part II* to report your reduction of tax attributes. The reduction must be made in the following order unless you check the box on line 1d for qualified real property business indebtedness or make the election on line 5 to reduce basis of depreciable property first. **1.** Any net operating loss (NOL) for the tax year of the discharge (and any NOL carryover to that year) (dollar for dollar); **2.** Any general business credit carryover to or from the tax year of the discharge ($33\frac{1}{3}$ cents per dollar); **3.** Any minimum tax credit as of the beginning of the tax year immediately after the tax year of the discharge ($33\frac{1}{3}$ cents per dollar); **4.** Any net capital loss for the tax year of the discharge (and any capital loss carryover to that tax year) (dollar for dollar); **5.** The basis of property (dollar for dollar); **6.** Any passive activity loss (dollar for dollar) and credit ($33\frac{1}{3}$ cents per dollar) carryovers from the tax year of the discharge; and **7.** Any foreign tax credit carryover to or from the tax year of the discharge ($33\frac{1}{3}$ cents per dollar). Use *Part III* to exclude from gross income under section 1081(b) any amounts of income attributable to the transfer of property described in that section.

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Certain individuals may need to complete only a few lines on Form 982. For example, if you are completing this form because of a discharge of indebtedness on a personal loan (such as a car loan or credit card debt) or a loan for the purchase of your principal residence, follow the chart, earlier, to see which lines you need to complete. Also, see Pub. 4681, Canceled Debts, Foreclosures, Repossessions, and Abandonments, for additional information.

Definitions

Title 11 Case

A *title 11 case* is a case under title 11 of the United States Code (relating to bankruptcy), but only if you are under the jurisdiction of the court in the case and the discharge of indebtedness is granted by the court or is under a plan approved by the court.

Discharge of Indebtedness

The term *discharge of indebtedness* conveys forgiveness of, or release from, an obligation to repay.

When To File

File Form 982 with your federal income tax return for a year a discharge of indebtedness is excluded from your income under section 108(a).

The election to reduce the basis of depreciable property under section 108(b)(5) and the election made on line 1d of Part I regarding the discharge of qualified real property business indebtedness must be made on a timely filed return (including extensions) and can be revoked only with the consent of the IRS.

If you timely filed your tax return without making either of these elections, you can still make either election by filing an amended return within 6 months of the due date of the return (excluding extensions). Write "Filed pursuant to section 301.9100-2" on the amended return and file it at the same place you filed the original return.

Specific Instructions

Part I

The time for making a section 108(i) election has passed. If you made an election under section 108(i) to defer income from the discharge of business debt arising from the reacquisition of a debt instrument in 2009 or 2010, don't report the amount deferred under the election in lines 1a through 1d and line 2.

Line 1b

The insolvency exclusion doesn't apply to any discharge that occurs in a title 11 case. It also doesn't apply to a discharge of qualified principal residence indebtedness (see the instructions for line 1e on page 4) unless you elect to have the insolvency exclusion apply instead of the exclusion for qualified principal residence indebtedness.

Check the box on line 1b if the discharge of indebtedness occurred while you were insolvent. You were insolvent to the extent that your liabilities exceeded the fair market value (FMV) of your assets immediately before the discharge. For details and a worksheet to help calculate insolvency, see Pub. 4681.

Example. You were released from your obligation to pay your credit card debt in the amount of $5,000. The FMV of your total assets immediately before the discharge was $7,000 and your liabilities were $10,000. You were insolvent to the extent of $3,000 ($10,000 of total liabilities minus $7,000 of total assets). Check the box on line 1b and include $3,000 on line 2.

Line 1c

Check this box if the income you exclude is from the discharge of qualified farm indebtedness. The exclusion relating to qualified farm indebtedness doesn't apply to a discharge that occurs in a title 11 case or to the extent you were insolvent.

Qualified farm indebtedness is the amount of indebtedness incurred directly in connection with the trade or business of farming. In addition, 50% or more of your aggregate gross receipts for the three tax years preceding the tax year in which the discharge of such indebtedness occurs must be from the trade or business of farming. For more information, see sections 108(g) and 1017(b)(4).

The discharge must have been made by a qualified person. Generally, a *qualified person* is an individual, organization, etc., who is actively and regularly engaged in the business of lending money. This person can't be related to you, be the person from whom you acquired the property, or be a person who receives a fee with respect to your investment in the property. A qualified person also includes any federal, state, or local government or agency or instrumentality thereof.

If you checked line 1c and didn't make the election on line 5, the debt discharge amount will be applied to reduce the tax attributes in the order listed on lines 6 through 9. Any remaining amount will be applied to reduce the tax attributes in the order listed on lines 11a through 13.

You can't exclude more than the total of your (a) tax attributes (determined under section 108(g)(3)(B)) and (b) basis of property used or held for use in a trade or business or for the production of income. Any excess is included in income.

Line 1d

If you check this box, the discharge of qualified real property business indebtedness is applied to reduce the basis of depreciable real property on line 4. The exclusion relating to qualified real property business indebtedness doesn't apply to a discharge that occurs in a title 11 case or to the extent you were insolvent.

Qualified real property business indebtedness is indebtedness (other than qualified farm indebtedness) that (a) is incurred or assumed in connection with real property used in a trade or business, (b) is secured by that real property, and (c) with respect to which you have made an election under this provision. This provision doesn't apply to a corporation (other than an S corporation).

Indebtedness incurred or assumed after 1992 isn't qualified real property business indebtedness unless it is either (a) debt incurred to refinance qualified real property business indebtedness incurred or assumed before 1993 (but only to the extent the amount of such debt doesn't exceed the amount of debt being refinanced) or (b) qualified acquisition indebtedness.

Qualified acquisition indebtedness is (a) debt incurred or assumed to acquire, construct, reconstruct, or substantially improve real property that is secured by such debt and (b) debt resulting from the refinancing of qualified acquisition indebtedness to the extent the amount of such debt doesn't exceed the amount of debt being refinanced.

You can't exclude more than the excess of the outstanding principal amount of the debt (immediately before the discharge) over the net FMV (as of that time) of the property securing the debt reduced by the outstanding principal amount of other qualified real property business indebtedness secured by that property (as of that time). The amount excluded is further limited to the aggregate adjusted basis (as of the first day of the next tax year or, if earlier, the date of disposition) of depreciable real property (determined after any reductions under sections 108(b) and (g)) you held immediately before the discharge (other than property acquired in contemplation of the discharge). Any excess is included in income.

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Line 1e

Check this box if the income you exclude is from discharge of qualified principal residence indebtedness. Also, be sure you complete line 2 (and line 10b if you continue to own the residence after discharge). However, if the discharge occurs in a title 11 case, you must check the box on line 1a and not this box. If you are insolvent (and not in a title 11 case), you can elect to follow the insolvency rules by checking box 1b instead of checking this box. For more information, see Pub. 4681.

Principal residence. Your principal residence is your *main home*, which is the home where you ordinarily live most of the time. You can have only one main home at any one time.

Qualified principal residence indebtedness. This indebtedness is a mortgage you took out to buy, build, or substantially improve your main home. It also must be secured by your main home. If the amount of your original mortgage is more than the cost of your main home plus the cost of any substantial improvements, only the debt that is **not** more than the cost of your main home plus improvements is qualified principal residence indebtedness. Any debt secured by your main home that you use to refinance qualified principal residence indebtedness is treated as qualified principal residence indebtedness, but only up to the amount of the old mortgage principal just before the refinancing. Any additional debt you incurred to substantially improve your main home is also treated as qualified principal residence indebtedness.

Amount eligible for the exclusion. The exclusion applies only to debt discharged after 2006. The maximum amount you can treat as qualified principal residence indebtedness is $2 million ($1 million if married filing separately). You can't exclude from gross income discharge of qualified principal residence indebtedness if the discharge was for services performed for the lender or on account of any other factor not directly related to a decline in the value of your residence or to your financial condition.

Ordering rule. If only a part of a loan is qualified principal residence indebtedness, the exclusion applies only to the extent the amount discharged exceeds the amount of the loan (immediately before the discharge) that is **not** qualified principal residence indebtedness. For example, assume your main home is secured by a debt of $1 million, of which $800,000 is qualified principal residence indebtedness. If your main home is sold for $700,000 and $300,000 of debt is discharged, only $100,000 of the debt discharged can be excluded (the $300,000 that was discharged minus the $200,000 of nonqualified debt). The remaining $200,000 of nonqualified debt may qualify in whole or in part for one of the other exclusions, such as the insolvency exclusion.

Line 2

Enter the total amount excluded from your gross income due to discharge of indebtedness under section 108. If you checked any box on lines 1b through 1e, don't enter more than the limit explained in the instructions for those lines. If you checked line 1a, 1b, or 1c, this amount won't necessarily equal the total reductions on lines 5 through 13 (excluding line 10b) because the debt discharge amount may exceed the total tax attributes. If you checked line 1e, this amount won't necessarily equal the total basis reduction on line 10b (which is required only if you continue to own the residence after the discharge).

See section 382(l)(5) for a special rule regarding a reduction of a corporation's tax attributes after certain ownership changes.

Line 3

You can elect under section 1017(b)(3)(E) to treat all real property held primarily for sale to customers in the ordinary course of a trade or business as if it were depreciable property. This election doesn't apply to the discharge of qualified real property business indebtedness. To make the election, check the "Yes" box.

Part II

Basis Reduction

If you check any of the boxes on lines 1a through 1c, you can elect, by completing line 5, to apply all or a part of the debt discharge amount to first reduce the basis of depreciable property (including property you elected on line 3 to treat as depreciable property). Any balance of the debt discharge amount will then be applied to reduce the tax attributes in the order listed on lines 6 through 13 (excluding line 10b). You must attach a statement describing the transactions that resulted in the reduction in basis under section 1017 and identifying the property for which you reduced the basis. If you don't make the election on line 5, complete lines 6 through 13 (excluding line 10b) to reduce your attributes. See section 1017(b)(2) and (c) for limitations of reductions in basis on line 10a.

Line 7

If you have a general business credit carryover to or from the tax year of the discharge, you must reduce that carryover by 33⅓ cents for each dollar excluded from gross income. See Form 3800, General Business Credit, for more details on the general business credit, including rules for figuring any carryforward or carryback.

Line 10a

In the case of a title 11 case or insolvency, the reduction in basis is limited to the aggregate of the basis of your property immediately after the discharge over the aggregate of your liabilities immediately after the discharge. However, this limit doesn't apply to a reduction in basis reported on line 5 pursuant to section 108(b)(5).

Line 10b

If box 1e is checked and you continue to own the residence after discharge, enter the smaller of:

- The part of line 2 that is attributable to the exclusion of qualified principal residence indebtedness, or
- The basis of your main home.

Part III

Adjustment to Basis

Unless it specifically states otherwise, the corporation, by filing this form, agrees to apply the general rule for adjusting the basis of property (as described in Regulations section 1.1082-3(b)).

If the corporation desires to have the basis of its property adjusted in a manner different from the general rule, it must attach a request for variation from the general rule. The request must show the precise method used and the allocation of amounts.

Consent to the request for variation from the general rule will be effective only if it is incorporated in a closing agreement entered into by the corporation and the Commissioner of Internal Revenue under the rules of section 7121. If no agreement is entered into, then the general rule will apply in determining the basis of the corporation's property.

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Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You aren't 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 required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated burden for individual taxpayers filing this form is approved under OMB control number 1545-0074 and is included in the estimates shown in the instructions for their individual income tax return. The estimated burden for all other taxpayers who file this form is shown as follows: **Recordkeeping,** 5 hr., 58 min.; **Learning about the law or the form,** 2 hr., 34 min.; **Preparing and sending the form to the IRS,** 2 hr., 48 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. See the instructions for the tax return with which this form is filed.

[Reserved]

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Chapter 24

Foreclosures Resulting from Ad Valorem Taxation

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Chapter 24

Foreclosures Resulting from Ad Valorem Taxation

The editors gratefully acknowledge Edward Lopez, Jr. for his contribution to this chapter.

§ 24.1 Introduction

A tax is a state or federally mandated imposition created and imposed to pay for governmental activities. One such tax is a property tax, which is assessed and imposed based on the value of the property being taxed. As such, it is called "ad valorem," which means "according to value." There are generally two types of property that are taxed in Texas: real property (land, improvements, mines, minerals, and timber) and personal property (everything else that isn't real property). Tex. Tax Code § 1.04(2), (4).

This chapter generally addresses the processes of the assessment and imposition of the tax upon the nonexempt property owned by a person within the state of Texas. (See Texas Property Code chapters 41 and 42 and Texas Tax Code chapter 11 for information on exempt property and the administration of exemptions.) More importantly, it addresses the process of foreclosure by local taxing units in the event that the subject taxes (and other accrued amounts) are not timely paid by the property owner.

§ 24.2 Bifurcated System of Taxation: Appraisal Districts and Administrative Process

For the practitioner in Texas, it is important to note that the process of taxation begins with the local appraisal district. The taxing units do not come into play until the administrative process undertaken by the appraisal district is substantially completed in late July of each year.

In most appraisal districts, property appraisal, recordkeeping, and maintenance of property tax maps occur year round. The process of gathering this information is ongoing. Doing so provides the local appraisal district with the information that it vitally needs to perform its function each year. As such, the chief appraiser and the staff will undertake their responsibility of appraising all taxable property according to its value on January 1 of the tax year. Tex. Tax Code § 23.01.

§ 24.2:1 Property Renditions

Between January 1 and April 1, property owners are required to file property renditions when necessary. *See* Tex. Tax Code §§ 22.01, 22.22–.27. Taxpayers turn in applications for exemptions and requests for special appraisal during the same general period from January 1 through May 1.

While this process is going on, the local appraisal office is also reviewing its records and other information from local city records, deed records, building construction records, business start-up records, and the like to add all new property to the tax roll and appraise the value of such property based on the determination of its value. *See* Tex. Tax Code §§ 25.01–.02.

Throughout this phase, the chief appraiser grants or denies exemptions and special use applications. *See* Tex. Tax Code § 25.25.

§ 24.2:2 Notice of Appraised Value and Protests

It is also during this evaluation phase that the chief appraiser must notify taxpayers of any

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changes in their records and send a notice of appraised value. Tex. Tax Code § 25.19. Notices are to be sent to the property owner or the owner's agent "according to the most recent record [of the address] in the possession of the official," unless the owner or agent has filed a written request that notice be sent to a particular address. Tex. Tax Code § 1.07(b). Notices may be in electronic form if agreed to in advance. Tex. Tax Code §§ 1.07, 1.085.

On May 15, or as soon afterward as possible, the chief appraiser presents the appraisal records to the appraisal review board (ARB). During June and July, the ARB reviews the appraisal records and hears challenges to the records. Tex. Tax Code § 41.44. The ARB submits the challenges to the chief appraiser by written order and notifies the property owner of the determination made relative to his property. Tex. Tax Code § 41.11. If the property owner disagrees with the determination, he must file a written notice of protest. The protest must be filed:

(1) not later than May 15 or the 30th day after the date that notice to the property owner was delivered to the property owner as provided by Tax Code Section 25.19, whichever is later;

(2) in the case of a protest of a change in the appraisal records ordered as provided by Subchapter A of Tax Code Chapter 41 or by Tax Code Chapter 25, not later than the 30th day after the date notice of the change is delivered to the property owner;

(3) in the case of a determination that a change in the use of land appraised under Subchapter C, D, E, or H, Tax Code Chapter 23, has occurred, not later than the 30th day after the date the notice of the determination is delivered to the property owner; or

(4) in the case of a determination of eligibility for a refund under Tax Code Section 23.1243, not later than the 30th day after the date the notice of the determination is delivered to the property owner.

Tex. Tax Code § 41.44.

A person who acquires property after January 1 and before the deadline for filing notice of the protest may pursue a protest under section 41.44 in the same manner as a property owner who owned the property on January 1. Tex. Tax Code § 41.412(a). If during the pendency of a protest the ownership of the property subject to the protest changes, the new owner of the property on application to the ARB may proceed with the protest in the same manner as the property owner who initiated the protest. Tex. Tax Code § 41.412(b).

§ 24.2:3 Rights of Lessee to Protest

A person leasing real or tangible personal property who is contractually obligated to reimburse the property owner for taxes imposed on the property is entitled to protest before the ARB a determination of the appraised value of the property if the property owner does not file a protest relating to the property. Tex. Tax Code § 41.413(a), (b). That is, the protest is limited to a single protest by either the property owner or the lessee. Tex. Tax Code § 41.413(b). The lessee is considered the owner of the property for purposes of the protest. Tex. Tax Code § 41.413(c). One of the actual owners is statutorily required to send the lessee a copy of any notice of the property's reappraisal received by the property owner, but the failure of the owner to send a copy of the notice to the person leasing the property does not affect the time within which the person leasing the property may pro-

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test the appraised value. Tex. Tax Code § 41.413(d).

§ 24.2:4 Failure to Give Notice of Protest

The notice of protest is essential to the property owner for many reasons. First, it is the initial legal opportunity for the property owner to challenge and have a hearing on the validity of the chief appraiser's determination. Second, the notice of protest provides the property owner with an administrative forum in which he can present evidence and be heard before an independent administrative body, the ARB. *See* Tex. Tax Code §§ 41.04–.07. This right is absolute and provided for by law. Tex. Tax Code § 41.41. The Tax Code identifies nine specific items that the property owner can protest before the ARB. *See* Tex. Tax Code § 41.41(a)(1)–(9).

The failure of a taxpayer to exhaust this administrative remedy may be fatal to the taxpayer's cause when a taxing unit subsequently files a lawsuit to collect a tax which the taxpayer believes is excessive. The Tax Code strictly outlines the administrative processes that must be undertaken by a taxpayer to protest the items listed in section 41.41(a). When these are not followed, the taxpayer loses the right to challenge a lawsuit subsequently brought by a taxing unit. *See* Tex. Tax Code § 42.09.

The Texas Supreme Court and the various courts of appeal have uniformly held that the administrative remedies outlined in chapter 41 of the Texas Tax Code are exclusive and that a property owner who fails to exercise such remedies cannot subsequently challenge those particular matters. *See Starflight 50, L.L.C. v. Harris County Appraisal District*, 287 S.W.3d 741 (Tex. App.—Houston [1st Dist] 2009, no pet.); *Public, Inc. v. County of Galveston*, 264 S.W.3d 338 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Valero Transmission Co. v. Hays Consolidated Independent School District*, 704 S.W.2d 857 (Tex. App.—Austin 1985, writ ref'd n.r.e.). Furthermore, failure to comply with the Code's requirements deprives a district court (in either a case against the appraisal district or in a suit brought by a taxing unit) of jurisdiction to consider any of the arguments or challenges. *KM Timbercreek, LLC v. Harris County Appraisal District*, 312 S.W.3d 722 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

§ 24.2:5 Appeals to Courts

In the event the taxpayer timely files a notice of protest and participates in the administrative process and still disagrees with the finding of the ARB, he has an additional right under the Tax Code. The property owner can file an appeal to a district court. *See* Tex. Tax Code § 42.01. The petition for review must be filed with the district court within sixty days after the party receives notice that a final order has been entered from which an appeal may be had or at any time after the hearing but before the sixty-day deadline. Tex. Tax Code § 42.21. Failure to timely file a petition bars any appeal under the applicable chapter. Tex. Tax Code § 42.21. Equally important to the filing of any appeal is the mandatory requirement that the taxpayer pay the taxes that become due before the delinquency date in an amount equal to the lesser of (1) the amount of taxes due on the portion of the taxable value of the property that is not in dispute or (2) the amount of taxes due on the property under the order from which the appeal is taken. Tex. Tax Code § 42.08(b). While not all district courts in Texas enforce this prepayment, the practitioner should be mindful that the Tax Code makes such payment mandatory and a precursor to jurisdiction.

§ 24.3 Equalization and Assessment Phases

During June and July, the ARB usually reviews the appraisal records and hears taxing unit challenges to the appraisal roll. Most protests must

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be filed by June 1. *See* Tex. Tax Code § 41.44. By July 20, the ARB finishes its hearings and approves appraisal records, thus making them the official appraisal roll. However if more than 5 percent of the total appraised value remains under protest, the ARB may not approve the roll. During this period of time, additional processes are undertaken to provide the taxing units with the appraisal roll which reflects all of the properties subject to taxation.

§ 24.4 Taxing Units: Tax Bills and Delinquency Dates

§ 24.4:1 Certification of Tax Roll

By July 25, the chief appraiser prepares and certifies to the assessor for each taxing unit its respective certified tax roll. The certified tax roll is then presented to the governing body for each taxing unit within the appraisal district's jurisdiction. Tex. Tax Code § 26.01. The information contained in the tax roll assists the taxing unit in setting its budget and adopting its tax rate based on its determination of anticipated values and revenue generated therefrom. The assessor for the taxing unit then calculates the effective tax rate and roll back tax rate as soon as he receives the tax roll. Thereafter, the taxing unit publishes those rates along with other financial information required by the Tax Code. Tax rates must be adopted by September 30 or sixty days after receipt of the certified tax roll. Tex. Tax Code § 26.05. Otherwise, the rate is based on the lower of the effective tax rate or the rate from the previous year.

§ 24.4:2 Adoption of Tax Rate

Soon after the governing body adopts its budget based on the latest appraisal information, the governing body adopts a tax rate to generate enough revenue to fund that budget. The assessor then calculates the tax liabilities for each property by multiplying the taxable value times the adopted tax rate. This generates a tax levy and the tax assessor then mails notices to taxpayers in October of the adopting year. *See* Tex. Tax Code § 31.01.

§ 24.4:3 Tax Payment and Delinquency Dates

Taxes are due upon receipt of the tax bill and become delinquent if not paid before February 1 of the following year. Tex. Tax Code § 31.02(a). To be deductible for federal income tax purposes, the taxes should be paid on or before December 31, even though they are not delinquent pursuant to state law until February 1.

Once the taxes become delinquent on February 1, penalties and interest begin to accrue as outlined in chapter 33 of the Tax Code. Tex. Tax Code § 33.01. A delinquent tax incurs a penalty of 6 percent of the amount of the tax for the first calendar month it is delinquent plus one percent for each additional month or portion of the month it remains unpaid prior to July 1 of the year in which it becomes delinquent. For the practitioner and taxpayer, July 1 is an important date for two specific reasons: First, on July 1 an additional penalty "to defray costs of collection" is added to the delinquent account if the taxing unit has contracted with an attorney for collection. Tex. Tax Code § 33.07(a). A tax lien attaches to the property to secure the payment of this penalty. Tex. Tax Code § 33.07(b). Second, if the collection penalty is added, the attorney may not recover any additional attorney's fee. Tex. Tax Code § 33.07(c).

§ 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

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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

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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 have 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 restrictions on tax lenders. *See* Acts 2013, 83d Leg., R.S. ch. 206, § 1 (S.B. 247), eff. Sept. 1, 2013.

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§ 24.6 Judgment by Taxing Units and Orders of Sale

The typical tax lawsuit goes to trial in an uncontested manner. The taxing units generally appear and present their case in chief based upon certified tax records as permitted by the Tax Code. *See* Tex. Tax Code § 33.47(a). These records, once introduced and admitted, constitute prima facie evidence that each person charged with a duty relating to the imposition of the tax has complied with all requirements of law and that the amount of tax alleged to be delinquent against the property and the amount of penalties and interest due on the tax as listed are the correct amounts. Tex. Tax Code § 33.47(a).

If the records of the tax office are insufficient to describe the property, the records of the appraisal office are admissible to identify the property. Tex. Tax Code § 33.47(b).

In addition to recovering the outstanding taxes, penalties, interest, and fees that are due and owing, the taxing unit is entitled to plead for and recover an array of costs and expenses incurred in prosecuting the lawsuit. *See* Tex. Tax Code § 33.48(a). Note, however, that section 33.48(a)(5) (recovery of attorney's fees in the amount of 15 percent) applies only to taxes that have become delinquent in the most current tax year (after February 1) but not yet reached July 1 (the date the automatic penalty applies). Stated simply, if July 1 has not occurred for the current delinquent year and the automatic penalty permitted under section 33.07 has not attached, the taxing unit can recover 15 percent in attorney's fees for that year; if July 1 has passed and the section 3.07 penalty has attached, then the 15 percent cannot be recovered.

After all the evidence is presented to the court by both the taxing unit and the taxpayer, the court should enter a judgment that forecloses the tax lien, permits the foreclosure of the property, and imposes personal liability against each person or entity that owned the property on January 1 of the year for which the tax was imposed. As to any party who was added as a party but was not an owner of the property, the judgment should be taken in rem as to that party. See form 24-3 in this manual.

Practice Tip: The practitioner should weigh the benefits of having his client named as an in rem party. Many attorneys will request a dismissal of their client rather than have them named in a judgment, even if the judgment is for nominal purposes. Over the years, many title companies have asked for written clarification of the scope of the judgment relative to an in rem party. This could be avoided, and probably should be considered, by simply filing a disclaimer of interest and seeking a dismissal. Remember that unless a party owned the property on January 1 of a given year, he has no personal liability for the payment of taxes and costs.

If the practitioner represents a creditor or lienholder who has an unpaid obligation that was filed against the property, that obligation may or may not be paid from excess proceeds that may exist following the sale of the subject property. Although the Tax Code does not require a person to be a party in order to file a petition for excess proceeds (*see* Tex. Tax Code § 34.04), being a party will ensure receipt of notices of the date of sale, deposit of proceeds, and notices by the district clerk.

§ 24.7 Tax Sale

After the judgment becomes final, the taxing unit will request an order of sale from the clerk of the court. *See* Tex. Tax Code § 33.53(b). The order is directed to an officer authorized to conduct the sale, usually the sheriff or constable of the county. If more than one parcel of property is included in the judgment, the taxing unit may specify which parcels it seeks to sell. Tex. Tax Code § 33.53(b). The order has to be executed

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within 181 days or must be returned "unexecuted." Tex. Tax Code § 33.53(c)(1).

The legal requirements for executing the sale are set forth in chapter 34 of the Tax Code. Most counties in Texas have a standard time, place, and location where their respective tax sales take place each month. Further, the law firms who represent the taxing units will likewise generally advertise the particular properties which are being sold. This information, however, is not conclusive and is provided to prospective purchasers. The taxpayer should pay special attention to the Notice of Sheriff's Sale that has been sent to him and direct all communications to the sheriff or executing officer from that point forward.

Practice Tip: Once the property has been placed in the hands of the executing officer or sheriff, all communications regarding payment, payoff, notices, or bankruptcy filing should be directed to the executing officer or sheriff. All monies need to be delivered to the executing officer or sheriff. For example, if on the day before the tax sale the taxpayer pays his respective taxes online or at the local tax office, that action will not stop the sale of the property because the executing officer or sheriff has a mandate to sell the property for all the amounts due and owing, which includes the costs the sheriff or executing officer has incurred. Those costs are not available at the time of the online payment and are not known to the local tax office. Also, if the taxpayer files for bankruptcy, it is essential that the executing officer or sheriff is apprised of such action so that sale will be stayed pursuant to federal law.

§ 24.8 Right of Redemption

If the property sold was the taxpayer's residence homestead, he can redeem the property within two years following the sale by paying the purchaser the amount the purchaser bid for the property; the amount of the deed recording fee; and the amount paid by the purchaser as taxes, penalties, interest, and costs on the property, plus a redemption premium of 25 percent of the aggregate total if the property is redeemed during the first year of the redemption period or 50 percent of the aggregate total if the property is redeemed during the second year of the redemption period. Tex. Tax Code § 34.21(a). If the property is not residential homestead, the time period is 180 days to redeem with a 25 percent redemption premium. Tex. Tax Code § 34.21(e).

§ 24.9 Limitation Periods

Texas Tax Code section 33.54 allows either a one- or two-year limitation to challenge the validity of the tax sale. The applicable period depends on the nature of the property itself. Tex. Tax Code § 33.54(a). Further, in order to commence suit, the taxpayer must first deposit into the registry an amount equal to the amount of delinquent taxes, penalties, and interest specified in the judgment of foreclosure, plus all costs of the tax sale. Tex. Tax Code § 34.08(a).

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[Reserved]

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Chapter 25

Property Tax Loan Foreclosure Process

The editors gratefully acknowledge Brian S. Bellamy for his contribution to this chapter.

Note: 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, has 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 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 forms can also be found on the Texas Supreme Court website at **www.txcourts.gov/supreme**. 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.

Transferred tax liens are afforded superpriority status pursuant to Tex. Tax Code § 32.05 and take priority over preexisting mortgages and most other liens, regardless of when they are recorded.

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)).

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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.

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. 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 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.
>
> (b) *Style.* An application must be styled "In re: Order for Foreclosure Concerning [state: property's mailing address] under Tex. R. Civ. P. 736."
>
> (c) *When Filed.* An application may not be filed until the opportunity to cure has expired under applicable law and the loan agreement, contract, or lien sought to be foreclosed.

[Note: Pursuant to Texas Tax Code section 32.06(f), the holder of a loan secured by a transferred tax lien that is delinquent for ninety consecutive days must send a notice of the delinquency by certified mail on or before the 120th day of delinquency to any holder of a recorded preexisting lien on the property. The holder or mortgage servicer of a recorded preex-

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isting lien is entitled, within six months after the date on which the note is sent, to obtain a release of the property tax lien by paying the amount owed under the contract.

After this notice has been sent, Texas Tax Code section 32.06(c–1)(C) then requires the tax lien transferee to give the property owner and each holder of a recorded first lien on the property notice to cure the default, notice of intent to accelerate, and notice of acceleration of the maturity of the debt in the manner required for notice to a debtor under section 51.002 of the Texas Property Code *before* it can file an application under rule 736. See chapters 8 and 12 in this manual for a review on how to properly draft and send the notice to cure the default, notice of intent to accelerate, and notice of acceleration of the maturity of the debt.]

(d) *Contents*. The application must:

(1) Identify by name and last known address each of the following parties:

(A) "Petitioner" - any person legally authorized to prosecute the foreclosure

[Note: The person filing the application is no longer referred to as the "applicant" but, rather, the "petitioner" under the January 1, 2012, amendments.

Texas Property Code section 51.0025 authorizes a mortgage servicer to administer the foreclosure of property under section 51.002 on behalf of a mortgagee if certain prerequisites are met, so presumably, a servicer for a tax lien transferee could be a "person legally authorized to prosecute the foreclosure" on behalf of the actual transferee.]

(B) "Respondent" - according to the records of the holder or servicer of the loan agreement, contract, or lien sought to be foreclosed;

. . .

(ii) for a tax lien transfer or property tax loan, each person obligated to pay the loan agreement, contract, or lien sought to be foreclosed, each mortgagor, if any, of the loan agreement, contract, or lien sought to be foreclosed, each owner of the property, and the holder of any recorded preexisting first lien secured by the property;

[Note: A careful examination of the current title to the property at the time the application is filed is necessary to comply with this provision. If, for example, the property was foreclosed by a preexisting lienholder and sold to a third party after the property tax loan was made, the new third-party purchaser should be the "owner" named in the application under this provision.

Practitioners in this field will soon discover that properly notifying the "holder of any recorded preexisting first lien secured by the property" is one of the most difficult, uncertain, and problematic tasks in conducting a nonjudicial transferred tax lien foreclosure under rule 736. A petitioner will probably have to obtain and rely on a third-party title run to ascertain whether there are any recorded preexisting first liens on the property. Mortgage liens are commonly assigned (and often times bundled), but the assignments are not always reported or disclosed on a standard title run, which usually

only researches by grantor/grantee and not by legal description. Furthermore, many counties in Texas do not publish their deed records online (or do so for a fee), which makes locating mortgage assignments even more difficult.

Even if the mortgage has not been assigned, often times the last known address of the mortgagee, as depicted in the recorded preexisting lien instrument, is no longer a valid address. Is it reasonable then for a property tax lender to continue to send notices to a lienholder at an address that the lender knows will be returned as undeliverable? Although the Texas statutes are silent as to what additional reasonable steps could be expected or required of a lender in a situation where delivery was returned "undeliverable," a practitioner should nonetheless use reasonable discretion on a case by case basis when attempting to provide notice under this section. *See Jones v. Flowers*, 547 U.S. 220 (2006); *Krueger v. Swann*, 604 S.W.2d 454 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).]

(2) Identify the property encumbered by the loan agreement, contract, or lien sought to be foreclosed by its commonly known street address and legal description.

(3) Describe or state:

(A) the type of lien listed in Rule 735 sought to be foreclosed and its constitutional or statutory reference;

[Note: A general statement such as "the type of lien sought to be foreclosed under rule 735 is a tax lien transfer or property tax loan under sections 32.06 and 32.065 of the Texas Property Tax Code" should suffice for this requirement.]

(B) the authority of the party seeking foreclosure, whether as the servicer, beneficiary, lender, investor, property owners' association, or other person with authority to prosecute the foreclosure;

(C) each person obligated to pay the loan agreement, contract, or lien sought to be foreclosed;

(D) each mortgagor, if any, of the loan agreement, contract, or lien sought to be foreclosed who is not a maker or assumer of the underlying debt;

[Note: The mortgagor and maker are not always the same parties. An underwriter may require that an additional party, who is not a maker of the note, but may have some proprietary interest in the property, also execute the deed of trust/contract for foreclosure. This party would be a mortgagor, but not a maker.]

(E) as of a date that is not more than sixty days prior to the date the application is filed:

(i) if the default is monetary, the number of unpaid scheduled payments,

(ii) if the default is monetary, the amount required to cure the default,

[Note: The 2012 amendments to rules 735 and 736 did not require a debt be accelerated before a rule 736 application could be filed, as was the case under the 1999 version of rules 735 and 736. The 2012 rule only required a borrower be given the opportunity to cure under statutory and applicable law. However, if the maturity of the debt has been accelerated, the amount to cure the default is the accelerated amount. *See*

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Hiller v. Prosper Tex, Inc., 437 S.W.2d 412 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ). It is probably best practice, however, to state the reinstatement amount in this section as it currently stands at the time the application is filed because the payoff amount required to be stated in rule 736.1(d)(E)(iv) should be effectively the accelerated amount, notwithstanding the acceleration.]

(iii) if the default is non-monetary, the facts creating the default, and

(iv) if applicable, the total amount required to pay off the loan agreement, contract or lien;

(F) 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 loan agreement, contract, or lien sought to be foreclosed and that the opportunity to cure has expired; and

(G) that before the application was filed, any other action required under applicable law and the loan agreement, contract, or lien sought to be foreclosed was performed.

(4) For a tax lien transfer or property tax loan, state all allegations required to be contained in the application in accordance with section 32.06(c–1)(1) of the Tax Code.

[Note: This language is included in form 25-1 in this manual, Application for an Expedited Order Under Rule 736 on a Tax Lien Transfer or Property Tax Loan Created After September 1, 2007 and Before May 29, 2013, as promulgated by the Texas Supreme Court.]

(5) Conspicuously state:

(A) 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; and

(B) that 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 loan agreement, contract, or lien sought to be foreclosed.

(6) Include an affidavit of material facts in accordance with Rule 166a(f) signed by the petitioner or the servicer describing the basis for foreclosure and, depending on the type of lien sought to be foreclosed, attach a legible copy of:

[Note: Affidavits must meet the standard for a summary judgment affidavit that would be used in a judicial foreclosure or other summary judgment proceeding. At a minimum, affidavits must be based on personal knowledge of a witness competent to testify under penalty of perjury.]

(A) the note, original recorded lien . . . and current assignment of the lien, if assigned;

[Note: This requirement is premised on the assumption that the foreclosure process must be transparent and self-enforcing in that the foreclosure notices, note, security instrument, cur-

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rent assignment, and any other lien-specific documents required by statute are attached to the pleadings for court review.]

(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.

[Note: Obviously this provision requires the practitioner to attach to the application copies of the notice to cure the default, notice of intent to accelerate, and notice of acceleration of the maturity of the debt along with proof of mailing. Does this provision, however, also require the practitioner to attach copies of the initial ten-day notice under Texas Tax Code section 32.06(b–1), and the ninety-day notice under section 32.06(f) as well?

It is doubtful that the Texas Supreme Court intended that these two notices, which have no bearing on the foreclosure whatsoever, be attached to an application, but it's a good example of how confusing the nonjudicial process has become. For example, if a transferred tax lender is unable to prove that it sent the initial ten-day notice to a preexisting lienholder at the inception of the lien, is the lender now forever barred from bringing a 736 application and performing a nonjudicial foreclosure of its tax lien? The answer is probably not. Texas Tax Code section 32.06(f–4) states that failure to comply with (b–1), (f), or (f–1) does not invalidate a tax lien, a contract lien, or a deed of trust. Since the only real purpose of even having a contract lien or a deed of trust in a transferred tax lien setting (as previously discussed) is to allow for nonjudicial foreclosure, and noncompliance with these provisions does not invalidate a contract lien or a deed of trust, then a practitioner should still be able to bring an application under rule 736 and foreclose nonjudicially even without attaching these additional two notices.]

(C) for a tax lien transfer or property tax loan:

(i) the property owner's sworn document required under section 32.06(c–1) of the Tax Code; and

(ii) the taxing authority's certified statement attesting to the transfer of the lien, required under section 32.06(b) of the Tax Code.

[Note: This is not always a single, solitary document. Some taxing authorities (the school district, the city, the local college, etc.) may all individually issue their own certified statements for their portion of the applicable taxes to the transferee. All should be recorded and copies of all should be referenced in, and attached to, the application.]

See form 25-2, Affidavit in Support of Petitioner's Application for an Expedited Order Under Rule 736, as promulgated by the Texas Supreme Court; alternatively, the practitioner may use form 25-3, Declaration in Support of Petitioner's Application for an Expedited Order Under Rule 736, as promulgated by the Texas Supreme Court.

§ 25.3:2 Notice

Before the 83rd legislative session, rule 736.3(b)(1) required the clerk of the court to send a citation and copy of the application to each applicable respondent and the occupant by both first-class mail and certified mail. Beginning June 14, 2013, as a result of House Bill 2978, the petitioner now has the option to com-

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plete service in accordance with Texas Rule of Civil Procedure 106 instead of rule 736.3. House Bill 2978 amended chapter 17 of the Texas Civil Practice and Remedies Code by adding section 17.031, which states:

> For a power of sale exercised by the filing of an application for an expedited court order allowing the foreclosure of a contract lien under the Texas Rules of Civil Procedure 736, service of citation shall be completed in accordance with Rule 736 or 106, Texas Rules of Civil Procedure, or in any other manner provided for petitions under the Texas Rules of Civil Procedure.

Tex. Civ. Prac. & Rem. Code § 17.031.

Pursuant to the January 1, 2012, amendments to rules 735 and 736 of the Texas Rules of Civil Procedure, if the petitioner elects service under rule 736.3(b)(1), the clerk of the court in the county in which the application is filed is required to both prepare and serve by first-class and certified mail a citation on each person identified as a respondent in the application at the last known address stated in the application and to the "occupant" at the property mailing address. This means that the petitioner will need to supply the clerk with two copies of the application and all attached exhibits for each respondent served (one certified mail, one first-class mail) or pay the clerk's copy charge per page. *See* Tex. R. Civ. P. 736.3(b)(1).

For example, if there are two borrower respondents (husband and wife), a new owner respondent (due to a foreclosure or deed transfer), a lienholder respondent, and the occupant, the petitioner will need to supply the clerk with ten copies of the application and requisite attached exhibits for service (in addition to the clerk's copies and any returned filed stamped copies the petitioner will require). When considering all of the documentation that is required to be attached to an application under these recent amendments, one can easily see how this new process proves to be inefficient and has placed a tremendous burden on clerks just by way of sheer paper load alone. Alternatively, if the petitioner chooses instead to pay the clerk's copy charge per page, the resulting fee will be significant given the number of pages attached to a rule 736 affidavit.

All filing, citation, mailing, service, and other court costs and fees are costs of court and must be paid by the petitioner at the time of filing an application with the clerk of the court. The fee for the service of citation is the same amount paid to a sheriff or constable to personally serve a citation. The unintended consequence of this new requirement is that it significantly increases a property owner's indebtedness with little to no effect or purpose. Prior to the recent amendments, counsel for the petitioner was allowed to serve respondents with notice of the application via certified mail and first-class mail at seemingly minimal cost. The recent amendments, which require the same type of service (certified mail and first-class mail), but now through the clerk's office, can cost hundreds of dollars that are immediately passed through to the debtor.

The service date is the date the clerk deposits the citation in the mail. Even if the designated recipient refuses to accept the notice or pick up his mail, there is a presumption that the citation was received nonetheless. The clerk is required to file a verified return of service that includes the certified mail return receipt unless certified mail was unsuccessful.

The clerk's return of service must be on file for at least ten days before the court can enter an order granting the application.

§ 25.4 Debtor's Response

Any respondent may file a response contesting the application. Tex. R. Civ. P. 736.5(a). Any

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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, as stated on the citation. Tex. R. Civ. P. 736.5(b).

A respondent may respond by general denial but *must* specifically plead the following affirmative defenses: (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 for 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 in accordance with rule 95. *See* Tex. R. Civ. P. 736.5(c). A response, however, may not state an independent claim for relief, and the court is required, without a hearing, to strike and dismiss any counterclaim, crossclaim, third-party claim, intervention, or cause of action filed in an expedited nonjudicial foreclosure proceeding. Tex. R. Civ. P. 736.5(d).

When a borrower files a response, the court must hold a hearing, which must occur neither sooner than twenty days nor later than thirty days after any party requests a hearing. *See* Tex. R. Civ. P. 736.6. No discovery is permitted under rule 736. Tex. R. Civ. P. 736.5(a).

At the hearing, the only issue to be determined is whether the petitioner can obtain an order allowing foreclosure to proceed in accordance with Texas Property Code chapter 51. The petitioner has a burden to prove by affidavits on file or evidence presented at the hearing "the grounds for granting the order." Tex. R. Civ. P. 736.6.

§ 25.5 Mediation

A court in which an application and a subsequent response have been filed may, in the court's discretion, conduct a hearing to determine whether to order mediation. A court may not order mediation without first conducting a hearing. Alternatively, the petitioner or respondent may request a hearing to determine whether mediation is necessary. Tex. Civ. Prac. & Rem. Code § 154.028(a). The hearing may be conducted by telephone. Tex. Civ. Prac. & Rem. Code § 154.028(c).

If the parties cannot agree on a mediator, the court may appoint one. Tex. Civ. Prac. & Rem. Code § 154.028(g). The mediation fee is divided equally between the parties. Tex. Civ. Prac. & Rem. Code § 154.028(h). The parties may also agree to waive mediation. Tex. Civ. Prac. & Rem. Code § 154.028(i). If the court orders the case to mediation, the mediation must be conducted before the expiration of any deadline imposed by Texas Rule of Civil Procedure 736. Tex. Civ. Prac. & Rem. Code § 154.028(f).

A court may not conduct a mediation hearing if the citation was served in compliance with rule 106 of the Texas Rules of Civil Procedure, and a response has not been filed before the deadline provided by Texas Rule of Civil Procedure 736. Tex. Civ. Prac. & Rem. Code § 154.028(j).

However, Tex. Civ. Prac. & Rem. Code § 154.028(*l*) states, "If a respondent attends a hearing and mediation is ordered, any mediation must take place not later than the 29th day after the date the petitioner filed a motion for default order." This seems to imply that the court can still order a mediation hearing if a respondent who is served with citation pursuant to Texas Rule of Civil Procedure 736 (via certified mail and regular mail through the clerk's office), instead of rule 106, files a late response, even after a motion for default order has already been filed.

If a respondent fails to attend a mediation hearing after notice is given, the court may not order mediation and shall either grant or deny the petitioner's motion for default order without the

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necessity of another subsequent hearing on the merits. Tex. Civ. Prac. & Rem. Code § 154.028(k).

§ 25.6 Default Order

One of the premised assumptions upon which the amended rules were drafted is that a petitioner is entitled to an order expeditiously and without hearing if the respondent fails to file an answer. As such, courts are prohibited from holding a hearing where no response is filed by the Monday next following thirty-eight days after the clerk served the citation.

After the respondent's time to answer has passed, the petitioner may file a motion for a default order along with a proposed default order. Tex. R. Civ. P. 736.7(a). See form 25-4 in this manual, Default Order, as promulgated by the Texas Supreme Court. Pursuant to the Servicemembers Civil Relief Act, the petitioner must also file an affidavit of nonmilitary status as to each of the respondents and should attach the corresponding Department of Defense printouts to the affidavit (the requisite printouts can be obtained at **https://scra.dmdc.osd.mil/**). See form 25-5, Military Status Affidavit, as promulgated by the Texas Supreme Court; alternatively, the practitioner may use form 25-6, Military Status Declaration, as promulgated by the Texas Supreme Court. (See chapter 33, which discusses the requirements of the Servicemembers Civil Relief Act in more detail.) A court must grant the application within thirty days of the date the default motion is filed if the court finds the application meets the pleading requirements and the petitioner "establishes the basis for foreclosure." *See* Tex. R. Civ. P. 736.7(b); 736.8(a).

Notwithstanding, many judges in different counties simply ignore these provisions and still require that the petitioner appear for a hearing before they will sign a default order, despite the clear language instructing them not to do so. In their defense though, many judges are simply not familiar with the rule 736 expedited order procedure or the rules governing and fail to realize that unnecessarily forcing a petitioner to appear for a default hearing, contrary to the rules, only causes more indebtedness (by way of additional attorney's fees and costs) to be added to a debtor's account making it even more difficult for a debtor to cure or pay off their indebtedness prior to foreclosure. In many instances, a polite and informative follow-up letter (after you have filed your default motion and order) explaining the procedure, with a copy of the rule attached will persuade a hesitant judge to sign the default order without the necessity of a hearing.

As in the previous version of the rule, a foreclosure order is without prejudice, is not final, may not be appealed, and has no preclusive effect in any other proceeding. It is presumed then, that if an application is denied, the petitioner could simply file a new application (assuming the grounds for the previous denial were not due to a fatal defect in the petitioner's ability to foreclose under rule 736).

After an order authorizing foreclosure has been granted, the respondent can challenge a foreclosure proceeding by filing an independent lawsuit, which operates like an automatic stay in bankruptcy. *See* Tex. R. Civ. P. 736.11.

§ 25.7 Breach of Obligation in Loan Documents

After a rule 736 order authorizing the foreclosure of a transferred tax lien has been obtained, the transferee may proceed with a nonjudicial foreclosure of the lien in accordance with Texas Property Code chapter 51 and the terms of the lien sought to be foreclosed. Tex. R. Civ. P. 736.9. See chapters 11 and 21 in this manual for a review of the posting and notice procedures and requirements necessary to properly conduct

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a nonjudicial foreclosure sale under Texas Property Code chapter 51.

Regular foreclosure practices as required under the security instrument and Texas Property Code chapter 51 were not changed by the recent amendments to Texas Rules of Civil Procedure 735 and 736 and remain intact. However, sections 32.06 and 32.065 of the Texas Tax Code do add some additional requirements to the foreclosure sale notice provisions of Texas Property Code chapter 51. For example, section 32.065(b)(6) requires that the transferee add the following language, in fourteen-point boldfaced type or fourteen-point uppercase typewritten letters, to the first page of the foreclosure notices sent to the property owner and preexisting lienholders (or their mortgage servicer):

> Pursuant to Texas Tax Code section 32.06, the foreclosure sale referred to in this document is a superior transfer tax lien subject to right of redemption under certain conditions. The foreclosure is scheduled to occur on the (date).

Tex. Tax Code § 32.065(b)(6).

Section 32.06 (c–1)(2) also requires that "the holder of a preexisting lien must be provided at least 60 days' notice before the date of the proposed foreclosure." Tex. Tax Code § 32.06(c–1)(2). Does this provision trump the standard twenty-one day requirement found in Texas Property Code chapter 51? Or, is service and receipt of the rule 736 application sufficient notice to a preexisting lienholder, under this provision, that a foreclosure is forthcoming, assuming it is served on the holder of a preexisting lienholder more than sixty days from the date of the foreclosure (which will always be the case)?

As of the publication date of this manual, there have been no reported Texas cases addressing this issue. Again, one of the premised assumptions upon which the amended rules were drafted was that regular foreclosure practices as required under the security instrument and Texas Property Code chapter 51 were not changed and remained intact. Still though, given the lack of clarity as to the transferee's obligation under this provision, and what specific kind of notice the provision refers to, it is probably wise to give notice of all foreclosure sales involving a preexisting lienholder to that preexisting lienholder sixty days out from the date of sale, to be safe.

§ 25.8 Postsale Considerations

After the nonjudicial foreclosure sale has been completed, the transferee must attach a copy of the order authorizing the foreclosure to the trustee's deed when recording. An affidavit of the transferee executed and recorded after foreclosure that recites compliance with the terms of sections 32.06 and 32.065 of the Tax Code is prima facie evidence of compliance with sections 32.06 and 32.065 and may be relied on conclusively by a bona fide purchaser for value without notice of any failure to comply. *See* Tex. Tax Code § 32.065(h).

If the proceeds realized from the sale exceed the transferee's payoff, the transferee is required to deposit the excess proceeds into the registry of the court that granted the foreclosure order, within ten days from the date of the sale, pursuant to section 34.021 of the Tax Code. See forms 25-7 and 25-8 in this manual. Many registries, however, will only accept deposits by order of the court. It is highly unlikely that a transferee is going to be able to file a motion, obtain an order authorizing the deposit, and then actually tender the excess proceeds into the court registry all within ten days from the date of sale. Notwithstanding, the practitioner should comply with this requirement as quickly as practicable. The excess proceeds from the sale will be disbursed according to sections 34.03 and 34.04 of the Tax Code. *See* Tex. Tax Code §§ 34.03, 34.04.

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Additional Resources

Bastian, G. Tommy. "Expedited Foreclosure Home Equity, Home Equity Line of Credit, Reverse Mortgage, and Tax Lien Transfer and Property Tax Loan Forms for the New Supreme Court Rules." In *Advanced Real Estate Drafting Course, 2012.* Austin: State Bar of Texas, 2012.

Bellamy, Brian S. "Expedited HOA Foreclosures." In *Handling Your First (or Next) HOA Assessment Lien Foreclosure for Condos and Subdivisions, 2014.* Austin: State Bar of Texas, 2014.

Bonura, Thomas. "Misdirected Hostility: Are Criticisms of Texas Property Tax Lenders?" 53 S. Tex. L. Rev. 569 (2012).

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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.*, 472 S.W.3d 848, 855–56 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *see also* Tex. Est. Code § 32.005(a). 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 Texas Real Property Transfer on Death Act authorizes the use of revocable deeds that transfer title to real property at the transferor's death outside of the probate process. *See* Tex. Est. Code ch. 114. 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 Estates Code, 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.

The Eighty-fifth Texas Legislature made amendments to Estates Code sections 114.103 and 114.151 that relate to TOD deeds. *See* Acts 2017, 85th Leg., R.S., ch. 971, §§ 1, 2 (S.B. 2150), eff. Sept. 1, 2017. As amended, section 114.103 provides that if a designated beneficiary under a TOD deed fails to survive the transferor by 120 hours, the designated beneficiary's share passes in accordance with Estates Code chapter 255, subchapter D, as if the proposed transfer were a devise made in a will, regardless of whether there were two or more beneficiaries. *See* Tex. Est. Code § 114.103(a). Further, revisions to section 114.151 address situations where: (1) at least one primary beneficiary survives the transferor; (2) no primary beneficiary survives the transferor; or (3) an alternate beneficiary does not survive the transferor. *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

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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

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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.

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§ 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

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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).

§ 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.

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§ 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 creditor's administration for the decedent's estate 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 claims statutes are found in chapters 308, 355, and 403 of the Texas Estates Code. Chapter 308 addresses the administrator's notice to claimants; chapter 355 addresses presentment and payment of claims in dependent administrations; and chapter 403 addresses exemptions, allowances, and claims in 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 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).

Because the secured creditor cannot foreclose on its collateral, 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.

By electing matured secured claim status, the due date of the underlying debt can be accelerated. 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. 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).

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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). In 2016, the Dallas court of appeals again addressed the priority of claims in dealing with a preferred debt and lien—specifically, whether expenses directly related to preserving, maintaining, managing, and selling the property have priority over a preferred debt and lien creditor. *See In re Estate of Parks*, No. 05-15-00346-CV, 2016 WL 1085258 (Tex. App.—Dallas Mar. 21, 2016, pet. denied) (mem. op.). The court upheld the ruling of the trial court that the distribution of the net sales proceeds of the property to the estate for payment and reimbursement of administrative expenses directly related to the preserving, maintaining, managing, and selling of the property had priority over a preferred debt and lien creditor. *In re Estate of Parks*, 2016 WL 1085258, at *3.

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, 403.056. 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). In a dependent administration, 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. Before the enactment in 2011 of Estates Code section 403.056, there was no prescribed format for an unsecured claim in an independent administration. An email or invoice might constitute a valid claim against the estate. *See, e.g., Alterman v. Frost National Bank of San Antonio*, 675 S.W.2d 619 (Tex. App.—San Antonio 1984, no writ) (holding that a letter describing the claim

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was sufficient to constitute a claim even though it did not expressly demand payment). Estates Code section 403.056 now requires compliance with Estates Code section 355.004 when presenting claims in an independent administration.

In the past, Texas courts have 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, Estates Code section 355.004(b) now provides that "a photostatic copy of an exhibit or voucher necessary to prove a claim may be offered with and attached to the claim instead of attaching the original," implying that some supporting documentation must be added. *See* Tex. Est. Code § 355.004(b).

§ 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 ignores or 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

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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, where the administrator may accept, reject, or take no action with respect to a submitted claim. Tex. Est. Code § 403.051.

§ 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). However, 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 should present its claim by filing rather than presenting it directly to the personal representative. If a claim has not been properly presented, filing suit to establish a claim that is required to be 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

Except as otherwise provided by Texas Civil Practice and Remedies Code section 16.062 with respect to causes of action against or held

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by the decedent, 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. However, the probate of a will as a muniment of title is only authorized if the testator's estate does not owe an unpaid debt, other than any debt secured by a lien on real estate, or the court finds there is no necessity of administration of the estate. Tex. Est. Code § 257.001.

§ 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

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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 administra-

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tion. 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 but not foreclosure 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

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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.

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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.

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Form 26-1

[Caption. See § 3 of the Introduction in this manual.]

Application for Foreclosure of Real Property

[**Name of mortgagee**] ("Claimholder") makes this Application for Foreclosure of Real Property and shows as follows:

1. This proceeding concerns the real property and improvements commonly known as [**address**] ("Property"), and more particularly described as follows: [**legal description**].

2. Texas Estates Code section 355.155 provides that if a property securing a debt for which a claim is allowed, approved, and fixed is not sold or distributed within six months from the date letters are granted, the representative of the estate must promptly pay all maturities which have accrued on the debt; and if the representative defaults, the court shall authorize foreclosure by the claimholder.

3. Claimholder holds a claim secured by a valid mortgage, which has been allowed and approved as a preferred debt and lien against the Property. See the Order Approving Claim, attached hereto as Exhibit A.

4. The representative of the estate has defaulted on payment or performance of the terms of the contract securing the Property as established by the Affidavit of Claimholder, attached hereto as Exhibit B. On or about [**date**], letters were granted to [**name of administrator**] as representative of the estate. Therefore, it has been more than six months since letters were issued. Claimholder seeks an order authorizing foreclosure of the Property in conformity with Texas Estates Code sections 355.156 through 355.160.

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5. In accordance with Texas Estates Code section 355.157, Claimholder requests that the clerk issue citation upon [**name of administrator**], personal representative of the estate, by and through [his/her] attorney of record, [**name of attorney**], [**address of attorney**].

6. Further, pursuant to Texas Estates Code section 355.158, upon hearing and determination by the Court that there is a default in payment or performance under the contract securing the payment of the claim, Claimholder requests that the Court enter an order authorizing foreclosure in conformity with the provisions of the security instrument and Texas Property Code section 51.002(a), (b)(1) and (2), and (c), as such would pass both constitutional and statutory muster as to the method and means to fairly conduct a public sale.

7. Claimholder contends that these proceedings have given constructive notice of the demand to cure, notice of intent to accelerate, and notice of acceleration of the maturity of the debt to all persons legally obligated to receive such notices. Therefore, notice to all persons legally obligated to receive such notices should be given, if at all, in accordance with the security instrument and Texas Property Code section 51.002(b)(1) and (2), and copies mailed to the representative of the estate and the representative's attorney of record.

Claimholder prays that this Court issue an order authorizing foreclosure of the property.

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

Attach exhibits.

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Condominium Foreclosures

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Chapter 27

Condominium Foreclosures

The editors gratefully acknowledge Dean Riddle for his contribution to this chapter. In addition, Mr. Riddle would like to recognize Julie L. Dupont for her assistance.

§ 27.1 Introduction

A condominium association is a specific type of property owners association that oversees the operation of a condominium development subject to Texas Property Code chapter 81, the Texas Condominium Act, or chapter 82, the Texas Uniform Condominium Act. A condominium development is created by recordation of a declaration or other restrictive covenant that subjects real property to the authority under one of two Texas statutes governing condominiums. In a property owners association that is subject to and governed by Texas Property Code chapter 209 and not the condominium statutes, each owner separately owns his house/residence along with the land or lot on which the house is located. Conversely, in a condominium, there are two distinct types of property interests—units and common elements. All owners collectively own a percentage interest in the common elements (the building and the land on which it is located), and each owner owns fee simple title to his individual unit.

The size and arrangement of condominium developments varies widely. While some condominiums fit the typical image of a mid- or high-rise development with multiple floors and units stacked on top of one another, some condominium developments are not so obvious. Townhome developments with a shared or party wall between residences may sometimes, but not always, be subjected to the condominium statutes. To determine if a development is a condominium, a good preliminary indicator is the legal description for an owner's separate property in the development. Property owned in a condominium is usually described by unit and building numbers, whereas other property is described by lot and block numbers in a property owners association. In order to officially establish a development as a condominium, the property must be subjected to the condominium form of ownership under the condominium statutes. The declaration of condominium will typically reference either the old Texas Condominium Act or the Texas Uniform Condominium Act. Without a specific reference to a condominium regime or one of the condominium statutes, the development is likely not a condominium.

Besides the obvious differences in land ownership, condominium associations also differ from other types of property owners associations in their rights and obligations. Condominium associations not only maintain the common recreational amenities like other property owners associations, but they also typically maintain the land on which the condominium is located, the condominium building itself, and even the pipes, ducts, and other conduits that supply utilities to the individual units. Because of the much greater importance and broader scope of maintenance provided by condominium associations, the Texas legislature has apparently determined that it is extremely important that condominium associations have access to adequate funds in order to maintain the condominium. For this reason, the Texas legislature has given condominium associations special rights and protections through the Texas Property Code in order to effectuate swift collection of unpaid assessments.

Condominium associations whose declarations were recorded prior to January 1, 1994, are governed by the Texas Condominium Act contained in chapter 81 of the Texas Property Code. Those condominiums with declarations recorded on or after January 1, 1994, are governed by the Texas Uniform Condominium Act (TUCA) contained in chapter 82 of the Texas Property Code. However, pursuant to section 82.002(c), certain sections of TUCA apply retroactively to all condominium associations, including section 82.113, which contains most of TUCA's lien and foreclosure provisions. *See* Tex. Prop. Code §§ 82.002(c); 82.113. Despite this language in section 82.002(c), TUCA further states that these retroactive provisions do not apply if such application would invalidate an existing provision in a declaration recorded prior to January 1, 1994. Section 209.003(d) of the Texas Property Code expressly provides that chapter 209 of the Property Code does not apply to condominium associations that are subject to either chapter 81 or 82 of the Texas Property Code.

§ 27.2 Lien

§ 27.2:1 Creation of Lien

Most condominium declarations will contain language that establishes a continuing lien against the units in the condominium to secure the payment of assessments, interest, late charges, and costs of collection. Section 82.113(a) of TUCA states that condominium assessments are secured by a statutory lien against the unit and any rents or insurance proceeds received in connection with the unit. *See* Tex. Prop. Code § 82.113(a). Therefore, even those associations where the declaration fails to expressly create a lien have a statutory lien securing this obligation pursuant to section 82.113(a).

The lien created by section 82.113(a) defines "assessments" to include not only regular and special assessments but also dues, fees, charges, interest, late fees, fines, collection costs, attorney's fees, and any other amounts either levied by the association against the unit or owed to the association by the unit owner, unless the declaration provides otherwise. *See* Tex. Prop. Code § 82.113(a). As such, the assessment lien secures the payment of virtually all legitimate amounts levied against an owner by the condominium association. This would arguably also include any amounts owed to the association by the unit owner for property damage to the condominium, costs associated with any self-help undertaken by the association, and even fees established for services by the association, such as fees to use particular amenities.

The lien created by section 82.113(a) is not only imposed against the unit itself; it is also a continuing lien against "rents and insurance proceeds received by the unit owner and relating to the owner's unit." *See* Tex. Prop. Code § 82.113(a). However, TUCA gives no express guidance as to how to enforce or foreclose this lien on rents and insurance proceeds, which acts like a garnishment by attaching the rent or insurance proceeds once actually received by the unit owner. In some instances, condominium associations have been successful by demanding that the unit owner turn over such proceeds, and some associations have even successfully relied on section 82.113(a) to convince the unit owner's tenant to make rental payments directly to the association. At present, there are no reported cases giving procedural guidance on how to enforce TUCA's lien on rents and insurance proceeds.

§ 27.2:2 Lien Priority

Section 82.113(b) of TUCA establishes the priority of a condominium association's assessment lien over other liens recorded against an owner's unit. It states that the association's lien is superior to all other liens with the exception of—

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(i) a lien for real property taxes;

(ii) a lien recorded before the declaration was recorded;

(iii) a "first vendor's lien or first deed of trust lien" recorded before the owner became delinquent in the payment of assessments; and

(iv) unless otherwise provided by the declaration, a lien for construction of improvements to the unit or an assignment of the right to insurance proceeds if such lien was recorded before the owner became delinquent in the payment of assessments.

Tex. Prop. Code § 82.113(b).

Although the language in section 82.113(b) regarding lien superiority appears relatively straightforward, there have been some recent challenges to lien priority, specifically in connection with home equity loans. In *Riner v. Neumann*, 353 S.W.3d 312 (Tex. App.—Dallas 2011, no pet.), the purchaser of a condominium unit at an association's foreclosure argued that a home equity lien did not fall within any of the enumerated superior liens expressly listed in section 82.113(b), making it inferior to the association's assessment lien. The condominium declaration at issue in *Riner* contained its own lien superiority provisions and stated that the association's assessment lien did not attach to the unit until the unit owner became delinquent in the payment of assessments, and such assessment lien was not superior to any prior recorded deed of trust. *Riner*, 353 S.W.3d at 316. The Dallas court of appeals found that the lien priority provisions contained in section 82.113(b) did not apply retroactively because such provisions would invalidate existing provisions of the declaration, in violation of section 82.002(c) of TUCA. *Riner*, 353 S.W.3d at 316–17.

In dicta, the *Riner* court noted that the home equity lien was a "prior recorded deed of trust" under the terms of the declaration. *Riner*, 353 S.W.3d at 320. However, the historical timeline underlying TUCA and home equity loans was not at issue before the court. It is important to note that TUCA became effective January 1, 1994. At the time of its adoption, home equity loans did not exist in Texas. It was not until 1997 that the Texas legislature amended the Texas Constitution to permit home equity loans. There is an argument that the Texas legislature could not have intended to include home equity liens within the phrase "first deed of trust" as referenced in section 82.113(b), as such liens did not exist until three years after the adoption of TUCA.

§ 27.2:3 No Lien Recordation Necessary

Pursuant to section 82.113(c) of TUCA, the association's assessment lien is created when the condominium declaration is recorded. *See* Tex. Prop. Code § 82.113(c). If an owner subsequently becomes delinquent in the payment of assessment, no additional recorded notice of lien is necessary unless the declaration requires otherwise. However, in practice, some condominium associations do record a notice of lien once an owner is delinquent in order to place the owner and future owners on record notice of the delinquency. Owners, potential purchasers, lenders, and the general public are accustomed to finding a recorded notice of lien in the deed records when an owner is delinquent, so recording a notice of lien for a condominium is sometimes performed by some legal practitioners.

In *Aghili v. Banks*, 63 S.W.3d 812 (Tex. App.—Houston [14th Dist.] 2001, pet. denied), a former owner of a condominium unit sued to set aside the nonjudicial foreclosure of the owner's unit on the basis that the condominium association failed to record a notice of lien prior to foreclosure. The declaration at issue in *Aghili* expressly stated that the association may, but is not required, to file a notice of lien in the deed

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records when an owner becomes delinquent. *Aghili*, 63 S.W.3d at 816. However, the declaration further stated that the association could foreclose its lien "upon the recording of notice of claim thereof." *Aghili*, 63 S.W.3d at 816. In summarily disposing of this point of error, the court held that restrictive covenants must be liberally construed to give effect to their full purpose and intent, and if the association had to record a lien in order to foreclose, it would render meaningless the language giving the association express permission, without obligation, to record a lien. *Aghili*, 63 S.W.3d at 817. As such, the association had no obligation to record a notice of lien because the statutorily created continuing lien secured the lien created by recordation of the declaration.

Condominium associations should exercise caution in recording a lien where the declaration does not require or make it optional to record a notice of lien. An owner could argue that the filing of an "unnecessary" lien is nothing more than an attempt to drive up fees and increase profits on behalf of the association and/or its legal counsel. Such owner's argument may not be particularly strong, as the reason for recording the lien is to place the owner and world on record notice of the delinquency, but a disgruntled owner may try to make such a claim in an attempt to offset some or all of the owner's delinquency. Also, any release of a secondary notice of lien must be carefully crafted such that it only releases or rescinds the notice of lien filed pursuant to the owner's delinquency and does not release the continuing lien created by the declaration itself. Form 27-1 provides an example of a "Notice of Payment" used to release a recorded notice of lien without releasing the continuing lien itself. Form 27-2 is an example of a "Notice of Sale" to be used where the association has not recorded an additional notice of lien and is simply relying on the continuing lien created by TUCA and the association's declaration.

§ 27.3 Foreclosure

§ 27.3:1 Authority for Charges

Prior to pursuing collections and foreclosure of a condominium association's assessment lien, the authority for each type of charge levied against the delinquent owner should be verified. If special assessments are part of the delinquency, the association should confirm that the special assessments were properly levied, including any required owner approval. Unless prohibited by the declaration, condominium associations are authorized to levy late charges and interest on unpaid assessments and impose charges for returned checks pursuant to section 82.102(a)(12) of TUCA, which is also retroactive. *See* Tex. Prop. Code § 82.102(a)(12).

§ 27.3:2 Late Charges Are Not Subject to Usury Restrictions

In *Tygrett v. University Gardens Homeowners' Ass'n*, 687 S.W.2d 481 (Tex. App.—Dallas 1985, writ ref'd n.r.e.), a unit owner alleged that the late fees charged by the condominium association were actually usurious interest prohibited by law. The court of appeals held that the condominium association was not a lender, and there was no use or detention of funds loaned by the association, nor a forbearance agreement on the part of the association. *Tygrett*, 687 S.W.2d at 483. The association was more properly characterized as an agent of the owners and a conduit for the owners' funds to maintain the condominium, making the usury laws inapplicable here. *Tygrett*, 687 S.W.2d at 483.

§ 27.3:3 Military Notice

Section 51.002 of the Texas Property Code imposes certain requirements on the notices sent to a debtor/owner in connection with the foreclosure of a contract lien such as a condominium assessment lien. Section 51.002(i) of the Texas

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Property Code provides that, in addition to containing the name and address of the association, correspondence to an owner regarding a foreclosure of the owner's unit must include the following statement in boldface 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.

Tex. Prop. Code § 51.002(i).

§ 27.3:4 Limitations on Foreclosure—No Foreclosure for Debt Consisting Solely of Fines

There are some limitations on the types of charges that may provide the basis for foreclosure. Despite popular allegations by unit owners, there is no prohibition on a condominium association's foreclosure when the delinquency is made up of collection costs or collection-related attorney's fees. However, section 82.113(e) of TUCA prohibits foreclosure where the debt consists solely of fines. *See* Tex. Prop. Code § 82.113(e). If an owner is delinquent in the payment of both assessments and fines, the condominium association may include the fines and foreclose based on the entire debt owed. Although TUCA does not prohibit foreclosure where the debt consists of attorney's fees in connection with a fine, associations should exercise caution in foreclosing if no other amounts are owed as this is likely to draw a lawsuit since other types of property owners associations are expressly prohibited from foreclosing when the debt contains only fines and attorney's fees.

§ 27.3:5 Appointment of Substitute Trustee

If the foreclosure sale will be conducted by anyone other than a board member of the condominium association, such as an officer, agent, trustee, or attorney, section 82.113(d) of TUCA requires that the board appoint such individual by written resolution. *See* Tex. Prop. Code § 82.113(d). Form 27-3 in this chapter contains a sample board resolution in which the board appoints one or more substitute trustees to conduct foreclosure sales on behalf of the association. While section 202.006(a) of the Texas Property Code requires that a property owners association must record all dedicatory instruments in the county's real property records, a written resolution appointing a substitute trustee is not a dedicatory instrument as defined by section 202.001(a). *See* Tex. Prop. Code §§ 202.001(a), 202.006(a). Accordingly, the resolution does not need to be recorded.

§ 27.3:6 Power of Sale

By accepting a deed to unit, each owner grants a power of sale to the association in connection with the assessment lien pursuant to section 82.113(d) of TUCA, which authorizes the association to foreclose on the unit in the event the owner defaults in his assessment obligations. *See* Tex. Prop. Code § 82.113(d). Section 82.113(e) further provides that a condominium association may foreclose either judicially, through a court-ordered sale, or nonjudicially pursuant to section 51.002 of the Texas Property Code. *See* Tex. Prop. Code § 82.113(e). However, this foreclosure authority cannot conflict with an existing provision of the declaration for a pre-1994 condominium.

The Dallas court of appeals addressed this issue in *Holly Park Condominium Homeowners' Association, Inc. v. Lowery*, 310 S.W.3d 144 (Tex. App.—Dallas 2010, pet. denied). In *Holly Park*, the unit owner filed a wrongful foreclo-

sure suit where the association conducted a nonjudicial foreclosure of the owner's unit for nonpayment of assessments. The declaration was recorded prior to January 1, 1994, and expressly stated that enforcement of the assessment lien shall be by judicial foreclosure. *Holly Park*, 310 S.W.3d at 145–46. The association foreclosed nonjudicially pursuant to the authority contained in section 82.113(e) of TUCA. In ruling in favor of the unit owner, the court of appeals held that the application of section 82.113(e) is limited by section 82.002(c) in that a provision of TUCA cannot be applied if it will invalidate an existing provision of the declaration. *Holly Park*, 310 S.W.3d at 149. Since the condominium association's declaration expressly required judicial foreclosure, the association could not rely on TUCA for the authority to foreclose nonjudicially.

In *Dickerson v. DeBarbieris*, 964 S.W.2d 680, 682 (Tex. App.—Houston [14th Dist.] 1998, no pet.), the declaration simply stated that the assessment lien "may be foreclosed in the same manner as a foreclosure of a mortgage or deed of trust on real property." The declaration failed to specify any procedures relating to nonjudicial foreclosure of the lien. Rather than amending the declaration, which required approval of 75 percent of the record owners, the condominium association amended the bylaws, with approval of a simple majority of the owners. The amendment specifically stated that the lien could be nonjudicially foreclosed in accordance with section 51.002 of the Texas Property Code. Dickerson argued that an amendment to the declaration was necessary in order to grant a power of sale to the association. The court of appeals found that not only is there no requirement that a condominium declaration specify a foreclosure remedy, but there is also no statutory prohibition against the bylaws addressing such matters. *Dickerson*, 964 S.W.2d at 684–85. As such, the court upheld the condominium association's authority to utilize nonjudicial foreclosure.

§ 27.3:7 Additional Considerations

An owner's right to redeem the unit after the association has foreclosed its lien is more limited with a condominium than with a noncondominium property owners association lien. See section 30.5 in this manual for additional discussion. As such, condominium associations should proceed more carefully before foreclosing for nonpayment of assessments. Although not required by statute, condominium associations should consider whether the owner has received actual notice of the association's collection efforts by reviewing whether there has been any communications received from the owner and whether the owner has actually signed for any certified letters regarding the debt. If there is no identifiable contact with the unit owner, in addition to sending by certified mail, return receipt requested, the condominium association may want to consider sending a copy of its final communication prior to foreclosure via hand delivery to the unit, or by affixing a copy of the correspondence in an envelope on the door to the unit, or, at a minimum, attempt to locate an alternate address for the owner.

However, a lack of actual notice to the unit owner does not necessarily defeat the sale, especially where the association has been diligent in attempting to locate the owner. In *Onwuteaka v. Cohen*, 846 S.W.2d 889 (Tex. App.—Houston [1st Dist.] 1993, writ denied), the condominium association sent all collections and foreclosure notices to the unit address, which was shown as the owner's address on the recorded deed to the owner. All certified mail to the unit address came back as undeliverable, but the association could not locate another address for the owner even via a "skip search" through a credit service. After the foreclosure sale, the owner alleged the association had conducted a wrongful foreclosure, as the owner did not receive notice of the foreclosure sale. The court held that, in order for the owner to demonstrate that the association violated the service requirements for the notice

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of sale contained in Texas Property Code section 51.002, the owner had to prove that the association had in its records the actual address of the owner and failed to send notice to such address. *Onwuteaka*, 846 S.W.2d at 892–93. As the owner in *Onwuteaka* admitted he had never provided his actual address to the association, the court of appeals upheld the lower court's ruling that the foreclosure was proper. *Onwuteaka*, 846 S.W.2d at 893.

A condominium association may also want to calculate a rough estimate of the amount of any equity the owner has in the unit. Notwithstanding a properly handled foreclosure, lost equity could spur an owner to file suit for wrongful foreclosure simply because of the financial loss. Estimating the equity in the unit will allow the association to evaluate its exposure to risk in proceeding with foreclosure. If a title search reveals one or more recent liens with a combined value greatly in excess of the value of the unit as estimated by the county appraisal district, the owner is likely "upside down" in the unit and owes more than the unit is worth, leaving no equity in the unit. If, however, the total amount of the recorded liens against the unit is substantially less than the estimated value of the unit, the owner likely has significant equity in the unit, and it is unlikely that the unit owner is knowingly relinquishing this equity through a possible foreclosure. Ultimately, whether to proceed with foreclosure will be a judgment call for the board based on the unit value, the total amount of the liens against the unit, and communications with the owner, if any.

§ 27.3:8 Homestead

Frequently, an owner may allege that his unit is shielded from forced sale through foreclosure because the unit is the owner's homestead and is entitled to protection under the homestead exemption. Section 41.001 of the Texas Property Code, which applies to condominiums, provides that an owner's homestead is exempt from seizure to satisfy debt owed to creditors except for encumbrances properly fixed against homestead property. *See* Tex. Prop. Code § 41.001. A condominium association's assessment lien does not expressly fall within any of the enumerated categories of encumbrances that may be properly fixed against homestead property.

In *Johnson v. First Southern Properties, Inc.*, 687 S.W.2d 399 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.), the fourteenth district court of appeals evaluated such a claim with respect to a condominium unit. There, the declaration created a lien to secure the payment of assessments and provided for nonjudicial foreclosure of the association's lien. The owner challenged the association's foreclosure of its assessment lien, claiming the unit was protected by the homestead exemption. In denying the owner's point of error, the court held that a right, such as a lien, may prevail over a homestead claim if such right exists before the land becomes a homestead. *Johnson*, 687 S.W.2d at 401. Here, by accepting a deed to the unit, the owner accepted title to the unit subject to the terms of the condominium declaration, including the declaration's assessment lien provisions. The owner's acceptance of the deed subject to the declaration's lien and foreclosure terms was a prior relinquishment of the owner's homestead claim, defeating any homestead protection against foreclosure of the assessment lien. *Johnson*, 687 S.W.2d at 402.

Two years later, the Texas Supreme Court also weighed in on this issue in *Inwood North Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987). Although *Inwood North* relates to a single-family development and not a condominium, its general rule is applicable in the condominium context as well. There, the declaration stated that assessments and related costs were a charge on the land and were secured by a continuing lien upon the lot. The lower courts had refused to permit foreclosure of the association's assessment lien where the

lot had been designated the owner's homestead. In overturning the lower courts, the Texas Supreme Court noted that at the time the developer was the owner of all lots in the subdivision, it created assessment liens against each lot. A properly affixed encumbrance against property cannot be affected by the subsequent impression of the homestead exception upon the property. Since the assessment lien attached pursuant to recordation of the declaration before any property was designated a homestead, the property could not be protected from foreclosure of the assessment lien when the property later became the owner's homestead. *Inwood North*, 736 S.W.2d 634–35.

§ 27.4 Postforeclosure

§ 27.4:1 Rescission of Foreclosure Sales

A trustee may rescind a nonjudicial foreclosure sale within fifteen days after the sale in the event there was a defect in the foreclosure. *See* Tex. Prop. Code § 51.016(b). Such defects include, but are not limited to, the failure to comply with the statutory requirements for the sale, the owner cured the delinquency prior to the sale, or the owner filed bankruptcy prior to the sale, and a court-ordered or automatic stay was in effect at the time of the sale. To rescind the sale, the trustee must serve notice by certified mail to the purchaser and the owner of the rescission, and such notice must give the reason for the rescission and provide the recording information for the affected deed. Tex. Prop. Code § 51.016(c)(1), (d). This notice of rescission must also be recorded in the county's real property records. Tex. Prop. Code § 51.016(c)(2). Within five days after giving such notice, the trustee must return the purchase price to the purchaser. Tex. Prop. Code § 51.016(e). The trustee must also record an affidavit stating that the bid amount was returned and include the certified mail number, wire transfer information, or courier service tracking information for the return of the purchase price to the purchaser. Tex. Prop. Code § 51.016(f). Any challenge to a rescission must be brought within thirty days after the recordation of the notice of rescission. Tex. Prop. Code § 51.016(j).

§ 27.4:2 Redemption

An owner has a limited right to redeem a unit after an association's foreclosure of its assessment lien.

Texas Property Code section 82.113(g), as amended in 2013, provides a ninety-day redemption period to the owner regardless of whether the association or a third party is the successful purchaser. The owner has through the ninetieth day after the date of the foreclosure sale to redeem the unit from the purchaser. If the association is the purchaser, the owner must pay to the association the following amounts in order to redeem the unit—

1. all amounts due to the association at the time of the foreclosure sale;
2. interest from the date of sale to the date of redemption at the rate designated by the declaration for delinquent assessments;
3. reasonable attorney's fees and costs incurred by the association in connection with the foreclosure;
4. any assessments levied after the date of the sale; and
5. any reasonable costs incurred by the association as the owner of the unit, including any costs of maintenance and/or leasing.

If a third party is the successful purchaser, the redeeming owner must pay to the purchaser—

1. the amount bid at the sale;

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2. interest on the bid amount from the date of the sale to the date of redemption at the rate of 6 percent;
3. any assessment paid by the purchaser to the association following the date of the sale; and
4. any reasonable costs incurred by the purchaser in connection with ownership of the unit, including maintenance and leasing costs.

In addition to these amounts, the owner must also pay to the association—

1. all assessments due and unpaid by the purchaser as of the date of the redemption; and
2. reasonable attorney's fees incurred by the association in connection with its foreclosure of the lien.

See Tex. Prop. Code § 82.113(g).

If the unit is redeemed by the owner under section 82.113(g), it is subject to all liens and encumbrances that were in place against the unit prior to the foreclosure sale, such that, if the association's foreclosure would have extinguished an inferior lien against the unit, the foreclosure is set aside and the inferior lien remains in place against the unit. The purchaser at a foreclosure of the association's assessment lien is also prohibited from transferring the unit to any person other than the redeeming owner during any applicable redemption period. *See* Tex. Prop. Code § 82.113(g).

§ 27.4:3 Renting during Redemption Period

While a purchaser at a condominium foreclosure sale cannot transfer title to the unit during the redemption period, the purchaser may lease the unit to tenants during such period. However, pursuant to section 82.113(g) of TUCA, while all rents and other income collected from the unit by the purchaser from the date of the foreclosure sale belong to the purchaser, these amounts must be credited against the redemption amount. *See* Tex. Prop. Code § 82.113(g). An interesting question arises if the amount of the rental income received by the purchaser meets or exceeds the amount to redeem the unit during any applicable redemption period. Can the former owner argue that the purchaser must reconvey the unit back to the original owner as though the owner has redeemed, even if the former owner has made no request to redeem the unit? As noted above, any costs incurred by the purchaser to make repairs or otherwise make the unit ready for occupancy, and any costs to market the unit for lease, must be paid by the owner in order to redeem the unit.

§ 27.5 Miscellaneous

§ 27.5:1 Lienholder Notification

Unlike other property owners associations, condominium associations are not required by statute to notify other lienholders of the association's intent to foreclose its assessment lien. However, some condominium declarations do require certain lienholder notifications, but the governing documents themselves will determine what notice, if any, is required and to which categories of lienholders.

Section 82.113(h) of TUCA grants condominium associations permission to notify other lienholders of a unit owner's delinquency, but generally does not obligate the association to do so. *See* Tex. Prop. Code § 82.113(h). Nonetheless, section 82.113(h) does require lienholder notification in certain limited circumstances. A condominium association is required to notify the holder of a recorded lien or perfected mechanic's lien only if such lienholder has given a written request to the association for notification if the owner becomes delinquent and/or if the association intends to foreclose its

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lien against the unit. In practice, lienholders rarely provide such written requests.

§ 27.5:2 Communications with Lienholders

Although debt collection laws typically prevent creditors from communicating about a debt with anyone other than the debtor, section 82.113(m) of TUCA provides an exception to this restriction. Once a unit owner becomes delinquent in the payment of assessments, the association may request that any holder of a lien against the unit provide the association with information about debt secured by the lienholder's lien and any other relevant information. Tex. Prop. Code § 82.113(m). Similarly, at the request of a lienholder, the association may provide the lienholder with information "about the condominium and the unit owner's obligations to the association." Tex. Prop. Code § 82.113(m). It is noteworthy that the information to be provided by the association to a lienholder upon request is apparently not limited as to whether the unit owner is delinquent at the time of the request. Also, although the quoted language is unclear as to whether the association may only provide general information about the owner's obligations or may provide specific details about the owner's delinquency, reading section 82.113(m) together with the permissive notification to lienholders regarding an owner's delinquency permitted by section 82.113(h) would indicate that a condominium association may provide any information about the owner's debt to the lienholder.

However, the case of *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 911 F. Supp. 2d 1 (D. Mass. 2012) is important to review. The federal Fair Debt Collection Practices Act (FDCPA) prohibits, among other things, a debt collector communicating with any person other than the debtor regarding the collection of a debt without the permission of the debtor or a court order. *See* 15 U.S.C. § 1692c(b). Massachusetts state law required that associations send certain lienholder notifications before commencing a foreclosure action. The law firm of Marcus, Errico, Emmer & Brooks, P.C., sent communications to certain lienholders on units owned by McDermott in connection with foreclosure actions as prescribed by Massachusetts state law. The Massachusetts district court found that complying with state law did not constitute "express permission" of the debtor or a court, thus the communications the law firm sent to lienholders violated the FDCPA. *McDermott*, 911 F. Supp. 2d at 69–72. Although this ruling is not binding upon courts in Texas, debt collectors for condominium associations should keep this case in mind whenever a condominium association's governing documents require or permit notice to lienholders or where a lienholder requests information regarding debts owed to the condominium association.

§ 27.5:3 Other Remedies

Prior to or in lieu of foreclosure, condominium associations may want to review other available remedies to encourage the payment of assessments by delinquent owners. Section 82.102(a)(18) of TUCA, which applies retroactively, states that a condominium association may suspend the rights of a unit owner to vote and utilize certain general common elements if the owner is more than thirty days delinquent in the payment of all assessments due, unless the declaration provides otherwise. *See* Tex. Prop. Code § 82.102(a)(18). Associations should still use caution before exercising either of these remedies. While an association may be able to terminate an owner's right to use a common amenity like the association's pool or assembly hall, the association cannot restrict a unit owner's use of general common elements that would act to bar the owner from accessing or using his unit. Also, the Texas legislature has indicated that it disfavors revoking an owner's voting rights and expressly prohibited suspending voting rights for any reason in an amend-

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ment to chapter 209 of the Texas Property Code that became effective in 2012, which is not applicable to condominiums. In a future legislative session, the legislature may amend TUCA to remove this right from condominium associations as well.

Section 82.102(a)(14) of TUCA, which is also a retroactive provision, grants the board of directors of a condominium association the right to adopt and amend rules that provide for termination of utilities to a unit if the owner is delinquent in the payment of an assessment that pays, in whole or in part, for such utilities, unless the declaration states otherwise. *See* Tex. Prop. Code § 82.113(a)(14). This is not an express grant of authority to terminate utilities—the board must first adopt rules regarding termination before the board can actually terminate an owner's utilities for nonpayment. Also, associations may want to follow the utility termination procedures applicable to utility companies established by the Texas Utilities Code and the termination procedures applicable to landlords contained in Texas Property Code section 92.008, which impose certain additional restrictions such as providing the owner with notice prior to termination and limits termination in extremely hot or cold weather. Associations should also exercise caution when terminating utilities, especially where the association is aware of health issues afflicting the occupants that could be negatively impacted by a loss of air conditioning/heating, electricity, or water service.

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Additional Resources

J. Richard White, *Annual Survey of Texas Law: Real Property*, 56 SMU L. Rev. 1925 (2003).

Kendrick, John J., Jr. and Herbert S. Kendrick. *Texas Transaction Guide: Legal Forms*, vol. 21, §§ 88.51 (Association's Lien for Assessments), 88.74 (Lien for Unpaid Council Assessments). New York: Matthew Bender & Co., 2013.

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Chapter 28

HEL/HELOC Foreclosure Process

The editors gratefully acknowledge Connie J. Vandergriff for her contribution to this chapter.

§ 28.1 Introduction

The primary focus of this chapter will be on the mechanical and logistical aspects of filing an application under rule 736 of the Texas Rules of Civil Procedure. The Texas Supreme Court issued a set of home equity (HEL) and home equity line of credit (HELOC) promulgated forms for use in expedited foreclosure proceedings, and the forms can be found on the Texas Supreme Court website at **www.txcourts.gov/rules-forms**. The practitioner seeking to foreclose an HEL or HELOC must be aware that a court order must be obtained before an HEL/HELOC encumbered property can be sold by normal nonjudicial or judicial procedures.

Note: In this chapter the term *HEL* will apply to both HEL and HELOC loans unless the context implies otherwise.

Beginning with the financial crisis in 2007, there have been a substantial amount of litigation and a number of appellate court opinions related to HEL foreclosures. See section 10.15 in chapter 10 of this manual for a discussion of the legal issues and challenges raised by borrowers' and lenders' responses to those challenges in HEL litigation.

This chapter covers the mechanics of preparing a rule 736 application, as there are few appellate opinions related to the application process. The probable reasons are: (1) the supreme court's promulgated forms make the application process an almost fill-in-the-blank procedure—assuming the loan level information can be obtained from the mortgagee or mortgage servicer; (2) because the supreme court was directed by Tex. Const. art. XVI, § 50(r) to expedite the foreclosure process, the granting or denial of a rule 736 application is not subject to a motion for rehearing, new trial, bill of review, or appeal, and the order is without prejudice and has no res judicata effect under rule 736.8 and 736.9; and (3) rules 735 and 736 are written in simple instructional language.

§ 28.2 Background

An HEL is a unique form of a loan agreement enabling a homeowner to convert the equity in the homeowner's homestead to cash by borrowing money secured by a lien against the homestead. Because Texas laws have traditionally been designed to protect homesteads, HELs were not available in Texas until 1997 when HELs were established by an amendment to the Texas Constitution. Tex. Const. art. XVI, § 50(a)(6). One of the principal constitutional provisions related to HELs is that an HEL loan agreement cannot be foreclosed without obtaining a court order. Tex. Const. art. XVI, § 50(a)(6)(D). To create the procedure for obtaining the foreclosure order, Tex. Const. art. XVI, § 50(r) required the Texas Supreme Court to "promulgate rules of civil procedure for expedited foreclosure proceedings related to foreclosure of liens . . . that require a court order." The supreme court responded with rules 735 and 736 of the Texas Rules of Civil Procedure, as the expeditious means to obtain the court order before continuing with the standard nonjudicial process under the power of sale in the deed of trust and Tex. Prop. Code ch. 51 or judicial foreclosure under Tex. R. Civ. P. 309. Both HELs and HELOCs are treated the same under the

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Texas Rules of Civil Procedure and the safe harbor rules adopted by the Joint Financial Regulatory Commission at 7 Tex. Admin. Code ch. 153. For additional information, see the Texas Finance Commission website at **www.fc.texas.gov/homeinfo/homeinfo.html**. While treated the same, an HELOC differs from a standard HEL because, at closing, the borrower obtains a line of credit under Tex. Const. art. XVI, § 50(t) that can be accessed at the borrower's discretion under the terms of the loan agreement instead of a lump sum amount for an HEL under Tex. Const. art. XVI, § 50(a)(6).

§ 28.3 Type of Foreclosure Sale

Rules 735 and 736 of the Texas Rules of Civil Procedure provide an expedited procedure to proceed with a nonjudicial foreclosure under applicable law by allowing a mortgagee to file an application for a home equity foreclosure order rather than filing a traditional judicial foreclosure lawsuit. Once the court order is obtained, the petitioner can proceed with a nonjudicial sale under Texas Property Code chapter 51 and the terms and conditions of the deed of trust. The term *petitioner* is as a term of art used to signal to the clerk that the pleading being filed is a rule 736 application. It is also used because there are multiple parties that may be legally authorized to conduct the foreclosure. A foreclosure can be initiated by the mortgagee as the holder or transferee with custody and control of the note or the mortgage servicer. *See* Tex. Prop. Code §§ 51.0001(3), (4), 51.0025.

There are, however, some circumstances in which a judicial foreclosure must be used to obtain the court order necessary to foreclose. Examples include (1) a petitioner who cannot comply with or supply the information required in a rule 736 application; (2) when additional causes of action are required due to a problem with the chain of title or a defect in the lien documents; (3) when the loan agreement requires a judicial sale; or (4) when the borrower is extremely difficult or litigious. In these circumstances, the lienholder has the option of proceeding under rule 735, which provides a cause of action for a judicial foreclosure sale. *See* Tex. R. Civ. P. 735.3, cmt. to 2011 change. See chapter 20 in this manual for a discussion and forms for initiating a judicial foreclosure.

§ 28.4 Filing a Home Equity Application

Rule 736.1(a) of the Texas Rules of Civil Procedure provides that an application for a home equity foreclosure order must be filed in the county where the property is located or in a probate court with jurisdiction over proceedings involving the property. *See* Tex. R. Civ. P. 736.1(a). If the property is located in a county with statutory probate courts, the application must be filed in probate court. *King v. Deutsche Bank National Trust Co.*, 472 S.W.3d 848 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

§ 28.4:1 Application Style

The application must be styled: "In re: Order for Foreclosure Concerning **[property address]** under Tex. R. Civ. P. 736." Tex. R. Civ. P. 736.1(b).

§ 28.4:2 Conditions Precedent

The application should not be filed until the requisite demand to cure the default has been sent to the obligor(s) under the loan agreement, contract, or lien and the time period to cure the default has expired. *See* Tex. R. Civ. P. 736.1(c). Typically, both the loan agreement documentation and Texas Property Code section 51.002(d) require that the mortgagee must put the borrower on notice that a default of the loan has occurred and that the default must be cured. Before January 1, 2012, an unequivocal notice of intent to accelerate and a notice of acceleration of the maturity of the debt had to be accomplished before a rule 736 application could be

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filed. However, when the supreme court amended rule 736, effective January 1, 2012, sending a notice of acceleration to the obligor of the debt was no longer required before an application could be filed. This was to prevent the inadvertent running of the four-year statute of limitations requiring nonjudicial foreclosure of the property within four years of accelerating the maturity of the debt. For more information related to the actions necessary to declare the borrower in default, see chapter 8 in this manual.

§ 28.4:3 Application Requirements

One of the cardinal principles underlying rule 736 of the Texas Rules of Civil Procedure was the idea that the application must contain all the information needed to legally affirm the borrower was in default to the party who was legally entitled to enforce the borrower's loan agreement. Once it was clear the borrower was in default, based on the evidence of default, the judge could issue a rule 736 court order knowing the petitioner, as lender, mortgagee, or mortgage servicer, would have to comply with all the legal requirements of conducting a lawful foreclosure, and the borrower would have all the legal protections provided under law. In essence, a rule 736 application would be self-enforcing because all the evidence indicating the borrower's default would be presented.

Therefore, the application must include the following:

1. The name and last known address of the party legally authorized to conduct the foreclosure (the petitioner). Note that the authority for the petitioner to foreclose must be stated later in the application; therefore, ensure the named petitioner has the legal authority to foreclose.

2. The name and last known address of any obligors of the loan agreement debt and grantors of the deed of trust (the respondent(s)). The term *obligor* was intentionally used to indicate the person who signed the note and *mortgagor* for a person who signed the deed of trust but not the note.

3. The commonly known street address and legal description of the property encumbered by the loan agreement sought to be foreclosed. This provision is included to ensure that the property sought to be foreclosed was the same property encumbered by HEL loan agreement.

4. The type of lien sought to be foreclosed and its constitutional or statutory reference. Because a rule 736 application is also used to obtain a court order as condition precedent to foreclosing a reverse mortgage, a property owner association assessment lien, and, until January 1, 2015, a property tax or transferred tax lien under section 32.06(c–1)(1) of the Texas Tax Code, this section clearly disclosed the type of loan made the subject of the application.

5. The authority of the petitioner to prosecute the foreclosure. This provision is to ensure the petitioner shows the legal authority under which the petitioner is conducting the foreclosure sale. The petitioner can be the current lender or beneficiary named in the deed of trust; the mortgagee, as defined in Tex. Prop. Code § 51.0001(4); the holder or transferee, as defined in Tex. Bus. & Com. Code § 3.301 and § 3.203, having custody and control of physical possession of the note; or the mortgage servicer under Tex. Prop. Code § 51.0025.

6. The type of default, either monetary or nonmonetary. If the default is mone-

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tary, the application must include the number of unpaid scheduled payments, the amount required to reinstate the debt, and the total amount required to pay off the loan agreement. Any figures included in this portion of the application must be as of a date not more than sixty days prior to the date the application is filed. If the default is nonmonetary, the application must describe the facts creating the default. The reason the number of unpaid scheduled payments must be disclosed is that it generally makes a difference to a judge whether the borrower is only one or two payments behind as opposed to many. Simply alleging the total dollar amount due does not tell the judge much about the severity of the default unless the judge knows the monthly loan payment due and then does a mental calculation as to the number of payments past due.

7. A statement that the requisite notice or notices to cure were mailed in accordance with the terms of the agreement and applicable law, that the opportunity to cure has expired, and that, prior to filing the application, all other requirements under the loan agreement and applicable law have been completed. The application requires that copies of the notice of demand to cure and notice of intent to accelerate be attached so that there is no dispute whether the notices were in fact given. In addition to copies of the notices, proof of mailing must be included. The standard proof of mailing is obtained from the United States Postal Service (U.S.P.S.) Tracking website, a U.S.P.S. mailing receipt, or a signed "green card." This is a typical example of the application seeking to ensure it is self-proving as to the petitioner's compliance with foreclosure law.

8. A conspicuous statement that the legal action is not being sought against an occupant of the property unless that occupant is a party to the underlying loan agreement (a named respondent). This provision is part of the application so that any occupant of the property who is not an obligor of the debt or a mortgagor of the deed of trust has notice of the foreclosure sale instead of being served with a notice of eviction after the property has been sold at a foreclosure sale.

9. A conspicuous statement that if the petitioner obtains a foreclosure order, the petitioner will proceed with a foreclosure of the property in accordance with applicable law and the underlying agreement. This statement in the application restates one of the fundamental principles of the rule 736 process, which is that getting a court order does not change the lender's obligation to foreclose in compliance with all the legal statutory authority and terms and conditions of the deed of trust as required in any foreclosure proceeding.

See Tex. R. Civ. P. 736.1(d)(1)–(5). See form 28-1 in this manual, Application for an Expedited Order Under Rule 736 on a Home Equity, Reverse Mortgage, or Home Equity Line of Credit Loan, as promulgated by the Texas Supreme Court.

§ 28.4:4 Supplemental Documents

Pursuant to rule 736.1(d)(6) of the Texas Rules of Civil Procedure, the application must include an affidavit of material facts in accordance with rule 166a(f). The affidavit must be signed by the petitioner or the servicer. In support of the affidavit, rule 736 requires that the following attachments be included: (1) a copy of the note, the original recorded lien, and a current assign-

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ment of the lien or a document showing how the petitioner gained its authority to file the application (i.e., merger document, name change certificate, etc.) and (2) a copy of each notice required to be mailed to the respondent prior to filing the application under applicable law and the loan agreement together with proof of mailing. *See* Tex. R. Civ. P. 736.1(d)(6). See form 28-2 in this manual, Affidavit in Support of Petitioner's Application for an Expedited Order Under Rule 736, as promulgated by the Texas Supreme Court; alternatively, the practitioner may use form 28-3, Declaration in Support of Petitioner's Application for an Expedited Order Under Rule 736, as promulgated by the Texas Supreme Court.

Though the Texas Supreme Court promulgated an affidavit it considered sufficient to comply with Texas law, many national servicers will not sign an affidavit that replicates the supreme court's promulgated form and will only execute the servicer's in-house approved form of affidavit.

§ 28.5 Service

After the petitioner files its application and pays its filing fees and costs, the clerk issues a citation together with the application, and either the clerk serves the citation under the special service procedures found in Tex. R. Civ. P. 736.3 or, pursuant to Tex. Gov't Code § 22.018, the sheriff, constable, or other authorized person under Tex. R. Civ. P. 103 serves the citation in the same manner as a regular lawsuit in accordance with Tex. R. Civ. P. 106. The citation issued by the clerk must state that a response is due the first Monday after thirty-eight days from the date the citation was placed in the U.S. mail. Tex. R. Civ. P. 736.3(a)(2). The clerk must send the citation and copy of the application to the last known address of the obligor of the debt and mortgagor of the deed of trust stated in the application. In addition, the clerk serves a citation and copy of the application addressed to the occupant of the property to be foreclosed, containing a notice that the occupant is not required to file a response to the application if the occupant is not otherwise named as a party in the application. Tex. R. Civ. P. 736.3(b)(1). Concurrently with service, the clerk prepares the return of service in accordance with rule 107 of the Texas Rules of Civil Procedure, except that the return of service need not contain a return receipt. Tex. R. Civ. P. 736.3(b)(2). The date of service and the return of service are the same date the clerk placed the citation and application in the U.S. mail. The clerk does not need to attach a copy of the return receipt to the citation because rule 736 is intended to be an expedited process, and requiring the clerk to wait on the U.S.P.S. to return the green card could take several months as well as add an extra burden on the court's staff to match green cards with citations.

§ 28.6 Response

A respondent may file a response contesting the petitioner's application. Tex. R. Civ. P. 736.5(a). As stated above, the response is due on the first Monday after the expiration of thirty-eight days from the date the citation is placed in the U.S. mail by the clerk of the court. Tex. R. Civ. P. 736.5(b). A general denial is an acceptable response, but the response must be signed by the respondent(s) in accordance with rule 57 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 736.5(c).

If the respondent wishes to challenge the application, the response must specifically allege: (1) why the respondent believes he did not sign the underlying agreement; (2) why the respondent is not obligated to pay the lien; (3) if the default is a monetary default, why the figures included in the application are incorrect; (4) why the evidence of the loan agreement attached to the supporting affidavit is not true and correct; and (5) proof of payment in accordance with rule 95 of the Texas Rules of Civil Procedure. *See* Tex. R.

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Civ. P. 736.5(c)(1)–(5). The specificity of the elements that must be alleged in a response is to give the trial judge something in writing so that the judge can determine whether there is a true default or defect in the application.

Because rule 736 is an expedited proceeding, as opposed to the standard lawsuit or judicial foreclosure, a counterclaim or cross claim is prohibited in a rule 736 proceeding and the borrower or respondent must file a regular lawsuit. If a counterclaim or cross claim is filed, the court must immediately strike that portion of the response without the need for a hearing. *See* Tex. R. Civ. P. 736.5(d). The reasoning behind this restriction relates back to the supreme court's desire to limit the trial court's review to the requirements that must be met by the petitioner under rule 736 without clouding the issue with related claims, much like an eviction proceeding that only considers who has the superior right of possession.

§ 28.7 Hearing Requirement

A hearing is required when a response is filed. The hearing on the application cannot be held earlier than twenty days or later than thirty days after a request for a hearing is made by any party. At the hearing, the petitioner has the burden of proof. *See* Tex. R. Civ. P. 736.6.

If no response is filed, the petitioner may file a motion and proposed order to obtain a default order. Tex. R. Civ. P. 736.7(a). The court must grant the motion no later than thirty days after the motion is filed if (1) the application complies with the rules set forth under Tex. R. Civ. P. 736.1; (2) the motion was properly served in accordance with rule 736.3 or rule 106; and (3) the return of service has been on file for at least ten days. Tex. R. Civ. P. 736.7(b), (c). Rule 736.7 states that if the application meets the requirements above, the court must grant the default order without a hearing. *See* Tex. R. Civ. P. 736.7.

Though rule 736.6 states that "the court must not conduct a hearing under this rule unless a response is filed," many courts ignore this rule and require a hearing. Typically, the court will sign the 736 default order at the hearing. Because there is no appeal under rule 736, only a writ of mandamus is available to make the court follow the no-hearing rule. All foreclosures, including HELs and HELOCs, must comply with all foreclosure requirements under the law. The rule 736 process is an extrajudicial proceeding that requires an order to continue with a normal foreclosure; therefore, conducting a hearing when the borrower fails to file a response adds time and expense to the regular foreclosure process. Furthermore, if the borrower has a complaint about the rule 736 process, the borrower can file a separate lawsuit.

§ 28.8 Order

Pursuant to rule 736.8 of the Texas Rules of Civil Procedure, if the order is granted, it must contain the following: (1) the material facts establishing the basis for foreclosure; (2) identification of the property to be foreclosed on, using its commonly known mailing address and legal description; (3) the name and last known address of the respondents; and (4) the recording or indexing information of the lien to be foreclosed. *See* Tex. R. Civ. P. 736.8(b). An order granting or denying the application is final and is not appealable, subject to a motion for rehearing, new trial, or bill of review. In addition, the order is without prejudice and has no res judicata effect. Tex. R. Civ. P. 736.9. This means the petitioner can refile a new application after curing the defect causing the rule 736 application to be denied, or the borrower can file a separate lawsuit to challenge the foreclosure.

If a separate lawsuit is filed contesting the order granted under rule 736 or any other element of the foreclosure process, the rule 736 order is automatically stayed. *See* Tex. R. Civ. P. 736.11(a). It is the duty of the respondent to give

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prompt notice of the suit to the petitioner. *See* Tex. R. Civ. P. 736.11(b). Within ten days of filing the suit, the respondent must file a motion to dismiss the application or a motion to vacate the foreclosure order with the clerk of the court where the application was filed. *See* Tex. R. Civ. P. 736.11(c). The court must either dismiss the application or vacate its order. *See* Tex. R. Civ. P. 736.11(c).

If a separate lawsuit is filed to stop a foreclosure in which a 736 order has been granted, the suit must be filed by 5:00 P.M. on the Monday before the scheduled foreclosure sale. *See* Tex. R. Civ. P. 736.11(a). This suit eliminates the necessity of the borrower having to file a temporary restraining order and posting a bond.

If the lawsuit is timely filed, but the property is sold at the scheduled foreclosure sale, the foreclosure sale is void and any trustee or substitute trustee's deed must be rescinded. *See* Tex. R. Civ. P. 736.11(d).

§ 28.9 Effect of Order

After the rule 736 order is obtained, the petitioner may continue with the foreclosure process, which requires compliance with all existing foreclosure rules and regulations required under federal and state law. Rule 736 does not change any normal foreclosure requirement. It merely adds the necessity of obtaining a rule 736 order before an HEL loan agreement can be foreclosed. At the time the order is granted, all of the requisite demand letters and notices of acceleration have been sent to the relevant parties. The petitioner may now set a foreclosure date, send the appropriate notices of sale, post the property for sale, and conduct the foreclosure sale in accordance with Texas Property Code section 51.002 and the terms of the loan agreement. After the property is sold, a copy of the foreclosure order must be attached to the trustee's or substitute trustee's foreclosure deed. Tex. R. Civ. P. 736.12.

§ 28.10 Discovery

There is no discovery in an action filed under rule 736 of the Texas Rules of Civil Procedure. Tex. R. Civ. P. 736.4. The reason for this provision is that the constitution required the supreme court to create expeditious rules of civil procedure. Therefore, discovery is not required because the application is designed to be self-proving as to the status of the borrower's default and the mortgagee's compliance with all the foreclosure requirements under Texas law up to the time the application is filed. If the borrower believes the evidence presented in the application is incorrect or has other complaints about the origination or servicing of the borrower's loan agreement, the borrower can file a separate lawsuit and obtain all the discovery the rules allow.

§ 28.11 Mediation

The Texas legislature amended the Texas Civil Practice and Remedies Code to include a provision allowing mediation following the filing of an application but only if a response is filed. The court must then schedule a hearing to determine if mediation should be ordered. *See* Tex. Civ. Prac. & Rem. Code § 154.028.

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Additional Resources

Bagget, Mike W. and G. Tommy Bastian. "FORECLOSURE Tex. R. Civ. Proc. § 735 and 736 Effective January 1, 2012." In *Suing, Defending, and Negotiating with Financial Institutions, 2012*. Austin: State Bar of Texas, 2012.

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Chapter 29

Manufactured Housing Unit Foreclosure Process

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Chapter 29

Manufactured Housing Unit Foreclosure Process

The editors gratefully acknowledge K. Clifford Littlefield for his contribution to this chapter.

§ 29.1 Introduction

This chapter addresses the foreclosure process involving a manufactured home, also known as a mobile home or, more accurately, a manufactured housing unit (MHU). The Texas Department of Housing and Community Affairs (TDHCA), through its Manufactured Housing Division, regulates the manufactured housing industry in Texas. It administers the TDHCA Manufactured Housing Rules and Texas Manufactured Housing Standards Act (Texas Occupations Code chapter 1201) and acts as the U.S. Department of Housing and Urban Development's (HUD's) state supervisory agent to administer certain aspects of the National Manufactured Housing Construction and Safety Standards Act of 1974.

If a manufactured home is personal property, chapter 9, subchapter F, sections 9.601 through 9.628, of the Texas Business and Commerce Code governs the foreclosure of a security interest in the manufactured home. Even if the manufactured home is personal property, if the manufacturer, model, year, and serial number is specifically described in the deed of trust to be foreclosed, Tex. Bus. & Com. Code § 9.604 provides the manufactured home may be nonjudicially foreclosed under chapter 51 of the Texas Property Code. Often an MHU is converted to real property under the procedures found in section 2.001 of the Texas Property Code, and if the MHU has been properly converted to real property, it can be foreclosed in the same manner as real property is judicially or nonjudicially foreclosed. Because MHUs are often financed in accordance with chapter 347 of the Texas Finance Code, it must be consulted with reference to insurance and taxes, allowable fees and charges, actions on default, possessory liens, unpaid rent, and the rights, duties, liabilities, and penalties that may be imposed on the creditor or the residential mortgage loan originator.

§ 29.2 Definition of Manufactured Home

Section 1201.003(12)(A) of the Texas Occupations Code defines a manufactured home as a structure constructed on or after June 15, 1976, according to the rules of HUD; built on a permanent chassis; designed for use as a dwelling with or without a permanent foundation when the structure is connected to the required utilities; transportable in one or more sections; and in the traveling mode, at least eight body feet in width or at least forty body feet in length or, when erected on site, at least 320 square feet. Tex. Occ. Code § 1201.003(12)(A).

A manufactured home also includes the plumbing, heating, air conditioning, and electrical systems of the home, but does not include a recreational vehicle as that term is defined by 24 C.F.R. § 3282.8(g). Tex. Occ. Code § 1201.003(12)(B), (C).

Section 347.002(a)(5) of the Texas Finance Code further defines a manufactured home as including any furniture, appliances, drapes, carpets, wall coverings, or other items that are attached to or contained in the structure and that are included in the cash price and sold in conjunction with the structure. Tex. Fin. Code § 347.002(a)(5).

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§ 29.3 Definition of Consumer

"Consumer," as used in a manufactured home credit transaction, is broadly defined as "a person to whom credit is extended in a credit transaction." Tex. Fin. Code § 347.002(a)(1). This definition of consumer is broader than a consumer in other contexts, for example, persons acquiring goods or services for "personal, family, or household purposes" (see, for example, Texas Business and Commerce Code section 9.102(a)(23)), and thus also encompasses financing a purchase of a manufactured home for use at a construction site or for use as a place of business. In this latter context, the debtor is a consumer protected under chapter 347 of the Finance Code, but the manufactured home is not a "consumer-goods transaction" under chapter 9 of the Business and Commerce Code. *See* Tex. Bus. & Com. Code § 9.102(a)(24). For chapter 347 of the Finance Code to apply, there must be a "retail purchase" and a purchase money lien. *See* Tex. Fin. Code § 347.002(a)(1), (a)(3)(A).

§ 29.4 Procedure to Perfect Lien on MHU as Real Property

If a new MHU is sold with the intent of it being designated as real property, a Manufacturer's Certificate of Origin (MCO), together with an Application for Statement of Ownership and Location (SOL), must be submitted to TDHCA with the appropriate application fee to convert the MHU to real property. The SOL must identify the lienholder and specifically describe the manufacturer, model, year, and serial or HUD ID number of the MHU. Additionally, a moving permit issued by the Texas Department of Transportation (TXDOT) must be submitted to TDHCA if the home was moved onto the real property as part of the sale. *See* Statement of Ownership and Location (SOL) Application Instructions, Texas Department of Housing and Community Affairs, Manufactured Housing Division, last revised March 11, 2014, **www.tdhca.state.tx.us/mh/docs/1037-apply-sol.pdf** (hereinafter SOL Instructions).

If a used manufactured home is sold with the intent of it being designated as real property, an SOL application must be submitted to TDHCA with the appropriate application fee. If an existing mortgage lien encumbers the manufactured home, TDHCA Form B, Release of Lien or Repossession, must also be 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 if the home was moved onto the real property as part of the sale. *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 29.12 below for a discussion of converting an MHU from real property to personal property.

§ 29.5 Procedure to Perfect Lien on MHU as Personal Property

If a new manufactured home is sold with the intent of it being designated as personal property, the MCO together with an SOL application must be submitted to TDHCA with the appropriate application fee. Additionally, a TXDOT moving permit must be submitted to TDHCA. *See* SOL Instructions.

Similarly, if a used manufactured home is sold with the intent of it being designated as personal property, an SOL application must be submitted to TDHCA with the appropriate application fee.

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If a mortgage lien exists, TDHCA Form B, Release of Lien or Repossession, must also be 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, if the home was moved, 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.

If an MHU is personal property but the secured transaction includes real property on which the MHU is affixed or is to be affixed, the MHU may be foreclosed as part of the real property foreclosure proceeding so long as the MHU is adequately described in the security instruments (manufacturer, model, year, and serial number). *See* Tex. Bus. & Com. Code § 9.604.

§ 29.6 Notice of Default

Before a creditor may commence repossession, foreclosure, or acceleration of the loan agreement involving a manufactured home, the Office of Thrift Supervision (OTS) requires a thirty-day notice of default 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

Only if the consumer is in default of the performance of an obligation under the credit transaction may a creditor accelerate the maturity of all or a part of the amount owed under the loan agreement for the purchase of a manufactured home. Tex. Fin. Code § 347.352. In computing the amount owed, 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 the maturity 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

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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 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 statement of ownership. 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 a statement of ownership and may be exchanged for a statement of ownership as provided by Occupations Code section 1201.214. Tex. Occ. Code § 1201.201(2).

A security interest in a manufactured home is only perfected by filing with TDHCA the notice of lien on a form provided by the TDHCA. The TDHCA is the party of record and discloses on its website 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 a statement of ownership for manufactured homes. In completing an application for a statement of ownership, 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.

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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 copy of the statement of ownership that on its face reflects that the owner has elected to treat the manufactured home as real property at the location listed on the statement. Tex. Occ. Code § 1201.2055(d). A real property election for a manufactured home is not considered to be perfected until a copy of the statement of ownership 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).

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 website, **www.tdhca.state.tx.us/mh/index.htm**, and select the "Search Our Database" link under the "Manufactured Housing Division" tab. Then, 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 real property election for this home has been perfected.

Once the manufactured home has been converted to real property, as evidenced by the statement of ownership filed in the real property records or confirmed by TDHCA, foreclosure of the real property includes the manufactured home—without the necessity of the MHU being specifically described in the security instrument.

§ 29.10 Foreclosure on MHU as Personal Property

If the real property election has not been perfected for a manufactured home, it is possible to conduct a foreclosure on the real property and home at the same time. But the deed of trust on the real property must specifically describe the MHU before the secured party can 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 repossess the MHU, if repossession is done without breach of the peace or by judicial process. 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.

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§ 29.11 Conversion of MHU from Personal Property to Real Property

After a manufactured home is acquired by self-help repossession, an execution or judicial foreclosure sale by the sheriff or constable after a judgment and order of sale is obtained, or nonjudicial foreclosure sale, the purchaser may elect to convert the manufactured home from personal property to real property. 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 must be filed with TDHCA. Tex. Occ. Code § 1201.2075(a). The conversion may not be completed until all lienholders release or give written consent to the conversion; however, TDHCA can issue a statement of ownership to a licensed title insurance company that commits to issuing a title commitment policy covering all prior liens on a loan that the title company closes or to a federally insured financial institution or licensed attorney who has obtained a title insurance policy covering all prior liens on the MHU. Tex. Occ. Code § 1201.2075(b).

The purchaser must complete an SOL application, which may be filled out and printed from the TDHCA website, **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, conversion may be accomplished by the written consent of each lienholder or 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. Tex. Occ. Code § 1201.2075(b).

Once the application is approved, TDHCA must issue to the owner a copy of the statement of ownership 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 perfected until a copy of the statement of ownership 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 copy of the statement of ownership in the real property records of the county where the MHU 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). When the MHU is converted to real property, the personal property lien 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 encumbered as real property is acquired by a judicial or nonjudicial foreclosure sale, the purchaser may convert the MHU from real property to personal property. The conversion is similar to the conversion of personal property MHU into a real property MHU, but in accordance with Tex. Occ. Code § 1201.2076, which includes getting written consent from the local taxing units. *See* Tex. Occ. Code § 1201.2076(a). Further, TDHCA also cannot issue a statement of ownership converting the MHU from real property to personal

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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 website, **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 issues a statement of ownership to the owner stating that the owner has elected to treat the manufactured home as personal property. The issuance of the statement of ownership 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 requires 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 did not encumber the manufactured home, it may be possible to obtain title to the vacant manufactured home through abandonment.

In addition, if a vacant manufactured home is titled in the name of a person or entity other than the owner of the real property on which the MHU is located, the owner may declare the MHU 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 MHU can be 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 MHU, all lienholders at the addresses listed on the home's statement of ownership on file with TDHCA, the tax collector for each taxing unit that imposes ad valorem taxes on the real property where the MHU 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 must 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 MHU abandoned, the record owner, 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 where the MHU is located and 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).

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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 statement of ownership listing the real property owner as the owner of the manufactured home. Tex. Occ. Code § 1201.217(d). When applying for a statement of ownership, the real property owner must include an affidavit stating that (1) the person owns the real property where the manufactured home is located and (2) the name of the person to whom title to the home will be transferred is the same name that is listed in the real property or tax records indicating the current ownership of the real property. Tex. Occ. Code § 1201.217(d–1).

Obtaining title to a manufactured home through the abandonment process is not permitted if the person who owns the real property is related to or affiliated with the record owner or has owned an interest in the manufactured home. Tex. Occ. Code § 1201.217(f).

§ 29.14 Rental Charges

If the manufactured home has been abandoned or voluntarily surrendered by the consumer, Texas Finance Code section 347.402 provides the owner of the real property on which a manufactured home is located with a possessory lien for all rental charges accruing after the fifteenth day after the creditor receives written notice of unpaid land lease charges. *See* Tex. Fin. Code § 347.402(b)(1). If the MHU 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, if the occupant will not voluntarily vacate, a forcible-detainer suit must be filed by the purchaser of the property to recover possession of the manufactured home. 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. Otherwise, judgment for possession is granted by default. Tex. Prop. Code § 24.0061(b). The forcible-detainer process is set forth in Texas Property Code chapter 24. See chapter 34 in this manual regarding the eviction process.

§ 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, protected tenants from eviction when a home they occupied was foreclosed. These provisions took effect on May 20, 2009, and expired December 31, 2014. However, a new bill has been introduced in the U.S. Senate on February 7, 2017, that would permanently extend the PTFA. *See* Permanently Protecting Tenants at Foreclosure Act of 2017, S. 325, 115th Cong. (2017). If the bill becomes law, it would be applicable to a tenant occupying a manufactured home located

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on the property that is foreclosed and should be reviewed to ensure compliance prior to eviction.

§ 29.17 Additional Case Law

Further cases relevant to the manufactured housing unit foreclosure process include the following:

1. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 152 (Tex. 1992) (discussing duty imposed on secured creditors pursuing a nonjudicial repossession to take precautions for public safety and any breach of the peace could result in creditor being held liable in tort).
2. *Guerra v. M.H. Equities, Ltd.*, No. 02-11-00261-CV, 2012 WL 2135596 (Tex. App.—Fort Worth June 14, 2012, no pet.) (mem. op.) (discussing calculation of liquidated damages from balance of a promissory in a foreclosure proceeding involving a manufactured home).
3. *Mazon v. Vanderbilt Mortgage & Finance, Inc.*, No. 03-02-00529-CV, 2006 WL 2083979 (Tex. App.—Austin July 28, 2006, pet. denied) (mem. op.) (discussing whether automatic stay in a bankruptcy proceeding prevented commencement of proceedings to foreclose on a manufactured home).
4. *Conseco Finance Servicing Corp. v. Cabrera*, 190 S.W.3d 41 (Tex. App.—Amarillo 2005, no pet.) (analyzing procedural requirements for judicial foreclosure of a manufactured home).
5. *Conseco Finance Servicing Corp. v. J&J Mobile Homes, Inc.*, 120 S.W.3d 878 (Tex. App.—Fort Worth 2003, pet. denied) (addressing whether holder of a preexisting security interest in manufactured home which was sold at tax lien foreclosure sale can assert its security interest lien rights to the manufactured home against a bona fide purchaser).
6. *W.H.V., Inc. v. Associates Housing Finance, LLC*, 43 S.W.3d 83 (Tex. App.—Dallas 2001, pet. denied) (reviewing lien perfection under Texas Manufactured Housing Standards Act).
7. *Pokorne Private Capital Group, LLC v. 21st Mortgage Corp.*, No. 13-06-575-CV, 2008 WL 963296 (Tex. App.—Corpus Christi Apr. 10, 2008, pet. denied) (mem. op.) (discussing whether an application for statement of ownership and location was defective when the application was filed by a previous owner after transfer of home that failed to note an existing lien).

Additional Resources

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Berry, Sarah F. "Manufactured Home Collections: Personal Property or Real Property?" In *Collections and Creditors' Rights, 2017*. Austin: State Bar of Texas, 2017.

Burkhart, Ann M. "Bringing Manufactured Housing into the Real Estate Finance System." *Pepperdine Law Review* 37, no. 2 (2010): 427–57.

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Hale, Kent D., and Steven C. James. "Manufactured Housing Litigation." In *Handling Your First Consumer Law Case, 2012*. Austin: State Bar of Texas, 2012.

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Chapter 30

Property Owners Association Foreclosure Process

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Chapter 30

Property Owners Association Foreclosure Process

The editors gratefully acknowledge Brady E. Ortego for his contribution to this chapter.

Note: In 2013, the Texas Supreme Court 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 legislation requiring the Texas Supreme Court to promulgate foreclosure forms related to Tex. Const. art. XVI, § 50(a)(6) loans (i.e., home equity, home equity line of credit, and reverse mortgages) did not specifically apply to POA foreclosures, but the Supreme Court's Rule 736 Task Force recommended and the Supreme Court adopted a promulgated rule 736 POA application form. *See* Acts 2013, 83d Leg., R.S., ch. 1044 (H.B. 2978); Tex. Gov't Code § 22.018.

The comments in this chapter are based on rule 736, 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 forms can also be found on the Texas Supreme Court website at **www.txcourts.gov/supreme**. 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;

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County/County Seat	*Designated Sale Site and Website Information*
BEE—Beeville	
Designated sale site	North side courthouse steps, facing West Corpus Christi Street
Appraisal district website	**www.beecad.org/**
County website	**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 website	**www.bellcad.org/**
County website	**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 website	**www.bcad.org/**
County websites	**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 website	**www.blancocad.com/**
County website	**www.co.blanco.tx.us/**
BORDEN—Gail	
Designated sale site	District courtroom in courthouse
Appraisal district website	**www.taxnetusa.com/texas/borden/**
County website	**www.co.borden.tx.us**
BOSQUE—Meridian	
Designated sale site	Front (east) door of courthouse
Appraisal district website	**www.bosquecad.com/**
County website	**www.bosquecounty.us/**

County/County Seat	*Designated Sale Site and Website Information*
BOWIE—New Boston	
Designated sale site	Front (north) entrance of courthouse
Appraisal district website	**www.bowieappraisal.com/**
County website	**www.co.bowie.tx.us/**
BRAZORIA—Angleton	
Designated sale site	Corridor outside room 108 of courthouse
Appraisal district website	**www.brazoriacad.org/**
County website	**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 website	**www.brazoscad.org/**
County website	**www.brazoscountytx.gov/**
BREWSTER—Alpine	
Designated sale site	Front (east) door of courthouse
Appraisal district website	**www.brewstercotad.org/**
County website	**http://brewstercountytx.com/**
BRISCOE—Silverton	
Designated sale site	Steps on west side of courthouse
Appraisal district website	**www.taxnetusa.com/texas/briscoe/**
County website	**www.co.briscoe.tx.us/**
BROOKS—Falfurrias	
Designated sale site	Steps on east side of courthouse
Appraisal district website	**http://brookscad.org/**
County website	**www.co.brooks.tx.us/**
BROWN—Brownwood	
Designated sale site	South hallway of first floor of courthouse
Appraisal district website	**www.brown-cad.org/**
County website	**www.browncountytx.org/**
BURLESON—Caldwell	
Designated sale site	South steps of courthouse
Appraisal district website	**http://burlesonappraisal.com**
County website	**www.co.burleson.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
BURNET—Burnet	
Designated sale site	East side of courthouse (outside county clerk's office)
Appraisal district website	**www.burnet-cad.org/**
County website	**www.burnetcountytexas.org/**

C

CALDWELL—Lockhart	
Designated sale site	Outside main entrance of Caldwell County Justice Center, 1703 South Colorado Street
Appraisal district website	**www.caldwellcad.org/**
County website	**www.co.caldwell.tx.us/**
CALHOUN—Port Lavaca	
Designated sale site	Front steps of courthouse, 211 South Ann Street
Appraisal district website	**www.calhouncad.org/**
County website	**www.calhouncotx.org/**
CALLAHAN—Baird	
Designated sale site	Front steps on south side of courthouse
Appraisal district website	**www.taxnetusa.com/texas/callahan/**
County website	**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 website	**www.cameroncad.org/**
County website	**www.co.cameron.tx.us/**
CAMP—Pittsburg	
Designated sale site	South door of courthouse
Appraisal district website	**www.campcad.org/**
County website	**www.co.camp.tx.us/**
CARSON—Panhandle	
Designated sale site	Front steps on east side of courthouse
Appraisal district website	**www.carsoncad.org/**
County website	**www.co.carson.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
CASS—Linden	
Designated sale site	North door of courthouse
Appraisal district website	**www.casscad.org/**
County website	**www.co.cass.tx.us/**
CASTRO—Dimmitt	
Designated sale site	Foyer of courthouse
Appraisal district website	**www.castrocad.org/**
County website	**www.co.castro.tx.us/**
CHAMBERS—Anahuac	
Designated sale site	East steps, second level of courthouse
Appraisal district website	**www.chamberscad.org/**
County website	**www.co.chambers.tx.us/**
CHEROKEE—Rusk	
Designated sale site	Immediate area (either inside or outside) of north entrance of courthouse
Appraisal district website	**www.cherokeecad.com/**
County website	**www.co.cherokee.tx.us/ips/cms**
CHILDRESS—Childress	
Designated sale site	Front steps of courthouse
Appraisal district website	**http://childresscad.org/**
County website	**www.co.childress.tx.us/ips/cms**
CLAY—Henrietta	
Designated sale site	West door of courthouse
Appraisal district website	**www.claycad.org/**
County website	**www.co.clay.tx.us/**
COCHRAN—Morton	
Designated sale site	East door and foyer of courthouse
Appraisal district website	**www.cochrancad.com/**
County website	**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 website	**http://cokecad.org/**
County website	**www.co.coke.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
COLEMAN—Coleman	
Designated sale site	Front porch of courthouse (south side of courthouse, on north end of Commercial Avenue)
Appraisal district website	**www.colemancountycad.com/Appraisal/PublicAccess/**
County website	**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 website	**www.collincad.org/**
County website	**www.collincountytx.gov/Pages/default.aspx**
COLLINGSWORTH—Wellington	
Designated sale site	East door of courthouse
Appraisal district website	**www.collingsworthcad.org/**
County website	**www.co.collingsworth.tx.us/**
COLORADO—Columbus	
Designated sale site	Foyer inside main entrance of the Colorado County Annex building
Appraisal district website	**www.coloradocad.org/**
County website	**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 website	**www.comalad.org/**
County website	**www.co.comal.tx.us/**
COMANCHE—Comanche	
Designated sale site	South door of courthouse
Appraisal district website	**www.comanchecad.org/**
County website	**www.comanchecountytexas.net/**

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County/County Seat	*Designated Sale Site and Website Information*
CONCHO—Paint Rock	
Designated sale site	Front steps, on south side of courthouse
Appraisal district website	**www.conchocad.org/**
County website	**www.co.concho.tx.us/**
COOKE—Gainesville	
Designated sale site	Steps on east side of courthouse
Appraisal district website	**www.cookecad.org/**
County website	**www.co.cooke.tx.us/**
CORYELL—Gatesville	
Designated sale site	North door of courthouse
Appraisal district website	**www.coryellcad.org/**
County website	**www.coryellcounty.org/**
COTTLE—Paducah	
Designated sale site	Commissioners courtroom on first floor of courthouse
Appraisal district website	**http://cottlecad.org/**
County website	**www.co.cottle.tx.us/**
CRANE—Crane	
Designated sale site	North door of courthouse
Appraisal district website	**www.cranecad.org/**
County website	**www.co.crane.tx.us/**
CROCKETT—Ozona	
Designated sale site	Front steps of courthouse
Appraisal district website	**www.taxnetusa.com/texas/crockett/**
County website	**www.co.crockett.tx.us/**
CROSBY—Crosbyton	
Designated sale site	Steps on east side of courthouse
Appraisal district website	**www.crosbycentral.org**
County website	**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 website	**http://culbersoncad.org/**
County website	**www.co.culberson.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*

D

DALLAM—Dalhart

Designated sale site	South steps of courthouse
Appraisal district website	**www.dallamcad.org/**
County website	**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 website	**www.dallascad.org/**
County websites	**www.dallascounty.org/** **www.dallascounty.org/department/pubworks/div-prop-faq.php**

DAWSON—Lamesa

Designated sale site	South entrance of courthouse
Appraisal district website	**www.dawsoncad.org/**
County website	**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 website	**www.deafsmithcad.org/**
County website	**www.co.deaf-smith.tx.us/**

DELTA—Cooper

Designated sale site	East steps of courthouse
Appraisal district website	**www.delta-cad.org/**
County website	**www.deltacountytx.com/index.html**

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County/County Seat	*Designated Sale Site and Website 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 website	**www.dentoncad.com/**
County websites	**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 website	**www.dewittcad.org/**
County website	**www.co.dewitt.tx.us/**
DICKENS—Dickens	
Designated sale site	Front steps on west side of courthouse
Appraisal district website	**http://dickenscad.org/**
County website	**www.co.dickens.tx.us/**
DIMMIT—Carrizo Springs	
Designated sale site	Front steps at west entrance of courthouse
Appraisal district website	**www.dimmit-cad.org/**
County website	**www.dimmitcounty.org/**
DONLEY—Clarendon	
Designated sale site	East steps of courthouse
Appraisal district website	**http://donleycad.org/**
County website	**www.co.donley.tx.us/**
DUVAL—San Diego	
Designated sale site	North door of courthouse
Appraisal district website	**www.duvalcad.org/**
County website	**http://courthouse.duval-county.net/defaultIE.htm**

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County/County Seat	*Designated Sale Site and Website Information*

E

EASTLAND—Eastland

Designated sale site	Front steps at south entrance of courthouse (sometimes referred to as Commerce Street entrance)
Appraisal district website	**http://eastlandcad.org/**
County website	**www.eastlandcountytexas.com/**

ECTOR—Odessa

Designated sale site	Front door (west entrance) of courthouse
Appraisal district website	**www.ectorcad.org/**
County website	**www.co.ector.tx.us/**

EDWARDS—Rocksprings

Designated sale site	South door of courthouse, facing Main Street
Appraisal district website	**www.edwardscad.org**
County website	**www.edwardscountytexas.us/**

ELLIS—Waxahachie

Designated sale site	Southeast porch of courthouse
Appraisal district website	**www.elliscad.org/**
County website	**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	County courthouse, 3rd floor
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 website	**www.epcad.org/**
County websites	**www.epcounty.com** **www.epcounty.com/clerk/** **www.epcounty.com/publicrecords/foreclosurerecords/map.aspx**

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County/County Seat	*Designated Sale Site and Website Information*
ERATH—Stephenville	
Designated sale site	South steps of courthouse
Appraisal district website	**www.taxnetusa.com/texas/erath/**
County website	**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 website	**www.fallscad.net/**
County website	**www.co.falls.tx.us/**
FANNIN—Bonham	
Designated sale site	North door of courthouse
Appraisal district website	**www.fannincad.org/**
County website	**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 website	**www.fayettecad.org/**
County website	**www.co.fayette.tx.us/**
FISHER—Roby	
Designated sale site	North door of courthouse
Appraisal district website	**www.fishercad.org/**
County website	**www.co.fisher.tx.us/**
FLOYD—Floydada	
Designated sale site	Outside steps at west entrance of courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=floydcad**
County website	**www.co.floyd.tx.us/**
FOARD—Crowell	
Designated sale site	South side steps of courthouse
Appraisal district website	**www.taxnetusa.com/texas/foard/**
County website	**www.foardcountytexas.us/**

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County/County Seat	*Designated Sale Site and Website 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 website	**www.fbcad.org/**
County websites	**www.fortbendcountytx.gov/** **www.fortbendcountytx.gov/index.aspx?page=115**
FRANKLIN—Mount Vernon	
Designated sale site	South steps of courthouse
Appraisal district website	**www.franklincad.com/**
County website	**http://co.franklin.tx.us/**
FREESTONE—Fairfield	
Designated sale site	Front steps at south entrance of courthouse
Appraisal district website	**www.freestonecad.org/**
County website	**www.co.freestone.tx.us/**
FRIO—Pearsall	
Designated sale site	Steps of north door of courthouse
Appraisal district website	**www.friocad.org/**
County website	**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 website	**www.gainescad.org/**
County website	**www.co.gaines.tx.us/**

County/County Seat	*Designated Sale Site and Website Information*
GALVESTON—Galveston	
Designated sale site	Commissioners court room, first floor of courthouse, 722 Moody
Appraisal district website	**www.galvestoncad.org/Appraisal/PublicAccess/**
County website	**www.co.galveston.tx.us/**
GARZA—Post	
Designated sale site	West door foyer leading to the Law Enforcement Annex
Appraisal district website	**http://garzacad.org/**
County website	**www.garzacounty.net/**
GILLESPIE—Fredericksburg	
Designated sale site	Main front courthouse door facing Main Street
Appraisal district website	**www.gillespiecad.org/**
County website	**www.gillespiecounty.org/**
GLASSCOCK—Garden City	
Designated sale site	North door of courthouse
Appraisal district website	**www.glasscockcad.org/**
County website	**www.co.glasscock.tx.us/**
GOLIAD—Goliad	
Designated sale site	Hallway at north entrance of courthouse
Appraisal district website	**http://goliadcad.org/**
County website	**www.co.goliad.tx.us/**
GONZALES—Gonzales	
Designated sale site	Southeast corner of courthouse downtown
Appraisal district website	**www.gonzalescad.org/**
County website	**www.co.gonzales.tx.us/**
GRAY—Pampa	
Designated sale site	South entrance of courthouse
Appraisal district website	**www.graycad.org/**
County website	**www.co.gray.tx.us/**
GRAYSON—Sherman	
Designated sale site	West door of courthouse
Appraisal district website	**www.graysonappraisal.org/**
County website	**www.co.grayson.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
GREGG—Longview	
Designated sale site	Front door/patio area of courthouse
Appraisal district website	**www.gcad.org/**
County website	**www.co.gregg.tx.us/**
GRIMES—Anderson	
Designated sale site	Front door of courthouse
Appraisal district website	**www.grimescad.org/**
County website	**www.co.grimes.tx.us/**
GUADALUPE—Seguin	
Designated sale site	North porch of courthouse
Appraisal district website	**www.guadalupead.org/**
County website	**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 website	**http://halecad.org/**
County website	**www.halecounty.org/**
HALL—Memphis	
Designated sale site	North end of courthouse, adjacent to sheriff's office
Appraisal district website	**www.hallcad.org/**
County website	**www.hallcountytexas.us/**
HAMILTON—Hamilton	
Designated sale site	West center steps of courthouse
Appraisal district website	**www.hamiltoncad.org/**
County website	**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 website	**www.hansfordcad.org/**
County website	**www.co.hansford.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
HARDEMAN—Quanah	
Designated sale site	Old county courtroom inside the south entrance, first floor of the courthouse
Appraisal district website	**www.taxnetusa.com/texas/hardeman/**
County website	**www.hardemancountytexas.us/**
HARDIN—Kountze	
Designated sale site	Commissioners courtroom, first floor of courthouse
Appraisal district website	**http://hardin-cad.org/**
County website	**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 website	**www.hcad.org/**
County websites	**www.co.harris.tx.us/** **www.cclerk.hctx.net/**
HARRISON—Marshall	
Designated sale site	Immediately outside easternmost entrance to courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=harrrisoncad**
County website	**http://harrisoncountytexas.org/**
HARTLEY—Channing	
Designated sale site	Front door of courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=hartleycad**
County website	**www.co.hartley.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
HASKELL—Haskell	
Designated sale site	South entrance of courthouse
Appraisal district website	**http://haskellcad.com/**
County website	**www.co.haskell.tx.us/**
HAYS—San Marcos	
Designated sale site	South door of Hays County Government Center, 712 South Stagecoach Trail
Appraisal district website	**www.hayscad.com/**
County website	**www.co.hays.tx.us/**
HEMPHILL—Canadian	
Designated sale site	Front door of courthouse
Appraisal district website	**www.taxnetusa.com/texas/hemphill/**
County website	**www.co.hemphill.tx.us/**
HENDERSON—Athens	
Designated sale site	South entrance porch of courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=hendersoncad**
County website	**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 website	**www.hidalgoad.org/**
County websites	**https://tx-hidalgocounty.civicplus.com/**

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County/County Seat	*Designated Sale Site and Website 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 website	**www.hillcad.org/**
County website	**www.co.hill.tx.us/**
HOCKLEY—Levelland	
Designated sale site	North door of courthouse
Appraisal district website	**www.hockleycad.org/**
County website	**www.co.hockley.tx.us/**
HOOD—Granbury	
Designated sale site	Steps at front entrance on south side of courthouse
Appraisal district website	**www.co.hood.tx.us/161/Appraisal-District**
County website	**www.co.hood.tx.us/**
HOPKINS—Sulphur Springs	
Designated sale site	Southwest entrance to first floor of courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=hopkinscad**
County website	**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 website	**www.houstoncad.org/**
County website	**www.co.houston.tx.us/**
HOWARD—Big Spring	
Designated sale site	North door of courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=howardcad**
County website	**www.co.howard.tx.us/**
HUDSPETH—Sierra Blanca	
Designated sale site	Front steps of courthouse
Appraisal district website	**www.taxnetusa.com/texas/hudspeth/**
County website	**www.hudspethcountytexas.us/**

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County/County Seat	*Designated Sale Site and Website 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 website	**www.hunt-cad.org/**
County website	**www.huntcounty.net/**
HUTCHINSON—Stinnett	
Designated sale site	West courthouse steps or inside west courthouse door in case of inclement weather
Appraisal district website	**www.hutchinsoncad.org/**
County website	**www.co.hutchinson.tx.us/**

I

IRION—Mertzon	
Designated sale site	Steps just inside main foyer on east side of courthouse
Appraisal district website	**www.taxnetusa.com/texas/irion/**
County website	**www.co.irion.tx.us/**

J

JACK—Jacksboro	
Designated sale site	Steps fronting doors on west side of courthouse
Appraisal district website	**www.jackcad.org/**
County website	**www.jackcounty.org/**
JACKSON—Edna	
Designated sale site	Downstairs main lobby at courthouse front door facing Main Street
Appraisal district website	**www.jacksoncad.org/**
County website	**www.co.jackson.tx.us/**
JASPER—Jasper	
Designated sale site	Steps at south entrance of courthouse annex building
Appraisal district website	**www.jaspercad.org/**
County website	**www.co.jasper.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
JEFF DAVIS—Fort Davis	
Designated sale site	South entrance of courthouse
Appraisal district website	**www.jeffdaviscad.org/**
County website	**www.co.jeff-davis.tx.us/**
JEFFERSON—Beaumont	
Designated sale site	Most northerly entrance of newest addition to courthouse
Appraisal district website	**www.jcad.org/**
County website	**www.co.jefferson.tx.us/**
JIM HOGG—Hebbronville	
Designated sale site	West side of courthouse
Appraisal district website	**www.taxnetusa.com/texas/jimhogg/**
County website	**http://jimhoggcounty.net/**
JIM WELLS—Alice	
Designated sale site	South door of courthouse
Appraisal district website	**www.jimwellscad.org/**
County website	**www.co.jim-wells.tx.us/**
JOHNSON—Cleburne	
Designated sale site	Outside west doors of courthouse
Appraisal district website	**www.johnsoncad.com/**
County website	**www.johnsoncountytx.org/**
JONES—Anson	
Designated sale site	South hall entrance on first floor of courthouse
Appraisal district website	**www.jonescad.org/**
County website	**www.co.jones.tx.us/**

K

KARNES—Karnes City	
Designated sale site	Area inside courthouse front door (east entrance, facing Panna Maria)
Appraisal district website	**www.karnescad.org/**
County website	**www.co.karnes.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
KAUFMAN—Kaufman	
Designated sale site	Front steps of courthouse
Appraisal district website	**www.kaufman-cad.org/**
County website	**www.kaufmancounty.net/**
KENDALL—Boerne	
Designated sale site	Main entrance of courthouse, 201 E. San Antonio Street
Appraisal district website	**www.kendallad.org/**
County website	**www.co.kendall.tx.us/**
KENEDY—Sarita	
Designated sale site	East door of courthouse steps
Appraisal district website	**www.taxnetusa.com/texas/kenedy/**
County website	**www.co.kenedy.tx.us/**
KENT—Jayton	
Designated sale site	Front steps of courthouse
Appraisal district website	**www.kentcad.org/**
County website	**www.kentcountytexas.us/**
KERR—Kerrville	
Designated sale site	Steps in front of courthouse
Appraisal district website	**www.kerrcad.org/**
County website	**www.co.kerr.tx.us/**
KIMBLE—Junction	
Designated sale site	Steps of west door of courthouse
Appraisal district website	**www.kimblecad.org/**
County website	**www.co.kimble.tx.us/**
KING—Guthrie	
Designated sale site	West door of courthouse
Appraisal district website	**www.kingcad.org**
County website	**www.kingcountytexas.us**
KINNEY—Brackettville	
Designated sale site	Main courthouse entrance facing James Street, on northeast side of building
Appraisal district website	**www.kinneycad.org/**
County website	**www.co.kinney.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
KLEBERG—Kingsville	
Designated sale site	West entrance of courthouse
Appraisal district website	**www.kleberg-cad.org/**
County website	**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 website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=knoxcad**
County website	**www.knoxcountytexas.org/**

L

County/County Seat	*Designated Sale Site and Website Information*
LAMAR—Paris	
Designated sale site	East foyer, just inside first floor east entrance of courthouse
Appraisal district website	**http://lamarcad.org/**
County website	**www.co.lamar.tx.us/**
LAMB—Littlefield	
Designated sale site	Front door on north side of courthouse
Appraisal district website	**www.lambcad.org/**
County website	**www.co.lamb.tx.us/**
LAMPASAS—Lampasas	
Designated sale site	West entrance of courthouse
Appraisal district website	**www.lampasascad.org/**
County website	**www.co.lampasas.tx.us/**
LA SALLE—Cotulla	
Designated sale site	East side of entrance of courthouse
Appraisal district website	**www.lasallecad.com/**
County website	**www.lasallecountytx.org/**
LAVACA—Hallettsville	
Designated sale site	East steps of courthouse
Appraisal district website	**www.lavacacad.com/**
County website	**www.co.lavaca.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
LEE—Giddings	
Designated sale site	Northeast corner of courthouse
Appraisal district website	**www.lee-cad.org/**
County website	**www.co.lee.tx.us/**
LEON—Centerville	
Designated sale site	Southeast doors of District Court Building
Appraisal district website	**www.leoncad.org/**
County website	**www.co.leon.tx.us/**
LIBERTY—Liberty	
Designated sale site	Front steps on south side of courthouse, 1923 Sam Houston
Appraisal district website	**www.libertycad.com/**
County website	**www.co.liberty.tx.us/**
LIMESTONE—Groesbeck	
Designated sale site	Front door of courthouse
Appraisal district website	**www.limestonecad.com/**
County website	**www.co.limestone.tx.us/**
LIPSCOMB—Lipscomb	
Designated sale site	West porch and steps of courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=lipscombcad**
County website	**www.co.lipscomb.tx.us/**
LIVE OAK—George West	
Designated sale site	Front steps of courthouse
Appraisal district website	**www.liveoakappraisal.com/**
County website	**www.co.live-oak.tx.us/**
LLANO—Llano	
Designated sale site	South door of courthouse
Appraisal district website	**www.llanocad.net/**
County website	**www.co.llano.tx.us/**
LOVING—Mentone	
Designated sale site	100 Bell Street, east door
Appraisal district website	**http://lovingcad.org/**
County website	**www.lovingcountytexas.com/**

County/County Seat	*Designated Sale Site and Website 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 website	**www.lubbockcad.org/Appraisal/PublicAccess/**
County website	**www.co.lubbock.tx.us/**
LYNN—Tahoka	
Designated sale site	Steps on north side of courthouse
Appraisal district website	**www.lynncad.org/**
County website	**www.co.lynn.tx.us/**

M

County/County Seat	*Designated Sale Site and Website Information*
MADISON—Madisonville	
Designated sale site	First-floor foyer in front of county clerk's office, room 102
Appraisal district website	**www.madisoncad.org/**
County website	**www.co.madison.tx.us/**
MARION—Jefferson	
Designated sale site	Austin Street courthouse door
Appraisal district website	**www.marioncad.org/**
County website	**www.co.marion.tx.us/**
MARTIN—Stanton	
Designated sale site	At or about bulletin board inside northeast entrance of courthouse
Appraisal district website	**www.martincad.org/**
County website	**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 website	**www.masoncad.org/**
County website	**www.co.mason.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
MATAGORDA—Bay City	
Designated sale site	North foyer of courthouse
Appraisal district website	**www.matagorda-cad.org/**
County website	**www.co.matagorda.tx.us/**
MAVERICK—Eagle Pass	
Designated sale site	Steps at front of courthouse, on Quarry Street
Appraisal district website	**www.maverickcad.org/**
County website	**www.co.maverick.tx.us/**
McCULLOCH—Brady	
Designated sale site	South side steps/porch of courthouse
Appraisal district website	**www.mccullochcad.org/**
County website	**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 website	**www.mclennancad.org/**
County website	**www.co.mclennan.tx.us/**
McMULLEN—Tilden	
Designated sale site	County commissioners courtroom in courthouse
Appraisal district website	**www.mcmullencad.org/**
County website	**www.mcmullencountytexas.us/**
MEDINA—Hondo	
Designated sale site	Area in front of north door of courthouse
Appraisal district website	**www.medinacad.org/**
County website	**www.medinacountytexas.org/**
MENARD—Menard	
Designated sale site	Outside north door of courthouse facing American Legion Park, including steps and porch
Appraisal district website	**www.menardcad.org/**
County website	**www.co.menard.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
MIDLAND—Midland	
Designated sale site	South entrance of courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=midlandcad**
County website	**www.co.midland.tx.us/**
MILAM—Cameron	
Designated sale site	East door of courthouse
Appraisal district website	**http://milamad.org/**
County website	**www.milamcounty.net/**
MILLS—Goldthwaite	
Designated sale site	North porch of courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=millscad**
County website	**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 website	**www.mitchellcad.org/**
County website	**www.mitchellcountytexas.us/**
MONTAGUE—Montague	
Designated sale site	East entrance to courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=montaguecad**
County website	**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 website	**www.mcad-tx.org/**
County website	**www.mctx.org/**

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County/County Seat	*Designated Sale Site and Website Information*
MOORE—Dumas	
Designated sale site	Center area of hall on first floor of courthouse
Appraisal district website	**www.moorecad.org/**
County website	**www.co.moore.tx.us/**
MORRIS—Daingerfield	
Designated sale site	East door of courthouse
Appraisal district website	**http://morriscad.com**
County website	**www.co.morris.tx.us/**
MOTLEY—Matador	
Designated sale site	South entrance of courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=motleycad**
County website	**www.motleycountytexas.us/**

N

County/County Seat	*Designated Sale Site and Website Information*
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 website	**www.nacocad.org/**
County website	**www.co.nacogdoches.tx.us/**
NAVARRO—Corsicana	
Designated sale site	East entrance, Navarro Center, 800 N. Main
Appraisal district website	**www.navarrocad.com/**
County website	**www.co.navarro.tx.us/**
NEWTON—Newton	
Designated sale site	East door of courthouse
Appraisal district website	**www.newtoncad.org/**
County website	**www.co.newton.tx.us/**
NOLAN—Sweetwater	
Designated sale site	Lobby of courthouse
Appraisal district website	**www.nolan-cad.org/**
County website	**www.co.nolan.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
NUECES—Corpus Christi	
Designated sale site	South entrance of courthouse facing Lipan Street
Appraisal district website	**www.ncadistrict.com/**
County website	**www.co.nueces.tx.us/**

O

OCHILTREE—Perryton	
Designated sale site	Main entrance to courthouse
Appraisal district website	**www.ochiltreecad.com**
County website	**www.co.ochiltree.tx.us/**
OLDHAM—Vega	
Designated sale site	East steps of courthouse at east entrance
Appraisal district website	**www.taxnetusa.com/texas/oldham/**
County website	**www.co.oldham.tx.us/**
ORANGE—Orange	
Designated sale site	Back door of courthouse
Appraisal district website	**www.orangecad.net/**
County website	**www.co.orange.tx.us/**

P

PALO PINTO—Palo Pinto	
Designated sale site	Exterior steps at south-facing courthouse door
Appraisal district website	**http://iswdataclient.azurewebsites.net/webidex.aspx?dbkey=palopintocad**
County website	**www.co.palo-pinto.tx.us/**
PANOLA—Carthage	
Designated sale site	Steps on east side of courthouse
Appraisal district website	**www.panolacad.org/**
County website	**www.co.panola.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
PARKER—Weatherford	
Designated sale site	Area immediately outside south door and main entrance of district court building
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=parkercad**
County website	**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 website	**www.parmercad.org/**
County website	**http://parmercounty.org/**
PECOS—Fort Stockton	
Designated sale site	East steps of courthouse
Appraisal district website	**www.pecoscad.org/**
County website	**www.co.pecos.tx.us/**
POLK—Livingston	
Designated sale site	Posting board inside north entrance of courthouse
Appraisal district website	**www.polkcad.org/**
County website	**www.co.polk.tx.us/**
POTTER—Amarillo	
Designated sale site	Steps of west entrance of courthouse
Appraisal district website	**www.prad.org/**
County website	**www.co.potter.tx.us/**
PRESIDIO—Marfa	
Designated sale site	Front door at steps of courthouse
Appraisal district website	**www.presidiocad.org/**
County website	**www.co.presidio.tx.us/**

R

RAINS—Emory	
Designated sale site	Within 20-foot radius of east door of courthouse
Appraisal district website	**www.rainscad.org/**
County website	**www.co.rains.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
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 website	**www.prad.org/**
County website	**www.randallcounty.org/**
REAGAN—Big Lake	
Designated sale site	Vestibule area immediately inside front door on south side of courthouse
Appraisal district website	**www.reagancad.org/**
County website	**www.reagancountytexas.us/**
REAL—Leakey	
Designated sale site	Main, south, outside entrance to courthouse
Appraisal district website	**www.realcad.org/**
County website	**www.co.real.tx.us/**
RED RIVER—Clarksville	
Designated sale site	Hallway inside east door of courthouse
Appraisal district website	**http://redrivercoc.com/county/red-river-appraisal-district/**
County website	**www.co.red-river.tx.us/**
REEVES—Pecos	
Designated sale site	Front door at steps of courthouse
Appraisal district website	**www.reevescad.org/**
County website	**www.reevescountytexas.net/**
REFUGIO—Refugio	
Designated sale site	Front porch of courthouse, on easterly side of courthouse facing Commerce Street
Appraisal district website	**www.refugiocad.org/**
County website	**www.co.refugio.tx.us/**
ROBERTS—Miami	
Designated sale site	South porch of courthouse
Appraisal district website	**www.taxnetusa.com/texas/roberts/**
County website	**www.robertscountytexas.us/**

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County/County Seat	*Designated Sale Site and Website Information*
ROBERTSON—Franklin	
Designated sale site	South door of courthouse
Appraisal district website	**http://robertsoncad.com/**
County website	**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 website	**www.rockwallcad.com/**
County website	**www.rockwallcountytexas.com/**
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 website	**http://runnelscad.org/**
County website	**www.co.runnels.tx.us/**
RUSK—Henderson	
Designated sale site	Foyer at north Main Street entrance of courthouse
Appraisal district website	**www.ruskcad.org/**
County website	**www.co.rusk.tx.us/**

S

SABINE—Hemphill	
Designated sale site	Front steps on north side of courthouse
Appraisal district website	**www.sabine-cad.org/**
County website	**www.co.sabine.tx.us/**
SAN AUGUSTINE—San Augustine	
Designated sale site	Northeast corner of courthouse square at Stripling Pavilion
Appraisal district website	**www.sanaugustinecad.org/**
County website	**www.co.san-augustine.tx.us/**
SAN JACINTO—Coldspring	
Designated sale site	North end of courthouse
Appraisal district website	**www.sjcad.org/**
County website	**www.co.san-jacinto.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
SAN PATRICIO—Sinton	
Designated sale site	First floor of courthouse, at south entrance, between glass doors in vestibule
Appraisal district website	**www.spcad-egov.org/**
County website	**www.co.san-patricio.tx.us/**
SAN SABA—San Saba	
Designated sale site	South steps of courthouse
Appraisal district website	**www.sansabacad.org/**
County website	**www.co.san-saba.tx.us/**
SCHLEICHER—Eldorado	
Designated sale site	South door of courthouse
Appraisal district website	**www.schleichercad.org/**
County website	**www.schleichercountytexas.us/**
SCURRY—Snyder	
Designated sale site	North steps of courthouse
Appraisal district website	**www.scurrytex.com/**
County website	**www.co.scurry.tx.us/**
SHACKELFORD—Albany	
Designated sale site	East door of courthouse
Appraisal district website	**www.shackelfordcad.com/**
County website	**http://shackelfordcounty.org/**
SHELBY—Center	
Designated sale site	Area within 100-foot radius of southeastern door of house provided for holding district court
Appraisal district website	**www.shelbycad.com/**
County website	**www.co.shelby.tx.us/**
SHERMAN—Stratford	
Designated sale site	Foyer at front door of courthouse
Appraisal district website	**www.shermancad.org/**
County website	**www.co.sherman.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
SMITH—Tyler	
Designated sale site	Within 25 feet of and including outside steps and main hall of west entrance of courthouse
Appraisal district website	**www.smithcad.org/**
County website	**www.smith-county.com/**
SOMERVELL—Glen Rose	
Designated sale site	East door of courthouse
Appraisal district website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=somervellcad**
County website	**www.co.somervell.tx.us/**
STARR—Rio Grande City	
Designated sale site	Front steps of south side entrance to courthouse
Appraisal district website	**www.starrcad.org/**
County website	**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 website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=stephenscad**
County website	**www.co.stephens.tx.us/**
STERLING—Sterling City	
Designated sale site	Front steps of courthouse
Appraisal district website	**www.sterlingcad.org/**
County website	**www.co.sterling.tx.us/**
STONEWALL—Aspermont	
Designated sale site	Steps on front entrance on south side of courthouse
Appraisal district website	**www.stonewallcad.org/**
County website	**www.stonewallcountytexas.us/**
SUTTON—Sonora	
Designated sale site	Front (south) courthouse steps facing Water Street
Appraisal district website	**http://suttoncad.com/**
County website	**www.co.sutton.tx.us/**

County/County Seat	*Designated Sale Site and Website Information*
SWISHER—Tulia	
Designated sale site	Steps inside west entrance of courthouse
Appraisal district website	**www.swisher-cad.org/**
County website	**www.co.swisher.tx.us/**

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 website	**www.tad.org/**
County website	**www.tarrantcounty.com/**
TAYLOR—Abilene	
Designated sale site	Lobby of southeast entrance of courthouse and adjacent exterior upper porch area
Appraisal district website	**www.taylor-cad.org/**
County website	**www.taylorcountytexas.org/**
TERRELL—Sanderson	
Designated sale site	Front steps on south side of courthouse
Appraisal district website	**www.terrellcad.org/**
County website	**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 website	**http://terrycoad.org/**
County website	**www.co.terry.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
THROCKMORTON—Throckmorton	
Designated sale site	East entrance hallway of first floor of courthouse
Appraisal district website	**www.throckmortoncad.org/**
County website	**www.throckmortontx.org/index.html**
TITUS—Mount Pleasant	
Designated sale site	North entrance of courthouse
Appraisal district website	**www.titus-cad.org/**
County website	**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 website	**http://iswdataclient.azurewebsites.net/webindex.aspx?dbkey=tomgreencad**
County website	**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 website	**www.traviscad.org/**
County website	**www.co.travis.tx.us/**
TRINITY—Groveton	
Designated sale site	Front center steps of courthouse
Appraisal district website	**www.trinitycad.net/**
County website	**www.co.trinity.tx.us/**
TYLER—Woodville	
Designated sale site	Under the stairs of the north entrance of courthouse
Appraisal district website	**www.tylercad.net/**
County website	**www.co.tyler.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*

U

UPSHUR—Gilmer

Designated sale site	South (Highway 154) entry of courthouse
Appraisal district website	**www.upshur-cad.org/**
County website	**www.countyofupshur.com/**

UPTON—Rankin

Designated sale site	Steps of south door of courthouse
Appraisal district website	**http://uptoncad.org/**
County website	**www.co.upton.tx.us/**

UVALDE—Uvalde

Designated sale site	Steps on east side of courthouse
Appraisal district website	**www.uvaldecad.org/**
County website	**www.uvaldecounty.com/**

V

VAL VERDE—Del Rio

Designated sale site	Front steps of courthouse
Appraisal district website	**http://valverdecad.org/**
County website	**www.valverdecounty.org/**

VAN ZANDT—Canton

Designated sale site	Steps on north side of courthouse
Appraisal district website	**http://vzcad.org/**
County website	**www.vanzandtcounty.org/**

VICTORIA—Victoria

Designated sale site	Area in front of east door of courthouse facing North Bridge Street
Appraisal district website	**www.victoriacad.org/**
County website	**www.victoriacountytx.org/**

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County/County Seat	*Designated Sale Site and Website Information*

W

WALKER—Huntsville

Designated sale site	East entrance and adjacent areas of courthouse
Appraisal district website	**www.walkercountyappraisal.com/**
County website	**www.co.walker.tx.us/**

WALLER—Hempstead

Designated sale site	Foyer at south entrance to courthouse
Appraisal district website	**www.waller-cad.org/**
County website	**www.co.waller.tx.us/**

WARD—Monahans

Designated sale site	First-floor lobby at west front door of courthouse
Appraisal district website	**www.wardcad.org/**
County website	**www.co.ward.tx.us/**

WASHINGTON—Brenham

Designated sale site	South entrance of courthouse
Appraisal district website	**http://washingtoncad.org/**
County website	**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 website	**www.webbcad.org/**
County website	**www.webbcounty.com/**

WHARTON—Wharton

Designated sale site	Outside front entrance of courthouse annex
Appraisal district website	**www.whartoncad.net/**
County website	**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 website	**www.wheelercad.org/**
County website	**www.co.wheeler.tx.us/**

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County/County Seat	*Designated Sale Site and Website Information*
WICHITA—Wichita Falls	
Designated sale site	South steps of courthouse
Appraisal district website	**www.wadtx.com/**
County website	**www.co.wichita.tx.us/**
WILBARGER—Vernon	
Designated sale site	West door of courthouse at top of steps
Appraisal district website	**www.wilbargerappraisal.org/**
County website	**www.co.wilbarger.tx.us/**
WILLACY—Raymondville	
Designated sale site	Front-door steps of courthouse, facing Hidalgo Avenue
Appraisal district website	**https://propaccess.trueautomation.com/clientdb/?cid=31**
County website	**www.co.willacy.tx.us/**
WILLIAMSON—Georgetown	
Designated sale site	Northeast lower-level door of Justice Center
Appraisal district website	**www.wcad.org/**
County website	**www.wilco.org/**
WILSON—Floresville	
Designated sale site	Most westerly courthouse door (faces Third Street)
Appraisal district website	**http://wilson-cad.org/**
County website	**www.co.wilson.tx.us/**
WINKLER—Kermit	
Designated sale site	Steps outside south doorway of courthouse
Appraisal district website	**www.winklercad.org/**
County website	**www.co.winkler.tx.us/**
WISE—Decatur	
Designated sale site	Front door at southeast corner of courthouse
Appraisal district website	**https://iswdataclient.azurewebsites.net/webindex.aspx?dbkey= wisecad**
County website	**www.co.wise.tx.us/**
WOOD—Quitman	
Designated sale site	Front door on east side of courthouse
Appraisal district website	**www.woodcad.net/**
County website	**www.mywoodcounty.com/**

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County/County Seat	*Designated Sale Site and Website Information*

Y

YOAKUM—Plains

Designated sale site	South front entrance of courthouse
Appraisal district website	**www.taxnetusa.com/texas/yoakum/#!search**
County website	**www.co.yoakum.tx.us/**

YOUNG—Graham

Designated sale site	Under portico at north entrance of courthouse
Appraisal district website	**www.youngcad.org/**
County website	**www.co.young.tx.us/**

Z

ZAPATA—Zapata

Designated sale site	Front doors of main courthouse entrance
Appraisal district website	**http://zapatacad.com**
County website	**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 website	**http://zavalacad.com/**
County website	**www.co.zavala.tx.us/**

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Statutes and Rules Cited

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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 cannot 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

Effective September 1, 2015, Texas Property Code section 209.0092(a) provides that a POA whose dedicatory instruments granted a power of sale could use the expedited foreclosure procedures under Tex. R. Civ. P. 735 and 736 to obtain the court order necessary to foreclose a POA assessment lien. *See* Tex. Prop. Code § 209.0092(a). However, expedited foreclosure is not required if the owner agrees in writing at the time the foreclosure is sought to waive expedited foreclosure, and 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

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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.

§ 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 reference 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.

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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

A citation directed to a respondent must be mailed to each respondent's last known address stated in the application. Tex. R. Civ. P. 736.3(b)(1). A citation also 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).

POAs 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.

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 Mon-

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day 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

Texas Civil Practice and Remedies Code section 154.028 creates a process for court-mandated mediation applicable in expedited foreclosure proceedings. 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.

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§ 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).

Practice Tip: When considering POA foreclosures, be aware many judges ignore Tex. R. Civ. P. 736.6, which states, "The Court must not conduct a hearing under this rule unless a response is filed," and set a hearing even though at the hearing the court grants a default judgment.

§ 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.

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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.

During the 85th legislative session, Texas Civil Practice and Remedies Code section 34.041 and Texas Property Code section 51.002 were amended to provide that a foreclosure sale must take place between 10:00 A.M. and 4:00 P.M. on the first Tuesday of a month or, if the first Tuesday of a month occurs on January 1 or July 4, between 10:00 A.M. and 4:00 P.M. on the first Wednesday of the month. *See* Acts 2017, 85th Leg., R.S., ch. 133, §§ 1, 2 (H.B. 1128), eff. Sept. 1, 2017.

Also during the 85th legislative session, the Texas Business and Commerce Code was amended by adding chapter 22 dealing with the public sale of residential real property under a power of sale in a security instrument. *See* Acts 2017, 85th Leg., R.S., ch. 1012, § 1 (H.B. 1470), eff. Sept. 1, 2017. The legislation does not apply to the judicial foreclosure sales of POAs but is applicable to POA foreclosure sales conducted pursuant to an order granting an application for expedited foreclosure under Texas Rules of Civil Procedure 735 and 736.

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Information from the Winning Bidder: A winning bidder at a sale, other than the foreclosing mortgagee or mortgage servicer, shall provide the following information to the trustee or substitute trustee at the time the trustee or substitute trustee completes the sale:

(1) the name, address, telephone number, and e-mail address of the bidder and of each individual tendering or who will tender the sale price for the winning bid;

(2) if the bidder is acting on behalf of another individual or organization, the name, address, telephone number, and e-mail address of the individual or organization and the name of a contact person for the organization;

(3) the name and address of any person to be identified as the grantee in a trustee's or substitute trustee's deed;

(4) the purchaser's tax identification number;

(5) a government-issued photo identification to confirm the identity of each individual tendering funds for the winning bid; and

(6) any other information reasonably needed to complete the trustee's or substitute trustee's duties and functions concerning the sale.

Tex. Bus. & Com. Code § 22.004(a).

If a winning bidder required to provide information under section 22.004(a) fails or refuses to provide the information, the trustee or substitute trustee may decline to complete the transaction or deliver a deed. Tex. Bus. & Com. Code § 22.004(b).

Receipt and Deed Required from the Trustee or Substitute Trustee: The trustee or substitute trustee must:

(1) provide the winning bidder with a receipt for the sale proceeds tendered; and

(2) except when prohibited by law, within a reasonable time:

(A) deliver the deed to the winning bidder; or

(B) file the deed for the recording.

Tex. Bus. & Com. Code § 22.005.

The trustee or substitute trustee must ensure that funds received at the sale are maintained in a separate account until distributed. Tex. Bus. & Com. Code § 22.006(a). The trustee or substitute trustee shall cause to be maintained a written record of deposits to and disbursements from the account. Tex. Bus. & Com. Code § 22.006(a). The trustee or substitute trustee shall make reasonable attempts to identify and locate the persons entitled to all or any part of the sale proceeds. Tex. Bus. & Com. Code § 22.006(b).

In connection with the sale and related postsale actions to identify persons with legal claims to sale proceeds, determine the priority of any claims, and distribute proceeds to pay claims, a trustee or substitute trustee may receive:

(1) reasonable actual costs incurred, including costs for evidence of title;

(2) a reasonable trustee's or substitute trustee's fee; and

(3) reasonable trustee's or substitute trustee's attorney's fees.

Tex. Bus. & Com. Code § 22.006(c).

A fee described by section 22.006(c):

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(1) is considered earned at the time of the sale;

(2) may be paid from sale proceeds in excess of the payoff of the lien being foreclosed; and

(3) is conclusively presumed to be reasonable if the fee:

(A) is not more than the lesser of 2.5 percent of the sale proceeds or $5,000, for a trustee's or substitute trustee's fee; or

(B) is not more than 1.5 percent of the sale proceeds, for trustee's or substitute trustee's attorney's fees incurred to identify persons with legal claims to sale proceeds and determine the priority of the claims.

Tex. Bus. & Com. Code § 22.006(d).

A trustee or substitute trustee who prevails in a suit based on a claim that relates to the sale and that is found by a court to be groundless in fact or in law is entitled to recover reasonable attorney's fees necessary to defend against the claim, which may be paid from the excess sale proceeds, if any. Tex. Bus. & Com. Code § 22.006(e). Nothing in section 22.006 of the Business and Commerce Code precludes the filing of an interpleader action or the depositing of funds in a court registry. Tex. Bus. & Com. Code § 22.006(f).

§ 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.

Even though a POA may have power of sale language in its dedicatory instruments, a POA may, in its discretion, elect to judicially foreclose 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 is authorized to use to obtain the court order necessary to foreclose its assessment lien. *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

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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

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, 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.

§ 30.4:6 Sale

As discussed in section 30.3:12 above, Texas Civil Practice and Remedies Code section 34.041 and Texas Property Code section 51.002

were amended effective September 1, 2017, to provide that if the first Tuesday of a month occurs on January 1 or July 4, the foreclosure sale must take place on the first Wednesday of the month. While the constable or sheriff is the noticing party of judicial foreclosure sales for POAs, it is important to note that this new legislation will affect the actual date of the sale and practitioners need to be aware that there may be exceptions to the widely understood "first Tuesday of every month" rule for foreclosure sales.

§ 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 website 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

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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).

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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.

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Chapter 31

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[Reserved]

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Chapter 31

Reverse Mortgage Foreclosure Process

The editors gratefully acknowledge Robert D. Forster, II for his contribution to this chapter.

§ 31.1 Introduction

This chapter covers reverse mortgages and the information necessary to initiate and conduct a foreclosure in compliance with the terms of the deed of trust and Texas law. For purposes of this chapter, the type of reverse mortgage referred to is a home equity conversion mortgage (HECM). HECMs are federally insured mortgages, backed by the U.S. Department of Housing and Urban Development (HUD). HECMs comprise the vast majority of the reverse mortgage market, accounting for over 90 percent of the total market share. The origination, servicing, and foreclosure of any non-HECM security instrument is virtually similar, with the sole exception of the necessity for HUD approval under certain circumstances.

§ 31.2 Reverse Mortgage Defined

A constitutional reverse mortgage is defined in terms of an extension of credit made in conformity with the provisions of section 50, article XVI of the Texas Constitution, sections (k) through (p), as authorized under section 50(a)(7). *See* Tex. Const. art. XVI, § 50(k)–(p). In Texas, reverse mortgages are a type of home equity loan granting homeowners, aged sixty-two or older, the ability to convert the equity in their home into tax-free proceeds without having to sell their home, transfer title, or cope with a new monthly mortgage payment. A reverse mortgage is aptly named because the stream of payments is in "reverse" in that a lender makes payments to the borrower, in contrast to a "forward" mortgage, where the borrower makes payments to the lender.

§ 31.3 Unique Characteristics

§ 31.3:1 Constitutional Authorization under Section 50(a)(7)

Strictly construed, reverse mortgages are authorized under Texas Constitution article XVI, section 50(a)(7), in compliance with sections (k) through (p). Consequently, the laundry list of origination restrictions applicable to home equity loans contained in Tex. Const. art. XVI, § 50(a)(6) do not apply to reverse mortgages. This is noteworthy since Texas courts have long held that a valid lien cannot be originated on a homestead property in any manner other than strict compliance with the requirements of the statutes and Constitution. *Toler v. Fertitta*, 67 S.W.2d 229, 230 (Tex. Comm'n App. 1934, holding approved). Also noteworthy is the fact that reverse mortgages are nonrecourse to both the property owner and spouse under Tex. Const. art. XVI, § 50(k)(3).

§ 31.3:2 Two Notes and Two Deeds of Trust

As referenced above, HECMs are backed by HUD. Every HECM loan has two notes and two deeds of trust, each referencing the exact same debt with identical terms. The only material distinction between the two is the beneficiary. The beneficiary of the first is the lender, while the beneficiary of the second is HUD. Typically, the first security instrument is foreclosed. After foreclosure or full satisfaction of the first lien, the second lien is released by HUD. While typically recorded concurrently, it is important to

ensure the first deed of trust is recorded prior to the second deed of trust.

In the event the loan balance of the first lien reaches 98 percent of the maximum claim amount, the lender may assign the first lien to HUD. Under these circumstances, HUD will continue to service the loan until the occurrence of a maturing event, upon which HUD will appoint an authorized foreclosure commissioner to conduct a foreclosure sale in compliance with federal law. *See* 12 U.S.C. §§ 3751–3768.

§ 31.4 Maturing Events

Like "forward" mortgages, prior to initiation of any foreclosure proceeding, there must be the occurrence of a maturing event. The four constitutional grounds for default are: (1) the death of all borrowers; (2) the homestead property securing the loan is sold or otherwise transferred; (3) all borrowers cease occupying the homestead property for a period of longer than twelve consecutive months without prior written approval from the lender; or (4) the borrower (a) defaults on an obligation specified in the loan documents to repair and maintain, pay taxes and assessments on, or insure the homestead property; (b) commits actual fraud in connection with the loan; or (c) fails to maintain the priority of the lender's lien on the homestead property, after the lender gives notice to the borrowers, by promptly discharging within ten days after the date the borrower receives the lender's notice any lien that has priority or may obtain priority over the lender's lien, unless the borrower (i) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to the lender; (ii) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings so as to prevent the enforcement of the lien or forfeiture of any part of the homestead property; and (iii) secures from the holder of the lien an agreement satisfactory to the lender subordinating the lien to all amounts secured by the lender's lien on the homestead property. Tex. Const. art. XVI, § 50(k)(6)(A)–(D). Only the occurrence of a maturing event may initiate the foreclosure process, subject to obtaining any necessary prior approval from the secretary of HUD. See section 31.5 below concerning the approval requirement.

§ 31.4:1 Death of All Borrowers

Pursuant to the terms of the loan agreement, "borrower" is defined as one who signs the note. Given the minimum age requirement associated with reverse mortgages, the death of all borrowers is the most common maturing event. *See* Tex. Const. art. XVI, § 50(k)(6)(A).

§ 31.4:2 Sale or Transfer of Homestead Property

The sale or transfer of all of the borrower's title in the homestead property is a maturing event. *See* Tex. Const. art. XVI, § 50(k)(6)(B). In addition to the occurrence of the transfer of title of all of a borrower's title interest in the property, most reverse mortgage standard deed of trust forms created for use in all states provide that no other borrower shall retain the following: (1) title to the property in fee simple; (2) a leasehold under a lease for less than ninety-nine years which is renewable or a lease having a remaining period of not less than fifty years beyond the date of the one hundredth birthday of the youngest borrower; or (3) a life estate in the property.

§ 31.4:3 Nonoccupancy of Property

Failure to occupy the homestead property by all borrowers for a period of longer than twelve consecutive months without prior written approval from the lender is a maturing event. *See* Tex. Const. art. XVI, § 50(k)(6)(C).

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§ 31.4:4 Breach of Obligation in Loan Documents

Multiple maturing events can be set out in the deed of trust. The most common are the failure of the borrower to repair and maintain, pay taxes and assessments on, or insure the homestead property. Fraud in connection with the loan origination, as well as failure to maintain the priority of the reverse mortgage lien, are also defined as maturing events. *See* Tex. Const. art. XVI, § 50(k)(6)(D).

§ 31.5 Secretary Approval

While not required under the Texas Constitution, HECM security instruments require approval from the secretary of HUD prior to calling the loan due and payable for certain types of maturing events, such as nonpayment of taxes or insurance or failure to properly maintain the property.

Other maturing events, such as the death of all borrowers or transfer of title, do not require HUD approval to enforce the borrower's loan agreement by foreclosure.

§ 31.6 Notice of Maturing Event

Upon occurrence of a maturing event, the lender may not commence foreclosure until notice is provided by mail to the borrower. The notice must specifically give the borrower at least thirty days to do one of the following: (1) remedy the condition causing the default, (2) pay the debt secured by the property, or (3) convey the property to the lender by a deed in lieu of foreclosure. In the event the maturing event is for failure to maintain the priority of the reverse mortgage lien, only twenty days' notice is required. *See* Tex. Const. art. XVI, § 50(k)(10).

§ 31.7 Statute of Limitations

Texas law holds a person must bring suit for recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues. *See* Tex. Civ. Prac. & Rem. Code § 16.035(a). Further, a sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues. *See* Tex. Civ. Prac. & Rem. Code § 16.035(b). After the foreclosure crisis of 2008 through 2010, the statute of limitations became the most heavily litigated topic in foreclosure law. This trend also impacted reverse mortgage foreclosures.

§ 31.7:1 Cause of Action Accrual

Acceleration formally accelerates the maturity of the entire debt and starts the ticking of the clock for statute of limitations purposes. A foreclosure action accrues when the note is accelerated. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001) ("Effective acceleration requires two acts: (1) notice of intent to accelerate, and (2) notice of acceleration."). Unique to reverse mortgages, the type of default dictates when the cause of action accrues (also commonly referred to as "acceleration of the debt").

§ 31.7:2 Case Law

In 2009, a Texas appellate court opinion held the lender's cause of action to enforce the lien accrued and limitations period began to run upon the death of the borrower, not when the lender sent its notice of acceleration. *See Financial Freedom Senior Funding Corp. v. Horrocks*, 294 S.W.3d 749 (Tex. Civ. App.—Houston [14th Dist.] 2009, no pet.). The court distinguished its holding from that in *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562 (Tex. 2001), because the notes at issue in *Hor-*

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rocks did not provide for repayment through periodic installments but rather that payment would be made in full once specified conditions occurred. Because the entire debt would always be due upon demand, there was never any requirement that the debt be accelerated first. *See Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232, 234 (Tex. 1982). Further, the court opined that because the notes are payable at a definite time, in this case, the death of the borrower, the cause of action accrued then. *See Horrocks*, 294 S.W.3d at 754.

The same appellate court considered a similar issue in *Powell v. CIT Bank, N.A.*, No. 14-15-00949-CV, 2016 WL 7323312 (Tex. Civ. App.—Houston [14th Dist.] Dec. 15, 2016, no pet.) (mem. op.). In reviewing when the cause of action accrued for statute of limitation purposes, the court again looked to the loan documents, specifically whether or not the note or deed of trust contained an optional acceleration clause. If a note or deed of trust contains an optional acceleration clause and the holder exercises its option to accelerate, the claim accrues when the holder actually exercises the option to accelerate. *See* Tex. Civ. Prac. & Rem. Code § 16.035(e); *Holy Cross*, 44 S.W.3d at 566. In *Powell*, the court held that neither the note nor the deed of trust contained a clause giving the creditor the option of accelerating the indebtedness in the event that the sole borrower died. *Powell*, 2016 WL 7323312, at *3. Instead, under the plain terms of the note and deed of trust, all outstanding principal, accrued interest, and other charges became immediately due and payable on the date of the borrower's death. The court elaborated by distinguishing *Powell* from *Horrocks* because the notes at issue in *Horrocks* did not provide for repayment through periodic installments or for acceleration in the event of default. *Powell*, 2016 WL 7323312, at *3.

§ 31.7:3 Abandonment of Acceleration

Texas statutorily provides a manner in which a mortgagee can unilaterally rescind acceleration of maturity of a debt. *See* Tex. Civ. Prac. & Rem. Code § 16.038. See section 26.10:2 in this manual. However, in *Powell v. CIT Bank, N.A.*, No. 14-15-00949-CV, 2016 WL 7323312 (Tex. Civ. App.—Houston [14th Dist.] Dec. 15, 2016, no pet.) (mem. op.), since all sums secured under the deed of trust became immediately due and payable upon the death of the borrower, the option to accelerate did not exist, and consequently the acceleration could not be abandoned.

While there is no authority to date on defaulting events other than death, the holdings in *Financial Freedom Senior Funding Corp. v. Horrocks*, 294 S.W.3d 749 (Tex. Civ. App.—Houston [14th Dist.] 2009, no pet.), and *Powell* imply that death is the only defaulting event that cannot be abandoned. While rare, defaults in transfer of title also follow the logic the courts applied in *Horrocks* and *Powell* and presumably would receive similar treatment. As to nonoccupancy and breach of obligations contained in the loan document defaults, the HECM loan documents additionally require secretary approval as a condition precedent to initiation of foreclosure proceedings. See section 31.5 in this chapter. Furthermore, notice of the maturing event is also required under the Texas Constitution. *See* Tex. Const. art. XVI, § 50(k)(10). See section 31.6. Following the logic applied in *Horrocks* and *Powell*, it is probable that defaults for nonoccupancy and breach of obligations contained in the loan documents will be treated as optional acceleration clauses since additional actions other than the default, itself, are needed. As such, these accelerations can also be abandoned.

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§ 31.8 Foreclosure Process

All reverse mortgage foreclosures in Texas are subject to the provisions of Tex. Const. art. XVI, § 50(k), Texas Property Code chapter 51, and the loan agreement.

§ 31.8:1 Quasi-Judicial Foreclosure

The Texas Constitution mandates that foreclosure of a reverse mortgage must include a court order if foreclosure is for grounds other than the death of all borrowers or transfer of title. *See* Tex. Const. art. XVI, § 50(k)(11). The court order requirement is constitutionally vested and cannot be waived by the parties. *See Englander Co. v. Kennedy*, 424 S.W.2d 305 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

§ 31.8:2 Expedited Order Proceeding under Rule 736

Maturing events that require a court order to foreclose under Tex. Const. art. XVI, § 50(k)(11) include nonoccupancy of the property, as well as breach of an obligation specified in the loan documents. All maturing events that require secretary of HUD approval also require a court order to foreclose. See section 31.4 above. See form 31-1 in this manual, Application for an Expedited Order Under Rule 736 on a Home Equity, Reverse Mortgage, or Home Equity Line of Credit Loan, as promulgated by the Texas Supreme Court. See also form 31-2, Affidavit in Support of Petitioner's Application for an Expedited Order Under Rule 736, or, alternatively, the practitioner may use form 31-3, Declaration in Support of Petitioner's Application for an Expedited Order Under Rule 736, both promulgated by the Texas Supreme Court.

§ 31.8:3 Judicial Foreclosure under Rule 735

Rule 735 of the Texas Rules of Civil Procedure provides an alternative remedy to a party seeking to foreclose a reverse mortgage. However, in sharp contrast to rule 736, rule 735 states the party seeking foreclosure must obtain a judgment from a district court in a county where the real property is located for judicial foreclosure. This creates additional burdens and expense for lenders, as judicial foreclosures are more complex than standard nonjudicial foreclosures conducted by the trustee or substitute trustee. See chapter 20 in this manual for a discussion of the judicial foreclosure process and chapter 21 for a discussion of residential nonjudicial foreclosures.

§ 31.8:4 Nonjudicial Foreclosure

Foreclosures conducted on the grounds set out in Tex. Const. art. XVI, § 50(k)(6)(A) or § 50(k)(6)(B) (death of all borrowers or selling or transfer of all title interest of the borrower) are performed under the power of sale contained in the deeds of trust securing the loan and must meet all the requirements of Texas Property Code chapter 51. See chapter 21 in this manual for the residential nonjudicial foreclosure process.

§ 31.9 Mediation Requirement

Under section 154.028 of the Texas Civil Practice and Remedies Code, a court, at its discretion, may conduct a hearing to determine whether to order mediation. This mediation hearing can only occur if a respondent files a response to a foreclosure application. *See* Tex. Civ. Prac. & Rem. Code § 154.028.

§ 31.10 Additional Case Law

While confusing at times, one court of appeals has clarified who indeed is a borrower under a

reverse mortgage loan agreement. In *Washington-Jarmon v. Onewest Bank, FSB*, 513 S.W.3d 103 (Tex. App.—Houston [14th Dist.] 2016, no pet.), despite the reference to each signor to the deed of the trust and usage of the word "borrower" under their respective signature lines, the "borrower" is only the person who signs the note. The court referenced the definition of "borrower" in the note as "each person signing at the end of this Note." *Washington-Jarmon*, 513 S.W.3d at 106. Additionally, the deed of trust stated "that the agreement to repay is evidenced by Borrower's Adjustable Rate Note dated the same date as this Security Instrument." *Washington-Jarmon*, 513 S.W.3d at 109. The court surmised the deed of trust's own terms negated the appellant's assertion as a borrower, despite the shorthand references therein, because the deed of trust looks to the note to define the debt. *Washington-Jarmon*, 513 S.W.3d at 109.

Another case involving reverse mortgages held that HUD regulations are not a private cause of action. *Johnson v. World Alliance Financial Corp.*, 830 F.3d 192 (5th Cir. 2016). The Fifth Circuit elaborated by expressly confirming that HUD regulations govern the relationship between the reverse mortgage lender and HUD as insurer of the loan. HUD regulations do not give the borrower a private cause of action unless the regulations are expressly incorporated in the lender-borrower agreement. *Johnson*, 830 F.3d at 196 (citing *Smith v. JPMorgan Chase Bank, N.A.*, 519 F. App'x 861, 864 (5th Cir. 2013) (holding that federal statutes and regulations can form the basis of a breach of contract claim if expressly incorporated in the contract)).

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Additional Resources

Alsup, J. Alton. "Texas' New and Improved Reverse Mortgage," 68 Tex. B.J. 1076 (Dec. 1995).

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Chapter 33

Servicemembers Civil Relief Act

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Chapter 33

Servicemembers Civil Relief Act

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§ 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) SCRA website at **https://scra.dmdc.osd.mil/scra/#/home**, 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.

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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 website provides the servicemember's last date of active duty military service by accessing **https://scra.dmdc.osd.mil/scra/#/single-record**. 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 generally* 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).

§ 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 stand-

ing 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 Servicemembers Civil Relief Act, available at **http://www.nclamp.gov/media/425665/jdg-guide.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

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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, 2017. This means that effective January 1, 2018, 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.

§ 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.

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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).

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§ 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

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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).

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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://www.nclamp.gov/media/425665/jdg-guide.pdf**.

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Chapter 34

Residential Evictions Following Foreclosure

The editors gratefully acknowledge Jack O'Boyle and Travis Gray for their contribution to this chapter.

§ 34.1 Introduction

Texas foreclosures are predominantly nonjudicial proceedings without the need for court involvement. However, after foreclosure, if the borrower or occupant of the foreclosed property refuses to vacate the property, the foreclosure purchaser must initiate a suit in the justice of the peace court in the precinct where the foreclosed property is located to obtain possession of the property.

Although under Texas law the cause of action used to oust a borrower or occupant from the premises is commonly known as an eviction suit, statutorily an eviction must be brought as either a forcible-entry-and-detainer suit or a forcible-detainer suit. Generally, in this chapter the word *eviction* is used to describe the process of removing a borrower, tenant, or occupant from real property after foreclosure, regardless of whether a forcible-entry-and-detainer or forcible-detainer action is required.

A forcible entry and detainer occurs when a person enters real property of another without legal authority or by force and refuses to surrender possession upon demand. Tex. Prop. Code § 24.001(a). No landlord-tenant relationship exists in a forcible-entry situation. *American Spiritualist Ass'n v. Ravkind*, 313 S.W.2d 121, 124 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.).

By contrast, under Texas Property Code section 24.002, a person commits a forcible detainer if he refuses to surrender possession of real property on demand and the person is either (1) a tenant or a subtenant who willfully and without force holds over after termination of the tenant's right of possession; (2) a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease; or (3) a tenant of a person who acquired possession by forcible entry. Tex. Prop. Code § 24.002(a). In this instance, the landlord's remedy to regain possession from the tenant is an action in forcible detainer. *Goggins v. Leo*, 849 S.W.2d 373, 375 (Tex. App.—Houston [14th Dist.] 1993, no writ) (plaintiff prevailed on theory that defendant was tenant by sufferance).

While both types of eviction suits are intended to be expedited proceedings, there are numerous pitfalls that can turn the normal thirty- to forty-five-day eviction proceeding into a two-year legal entanglement. The purpose of this chapter is to explain generally the eviction process after foreclosure—especially for those who are not familiar with this unique proceeding.

§ 34.2 Distinction between Forcible-Entry-and-Detainer and Forcible-Detainer Suits

There are procedural and evidentiary differences between a Texas Property Code section 24.001 action for forcible entry and detainer and a forcible-detainer action described in Texas Property Code section 24.002. Procedurally, Texas Property Code section 24.005 provides different requirements on how notice must be given to a defendant before filing a forcible-entry-and-detainer suit or a forcible-detainer suit. *See* Tex. Prop. Code § 24.005. From the

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standpoint of evidence, the plaintiff must show the defendant entered the real property of another without legal authority or by force in a forcible-entry-and-detainer suit, while no such showing is required in a forcible-detainer suit. *Yarto v. Gilliland*, 287 S.W.3d 83, 87 n.3 (Tex. App.—Corpus Christi 2009, no pet.).

§ 34.3 Eviction Following Foreclosure

After foreclosure, a purchaser is entitled to full ownership of the rights conveyed at foreclosure, including possession. *Scott v. Hewitt*, 90 S.W.2d 816 (Tex. 1936). Although foreclosure transfers title from the mortgagor to the purchaser, it does not put the purchaser in possession; it only gives the purchaser a right to possession. *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595, 603 (Tex. App.—Houston [14th Dist.] 1994, writ denied). If a mortgagor or another party who is not entitled to possession remains in possession of property following foreclosure, that party is deemed a tenant at sufferance. *Home Savings Ass'n v. Ramirez*, 600 S.W.2d 911 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). To remove a tenant at sufferance, the foreclosure sale purchaser may file a forcible-detainer suit. *Lighthouse Church of Cloverleaf*, 889 S.W.2d at 603.

Beginning in 1989, the Texas legislature specifically provided that an occupant of property at the time of foreclosure could be evicted by a forcible-detainer lawsuit if the lien foreclosed was superior to the occupant's lease. Tex. Prop. Code § 24.002(a)(2); *Powelson v. U.S. Bank National Ass'n*, 125 S.W.3d 810 (Tex. App.—Dallas 2004, no pet.). Previously, a forcible-detainer lawsuit could not be brought after foreclosure unless the deed of trust provided for a landlord-tenant relationship after foreclosure. *Ramirez*, 600 S.W.2d at 913.

With the 1989 change to Texas Property Code section 24.002, arguably a buyer at a foreclosure sale can bring a forcible-detainer suit without having to prove the deed of trust created a landlord-tenant relationship after foreclosure. However, this proposition has not been definitely decided by the courts. *See Chinyere v. Wells Fargo Bank, N.A.*, 440 S.W.3d 80 (Tex. App.—Houston [1st Dist.] 2012, no pet.). When a defendant in a postforeclosure eviction suit raises issues of title, the substitute trustee's deed is not, in itself, sufficient to establish a landlord-tenant relationship; therefore, a deed of trust containing a "tenant at sufferance" clause is necessary. *Wells Fargo, N.A. v. Steel*, No. 03-13-00297-CV, 2014 WL 108414 (Tex. App.—Austin Jan. 7, 2014, no pet.) (mem. op.).

§ 34.4 Occupying, Vacating, and Abandoning Property

After foreclosure, a purchaser may find it difficult to determine whether an eviction action is needed for occupied property. Important to such an analysis is the fact that, in Texas, a tenant may occupy a property without actually living in it. *Kelley-Coppedge, Inc. v. Highlands Insurance Co.*, 980 S.W.2d 462, 468 (Tex. 1998) ("occupy" means "to hold or keep for use"). A tenant has vacated the premises when the tenant no longer occupies the premises and has removed all or substantially all of his property from the premises. *Knoff v. United States Fidelity & Guaranty Co.*, 447 S.W.2d 497, 501 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ). Intent is not required to establish that an occupant has vacated the premises. *Scot Properties, Ltd. v. Wal-Mart Stores, Inc.*, 138 F.3d 571 (5th Cir. 1998). If a substantial amount of personal property remains in the premises, the property should be considered "occupied" and an action for forcible detainer pursued.

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§ 34.5 Governing Law and Statutes

Chapter 24 of the Texas Property Code sets the statutory requirements for both forcible-entry-and-detainer and forcible-detainer lawsuits. *See* Tex. Prop. Code §§ 24.001–.011. The Rules of Practice in Justice Courts, chapter 500 of Texas Rules of Civil Procedure, and specifically Texas Rule of Civil Procedure 510 apply "to a lawsuit to recover possession of real property under Chapter 24 of the Texas Property Code." Tex. R. Civ. P. 510.

It must be noted that unless a specific eviction rule found in rule 510 apply, the rules of civil procedure applying to all justice court proceedings are also applicable to eviction matters.

§ 34.6 Jurisdiction

The justice court in the precinct in which the real property is located has jurisdiction to issue a writ of possession in any eviction suit. Tex. Prop. Code § 24.004. Additionally, a forcible-detainer judgment does not have res judicata effect with respect to other issues related to a lease other than the right to immediate possession of the property. *McGlothlin v. Kliebert*, 672 S.W.2d 231 (Tex. 1984). When a mortgage holder forecloses and seeks to evict the former owner, the owner's contention that the foreclosure and sale were not properly conducted does not deprive the justice court of jurisdiction to grant an eviction. *Dormady v. Dinero Land & Cattle Co.*, 61 S.W.3d 555 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.); *Falcon v. Ensignia*, 976 S.W.2d 336, 338 (Tex. App.—Corpus Christi 1998, no pet.) ("Justice courts may adjudicate possession even where issues related to the title of real property are tangentially or collaterally related to possession.").

However, if the question of title is so integrally linked to the issue of possession and possession cannot be determined without first determining title, a justice court lacks jurisdiction to grant an eviction. *Falcon*, 976 S.W.2d at 338. A suit to determine title and ownership of real property can be brought in only a district court or a county court with jurisdiction to determine title.

§ 34.7 Scope of Suit

A forcible-detainer action is a procedure by which the right to immediate possession of real property is determined. *Cattin v. Highpoint Village Apartments*, 26 S.W.3d 737 (Tex. App.—Fort Worth 2000, pet. dism'd w.o.j.). It is intended to be a speedy, simple, and inexpensive means to obtain possession without resort to an action on the title. *Scott v. Hewitt*, 90 S.W.2d 816, 818–19 (Tex. 1936). To prevail in a forcible-detainer action, the plaintiff does not need to prove title—only sufficient evidence of ownership to demonstrate a superior right to immediate possession. *Dormady v. Dinero Land & Cattle Co.*, 61 S.W.3d 555, 557 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.). The mere existence of a title dispute does not deprive a justice court or county court on appeal of jurisdiction over a forcible-detainer action. *Rice v. Pinney*, 51 S.W.3d 705 (Tex. App.—Dallas 2001, no pet.).

However, if the question of title is so intertwined with the issue of possession, then possession may not be adjudicated without first determining title. *Dormady*, 61 S.W.3d at 557. In those cases, when possession cannot be determined until the issue of title is decided, neither the justice court nor the county court on appeal has jurisdiction. *Dormady*, 61 S.W.3d at 558.

Cases where title was seen to be so intertwined with a determination of possession involved compliance with a contract for sale or a claim of title to the property by adverse possession. *Dormady*, 61 S.W.3d at 559. In *Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d 169, 170 (Tex. App.—Houston [1st Dist.] 1995, writ denied), the Houston court of appeals concluded the homeowner's title issue deprived the justice

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court and county court of subject-matter jurisdiction when the note holder sued to enforce a "builder's and mechanic's lien contract." Later, the Dallas court of appeals observed the contract in *Mitchell* did not create any type of landlord-tenant relationship or provide any other independent basis on which the trial court could decide the immediate possession issue. *Rice*, 51 S.W.3d at 712.

§ 34.8 Eviction Notice

The first step in the postforeclosure forcible-detainer process is to serve a notice to vacate. Pursuant to Texas Property Code section 24.002, "[a] person who refuses to surrender possession of real property on demand commits a forcible detainer if the person . . . is a tenant at will or by sufferance." Tex. Prop. Code § 24.002(a)(2). Proper notice is an element of a forcible-detainer action. *See* Tex. Prop. Code § 24.002, 24.005; *Murphy v. Countrywide Home Loans, Inc.*, 199 S.W.3d 441 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Because forcible detainer is a statutory cause of action, a landlord must strictly comply with its requirements. *Kennedy v. Andover Place Apartments*, 203 S.W.3d 495, 497 (Tex. App.—Houston [14th Dist.] 2006, no pet.). A notice to vacate is considered a demand for possession for purposes of section 24.002(b). *See* Tex. Prop. Code § 24.005(h).

§ 34.8:1 Form and Content

The notice to vacate and demand for possession must be made in writing by a person entitled to possession of the property and must comply with the requirements for notice to vacate under Texas Property Code section 24.002(b). *See* Tex. Prop. Code §§ 24.002, 24.005. See form 34-1 in this chapter. Section 24.005(d) provides that an oral notice to vacate may be provided to only an occupant who obtained possession by forcible entry under Texas Property Code section 24.001.

The notice to vacate should state the reason for the landlord's action with enough specificity to enable the occupant to prepare a defense. *Nealy v. Southlawn Palms Apartments*, 196 S.W.3d 386 (Tex. App.—Houston [1st Dist.] 2006, no pet.). In the context of a postforeclosure action for forcible detainer, a well-drafted notice should include the basis for the parties' claim for possession (that is, foreclosure), a specific time deadline to vacate, and the date for delivery of possession. The notice to vacate should also include an unequivocal demand for possession.

If the occupant is a tenant at will or by sufferance, the landlord must give the tenant at least three days' written notice to vacate before the landlord files a forcible-detainer suit unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. Tex. Prop. Code § 24.005(b).

The express language of the notice provisions does not preclude an attorney for a person entitled to possession from actually sending the demand/notice letter. *See* Tex. Prop. Code §§ 24.002(b), 24.005; *Effel v. Rosberg*, 360 S.W.3d 626, 631 (Tex. App.—Dallas 2012, no pet.) (written notice to vacate sent by purchaser of property "through his attorney" before filing forcible-detainer action conclusively showed compliance with notice requirements of Property Code); *Armbruster v. Deutsche Bank National Trust Co.*, No. 03-13-00532-CV, 2015 WL 5232109, at *2 (Tex. App.—Austin Aug. 31, 2015, no pet.) (mem. op.) (evidence was sufficient to establish right to possession where it included "copies of the notice mailed by Deutsche's counsel to the Armbrusters that advised them that their tenancy was being terminated and that they were required to vacate the property"); Tex. R. Civ. P. 500.4 (individuals, corporations, and entities may be represented by attorney or "authorized agent" in eviction cases in justice court).

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There is also no requirement that the person (or entity) represented by the attorney be specifically named in a demand letter. *See* Tex. Prop. Code §§ 24.002(b), 24.005; *Randle v. Deutsche Bank National Trust Co.*, No. 05-14-01439-CV, 2016 WL 308711, at *9 (Tex. App.—Dallas Jan. 26, 2016, no pet.) (mem. op.).

§ 34.8:2 Attorney's Fees

In general, a party who successfully obtains possession of property in a forcible-detainer action may recover its attorney's fees, provided a proper notice to vacate was sent at least ten days before suit was filed. *See* Tex. Prop. Code § 24.006(a). The notice requirement, however, does not apply when "a written lease entitles the landlord to recover attorney's fees." Tex. Prop. Code § 24.006(a), (b).

In the context of residential tenancies, the Property Code defines the term *lease* as "any written or oral agreement between a landlord and tenant that establishes or modifies the terms, conditions, rules, or other provisions regarding the use and occupancy of a dwelling." Tex. Prop. Code § 92.001(3).

Previous practice and interpretation of Texas law had plaintiffs who wished to seek attorney's fees sending a ten-day notice and then filing its postforeclosure suit for forcible detainer. Case law changed this practice for the benefit of plaintiffs. In *Rust v. Bank of America, N.A.*, No. 01-15-00373-CV, 2016 WL 3221233 (Tex. App.—Houston [1st Dist.] June 9, 2016, pet. denied) (mem. op.), a postforeclosure purchaser brought a forcible-detainer suit and sought attorney's fees. Bank of America admitted it did not send a ten-day notice but argued that the deed of trust constituted a written lease and provided for the award of attorney's fees. *Rust*, 2016 WL 3221233, at *4. The Houston court of appeals agreed with Bank of America and held the deed of trust satisfied the definition of "lease" under Texas Property Code section 92.001(3). Therefore, the court held that despite not sending a ten-day notice, Bank of America was entitled to its attorney's fees under Texas Property Code section 24.006(b). *Rust*, 2016 WL 3221233, at *4.

§ 34.8:3 Delivery of Notice

The notice to vacate must be given in person or by mail at the premises in question. Personal notice may be by personal delivery to the tenant or any person residing at the premises who is sixteen years of age or older or by personal delivery to the premises and affixing the notice to the inside of the main entry door. Notice by mail may be by regular, registered, or certified mail, return receipt requested, to the premises in question. Tex. Prop. Code § 24.005(f).

The notice period is calculated from the day the notice is delivered. Tex. Prop. Code § 24.005(g).

When a letter, properly addressed and postage prepaid, is mailed, a presumption exists the notice was duly received by the addressee. *Thomas v. Ray*, 889 S.W.2d 237, 238 (Tex. 1994); *Brittingham v. Federal Home Loan Mortgage Corp.*, No. 02-12-00416-CV, 2013 WL 4506787, at *2 (Tex. App.—Fort Worth Aug. 22, 2013, pet. dism'd w.o.j.) (mem. op.) (evidence showed notice to vacate sent by certified mail returned as "unclaimed and unable to forward," but business records affidavit provided evidence notice also mailed by first-class mail and trial court "was free to disbelieve tenant's testimony during bench trial that he did not receive the first-class letters"); *Fashakin v. Federal Home Loan Mortgage Corp.*, No. 14-11-01079-CV, 2013 WL 1316694 (Tex. App.—Houston [14th Dist.] Apr. 2, 2013, pet. denied) (mem. op.) (delivery of notice to vacate established because summary judgment evidence showed it was sent by first-class mail and no summary judgment evidence controverted receipt of the first-class letter); *Farkas v. Federal National Mortgage Ass'n*, No. 05-11-

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01416-CV, 2012 WL 5351262 (Tex. App.—Dallas Oct. 31, 2012, no pet.) (mem. op.) (testimony of custodian of records for plaintiff's attorney that he mailed notice to vacate by first-class mail and it had not been returned was sufficient to establish notice to vacate was given; however, this presumption could be rebutted by an offer of proof of nonreceipt). In the absence of proof to the contrary, the presumption has the force of a rule of law. *Kaldis v. U.S. Bank National Ass'n*, No. 14-11-00607-CV, 2012 WL 3229135 (Tex. App.—Houston [14th Dist.] Aug. 9, 2012, pet. dism'd w.o.j.) (mem. op.) (landlord established delivery of notice to vacate by proving that, although letters sent to tenant by certified mail were returned unclaimed, letters sent by first-class mail were not, and trial court was free to disbelieve tenant's testimony during a bench trial that he did not receive the first-class letters); *Ramey v. Bank of New York*, No. 14-06-00824-CV, 2010 WL 2853887 (Tex. App.—Houston [14th Dist.] July 22, 2010, pet. dism'd w.o.j.) (mem. op.) (landlord established delivery of notice to vacate because it proved letter was sent to tenant by certified and first-class mail and there was no evidence negating receipt of the first-class letter).

Alternatively, Texas Property Code section 24.005 provides that—

> a landlord may deliver the notice to vacate by securely affixing to the outside of the main entry door a sealed envelope that contains the notice and on which is written the tenant's name, address, and in all capital letters, the words "IMPORTANT DOCUMENT" or substantially similar language and, not later than 5 p.m. of the same day, depositing in the mail in the same county in which the premises in question is located a copy of the notice to the tenant if:
>
> 1. the premises has no mailbox and has a keyless bolting device, alarm system, or dangerous animal that prevents the landlord from entering the premises to affix the notice to vacate to the inside of the main entry door; or
> 2. the landlord reasonably believes that harm to any person would result from personal delivery to the tenant or a person residing at the premises or from personal delivery to the premises by affixing the notice to the inside of the main entry door.

Tex. Prop. Code § 24.005(f–1). A notice to vacate is considered delivered on the date the envelope is affixed to the outside of the door and is deposited in the mail, regardless of the date the notice is received. Tex. Prop. Code § 24.005(f–2).

§ 34.9 Eviction Petition

After a proper notice to vacate is delivered under applicable law, the foreclosure sale purchaser or its successor in interest may file a sworn complaint with the justice court seeking judgment against the tenant for possession of the premises. *See* Tex. Prop. Code § 24.005, 24.0051; Tex. R. Civ. P. 510.3.

§ 34.9:1 Sworn Petition Required

Once a sworn eviction petition is filed in accordance with Texas Rule of Civil Procedure 510.3, the justice of the peace must immediately issue citation directed to the defendant. Texas courts have held that it is sufficient for the plaintiff's attorney in a postforeclosure forcible-detainer action to verify the petition. *Norvelle v. PNC Mortgage*, 472 S.W.3d 444 (Tex. App.—Fort Worth 2015, no pet.).

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§ 34.9:2 Contents of Petition

The eviction petition must include—

1. the name of the plaintiff;
2. the name, address, telephone number, and fax number, if any, of the plaintiff's attorney, if applicable, or the address, telephone number, and fax number, if any, of the plaintiff;
3. the name, address, and telephone number, if known, of the defendant;
4. the amount of rent due and unpaid at the time of filing and within the jurisdictional limits of the court and the amount of money, if any, the plaintiff seeks;
5. the basis for the plaintiff's claim against the defendant, including the facts and grounds for eviction. When eviction is based upon a written residential lease, the plaintiff must name all tenants obligated under the lease the plaintiff seeks to evict;
6. a statement of whether the plaintiff consents to e-mail service of the answer and any other motions or pleadings;
7. a description, including the address, if any, of the premises that the plaintiff seeks possession of;
8. a description of when and how the notice to vacate was delivered; and
9. if applicable, a statement that attorney's fees are being sought.

See Tex. R. Civ. P. 502.2, 510.3. See form 34-2 in this chapter.

The petition must list all defendants' home and work addresses known to the plaintiff and must state that the plaintiff knows of no other home or work addresses of the defendant in the county where the premises are located to support a judgment based upon substituted service. Tex. R. Civ. P. 510.4(c).

§ 34.9:3 Naming All Parties

When a forcible-entry-and-detainer eviction is based on a written residential lease, all tenants obligated under the lease and residing at the premises that plaintiff seeks to evict must be named as defendants. No judgment or writ of possession may issue or be executed against any person not named in the petition and served with citation. Tex. R. Civ. P. 510.3(c). Notably, in forcible-detainer actions, Texas law imposes no requirement on a plaintiff to name as defendants all parties with a possessory interest in the contested property. Tex. Prop. Code §§ 24.002, 24.005; *McGillivray v. Countrywide Home Loans, Inc.*, 360 F. App'x 533, 536 (5th Cir. 2010).

A minority of justice courts in postforeclosure forcible-detainer suits impose different rules governing who must be named as proper party defendants. To alleviate surprises and delays, the practitioner should name as defendants all mortgagors of the foreclosed deed of trust and all occupants of the subject property.

§ 34.9:4 Identification of Subject Property

A forcible-detainer petition must describe the real estate the plaintiff seeks to possess and state the facts that entitle the petitioner to possession. *Powelson v. U.S. Bank National Ass'n*, 125 S.W.3d 810, 812 (Tex. App.—Dallas 2004, no pet.). Identification of the premises by street address is sufficient. *See* Tex. R. Civ. P. 510.3(a)(1); *Mitchell v. CitiFinancial Mortgage Co.*, 192 S.W.3d 882, 883 (Tex. App.—Dallas 2006, no pet.). There is no legal requirement that the property be described by legal description. *Powelson*, 125 S.W.3d at 812.

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§ 34.9:5 Venue and Jurisdiction—Where to File Suit

Venue is mandatory in the justice precinct where all or part of the premises is located. Tex. Civ. Prac. & Rem. Code § 15.084. In *Markham v. Deutsche Bank National Trust Co.*, No. 13-09-00633-CV, 2001 WL 2739558, at *2 (Tex. App.—Corpus Christi July 14, 2011, no pet.) (mem. op.), the court of appeals held both the justice court and the county court lacked subject matter jurisdiction because the property was located in a different precinct than the precinct in which the eviction suit was filed. Therefore, the petition was dismissed because it was filed in the wrong precinct. If suit is filed in the wrong county, plaintiff is not entitled to a refund of the filing fee, but all fees for service of process will be refunded if the case was dismissed before service was attempted. *See* Tex. R. Civ. P. 510.3(b).

§ 34.9:6 Citation

After filing of a sworn petition, the justice of the peace is required to immediately issue citation directed to each defendant. Tex. R. Civ. P. 510.4. The citation must—

1. be styled "The State of Texas";
2. be signed by the clerk under seal of court or by the judge;
3. contain the name, location, and address of the court;
4. state the date of filing of the petition;
5. state the date of issuance of the citation;
6. state the file number and names of parties;
7. state the plaintiff's cause of action and relief sought;
8. be directed to the defendant;
9. state the name and address of attorney for plaintiff or, if the plaintiff does not have an attorney, the address of plaintiff;
10. state the date the defendant must appear in person for trial at the court issuing citation, which must not be less than ten days nor more than twenty-one days after the petition is filed;
11. notify the defendant that if the defendant fails to appear in person for trial, judgment by default may be rendered for the relief demanded in the petition;
12. inform the defendant that, upon timely request and payment of a jury fee no later than three days before the day set for trial, the case will be heard by a jury;
13. contain all warnings required by chapter 24 of the Texas Property Code; and
14. include the following statement: "For further information, consult Part V of the Texas Rules of Civil Procedure, which is available online and also at the court listed on this citation."

Tex. R. Civ. P. 510.4; *see also* Tex. R. Civ. P. 502.2.

§ 34.9:7 Service Requirements

A private process server is not authorized to serve citation in an eviction lawsuit. Tex. Att'y Gen. Op. GA-112 (2003). Only a sheriff or constable can serve an eviction suit and must deliver a copy of the citation, with a copy of the petition attached, to the defendant or by leaving a copy with some person, other than the plaintiff, over the age of sixteen years at the defendant's usual place of residence, at least six days before the day set for trial. Tex. R. Civ. P. 510.4(b).

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The citation may be served by delivery to the premises if—

1. the constable, sheriff, or other person authorized by written court order is unsuccessful in serving the citation under Texas Rule of Civil Procedure 510.4(b);
2. the petition lists all home and work addresses of the defendant that are known to the plaintiff and states that the plaintiff knows of no other home or work addresses of the defendant in the county where the premises are located; and
3. the constable, sheriff, or other person authorized files a sworn statement that it has made diligent efforts to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located, stating the times and places of attempted service.

Tex. R. Civ. P. 510.4(c).

A judge must promptly determine whether a sworn statement seeking service by delivery of citation to the premises meets the requirements of Texas Rule of Civil Procedure 510.4(c)(1)(C). *See* Tex. R. Civ. P. 510.4(c)(2). The plaintiff is not required to make a request or motion for alternative service.

If the judge authorizes service by delivery of citation to the premises, at least six days before the day set for trial, the constable, sheriff, or other person authorized by written court order must—

1. deliver a copy of the citation with a copy of the petition attached to the premises by placing it through a door mail chute or slipping it under the front door. If neither method is possible, the officer may securely affix the citation on the front door or main entry to the premises;
2. deposit in the mail a copy of the citation with a copy of the petition attached, addressed to defendant at the premises and sent by first-class mail; and
3. the constable, sheriff, or other person authorized by written court order must note on the return of service the date the citation was delivered and the date it was deposited in the mail.

Tex. R. Civ. P. 510.4(c)(3), (4); *see also* Tex. Prop. Code 24.0051(a).

§ 34.10 The Eviction Proceeding

Once a petition is filed and citation is properly served, the court must determine whether the plaintiff is entitled to possession of the subject real property.

§ 34.10:1 Trial Date

The appearance date for trial must be stated in the citation and must not be less than ten days nor more than twenty-one days after the petition is filed. Tex. R. Civ. P. 510.4(a)(10); *see also* Tex. R. Civ. P. 510.6(a). Further, an eviction trial cannot be held less than six days after service was obtained. Tex. R. Civ. P. 510.7(a). Otherwise, an eviction case is docketed and tried the same as any other case in justice court.

§ 34.10:2 Transfer of Case

A party may file a sworn motion supported by two other credible persons for the mandatory transfer of a case to the nearest justice of the peace within the county if the party believes a fair and impartial trial before the justice or in the precinct cannot be obtained. Tex. R. Civ. P. 502.4(e) (former rule 528); *Crowder v. Franks*, 870 S.W.2d 568 (Tex. App.—Houston [1st

Dist.] 1993, no writ) (applying rule 528 to a forcible-detainer suit but upholding trial court's denial of transfer because affiants did not state that they were residents of county in which justice of the peace presided).

§ 34.10:3 Counterclaims

Counterclaims and the joinder of suits against third parties are not permitted in eviction cases. Tex. R. Civ. P. 510.3(e).

§ 34.10:4 Discovery

Before August 31, 2013, pretrial discovery in forcible-detainer actions was permitted. *Forward v. Housing Authority of the City of Grapeland*, 864 S.W.2d 167 (Tex. App.—Tyler 1993, no writ) (forcible-detainer case in which tenant engaged in discovery). However, pretrial discovery is now limited to what the judge considers reasonable and necessary. Tex. R. Civ. P. 500.9(a). The discovery rules under the Rules of Civil Procedure apply "when the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties." Tex. R. Civ. P. 500.3(e). All pretrial discovery requests must be attached to a written motion and filed with the court for approval. The motion, but not the attached discovery request, must be served on the opposing party. Unless a hearing is requested, the judge may rule on the motion without a hearing.

§ 34.10:5 Continuances

Trial in an eviction case cannot be postponed for more than seven days unless both parties agree in writing. Tex. R. Civ. P. 510.7(c).

§ 34.10:6 Jury Trials

Either party may file a written demand for a jury trial at least three days before the trial date. The demand must be accompanied by payment of a jury fee or by filing a sworn statement of inability to pay the jury fee. If a jury is properly demanded, a jury is empaneled and sworn in as in any other case. After hearing the evidence, the jury returns a verdict in favor of the plaintiff or the defendant. Tex. R. Civ. P. 510.7(b).

The justice of the peace cannot charge the jury but may grant a judgment notwithstanding the verdict. Tex. R. Civ. P. 504.3, 510.8(a). If no jury is timely demanded, the judge tries the case. Tex. R. Civ. P. 510.7(b).

The current jury fee is $22 unless otherwise provided by law. Tex. R. Civ. P. 504.1(b). If a party demands a jury trial but subsequently withdraws the demand, the case remains on the jury docket unless all parties agree to a bench trial. Tex. R. Civ. P. 504.1(c).

§ 34.10:7 Judge to Develop Case

A judge may question both a witness and party and may summon any person or party to appear as a witness when the judge considers it necessary to ensure a correct judgment and speedy disposition. Tex. R. Civ. P. 500.6.

§ 34.10:8 Written Answer Not Required

The defendant may file a written answer on or before the day set for trial but is not required to do so. Tex. R. Civ. P. 510.6(a).

§ 34.10:9 Plaintiff's Failure to Appear and Default Judgment

If the plaintiff fails to appear when a case is called for trial, the judge may postpone or dismiss the suit. Tex. R. Civ. P. 503.6(b).

If the defendant fails to file an answer before trial, fails to appear at trial, and proof of service complies with rule 510.4, the petition's allegations must be taken as admitted and judgment by default rendered. Tex. R. Civ. P. 510.6(b),

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503.6(c). If a defendant who has filed an answer fails to appear for trial, the court may render judgment based on the evidence. If the plaintiff fails to prove its case, judgment must be rendered against the plaintiff. Tex. R. Civ. P. 503.6(c).

§ 34.10:10 Burden at Trial

To prevail in a forcible-detainer action, the plaintiff must show sufficient evidence of ownership to demonstrate a superior right to immediate possession. *Villalon v. Bank One*, 176 S.W.3d 66, 70 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). Superior right to immediate possession is typically demonstrated by the plaintiff proving (1) it owns the subject property by virtue of a foreclosure sale, (2) the defendant became a tenant at sufferance when the property was sold at foreclosure, (3) the plaintiff gave the defendant notice to vacate the premises, and (4) the defendant refused to vacate the premises. *Elwell v. Countrywide Home Loans, Inc.*, 267 S.W.3d 566, 568–69 (Tex. App.—Dallas 2008, pet. dism'd w.o.j.).

Admitting a certified copy of the substitute trustee's deed naming plaintiff as grantee of the property, a certified copy of the deed of trust foreclosed upon (containing tenant-at-sufferance language), and a notice to vacate and demand for possession (with proof of mailing via first-class and certified mail) are the most common elements for a plaintiff to meet its burden in a forcible-detainer trial.

§ 34.10:11 Judgment

If a jury returns a verdict, the judge may render judgment on the verdict or, if the verdict is contrary to the law or the evidence, enter a judgment notwithstanding the verdict. Tex. R. Civ. P. 510.8(a).

If the judgment is in favor of the plaintiff, the judge must render judgment to plaintiff for possession of the premises, costs, delinquent rent (if any) as of the date of entry of judgment, and attorney's fees if recoverable by law. Tex. R. Civ. P. 510.8(b). If the judgment or verdict is in favor of the defendant, the judge must render judgment for the defendant and for costs and attorney's fees against plaintiff if recoverable by law. Tex. R. Civ. P. 510.8(c).

A specific form of an eviction final judgment is not prescribed by the Texas Rules of Civil Procedure. However, a judgment must state the court's determination of the rights of the parties, must state which party must pay the costs, and must be signed and dated on the date the judge signs the judgment. Tex. R. Civ. P. 505.1(c); *Goebel v. Sharon Peters Real Estate, Inc.*, No. 03-14-00635-CV, 2015 WL 1778295 (Tex. App.—Austin Apr. 16, 2015, no pet.) (mem. op.). Texas law is clear: an agreed judgment in a forcible-detainer action is appealable to the county court. *Mullins v. Coussons*, 745 S.W.2d 50, 50–51 (Tex. App.—Houston [14th Dist.] 1987, no writ) ("[a]n agreed judgment in the justice court does not deprive the county court of jurisdiction to hear the case in a trial de novo"). See form 34-3 in this chapter.

§ 34.10:12 Motion for New Trial

A motion for new trial is not allowed in an eviction proceeding. Tex. R. Civ. P. 510.8(e). Erroneous filing of a motion for new trial does not extend the period for appeal. *RCJ Liquidating Co. v. Village, Ltd.*, 670 S.W.2d 643, 644 (Tex. 1984) (per curiam).

§ 34.10:13 Motion to Reinstate and Motion to Set Aside Default Judgment

A party whose case is dismissed in a justice court proceeding may file a motion to reinstate within fourteen days of the dismissal order. Tex. R. Civ. P. 505.3(a). This general justice court provision also applies to eviction cases.

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Unless a specific eviction statute found in Texas Rules of Civil Procedure 510.1 through 510.13 applies, the rules of civil procedure applying to all justice court proceedings are also applicable to eviction matters.

The general rules applicable to justice court cases allow a defendant in an eviction case to file a motion to set aside a default judgment for good cause. However, because there is no general provision allowing the delay of execution of a writ of possession, a defendant runs the risk that the writ will be executed while the motion to set aside a default is pending. *RCJ Liquidating Co. v. Village, Ltd.*, 670 S.W.2d 643, 644 (Tex. 1984) (per curiam) ("No provision is made for delay in the event a motion for new trial is filed."); *Wetsel v. Fort Worth Brake, Clutch & Equipment, Inc.*, 780 S.W.2d 952 (Tex. App.—Fort Worth 1989, no writ) (motion for new trial in eviction was a nullity since rule 749 (now rule 510.8(e)) does not allow for new trial motions; thus appeal bond filed within five days of order denying new trial but more than five after original judgment was not timely).

§ 34.10:14 Certiorari to County Court

Forcible-detainer actions are not removable from justice court to county court by writ of certiorari. Tex. R. Civ. P. 506.4(a); Tex. Civ. Prac. & Rem. Code § 51.002(a), (d); *Chang v. Resolution Trust Corp.*, 814 S.W.2d 543, 544 (Tex. App.—Houston [1st Dist.] 1991, no writ).

§ 34.10:15 Mandamus

The county court may issue a writ of mandamus to the justice court to enforce not only the county court's jurisdiction but also other matters within the county court's jurisdiction. *Meridien Hotels, Inc. v. LHO Financing Partnership I, L.P.*, 97 S.W.3d 731, 736 (Tex. App.—Dallas 2003, no pet.).

§ 34.10:16 Bill of Review

A forcible-detainer judgment may be reviewed by a properly drafted bill of review setting forth a meritorious defense. *See Rodriguez ex rel. Rodriguez v. EMC Mortgage Corp.*, 94 S.W.3d 795 (Tex. App.—San Antonio 2002, no pet.); *Winrock Houston Associates Ltd. Partnership v. Bergstrom*, 879 S.W.2d 144 (Tex. App.—Houston [14th Dist.] 1994, no writ).

For example: The court clerk gives the occupant wrong information about the answer date or trial date or an owner leads an occupant to believe the dispute is resolved, and as a result, the occupant does not answer the lawsuit and the owner obtains a default judgment. If the occupant discovers the default within five days after the appeal period runs, the occupant can attack the judgment by a bill of review in the justice court.

§ 34.11 Writ of Possession

The statutory rules governing the execution of a writ of possession are detailed in Texas Property Code sections 24.0061 and 24.0062.

A landlord who prevails in an eviction suit is entitled to a judgment and writ of possession of the premises. However, the writ cannot be issued before the sixth day after the date the judgment for possession was rendered. Tex. Prop. Code § 24.0061(a), (b).

The court must notify a tenant in writing of a default judgment for possession by sending a copy of the judgment to the premises by first-class mail not later than forty-eight hours after the entry of judgment. Tex. Prop. Code § 24.0061(c).

The writ of possession must order the officer executing the writ to—

1. post a written warning of at least 8-1/2 by 11 inches on the exterior of the front door of the rental unit notifying

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the tenant the writ has been issued and the writ will be executed on or after a specific date and time stated in the warning but not sooner than 24 hours after the warning is posted; and

2. when the writ is executed—

   (A) deliver possession of the premises to the landlord;

   (B) instruct the tenant and all persons claiming under the tenant to leave the premises immediately, and, if the persons fail to comply, physically remove them;

   (C) instruct the tenant to remove or to allow the landlord, the landlord's representatives, or other persons acting under the officer's supervision to remove all personal property from the rental unit other than personal property claimed to be owned by the landlord; and

   (D) place, or have an authorized person place, the removed personal property outside the rental unit at a nearby location, but not blocking a public sidewalk, passageway, or street and not while it is raining, sleeting, or snowing.

Tex. Prop. Code § 24.0061(d).

The writ of possession must also authorize the officer to hire a bonded or insured warehouseman to remove and store all or part of the property at no cost to the landlord or the officer executing the writ. Tex. Prop. Code § 24.0061(e). The officer, however, cannot require the landlord to store the property. Tex. Prop. Code § 24.0061(f).

The writ of possession must also contain a notice that the officer is not liable for damages resulting from the execution of the writ if the officer executes it in good faith and with reasonable diligence. Tex. Prop. Code § 24.0061(g). A sheriff or constable is allowed to use reasonable force in executing a writ. Tex. Prop. Code § 24.0061(h).

§ 34.11:1 Deadline to Issue Writ

A writ of possession may not issue more than sixty days after a judgment for possession is signed, but the court may extend the deadline for issuance to ninety days for "good cause." *See* Tex. R. Civ. P. 510.8(d)(1).

§ 34.11:2 Deadline to Execute Writ

A writ cannot be executed ninety days after a judgment for possession is signed. Tex. R. Civ. P. 510.8(d)(2).

§ 34.11:3 Effect of Appeal

A writ of possession cannot issue if an appeal is perfected and, if applicable, rent is paid into the court registry. Tex. R. Civ. P. 510.8(d)(3).

§ 34.11:4 No Execution of Writ with Rain, Sleet, or Snow

A sheriff or constable may not execute a writ of possession by placing a tenant's property outside the rental unit while it is raining, sleeting, or snowing. Tex. Prop. Code § 24.0061(d)(2)(D).

§ 34.11:5 No Duty of Care on Part of Landlord for Property Removed under Writ of Possession

Under a valid writ of possession, a landlord has no duty to care for a tenant's property properly removed from a dwelling unit. *Campos v. Investment Management Properties, Inc.*, 917 S.W.2d 351, 354–55 (Tex. App.—San Antonio 1996, writ denied). However, denying a tenant access

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to the premises before the date a writ of possession may be issued may create a claim for damages. *FDIC v. White*, No. 13-08-00263-CV, 2011 WL 4498515 (Tex. App.—Corpus Christi Oct. 20, 2011, no pet.) (mem. op.) (upholding claim based on breach of settlement agreement giving former owner certain period to remove property from home).

§ 34.11:6 Storage of Property; Use of Warehouseman

The sheriff or constable executing a writ has discretion to engage the services of a bonded or insured warehouseman to remove and store all or part of the property at no cost to the landlord or the officer executing the writ. Tex. Prop. Code § 24.0061(e). The officer may not require the landlord to store the property. Tex. Prop. Code § 24.0061(f).

If personal property is removed from a tenant's premises and stored in a public warehouse, the warehouseman has a lien on the property to the extent of any reasonable storage and moving charges incurred by the warehouseman. Tex. Prop. Code § 24.0062(a). The officer executing the writ must notify the tenant of the removal and storage and describe the circumstances under which the tenant may redeem the property. *See* Tex. Prop. Code § 24.0062(b), (c). Any sale of property must be conducted in accordance with Texas Business and Commerce Code sections 7.210, 9.301, and 9.501. Tex. Prop. Code § 24.0062(j). The tenant may bring suit to recover the property before sale. *See* Tex. Prop. Code § 24.0062(i).

A private storage company may violate a tenant's right to substantive due process by charging excessive fees to recover property once it has been removed from the premises. The officer executing the writ is not liable for a constitutional deprivation unless the officer is personally involved or there is a causal connection between the officer's acts causing the constitutional deprivation. *Merritt v. Harris County*, 775 S.W.2d 17 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

§ 34.11:7 No Constable Liability for Good-Faith Execution

Constables are required to execute a writ of possession. *See* Tex. Prop. Code § 24.0061. They are under the control of the court in enforcing a court order. *See* Tex. Prop. Code § 24.0061. An officer who executes a facially valid writ of possession in good faith is not liable for damages resulting from the execution of the writ. Tex. Civ. Prac. & Rem. Code § 7.003(a).

§ 34.12 Appeal of Justice Court's Judgment

A justice court's judgment may be appealed to a county court. Tex. Gov't Code § 26.042(e); Tex. R. Civ. P. 510.9. The case in county court is tried de novo. Tex. R. Civ. P. 510.10(c).

A writ of possession cannot issue if an appeal is perfected and, if applicable, rent is paid into the court registry. Tex. R. Civ. P. 510.8(d)(3).

§ 34.12:1 Effect of Appeal on Justice Court Judgment

Perfection of an appeal to the county court vacates and annuls the judgment of the justice court. *Mullins v. Coussons*, 745 S.W.2d 50, 50 (Tex. App.—Houston [14th Dist.] 1987, no writ).

Even if the county court appeal is subsequently dismissed for want of prosecution, the justice court's judgment is a nullity. *Poole v. Goode*, 442 S.W.2d 810, 813 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

Once a county court acquires jurisdiction by perfection of an appeal from a justice court, the county court tries the case de novo and cannot

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affirm, reverse, or remand the cause to the justice court. *Villalon v. Bank One*, 176 S.W.3d 66, 70 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (holding that county court properly refused to dismiss eviction suit on basis of occupant's claim the justice court denied due process by failing to give notice of the trial setting in justice court).

Consequently, any errors in a justice court's proceedings are moot. *Coleman v. Bank of America, N.A.*, No. 06-11-00105-CV, 2012 WL 1940674 (Tex. App.—Texarkana May 30, 2012, no pet.).

§ 34.12:2 Reinstatement of Justice Court Judgment

If the appellant of a justice court judgment fails to pay the county court filing fee or files an affidavit of inability to pay the filing fee within twenty days after being notified to do so by the county clerk, the appeal is deemed not perfected. Tex. R. Civ. P. 143a. In that case, the justice court judgment remains viable and enforceable.

However, if the justice court approves appeal on a pauper's affidavit, the tenant is not required to pay a county court filing fee or file an additional pauper's affidavit in county court. Tex. Prop. Code § 24.0052(e).

§ 34.12:3 Appeal Process

Within five days after the eviction judgment is signed, a party may appeal a justice court's judgment in a forcible-detainer suit by filing a bond, making a cash deposit, or filing a sworn statement of inability to pay with the justice court. Tex. R. Civ. P. 510.9(a).

§ 34.12:4 Perfection of Appeal

An appeal is perfected when, in accordance with the rules, the appellant files a bond, deposits the appropriate amount of cash into the court's registry, or files a statement of inability to pay. Tex. R. Civ. P. 510.9(f).

§ 34.12:5 Time Calculations for Appeals

Texas Rule of Civil Procedure 500.5 applies to the computation of time in eviction cases. However, if a document is filed by mail but is not received by the court by the due date, the court may take any action authorized by the rules, including issuing a writ of possession. Tex. R. Civ. P. 510.2.

§ 34.12:6 Amount of Appeal Bond

The justice court judge must set the amount of the appeal bond to include the items enumerated in Texas Rule of Civil Procedure 510.11. Tex. R. Civ. P. 510.9(b).

Texas Rule of Civil Procedure 510.11 references damages a party may suffer for withholding or defending possession of the premises during the appeal and reasonable attorney's fees incurred in the justice and county courts, if attorney's fees are properly recoverable. *See* Tex. R. Civ. P. 510.11. Courts generally have considerable discretion in setting bond amounts. *Northwest Bank v. Garrison*, 874 S.W.2d 278, 281 (Tex. App.—Houston [1st Dist.] 1994, no writ).

§ 34.12:7 Failure to Timely File Appeal Bond

If the appeal bond is not timely filed, the county court is without jurisdiction to hear the appeal, and the appeal should be dismissed for lack of jurisdiction. *Searcy v. Sagullo*, 915 S.W.2d 595, 597 (Tex. App.—Houston [14th Dist.] 1996, no writ) (non-forcible-detainer appeal from justice court to county court).

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§ 34.12:8 Defective Appeal Bond

If a party filing an appeal makes an error or files the wrong instrument required to perfect the appeal, the appeal cannot be dismissed without giving the appellant an opportunity to correct the error. *Grand Prairie Independent School District v. Southern Parts Imports, Inc.*, 813 S.W.2d 499 (Tex. 1991) (per curiam) (appeals from district court to appellate courts); *Ashley Furniture Industries, Inc. v. Law Office of David Pierce*, 311 S.W.3d 595, 599 (Tex. App.—El Paso 2010, no pet.) (notice from opposing party that bond was not twice amount of judgment constituted sufficient notice of defect to give appellant five days to correct appeal bond; failure to do so resulted in dismissal of appeal).

§ 34.12:9 Filing Fee in County Court When Tenant Files Appeal Bond

When an appellant files an appeal bond the appellant must also pay the county court filing fee to the county clerk. *Almahrabi v. Booe*, 868 S.W.2d 8, 10 (Tex. App.—El Paso 1993, no writ) (holding that justice court appeal bond does not satisfy filing fee required by rule 143a unless appeal bond is sufficiently large to cover both appeal bond amount and county court filing fee).

§ 34.12:10 Appeal via Statement of Inability to Pay or Pauper's Affidavit

Contents of Statement of Inability to Pay: A sworn statement of inability to pay must contain the information set forth in Texas Property Code section 24.0052 and Texas Rules of Civil Procedure 502.3(b) and 510.9(c). *See* Tex. Prop. Code § 24.0052; Tex. R. Civ. P. 502.3(b), 510.9(c).

Notice to Other Parties Required: The court must provide notice to all other parties within one business day that a party has filed a statement of inability to pay. Tex. R. Civ. P. 510.9(d).

Interest on Lawyers' Trust Accounts Certificate: When an indigent party is represented by an attorney providing pro bono legal services through a program funded by the Interest on Lawyers' Trust Accounts (IOLTA) program, the attorney may file an IOLTA certificate confirming the IOLTA screened the indigent party for income eligibility under the IOLTA guidelines. Tex. R. Civ. P. 502.3(c).

Contest of Statement of Inability to Pay: A statement of inability to pay may be contested by the opposing party or the judge within five days after receiving notice the statement was filed. Tex. R. Civ. P. 502.3(d), 510.9(c)(2).

No Contest When IOLTA Certificate Filed: A party's statement of inability to pay accompanied by an attorney's IOLTA certificate may not be contested. Tex. R. Civ. P. 502.3(c), 510.9(c)(2).

Receipt of Government Entitlement Based on Indigence: If a statement of inability to pay attests to receipt of a government entitlement based on indigence (for example, subsidized housing, public housing, food stamps, or supplemental security income), the statement can be contested only on the veracity of the attestation. Tex. R. Civ. P. 502.3(d).

Contest by Judge: Regardless of whether the opposing party contests the statement of inability to pay, the judge may conduct a hearing to determine the ability to pay. If the judge determines an appealing party has the ability to pay, the judge must enter a written order listing the reasons for the determination and set a deadline for payment. Tex. R. Civ. P. 502.3(d).

Appeal If Contest Sustained: If a challenge to a statement of inability to pay is sustained, the appellant may appeal the decision by filing notice with the justice court within five days of

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that court's written order. The justice court must then forward all related documents to the county court for resolution. The county court must set the matter for hearing within five days and hear the contest de novo. If the appeal is granted, the county court must direct the justice court to transmit to the clerk of the county court the transcript, records, and papers of the case. Tex. R. Civ. P. 510.9(c)(3).

If No Appeal or If Appeal Overruled: If the appellant does not appeal the ruling sustaining the contest or if the county court denies the appeal, within one business day, the appellant may post an appeal bond or make a cash deposit in compliance with the rule. Tex. R. Civ. P. 510.9(c)(4).

Waiver of Right to Appeal on Statement of Inability to Pay by Delay: If the occupant fails to obtain a hearing in county court within five days on appeal of a pauper's affidavit denial, the occupant effectively waives the right to appeal on the pauper's affidavit for failure to comply with Tex. R. Civ. P. 510.9(c)(3). *Weber v. James*, No. 03-10-00668-CV, 2012 WL 3156144 (Tex. App.—Austin Aug. 2, 2012, no pet.) (mem. op.) (discussing former rule 749a).

§ 34.13 Trial De Novo before County Court

The judgment of a justice court may be appealed to a county court. Tex. Gov't Code § 26.042(e); Tex. R. Civ. P. 510.9. The case is tried de novo in county court and is presented in its entirety as if there were no previous trial. Tex. R. Civ. P. 510.10(c).

§ 34.13:1 County Court Jurisdiction on Appeal Limited to Justice Court Jurisdiction

The appellate jurisdiction of the county court is confined to the jurisdictional limits of the justice court. The county court has no jurisdiction on appeal unless the justice court had jurisdiction. *Goggins v. Leo*, 849 S.W.2d 373, 375 (Tex. App.—Austin 1993, no writ).

§ 34.13:2 Effect of Appeal on Justice Court Judgment

Once an appeal is perfected, the justice court judgment is vacated. *Villalon v. Bank One*, 176 S.W.3d 66, 69–80 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); *In re Garza*, 990 S.W.2d 372, 374 (Tex. App.—Corpus Christi 1999, orig. proceeding).

§ 34.13:3 Dismissal by County Court—Effect

If the county court dismisses a suit for want of prosecution or if the plaintiff nonsuits the case, dismissal of the appeal amounts to a dismissal of the entire cause of action, leaving the matter as if no suit had ever been filed. *Bryant v. U.S. Bank National Ass'n*, No. 05-11-00121-CV, 2012 WL 4845660, at *1 (Tex. App.—Dallas Oct. 10, 2012, no pet.) (county court dismissal of forcible-detainer action did not adversely affect tenant's rights because dismissal has same effect as if suit had never been filed); *In re Garza*, 990 S.W.2d 372, 374 (Tex. App.—Corpus Christi 1999, orig. proceeding).

However, if an appeal is dismissed by the county court because an appeal was not properly perfected, the dismissal acts as a dismissal of only the appeal, and the judgment of the justice court remains as a valid judgment. *Meyers v. Belford*, 550 S.W.2d 359 (Tex. Civ. App.—El Paso 1977, no writ).

§ 34.13:4 County Court Filing Fee on Appeal

If the appellant does not pay the filing fee in county court within twenty days after being notified to do so by the county clerk, the clerk must return all papers to the justice of the peace,

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who must proceed as though no appeal had been attempted. Tex. R. Civ. P. 143a. The appellant must pay the county court filing fees even if the appellant has filed an appeal bond in justice court. *Almahrabi v. Booe*, 868 S.W.2d 8, 10 (Tex. App.—El Paso 1993, no writ).

Unless the court directs otherwise, notice by the clerk to the appellant must comply with Texas Rule of Civil Procedure 21a, which requires notice in person, by fax, by e-mail, or by registered or certified mail. *See DePue v. Henderson*, 801 S.W.2d 178 (Tex. App.—Houston [14th Dist.] 1990, no writ) (reversing county court judgment dismissing appeal in forcible-detainer lawsuit for failure to pay filing fee because appellant did not receive notice of costs).

When a party is represented by an attorney who has made an appearance, all communications from the court or the clerk must be sent to the party's attorney. *See* Tex. R. Civ. P. 8, 21a; *Morin v. Boecker*, 122 S.W.3d 911 (Tex. App.—Corpus Christi 2003, no pet.) (reversing county court dismissal under Texas Rule of Civil Procedure 143a for failure to timely pay court costs because clerk sent notice requesting payment of court fees within twenty days to tenants and not to their attorney of record).

§ 34.13:5 Filing Fee in County Court and Appeal on Pauper's Affidavit

When the justice court approves the tenant's affidavit of inability to pay costs of appeal or an appeal bond, the tenant is not required to pay the county court's filing fee or file an additional affidavit of inability to pay in the county court. Tex. Prop. Code § 24.0052(e).

If the tenant files an appeal bond, the tenant must also pay the county court filing fee. *Almahrabi v. Booe*, 868 S.W.2d 8, 10 (Tex. App.—El Paso 1993, no writ) (holding that justice court appeal bond does not also satisfy filing fee required by Texas Rule of Civil Procedure 143a unless appeal bond is sufficiently large to cover both appeal bond amount and county court filing fee).

§ 34.13:6 Written Answer Required on Appeal

If the defendant filed a written answer in justice court, it constitutes an appearance and answer in the county court and may be amended as in other cases. A defendant who filed no written answer in justice court must file a written answer in county court within eight days after the transcript is filed; otherwise a default judgment can be entered. Tex. R. Civ. P. 510.12.

Filing of a pauper's affidavit by a pro se occupant constitutes an answer in county court at law. *Hughes v. Habitat Apartments*, 860 S.W.2d 872, 873 (Tex. 1993) (per curiam). A pro se occupant who appeals by filing a pauper's affidavit but who fails to file a written answer is entitled to notice of a hearing on a motion for default judgment. *Hughes*, 860 S.W.2d at 873.

A timely letter signed by a pro se defendant that identifies the parties, the case, and the defendant's current address serves as an answer and deserves notice of any subsequent proceedings. *Guadalupe Economic Services Corp. v. Dehoyos*, 183 S.W.3d 712, 716 (Tex. App.—Austin 2005, no pet.).

In *Okpala v. Coleman*, 964 S.W.2d 698 (Tex. App.—Houston [14th Dist.] 1998, no writ), a default judgment was reversed for an occupant's failure to file a formal answer because the occupant had appeared by filing discovery requests.

§ 34.13:7 Record on Appeal; Docketing; Trial De Novo

When an appeal has been perfected, all further proceedings on the judgment are stayed, and the justice court must immediately send the clerk of

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the county court a certified copy of all docket entries, a certified copy of the bill of costs, and the original papers in the case together with any money in the court registry, including sums tendered pursuant to Texas Rule of Civil Procedure 510.9(c)(5)(B). Tex. R. Civ. P. 510.10(a).

If the justice of the peace refuses to forward the necessary documents, the justice (not the clerk of the justice court) is subject to a mandamus action in county court. *Polk v. Braddock*, 864 S.W.2d 78, 80 (Tex. App.—Dallas 1992, no writ).

The county clerk must docket the case and immediately notify the parties of the date of receipt of the transcript and the docket number of the case. The notice must advise the defendant that if a written answer was not filed in the justice court, the defendant must file a written answer in the county court within eight days. Tex. R. Civ. P. 510.10(b).

The case must be tried de novo in the county court. A trial de novo is a new trial in which the entire case is presented as if there had been no previous trial. The trial, as well as any hearings and motions, is entitled to precedence in the county court. Tex. R. Civ. P. 510.10(c).

§ 34.13:8 Trial and Hearings Entitled to Precedence

The general rule for trial settings in civil cases is Texas Rule of Civil Procedure 245, which provides that the court may set a contested case for trial the first time upon reasonable notice of not less than forty-five days to the parties.

However, in forcible-detainer suits in county court, the trial and all hearings and motions are governed by Texas Rules of Civil Procedure 510.1 through 510.12. Rule 510.12 states, "An eviction case appealed to county court will be subject to trial at any time after the expiration of 8 days after the date the transcript is filed in the county court." Tex. R. Civ. P. 510.12.

Given the unique rules governing forcible entry and detainer, as well as the purpose of those rules to affect a speedy resolution of entitlement to possession of property, several Texas appellate courts have determined that rule 510.12 preempts rule 245. *Abend v. Federal National Mortgage Ass'n*, 466 S.W.3d 884, 885 n.1 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

However, other courts have applied rule 245 to eviction matters without any discussion of rule 510.12 or its predecessor. *Raines v. Gomez*, 118 S.W.3d 875, 877 (Tex. App.—Texarkana 2003, no pet.) (reversing for failure of trial court to provide proper notice of trial setting under rule 245); *Johnson v. Mohammed*, No. 03-10-00763-CV, 2013 WL 1955862, at *4–5 (Tex. App.—Dallas Dec. 30, 2010, pet. dism'd w.o.j.) (mem. op.) (finding error to set forcible-entry-and-detainer case for trial with less than rule 245 notice period, but error not preserved).

§ 34.13:9 Jury Demand in County Court

While Texas Rule of Civil Procedure 216(a) generally requires that a party demand a jury trial within a "reasonable time" before the date of the trial and not less than thirty days before trial, rule 510.12 provides that the trial may be held at any time eight days after the transcript is filed. The tension between the rules has created issues on timeliness.

In *Pease v. Federal National Mortgage Ass'n*, No. 03-12-00074-CV, 2012 WL 4872724 (Tex. App.—Austin Oct. 11, 2012, no pet.) (mem. op.), the appellate court upheld the denial of a jury demand filed fifty-seven days after the appeal was filed and trial had been set on the nonjury docket, although the jury demand had been filed eight days before the scheduled trial date. The court held an instructed verdict would

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have been justified, and thus denial of a jury trial was harmless. The court noted if the request was deemed timely, the refusal was harmless because the Texas Supreme Court has held a refusal to grant a jury trial is harmless if the record shows that no material issues of fact exist and an instructed verdict would have been justified. *Pease*, 2012 WL 4872724, at *2.

In *Brown v. Apex Realty*, 349 S.W.3d 162 (Tex. App.—Dallas 2011, pet. denied), the appellate court upheld the denial of jury trial as untimely based on the following dates: August 10, 2009—Brown files notice of appeal in justice of the peace court; September 9—Brown appears for hearing, and county court sets trial for September 14; September 14—Brown requests continuance, and court resets case to September 24; September 23—Brown files jury demand; September 24—court denies request for jury demand. The appellate court was unwilling to say the trial court abused its discretion in striking a jury demand filed one day before the scheduled trial date. *Brown*, 349 S.W.3d at 167.

Similarly, in *Cantu v. Federal National Mortgage Ass'n*, No. 02-11-00293-CV, 2012 WL 955363, at *2 (Tex. App.—Fort Worth Mar. 22, 2012, no pet.) (mem. op.), the appellate court upheld the trial court's denial of a jury trial when the tenant requested the jury trial one day before the trial and twenty-seven days after notice of the nonjury setting.

However, in *Maxwell v. U.S. Bank National Ass'n*, No. 14-12-00209-CV, 2015 WL 3580621, at *6 (Tex. App.—Houston [14th Dist.] July 11, 2013, pet. dism'd w.o.j.) (mem. op.), the Houston court of appeals concluded that although the county court erred by denying the defendant's jury request in an eviction case, it was harmless error because an instructed verdict against the defendant would have been proper.

If a court grants a jury request in a postforeclosure forcible-detainer action, the plaintiff should promptly file (and the court should grant) a motion in limine seeking to exclude evidence concerning the foreclosure sale by whichever plaintiff claims possession. *See Martin v. Federal National Mortgage Ass'n*, No. 05-15-00210-CV, 2016 WL 3568040 (Tex. App.—Dallas June 30, 2016, pet. dism'd w.o.j.) (mem. op.) (holding trial court did not abuse its discretion in granting Fannie Mae's motion in limine excluding testimony concerning Fannie Mae's purported failure to comply with certain provisions of the deed of trust when foreclosing on the property).

§ 34.13:10 Directed Verdict

A directed verdict is proper if there is no probative evidence to raise a fact issue on the material questions presented. *Szczepanik v. First Southern Trust Co.*, 883 S.W.2d 648 (Tex. 1994).

In *Loving v. Federal National Mortgage Ass'n*, No. 05-15-00624-CV, 2016 WL 3517643 (Tex. App.—Dallas June 24, 2016, no pet.) the Dallas court of appeals considered whether a directed verdict in favor of Fannie Mae on its claim for possession was proper when the defendant in the eviction case argued the foreclosure sale was improper. To establish an immediate right of possession, Fannie Mae had the burden of proving (1) it had a right to possession of the property, (2) the defendant's right of possession had ended, and (3) the defendant refused to vacate. Fannie Mae introduced into evidence (1) the substitute trustee's deed, showing Fannie Mae's purchase of the property at the foreclosure sale; (2) the deed of trust, showing the defendant's tenant-at-sufferance status following the foreclosure sale; and (3) the notices to vacate, establishing Fannie Mae gave the required notice to vacate. *Loving*, 2016 WL 3517643, at *1. The court noted that the defendant tacitly conceded she refused to vacate the property and remained in possession. Therefore, the court found the evidence established Fannie Mae's immediate right to possession of the property. The defen-

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dant's testimony regarding wrongful foreclosure did not create a fact issue concerning Fannie Mae's right to possession. Consequently, the trial court did not err in directing a verdict in Fannie Mae's favor. *Loving*, 2016 WL 3517643, at *3.

§ 34.13:11 Damages on Appeal

On appeal to county court, the parties may recover "damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal." Tex. R. Civ. P. 510.11. This type of claim is ancillary to the forcible-detainer suit and must be asserted in the eviction proceedings and not later in an independent lawsuit. *Haginas v. Malbis Memorial Foundation*, 354 S.W.2d 368 (Tex. 1962).

Pursuant to Texas Rule of Civil Procedure 510.11, damages may include, but are not limited to, loss of rents during the pendency of the appeal and attorney's fees in the justice and county courts proceedings, provided the requirements of Texas Property Code section 24.006 are met. Tex. R. Civ. P. 510.11. The damages are limited to those expenses and losses relating to maintaining or obtaining possession of the premises. *Hanks v. Lake Towne Apartments*, 812 S.W.2d 625, 626 (Tex. App.—Dallas 1991, writ denied). Damages include reasonable attorney's fees. *Mastermark Homebuilders, Inc. v. Offenburger Construction, Inc.*, 857 S.W.2d 765, 767 (Tex. App.—Houston [14th Dist.] 1993, no writ).

§ 34.13:12 Costs

Costs awarded by the trial court are ancillary to the forcible-detainer suit. Tex. R. Civ. P. 510.11. Because costs are ancillary to the eviction suit, an occupant may not recover costs in a suit for wrongful eviction. *Burns v. Johnson*, 491 S.W.2d 692 (Tex. Civ. App.—Waco 1973).

§ 34.13:13 Attorney's Fees

Texas Rule of Civil Procedure 510.11 allows for recovery of attorney's fees on appeal provided the requirements of Texas Property Code section 24.006 are met. Tex. R. Civ. P. 510.11. The right to recover attorney's fees incurred by a party in prosecuting or defending an eviction must be asserted in the eviction suit. A party may not maintain an independent suit, such as a wrongful eviction suit, for such fees after the eviction suit. *Tallwater v. Brodnax*, 156 S.W.2d 142, 144 (Tex. 1941).

In *Mastermark Homebuilders, Inc. v. Offenburger Construction, Inc.*, 857 S.W.2d 765 (Tex. App.—Houston [14th Dist.] 1993, no writ), the court held that a tenant who had not sought fees in justice court could seek attorney's fees in county court. In so holding, the *Mastermark* court rejected the arguments that (1) attorney's fees could not be recovered in county court since the tenant had not sought fees in justice court; and (2) fees may not be recovered if the tenant is not in possession of the property at the time of trial in county court. *Mastermark*, 857 S.W.2d at 768.

The county court may award attorney's fees accruing in the justice court and the county court, without regard to the jurisdiction of the justice court. *Carlson's Hill Country Beverage v. Westinghouse Road Joint Venture*, 957 S.W.2d 951, 955–56 (Tex. App.—Austin 1997, no pet.).

Attorney's fees may not be awarded in a forcible-detainer case in absence of evidence supporting the fees awarded. *Bruce v. Federal National Mortgage Ass'n*, 352 S.W.3d 891, 894 (Tex. App.—Dallas 2011, pet. denied) (reversing fee award for lack of evidence).

In addition to proving fees by testimony at trial, a party may prove up fees by affidavit in accordance with the procedure set forth in Texas Civil Practice and Remedies Code sections 18.001 and 18.002. *Rodriguez v. Citimortgage, Inc.*, No.

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03-10-00093-CV, 2011 WL 182122, at *6 (Tex. App.—Austin Jan. 6, 2011, no pet.) (mem. op.) (concluding in eviction cases, the trial court may not take judicial notice of the reasonableness of attorney's fees because eviction actions are not one of the claims under Texas Civil Practice and Remedies Code section 38.001 for which judicial notice of reasonable fees may be taken).

§ 34.13:14 Evidence at Trial

To prevail and obtain possession in its forcible-detainer action, the law requires a plaintiff to show (1) it owns the property by virtue of a foreclosure sale, (2) the defendant became a tenant at sufferance when the property was sold under the deed of trust, (3) the plaintiff gave proper notice to vacate the premises, and (4) the defendant refused to vacate the premises. *See* Tex. Prop. Code §§ 24.002(a)(2), (b), 24.005; *U.S. Bank, N.A. v. Freeney*, 266 S.W.3d 623, 625 (Tex. App.—Dallas 2008, no pet.).

In support of its case in chief or a motion for summary judgment in a postforeclosure eviction, plaintiffs most often rely on three documents: (1) the foreclosed deed of trust, (2) the substitute trustee's deed, and (3) the notices to vacate sent to the defendants and occupants of the subject property.

Generally the borrower's deed of trust signed by all persons obligated for the debt provides that if the property is sold at foreclosure, the borrower or any person holding possession of the property through the borrower must surrender possession of the premises immediately. If possession is not surrendered, the borrower or any other person in possession becomes a tenant at sufferance and may be removed by writ of possession. A substitute trustee's deed shows the plaintiff purchased the property at the foreclosure sale; therefore, the plaintiff is entitled to possession of the property pursuant to the tenant-at-sufferance clause contained in the deed of trust. Moreover, the notices to vacate provide proof of proper notice that plaintiff required the occupants to vacate the premises. *See* Tex. Prop. Code §§ 24.002(b), 24.005.

Unlike justice of the peace courts, county courts at law are courts of record. Thus, the rules of evidence apply. Fortunately, a trustee's deed and deed of trust are documents recorded in the real property records of the county in which the subject property is located. A file-stamped copy of an instrument filed in the real property records is self-authenticated under Texas Rule of Evidence 902(4). *Kyle v. Countrywide Home Loans, Inc.*, 232 S.W.3d 355, 362 n.2 (Tex. App.—Dallas 2007, pet. denied); *Murphy v. Countrywide Home Loans, Inc.*, 199 S.W.3d 441, 445 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). In addition, certified copies of recorded instruments are also self-authenticating under the rules of evidence. Tex. R. Evid. 902(4) (certified copies of public records are self-authenticating); *Tower v. Bank of America, N.A.*, No. 03-14-00404-CV, 2015 WL 4508687, at *2 (Tex. App.—Austin July 22, 2015, no pet.) (mem. op.).

As detailed below, a notice to vacate is most often offered into evidence via a business records affidavit of a duly authorized employee of the mortgage servicer, the plaintiff's law firm, or an affiliated service provider.

§ 34.13:15 Business Records Affidavits

The most common method of admitting copies of the notice to vacate and demand for possession into the evidentiary record is to submit them to the court via a business records affidavit.

The business records exception to the hearsay rule has four requirements: (1) the records were made and kept in the course of a regularly conducted business activity, (2) it was the regular practice of the business activity to make the records, (3) the records were made at or near the

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time of the event they memorialize, and (4) the records were made by a person with knowledge who was acting in the regular course of business. *In re EAK*, 192 S.W.3d 133, 141 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). An affidavit of the custodian of records or a "qualified witness" may be presented at trial with the business records to establish that the records satisfy these requirements and to render them self-authenticated. Tex. R. Evid. 803(6), 902(10). To be a "qualified witness," the affiant must have personal knowledge of the business' recordkeeping practices or of the facts contained within the business records. Tex. R. Evid. 602, 803(6), 902(10); *In re EAK*, 192 S.W.3d at 144.

In *Rodriguez v. Citimortgage, Inc.*, No. 03-10-00093-CV, 2011 WL 182122, at *5 (Tex. App.—Austin Jan. 6, 2011, no pet.) (mem. op.), the court held that an employee of Citimortgage's outside law firm, which had custody of all records related to the suit, including documents obtained from and kept by Citimortgage in its regular course of business, could properly attest to the documents obtained from Citimortgage, as well as the certified mail receipt, as business records.

However, not only can a person working for the prosecuting law firm provide a proper business records affidavit, any person with personal knowledge of the facts and recordkeeping practices of the record keeper can provided a business record affidavit. *Singha v. Federal National Mortgage Ass'n*, No. 05-13-01518-CV, 2015 WL 1477930, at *2 (Tex. App.—Dallas Mar. 31, 2015, no pet.) (mem. op.). The Amarillo court of appeals found the trial court did not abuse its discretion in admitting the notice to vacate over the defendant's objection when the business records affidavit was made by an employee of the foreclosure sale purchaser with personal knowledge of the bank's records and recordkeeping practices. *Allen v. Comerica Bank*, No. 07-16-00018-CV, 2016 WL 4291488, at *3 (Tex. App.—Amarillo Aug. 11, 2016, no pet.) (mem. op.).

§ 34.13:16 County Court Judgment and Issuance of Writ of Possession

Based on the terms of a judgment, a county court clerk may issue a writ of possession for execution by the sheriff or constable. Tex. R. Civ. P. 510.13. However, the writ may be stayed if, within ten days after judgment is entered, the appellant files a supersedeas bond in an amount set by the county court pursuant to Texas Property Code section 24.007 and Texas Rule of Civil Procedure 510.13. *In re Mata*, No. 14-12-00460-CV, 2012 WL 1857092, at *1 (Tex. App.—Houston [14th Dist.] May 18, 2012, orig. proceeding) (mem. op.).

§ 34.14 Judgment and Further Appeal

A final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises were used for residential purposes only. Tex. Prop. Code § 24.007; *Carlson's Hill Country Beverage v. Westinghouse Road Joint Venture*, 957 S.W.2d 951, 952–53 (Tex. App.—Austin 1997, no pet.). However, if additional relief is granted other than the right of possession, the judgment can be appealed on the other grounds. *Salaymeh v. Plaza Centro, LLC*, 264 S.W.3d 431 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

§ 34.14:1 Supersedeas Bond

A writ of possession may not be stayed by the appeal of an eviction judgment "under any circumstances" unless the appellant files a supersedeas bond in an amount determined by the county court within ten days of entering the judgment. Tex. Prop. Code § 24.007. Importantly, a supersedeas bond is not automatically set as part of the eviction judgment. Instead, the

defendant must request the court set a supersedeas bond. *Bell v. Mortgage Electronic Registration Systems, Inc.*, No. 05-06-00427-CV, 2007 WL 914759, at *3 (Tex. App.—Dallas Mar. 28, 2007, no pet.) (mem. op.) (tenant did not request that trial judge set supersedeas bond amount, and thus trial judge did not err in not doing so).

In setting the supersedeas bond, the county court must provide protection for the appellee as in any other appeal by taking into consideration the value of rents likely to accrue during appeal, damages that may occur as a result of the stay during appeal, and any other appropriate damages or amounts. *See* Tex. Prop. Code § 24.007; *Whitmire v. Greenridge Place Apartments*, 333 S.W.3d 255 (Tex. App.—Houston [1st Dist.] 2010, pet. dism'd) (upholding $10,000 supersedeas bond where tenant's monthly rent was $850; noting that tenant did not seek to reduce the bond based on his net worth and tenant remained in possession during appeal); *McCartney v. California Mortgage Service*, 951 S.W.2d 549, 550 (Tex. App.—El Paso 1997, no pet.) (upholding $19,000 bond in forcible-detainer appeal in which occupants had maintained possession of property for almost four years without making mortgage payments and property had fair monthly rental value of $700); *Hughes v. Habitat Apartments*, 828 S.W.2d 794 (Tex. App.—Dallas 1992, no writ) (reducing bond by amount of anticipated attorney's fees on appeal).

The trial court may not include anticipated appellate attorney's fees in setting the amount of the supersedeas bond. A supersedeas bond is not intended to provide security for damages that have not been finally determined by the trial court. *Hughes*, 828 S.W.2d at 795.

§ 34.14:2 Appellate Review of Supersedeas Bond Orders

Appellate courts may review the sufficiency or excessiveness of a supersedeas bond and issue any temporary orders necessary to preserve the parties' rights. *See* Tex. R. App. P. 24.4; *In re Bell*, No. 02-12-00390-CV, 2012 WL 5356302 (Tex. App.—Fort Worth Nov. 1, 2012, orig. proceeding) (mem. op.) (granting petition for writ of mandamus and vacating county court judgment directing clerk to disburse supersedeas bond although tenant vacated property and damage issues remained). A party must have a reporter's record or a written objection to the court reporter's failure to record the proceeding to preserve a supersedeas bond appeal. *Reyes v. Credit Based Asset Servicing & Securitization*, 190 S.W.3d 736, 740 (Tex. App.—San Antonio 2005, no pet.) (holding that appellant waived right to complain about $20,000 supersedeas bond because of failure to have court reporter transcribe hearing).

§ 34.14:3 Failure to Post Supersedeas Bond

If a supersedeas bond is not set and posted within the statutory ten-day period, execution of the writ of possession is not stayed. *Phillips v. Branch Bank & Trust Co.*, No. 03-11-00461-CV, 2012 WL 424875, at *1 (Tex. App.—Austin Feb. 1, 2012, no pet.) (dissolving temporary stay of execution of writ of possession and denying emergency motion for stay because defendant did not file supersedeas bond). Merely filing a motion contesting the amount of a supersedeas bond and a statement of inability to pay costs within ten days of the judgment does not stay the judgment pending appeal. *Booth v. Kondaur Capital Corp.*, No. 01-16-00188-CV (Tex. App.—Houston [1st Dist.] June 21, 2016, order).

Though a supersedeas bond must be posted to suspend enforcement of the writ of possession, filing a notice of appeal perfects the appeal, and posting bond is not a prerequisite to appellate jurisdiction. *Marshall v. Housing Authority of City of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006). The failure to file a supersedeas bond

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effectively eliminates the right to appeal the issue of possession because the writ of possession remains enforceable during the appeal. If an occupant loses any right to possession of the premises, an appeal becomes moot regardless of whether possession is actually lost by enforcement of the writ or the tenant voluntarily surrenders the premises. *Wilhelm v. Federal National Mortgage Ass'n*, 349 S.W.3d 766 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (when supersedeas bond is not posted and writ of possession is executed in favor of landlord, action is moot because tenant no longer has claim to possession of property); *Marshall*, 198 S.W.3d at 787 (when tenant voluntarily surrendered possession and lease term had expired, tenant had no claim to possession of premises, and issue of possession was moot).

§ 34.15 Common Issues at Trial

forcible-detainer actions are expedited proceedings; therefore, there is little if any pretrial discovery. Consequently a trial judge may require a prompt response and applicable case law to prevail on the many issues and arguments that can be presented at trial. A collection of common issues that frequently surface at trial are presented below, along with relevant law that addresses each issue.

§ 34.15:1 Alleged Defects in Foreclosure Process

One of the most common defenses brought in a postforeclosure eviction action is whether the plaintiff acquired title and possession of the property through an alleged wrongful foreclosure. However, in a forcible-detainer suit, the justice court (or county court on appeal) determines only who is entitled to immediate possession of the property. Whether the plaintiff acquired title in a defective foreclosure is the subject of an independent lawsuit. *Villalon v. Bank One*, 176 S.W.3d 66, 71 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

Courts of appeal consistently allow forcible-detainer actions to proceed without regarding whether the party seeking possession complied with the terms of the deed of trust but rather on a tenancy-at-sufferance clause in a deed of trust. *See, e.g., Dormady v. Dinero Land & Cattle Co.*, 61 S.W.3d 555, 558–59 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.).

A challenge to the validity of a foreclosure sale does not deprive the justice or county court of jurisdiction. *Dormady*, 61 S.W.3d at 558 (addressing deed of trust creating tenancy at sufferance when property is sold under the deed and concluding the dispute whether sale complied with deed of trust was "of no consequence" to issue of immediate possession); *Elwell v. Countrywide Home Loans, Inc.*, 267 S.W.3d 566, 568–69 (Tex. App.—Dallas 2008, pet. dism'd w.o.j.); *Rice v. Pinney*, 51 S.W.3d 705 (Tex. App.—Dallas 2001, no pet.) (discussing deed of trust creating tenancy at sufferance when property is "sold under this [deed]" and holding that challenge to validity of foreclosure sale in district court did not preclude forcible-detainer suit in justice court).

§ 34.15:2 Notice of Foreclosure

An alleged lack of proper notice of foreclosure does not raise a title issue sufficient to defeat forcible-detainer jurisdiction. *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.).

§ 34.15:3 Appointment of Substitute Trustee

Whether the trustee named as grantee in the trustee's deed was properly appointed or had the authority to sell the property, or any other issue allegedly making the underlying foreclosure sale void, is "outside of the scope of a forcible detainer case." *Kaldis v. Aurora Loan Services*, No. 01-09-00270-CV, 2010 WL 2545614, at *3

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(Tex. App.—Houston [1st Dist.] June 24, 2010) (mem. op.).

§ 34.15:4 Assignment Chain/Chain of Title

In a forcible-detainer action, it is not necessary to join every link in the chain of title from the deed of trust to the substitute trustee's deed. *Reardean v. Federal Home Loan Mortgage Corp.*, No. 03-12-00562-CV, 2013 WL 4487523, at *3 (Tex. App.—Austin Aug. 14, 2013, no pet.) (mem. op.). Inquiries into the validity of the foreclosure sale are specifically prohibited by statute. *Hornsby v. Secretary of Veterans Affairs*, No. 05-11-01075-CV, 2012 WL 3525420, at *3 (Tex. App.—Dallas Aug. 16, 2012, no pet.) (mem. op.); *Stephens v. Federal Home Loan Mortgage Corp.*, No. 02-10-00251-CV, 2011 WL 1532384, at *2 (Tex. App.—Fort Worth Apr. 21, 2011, no pet.) (holding Freddie Mac was not required to "connect the dots" between original lender and mortgage servicer regarding title); *Deubler v. Bank of New York Mellon*, No. 02-10-00125-CV, 2011 WL 1331540, at *2 (Tex. App.—Fort Worth Apr. 7, 2011, no pet.) (mem. op.) (holding party was not required to present evidence establishing linkage between deed of trust and substitute trustee's deed to establish superior right to possession).

§ 34.15:5 Bankruptcy Filed during Foreclosure

An inquiry into whether a bankruptcy automatic stay was in place when a foreclosure sale occurred relates to the status of title and should not be considered by the court in a postforeclosure forcible-detainer proceeding. *American Homes 4 Rent Properties One, LLC v. Ibarra*, No. 05-13-00973-CV, 2014 WL 3212843, at *2 (Tex. App.—Dallas July 8, 2014, no pet.).

§ 34.15:6 Intervening Third-Party Purchaser

When a mortgagor executes a deed of trust, legal and equitable title in the property are severed. The mortgagor retains the legal title, and the mortgagee holds equitable title. *Flag-Redfern Oil Co. v. Humble Exploration Co.*, 744 S.W.2d 6, 8 (Tex. 1987). If the mortgagor sells or transfers the mortgagor's right, title, and interest in the property to an intervening purchaser, the new purchaser's rights are subject to the mortgagee's equitable rights contained in the deed of trust granted by the mortgagor. Foreclosure of the deed of trust passes all of the intervener's rights in the property to the foreclosure sale purchaser. *Motel Enterprises, Inc. v. Nobani*, 784 S.W.2d 545, 547 (Tex. App.—Houston [1st Dist.] 1990, no writ) (foreclosure under valid deed-of-trust lien has effect of passing all right, title, and interest that mortgagor held at time deed of trust was executed, free and clear of rights of any subsequent purchaser).

Thus, any rights an intervening purchaser may claim from the mortgagor by a quitclaim deed, warranty deed, sheriff's sale deed, or the like after a deed of trust was executed by the mortgagor are subject to foreclosure of the mortgagor's deed of trust and the rights of the subsequent foreclosure sale purchaser. *Ford v. U.S. Bank, N.A.*, No. 01-07-00183-CV, 2008 WL 4670514, at *3 (Tex. App.—Houston [1st Dist.] Oct. 23, 2008, no pet.) (mem. op.).

If a deed of trust creates a landlord-tenant relationship by deeming anyone holding possession of property a tenant at sufferance after foreclosure (including an intervening purchaser of the mortgagor's interest in the property), the "landlord-tenant relationship provides a basis for determining the right to immediate possession without resolving the ultimate issue of title to the property." *U.S. Bank, N.A. v. Farhi*, No. 05-07-01539-CV, 2009 WL 4670514, at *4 (Tex.

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App.—Dallas Aug. 7, 2009, no pet.) (mem. op.); *Ford*, 2008 WL 4670514, at *3.

§ 34.15:7 Probate Proceedings During Foreclosure Process

In *Garza v. Wells Fargo Bank, N.A.*, No. 05-14-01578-CV, 2016 WL 3136150 (Tex. App.—Dallas June 2, 2016, no pet.) (mem. op.), the court considered a postforeclosure forcible-detainer action where the daughter of the deceased mortgagor moved into the mortgagor's property and filed an application to determine heirship. While the heirship proceeding was pending, the mortgagee, Wells Fargo, foreclosed on the mother's deed of trust and began a post-foreclosure eviction. The daughter argued the opening of a probate estate suspends the power of sale in the deed of trust and by filing an application to determine heirship it also suspended the power of sale, relying on *Pearce v. Stokes*, 291 S.W.2d 309 (Tex. 1956). Therefore, the daughter reasoned the foreclosure sale deed was void. The court held that because the foreclosed-upon deed of trust contained the requisite provision making the daughter a tenant at sufferance upon foreclosure, the trial court maintained jurisdiction to consider the issue of immediate possession and the daughter's allegations the trustee's foreclosure deed was void due to the pending probate proceeding was immaterial. Summary judgment was awarded to the mortgagee, the foreclosure sale purchaser. *Garza*, 2016 WL 3136150, at *2.

§ 34.15:8 Concurrent Actions

Either before or during the eviction proceeding, it is common to find that the foreclosed mortgagor has filed a separate action in state district court contesting the validity of the foreclosure sale. The foreclosed mortgagor then argues the judge should abate the forcible-detainer action until the district court suit is concluded.

While it is true that determining the right to immediate possession necessarily requires resolution of a title dispute and a justice or county court has no jurisdiction to enter a judgment concerning the validity of title in a forcible-detainer action, the Texas legislature has established a system expressly designed to decide the two issues separately. *Rice v. Pinney*, 51 S.W.3d 705, 710 (Tex. App.—Dallas 2001, no pet.); *Scott v. Hewitt*, 90 S.W.2d 816, 818–19 (Tex. 1936). The Texas Supreme Court has also held a forcible-detainer action is "not exclusive, but cumulative" of other remedies a party may have. Thus a party may pursue both a forcible-detainer action in justice court and a suit to quiet title in district court. *Scott*, 90 S.W.2d at 819. In the subsequent decades, appellate courts have consistently relied on *Scott*, holding a forcible-detainer action in justice court may be prosecuted concurrently with title disputes in district court. *See, e.g., Kassim v. Carlisle Interests, Inc.*, 308 S.W.3d 537, 541 (Tex. App.—Dallas 2010, no pet.); *Breceda v. Whi*, 224 S.W.3d 237, 240 (Tex. App.—El Paso 2005, no pet.); *Dormady v. Dinero Land & Cattle Co.*, 61 S.W.3d 555, 558 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.); *Young Women's Christian Ass'n of Austin, Tex. v. Hair*, 165 S.W.2d 238, 241–42 (Tex. Civ. App.—Austin 1942, writ ref'd w.o.m.).

In *Scott*, the Texas Supreme Court observed the legislature intended forcible-detainer proceedings to be "a summary, speedy, and inexpensive remedy for the determination of who is entitled to possession of premises." *Scott*, 90 S.W.2d at 818. Permitting parties to abate forcible-detainer actions simply by filing suit in district court would frustrate that legislative intent. *Rice*, 51 S.W.3d at 711 ("To hold . . . that the filing of a concurrent suit in district court challenging the validity of the substitute trustee deed precludes a forcible-detainer suit in justice court would ignore the long-established legislative scheme of parallel resolution of immediate possession and title issues."); *In re Mandola*, No. 03-11-

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00816-CV, 2012 WL 43365, at *1 (Tex. App.—Austin Jan. 4, 2012, orig. proceeding) (mem. op.).

§ 34.15:9 Abatement

Because the remedies in a forcible detainer are cumulative, a court having jurisdiction of an eviction suit in which only possession is disputed should neither abate the proceeding in deference to an ongoing title dispute in another court nor transfer the eviction suit to the court in which such a dispute is pending. *See It's The Berrys, LLC v. Edom Corner, LLC*, 271 S.W.3d 765 (Tex. App.—Amarillo 2008, no pet.); *Meridien Hotels, Inc. v. LHO Financing Partnership I, L.P.*, 97 S.W.3d 731 (Tex. App.—Dallas 2003, no pet.).

If a justice court abates the eviction proceeding, the appropriate court may issue mandamus to require the justice court to proceed with the eviction suit. *In re American Homes for Rent Properties Eight, LLC*, 498 S.W.3d 153, 157 (Tex. App.—Dallas 2016, orig. proceeding) (mem. op.); *Meridien*, 97 S.W.3d at 738–39 (holding that justice court abused its discretion in abating eviction suit until finalization of district court proceedings seeking declaration that tenant was in default and that county court properly issued mandamus to require justice court to proceed to trial on issue of possession).

§ 34.15:10 Persons Not Party to Mortgage Are Still Subject to Tenant-at-Sufferance Clause

Following foreclosure, even an occupant of the property that was not a party to the foreclosed note or deed of trust is subject to a tenant-at-sufferance clause in the foreclosed security instrument. This is because a grantor "cannot convey more than he has." *Pinnacle Premier Properties, Inc. v. Breton*, 447 S.W.3d 558, 564 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Thus, a grantor subject to a tenant-at-sufferance clause cannot convey an interest in the property free of the clause. Because the foreclosed-upon mortgagor encumbered its interest in the property with a deed of trust containing a tenant-at-sufferance clause, any party claiming a derivative interest in the property is also subject to the deed of trust's restrictions. *Pinnacle Premier Properties*, 447 S.W.3d at 564.

§ 34.15:11 Statute of Limitations

Forcible-detainer suits are subject to a two-year statute of limitations beginning from the date possession of the property is refused. Tex. Civ. Prac. & Rem. Code § 16.003. For a host of reasons, a postforeclosure plaintiff may opt to file suit months, if not years, after the property is sold at foreclosure. In this situation, eviction defendants often argue the eviction suit is barred by limitations. *See Federal Home Loan Mortgage Corp. v. Pham*, 449 S.W.3d 230 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

However, a forcible-detainer cause of action accrues each time a person refuses to surrender possession of real property after a person entitled to possession delivers proper written notification to vacate. *Massaad v. Wells Fargo Bank National Ass'n*, No. 03-14-00202-CV, 2015 WL 410514, at *1 (Tex. App.—Austin Jan. 30, 2015, no pet.) (mem. op.) (each refusal to surrender possession of real property on written demand for possession constitutes new forcible detainer). In *Massaad*, the appellant's sole issue on appeal was that the suit was barred by limitations because the appellant refused to comply with Wells Fargo's first notice to vacate sent more than two years before Wells Fargo filed suit. The court concluded that the suit was timely filed because Wells Fargo provided another notice to vacate a few weeks before filing suit, and Texas Property Code section 24.002 provides each refusal to surrender possession of the premises after receiving a proper

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notice to vacate "constitutes a new forcible detainer." *Massaad*, 2015 WL 410514, at *1.

A similar conclusion is found in other cases. *See, e.g.*, *Custer v. Wells Fargo Bank, N.A.*, No. 03-15-00362-CV, 2016 WL 1084165, at *3 (Tex. App.—Austin Mar. 18, 2016, pet. dism'd w.o.j.) (mem. op.) (concluding limitations did not bar action for forcible detainer brought within two years of subsequent notice to vacate and affirming judgment granting writ of possession); *Montenegro v. Wells Fargo Bank, N.A.*, No. 03-13-00123-CV, 2015 WL 3543055, at *4 (Tex. App.—Austin June 3, 2015, pet. dism'd) (mem. op.) (concluding a "forcible-detainer action accrues each time a person refuses to surrender possession of real property after a person entitled to possession delivers proper written notification to vacate").

§ 34.15:12 Res Judicata

To succeed on the affirmative defense of res judicata or claim preclusion, a defendant must prove that the current action is based on the same claims raised or could be raised in a prior action. *Travelers Insurance Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

If, after an adverse judgment in a forcible-detainer action, a plaintiff makes a new written demand for possession of the real property that complies with the notice-to-vacate requirements, a subsequent forcible-detainer action could not be based on the same claims raised or which could have been raised in the prior action. *See* Tex. Prop. Code §§ 24.002, 24.005; *Federal Home Loan Mortgage Corp. v. Pham*, 449 S.W.3d 230, 235–36 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

§ 34.15:13 Removal to Federal Court

In the last few years, following foreclosure sales, a number of former homeowners have removed the subsequent eviction suits to federal court. The most common claims for removal include (1) a federal question because the plaintiff violated a federal statute, (2) a federal question because of due process violations, and (3) diversity jurisdiction because the alleged amount in controversy is the value of the property.

Federal courts routinely remand these cases back to state court. *See, e.g.*, *HSBC Bank USA National Ass'n v. Shavers*, No. H-13-0694, 2013 WL 181761 (S.D. Tex. Apr. 29, 2013) (mem. op.) (remanding postforeclosure eviction suit to state court); *U.S. Bank, N.A. v. Rudd*, No. 3:10-CV-2440-L, 2011 WL 539120, at *4 (N.D. Tex. Feb. 7, 2011) (remanding because former owner did not produce evidence that value of right to occupy property exceeded $75,000); *Wells Fargo Bank v. Jones*, 733 F. Supp. 2d 741, 742–43 (N.D. Tex. 2010) (remanding eviction suit because no federal question, and former owner failed to prove diversity of citizenship and failed to show that value of right to occupy property exceeded $75,000).

§ 34.15:14 Lack of Standing

Another common defense in a postforeclosure eviction action is that the plaintiff lacks standing to bring suit because the plaintiff provided no proof the sale by which it claims possession was validly conducted. This defense often arises when the eviction defendant has a separate suit pending in another court contesting the title and the foreclosure sale.

"Standing is a component of subject-matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit." *In re I.I.G.T.*, 412 S.W.3d 803, 805 (Tex. App.—Dallas 2013, no pet.). The plaintiff in a lawsuit has the burden of alleging facts, which if taken as true, affirmatively demonstrate a court's jurisdiction to hear a case. *Nauslar v. Coors Brewing Co.*, 170 S.W.3d 242, 248 (Tex. App.—Dallas 2005, no pet.). A person has standing if (1) the person has

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sustained, or is in immediate danger of sustaining, some direct injury as a result of the defendant's wrongful act; (2) there is a direct relationship between the alleged injury and the claim being adjudicated; (3) the person has a personal stake in the controversy; (4) the challenged action has caused some injury in fact, either economic, recreational, environmental, or otherwise; or (5) the person is an appropriate party to assert the public's interest in the matter, as well as the person's own. *Asshauer v. Wells Fargo Foothill*, 263 S.W.3d 468, 471 (Tex. App.—Dallas 2008, pet. denied).

The Dallas court of appeals has held that a plaintiff in a postforeclosure forcible-detainer action sufficiently demonstrates standing by alleging the following: (1) the plaintiff acquired the property at a foreclosure sale; (2) the defendant, or any person holding possession of the property through the defendant, was a tenant at sufferance once the property was sold at the foreclosure sale; and (3) the defendant refused to vacate after notices to vacate the property were delivered. *Federal National Mortgage Ass'n v. Ephriam*, No. 05-13-00984-CV, 2014 WL 2628036, at *3 (Tex. App.—Dallas June 12, 2014, no pet.) (mem. op.).

§ 34.15:15 Timing of Eviction Notice

In the recent case of *Onabajo v. Household Finance Corp. III*, No. 03-15-00251-CV, 2016 WL 3917140 (Tex. App.—Austin July 14, 2016, no pet.) (mem. op.), the Austin court of appeals examined whether a plaintiff waited the requisite period of time after sending a three-day notice to vacate before filing its suit for forcible detainer.

The evidence included a notice to vacate dated October 8, 2014, and attached was a United States Postal Service (USPS) tracking report showing that the letter arrived at the USPS facility in Houston (the location of Household's counsel) on October 15, 2014, and was delivered in Austin (the location of the property) on October 17, 2014. Notably, and perhaps most important to the holding, the appellate record established the notice to vacate was not mailed by Household's counsel until October 14, 2014—despite being dated October 8, 2014. *Onabajo*, 2016 WL 3917140, at *3–4.

Household filed suit for forcible detainer on October 17, 2014, the same day the USPS tracking report reflected the notice to vacate was delivered. *Onabajo*, 2016 WL 3917140, at *4.

On appeal, Household relied on the mailbox rule and the holding in *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987), for the position notice was timely given because the notice was mailed by certified and first-class mail and, as a result, "there existed a presumption that the notice was duly received by the addressee."

The appellate court declined to comment on the mailbox rule's applicability to forcible-detainer actions. However, the court noted that even if the mailbox rule applied, Household failed to show the statutorily required notice period had not yet expired when Household instituted its forcible-detainer action on October 17. *Onabajo*, 2016 WL 3917140, at *5.

Onabajo demonstrates that it is best to send notices to vacate via first-class and certified mail and document the date and manner by which those notices were sent. This is best achieved by including the certified mail number on the notice to vacate and also by stating that the notice is being sent via first-class mail. Make a photocopy of the face of both mailers with postage affixed before depositing them in the mail. Have the case manager or office employees handling the eviction execute an affidavit of mailing. Rushing to file suit without verifying the status of the notice to vacate can be fatal to the success of the suit. Never assume notice is received. Track the status of the certified mailer via the USPS website, **https://tools.usps.com/go/TrackConfirmAction**. Also monitor incom-

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ing mail for the return of either the first-class or certified mailer. If the first-class mailer is not returned, under Texas law the three-day mailbox rule may apply. In an abundance of caution, add an additional three days to that (via the notice to vacate and demand for possession) before filing the complaint. If the certified mailer is received before that period, adjust the calculations accordingly and perhaps file suit sooner. Unfortunately, the postal service may take much longer to update the information within its track-and-confirm database. Additionally, if the first-class mailer gets returned, there is no presumption of receipt. In that case, it is highly advisable to have the client check to determine if the property is vacant. First-class mailers are commonly returned when the property is vacant and when no forwarding information is left. Also, check to verify the notice contained the correct address. If an eviction is still necessary, the other noticing methods identified in Texas Property Code section 24.005, such as hand delivery or posting, may be used.

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Form 34-1

Notice to Vacate

[**Date**]

[**Name and address of tenant**]

Re: Notice of foreclosure and change in ownership; three-day notice to vacate and demand for possession; alternative thirty-day notice to vacate and demand for possession to tenants; notice of termination of lease

Property: [**address of property**]

[**Salutation**]

NOTICE IS HEREBY GIVEN THAT [**name of foreclosure purchaser**] acquired title to the above-referenced Property as a result of a foreclosure sale. Pursuant to the terms of the foreclosed-upon deed of trust, you are now a tenant at sufferance.

Pursuant to sections 24.002(b) and 24.005 of the Texas Property Code, [**name of foreclosure purchaser**] hereby terminates your tenancy at sufferance. This letter constitutes formal and final demand that you vacate the Property no later than three days following the delivery of this letter. In the event you fail to comply with this demand, this firm has been authorized to immediately file suit against you seeking possession of the Property.

NOTICE TO TENANT(S)

Pursuant to Texas state law, if you are a tenant in the Property and have paid rent to your landlord for the month of the foreclosure sale and prior to receiving notice of the foreclosure referred to above, you must vacate the Property within thirty days from the date this notice is delivered. If this paragraph is applicable, you must provide our office with a copy of your lease agreement and proof of your last lease payment.

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NOTICE TO SERVICEMEMBERS AND THEIR DEPENDENTS

The Servicemembers' Civil Relief Act (SCRA, 50 U.S.C. App. §§ 3901–4043), as amended, grants active service members of the United States Armed Forces or a dependent of such an active service member certain rights, which include the temporary suspension of judicial and administrative proceedings against active service members and their dependents, and which rights can extend for up to one year after any active duty period concludes. Please note that you may wish to consult an attorney, or your local military legal liaison, to help you determine what rights you may have, if any, under the SCRA.

The seriousness of the actions suggested in this letter warrant your immediate attention. If you believe any of the referenced protections may apply to you or if you have any other questions or concerns, please contact our office.

Sincerely yours,

____

[Name of attorney]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certified Mail No. **[number]**

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Form 34-2

[Caption. See § 3 of the Introduction in this manual.]

Plaintiff's First Original Petition for Forcible Detainer

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now [**name of grantee in foreclosure sale deed or successor in interest**], Plaintiff herein, and files this First Original Petition for Forcible Detainer, and for grounds, therefore, would show the Court as follows:

I.

Introduction

1. Plaintiff is [**name of grantee in foreclosure sale deed or successor in interest**]; Defendant is [**name of defendant**] and/or all occupants of [**address**].

2. Plaintiff sued Defendant for forcible detainer. As a matter of law, the only issue before this Court is whether Plaintiff is entitled to immediate possession of the property located at [**address**] (the "Subject Property").

II.

Discovery

3. Discovery is intended to be conducted in accordance with Tex. R. Civ. P. 500.9.

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III.

Jurisdiction

4. This Court has jurisdiction of this case pursuant to rule 510 of the Texas Rules of Civil Procedure and chapter 24 of the Texas Property Code. Venue is properly in this Court as said Subject Property lies within the precinct boundaries of this Court.

IV.

Forcible Detainer

5. Plaintiff would show unto this Court that the Subject Property was purchased at a nonjudicial foreclosure as evidenced by a trustee's deed, which is recorded in the real property records of **[county]** County, Texas. Plaintiff is the [foreclosure sale purchaser/successor in interest to the foreclosure sale purchaser].

6. The foreclosure sale by which the grantee purchased the Subject Property was held pursuant to the terms of a deed of trust. [**Insert specific provisions from the deed of trust, e.g.,** The foreclosed upon deed of trust provides that if the Subject Property was foreclosed, "Borrower or any person holding possession of the Property through Borrower shall immediately surrender possession of the Property to the purchaser at that sale." It further provides that "if possession is not surrendered, Borrower or such person shall be a tenant at sufferance and may be removed by writ of possession."]

7. On **[date]**, Plaintiff provided written notice by certified and first-class mail to Defendant that the Subject Property should be vacated in accordance with the Texas Property Code. Notwithstanding said demand, Defendant continues to reside in the premises, to the exclusion of Plaintiff. As such, Defendant has committed a forcible detainer.

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8. All conditions precedent to Plaintiff's recovery of possession of the Subject Property have been performed or have occurred.

Prayer

WHEREFORE, PREMISES CONSIDERED, Plaintiff asks that the Court issue citation for Defendant to appear and answer, and that Plaintiff be awarded judgment against Defendant for possession of the Subject Property and for issuance of a writ of possession. In addition, Plaintiff asks for all other relief to which Plaintiff is entitled.

Respectfully submitted,

____

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Verification

STATE OF TEXAS)

COUNTY OF)

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], known to me to be the person whose signature is subscribed below and who, after being by me duly sworn, stated upon [his/her] oath the following:

"I am an authorized agent acting on behalf of the Plaintiff in this action and am capable of making this verification. I have read the Plaintiff's First Original Petition for Forcible Detainer. The facts stated in it are within my personal knowledge and are true and correct."

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____
[Name of affiant]

SWORN TO AND SUBSCRIBED BEFORE ME by the said **[name of affiant]** on the______ day of ______________, 20___.

____
Notary Public, State of Texas

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Form 34-3

[Caption. See § 3 of the Introduction in this manual.]

Judgment of Possession

On the _____ day of _______________, 20___, came on to be heard the above-styled and numbered cause. Plaintiff appeared by and through its counsel of record. The Defendant [did/ did not] appear. After hearing and considering the evidence, this Court is of the opinion that Plaintiff is entitled to possession of the property located at [**address**] prayed for in its Original Petition for Forcible Detainer.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that [**name of defendant**] have Judgment of Possession against [**name of defendant**] and/or all occupants of [**address**].

All costs of court are hereby taxed against the party by whom incurred, for all of which let execution issue.

All relief requested herein and not expressly granted herein is HEREBY DENIED.

The bond is hereby set as follows: ____.

SIGNED BY THE COURT this _____ day of ______________, 20____.

____
Justice of the Peace
[**county**] County

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its ownership after foreclosure continues to be consistent with holding the property primarily to protect its security interest. *See* Tex. Water Code § 26.3514.

To qualify for this exemption, the lender who forecloses on property must list the property for sale within twelve months of foreclosure and accept or consider offers of fair consideration for the property that would permit the lender to recover its debt. If a lender refuses to sell the foreclosed-on property to a purchaser who offers fair consideration for the property, the lender will lose the protections of the exemption and will be considered to be holding the property primarily for investment purposes, not primarily for purposes of protecting its security interest. *See* Tex. Water Code § 26.3514(g)–(i).

§ 35.3:3 Brownfields, Innocent Owners, and State-Approved Voluntary Cleanup Program

In 1997, subchapter V, Immunity from Liability of Innocent Owner or Operator, was added to the TSWDA. *See* Tex. Health & Safety Code §§ 361.751–.754. The TSWDA authorizes the Texas Commission on Environmental Quality (TCEQ) to issue an Innocent Owner/Operator Program (IOP) Certificate that declares that a person is an innocent owner or operator and not responsible for an environmental problem described in the certificate. (That is, the liability release does not apply to any subsequent releases of contaminants impacting the property.) An applicant must establish that his property has become contaminated as a result of a release or migration of contaminants from a source not located on the applicant's property and that he did not cause or contribute to the source of the problem. This protection is available "if after appropriate inquiry consistent with good commercial or customary practice, the person did not know or have reason to know of the contamination at the time the person acquired the property." *See* Tex. Health & Safety Code § 361.752(b). IOP Certificates are not transferable. See the TCEQ website for program requirements at **www.tceq.texas.gov/remediation/iop/iop.html**.

In 1995, subchapter S, Voluntary Cleanup Program (VCP), was added to the TSWDA. The VCP enables private property owners, including foreclosing lenders, to negotiate a voluntary cleanup of contaminated sites in order to achieve a release from liability for subsequent owners or lenders of a contaminated site. *See* Tex. Health & Safety Code §§ 361.601–.613. This Texas legislation is also referred to as "Brownfields" legislation, with the goal of making formerly contaminated property more marketable. On satisfaction of a cleanup plan approved by TCEQ, the commission issues a final certificate of completion, which results in TCEQ being bound to the legal conclusion that the site cleanup is finished (at least to the extent of the contamination identified in the plan). While in the VCP process, the current owner of the property is free from VCP enforcement actions. There is a memorandum of understanding between TCEQ and EPA-Region 6 providing that the EPA will generally not pursue enforcement actions on properties in the VCP. However, purchasers must be placed on the VCP application before purchase of the contaminated property or they will need to wait until a certificate of completion or conditional certificate of completion is issued to be eligible for liability waiver. Future owners or lenders will not be subject to cleanup liability for prior contamination as defined in the certificate, should it later be determined that the contamination was not properly remediated. However, subchapter S does not address potential tort liability of the property owner to third parties. See the TCEQ website at **www.tceq.texas.gov/remediation/vcp/vcp.html** for program requirements and the form of the final certificate of completion.

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§ 35.3:4 Dry Cleaner Remediation Program

In 2003 the legislature enacted the Dry Cleaner Environmental Response Act to facilitate cleanup of property contaminated by the operation of dry cleaners. *See* Tex. Health & Safety Code §§ 374.001–.253. The law establishes a TCEQ-administered fund (known as the Texas Dry Cleaner Remediation Program) available for TCEQ-conducted corrective actions. An applicant must have been the owner of the contaminated site for not less than five years. See the TCEQ website at **www.tceq.texas.gov/permitting/registration/dry_cleaners** for dry cleaner remediation program requirements.

§ 35.3:5 Closed Municipal Solid Waste Landfills

The development and use of property overlying a closed municipal solid waste landfill is regulated under Tex. Health & Safety Code §§ 361.531–.539 and 30 Tex. Admin. Code § 330.952. No one may lease land overlying such a landfill unless the land is in compliance with the statutory requirements or notice is given to prospective lessees of what is required to bring the land and any development into compliance with law and the prohibitions and restrictions on future development of the land. Tex. Health & Safety Code § 361.537; 30 Tex. Admin. Code § 330.964. An owner of such land must also notify each lessee and occupant of the land's former use as a landfill and the structural controls in place to "minimize potential danger" posed by the landfill. Tex. Health & Safety Code § 361.539(b); 30 Tex. Admin. Code § 330.963(b).

§ 35.3:6 Mold

If mold remediation is performed on a property, a licensed mold assessor is required to provide a certificate of mold remediation to the property owner within ten days following the remediation. If the assessor determines that it is reasonably certain that the mold will not return from that remediated cause, the mold assessor must note on the certificate that the underlying cause of the mold has been remediated. Tex. Occ. Code § 1958.154(a). Upon sale of the property, the seller must give the buyer a copy of each Certificate of Mold Damage Remediation issued for the property during the preceding five years. Tex. Occ. Code § 1958.154(b). Accordingly, if a borrower performs mold remediation on the collateral, the lender should obtain a copy of the certificate at that time, in case the lender later purchases the property at foreclosure.

§ 35.4 Foreclosure Strategies

Hopefully, the loan documents provide for inspection and Phase I and Phase II audit rights and compliance with the ASTMs information standards. Given the current state of environmental laws, the following are strategies that might be followed by a mortgagee.

§ 35.4:1 Inspection

If possible, the mortgagee should conduct a Phase I Environmental Site Assessment (ESA) of the mortgaged property. To inspect the property, the lender will have to obtain the cooperation of the owner of the property in gaining peaceable entry to the property. If the mortgagor refuses to cooperate, the lender may be able to obtain an injunction permitting entry for the purpose of having an ESA conducted. *See RTC v. Polmar Realty, Inc.*, 780 F. Supp. 177 (S.D.N.Y. 1991) (granting injunction to permit mortgagee entry to conduct ESA where mortgage contained clause permitting lender right to inspect property on occurrence of default on loan); *First Capital Life Insurance Co. v. Schneider, Inc.*, 608 A.2d 1082 (Pa. Super. Ct. 1992) (inspection clause did not allow for Phase II ESA since it would involve digging of holes in property, conducting subsurface tests, and leaving groundwater monitoring well, but found that "reentry to

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Chapter 36

Federal and State Foreclosure Assistance Programs

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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 website of the investor or servicer. Generally these sites are informative and user-friendly. The primary HUD website is **www.hud.gov**, the VA website is **www.va.gov**, the Fannie Mae website is **www.fanniemae.com**, and the Freddie Mac website 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

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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 website at **https://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 website 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), **https://www.fhfaoig.gov/Content/Files/SAR%20Home%20Foreclosure%20Process_0.pdf**. 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.

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§ 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 with 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 have stopped accepting applications, including the Home Affordable Refinance Program and the various alternatives under the Making Home Affordable Program.

§ 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 to enable borrowers with little or no equity to refinance into more affordable mortgages without new or additional mortgage insurance. *See* What is the HARP Program?, Federal Housing Finance Agency, **https://www.harp.gov/About**.

To be eligible for HARP, the following requirements must be met: (1) the borrower must be current on the loan, with no thirty-day plus late payments in the last six months and no more than one in the past twelve months; (2) the home must be the borrower's primary residence, a one-unit second home, or a one- to four-unit investment property; (3) the loan must be owned by Fannie Mae or Freddie Mac; (4) the loan must have been originated on or before May 31,

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2009; and (5) the current loan-to-value ratio must be greater than 80 percent. *See* Are You Eligible?, Federal Housing Finance Agency, **https://www.harp.gov/Eligibility**.

The application deadline for HARP is December 31, 2018. *See* What is the HARP Program?, Federal Housing Finance Agency, **https://www.harp.gov/About**.

§ 36.5:2 Department of Veterans Affairs Affordable Modification

The Department of Veterans Affairs (VA) offers a mortgage modification program designed to lower monthly mortgage payments to no more than 31 percent of the borrower's monthly gross income. VA-guaranteed loans should be considered for a VA Affordable Modification (VAAM) when traditional home retention options are not feasible. *See* U.S. Department of Veterans Affairs, Circular 26-17-10, Department of Veterans Affairs Affordable Modification, at 1 (Apr. 7, 2017).

The servicer must evaluate the loan for a VAAM before determining that the loan is insoluble. If a servicer is unable to contact the borrower to obtain financial information, or if the borrower declined to provide financial information, then evaluation for a VAAM cannot be completed. If verified financial information indicates insufficient income to justify a traditional loss mitigation option, then the servicer will use the financial information obtained to evaluate the possibility of a VAAM. *See* U.S. Department of Veterans Affairs, Circular 26-17-10, Department of Veterans Affairs Affordable Modification, at 1 (Apr. 7, 2017).

§ 36.5:3 Other Resources

Homeownership Preservation Foundation (HPF). HPF is a nonprofit organization, partnered with and supported by HUD and the U.S. Department of the Treasury, that provides comprehensive financial education and confidential foreclosure prevention counseling, free of charge. Additional information regarding HPF's services is available through Homeowner's HOPE Hotline at (888) 995-4673, or at the website **www.995hope.org/**.

NeighborWorks America. NeighborWorks America is a nonprofit organization that provides assistance for homeowners who are struggling or unable to meet their loan-repayment obligations by collaborating with numerous private and government organizations to help homeowners avoid or mitigate foreclosure through a network of HUD-certified counselors. Additional information regarding NeighborWorks is available at (202) 760-4000, or at its website **www.neighborworks.org/**.

§ 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.

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§ 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.

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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.

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over both the land and the crops produced from the land.

§ 37.2:6 Mortgagee's Priority in Receivership

As a general rule, a lienholder's interest in property held by a receiver has priority over the cost and expenses incurred in the administration and operation of the receivership. *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 a receiver or who acquiesces in the receivership and seeks its benefits may not be entitled to priority of its lien position over the receiver's fees and expenses. *Chase Manhattan Bank*, 52 S.W.3d at 880.

For additional discussion of receiverships, see Robert Allan Blackwell, *The Nuts and Bolts of Texas Receiverships, in* Receiverships in Texas, State Bar of Texas (2011).

§ 37.3 Residential Foreclosure Consultants

Chapter 21 of the Texas Business and Commerce Code regulates the business operations of residential foreclosure consulting services. *See* Tex. Bus. & Com. Code ch. 21. Residential foreclosure consultants are defined as persons who make a solicitation, representation, or an offer to a homeowner to perform for compensation, or who for compensation performs, a service that the person represents will (1) prevent or postpone a foreclosure, (2) obtain a forbearance agreement from a lienholder, (3) assist the homeowner to cure the default giving rise to the foreclosure or to reinstate a delinquent mortgage, (4) obtain an extension of the homeowner's reinstatement period, (5) obtain a waiver of the acceleration clause in a note or lien instrument, (6) assist the homeowner in obtaining a loan or advance of funds to prevent foreclosure, (7) avoid or ameliorate the impairment of a borrower's credit rating arising from a foreclosure, (8) save the homeowner's residence from foreclosure, or (9) assist the homeowner in obtaining excess proceeds from a foreclosure sale of the residence. *See* Tex. Bus. & Com. Code § 21.001(a). For purposes of the statute, a foreclosure commences with the filing of notice of sale under section 51.002(b) of the Texas Property Code or commencement of a judicial foreclosure action. Tex. Bus. & Com. Code § 21.001(b).

See section 36.6 in this manual for additional discussion.

§ 37.3:1 Persons Excluded from Statute's Coverage

There are limited exceptions to the scope of Texas Business and Commerce Code chapter 21 allowing certain enumerated persons to provide residential foreclosure consultant services and not be subject to the Act. *See* Tex. Bus. & Com. Code § 21.002. These exceptions expressly include attorneys licensed in Texas who are performing consulting services in connection with providing legal services to the residential homeowner, so long as the attorney (or an associate of the attorney) does not obtain, either directly or indirectly, a transfer of title to the residence in foreclosure. Tex. Bus. & Com. Code § 21.002(a)(1), (b).

§ 37.3:2 Written Contract Required

All residential foreclosure consulting contracts involving compensation to the foreclosure consultant must be in writing, dated, and signed by the homeowner. Tex. Bus. & Com. Code § 21.051. The contract must contain a mandatory contractual notice provision that advises the homeowner of his right to cancel or rescind the contract at any time, without penalty of any kind. *See* Tex. Bus. & Com. Code § 21.052.

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§ 37.3:3 Restrictions on Charge or Receipt of Consideration

Unless the foreclosure consultant has provided a surety bond in accordance with Texas Finance Code chapter 393, the foreclosure consultant cannot (1) charge or receive compensation until the foreclosure consultant has "fully performed" each service that the foreclosure consultant has contracted to perform or represented that the foreclosure consultant can or will perform or (2) receive any compensation from a third party in connection with the consulting services, unless the third-party consideration is fully disclosed in writing to the homeowner. Tex. Bus. & Com. Code § 21.101.

§ 37.3:4 Prohibited Conduct

The foreclosure consultant may not (1) take a power of attorney from the homeowner for any purpose other than to inspect documents, (2) acquire an interest (directly or indirectly) in the real or personal property of the homeowner for the purpose of securing payment of the foreclosure consultant's compensation, or (3) take an assignment of wages to secure his compensation. Tex. Bus. & Com. Code § 21.102.

§ 37.3:5 Record Retention

A foreclosure consultant must retain "each record and document" related to the foreclosure consulting services performed until at least the third anniversary of the date that the foreclosure consultant contract was terminated or concluded. Tex. Bus. & Com. Code § 21.103.

§ 37.3:6 Criminal Penalties

A violation of Texas Business and Commerce Code chapter 21 is a class C misdemeanor. Tex. Bus. & Com. Code § 21.151.

§ 37.4 Texas Fraudulent Conveyance Statute

The Texas Uniform Fraudulent Transfer Act (codified at Tex. Bus. & Com. Code §§ 24.001–.013) provides a safe harbor for 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 pursuant 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). For purposes of the Act, the value of the property is determined as of the date of the transfer. *In re IFS Financial Corp.*, 417 B.R. 419, 442 (Bankr. S.D. Tex. 2009), *aff'd*, 669 F.3d 255 (5th Cir. 2012); *Corpus v. Arriaga*, 294 S.W.3d 629, 636 (Tex. App.—Houston [1st Dist.] 2009, no pet.). The burden of proof is on the party seeking to set aside the transfer. *In re Pace*, 456 B.R. 253 (Bankr. W.D. Tex. 2011); *In re SMTC Manufacturing of Texas*, (Bankr. S.D. Tex. 2009); *Hunter v. Pitcock*, 346 S.W.2d 509 (Tex. Civ. App.—Fort Worth 1961, no writ).

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§ 37.4:1 When Is Debtor Considered Insolvent?

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. Tex. Bus. & Com. Code § 24.003(a). A debtor who is generally unable to pay debts as the debts become due is presumed to be insolvent. Tex. Bus. & Com. Code § 24.003(b).

§ 37.4:2 What Is Reasonably Equivalent Value?

"Reasonably equivalent value" is defined to include the range of values for which the debtor would have sold the assets in an arm's-length transaction. Tex. Bus. & Com. Code § 24.004(d).

§ 37.4:3 Setting Aside Fraudulent Conveyance

A foreclosure sale may be set aside as a fraudulent conveyance under the 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 or relative of a general partner; (3) a general partner in such a partnership; (4) a corporation of which the debtor is a director, officer, or person in control; or (5) a managing agent or affiliate of the debtor. 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); *Hahn v. Love*, 321 S.W3d 517 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *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).

§ 37.5 Americans with Disabilities Act

A lender contemplating foreclosing will need to determine the extent to which the collateral property will need post-foreclosure actions to bring the property into compliance with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213; the federal regulations further implementing the ADA are found at 28 C.F.R. pt. 36, including technical guidelines entitled "Accessibility Guidelines for Buildings and Facilities" at appendix A to 28 C.F.R. pt. 36, the Texas Architectural Barriers Act, Tex. Gov't Code §§ 469.001–.208, and the regulations promulgated by the Texas Department of Licensing and Regulation (TDLR) at 16 Tex. Admin. Code § 68.20, Building and Facilities Subject to Compliance with the Texas Accessibility Standards (TAS).

The ADA requires that all "public accommodations" be made readily accessible to disabled individuals. *See* 42 U.S.C. §§ 12181(7), 12182, 12183. The ADA's accessibility requirements and construction or alteration compliance requirements apply to all "commercial facilities" constructed for first occupancy or altered after January 26, 1993. *See* 42 U.S.C. §§ 12181(2), 12183.

The owner of the property is required to remove architectural and communications barriers from public accommodations where the removal is "readily achievable." *See* 42 U.S.C. §§ 12181(9), 12182(b)(2)(A)(iv). Whether a barrier removal is readily achievable is determined, in part, by the financial resources of the property owner and therefore of the lender once it becomes the owner of the property. 42 U.S.C. § 12181(9)(A), (B), (C). This raises the question: If the lender is more financially solvent

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than the mortgagor, will the "readily achievable" standard be more strictly applied to a foreclosing lender once the lender becomes the owner of the property?

In Texas, all commercial facilities (including offices) constructed and occupied after September 1, 1993, must comply with construction standards assuring accessibility for disabled persons. Tex. Gov't Code § 469.003(a)(5). The TAS are the technical standards adopted by the TDLR setting forth these construction standards and are available via the Internet at **www.license.state.tx.us/AB/abtas.htm**.

Inquiries may be made to the TDLR through its website at **www.license.state.tx.us**. Compliance may be determined by an inspection of the mortgaged property by a registered accessibility specialist. See the TDLR website for a list of registered specialists.

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