

**FORECLOSURE PROCESS
AND
FORMS**

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July 19 – 21, 2007

Galveston

CHAPTER 23

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LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS, AND HONORS

Author: National Mortgage Service Reference Director: Texas Edition 1991-Present
Author: Texas Mortgage Lending Law & Practice Deskbook: Servicing Edition 1998-Present
Author: "Trouble Stirs for Debt Collectors," Servicing Management, Vol. 15, No. 3, Oct. 2003
Author/Speaker: "Probate When the Mortgagor is Deceased," Texas Land Title and St. Mary's
Law School Institute, Dec. 1992
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Author: "Fair Debt Collection Practices Act," State Bar of Texas Bankruptcy Advanced Course,
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Author/Speaker: "Practical Foreclosure Tips for Texas Real Estate Loans," Mortgage Lending
Institute, Univ. of Texas, Sept. 1999
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Author/Speaker: "Black Mold and the Mortgage Servicer," Texas Mortgage Bankers Seminar, Apr. 2002

Author/Speaker: "10 Ways to Avoid a Wrongful Foreclosure," South Texas Real Estate Law Conference

Author/Speaker: "MERS: What Is It?" Texas Land Title and St. Mary's Law School Institute, Dec. 2002

Author/Speaker: 78th Session Legislative Change: Texas Mortgage Bankers Association, Feb. 2003

Author/Speaker: "From Demand to Sale and Everything in Between," Texas Saving & Community Bankers Associates & Independent Bankers Association, Mar. 2003

Author/Speaker: "Remedies in Foreclosure," Advanced Real Estate Remedies Workshop, May 2003

Author/Speaker: "Mortgage Electronic Registration System," South Texas College of Law Real Estate Conference, May 2003

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Author/Speaker: "Mobile Homes in Texas," Carolina Mortgage Banking Seminar, Sept. 2003

Author/Speaker: "Does Foreclosure Require Bankruptcy?" State Bar of Texas Advanced Consumer Bankruptcy Course, Sept. 2003

Author/Speaker: "Foreclosure and Workouts Involving Farm & Ranch Issues," Texas Land Title and St. Mary's Law School Institute, Dec. 2003

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Author/Speaker: "Servicemember Civil Relief Act," UT Mortgage Lending Institute, Sept. 2005

Author/Speaker: "Foreclosure Primer," Texas Association of Bank Counsel, Oct. 2005

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FORECLOSURE PROCESS AND FORMS

I. INTRODUCTION

The State Bar of Texas publishes two manuals containing standard foreclosure forms: “*Foreclosure Documents*,” found in TEXAS REAL ESTATE FORMS MANUAL, Chapter 24, and the TEXAS FORECLOSURE MANUAL, SECOND EDITION, which is devoted exclusively to foreclosure forms and was released for publication in mid-July 2006.

The purpose of this presentation is to present foreclosure forms and ideas for foreclosure forms not found in the State Bar manuals which can be used in unique foreclosure or foreclosure-related situations. The forms are not perfect and can be improved by any creative attorney, but they may be a starting point for anyone needing a foreclosure form for an unusual situation. The section entitled II. BACKGROUND that follows seeks to provide counsel with sufficient background information to understand and appreciate what a particular form seeks to accomplish.

The section entitled “Texas Law Section”, TEXAS FORECLOSURE LAW is an attempt to provide a busy attorney with a quick reference to legal issues and business practices that might be helpful to know in resolving a loan that is in default or needs to be foreclosed.

House Bill 2738, effective September 1, 2007, amends the Texas Property Code and makes a few changes to current foreclosure laws that are self-explanatory. House Bill 2738 is included in the IV. FORMS section.

II. BACKGROUND

The materials that are contained in this Background section attempt to give the practitioner pertinent background information that may be helpful in understanding the eight forms contained in the IV. FORMS section.

A. MERS

The first form presented in this paper concerns MERS or the Mortgage Electronic Registration System which is best understood by going back to the late 1960s and early 1970s. Wall Street was booming, but the backrooms of its brokerage houses were swamped trying to physically transfer stock and bond certificates indicating ownership of securities that were being bought and sold in a trading frenzy.

As clients’ frustration and anger reached alarming levels because securities were not delivered in a timely fashion, if at all, Wall Street came up with the idea of

an industry wide, book entry system that tracked ownership of securities on computers, thereby eliminating paper security certificates. Today, stock and bond certificates are obsolete. Ownership of most securities is registered through the National Securities Clearing Corporation as part of the Wall Street Depository Trust Company.

Thirty years later, after experiencing its own paperwork crisis, when loans were transferred that required an assignment be recorded in real property records, the mortgage banking industry copied Wall Street and created its own computerized book registration system or “utility” for tracking all the beneficial interest or “bundle of rights” connected to both residential and commercial mortgages. MERS is recognized in *Tex. Prop. Code §51.0001(1)* with the following definition:

“(1) ‘Book entry system’ means a national book entry system for registering a beneficial interest in a security instrument that acts as nominee for the grantee, beneficiary, owner, or holder of the security instrument and its successors and assigns.”

The official name of the new mortgage banking registration system is “MERS®System,” and it operates under the corporate umbrella of MERSCORP, Inc. As is the case with the National Security Clearing Corp., which registers stock and bond ownership, MERS®System does not purchase or sell mortgages; it merely tracks all the beneficial interest or bundle of rights connected to a mortgage that is owned or serviced by MERS members electronically. MERS is not the owner or holder of the note.

The MERS membership list includes the twenty largest mortgage banking organizations in the United States, as well as Fannie Mae, Freddie Mac, Ginnie Mae, VA, FHA, and HUD. The Mortgage Bankers Association, American Land Title Association, PMI, Merrill Lynch, most title company underwriters, and all the Wall Street rating agencies, i.e. Moody, Fitch, and Standard & Poor, are members of MERS.

In the first quarter of 2005, MERS claims to have registered 30 million loans since 1998 – 23 million loans are currently active – or 50 percent of all loans originated in 2004. MERS also claims that 30,000 loans per day are being registered on MERS®System.

Beginning in August 2003, MERS®Commercial became operational. MERS®Commercial registers the various bundle of rights connected with commercial mortgages, e.g., owner or holder of various tranches and the servicer. MERS®Registry will automatically register e-commerce notes and security instruments, in accordance with the Uniform Electronic Transactions Act (“UETA”) and the Federal Electronic Signatures in

Global and National Commerce Act (“E-SIGN”). Once the security issues related to accessing a loan servicer’s records for the payoff of a borrower’s loan are resolved, MERS plans to roll out MERS®Pay-Off, which will provide payoff information to title industry members on any loan registered on MERS.

“Mortgage Electronic Registration System, Inc., as nominee for Lender or Lender’s successor or assigns” should be the mortgagee of record for all security instruments registered on MERS. Regardless of the number of times a beneficial interest in a mortgage is bought or sold, no assignment of the security instrument is required. MERS remains the mortgagee of record, while all the beneficial interest and bundle of rights connected to a mortgagee are tracked and traded electronically.

As has been the practice for many years, mortgage servicers will remain responsible for all the day-to-day loan administration duties for mortgages registered on MERS. Since MERS®System offers a toll-free telephone number, 1-888-679-6377, anyone can obtain the name and phone number of the mortgage servicer for any loan registered on MERS by a phone call to the MERS Help Desk. In addition, MERS provides a website at www.mers-servicerid.org that also allows anyone to obtain the name and address and phone number of any loan registered on MERS, and generally there is a direct web link to the servicer’s official website.

Once the name of the mortgage servicer is obtained, the name, address, phone number, and e-mail address of a person in the mortgage servicer’s organization who is supposed to be the MERS expert for the servicer can be obtained from the MERS website at www.mersinc.org by typing the servicer’s name in the “Member Directory” menu. Therefore, an escrow officer or loan closer needing a payoff quote or lien release information can obtain immediate access to the mortgage servicer organization servicing the loan.

As the mortgagee of record and beneficiary of the security instrument, “MERS as nominee” can initiate foreclosure. In addition, most security agreements signed by the borrower contain a clause that allows MERS to foreclose the security instrument.

In a bankruptcy proceeding, as the mortgagee of record MERS holds an *in rem* security interest in the property. As the mortgagee of record, MERS has standing to seek relief from the automatic stay. However, MERS is not the creditor, and so the address for the “creditor” in all bankruptcy documents should be the servicer’s address so that all trustee payments go to the servicer, not to MERS. A Motion for Relief from Stay may be filed either in the name of MERS or jointly with the servicer.

Stewart, Chicago, Fidelity, and First American Title have modified their underwriting requirements so that a MERS loan can be insured in the name of the mortgagee as well as MERS for no additional premium or fee.

Over the years, the legal and title community had gotten used to assuming that the mortgagee of record was also the owner or holder of the note. This was true forty years ago when the local bank or savings and loan was the owner or holder of the note because they originated and serviced the borrower’s real estate loan. However, today, this assumption is generally wrong because most loans are sold into the secondary market to be securitized immediately after origination and the daily loan administration responsibilities are handled by a large mortgage servicer. Consequently, the mortgagee of record listed in the security instrument or assignment filed in the real property records is neither the owner nor holder of the note but the mortgage servicer. This is critical, because only the note holder or a person with the rights of a holder or their agent or representative can enforce the debt. *Tex. Bus. & Com. Code §3.301, Shephard v. Boone, 99 S.W.3d, 301 (Tex. App.—Eastland 2003, no writ)* and *Leavings v. Mills, 175S.W.3d, 301 (Tex. App.—Houston [1Dist.], 2004)*.

Wrongly assuming the mortgagee of record is the note owner or holder is caused by confusing the legal principles associated with enforcing a note under the UCC or Texas Business and Commerce Code and the recording statute, *Tex. Prop. Code §13.001*, that puts the world on notice that a lien encumbers a particular property. In fact, the owner or holder of a note can enforce its security interest against the borrower without ever recording the deed of trust. *Tex. Prop. Code §13.001(b) (1)*.

When MERS started appearing as the mortgagee of record, lawyers continued to use legacy foreclosure forms that alleged that MERS was the owner or holder of the debt. But MERS was not the owner or holder; MERS was merely the mortgagee of record of the security instrument filed in the real property records. When a Florida judge dismissed more than twenty foreclosures suits on his own Show Cause Order because MERS was alleged to be the owner or holder of the note sought to be enforced, shock waves rippled through the mortgage banking industry.

Texas was not materially affected by the Florida ruling because, contrary to most states, the Texas foreclosure statute has been amended to allow a mortgage servicer to administer the foreclosure process. *Tex. Prop. Code §51.0075*.

The MERS Foreclosure Recipe presented in this paper seeks to provide a roadmap on how to handle a

MERS foreclosure by a mortgage servicer because MERS and the mortgage servicer's role in foreclosure change traditional notions of the foreclosure process.

B. Dead Debtors

Another form in this paper deals with the vexing problem of what to do when the mortgagor has the audacity to die and no probate is opened. To handle this situation, a sample vendor's lien lawsuit is presented to give the practitioner ideas on how to obtain title and possession of the property from the heirs without opening a probate administration.

When a mortgagor dies, title to the decedent's interest in the secured property is immediately vested in the mortgagor's heirs-at-law. *Tex. Prob. Code* §§37, 38 and 45. "Heir-at-law" is defined in *Tex. Prob. Code* §3. Once 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, more commonly known as a "dead debtor" file, is not a default problem but, rather, a title problem. If the mortgagee forecloses, the foreclosure extinguishes the note and security instrument, which are the only tools the mortgagee needs to obtain title and possession of the property from the heirs.

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 REO title policy if the mortgagee foreclosed within four years of the mortgagor's death. In addition, if a dependent administration is opened after the property is foreclosed, the personal representative can force the foreclosed property back into the probate estate and sue the mortgagee for conversion. *American Sav. & 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.*).

If an independent probate administration is opened for the deceased mortgagor, the independent executor has six months to inventory and collect the assets of the estate before a security instrument can be foreclosed pursuant to *Bozeman v. Follitt*, 556 S.W.2d 608 (*Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.*). *Tex. Prob. Code* §147. The statute of limitation for any cause of action against an estate is also suspended for twelve months after the personal representative of the estate is appointed. *Tex. Civ. Prac. & Rem. Code* §16.062.

Rescission of the vendor's lien is an alternative to a creditor's administration, if the loan is in default and the mortgagor is deceased. *Lusk v. Mintz*, 625 S.W.2d 774 (*Tex. App.—Houston [14th Dist.] 1981, no writ*) and *Walton v. First Nat. Bank of Trenton, Trenton, Texas*, 956

S.W.2d 647 (*Tex. App.—Texarkana 1997, reh. den.*). 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 if the loan remains in default after the mortgagor's death. *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 must be made a party to the suit. So long as the purchase price for the property remains unpaid, the mortgagee has superior title to the property secured by a vendor's lien. 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."

Until the debt used to acquire the decedent's property is paid, any co-maker 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 mortgagee. By exercising its right to rescind the vendor's lien, the mortgagee is not making a claim for money against decedent or decedent's putative estate; therefore, there is no necessity of administration of lender's claim under the Texas Probate Code. *Walton vs. First Nat'l Bank of Trenton*, 956 S.W.2d 647, 652 (*Tex. App.—Texarkana, 1997*), *Skelton v. Washington Mutual Bank F.A.*, 61 S.W.3d 56 (*Tex. App.—Amarillo 2001*). For due process purposes, the suit to rescind the vendor's lien should allege that the foreclosure procedures in *Tex. Prop. Code* §51.002 will be used as the legal means to convert title from the decedent and heirs into lender.

C. Republic of Texas ("ROT")

Another form deals with the Republic of Texas, Citizen Soldier, or *Posse Comitatus* type borrower who uses gobbledygook documents filed in the real property records to keep from paying their mortgage – usually very successfully. The sample Republic of Texas plaintiff's petition has been proven in battle and has worked in more than fifty cases dealing with a Republic of Texas-type borrower.

Over the last several years, a proliferation of specious liens and claims inspired by the Republic of Texas ("ROT") and "debt elimination scams" have been used to thwart foreclosures and evictions. Because of 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 fore-

closure, many title insurance underwriters refuse to insure a foreclosure REO title policy because of the litigation risk unless the lender judicially forecloses.

The website of the Office of the Comptroller of Currency at www.occ.treas.gov should be visited regularly, because the OCC publishes alerts on a regular basis that describe the newest versions and variations of mortgage scams.

The specious documents used in these scams are hard to describe but are identifiable in the same way Justice Stewart defined pornography, “you know it when you see it, even though you cannot describe it.” *Jacobellis v. State of Ohio*, 378 U.S. 184, 84 S.Ct.1676, 12 L.Ed.2d 793 (1964).

One of the favorite theories used by the Republic of Texas zealot is that the lender “creates” money when a loan is made, therefore, the borrower cannot owe the money that was created from nothing. A variation of this theory was described in *Alcorn v. Washington Mut. Bank, F.A.*, 111 S.W.3d 264 (Tex. App.—Texarkana 2003) and also see *Fisher v. State*, 2001 WL 520799 (Tex. App.—Austin) May 17, 2001).

Whenever faced with a ROT issue or debt elimination scam, the provisions in *Tex. Govt. Code §§51.901-51.905* should be used to expunge any instrument that clouds title or purports to be a U.C.C. filing. However, the nuances and pitfalls connected with using *Tex. Govt. Code §§51.901 - 51.095* should be studied in light of *In re Purported Judgment Lien Against Barcroft*, 58 S.W.3d 799 (Tex. App.—Texarkana [6th Dist.] 2001). In *Barcroft*, the case was remanded to the trial court because the Order expunging the bogus lien failed to follow *Tex. Govt. Code §§51.901-51.903*.

Interestingly, the person who was the subject of *Barcroft* was not satisfied with his victory and subsequently sued Fannin County, the City of Paris, Texas, and various peace officers, claiming he was “one of the sovereign American people,” and his rights were violated when peace officers executed a search warrant. *Barcroft v. County of Fannin*, 118 S.W.3d 922 (Tex. App.—Texarkana 2003, reh. overruled). In *County of Fannin* the court discusses Barcroft’s attempts to manipulate the legal system using the “sovereign American people” argument originating in the infamous *Dredd Scott* case. *Scott v. Sandford*, 60 U.S. 393, 15 L.Ed. 691 (1856). *Barcroft* is definitely a case worth reading.

Though the claims made by Republic of Texas militants and debt elimination scammers are specious, 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 immediately filing a judicial foreclosure suit with: (a) *Tex.*

Govt. Code §§51.901-51.905 and *Tex. Civ. Prac. & Rem. Code §§12.001-12.007* allegations to remove bogus liens and U.C.C. filings; (b) a bastardization of *Tex. Prop. Code §§51.002* and *Tex. Prob. Code §§346* and *353* that requests nonjudicial foreclosure with the lender filing a report of sale and getting an order confirming sale after the nonjudicial foreclosure inside the judicial foreclosure suit; (c) a request for a permanent injunction to prevent further document harassment by the zealot; and (d) a request for a writ of possession from the District Court to evict any occupant of the property under *Tex. R. Civ. P. 310*.

III. TEXAS LAW SECTION

A. Foreclosure Overview

1. Strict Construction

One should never assume a Texas foreclosure can be processed with little information or preparation and only cursory due diligence. Approximately 134 statutes, codes, regulations and “black letter” case law holdings affect the Texas foreclosure process. Ignoring or failing to consider the nuances of any of these foreclosure provisions could easily result in a wrongful foreclosure.

For example, the Commissioner’s Court in all 254 Texas counties must file a notice in the county’s real property records describing the location where foreclosure sales are to take place. Foreclosure sales are usually held on one side of the courthouse; however, if the foreclosure trustee fails to conduct the sale at the location specifically designated by the Commissioner’s Court, the foreclosure sale is void.

Texas courts scrutinize all aspects of the foreclosure process and require strict compliance with both statutory and case law as well as the loan document requirements because “foreclosure is a harsh remedy to be resorted to only under the most dire circumstances.” See *Armenta v. Nussbaum*, 519 S.W. 2d 673 (Tex. Lin. App.—Corpus Christi 1975, writ ref’d n.r.e.). If a provision in the loan documents conflicts with statutory authority, the statute controls. *Wylie v. Hays*, 114 Tex. 46, 263 S.W. 563 (Tex. Com. App. 1924).

The terms of the deed of trust must be carried out literally, even if the details seem unimportant or frivolous. *Clarkson v. Ruiz*, 108 S.W.2d 281, 285 (Tex. App.—San Antonio 1937, writ dismissed); *American Savings & Loan Ass’n of Houston v. Musick*, 517 S.W.2d 627 (Tex. App.—Houston [14th Dist.] 1974) reversed on other grounds 531 S.W.2d 581 (Tex. 1975); and *Lawson v. Gibbs*, 591 S.W.2d 292 (Tex. App.—Houston [14th Dist.] 1979, writ ref’d n.r.e.). A Texas bankruptcy court, however, held that strict compliance with a loan instrument could not be enforced so rigidly

as to prevent the enforcement of an “honest obligation.” *In re: Davis Chevrolet, Inc.*, 135 B.R. 29 (Bankr. N. D. Tex. 1992). But the Texas Supreme Court has held there is no federal, state or common law requiring a mortgagee to foreclose or to foreclose expeditiously. *FDIC v. Coleman*, 795 S.W.2d 706 (Tex. 1990).

2. Debt Collection Acts

Any person involved in the foreclosure of a consumer debt must be familiar with the Fair Debt Collection Practice Act, 15 U.S.C. §§1692 – 1692o and *Pub.L. 95-109, §803* and the Texas Debt Collection Act, *Texas Finance Code §392.001 et seq.* Mortgagees who collect their own debts are not subject to the Fair Debt Collection Practice Act (“FDCPA”) unless a name is used in the debt collection process that would imply someone other than the mortgagee is the debt collector. 15 U.S.C. §1692a(6). However, if the loan was in default when the mortgagee acquired the loan, the Act applies. 15 U.S.C. §1692a(6)(F).

Attorneys who regularly collect debts are “debt collectors” and are not exempted from the FDCPA. *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 131 L.Ed.2d 395 (1995) and *Addison v. Braud*, 105 F.3d 223 (5th Cir. 1997). However, if the loan is not a consumer debt, the FDCPA does not apply to a lawyer’s debt collection activities.

In *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60 (2d Cir. 1993), the court held that the FDCPA was a strict liability statute and the degree of the debt collector’s culpability for violating the Act was only considered in computing damages. Because the FDCPA is such a technical and complicated piece of legislation, a mortgage servicer or attorney can easily violate the Act without regard to intent, knowledge or willfulness. *Booth v. Collection Experts, Inc.*, 969 F. Supp. 1161 (E.D. Wis. 1997). For example, in *Crossley v. Lieberman*, 868 F.2d 566 (3rd Cir. 1989), the court held that failure to give a foreclosure notice required by state law was a violation of the FDCPA, 15 U.S.C. §1692(e).

Though it is not a debt collection statute *per se* debtors and debtors’ counsel have discovered a RESPA provision, 12 U.S.C. §2605(e), which requires the mortgagee to timely respond to a “qualified written request” from the borrower or otherwise suffer penalties similar to those imposed for Fair Debt violation. *McDonald v. Washington Mutual Bank FA*, 2000 WL 967994 (N.D.IL. 2000) and *Ploog v. Homeside Lending Inc.*, 209 F. Supp. 2d 863 (N.D.IL 2002) are two cases that discuss the qualified written request letter.

3. U.C.C. Does Not Apply

Except for the commercial paper aspects of a

mortgage, the Uniform Commercial Code (“U.C.C.”) provisions found in the Texas Business & Commerce Code do not apply to real property foreclosures. (See *Tex. Bus. & Com. Code §9.109(c)(11)* and *Kimsey v. Burgin*, 806 S.W.2d 571 (Tex. App.—San Antonio 1991, writ dismissed). Therefore, the “commercially reasonable” standard of the U.C.C. does not apply to a real property foreclosure. *Pentad Joint Venture v. First Nat’l Bank*, 797 S.W.2d 92 (Tex. App.—Austin 1990) and *Huddleston v. Texas Commerce Bank, N.A.*, 756 S.W.2d 343 (Tex. App.—Dallas 1988, writ denied).

If a security instrument expressly describes both real and personal property with specificity, foreclosure under real property foreclosure law can serve as a foreclosure of the personal property under *Tex. Bus. & Com. Code §9.604*. See *Van Brunt v. Banc Texas Quorum*, 804 S.W.2d 117 (Tex. App.—Dallas [5th Dist.] 1990, no writ) which discussed a foreclosure of both real and personal property under the pre-July 2001 version of *Tex. Bus. & Com. Code §9.501(d)*.

For a comparison of the different notice requirements between notes secured by real property and notes secured by personal property under the U.C.C., see *Bishop v. Nat’l Loan Investors, L.P.*, 915 S.W.2d 241 (Tex. App.—Ft. Worth 1995).

If the dwelling affixed to the real property is a manufactured housing unit (MHU), more commonly known as a mobile home, the U.C.C. may or may not apply depending on whether the loan was originated as a land/home transaction and a certificate of attachment issued by the Texas Department of Housing and Community Affairs (“TDHCA”) was filed in the real property records.

Effective January 1, 2008, House Bill 1460 amending the *Tex. Occ. Code §1201.205 -1201.2075* modifies the process of converting a manufactured home, which is personal property, into a land/home real property transaction that allows the encumbrance of both the real property and manufactured home as a valid lien against a homestead with a deed of trust as the security instrument.

W.H.V. Inc. v. Associates Housing Finance, LLC, 43 S.W.3d 83 (Tex. App.—Dallas [5th Dist.] 2001, no writ) discusses various mobile home issues that can arise when dealing with whether a mobile home is real property or personal property. Also, see the TDHCA website at www.tdhca.state.tx.us for information and official forms needed to convert a mobile home to real property.

4. Mortgagee’s Duty of Good Faith

Unless there is express language in the loan documents or a “special relationship” exists between the

mortgagor and mortgagee, the Texas Supreme Court has held that the mortgagee and mortgagor relationship does not create a “duty of good faith.” *Federal Deposit Ins. Corp. v. Coleman*, 795 S.W.2d 706 (Tex. 1990). See also *Arnold v. Nat’l County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987) and *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983).

More recently, the courts in *Cockrell v. Republic Mortg. Ins. Co.*, 817 S.W.2d 106, 116 (Tex. App.—Dallas 1991, no writ) and *Vogel v. Travelers Indemnity Co.*, 966 S.W.2d 748 (Tex. App.—San Antonio 1998, no writ), held the mortgagee does not have a duty of good faith and fair dealing with respect to the borrower. As to guarantors, see *SEI Business Systems, Inc. v. Bank One Texas, N.A.*, 803 S.W.2d 838 (Tex. App.—Dallas 1991), where the court held that there is no duty of good faith as to guarantors. At the federal level, the 5th Circuit Court of Appeals also appears to be reluctant to find a duty of good faith and fair dealing in a creditor and debtor relationship. *Clay v. FDIC*, 934 F.2d 69 (5th Cir. 1991).

For a discussion of many of the “bad faith” allegations that are commonly made against lenders when a loan goes into default, see the 36-page opinion in *Bank One Texas, N.A. v. Maco Stewart*, 967 S.W.2d 419 (Tex. App.—Houston [14th Dist.] 1998).

B. Pre-Foreclosure Information

1. Security Instrument

The security instrument that is to be foreclosed should be reviewed prior to foreclosure because it may be on a non-standard form, or handwritten or type-written modifications or deletions may have radically changed typical “boiler plate” foreclosure language.

Too many times, the deed of trust will have the wrong property description. However, see *Escamilla v. Estate of Escamilla*, 921 S.W.2d 723 (Tex. App.—Corpus Christi 1996) that may provide some guidance on how to cure errors in the deed of trust and other real estate documents.

2. The Note Holder and “Lost Notes”

By definition, the note “holder” is the person in possession of an instrument that is drawn, issued or endorsed to the order of a person or to a bearer in blank, *Tex. Bus. & Com. Code §1.201(21)*, and there is no presumption of ownership unless the note is properly endorsed to the putative holder. See *Tex. Bus. & Com. Code §3.201(c)* and *Dillard v. NCNB Texas Nat’l Bank*, 815 S.W.2d 356 (Tex. App.—Austin 1991, no writ).

Invariably, mortgagees and mortgage servicers lose notes and assignments. In *Western Nat’l Bank v. Rives*, 927 S.W.2d 681 (Tex. App.—Amarillo 1996, reh.

overruled), the court’s analysis of the mortgagee’s efforts to overcome the loss of the note provides a guide on what to do in the “lost note” situation. It should be noted that *Western Nat’l Bank* focused on *Tex. Bus. & Com. Code §3.804*, which was renumbered by the Legislature, effective January 1, 1996, as *Tex. Bus. & Com. Code §3.309*.

In *Southeast Investments, Inc. v. Clade*, No. 3:97-CV-1799-L, 1999 U.S. Dist. Lexis 10844 (N.D. Tex. July 7, 1999), the court considered the new *Tex. Bus. & Com. Code §3.309* and held that even though the original note was lost while in the possession of the FDIC, the assignee could step into the FDIC’s shoes and enforce the loan obligation with a copy of the note. In *Priesmeyer v. Pacific Southwest Bank F.S.B.*, 917 S.W.2d 937 (Tex. App.—Austin 1996), the mortgagee was unsuccessful in proving it was the owner of a lost note, but the mortgagee’s creative efforts could provide guidance on how to draft a lost note affidavit. The presumptions found in *Resolution Trust Corp. v. Camp*, 965 F.2d 25 (5th Cir. 1992), are also helpful in proving ownership of a lost note.

For a discussion of the rights and remedies of the holder or owner of a lost note, see *Jernigan v. Bank One, Texas, N.A.*, 803 S.W.2d 774 (Tex. App.—Houston [14th Dist.] 1991). Because the lost note problem is so prevalent, *Tex. Bus. & Com. Code §3.309* provides a statutory checklist for the elements that must be contained in a lost note affidavit.

Tex. Prop. Code §51.0001 contains the most accurate definitions of “mortgagor”, “mortgagee”, and “mortgage servicer” that conform to how the mortgage banking industry operates in today’s world. A practical suggestion would be to use the definitions in *Tex. Prop. Code §51.0001* for the words “lender,” “owner,” or “holder” in the foreclosure process.

3. The Borrower

Most mortgagees’ files contain only the name and address of the current borrower obligated for the debt. However, many properties are sold by assumption; therefore, previous makers of the note may remain liable for the debt because a release was never filed in the deed records. Because everyone obligated for the debt must be given all the required foreclosure notices, the deed records must be examined to properly identify all mortgagors in the chain of title who remain liable for the debt. Otherwise, if only the current borrower is noticed, as opposed to all borrowers obligated for the debt, one of the required elements of a valid foreclosure is missing.

Based on *Fenimore v. Gonzales County Savings & Loan Assoc.*, 650 S.W.2d 213 (Tex. App.—San Antonio [4th Dist.] 1983, no writ) citing *Burnett v.*

Manufacturers Hanover Trust Co., 593 S.W.2d 755 (Tex. App.—Dallas 1979) writ ref'd n.r.e.), it could be argued that a mortgagor who has not been formally released from a debt by an instrument filed in the real property record but who conveyed all right, title and interest in the property securing the debt to be foreclosed is not required to receive foreclosure notices. The best practice, however, is to send foreclosure notices to all persons obligated for the debt, whether or not the borrower has conveyed the property to someone else.

Many wrongful foreclosures occur because the foreclosure notices were not sent to the borrower's last known address contained in the mortgagee's records. Since most mortgage servicers organize their servicing activities into functional areas to benefit from specialization, it is not unusual for one department in the servicer's organization to fail to inform other departments of a borrower's change of address. For example, the servicer's bankruptcy department may have the current address of the mortgagor because of a recent bankruptcy. If the bankruptcy department fails to advise the foreclosure department of the borrower's address change, the foreclosure notices will be sent to the wrong address. Clearly, failing to send foreclosure notices to the last known address contained anywhere in the mortgagee's files results in a wrongful foreclosure. *Tex. Prop. Code §51.002(e)* and *Lambert v. First Nat'l Bank of Bowie*, 993 S.W.2d 833 (Tex. App.—Ft. Worth 1999), but if the notices were truly sent to the "last known address" contained in the mortgagee's records, the foreclosure sale was good even if the mortgagor had a new address. [Note: *Lambert* also discusses the certified mail requirements for foreclosure notices.]

Tex. Prop. Code §51.0021 places a duty on the mortgagor to supply the mortgagee with any change of address in a reasonable manner.

If an abstract of judgment appears in the chain of title and clouds the title, *Tex. Civ. Prac. & Rem. Code §31.008* provides a way for the judgment debtor to obtain a release of the judgment even if the judgment creditor refuses to accept payment or refuses to give a release.

4. Tax Liens

If any indication of a tax lien exists in the chain of title, a copy of the lien should be obtained to determine its legal sufficiency and priority. Ad valorem tax liens are superior to all preexisting liens regardless of the date the lien was recorded. *Tex. Tax Code §§32.04-32.06*.

Mortgagees should be aware that there are companies who specialize in acquiring tax liens from the taxing authorities using *Tex. Tax Code §32.06* who

foreclose the note and deed of trust signed by the borrower for the tax pay-off proceeds that most assume extinguishes any other lien on the property to include a purchase money lien.

Effective September 1, 2007, House Bill 1520 will ameliorate many of the potential abuses that have arisen in the investor tax lien business and require a foreclosure under *Tex. R. Civ. Proc. 736*.

If an IRS lien encumbers the property, the mortgagee must provide the IRS with certain specific information at least twenty-five (25) days before the foreclosure sale date, otherwise the property remains subject to the IRS lien after foreclosure. In Texas, the IRS foreclosure notice must be in writing and sent by certified mail to the IRS as follows:

INTERNAL REVENUE SERVICE
Federal Tax Lien Division
ATTN: Kimberly Lester
1645 S. 101 East Ave.
Mail Stop 5022-TUL
Tulsa, OK 74128
Phone: (918) 581-7060 Ext 235

[NOTE: THIS ADDRESS CAN CHANGE WITHOUT NOTICE, SO IT IS BEST TO CHECK ON A MONTHLY BASIS FOR THE CORRECT ADDRESS.]

Filing the pre-foreclosure notice does not extinguish the IRS lien, but rather gives the IRS the right to redeem the property within 120 days after the foreclosure sale for the foreclosure's sale price. *I.R.C. 7425 and Treasury Regulations §301.7425-4*. If the IRS does not redeem, the purchaser at the foreclosure sale takes the property free of the IRS lien.

A ten year and thirty day statute of limitations bars the enforcement of a federal tax lien unless a tax suit was timely filed within ten years and thirty days from the date taxes were assessed, not the date the lien was recorded.

5. Receiverships and TROs

If there is any indication that the borrowers are involved in an acrimonious divorce, the divorce court docket sheet should be reviewed to determine whether a receivership has been opened. Otherwise, the mortgagee will never know the property is under the supervision of the divorce court, because most receivers fail to file a notice of the receivership in the real property records. *Texas Trunk Ry. Co. v. Lewis*, 81 Tex. 1, 16 S.W. 647 (Tex. 1891). So long as the property is in "custodia legis", the property cannot be foreclosed. A

receivership does not extinguish the mortgagee's rights in the property but merely preserves the status quo. *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339 (Tex. 1976). Upon the sale of the receivership property, the lien holder with a prior recorded lien has priority over costs and expenses related to the receivership, unless the lien holder asks for or consents to the receivership. *Chase Manhattan Bank v. Bowles*, 52 S.W.3d 871 (Tex. App.—Waco [10th Dist.] 2001, no writ).

For a discussion of the elements which should be contained in a suit seeking a TRO in the foreclosure context, see *PILF Investments v. Arlitt*, 940 S.W.2d 255 (Tex. App.—San Antonio 1997, writ reh. denied).

Lee v. Howard Broadcasting, Inc. Corp., 305 S.W.2d 629 (Tex. App.—Houston 1957, writ dismissed) suggests that the debtor must tender the amount that the debtor believes is owed while waiting for an injunction hearing. However, in *Church v. Rodriguez*, 767 S.W.2d 898 (Tex. App.—Corpus Christi 1989, no writ), the court held the borrower's good faith payment of the amount the borrower believed was due, was ineffective to cure the default.

6. Republic of Texas ("ROT") Liens

Over the last several years, Republic of Texas and other "paper terrorist" organizations have used bogus liens and other instruments filed in the deed records to thwart foreclosures and evictions and cloud title to the foreclosed property. Though the claims made by Republic of Texas disciples and other anti-government reactionaries are specious, mortgagees can spend years in protracted litigation trying to foreclose and obtain title and possession of the secured property. A Republic of Texas case has now generated an unpublished opinion in *Fisher v. State of Texas*, 2001 Tex. App. Lexis 3168 (Austin [3rd Dist.] May 17, 2001).

For an interesting law review article that analyzes some of the common Republic of Texas legal theories, see Daniel Lessard Levin and Michael W. Mitchell, *A Law Unto Themselves: The Ideology of the Common Law Court Movement*, 44 S.D.L. Rev. 9.

C. **The Foreclosure Process**

1. Default

There must be a default or breach of the underlying loan documents before a loan can be foreclosed. The right to sell the property at a non-judicial foreclosure sale by virtue of a power of sale clause found in the security instrument cannot be initiated unless there has been a default. *State Nat'l Bank v. Farah Mfg. Co.*, 678 S.W.2d 661 (Tex. App.—El Paso 1984, reh. overruled).

The general rule is that only those persons who

sign a note are personally liable for a debt. *Tex. Bus. & Com. Code §3.401(a)*. However, a common exception to this rule is the sale of the property by an assumption deed, which means the buyer assumes the seller's mortgage obligation as part of the purchase price. The new buyer's obligation to pay the seller's mortgage is usually evidenced by assumption language found in the deed from the seller to the new buyer. In an assumption transaction the new buyer does not sign a note, even though the buyer is obligated for the debt.

Though most defaults arise because of failure to pay the mortgage payment, other common defaults are the failure to pay taxes and insurance on non-escrowed loans. In addition, in *Lyons v. Montgomery*, 701 S.W.2d 641 (Tex. 1985), the Texas Supreme Court held that the mortgagee has the right to foreclose, if the borrower violates the due-on-sale clause usually found in the security instrument.

2. Demand for Payment

A formal "demand to cure" any alleged default is a condition precedent for a foreclosure. If an installment note obligation is breached, a formal notice of "intent to accelerate" is required to accelerate the maturity of the debt so that the unpaid principal balance and earned interest are due, not just the past due installments. *Ogden v. Gibraltar Savings Assoc.*, 640 S.W.2d 232 (Tex. 1982). Typically, the demand to cure the default and the notice of the lender's intent to accelerate the maturity of the debt are combined in the same letter to the defaulting mortgagor. If the secured property is the debtor's residence, the borrower must be given at least twenty days to cure the default. *Tex. Prop. Code §51.002(d)*.

If the borrower fails to remedy the default timely, the mortgagee usually provides in one certified letter notice of acceleration and notice of the date, time and place of the foreclosure. *Allen Sales & Servicer, Inc. v. Ryan*, 525 S.W.2d 863 (Tex. App.—Ft. Worth 1974, rev'd). If a loan is cross-collateralized, the mortgagee must identify each note that the mortgagee intends to foreclose. *Milliorn v. Finance Plus, Inc.*, 973 S.W.2d 690 (Tex. App.—Eastland 1998, no writ).

So long as the foreclosure notices are properly sent by certified mail to the borrower's last known address, the borrower does not have to actually receive the required foreclosure notices for the sale to be valid. *Lambert v. First Nat'l Bank of Bowie*, 993 S.W.2d 833 (Tex. App.—Ft. Worth 1999, no writ).

3. Texas Statutes of Limitation

If a debt is barred by the Texas statutes of limitation, the trustee has no authority to conduct a

foreclosure sale. *Stubbs v. Lowrey's Heirs*, 253 S.W.2d 312 (Tex. App.—Eastland 1952, ref'd n.r.e.). As the court held in *University Savings & Loan Ass'n. v. Security Lumber Co.*, 423 S.W.2d 287 (Tex. 1967), a lien is simply incidental to and inseparable from the debt it secures. If the debt is barred by limitations, then the lien is also barred. Foreclosure of a debt that is obviously barred by the statute of limitations is a violation of the Fair Debt Collection Practices Act, 15 U.S.C. 1692e.

Under former Texas law, a demand note had a four-year statute of limitation running from the date the note was issued. *Martin v. Ford*, 853 S.W.2d 680 (Tex. App.—Texarkana 1993, writ denied). *G & R Inv. v. Nance*, 683 S.W.2d 727 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd, n.r.e.). However, *Tex. Bus. & Com. Code §3.118(b)* changed the statute of limitation period for demand notes to six years beginning on the date a demand for payment was made. If no demand to cure a default is made, a ten-year limitation period commences from the date the last payment of principal or interest was made on the demand note.

If a note does not contain a repayment date, the note is a demand note. *Martin v. Ford*, 853 S.W.2d 680 (Tex. App.—Texarkana, 1993, reh. denied). A demand note is due from the moment of execution and is generally enforceable immediately, without a need to demand payment. *Stavert Properties, Inc. v. Republic Bank of Northern Hills*, 696 S.W.2d 278 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.). As a consequence, there is no reason to accelerate the demand note.

If an installment loan is secured by real property, *Palmer v. Palmer*, 831 S.W.2d 479 (Tex. App.—Texarkana 1992, no writ) holds that the four-year statute of limitations does not begin on the date the loan goes into default, but rather on the maturity date, i.e., the date the final installment payment is due. *Gabriel v. Alhabbal*, 618 S.W.2d 894 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

The State Bar Committee comments to *Tex. Bus. & Com. Code §3.118* make it clear that the applicable statutes of limitation for notes secured by real property are *Tex. Civ. Prac. & Rem. Code §§16.035 thru 16.037* and not the limitation periods contained in the Texas Business & Commerce Code.

Though overturned by *Tex. Civ. Prac. & Rem. Code §§16.035-16.037*, two old cases which could be reviewed for ideas on how to overcome the statute of limitation are *Central Nat'l Bank v. Latham & Co.*, 22 S.W.2d 765 (Tex. App.—Waco 1929, writ ref'd) and *Barlow v. Barlow*, 139 S.W.2d 139 (Tex. App.—Waco 1940, no writ). Also see *Tex. Civ. Prac. & Rem. Code §16.069*, which allows a counterclaim or cross claim to

enforce a debt barred by the statute of limitations so long as the cross claim or counterclaim is filed within 30 days from the date the answer is due and the counterclaim or cross claim arises out of the same transaction that is the basis of the suit.

If the RTC or FDIC as the conservator or receiver for a failed financial institution is the owner or holder of a note, the statute of limitations to enforce a note is six years. *Financial Institution Reform, Recovery & Enforcement Act ("FIRREA")*, 12 U.S.C. §1821(d)(14). For an excellent federal court discussion of statute of limitation questions under FIRREA, see *Cadle Co. v. 1007 Joint Venture*, 82 F.3d 102 (5th Cir. Tex. 1996). An assignee from FDIC can invoke FIRREA's six-year limitation period, but the note assigned must have been in default before it was acquired by the FDIC or have gone into default while the FDIC held the note. *Cadle Co. v. 1007 Joint Venture*, 82 F.3d 102 (5th Cir. 1996). The Texas Supreme Court upheld the six-year statute of limitation for notes held by the FDIC in *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562 (Tex. 2001).

Whenever a note or security instrument held by the RTC or FDIC is involved, the mortgagee should be familiar with *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). The *D'Oench Duhme* doctrine provides the mortgagee with protection from any undisclosed or secret deals between the borrower and the failed financial institution taken over by the FDIC.

Filing suit does not constitute presentment or demand for payment. *Mackey v. Mackey*, 721 S.W.2d 575 (Tex. App.—Corpus Christi 1986, no writ). However, *Smith v. Davis*, 453 S.W.2d 340 (Tex. App.—Ft. Worth 1970, writ ref'd n.r.e.), seems to indicate that filing suit is sufficient to accelerate the maturity of the debt.

4. Cure of Default

If a debt is accelerated, the borrower is obligated to pay the entire amount due under the terms of the note and deed of trust. *Hiller v. Prosper Tex., Inc.*, 437 S.W.2d 412 (Tex. App.—Houston [1st Dist.] 1969, no writ). This includes all collection costs and expenses, as well as attorney fees and any corporate advances made by the mortgagee to preserve and protect the property, i.e., taxes and insurance. *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232 (Tex. 1982) and *French v. May*, 484 S.W.2d 420 (Tex. App.—Corpus Christi 1972, writ ref'd n.r.e.).

To cure a default, there must be a tender or unconditional offer to pay the amount due in the form of cash or its equivalent. See *Arguelles v. Kaplan*, 736 S.W.2d

782 (Tex. App.—Corpus Christi, 1987, writ ref'd n.r.e.), for a general discussion of “tender” and “unconditional offer” to pay the amount due. For an interesting case involving a promise to make an unconditional offer to pay the amount due, see *Forestier v. San Antonio Savings Ass'n*, 564 S.W.2d 160 (Tex. App.—San Antonio, 1978, writ ref'd n.r.e.). An unpublished opinion in *Jenkins v. Redland Springs Homeowners Assoc.*, 1999 Tex App. Lexis 2812 (Tex. App.—San Antonio [4th Dist.] April 14, 1999), cites numerous examples of “tender”, where the debtor makes an unconditional offer to pay the full amount due and the consequence if the mortgagee fails to accept.

If the mortgagee negotiates, without protest, a check with words similar to “full and final satisfaction of the debt” and the check is for less than the amount owed, the debt may be considered paid in full. *Hixson v. Cox*, 633 S.W.2d 330 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) and *Borland v. Mundaca Investment*, 978 S.W.2d 146 (Tex. App.—Houston [1st Dist.] 1998, no writ).

5. Acceleration

Acceleration of the maturity of an installment debt cannot occur until the borrower has been given formal notice of the mortgagee's intent to accelerate. *Williamson v. Dunlap*, 693 S.W.2d 373 (Tex. 1985). Failure to give the notice of intent makes any subsequent acceleration void. *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232 (Tex. 1982). If a notice of acceleration is sent by certified mail to the borrower's last known address and the letter is returned unclaimed, no further duty is placed on the mortgagee to give notice of acceleration. *Dillard v. Broyles*, 633 S.W.2d 636 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

Two recent cases seem to imply that a formal notice of acceleration is not required if proper notice of the foreclosure sale date and time is given to the borrower and the notice is posted and filed at the courthouse. *McLemore v. Pacific Southwest Bank FSB*, 872 S.W.2d 286 (Tex. App.—Texarkana 1994, writ dismissed) and *Meadowbrook Gardens, Ltd. v. WMFMT. Real Estate, L.P.*, 980 S.W.2d 916 (Tex. App.—Ft. Worth 1998). As a practical matter, however, mortgagees should continue the current practice of sending the acceleration notice in the same letter that contains the notice of the date, time and place of the foreclosure sale.

Because acceleration of the maturity of a debt is such a harsh remedy, acceleration is closely scrutinized. *Vaughan v. Crown Plumbing & Sewer Serv., Inc.*, 523 S.W.2d 72 (Tex. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). For example, in *Purnell v. Follett*, 555

S.W.2d 761 (Tex. App.—Houston [14th Dist.] 1977, no writ), the acceleration notice stated for acceleration was based on the failure to make the monthly mortgage payments. In fact, the loan payments were current, but payment of taxes was in default. The court held the acceleration was defective because the wrong reason was given for the default. Even if the notice of acceleration is defective, the mortgager is not excused from making normal mortgage payments. *Rey v. Acosta*, 860 S.W.2d 654 (Tex. App.—El Paso 1993, no writ). If the borrower tenders the amount in arrears before notice of acceleration is given, the mortgagee is estopped from accelerating. *Fraser v. Kay*, 251 S.W.2d 754 (Tex. App.—San Antonio 1952, no writ).

Unless federal law applies, once a note is accelerated, statutes of limitation begin to run because acceleration matures the total debt. *Shepler v. Kubena*, 563 S.W.2d 382 (Tex. App.—Austin 1978, writ denied). In *Swaboda v. Wilshire Credit Corp.*, 975 S.W.2d 770 (Tex. App.—Corpus Christi 1998), the court considered the operative facts that would initiate statutes of limitation. According to the holding in *Swaboda*, sending a notice of acceleration was not enough to mature the debt. However, the Texas Supreme Court in *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3e 562 (Tex. 2001), overruled *Swaboda* and held that acceleration occurs when the notice of foreclosure sale date was posted and filed.

Acceleration can be suspended by filing a notice in the real property records that conforms to *Tex. Civ. Prac. & Rem. Code §16.036*, the mortgagee abandons accelerations or accepts payment. *City National Bank v. Pope*, 260 S.W. 903 (Tex. Civ. App.—San Antonio 1924, no writ). Without accelerating the debt, the mortgagee may be liable to the mortgagor for damages if it forecloses. *Ince v. Herskowitz*, 630 S.W.2d 762 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.). However, in *McLemore v. Pacific Southwest Bank, F.S.B.*, 872 S.W.2d 286 (Tex. App.—Texarkana, 1994, writ dismissed), the court held that since the mortgagee gave three separate notices of intent to accelerate and a separate notice of the foreclosure sale date, the failure to give a formal notice of acceleration did not make the foreclosure wrongful.

6. Waiver of Notice

If the mortgagee consistently accepts late payments without objection, the right to accelerate may be waived. *McGowan v. Pasol*, 605 S.W.2d 728 (Tex. App.—Corpus Christi 1980, no writ). However, in *Valley v. Patterson*, 614 S.W.2d 867 (Tex. App.—Corpus Christi 1981, no writ), the same Corpus Christi court held the mortgagee could accelerate even though

it had previously accepted late payments from the borrower. The mortgagee can always restore its right to accelerate if the mortgagor is advised that late payments will not be tolerated in the future. *Vaughan v. Crown Plumbing & Sewer Service, Inc.*, 523 S.W.2d 72 (Tex. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

Deplorable conduct on the part of the mortgagee can cause the waiver of the mortgagee's right to accelerate. In *Winton v. Daves*, 614 S.W.2d 464 (Tex. App.—Waco 1981, no writ), the court denied acceleration because of the lender's egregious behavior. The mortgagee can cure the waiver by resending the acceleration notices. *Slusky v. Coley*, 668 S.W.2d 930 (Tex. App.—Houston [14th Dist.] 1984, no writ).

When considering cases related to "waiver" in the foreclosure context, attention should be paid to whether the property is a commercial property or a homestead. In commercial foreclosures, the courts seem more willing to enforce a waiver clause against the borrower. If the debt is secured by the debtor's residence there can be no waiver of the twenty-day cure period and the twenty-one day advance notice of the foreclosure sale date regardless of any waiver clauses in the security instrument. See *Tex. Prop. Code §§51.002 (b) and (d)*.

For a waiver provision to be enforceable, there must be a specific statement of the rights surrendered. For example, a waiver of acceleration will not waive the separate right of notice of intent to accelerate. In *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991), the Texas Supreme Court rejected a line of cases holding that a general waiver provision could serve as a waiver of both the notice of intent to accelerate and acceleration.

In *Parker v. Frost Nat'l Bank of San Antonio*, 852 S.W.2d 741 (Tex. App.—Austin 1993), a creative debtor argued that to be enforceable a waiver clause had to be contained in each loan document. The court, however, held waiver language found in any document applies to the whole transaction.

Fannie Mae and Freddie Mac deed of trust forms contain a clause stating that the borrower must be given notice of the "right to reinstate" the loan. In *Jasper Federal Savings & Loan Ass'n v. Reddell*, 730 S.W.2d 672 (Tex. 1987), the Texas Supreme Court held that the failure to give the borrowers formal notice of the right to reinstate was not necessary because the right to reinstate was not statutory. However, in *Jasper*, the borrowers were represented by counsel, and the court found it was the attorney's responsibility to advise the borrowers of the right to reinstate.

7. Reinstatement After Acceleration

With foreclosure imminent, approximately 20% of

all loans posted for foreclosure reinstate. Most deeds of trust contain a clause terminating the borrower's right to reinstate the loan by paying only the amount needed to cure the default within five days of the foreclosure sale. However, most mortgagees allow reinstatement up to the moment the trustee sells the property on the courthouse steps. There appear to be no reported cases on whether, after acceleration, the mortgagee can force the borrower to pay the accelerated amount to stop the foreclosure, instead of the amount needed to cure the default.

If a loan is accelerated and later reinstated, the mortgagee must ensure the statute of limitation is suspended by filing a notice in the deed records that complies with *Tex. Civ. Prac. & Rem. Code §16.036* or sending written notice stating the mortgagee has abandoned its right to collect the accelerated amount.

8. The Trustee or Substitute Trustee

As a general rule, the trustee named in the security instrument is never available; therefore, a substitute trustee must be appointed. Because of the logistical problem of obtaining the appointment of a substitute trustee, one of the first steps in the foreclosure process is to determine who will exercise the power of sale.

Appointment of a substitute trustee must be in strict compliance with the terms of the deed of trust. *Johnson v. Koenig*, 353 S.W.2d 478 (Tex. App.—Austin 1962, writ ref'd n.r.e.) and *Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671 (Tex. 1942). However, a trustee can delegate certain ministerial duties to persons under the trustee's supervision. *Wilson v. Armstrong*, 236 S.W. 755 (Tex. App.—Beaumont 1921, no writ).

Citing a Texas case, the Arizona Supreme Court in *In re Bisbee v. Security National Bank & Trust Company*, 157 Ariz. 31, 754 P.2d 1135 (Arizona 1988), held that if the security instrument failed to name a trustee, the deed of trust was not void, and the beneficiary could appoint the substitute trustee.

The effective date for a substitute trustee's appointment is the date the appointment is signed, not acknowledged. *Martin v. Skelton*, 567 S.W.2d 585 (Tex. App.—Ft. Worth 1978, writ ref'd n.r.e.). In fact, there is no requirement that the trustee's appointment be acknowledged, *Onwuteaka v. Cohen*, 846 S.W.2d 889 (Tex. App.—Houston [1st Dist.] 1993, writ den.), unless the appointment is to be filed with the county clerk. *Tex. Prop. Code §12.001*. Though the mortgagee of record as the beneficiary of the security instrument usually designates a third party to act as the trustee, the creditor can be appointed in accordance with the deed of trust. *Valley International Properties, Inc. v. Ray*, 586 S.W.2d 898 (Tex. App.—Corpus Christi 1979, no writ).

In *FDIC v. Bodin Concrete Company*, 869 S.W.2d 372 (Tex. App.—Dallas 1993, writ denied) the court held a written appointment is not required to appoint a trustee. The beneficiary only has to have intent to appoint.

Though a substitute trustee must be appointed prior to posting the property for sale, reposting is unnecessary if a second substitute trustee has to be appointed after the posting notice was filed and posted at the courthouse door. *Koehler v. Pioneer Am. Ins. Co.*, 425 S.W.2d 889 (Tex. App.—Ft. Worth 1968, no writ); *Tarrant Savings Association v. Lucky Homes, Inc.*, 390 S.W.2d 473 (Tex. 1965); and *Loomis Land & Cattle Co. v. Diversified Mortg. Investors*, 533 S.W.2d 420 (Tex. App.—Tyler 1976, writ ref'd n.r.e.).

See *Chandler v. Guaranty Mortgage Co.*, 89 S.W.2d 250 (Tex. App.—San Antonio 1935), for a discussion of the proposition that the acts of a second appointed trustee simply ratified and affirmed all acts of the previous trustee.

In a 1991 trial court memorandum opinion rendered in *Richard Moore v. Charles Brown, Lawrence Torres & the RTC as Conservator for Padre Federal Savings*, Case No. SA-89-CA-0714, U.S. Dist. Court, Western District in Texas, San Antonio Division, May 1, 1991, the court held that the beneficiary of the deed of trust could appoint several substitute trustees. Any one of the trustees could conduct the foreclosure sale. Suggested verbiage for the use of duplicate trustees could be expressed as “ABC Mortgage appoints John Doe or Mary Jane Hill or a successor as the substitute trustee to conduct the public auction”.

Effective September 1, 2007, House Bill 2738 adds *Tex. Prop. Code* §§51.000(8) and 51.0074 which make it clear more than one person may be appointed as a substitute trustee.

Whether the appointment of a trustee can be delegated by a power of attorney is a fairly common issue. Beginning in 1989, the standard Fannie Mae and Freddie Mac deed of trust form included a clause allowing the appointment of a trustee by a power of attorney. This clause was a result of the borrowers' counsel citing the holding in *Michael v. Crawford*, 108 Tex. 352, 193 S.W. 1070 (Tex. 1917), which held that a substitute trustee could not be appointed by power of attorney. However, after *Michael* was decided in 1917, the Texas Supreme Court in *Helms v. Home Owner's Loan Corp.*, 129 Tex. 121, 103 S.W. 2 (Tex. 1937), approved the exercise of the power of appointment by a corporate resolution.

An example of a corporate resolution that could be modified to use to appoint a substitute trustee is the “Certifying Officer” Resolution published on the

MERS web site at www.mersinc.org in the section entitled “MERS Cite Tool Kit”.

The following factors seem to influence the court's determination whether an irregularity in the appointment of a substitute trustee constitutes a wrongful foreclosure:

1. Whether the foreclosed debtor wants to retain the homestead or is seeking monetary damages. The degree of irregularity causing a wrongful foreclosure is significantly smaller if the borrower wishes to keep the homestead. For example, in *University Savings Ass'n v. Springwoods Shopping Center*, 644 S.W.2d 705 (Tex. 1982), the court held that even though the deed of trust required the appointment of substitute trustee be filed in the deed records, the failure to do so did not invalidate the foreclosure sale;
2. Whether the alleged failure to properly appoint the trustee actually affected the fairness of the foreclosure sale. See *American Savings & Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581 (Tex. 1975); and
3. Whether the foreclosure caused the borrower to lose a substantial amount of equity. *Delley v. Unknown Stockholders of Brotherly and Sisterly Club of Christ, Inc.*, 509 S.W.2d 709 (Tex. App.—Tyler 1974, writ ref'd n.r.e.).

9. Trustee's Duties

The trustee is the special representative of both the mortgagor and mortgagee and must act with absolute impartiality and fairness to both. *Peterson v. Black*, 980 S.W.2d 818 (Tex. App.—San Antonio 1998, no writ). The trustee's only duty is to obtain, in a business-like manner, the highest possible price for the foreclosure property. *First Fed. Savings & Loan Ass'n v. Sharp*, 359 S.W.2d 902 (Tex. 1962). *Hammonds v. Holmes*, 559 S.W.2d 345 (Tex. 1977). There is no duty on the part of the trustee to take any affirmative action beyond what is required by statute and the deed of trust. *First State Bank v. Keilman*, 851 S.W.2d 914 (Tex. App.—Austin 1993, writ denied). The trustee is not required to provide the borrower with information concerning the amount necessary to pay off the debt. *Sanders v. Shelton*, 970 S.W.2d 721 (Tex. App.—Austin 1998, no writ). In litigation, any issue related to a trustee's duties in conducting a foreclosure is considered a question of law, not fact. *Centex Realty v. Siegler*, 899 S.W.2d 195 (Tex. 1995).

Effective September 1, 2007, House Bill 2738 adds *Tex. Prop. Code* §51.0074 which provides that a trustee may not be assigned a duty under a security

instrument other than exercising the power of sale and is not a fiduciary of either the mortgagor or mortgagee.

10. Trustee and T.P.C. §51.007

Texas Property Code §51.007 provides an expedited procedure for dismissing a trustee from a lawsuit, if the trustee was named as a party solely in the capacity as trustee. However, the dismissal process is without prejudice and the trustee can be made a party if the court determines that the trustee's acts or omissions were a proximate or producing cause of any damages suffered by the complaining party. This new amendment also protects the trustee if, in good faith, the trustee relied on information provided by the mortgagor, the mortgagee, or their respective agents, representatives or attorneys. *Tex. Prop. Code §51.007(f)*.

11. Foreclosure Notice

The purpose of foreclosure notices is to provide a minimum level of due process protection for the debtor. *Hausman v. Texas Savings & Loan Ass'n*, 585 S.W.2d 796 (Tex. App.—El Paso 1979, writ ref'd n.r.e.) and *Armenta v. Nussbaum*, 519 S.W.2d 673 (Tex. App.—Corpus Christi 1975, writ ref'd n.r.e.). Valid notice is complete when the mortgagee deposits a postage prepaid, certified mail notice with the U.S. Postal Service. *Capa v. Herbster*, 653 S.W.2d 594 (Tex. App.—Tyler 1983). If a foreclosure notice is posted in the proper place, the notice does not have to be visible to the public. *Chambers v. Lee*, 566 S.W.2d 69 (Tex. App.—Texarkana 1978, no writ).

The posting notice must be filed in the county clerk's office in the county where the property is located. Many debtors' lawyers assume they have grounds for a wrongful foreclosure when the posting notice giving the date and time of the foreclosure sale is not found in the deed records. However, *Tex. Prop. Code §51.002(f)* only requires the notice to be filed with the clerk and not recorded and indexed in the deed records. The county clerk is required to keep the posting notice in a convenient file for examination during normal business hours until the foreclosure sale date is passed. After the sale date, the clerks throw away the posting notices. Therefore, it is good business practice for the mortgage servicer or attorney to always obtain a filed stamped copy of the posting notice to keep in a permanent file, if someone claims the posting notice was not filed with the clerk.

A wrong zip code does not cause a foreclosure notice to be bad. *Judkins v. Davenport*, 59 S.W. 3d 689 (Tex. App.—Amarillo [7th Dist] 2000). A foreclosure notice returned by the U.S. Postal Service with the notation "Forwarding Order Expired" is also valid. In

Withrow v. Schou, 13 S.W.3d 37 (Tex. App.—Houston [14th Dist.] 1999, pet. den.), the court discussed the constitutional due process aspects of a properly addressed letter sent to the last known address of a lawyer which was returned "Forwarding Order Expired." The court held that the notice was sufficient, even though the lawyer never received the notice and a default judgment was entered because the attorney failed to appear for trial.

See *Balogh v. Ramos*, 978 S.W.2d 696 (Tex. App.—Corpus Christi 1998, pet. den.) where the court held that a party who does nothing to protect their due process rights, i.e., give notice of a new address, cannot complain if foreclosure notices were sent to the wrong address. *Tex. Prop Code §51.0001(2)* provides that if the loan is secured by the borrower's residence, the last known address for purposes of foreclosure notices is the residence address.

12. Persons Entitled to Notice

The only persons required to receive the statutory foreclosure notices are the persons obligated to pay the debt. There is no requirement to give notice of a foreclosure sale to the owner of secured property if the owner is not obligated for the debt. *Lawson v. Gibbs*, 591 S.W.2d 292 (Tex. App. 1979, writ ref'd n.r.e.).

Tex. Prop. Code §51.002 and case law do not require actual receipt of the foreclosure notices by the debtor. *Valley v. Patterson*, 614 S.W.2d 867 (Tex. App.—Corpus Christi 1981, no writ) and *Onwuteaka v. Cohen*, 846 S.W.2d 889 (Tex. App.—Houston [1st Dist.] 1993, writ denied). If the mortgagor is deceased, foreclosure notices to family members may not pass muster, even though the lender believes a family member is the executor of the estate. *Fenimore v. Gonzales County Savings & Loan Ass'n*, 650 S.W.2d 213 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

In *Savers Federal Savings & Loan Ass'n v. Reetz*, 888 F.2d 1497 (5th Cir. 1989), the court held that hand delivery of a foreclosure notice was sufficient even though *Tex. Prop. Code §51.002* requires foreclosure notices be sent by certified mail. [Note: The *Savers* case contains a mortgagee's Bill of Rights when confronted with a borrower who manipulates the legal system to keep from paying a just debt.] See also *Mahon v. Credit Bureau of Placer County*, 171 F.3d 1197 (9th Cir. 1999) and *Van Westrienen v. Americontinental Collection Corporation*, 94 F Supp. 2d 1087 (D. Or. 2000), where the court held that proof of the lender's customary business practices could serve as credible evidence that certain notices were in fact sent – in these cases, Fair Debt notices.

As a practical matter, most foreclosure professionals give foreclosure notices to anyone who may have a

putative interest in the property; however, a courtesy foreclosure notice can create the risk of a Fair Debt Collection Practice Act violation, if the recipient is not obligated for the debt. *15 U.S.C. 1692(e) and (f)*.

If subsequent mortgagors have assumed the loan, the mortgagee must give notice to the original mortgagor and all subsequent mortgagors who are obligated for the debt. *Villarreal v. Laredo Nat'l Bank*, 677 S.W.2d 600 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). However, the mortgagee does not have a duty to take any affirmative action other than that required by statute or the deed of trust. *First State Bank v. Keilman*, 851 S.W.2d 914 (Tex. App.—Austin 1993).

If two or more persons obligated for the debt have the same address, it is not necessary to send separate notices to each obligor. *Martinez v. Beasley*, 616 S.W.2d 689 (Tex. App.—Corpus Christi 1981, no writ).

13. Time and Place of Sale

A non-judicial foreclosure sale must be by public auction that is held within a three-hour time period between the hours of 10:00 a.m. and 4:00 p.m. on the first Tuesday of the month. *Tex. Prop. Code §51.002(c)*. The best practice is to specifically state in the posting notice the three-hour window when the sale will take place; however, failure to do so is not fatal. *Sanders v. Shelton*, 970 S.W.2d 721 (Tex. App.—Austin 1998, no writ). It should be noted that there was a strong dissent in *Sanders* opining that a specific three-hour period must be given in the foreclosure notice.

If the first Tuesday of the month falls on a holiday, such as July 4th and New Year's, foreclosure sales are valid. *Koehler v. Pioneer American Ins. Co.*, 425 S.W.2d 889 (Tex. App.—Ft. Worth 1968, no writ).

The trustee must conduct the foreclosure sale at the location designated by the Commissioner's Court in the county where the property is sold. [See *Attorney General Opinion JAM-1044 dated May 12, 1989*, related to designation of foreclosure sale locations.] If the real property is located in more than one county, the posting notice must designate in which county the property will be sold. But the notice must also be posted and filed in all counties where the property is located.

If a deed of trust includes property the debtor does not own, the foreclosure sale does not transfer title to the non-owned property. *Reed v. Roark*, 14 Tex. 329 (1855). A non-judicial foreclosure sale does not give the purchaser possession of the property. Possession must be obtained by an eviction proceeding if the borrower or tenant refuses to vacate the premises. *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595 (Tex. App.—Houston 1994, writ denied).

14. Proof of Posting and Burden of Proof

There is a rebuttable presumption that a foreclosure sale was conducted properly. *Roland v. Equitable Trust Co.*, 584 S.W.2d 883 (Tex. App.—San Antonio 1979, writ ref'd n.r.e.). To accommodate title companies, the trustee's deed filed in the deed records usually contains an affidavit averring that the foreclosure was conducted properly.

If the deed of trust requires the posting notice to be filed in the deed records, careful title examiners sometimes opine that the foreclosure sale was not valid if the posting notice was not recorded. With little discussion, the court in *Thompson v. Chrysler First Business Credit Corp.*, 840 S.W.2d 25 (Tex. App.—Dallas 1992, no writ), dismissed this notion.

15. Conducting the Foreclosure

If the trustee encounters problems during the foreclosure sale, the trustee should recess the sale and advise all prospective bidders of a time certain when the trustee will reconvene the sale. If the sale is reconvened, it should be within the three-hour time frame set out in the foreclosure notice; otherwise, the foreclosure sale will have to be rescheduled for another first Tuesday.

If the winning foreclosure purchaser does not have the money to pay the bid price, the trustee must give the bidder a "reasonable time" to obtain cash. *First Texas Service Corp. v. McDonald*, 762 S.W.2d 935 (Tex. App.—Ft. Worth 1988, reh denied). Reasonable time has been construed to mean "such time under all circumstances a man of reasonable prudence and diligence would need to perform the act contemplated." For the classic problems which arise if the bidder does not immediately pay the winning bid in cash, see *Kirkman v. Amarillo Savings Ass'n*, 483 S.W.2d 302 (Tex. App.—Amarillo 1972, writ ref'd n.r.e.).

If the bidder does not have cash in hand, the best practice is for the trustee to obtain a signed written commitment stating when the bidder must return with money. Otherwise, the trustee may be involved in a lawsuit over whether a "reasonable time" was given.

If the high bidder does not return with cash within the "reasonable time" set by the trustee, the property can be resold. However, all the original bidders must be given notice of the time the sale would reconvene if the bidder fails to return with cash. *Mitchell v. Texas Commerce Bank-Irving*, 680 S.W.2d 681 (Tex. App.—Ft. Worth 1984, writ ref'd n.r.e.).

Effective September 1, 2007, House Bill 2738 adds *Tex. Prop. Code §51.0075(f)* which provides that the purchase price for a foreclosure property is due **immediately** upon acceptance of the bid.

A trustee is sometimes faced with the dilemma of accepting official checks as opposed to cashier's checks at a foreclosure sale. The trustee does not have to accept official checks because payment can be cancelled by a stop pay order. A stop pay order does not affect a cashier's check because it is the equivalent of cash. See *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 572 (Tex. 1973); *Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1966, writ den.); and *Guaranty Fed. Savings v. Horseshoe Operating Co.*, 793 S.W.2d 652 (Tex. 1990).

The mortgagee can make a credit bid at the foreclosure sale for an amount equal to, or less than, the amount due on the note because the court said it was redundant for the mortgagee to pay cash for its bid and then have the trustee deliver the same cash price back to the mortgagee. *Habitat Inc. v. McKenna*, 523 S.W.2d 787 (Tex. App.—Eastland 1974).

D. Foreclosure Potpourri

1. Mortgagor's Address

The debtor has the burden of notifying the lender of any change of address. *Tex. Prop. Code §51.0021*. Otherwise, the mortgagee cannot be expected to send foreclosure notice to the borrower's current address. *Burnett v. Anderson*, 543 S.W.2d 15 (Tex. App.—Dallas 1976, no writ). If the mortgagor provides a change of address, a mortgagee must keep its records up to date. *Lido Intel, Inc. v. Lambeth*, 611 S.W.2d 622, 624 (Tex. 1981). If the borrower's address is not reflected in the mortgagee's records or if the mortgagor's last known address is obviously invalid, the mortgagee does not have a duty to search out the debtor's current address. *Krueger v. Swain*, 604 S.W.2d 454 (Tex. App.—Tyler 1980, writ ref'd n.r.e.).

If the mortgagee's records indicate the mortgagors have the same address, e.g. husband and wife, a single letter addressed to both mortgagors is sufficient. *Martinez v. Beasley*, 616 S.W.2d 689 (Tex. App.—Corpus Christi 1981, no writ) and *Forestier v. San Antonio Savings Ass'n*, 564 S.W.2d 160 (Tex. App.—El Paso, 1978, writ ref'd n.r.e.).

If a mortgage servicer is handling the foreclosure process, all notices to the borrower must contain the name and address of the mortgagee and that the mortgagee has a written servicing agreement with the mortgage servicer. *Tex. Prop. Code §51.025*.

2. Reliance on Government Officials

In *FDIC v. Royal Park No. 14 LTD*, 2 F.3d 637 (5th Cir. 1993), the court held "reliance upon oral representation of government officials is unreasonable as a matter of law regardless of whether the representation is

of fact or law." *Federal Corp Insurance Corp v. Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L. Ed 10 (1947).

3. Revival of Debt

A void foreclosure does not extinguish the debt or the deed of trust; however, the trustee's deed should be rescinded. Otherwise, title problems arise in the chain of title. *Shearer v. Allied Live Oak Bank*, 758 S.W.2d 940 (Tex. App.—Corpus Christi 1988, writ denied). In *Savers Federal Savings & Loan v. Reetz*, 888 F.2d 1497 (5th Cir. 1989), the court held the trustee could rescind the foreclosure sale because of a defective foreclosure notice. However, in *Savers*, the mortgagee acquired the property at both the original and subsequent foreclosure sale.

4. Constitutional Mechanic's and Materialman's Lien

An original contractor can have a silent mechanic's and materialman's lien based on TEX. CONST. art. XVI §37. This lien is self-executing but is only valid if the lien claimant has a direct contractual relationship with the owner. *Hayek v. Western Steel Co.*, 478 S.W.2d 786 (Tex. 1972) and *Berry v. McAdams*, 93 Tex. 431, 55 S.W. 1112 (Tex. 1900). This lien, however, is not enforceable against a mortgagee or a bona fide purchaser for value who does not have actual or constructive notice of its existence. *Irving Lumber Co. v. Alltex Mortg. Co.*, 446 S.W.2d 64 (Tex. App.—Dallas 1969), aff'd, 468 S.W.2d 341 (Tex. 1971) and *Detering Co. v. Green*, 989 S.W.2d 479 (Tex. App.—Houston [1st Dist.] 1999, no writ).

5. Servicemembers Civil Relief Act ("SCRA")

One of the principal purposes of the *Servicemembers Civil Relief Act*, 50 U.S.C. App. §§501-590, is to prevent the collection of debts from servicemembers whose call to active duty is a material cause of the default. The Act does not extinguish the debt, but temporarily suspends a creditor's collections rights while the servicemember is on active duty and for three months immediately following discharge from active duty. If the servicemember acquired the loan before entering military service, the mortgagee cannot foreclose unless it obtains a court order. 50 U.S.C. App. §533. The court can stay the foreclosure, defer the servicemember's payment obligations or set up a repayment schedule based on the servicemember's ability to pay.

As long as a servicemember is covered by the Act, the lender cannot charge more than six percent interest, which must be put into effect immediately upon the service member's request.

One of the best analyses of the *Servicemembers Civil Relief Act* is publication JA26 issued by the Legal Assistance Branch, Administrative and Legal Department, Judge Advocate General's School, U.S. Army, Charlottesville, VA. This publication contains a thorough but succinct and practical discussion of the Act. Publication JA26 can be obtained from:

Defense Technical Information Center
8725 John J. Kingman Road, Suite 0944
Ft. Belvoir, VA 22060-6218

[NOTE: THIS ADDRESS CAN CHANGE WITHOUT NOTICE, SO IT IS BEST TO CHECK ON A MONTHLY BASIS FOR THE CORRECT ADDRESS.]

If the mortgagee needs to verify whether a borrower is in fact a servicemember, such information can be obtained on the U.S. Department of Defense Manpower Data Center website at www.dmdc.osd.mil/scra/owa/home by providing the servicemember's name and Social Security number. A certificate will be provided with the Department of Defense seal and signature of the Director of the DMDC that should be admissible in any court of law.

Excellent websites that discuss the SCRA are www.defenselink.mil, www.af.mil, and www.jafnet.army.mil.

6. Bidder's Peril

Purchasers at a foreclosure sale buy the property at their peril, *Henke v. First Southern Properties, Inc.*, 586 S.W.2d 617 (Tex. App.—Waco 1979, writ ref'd n.r.e.), and take title subject to the rights contained in the deed of trust. *Smith v. Morris & Co.*, 694 S.W.2d 37 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.). Any title warranty in the trustee's deed comes from the mortgagor, not the mortgagee. *Diversified, Inc. v. Walker*, 702 S.W.2d 717 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). In *In re Niland v. Deason*, 825 F.2d 801 (5th Cir. 1987), the court cited numerous Texas cases for the proposition that no warranties run from the mortgagee to a foreclosure buyer at a void foreclosure sale. Also see *Sandel v. Burney*, 714 S.W.2d 40 (Tex. App.—San Antonio 1986, no writ).

Tex. Prop. Code §51.009 now provides that any property purchased at a foreclosure sale is bought "as is" except as to warranties of title that come from the borrower.

7. Trustee's Deed

A foreclosure sale extinguishes all inferior liens and encumbrances. *Motel Enterprises, Inc. v. Nobani*,

784 S.W.2d 545 (Tex. App.—Houston [1st Dist.] 1990, no writ). However, a trustee's deed only transfers what interest the borrower actually had in the property. *Diversified, Inc. v. Walker*, 702 S.W.2d 717 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

At a foreclosure sale, title passes immediately to the buyer upon acceptance of the bid price, *Peterson v. Black*, 980 S.W.2d 818 (Tex. App.—San Antonio 1998, no writ), and equitable title passes even though a trustee's deed was never prepared. *Pioneer Building & Loan Ass'n v. Cowan*, 123 S.W.2d 726 (Tex. App.—Waco 1938, writ dismissed & judgment cov.). A substitute trustee's deed is presumed to be valid unless rebutted by competent evidence. *Criswell v. Southwestern Fidelity Life Ins. Co.*, 373 S.W.2d 893 (Tex. App.—Houston [1st Dist.] 1963, no writ).

8. Late Payments Paid by Mail

If the note or security instrument permits payments to be made by mail, a loan is not in default as long as the payment is placed in a properly addressed and postage paid envelope on or before the due date. *McGowan v. Pasol*, 605 S.W.2d 728 (Tex. App.—Corpus Christi 1980, no writ). The mortgagee is not required to accept a partial payment, but the mortgagor must be advised if the partial payment was not accepted. *Merrell v. Fanning & Harper*, 597 S.W.2d 945 (Tex. App.—Tyler, 1980).

9. Statutory vs. Deed of Trust Prerequisites

The Texas Supreme Court has distinguished foreclosure requirements imposed by law from those required by the terms of the loan documents. In *Jasper Federal Savings & Loan Ass'n v. Reddell*, 730 S.W.2d 672 (Tex. 1987), the court held that strict compliance is necessary for statutory requirements but not loan document requirements. The Court's reasoning seems to rest on the premise that the notice provisions of the Texas Property Code are designed to inform the public as well as the debtor, while the deed of trust affects only the debtor and creditor.

10. "Inadequate Selling Price"

A typical wrongful foreclosure complaint is the property was sold for "inadequate consideration." See *Charter Nat'l Bank-Houston v. Stevens*, 781 S.W.2d 368 (Tex. App.—Houston [14th Dist.] 1989, writ denied), where the court reviews the "inadequate selling price" doctrine in the wrongful foreclosures context. The *Charter* court opined that irregularities will not vitiate a foreclosure sale unless the irregularities resulted in injury to the mortgagor.

According to the Texas Supreme Court, inadequate consideration, standing alone, cannot be grounds for setting aside a foreclosure sale that was legally and fairly made. *American Savings and Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581 (Tex. 1975).

To set aside a foreclosure sale for inadequate consideration, the mortgagor must plead and prove a foreclosure irregularity that caused or contributed to the property being sold for a grossly inadequate sales price. The irregularity can be slight, but it must exist. *Delley v. Unknown Stockholders of Brotherly and Sisterly Club of Christ, Inc.*, 509 S.W.2d 709 (Tex. App.—Tyler 1974, writ ref'd n.r.e.), and *Intertex, Inc. v. Walton*, 698 S.W.2d 707 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). In *Stanglin v. Kea Development Corp.*, 713 S.W.2d 94 (Tex. 1986), the Texas Supreme Court also held that the irregularity must have contributed to or been the actual cause of the inadequate sales price.

Debtors can now use the deficiency judgment provisions of *Tex. Prop. Code §§51.003 and 51.004* to obtain a judicial finding of the fair market value of the foreclosed property at the time of sale for purposes of calculating the deficiency. A discussion of how these provisions apply in actual practice can be found in *Resolution Trust Corp. v. Westside Court Joint Venture*, 815 S.W.2d 327 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

11. The “Chilled” Foreclosure Sale

A “chilled” foreclosure sale occurs if the trustee’s conduct discourages interested buyers to bid or causes the property to be sold for an inadequate price. *Biddle v. National Old Line Ins. Co.*, 513 S.W.2d 135 (Tex. App.—Dallas 1974, writ ref'd n.r.e.). In *Charter Nat'l Bank-Houston v. Stevens*, 781 S.W.2d 368 (Tex. App.—Houston [14th Dist.] 1989, writ ref'd n.r.e.), the court rescinded a foreclosure sale, even though the bid price was adequate, because the trustee’s actions “chilled the sale.”

12. Emotional Distress and Mental Anguish

In *LaCoure v. LaCoure*, 820 S.W.2d 228 (Tex. App.—El Paso 1991, writ denied), a former daughter-in-law was awarded \$300,000 in damages from her former father-in-law who had initiated a wrongful foreclosure sale. *LaCoure* contains an analysis of the tort of intentional infliction of emotional distress and mental anguish in the context of a wrongful foreclosure. But see *Dickerson v. DeBarbieris*, 964 S.W.2d 680 (Tex. App.—Houston [14th Dist.] 1998), where the court held there can be no award for mental anguish if there is no finding of liability against the mortgagee. Also see the

court’s analysis of emotional distress and mental anguish in *Phillips v. Latham*, 523 S.W.2d 19 (Tex. App.—Dallas 1975, writ ref'd n.r.e.), where the mortgagors claimed damages for “worry, lost earnings and emotional distress” because the foreclosure sale purchaser sought to evict the mortgagors from the property after foreclosure.

13. Stopping Foreclosure by Injunction

“Under the fundamental principle of equity,” the debtor must tender the amount necessary to cure the default if the mortgagor seeks to enjoin a foreclosure sale. *Ginther-Davis Center Ltd. v. Houston Nat'l Bank*, 600 S.W.2d 856, 864 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). In *Lincoln Nat'l Life Ins. Co. v. Freudenstein*, 87 S.W.2d 810 (Tex. App.—San Antonio 1935) the court held the mortgagors were not entitled to an injunction to stop a foreclosure sale merely to save their equity in the property or allow the mortgagors time to sell the property sometime in the future. As a practical matter, the granting of a TRO is almost a certainty if the property is the mortgagor’s residence.

14. Fatally Defective Sale

Noncompliance with any of the statutory foreclosure requirements is grounds for a wrongful foreclosure. *Shearer v. Allied Live Oak Bank*, 758 S.W.2d 940 (Tex. App.—Corpus Christi 1988, writ denied) and *Houston First American Savings v. Musick*, 650 S.W.2d 764 (Tex. 1983). Generally, any foreclosure requirement found in the security instrument must be strictly followed; otherwise, the trustee’s deed can be set aside. *University Savings Ass'n v. Springwoods Shopping Center*, 644 S.W.2d 705 (Tex. 1982).

The measure of damages for a wrongful foreclosure sale is the difference between the fair market value of the property and the total debt owed by the mortgagor on the date of the foreclosure sale. *Farrell v. Hunt*, 714 S.W.2d 298 (Tex. 1986).

In *Bonilla v. Roberson*, 918 S.W.2d 17 (Tex. App.—Corpus Christi 1996), the mortgagee bought the property at the foreclosure sale for a total debt bid. When the mortgagee discovered the inside of the property had been severely damaged, he rescinded the sale so that he could enter a low bid when he re-foreclosed to obtain a deficiency. The court held that a trustee cannot rescind a foreclosure sale simply because the mortgagee did not like the original sale results. However, *Ogden v. Gibraltar Savings Ass'n*, 640 S.W.2d 232 (Tex. 1982) seems to indicate that a foreclosure sale can be set aside if the mortgagor and mortgagee agree.

A borrower cannot obtain both rescission and damages for a wrongful foreclosure. *Reyna v. State Nat'l Bank of Iowa Park*, 911 S.W.2d 851 (Tex. App.—Ft. Worth 1995, writ denied) and *Carrow v. Bayliner Marine Corp.*, 781 S.W.2d 691 (Tex. App.—Austin 1989, no writ). *Reyna* and *Carrow* also seem to indicate that the constructive free rent the mortgagor receives during litigation must be credited against any damages imposed on the mortgagee.

To rescind the foreclosure sale and trustee's deed, the mortgagor must cure the default by paying the total amount due under the note. *Brachen v. Haid & Kyle Inc.*, 589 S.W.2d 501 (Tex. App.—Dallas 1979, writ ref'd n.r.e.). In a wrongful foreclosure suit, if the mortgagor seeks both damages and rescission but has not cured the default, the mortgagee should file a motion for summary judgment to eliminate the rescission cause of action because the borrower failed to cure. Tender of the amount due must be "an unconditional offer to pay in current coin of the realm of a specific sum" and cannot be in the form of a letter of credit, *Baucum v. Great American Ins. Co. of New York*, 370 S.W.2d 863 (Tex. 1963), but cash or cash equivalent. *Fillion v. David Silvers Co.*, 709 S.W.2d 240 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

15. Foreclosure Bid

Under case law, a trustee is obligated to give the foreclosure buyer a reasonable time to obtain cash to pay the bid. *First Fed. Savings & Loan Ass'n v. Sharp*, 359 S.W.2d 902 (Tex. 1962). But in *Bering v. Republic Bank of San Antonio*, 581 S.W.2d 806 (Tex. App.—Corpus Christi 1979, writ ref'd n.r.e.), the court held the trustee has no legal duty to wait for a buyer to obtain the foreclosure bid price.

Effective September 1, 2007, House Bill 2738 adds *Tex. Prop. Code* §51.075(f) which makes it clear that the purchase price for a foreclosure property is due immediately on acceptance of the foreclosure bid.

In *Provident Nat'l Assurance Co. v. Stephens*, 910 S.W.2d 926 (Tex. 1995), the Trustee sold two properties for one bid price and executed one Trustee's deed. In the deficiency suit that followed, the mortgagor challenged the cumulative bid. The Texas Supreme Court held the mortgagee could allocate a sale price for each individual tract as long as the value for each was reasonable.

The mortgagee is not required to tender cash for its bid at a foreclosure sale because it would be "an idle ceremony" for the trustee to receive cash from the mortgagee and then return the same money to the mortgagee. *Thomason v. Pacific Mutual Life Ins. Co. Of California*, 74 S.W.2d 162 (Tex. App.—El Paso 1934, writ ref'd).

16. Return to Status Quo

If a foreclosure sale is set aside, all parties must be returned to the same state that existed prior to sale but "he who asks for equity must do equity." *Price v. Reeves*, 91 S.W.2d 862 (Tex. Civ. App.—Ft. Worth 1936, no writ). In a bad foreclosure sale, the foreclosure buyer loses the property, but is entitled to a return of the purchase price plus any payments made for delinquent taxes, interest, insurance costs, and improvements made to the property. *Keda Development Corp. v. Strangling*, 721 S.W.2d 897 (Tex. App.—Dallas 1986, no writ).

The mortgagee must return the purchase price to the foreclosure buyer and the mortgagor must cure the default. *Bracken v. Haid & Kyle Inc.*, 589 S.W.2d 501 (Tex. App.—Dallas 1979, writ ref'd n.r.e.), *Loomis Land & Cattle Co. v. Diversified Mortgage Investors*, 533 S.W.2d 420 (Tex. App.—Tyler 1976, writ ref'd n.r.e.), and *Lambert v. First Nat'l Bank of Bowie*, 993 S.W.2d 833 (Tex. App.—Ft. Worth 1999, no writ). In *Criswell v. Southwestern Fidelity Life Ins. Co.*, 373 S.W.2d 893 (Tex. App.—Houston [1st Dist.] 1963, no writ), the court held that any person in possession of wrongfully foreclosed property was liable to the rightful owner for an amount equal to the fair market rental value of the property.

17. Malpractice Claims

A malpractice cause of action does not accrue in a foreclosure context until, in the exercise of reasonable care and due diligence, the facts establishing the alleged liability are discovered. *Independent Life & Accident Ins. Co. v. Childs, Fortenbach, Beck & Guyton*, 756 S.W.2d 54 (Tex. App.—Texarkana 1988, no writ). Further, a wrongful foreclosure suit tolls the statute of limitation for a subsequent malpractice suit against an attorney. *Gulf Coast Inv. Corp. v. Brown*, 821 S.W.2d 159 (Tex. 1991).

18. Standing to Contest a Foreclosure Sale

To contest a foreclosure sale, a person must have an equitable or legal interest in the foreclosed property. *Goswami v. Metropolitan Savings & Loan Ass'n*, 751 S.W.2d 487 (Tex. 1988). Therefore, a junior lien holder can contest a foreclosure because the junior lien holder's interest may be affected by the sale. *American Savings & Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581 (Tex. 1975) and *URSIC v. NBC Bank South Texas, N.A.*, 827 S.W.2d 334 (Tex. App.—Corpus Christi 1991, no writ).

For a mortgagor to challenge the validity of a foreclosure sale and obtain cancellation of the trustee's deed, the foreclosure sale price must be tendered to the

purchaser. *Durkay v. Madco Oil Co.*, 862 S.W.2d 14 (Tex. App.—Corpus Christi 1993, writ denied) and *Bracken v. Haid & Kyle Inc.*, 589 S.W.2d 501 (Tex. App.—Dallas 1979, writ ref'd n.r.e.).

19. Effect of Foreclosure on Other Liens

Foreclosure cuts off the rights of all inferior lien holders. *Hampshire v. Greeves*, 104 Tex. 620, 143 S.W. 147 (Tex. 1912). If a junior lien is foreclosed, the buyer takes title subject to all superior liens. 59 *C.J.S. Mortgages* 549 & 601 (1998). The priority of liens is determined by the first in time rule, which means the first lien recorded in the real property records has priority over liens filed later. *Windham v. Citizens Nat. Bank*, 105 S.W.2d 348 (Tex. App.—Austin 1937, writ dismissed).

After a foreclosure sale, the trustee distributes the sales proceeds in accordance with the terms of the security instrument. Any excess proceeds remaining after payment of trustee's fees, collection costs and attorney fees, and the amount due the mortgagee under the note are paid to inferior lien holders in order of priority. If any excess proceeds remain after all inferior lien holders are paid, the remainder is paid to the mortgagor. Excess foreclosure proceeds always flow down, not up, to lien holders in the chain of title. *Conversion Properties L.L.C. v. Kessler*, 994 S.W.2d 810 (Tex. App.—Dallas 1999).

If a lien is not recorded in the real property records, all other recorded encumbrances have priority over the unrecorded lien, so long as the mortgagee was without actual or constructive knowledge of the unrecorded lien. *Gordon-Sewall & Co. v. Walker*, 258 S.W. 233 (Tex. App.—Beaumont 1924, writ dismissed w.o.j.). If the mortgagor conveyed the property prior to foreclosure, but the deed was not recorded until after the sale, the foreclosure sale purchaser takes title to the property so long as the purchaser did not have actual knowledge of the unrecorded deed. *URSIC v. NBC Bank South Texas, N.A.*, 827 S.W.2d 334 (Tex. App.—Corpus Christi 1991, no writ).

The purchaser at a foreclosure sale is not personally liable for the payment of any inferior lien extinguished by foreclosure, except for certain tax and government liens. *Blanco, Inc. v. Porras*, 897 F.2d 788 (5th Cir. 1990).

20. DTPA

Typically in any wrongful foreclosure suit, there is a deceptive trade practice (“DTPA”) allegation made against the mortgagee, servicer or attorney. *Tex. Bus. & Com. Code* §§17.41-17.63. In *Brown v. Bank of Galveston*, 963 S.W.2d 511 (Tex. 1997), the Texas

Supreme Court succinctly explained what DTPA elements must be alleged against a mortgagee. To maintain a DTPA cause of action, the mortgagor must show: (1) the mortgagor is a consumer; (2) the mortgagee either committed a false, misleading or deceptive act under *Tex. Bus. & Com. Code* §17.46(b) or breached an expressed or implied warranty or engaged in an unconscionable action or course of conduct; and (3) these acts were the producing cause of the consumer's actual damages.

E. Deceased Mortgagor Foreclosure

1. Overview

When a person dies, title to their property immediately vests in the heirs-at-law. However, the heirs have no personal obligation to pay the decedent's debts, *Potts v. W.Q. Richards Memorial Hospital*, 558 S.W.2d 939 (Tex. Civ. App.—Amarillo 1977, no writ) and *Tex. Prob. Code* §37 or §45. For this reason, if the mortgagor is deceased, title companies are hesitant to issue a title policy until a probate proceeding is final. Whether a title policy can be obtained after a deceased mortgagor's property is foreclosed is the critical issue in “dead debtor” files. Many times title companies will issue a title policy even though the mortgagor is deceased so long as: (a) all heirs-at-law sign a deed conveying the property to the same grantee; and (b) an Affidavit of Heirship, prepared in accordance with *Tex. Prob. Code* §52A, is filed in the deed records. If there is equity in the property, or counsel represents the heirs, or the property is occupied, few title companies will issue a title policy unless the title issue is settled by a court order – whether from district court or a probate court.

If an independent administration is pending and Letters of Testamentary have been granted, no court supervision of the estate is required. *Corpus Christi Bank & Trust v. Alice Nat'l Bank*, 444 S.W.2d 632 (Tex. 1969). However, if a personal representative has not been appointed or Letters of Testamentary obtained, the probate is in limbo and many title companies treat the probate application as if it were a dependent administration.

If a dependent probate administration is pending, supervision of the court is required for all matters. *Tex. Prob. Code* §178. In many respects, a dependent administration is analogous to a bankruptcy proceeding with the personal representative operating under the authority of Letters of Administration. A dependent administration is usually opened when the decedent dies without a Will, or court supervision of the administration of the estate is required because of disputes between the heirs or creditors.

If a dependent probate administration is opened, the creditor must file a “matured” or “preferred” claim against the estate. The creditor must then proceed through a technical claims process mandated by the Texas Probate Code that many commentators have called “more honored in the breach than in the observance.” Professor Featherston said, “In a dependent administration, the Texas Probate Code is a veritable minefield for the careless and unsuspecting creditor, and what otherwise would be a valid and fully collectable claim can be eliminated by failure to comply with statutory requirements.” See “*Handling Claims in Decedent’s Estates*,” 1995 *State Bar Adv. Estate Planning & Probate*, J-16.

If the decedent has been dead for more than four years and no probate proceeding has been opened, a properly conducted foreclosure sale passes good title because the statute of limitations for opening a dependent administration has run. *Wiener v. Zweib*, 105 Tex. 262, 147 S.W. 867 (Tex. 1912).

If, however, less than four years have passed since the decedent’s death, the mortgagee takes the risk that an “interested” person could void the foreclosure sale at the election of the personal representative. By definition, “interested person” means “heirs, devisees, spouses, creditors, or any other person who has a property right in, or claim against the estate being administered.” *Tex. Prob. Code* §3.

Even though the heirs may agree that the decedent’s property could be conveyed to the mortgagee to extinguish the debt and that no probate proceeding opened, there is always the possibility another “interested person” will open a dependent administration, forcing the secured property into the estate.

If no probate is pending for the decedent’s estate, most mortgagees open a creditor’s administration. This means the creditor or its representative becomes the personal representative of the estate and must post a surety bond to manage all the affairs of the estate to include collecting all the assets and settling all the debts and liabilities of the decedent. Any mistake on the part of the creditor or its representative as the personal representative of the estate creates potential liability, with the surety board serving as a source of funds to pay damages if the personal representative is judgment proof.

However, if the mortgagee holds a superior title secured by a vendor’s lien, the creditor can file a suit to rescind the vendor’s lien and obtain title and possession of the property without opening a dependent administration. The reservation of the vendor’s lien is found in almost all deeds, and most security instruments have a vendor’s lien clause in the paragraph immediately above the signature block.

2. Independent Administration

If an independent administration is opened for the decedent’s estate with Letters Testamentary granted to the personal representative, the power of sale in the deed of trust is not suspended and the lender can foreclose if the loan is in default. *Bozeman v. Folliott*, 556 S.W.2d 608 (Tex. App.—Corpus Christi 1977, writ ref’d n.r.e.).

However, *Tex. Prob. Code* §257 suggests that a lender cannot foreclose until six months after the personal representative has been granted Letters Testamentary so that the personal representative can inventory the assets and liabilities of the estate.

3. Notice to Decedent’s Estate

If the mortgagor is deceased, the foreclosure notice provisions required by *Tex. Prop. Code* §51.002 present an interesting dilemma. If the mortgagee is foolish enough to take the risk, foreclosure notices should be sent to the decedent at the decedent’s last known address found in the mortgagee’s files and addressed “John Doe, deceased.”

If an independent probate administration is opened, foreclosure notices should be sent to the personal representative of the estate as well as the attorney for the estate. The best practice for these notices would be “Estate of John Doe, c/o Mary Jane Doe, Executor of the Estate” at the property address and the executor’s address, if known, and if not, in care of the estate’s attorney. For the estate’s attorney, the notice should read “Estate of John Doe c/o Lynn Lawyer, Esq.”

In those instances where the mortgagee is foreclosing a decedent’s interest in property where no probate has been opened or personal representative appointed, or the statute of limitations has expired, the foreclosure notices should be addressed to “John Doe, deceased” because to say “Estate of John Doe” would be a misrepresentation, because no estate has been opened.

If the mortgagor is deceased, foreclosure notices must be sent to decedent in some fashion. In *Fenimore v. Gonzales County Savings & Loan Ass’n*, 650 S.W.2d 213 (Tex. App.—San Antonio 1983, writ ref’d n.r.e.), the court held that foreclosure notices sent to the debtor’s surviving son in the mistaken belief that he was the only heir and executor of the debtor’s estate, instead of to the decedent at the decedent’s last known address, were invalid.

4. Foreclosure Preceding Death

If a proper foreclosure sale takes place before the decedent’s death, the foreclosure sale is valid even if a

dependent administration is opened afterwards, because the property was not in the decedent's estate at the time of death. *Smith v. San Antonio Joint Stock Land Bank*, 130 S.W.2d 1070 (Tex. App.—Eastland 1939).

5. Community Estate

A decedent's estate includes all tangible and intangible real and personal property, whether separate or community property, owned by the decedent at the time of death. See *In re: Hite*, 700 S.W.2d 713 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e). Therefore, if the mortgaged property in question is community property, probate affects only the decedent's undivided one-half interest in the mortgaged property at the time of death.

If the decedent died after September 1, 1993, and all the children of the decedent were also the children of the surviving spouse, then the surviving spouse is vested with all of the decedent's community property. *Tex. Prob. Code §45*.

See *Skelton v. Washington Mutual Bank, F.A.*, 61 S.W.3d 56 (Tex. App.—Amarillo [7th Dist.] 2001) which discusses homestead rights of a surviving spouse *vis à vis* a mortgagee if the spouse was not a title owner of record to the secured property. The court held a spouse cannot accept the use or benefit of the encumbered property and then reject the loan agreement obligation, which funded the purchase of the property.

6. Dependent Administration

The opening of a dependent administration suspends the power of sale in a deed of trust. Therefore, if a foreclosure sale is conducted while a dependent administration is pending, the foreclosure sale is void. *Pearce v. Stokes*, 155 Tex. 564, 291 S.W.2d 309 (Tex. 1956).

If a foreclosure sale occurred after the decedent died, but before Letters of Administration were issued in a dependent administration, the foreclosure sale is voidable at the election of the personal representative of the estate. In addition to having the foreclosure sale set aside, the personal representative can seek damages based on a conversion theory against the mortgagee, if the mortgagee knew or should have known the mortgagor was deceased. *American Savings & Loan Ass'n v. Jones*, 482 S.W.2d 62 (Tex. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

The *Texas Probate Code §306(f)* provides for the foreclosure of a preferred claim against the estate. However, see *Vineyard v. Irvin*, 855 S.W.2d 208 (Tex. App.—Corpus Christi 1993, no writ), which allowed a “public sale” of property in a dependent administration in accordance with *Tex. Prob. Code §338* instead of *§306(f)*.

7. Vendor's Lien

The rescission of the vendor's lien is a very powerful tool if no probate has been opened for the deceased mortgagor and the loan is in default. Rescission of the vendor's lien is not a “claim for money.” Two cases provide a legal road map for the use of the vendor's lien technique, *Lusk v. Mintz*, 625 S.W.2d 774 (Tex. App.—Houston [14th Dist.] 1981, no writ) and *Walton v. First Nat'l Bank of Trenton*, 956 S.W.2d 647 (Tex. App.—Texarkana 1997, reh. denied), which result in the mortgagee obtaining title and possession of the deceased mortgagor's property.

In *Lusk* the court held that the only defense to a rescission of a vendor's lien suit is payment of the purchase money, because a person in possession of the property cannot keep it without paying for it. Another argument for the rescission of the vendor's lien is also supported by the principle that a mortgagor's death should not vest in mortgagor's estate or heirs any extra rights, which the mortgagor did not have while living. *Estes v. Browning*, 11 Tex. 237 (Tex. 1853).

In *Hudson v. Norwood*, 147 S.W.2d 826 (Tex. App.—Eastland 1941, writ dismissed judgment corr.), the court held that the superior title held by the owner of the vendor's lien is not affected by the purchaser's death and superior title remained in the holder of the vendor's lien as long as the purchase price for the property is not paid. Therefore, if the mortgagee could rescind the vendor's lien when the mortgagor was living, then the estate or decedent's heirs could not prevent rescission upon the mortgagor's death.

F. Deed in Lieu

A deed in lieu of foreclosure is the voluntary conveyance of the secured property from the mortgagor to the mortgagee in return for forgiveness of the debt. The mortgagor cannot unilaterally extinguish the debt by delivering a deed to the mortgagee or by filing a deed in the deed records because, without acceptance of the deed-in-lieu by the mortgagee, there can be no conveyance of the property to the mortgagee. *Puckett v. Hoover*, 146 Tex.1, 202 S.W.2d 209 (Tex. 1947).

It should be noted, the Texas Supreme Court in *Flag-Redfern Oil Company v. Humbell Exploration, Inc.*, 744 S.W.2d 6 (Tex. 1987) held that “... [t]here is no such deed as a deed-in-lieu of foreclosure.” In *Flag-Redfern* the Court clearly indicated that a deed-in-lieu is not the same or similar to a foreclosure and will not cut off any inferior liens that properly encumber the property.

A recent addition to the Texas Property Code has removed some of the risk if a mortgagee accepts a deed-in-lieu. Pursuant to *Tex. Prop. Code §51.006*, a

mortgagee who accepts a deed-in-lieu from the debtor in satisfaction of the debt can void the deed at any time within four years of acceptance if, without the mortgagee's knowledge, the debtor failed to disclose other encumbrances on the property. If the mortgagee elects to void the deed-in-lieu, the priority of the original deed of trust is not affected or impaired and the mortgagee can foreclose under the original deed of trust.

IV. FORMS

**A. MERS
FORECLOSURE RECIPE
(Texas Style)**

This recipe takes real property, title and U.C.C. legal principles plus mortgage banking and Wall Street related provisions (the “Ingredients”), which are then molded and mixed (the “Preparation” and “Mixing” stage) into a final MERS foreclosure “Crème Brulée.”

Ingredients

1. Take *one* standard Mortgage Electronic Registration System, Inc. (“MERS”) deed of trust or security instrument.
2. Take *one* foreclosure referral from any client.
3. Take *one* copy of pertinent Texas foreclosure statutes:
 - a. Texas Property Code (“TPC”) §51.0001 – definitions for “mortgagee,” “mortgage servicer,” “book entry system” – MERS;
 - b. TPC §51.0025 – administration of Texas foreclosures by the mortgage servicer;
 - c. TPC §51.0075 – appointment of substitute trustee(s).
4. Take *one* Restatement of (Third) Property: Mortgages:
 - a. Section 5.4(c) – mortgage may be enforced only by, or on behalf of, a person entitled to enforce the obligation the mortgage secures;
 - b. Reporter’s Notes to Section 5.4(e) – mortgage servicer can enforce mortgage on investor’s behalf if investor has given mortgage servicer such authority as a trustee or through an agency agreement.
5. Take *one* copy of Ginnie Mae Memorandum 02-10 dated May 1, 2002 and Ginnie Mae MBS Guide – Chapter 12: The *Prospectus, Securities, and Securities Marketing* – all Ginnie Mae serial notes converted from Wall Street’s Depository Trust & Clearing Corporation to the Federal Reserve “book entry” form (see www.ginniemae.com).
6. Take *one* copy of Fannie Mae Single-Family MBS Prospectus related to the book entry of loans (see www.fanniemae.com).
7. Take *one* copy of Evaluation of NSCC and DTC and No More Paper – discusses the evolution of Wall Street’s “book entry system” for stocks and bonds, which the mortgage banking industry adopted to create MERS (see www.dtcc.com).
8. Take *one* standard MERS®System screen print, which discloses:
 - a. Debtor’s name, property address, loan number, note amount and note date;
 - b. Servicer’s name and address;
 - c. Custodian’s name and address;
 - d. Investor’s name and address.
9. Take *one* DOD Manpower Data Center Military Status Report – used to prove military status as required by Servicemembers Civil Relief Act and universally accepted by trial judges as proof of military status (see Exhibit A, attached).
10. Take *one* business record that seeks to mimic functionality of the DOD Manpower Data Center Status Response to prove the name and address of the investor and servicer of any loan registered on MERS.
 - a. See Exhibit B, attached, for suggested MERS business record – *NOT approved by MERS* yet but trying;
 - b. See Exhibit C, attached for Servicer’s MERS business record.
11. Take *one* copy of *Mortgage Electronic Registration System, Inc. v. Nebraska Dept. of Banking and Finance*, 270 Neb. 529, 704 N.W.2d 784 (Neb. 2005) – discussion of MERS by Nebraska Supreme Court in November 2005.

Preparation

1. Clearly distinguish and separate so as to not confuse the legal principle associated with the enforcement of a delinquent note under the Uniform Commercial Code from the legal principles associated with a state’s recording and real property records statutes which hold that recording a lien simply establishes the existence of a lien and its priority.
 - a. U.C.C. PRINCIPLES:

- i. Tex. Bus. & Com. Code §3.117 – enforcement of a note can be modified by other instrument, e.g., deed of trust or statute;
 - ii. Tex. Bus. & Com. Code §3.205 – describes various note endorsement methods to include “in blank”;
 - iii. Tex. Bus. & Com. Code §3.301 – persons entitled to enforce a note;
 - iv. Tex. Bus. & Com. Code §3.308 – in an action, the authenticity of a note is admitted unless specifically denied by the borrower;
 - v. Tex. Bus. & Com. Code §3.601(3) – if a debtor pays off a note, debtor cannot be made to pay twice if a mistake is made as to the true owner or holder of the indebtedness.¹
- b. RECORDING STATUTE PRINCIPLES:
- i. TEX. PROP. CODE §§13.001(b) – security instrument is binding on the parties to the instrument even though security instrument is *NOT* recorded in the real property records:
“The unrecorded instrument is binding on a party to the instrument, on the party’s heirs, and on a subsequent purchaser who does not pay valuable consideration or who has notice of the instrument.”
 - ii. TEX. PROP. CODE §13.002 – Purpose of a properly recorded security instrument is to give notice to all persons of the existence of the instrument.

2. Set aside from client’s foreclosure referral for future use, the following:

- a. Name of the “Investor,” which receives the mortgagor’s mortgage payment from the servicer;
- b. Any reference that the loan may be registered on MERS, for example an eighteen-digit MIN number is listed.

3. Set aside from the recorded deed of trust for future use, the following:

- a. Name of the “Lender” which will be the “original creditor” for FDCPA purposes under 15 U.S.C. §1692(g);
- b. The language in a standard MERS deed of trust that states:
 - i. *“Mortgage Electronic Registration System, Inc., (“MERS”) acting solely as*

a nominee for Lender and Lender’s successors and assigns.”

- ii. *“The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender’s successors and assigns) and the successors and assigns of MERS.”*
- iii. *“Borrowers understand and agree that MERS holds only legal title to the interest granted to Borrowers in the Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to ... foreclose and sell the property.”*
- iv. *“Lender, at its options and with or without cause, may from time to time, by power of attorney or otherwise, remove or substitute any trustee, add one or more trustees, or appoint a substitute trustee to any trustee without the necessity of any formality other than the designation by Lender in writing.”*

4. From the client obtain a copy of the MERS®System screen print that provides the following:

- a. Property address;
- b. Borrower’s name and Social Security number;
- c. Note amount and Note Date;
- d. “Servicer’s” name and address;
- e. “Custodian’s” name and address;
- f. “Investor’s” name and address;
- g. “Subservicer’s” name and address.

Mixing the Ingredients

1. All correspondence to a borrower and all pleadings should clearly delineate the status or role of each of the principal players to the borrower’s loan agreement, which are:

- a. The mortgagee or “investor”
 - i. The mortgagee is owner or holder of the indebtedness owed by the mortgagor or borrower;
 - ii. The entity described as “Investor” in the client’s foreclosure referral or on the MERS®System status screen is the mortgagee. (See Exhibit B or C.) The servicer sends the sum of money representing the borrower’s mortgage payment to the investor listed on the MERS®System status screen.

- b. The “mortgage servicer,” which is defined in:
 - i. TEX. PROPERTY CODE §51.0001(3) – the last person who the mortgagor has been instructed by the current mortgagee to send mortgage payments;
 - ii. 12 U.S.C. §2605 – describes the mortgage servicer’s duties.
 - c. MERS, which is:
 - i. The “mortgagee of record” for purposes of the recording statutes – TEX. PROP. CODE §§13.001 and 13.002;
 - ii. Acts solely as a nominee for a Lender and Lender’s successors and assigns in a standard MERS deed of trust.
2. Recommended language to describe the mortgagee or investor, the mortgage servicer, and MERS is as follows:

- a. Mortgagee or Investor
(Name of Investor from foreclosure referral or MERS®System) is the mortgagee of the indebtedness owed by [debtor, borrower or mortgagor] as evidenced by a note which is secured by a security instrument that encumbers certain real property and improvements of the mortgagor (hereafter “mortgagee”).
 [NOTE: The mortgagor or obligor of an indebtedness is referred to as “debtor” in the foreclosure statutes – TEX. PROP. CODE §51.002; as the “consumer” in the Fair Debt Collection Practices Act – 15 U.S.C. §1601-1692; and as “mortgagor,” “mortgage debtor,” or “borrower” in BLACK’S LAW DICTIONARY; as “mortgagor in 12 C.F.R. §203 *et seq.* (HUD servicing regulations); as “mortgagor” in 38 F.C.R. §36.4300 (VA servicing regulations); as “borrower” in 12 U.S.C.A. §2605 (servicing regulations in RESPA); and as “borrower” in a standard MERS deed of trust.]
- b. Mortgage Servicer
(Name of Mortgage Servicer from foreclosure referral or MERS®System) is the mortgage servicer and the mortgagee’s duly authorized agent for loan service administration for the indebtedness owed by [debtor, mortgagor, or borrower] or is authorized to conduct the foreclosure of the secured property pursuant to TEX. PROP. CODE §51.0025 (hereafter “mortgage servicer”).
- c. MERS
Mortgage Electronic Registration System, Inc. (“MERS”), acting solely as a nominee for

*Lender and Lender’s successors and assign, is the mortgagee of record for purpose of the real property recording statutes, (TEX. PROP. CODE §§13.001 and 13.002) and is not the owner or holder of the indebtedness sought to be enforced. However, the security instrument [authenticated] by the mortgagor(s) and which encumbers the secured property expressly states: (i) MERS has legal title to the secured property; (ii) MERS is the beneficiary of the security instrument; and (iii) MERS is authorized to exercise any and all rights and interest, including but not limited to, the right to foreclose and sell the property.” [*NOTE: The U.C.C. substitutes the word “authenticate” for the mechanical process of signing or executing a document.]*

The Resulting Foreclosure Crème Brûlée

1. A mortgage servicer may administer a Texas foreclosure as either the:
 - a. Duly authorized agent for loan service administration for the mortgagee or investor pursuant to a written loan servicing agreement; or
 - b. Pursuant to TEX. PROP. CODE §51.0025, so long as:
 - i. The mortgage servicer has a written servicing agreement to service the mortgage with the mortgagee – the “investor” listed in the client’s foreclosure referral or on the MERS®System;
 - ii. The mandatory foreclosure posting notice required by T.P.C. §51.002(b), which gives the date, time, and place of the foreclosure sale and must be sent to the mortgagor and filed with the County Clerk discloses:
 1. The name of the mortgagee; and
 2. Either the address of the mortgagee or c/o of the address of the mortgage servicer.
2. If the loan is registered on MERS®System and the mortgagee of record is MERS because:
 - a. the deed of trust is a MOM (MERS as Original Mortgagee); or
 - b. the security was assigned or transferred to MERS after origination, **THEN**
 - c. There is no necessity to assign or transfer the lien from MERS into the name of the

mortgagee or investor so long as the status or role of the mortgagee, mortgage servicer, and MERS are clearly described in each communication with the mortgagor and in the pleadings.

3. Acting solely as a nominee for Lender and Lender's successor and assigns and as the mortgagee of record for the purposes of the real property records, MERS fulfills the principal purpose of the recording statutes, in that:

- a. The public at large has notice that the debtor's property is secured by a lien;
- b. The public at large can obtain pertinent information about the lien by calling MERS at either 888-679-6377 or 888-680-6377, which will result in obtaining the mortgage servicer's name and phone number; and
- c. Once the public at large obtains the name of the servicer, the public can obtain the name, address, phone and fax number, and email address of the servicer's MERS liaison, by typing in the servicer's name in the "Member Directory" menu on the MERS web site at www.mersinc.org.

4. Since the standard MERS deed of trust generally provides in Paragraph 24 that "a Lender or its successors or assigns" appoints the substitute trustee, either the Lender, the Lender's successor or assign, or MERS, as the nominee for the Lender, can appoint the substitute trustee to conduct the foreclosure of the secured property.

5. However, beginning September 1, 2005, the appointment of the substitute trustee process in Texas is determined by statute, not by the terms of the deed of trust.

- a. TEXAS PROP. CODE §51.0075(c) and (d) states:
"(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 as authorized under this section 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)."

- b. See suggested Power of Attorney (Exhibit D).

6. Based on the success of the DOD Manpower Center Response as proof in trial courts as to military status and based on "management by exception" business principles, Exhibits B and C, taken from the MERS®System status screen, seek to prove in an electronic business environment who is the mortgagee or investor and servicer of the mortgagor's indebtedness. Generally, production of either B or C should be sufficient to independently establish the identity of the mortgagee, investor, or servicer, or to shift the burden of proof to the mortgagor to prove the mortgagee or investor named in B or C is not the owner or holder of the indebtedness sought to be enforced.

7. Since the mortgagee or investor is the owner or holder of the indebtedness foreclosed, only the mortgagee or investor has the right to make a "credit bid" for the secured property at the foreclosure sale. Therefore, if the credit bid purchased the property, the foreclosed property should be struck to the mortgagee or investor and the grantee of the Substitute Trustee's Deed should be the mortgagee or investor.

8. The "insured" under a Texas mortgage's title policy is defined as the "holder of the indebtedness." Therefore, the continuation of coverage clause of a Texas mortgage title policy means the investor as the "holder of the indebtedness" is insured under the mortgage's title policy after foreclosure, not MERS.

9. Most title companies are now requiring evidence of the "holder of the indebtedness" for purposes of issuing a title policy for the REO. Either the client's foreclosure referral or the MERS®System status screen has been acceptable to many Texas title underwriters as proof of the holder of the indebtedness foreclosed.

Request for Military Status



Page 1 of 1

Department of Defense Manpower Data Center

FEB-01-2006 08:32:34



Military Status Report
Pursuant to the Service Members' Civil Relief Act

| ◀ Last Name | First/Middle | Begin Date | Active Duty Status | Service/Agency |
|-------------|--------------|--|--------------------|----------------|
| BASTIAN | GEORGE T | Based on the information you have furnished, the DMDC does not possess any information indicating that the individual is currently on active duty. | | |

Upon searching the information data banks of the Department of Defense Manpower Data Center, the above is the current status of the individual, per the Information provided, as to all branches of the Military.

Robert J. Brandewie, Director
Department of Defense - Manpower Data Center
1600 Wilson Blvd., Suite 400
Arlington, VA 22209-2593

The Defense Manpower Data Center (DMDC) is an organization of the Department of Defense that maintains the Defense Enrollment and Eligibility Reporting System (DEERS) database which is the official source of data on eligibility for military medical care and other eligibility systems.

The Department of Defense strongly supports the enforcement of the Service Members Civil Relief Act [50 USCS Appx. §§ 501 et seq] (SCRA) (formerly the Soldiers' and Sailors' Civil Relief Act of 1940). DMDC has issued hundreds of thousands of "does not possess any information indicating that the individual is currently on active duty" responses, and has experienced a small error rate. In the event the individual referenced above, or any family member, friend, or representative asserts in any manner that the individual is on active duty, or is otherwise entitled to the protections of the SCRA, you are most strongly encouraged to contact us by phone at (703-696-6762). We will then conduct further research. Your failure to re-contact DMDC may cause provisions of the SCRA to be invoked against you.

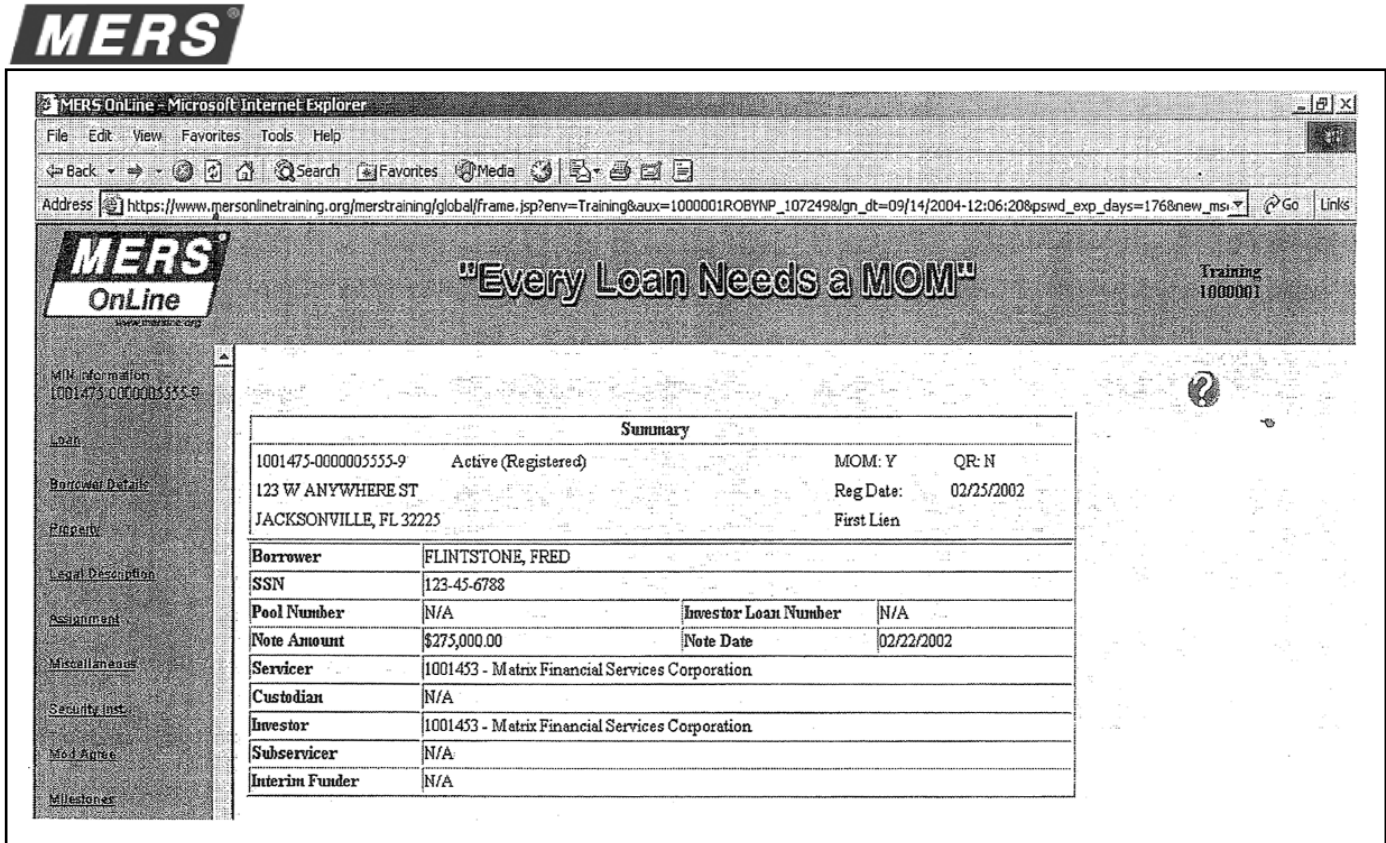
This response reflects current active duty status only. For historical information, please contact the military services SCRA point of contact.

See: <http://www.defenselink.mil/faq/pis/PC09SLDR.html>.

WARNING: This certificate was provided based on a name and Social Security number (SSN) provided by the requester. Providing an erroneous name or SSN will cause an erroneous certificate to be provided.

Report ID: *BFNVFCIDCCA*

MERS LOAN REGISTRATION STATUS REPORT



BEFORE ME, the undersigned authority, personally appeared [Boilerplate: Name of MERS Official serving as Affiant] who, being by me duly sworn, deposed and said:

1. My name is [Boilerplate: Name] I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated in it.
2. I am the [Boilerplate: Affiant’s official position MERS] for Mortgage Electronic Registration Systems Inc. (“MERS”), which is the national mortgage banking industry’s approved utility that provides a book entry registration system for mortgage loans in the same manner as the Wall Street industry’s Depository Trust & Clearing Corporation registers stocks and bonds by a book entry system. I am the person responsible for or custodian of the MERS’ business record for borrower’s mortgage referenced above which is registered on the MERS®System.
3. The MERS record above is an original, as the term “original” is defined in the Federal Rules of Evidence (“F.R.E”) 1001 and the data compilation on MERS®System is a business record, as the term “business record” is defined in F.R.E. 803(6) and (17) and is kept by MERS in the regular course of its business. It

was the regular course of the business of MERS for an employee or representative of MERS with knowledge of the act, event, condition, or opinion recorded to make the MERS®System data compilation or electronic record or to transmit information thereof to be included in such record. The business record was made at or near the time of the act, event, condition, or opinion recorded, or reasonably soon thereafter. The business record attached is a true and correct copy of the data compilation stored in the MERS®System as required in F.R.E. 1001.

4. MERS, the Investor or the Servicer requests judicial notice be taken of the business record as an adjudicated fact pursuant to F.R.E. 210(d) and (e).

5. This document and the electronic signature is made in accordance with the *Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001 et seq.*

SUBSCRIBED and SWORN TO BEFORE ME on (Electronic Date) to certify which witness my hand and seal of office.

(Electronic Signature _____)
 Notary _____
 Notary for the State of Virginia

B. DEAD DEBTOR VENDOR’S LIEN SUIT

CAUSE NO. _____

| | | |
|------------------------------------|---|--------------------------------|
| MORTGAGEE, | § | IN THE DISTRICT COURT |
| Plaintiff | § | |
| | § | |
| v. | § | |
| | § | |
| MORTGAGOR, KNOWN HEIRS, AND | § | IN _____ COUNTY, TEXAS |
| THE UNKNOWN HEIRS AT LAW OF | § | |
| DECEDENT, | § | |
| Defendants | § | |
| | § | |
| IN RE: PROPERTY ADDRESS | § | _____ JUDICIAL DISTRICT |

PLAINTIFF’S ORIGINAL PETITION

SYNOPSIS: Mortgagee seeks to enforce its security interest against real property held by the holder of the mortgage, who is deceased. The heirs have title and the property but fail or refuse to pay the debt.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, MORTGAGEE, its successors in interest or assigns (“Plaintiff” or “Mortgagee” as the context herein implies) and would respectfully show the Court:

DISCOVERY

1. Plaintiff intends to conduct discovery under Level 2 of TEX. R. CIV. P. 190.

PROPERTY

2. This proceeding concerns a certain loan agreement, as that term is defined in TEX. BUS. & COM. CODE §26.02 (“Loan Agreement”), secured by the real property and improvements commonly known as PROPERTY ADDRESS (“Property”), and more particularly described as follows:

[LEGAL DESCRIPTION OF PROPERTY]

PARTIES

3. Plaintiff acquires loan agreements secured by real property in the State of Texas and, when necessary, enforces such security interests. With respect to the Property and Loan Agreement made the subject of this proceeding, Plaintiff is the mortgagee, as “mortgagee” is defined in TEX. PROP. CODE §51.0001(4).

4. DECEDENT (“Decedent”) was an obligor under the Loan Agreement and died on or about DATE. It appears no probate proceeding has been opened for Decedent in the county where the Property is located. Therefore, there is no executor or administrator to be made a party in this proceeding as the personal representative of the Decedent’s probate estate. OR (choose no probate or probate pending) probate proceeding was opened for the Decedent’s estate in (*style of case*), but the Court has not issued an Order appointing an Administrator or Personal Representative.

5. Pursuant to TEX. PROB. CODE §37, the heirs-at-law of Decedent (“Heir” or “Defendant” as the context implies), whether known or unknown, acquired Decedent’s undivided interest in the Property immediately upon Decedent’s death. Each Heir is made a party to this proceeding pursuant to TEX. CIV. PRAC. & REM. CODE §17.002.

6. Defendant NAME OF KNOWN HEIR is an Heir of the Decedent and may be served with process at STREET ADDRESS.

7. Defendant NAME OF KNOWN HEIR is an Heir of the Decedent and may be served with process at STREET ADDRESS.

8. IF HEIR IS A MINOR Defendant NAME OF KNOWN MINOR HEIR is an Heir of the Decedent and is also a minor. Minor may be served at STREET ADDRESS by and through NAME OF NEXT FRIEND, the Heir's RELATIONSHIP TO MINOR HEIR, who is the minor's next friend pursuant to TEX. R. CIV. P. 44 or 173.

9. IF APPLICABLE Defendant NAME OF ALL KNOWN HEIRS WHOSE WHEREABOUTS ARE UNKNOWN IS/ ARE an Heir(S) of Decedent, but his or her whereabouts are unknown. Plaintiff will seek service of process by citation by publication and appointment of an attorney ad litem to represent Defendant's interests.

10. If Decedent had other Heirs-at-law who have an interest in the Property, but whose identity and whereabouts are unknown, in accordance with TEX. CIV. PRAC. & REM. CODE ANN. §17.004, Plaintiff will seek service of process by citation by publication and appointment of an attorney ad litem to represent such Defendants' interests.

11. Defendant, INSERT NAME OF SURVIVING SPOUSE, is the surviving spouse of Decedent, and **is OR (choose one) is not an obligor** under the Loan Agreement. Spouse may be served with process at STREET ADDRESS. Spouse may be sued to discharge any community obligation and/or community interest acquired as a result of the death of the Decedent pursuant to TEX PROB. CODE §160. Spouse may be served with process at STREET ADDRESS. IF APPLICABLE Defendant Spouse is not obligated under the Loan Agreement, but is being made a party to this suit for purposes of due process because his/her interest in the Property, if any, may be affected by this proceeding.

JURISDICTION

12. This Court has subject matter jurisdiction over the controversy because Plaintiff seeks only title and possession of the Property secured by the Loan Agreement debt. TEX. CIV. PRAC. & REM. CODE ANN. §17.002 and TEX. PROB. CODE §37.

VENUE

13. Venue is proper in this county because the Property is located in this county.

FACTS

14. The documents attached to this petition are made a part of this proceeding for all purposes and are true and correct copies of pertinent original Loan Agreement documents related to the debt secured by the Loan Agreement and the Property made the subject of this proceeding. Subject documents include:

INCLUDE ONLY THOSE APPLICABLE DOCUMENTS BELOW

- a. Deed marked as Exhibit "_____" attached hereto and incorporated herein by reference.
- b. Note marked as Exhibit "_____" attached hereto and incorporated herein by reference.
- c. Security Instrument marked as Exhibit "_____" attached hereto and incorporated herein by reference.
- d. Assignments or Transfers of Security Instrument are marked as Exhibit "_____" attached hereto and incorporated herein by reference.

15. The obligors of the debt evidenced by the Loan Agreement used funds advanced by the original mortgagee to purchase **OR** assume the Property. The debt created under the terms of the Loan Agreement was secured by the Property.

16. According to Plaintiff's records, no payments have been made in accordance with the terms of the Loan Agreement since DATE. Therefore, there has been a material breach of the Loan Agreement. As of DATE, the Loan Agreement payoff, as "pay-off" is defined in TEX. PROP. CODE §12.017, was at least \$ AMOUNT. However, this sum increases daily under the terms of the Loan Agreement to include, but not limited to, earned interest, collection costs to include attorney fees, taxes, insurance and other legally authorized expenses.

17. Under the terms of the Loan Agreement, Plaintiff has advanced funds for the payment of taxes, insurance, and property preservation expenses, in an attempt to preserve and protect the Property from becoming a wasting asset and subject to vandalism.

18. Subject to TEX PROB. CODE §37, the heirs-at-law of Decedent acquired all of Decedent's interest in the Property immediately upon Decedent's death. Though all Defendants have had the use, benefit, and

enjoyment of the Property, they have failed or refused to pay the debt evidenced by the Loan Agreement. All conditions precedent have been performed or have occurred as required by TEX. R. CIV. P. 54.

19. But for the death of the Decedent, Plaintiff would have exercised its right to enforce its security instrument against the property because of the material breach of the Loan Agreement. The most practical, efficient, and effective means to enforce Plaintiff's security interest in the Property would be a public auction of the Property.

- a. The rights, responsibilities, and duties of Plaintiff and the trustee of the security instrument are well known under TEX. PROP. CODE §51.002 and Texas case law; therefore, a public auction conducted in the same manner as a non-judicial foreclosure sale would meet all constitutional standards of due process.
- b. In addition, a public auction of the Property would also be the most expedient means to put the Property back into the stream of commerce, as well as into the housing stock of the community. Otherwise, the Property will continue to be a wasting asset that is subject to vandalism and deterioration.

20. Under the terms of the security instrument, Plaintiff appoints INSERT NAMES OF SUBSTITUTE TRUSTEE(S) or a successor, as a Substitute Trustee to conduct the public auction.

VII. CAUSES OF ACTION RESCISSION OF VENDOR'S LIEN

21. Pursuant to the Texas Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. §37.001, *et seq.*, Plaintiff requests this Court declare and enter judgment as to all Defendants that Plaintiff has superior title to the Property secured by a vendor's lien as evidenced by the reservations in the Loan Agreement documents which state in pertinent part:

INCLUDE ONLY THOSE DOCUMENTS ABOVE CONTAINING VENDOR'S LIEN LANGUAGE.

Deed: – *“Insert Vendor's Lien language from Deed”*

Note: – *“Insert Vendor's Lien language from Note”*

Deed of Trust: – *“Insert Vendor's Lien language from Deed of Trust”*

22. Plaintiff seeks to exercise its right of title and possession to the Property against all Defendants by rescission of the vendor's lien due to the material breach of the Loan Agreement. 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.”*

23. Until the Loan Agreement debt used to acquire the Property is paid, the obligors have only equitable title to the Property that is the use, benefit and enjoyment of the Property – not legal title which is held by Plaintiff.

24. By exercising its right to rescind the vendor's lien, Plaintiff is not making a claim for money against Decedent or Decedent's putative Estate; therefore, there is no necessity of administration of Plaintiff's claim under the Texas Probate Code. *Walton vs. First Nat'l Bank of Trenton*, 956 S.W. 2d 647, 652 (Tex. App. – Texarkana, 1997).

25. For due process purposes, Plaintiff seeks to rescind the vendor's lien by using the provisions of the Loan Agreement and TEX. PROP. CODE §51.002 to conduct a non-judicial foreclosure of the Property.

Enforcement of Statutory Lien

26. Pursuant to the Texas Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. §37.001, *et seq.*, Plaintiff seeks a declaration that Plaintiff has an *in rem* lien against the Property under the terms of the Loan Agreement and the following statutory authority:

- a. TEX. PROB. CODE §37, which states in pertinent part:
“... whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but with the exception aforesaid shall still be liable and subject in their hands to the payment of the debts of the intestate ...”
- b. *Tex. Prob. Code* §45, which states in pertinent part:
“In every case, the community estate passes charged with the debts against it.”

Also see:

- c. *TEXAS TITLE EXAMINATION STANDARDS §11.10*, which states in pertinent part:
“A decedent's Property passes to his or her heirs at law or devisees immediately upon death, subject in each instance, except

- for exempt Property, to payment of debts, including estate and inheritance taxes,” and*
- d. **TEXAS TITLE EXAMINATION STANDARDS** §11.60, which states in pertinent part:
“A decedent’s Property passes to his or her heirs at law or devisees immediately upon death, subject in each instance, except for exempt Property, to payment of debts, including estate and inheritance taxes ... Property of a decedent passes subject to unpaid debts and taxes of the estate.”

27. Plaintiff’s statutory lien gives Plaintiff an enforceable and superior *in rem* lien against the Property. Because of a material breach of the Loan Agreement, Plaintiff seeks to enforce its statutory lien against the Property in accordance with the terms of the Loan Agreement and TEX. PROP. CODE §51.002 or TEX. R. CIV. P. 309.

28. Plaintiff seeks no personal liability against the Heirs. Plaintiff seeks only the *in rem* interest in the Property acquired by the Heirs upon the death of the Decedent.

Quiet Title

29. Pursuant to the Texas Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE ANN. §37.001, *et seq.*, Plaintiff requests this Court declare and enter judgment that after enforcing its security interest, Plaintiff has all right to and interest in the Property and that all of Decedent’s and Defendants’ interests in the Property be vested in Plaintiff. *Brainard vs. State*, 12 S.W.3d 6, 29 (Tex. 1999).

30. Upon Decedent’s death, the Heirs of Decedent became vested with an interest in the Property, adverse to Plaintiff. All claims to the Property by the Heirs are subject to Plaintiff’s superior security instrument in the Property.

31. The heirs cannot hold greater rights in the property than the Decedent, who was the obligor under the Loan Agreement. The heirs take their interest in the property subject to the Loan Agreement. Though not personally liable on the debt, the heirs have failed to make payments and/or payoff the loan, while still enjoying the use and benefit of the property. Therefore, any and all interest in the Property the heirs maintain is extinguished when the Plaintiff enforces its security interest against the Property.

32. Because of a material breach of the Loan Agreement, Plaintiff seeks to enforce its security interest in the Property against the Heirs and Defendants in accordance with the terms of the Loan Agreement and TEX. PROP. CODE §51.002 or TEX. R. CIV. P. 309.

Writ of Possession

33. If any person (“Occupant”) occupies or claims possession of the Property after transfer of all right, title and interest in the Property by trustee’s or sheriff’s deed, Plaintiff requests a writ of possession against Occupant in accordance with TEX. R. CIV. P. 310.

Attorney Fees

34. Plaintiff is entitled to recover reasonable and necessary attorney fees under TEX. CIV. PRAC. & REM. CODE ANN. §38.001 *et seq.* due to the material breach of the Loan Agreement as a charge against the Property.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that upon final hearing, that Defendants be cited to appear and answer, and, the Court enter judgment granting:

1. A declaration that all of Decedent’s heirs-at-law have been made parties to this suit and are vested with all of Decedent’s right, title and interest in the Property; and
2. A declaration that Plaintiff’s vendor’s lien against the Property be rescinded and that the Defendants be divested and Plaintiff vested with all of Decedent’s and Defendants’ right, title, and interest to the Property; or
3. A declaration that Plaintiff’s statutory lien against the Property be enforced by a foreclosure, and that through foreclosure the Defendants be divested and Plaintiff vested with all of Decedent’s and Defendants’ right, title, and interest to the Property; and
4. A declaration that Plaintiff is vested with all right, title, and interest in the Property in order to remove any cloud on title that the Heirs’ interest may have created; and

5. A writ of possession against any occupant of the Property (“Occupant”) if the Occupant fails or refuses to leave the Property after foreclosure; and

6. Attorney fees and costs of suit; and

7. All other relief, in law and in equity, to which Plaintiff may be entitled.

Respectfully submitted,

[NAME]

ATTORNEY FOR PLAINTIFF

C. REPUBLIC OF TEXAS (“ROT”) PETITION

CAUSE NO. _____

| | | |
|-------------------------------------|---|---------------------------------|
| MORTGAGEE, MORTGAGE SERVICER | § | IN THE DISTRICT COURT OF |
| OR LAW FIRM | § | |
| Plaintiff | § | |
| | § | |
| v. | § | |
| | § | |
| MORTGAGOR OR DEBTOR(S) | § | _____ COUNTY, TEXAS |
| Defendant(s) | § | |
| | § | |
| IN RE: PROPERTY ADDRESS | § | |
| Property | § | _____ JUDICIAL DISTRICT |

PLAINTIFF’S ORIGINAL PETITION

SYNOPSIS: Mortgagee seeks to enforce its security interest against the property and Mortgagors who adopt Republic of Texas type tactics to avoid paying the debt.

NOW COMES, NAME OF MORTGAGEE, MORTGAGE SERVICER OR HARASSED EMPLOYEES OR LAW FIRM its successors and assigns (“Plaintiff”, “Mortgagee” or “Mortgage Servicer”, “Employee” or “Law Firm” as the context implies), and would respectfully show the Court the following:

DISCOVERY

1. Discovery is intended to be conducted under Level 2 of Rule 190, Texas Rules of Civil Procedure.

PROPERTY

2. The real property and improvements that are the subject of this cause of action are commonly known as ADDRESS (“Property”), and more particularly described as follows:

PROPERTY DESCRIPTION

PARTIES

PLAINTIFF:

3. Mortgagee is a residential mortgage lending institution doing business in the State of Texas and

acquires debts secured by mortgages or liens on real property in Texas. NAME is the mortgagee, as “mortgagee” is defined in TEX. PROP. CODE ANN. §51.0001(4)(A – C) of the loan agreement, as “loan agreement” is defined in TEX. BUS. & COM. CODE ANN. §26.02(2) (“Loan Agreement”), evidenced by a note (“Note”), and deed of trust (“Deed of Trust”, see “Deed of Trust” marked Exhibit “??” attached), which obligated the makers of the Loan Agreement note to pay the debt which was secured by the Property made the subject of this cause of action.

4. NAME appears to be the victim of various “Republic of Texas” type documents, instruments, liens and claims (hereinafter collectively referred to as “Documents”) filed by Defendants NAME against the NAME OF MORTGAGEE, MORTGAGE SERVICER OR EMPLOYEES. The Documents are recorded in the official public records of NAME County, Texas or are published and disseminated to the public at large.

5. Law Firm, and its partners, associates and employees is a Texas law firm (“Law Firm”) that is seeking to enforce Mortgagee’s security interest against the Property because of a material breach of the Loan Agreement. Law Firm may be the victim of various “Republic of Texas” type Documents filed by the Defendants against Law Firm real and personal property. These Documents would be recorded in the official public records of the State of Texas, in the official real property records of various counties in Texas or published and disseminated to the public at large.

6. The officers, employees, agents, and representatives of Mortgagee or Mortgage Servicer (hereinafter collectively referred to as “Employees”) may also be the victim of the same “Republic of Texas” type Documents filed or published by Defendants against the Employee’s interest in real and personal property.

7. Mortgagee or Mortgage Servicer is hereinafter referred to as “Plaintiff” or “Plaintiffs.”

8. The “Republic of Texas” type Documents referred to in paragraphs 4, 5, and 6 above are attached as Exhibit “A” and made a part hereof for all purposes.

DEFENDANTS:

9. Defendant NAME: a/k/a NAME a/k/a NAME (“Defendant” or “NAME”), and all other *idem sonans*, as “*idem sonans*” is defined in TEXAS TITLE EXAMINATION STANDARDS §3.10, of Defendant is the mortgagor of the Loan Agreement and the publisher of the “Republic of Texas” type Documents. Defendant NAME may be served with citation at ADDRESS.

10. Defendant NAME: a/k/a NAME a/k/a NAME (“Defendant” or “NAME”), and all other *idem sonans*, as “*idem sonans*” is defined in TEXAS TITLE EXAMINATION STANDARDS §3.10, of Defendant is the mortgagor of the Loan Agreement and the publisher of the “Republic of Texas” type Documents. Defendant NAME may be served with citation at ADDRESS.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this controversy because the causes of action involve the title to real property. The Court also has subject matter jurisdiction pursuant to TEX. GOVT. CODE ANN. §51.901 with respect to the documents, instruments, and claims that were created and published by Defendants against the other parties in this cause.

12. Venue is proper in this county because Defendants’ residence, the Property and acts of Defendants directed against Plaintiff occurred or originated in NAME County, Texas.

BACKGROUND

13. The Property made the subject of this suit was conveyed to Defendants by a warranty deed (see “Deed” marked Exhibit “???” attached). Defendant

acquired the Property by and through the Loan Agreement now held by MORTGAGEE. The Deed conveying the Property in question also expressly reserved superior title to Mortgagee secured by a “vendor’s lien” against the Property until the purchase money mortgage was paid. The Note, superior title, vendor’s lien and Deed of Trust, and all other Loan Agreement documents secured by the Property as well as the Mortgagee’s rights in the Property are hereinafter collectively referred to as the “Indebtedness.”

14. According to MORTGAGE SERVICER loan servicing records, Defendants defaulted in making the monthly mortgage payments even though they have continued to enjoy the use and benefit of the Property. The payoff due on the mortgage indebtedness is at least \$ AMOUNT as of DATE.

15. Defendants prepared, filed and published what Plaintiffs contend are “Republic of Texas” Documents against Plaintiff’s property in various public records. Plaintiff contends the Documents are the same or similar type claims which TEX. GOVT. CODE ANN. §51.901, *et seq.*, and TEX. CIV. PRAC. & REM. CODE ANN. §12.001, *et seq.*, seek to prohibit.

16. Defendants’ assertions that they are not obligated to pay for the Property as well as other claims that cloud title to the Property appear to be premised on documents which are similar to instruments commonly disseminated by the “Republic of Texas” or other anti-government reactionary, entities or organizations (“AGRs”). Examples of Defendants’ AGR allegations are found in the documents marked Exhibit “????”. Plaintiff contends the Documents are the same or similar type claims which TEX. GOVT. CODE ANN. §51.901, *et seq.*, and TEX. CIV. PRAC. & REM. CODE ANN. §12.001, *et seq.*, seek to prohibit.

17. Plaintiff seeks to expunge, extinguish, remove, annul and hold for naught all Documents, both known and unknown, published by Defendants against Plaintiff which are subject to TEX. GOVT. CODE ANN. §51.901, *et seq.*, and TEX. CIV. PRAC. & REM. CODE ANN. §12.001, *et seq.*, and which putatively affect, encumber or cloud Plaintiff’s interests in their personal and real property.

18. Plaintiff believes the Documents were published with malice and with the intent to harm Plaintiff, because Plaintiff is involved in the foreclosure of Defendants’ Property.

19. Plaintiff's causes of action adopt the Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE ANN. §37.001 *et seq.* ("UDJA"), TEX. PROP. CODE ANN. §22.001, *et seq.*, and TEX. CIV. PRAC. & REM. CODE ANN. §38.001 by reference as appropriate.

CAUSES OF ACTION
RESCISSION OF VENDOR'S LIEN

20. Plaintiff adopts by reference all pertinent allegations contained in paragraphs 3-17 in the following Cause of Action.

21. Pursuant to the Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. §37.001, *et seq.*, MORTGAGEE, MORTGAGE SERVICER, EMPLOYEE OR LAW FIRM requests this Court declare and enter judgment that MORTGAGEE has superior title to the Property secured by a vendor's lien as evidenced by the reservations in the Loan Agreement documents which state in pertinent part:

Deed of Trust: *"This Note Secured hereby is primarily secured by the Vendor's Lien Retained in the Deed of date herewith conveying the property to Borrower, which Vendor's Lien has been assigned to Lender, this Deed of Trust being additional security therefor."*

Warranty Deed: *"But it is expressly agreed that the Grantor herein reserved and retains for himself, his heirs and assigns, a VENDOR'S LIEN, as well as the Superior Title, against described property, premises and improvements, until the above-described Note and all interest thereon have been fully paid according to the terms thereof, when this Deed shall become absolute."*

22. According to MORTGAGE SERVICER servicing records, Defendants defaulted in making the monthly mortgage payments even though they have continued to enjoy the use and benefit of the Property. For due process purposes, MORTGAGEE seeks to enforce its vendor's lien by rescission or non-judicial foreclosure under the terms of the Loan Agreement and TEX. PROP. CODE ANN. §51.002.

23. Until the Loan Agreement debt used to acquire the Property is paid, Defendants, who are the obligors of the Loan Agreement, have only equitable title to the Property. As the Texas Supreme Court held in *Estes v. Browning*, 11 Tex. 243 (1853), *"no man shall claim title to another without payment of the price agreed upon."*

DECLARATORY JUDGMENT FOR PUBLIC SALE

24. Plaintiff adopts by reference all pertinent facts contained in Paragraphs 3-23 herein.

25. Pursuant to the Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. §37.001, *et seq.*, because of a default in payment of the mortgage indebtedness, Plaintiff seeks an order allowing Mortgagee to exercise its rights against the Property in accordance with the Deed of Trust (see Exhibit "???? attached).

26. Plaintiff has given Defendants the default notices required by the Deed of Trust as well as TEX. PROP. CODE ANN §51.002 (see Exhibit "???" and Notice of Acceleration marked as Exhibit "???"). Defendants refused and failed to remedy the default.

27. Therefore, Plaintiff seeks authorization to proceed with a public sale of Property in accordance with the Deed of Trust. Upon completion of the public sale and conveyance of the Property by a Trustee or Substitute Trustee's Deed, Plaintiff will file a Report of Sale and thereafter seek an Order Confirming Sale from the Court, which is similar to the process outlined in TEX. PROB. CODE ANN. §§353 and 355.

28. Upon signing the Order Confirming Sale, Plaintiff or the grantee of the Trustee/Substitute Trustee Deed issued at the public sale will seek a Writ of Possession for the Property if Defendants or their successors ("Occupants") fail or refuse to vacate the Property.

29. The purpose of the Order Confirming Sale procedure is for judicial economy so that all the issues related to title and possession of the Property can be adjudicated by this Court in this proceeding until such time as the Defendants are dispossessed of the Property and any cloud on title created by Defendants has been adjudicated and expunged.

DECLARATORY JUDGMENT FOR JUDICIAL FORECLOSURE

30. Plaintiff adopts by reference all pertinent facts contained in Paragraphs 3-29 herein.

31. On or about DATE, Defendants executed a promissory note ("Note"), promising to pay the principal amount of \$ AMOUNT (*See Exhibit "???"*).

32. The Note provides that if default were made in the payment of any installment when due or in the performance of any agreement set forth in the Note, the mortgagee can elect to mature the Note, in which event the remaining unpaid balance would become immediately due and payable.

33. After a Demand to Cure and Notice of Intent to Accelerate, MORTGAGEE elected to mature the Note and therefore the total sum became due in the amount of at least \$ AMOUNT as of DATE, as unpaid principal, plus all legally earned interest and all reasonable collection costs and attorney fees, each bearing interest from maturity as provided in such Notes.

34. Plaintiff seeks judgment for all of such sums against Defendants with subsequent enforcement of such judgment by sale of the Property by the Sheriff, Constable or other duly authorized official of NAME County, Texas.

DECLARATORY JUDGMENT PURSUANT TO TEXAS GOVERNMENT CODE ANN. TO EXPUNGE FALSE LIEN FILINGS

35. Plaintiff adopts by reference all pertinent facts contained in Paragraphs 3-34 herein.

36. Plaintiff alleges that the Documents, and any other unknown documents which are the same or similar to the Documents, that have been and may be created by Defendants in the future, are fraudulent in that, in accordance with TEX. GOVT. CODE ANN. §51.901(c) (1), and (2):

“(c) ... a document or instrument is presumed to be fraudulent if:

(1) document is a purported judgment or other document purporting to memorialize or evidence an act, an order, a directive, or process of:

(a) a purported court or a purported judicial entity not expressly created or established under the constitution or the laws of this state or of the United States; or

(b) a purported judicial officer of a purported court or purported judicial entity described by Paragraph (A); or

(2) the document or instrument purports to create a lien or assert a claim against real or

personal property or an interest in real or personal property and:

(a) is not a document or instrument provided for by the constitution or laws of this state or of the United States;

(b) is not created by implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property, if required under the laws of this state, or by implied or express consent or agreement of an agent, fiduciary, or other representative of that person; or is not an equitable, constructive, or other lien imposed by a court with jurisdiction created or established under the constitution or laws of this state or of the United States.”

37. Plaintiff alleges that Defendants knew or should have known that the Documents were fraudulent liens or claims against Plaintiff's real or personal property; that the intent of the Documents was to give the instruments the same legal effect as a court record or document of a court created or established under the Constitution or the laws of this State or the United States; or the Documents were intended to cause Plaintiff to suffer physical injury, mental anguish or emotional distress.

38. In accordance with TEX. GOVT. CODE ANN. §§51.901(a)(2) and (c) and 51.902(a) (c) (c) and TEX. CIV. PRAC. & REM. CODE ANN. §11.001 Plaintiff requests the Court review and expunge, extinguish, remove, annul and otherwise hold for naught any known and unknown claim, lien or instruments which encumbers, affects or clouds Plaintiff's interest in real or personal property that is the same or similar to those prohibited by the TEXAS GOVERNMENT CODE ANNOTATED, the TEXAS RULES OF CIVIL PROCEDURE ANNOTATED and the TEXAS CIVIL PRACTICE AND REMEDIES CODE ANNOTATED, whether in the past, present or future.

39. Plaintiff does not seek to invalidate any legitimate claim or lien that Defendants may have against Plaintiff, if any.

FRAUDULENT LIEN OR CLAIM

40. Plaintiff adopts by reference all pertinent facts contained in Paragraphs 3-39 herein.

41. In accordance with TEX. R. CIV. P. 683, Plaintiff seeks an injunction to prevent Defendants or

his agents or representatives from creating and publishing any other documents, instruments, or claims that are the same or similar to the Documents presently published against Plaintiff which are the type of claims, liens or instruments which are prohibited by TEX. GOVT. CODE ANN. §51.901 and TEX. CIV. PRAC. & REM. CODE ANN. §12.001.

42. If the Court finds that the Defendants have filed a fraudulent lien or claim against the Property, Plaintiff also request the Court take judicial notice of TEX. CIV. PRAC. & REM. CODE ANN. §11.002 and award the Plaintiff the greater of \$10,000 or the actual and exemplary damages, court costs and reasonable attorney fees incurred by Plaintiff as a result of the Documents Defendants have filed in the official real property records of NAME County, Texas or otherwise published in the public domain which cloud title to the Property.

43. In addition, Plaintiff requests the Court to take judicial notice of TEX. PEN. CODE ANN. §§32.48 and 32.49 which provides that if the Court finds that the Documents published by Defendants are not released within twenty-one (21) days after receipt of actual written notice of such fact, which should be deemed given by these pleadings, such refusal is a Class A misdemeanor which is punishable by a fine not to exceed \$4,000.00, confinement in jail for a term not to exceed one (1) year, or both.

DECLARATORY JUDGMENT TO QUIET TITLE

44. Plaintiff adopts by reference all pertinent facts contained in Paragraphs 3-43 herein.

45. Defendants failed or refused to pay the purchase money mortgage used to acquire the Property. Upon the exercise of its right of rescission of the vendor's lien, non-judicial foreclosure or judicial foreclosure, and subject to judgment in accordance with the Uniform Declaratory Judgments Act, Plaintiff requests this Court declare and enter judgment to quiet title in the name of Plaintiff or the grantee of a public sale deed executed by the Sheriff, Constable or other authorized official of NAME County or the Trustee or Substitute Trustee under the Deed of Trust as to all right, title and interest now held by the Defendants.

WRIT OF POSSESSION

46. Plaintiff adopts by reference all pertinent facts contained in Paragraphs 3-45 herein.

47. If any person ("Occupant") occupies or claims possession of the property after transfer of all rights, title and interest in the Property by trustee's or Sheriff's Deed, Plaintiff requests a Writ of Possession against occupant in accordance with TEX. R. CIV P. 310.

COLLECTION COSTS AND FEES

48. Plaintiff was required to retain the undersigned attorneys to protect their security interest in the Property as well as their rights under the terms of the Indebtedness against the Defendants. Therefore, Plaintiff requests the Court award them reasonable attorney's fees and costs pursuant to TEX. CIV. PRAC. & REM. CODE ANN. §§37.009 and 38.001 against the Defendants, in accordance with the terms of the Note and Deed of Trust.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that upon the final hearing:

1. The Court rescind or foreclose the vendor's lien secured by the Property because of the default in the payment of the purchase money mortgage and declare that Plaintiff is vested with all right, title and interest held by Defendants in the Property and that Defendants' interest in the Property be divested and quieted in Plaintiff's name; or

2. The Court issue either a Judgment for a foreclosure of the Property pursuant to judicial foreclosure or Judgment for non-judicial foreclosure pursuant to the Deed of Trust and TEX. PROP. CODE ANN. §51.002 and that upon public sale Mortgagee file a Report of Sale and seek an Order Confirming Sale; and

3. The Court declare that all the Defendants' past, present and future filings of Documents as described herein that cloud title to the Property be declared void; and

4. A writ of possession against any occupant of the property if any person fails or refuses to leave the property after foreclosure or auction; and

5. For all costs and reasonable attorney's fees necessary to enforce and protect Plaintiff's rights as against the Defendants as provided herein; and

6. For all other relief in law or equity to which Plaintiff may be justly entitled.

Respectfully submitted,

[NAME]
ATTORNEYS FOR PLAINTIFF

AFFIDAVIT

STATE OF TEXAS §
COUNTY OF NAME §

BEFORE ME, the undersigned authority, personally appeared NAME being by me duly sworn, deposed as follows:

“My name is NAME. I am over 21 years of age, of sound mind, with personal knowledge of the following facts, and fully competent to testify.

“I attest that the assertions contained in the Original Petition are true and correct.”

FURTHER AFFIANT SAYETH NOT.

[NAME]
AFFIANT

SWORN TO AND SUBSCRIBED before me this

_____ day of _____ 200____

D. HOME EQUITY RULE 736 APPLICATION FORMS

CAUSE NO. _____

| | | |
|--------------------------------------|---|---------------------------------|
| In re: Order for Foreclosure | § | IN THE DISTRICT COURT OF |
| Concerning | § | |
| | § | |
| «Borrower_Name» | § | |
| (“Respondent[s]”) | § | |
| | § | |
| and | § | |
| | § | «COUNTY» COUNTY, TEXAS |
| «Property_Address», «Property_City», | § | |
| «State» «Zip_Code» | § | |
| (“Property Mailing Address”) | § | |
| | § | |
| and | § | |
| | § | |
| «Noteholder_Abbreviated» | § | |
| (“Applicant”) | § | _____ JUDICIAL DISTRICT |

**VERIFIED TEX. RULE CIV. P. 736
APPLICATION FOR HOME EQUITY
FORECLOSURE ORDER**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, «Note_Holder» (hereinafter “Applicant”), and files this Verified Application seeking an order allowing an *in rem* foreclosure in accordance with Tex. Rule Civ. P. 736. In support of this application, Applicant would show as follows:

1. Tex. R. Civ. P. 736(1)(B): «Borrower_Name» (hereinafter referred to as “Respondent(s)”) is/are: (a) obligated to pay the debt secured by the property and loan agreement made the subject of this proceeding; or (b) a maker of the promissory note evidencing the debt; or (c) a grantor of the security agreement evidencing the debt that encumbers the property sought to be foreclosed; or (d) a borrower who received the benefit of the loan proceeds that were paid at the closing of the loan agreement. Each Respondent will be served with notice of this proceeding in accordance with Tex. R. Civ. P. 736(2), which provides for service by certified and regular mail. **No personal liability is sought against any Respondent.**

2. Tex. R. Civ. P. 736(1)(C): The real property, fixtures, and improvements made the subject of this proceeding is commonly known as «Property_Address», «Property_City», «State» «Zip_Code» and is legally described as follows:

[INSERT PROPERTY DESCRIPTION]

3. Tex. R. Civ. P. 736(1)(D): Applicant is the current mortgagee, as the term “mortgagee” is defined in Tex. Prop. Code §51.0001(4), of Respondent’s loan agreement. As provided in Tex. Bus. & Com. Code §3.301, Applicant is the person entitled to enforce Respondent’s loan agreement. Applicant’s mortgage servicer or its successors and assigns, as the term “mortgage servicer” is defined in Tex. Prop. Code §51.0001(3), is «Client_Label_Name» which is Applicant’s duly authorized agent for all loan servicing administration matters related to the debt owed to Applicant by Respondent(s). All conditions precedent for Applicant’s mortgage servicer to administer this foreclosure proceeding have been accomplished in accordance with Tex. Prop. Code §51.0025.

4. Applicant is either the original mortgagee or its successor in interest of Respondent’s loan agreement

dated «DOTExecuted», in the original principal amount of \$«OPB», executed by NAME OF BORROWERS WHO EXECUTED HESI NOTE. The note was further secured by a Deed of Trust or Security Agreement on «DOTExecuted» which is recorded under «Recording_Info» in the Real Property Records of «County» County, Texas. The security agreement was executed by «Borrower_Name». True and correct copies of the Deed of Trust or Security Agreement and related Assignment(s), if applicable, are attached hereto and incorporated herein by reference.

5. Applicant alleges herein and further supplements its allegations in the Affidavit attached hereto, that:

- a. Tex. R. Civ. P. 736(1)(E)(1): A debt exists by virtue of the loan agreement executed by Respondent that evidences Respondent's promise to repay the sums borrowed. The payoff good through «C81_Completed» is \$PAYOFF Amt. However, this sum increases daily under the terms of the loan agreement to include, but not limited to, late charges, earned interest, collection costs to include attorney fees, taxes, insurance, and other legally authorized expenses.
- b. Tex. R. Civ. P. 736(1)(E)(2): The debt is secured by a lien created under Tex. Const. Art. XVI §50a, for a home equity loan as evidenced by the Deed of Trust attached hereto that is recorded in the official real property records of this county.
- c. Tex. R. Civ. P. 736(1)(E)(3): A default under the security agreement exists because Respondent has breached his/her obligations under the loan agreement as further described below and in the Verified Affidavit attached hereto.
- d. Tex. R. Civ. P. 736(1)(F): A default exists under the Deed of Trust or security agreement in that the Respondent(s) failed or refused to timely pay their mortgage obligations in accordance with the terms and conditions of the loan agreement. The Respondent(s) failed to pay the required monthly payment which became due on «duedate» and every monthly installment that has become due since that date.
- e. Tex. R. Civ. P. 736(1)(E)(4): The Applicant, by and through its duly authorized mortgage servicer or attorney, has given Respondent(s) the requisite foreclosure notices of: (i) a notice of default and intent to accelerate the

maturity of the debt, and (ii) a notice of acceleration of the maturity of the debt complying with federal fair debt guidelines. Said notices were provided and mailed to the Respondent(s) at the last known mailing address for each Respondent.

6. Tex. R. Civ. P. 736(1)(G): Applicant seeks a court order required by Texas Constitution Art. XVI, §50(a)(6)(D) to sell the property made the subject matter of this action under the terms of the Deed of Trust or Security Agreement and Tex. Prop. Code §51.002.

Respectfully submitted,

[NAME]

ATTORNEYS FOR APPLICANT

D. AFFIDAVIT IN SUPPORT OF HOME EQUITY APPLICATION
AFFIDAVIT IN SUPPORT OF HOME EQUITY APPLICATION

STATE OF _____ §

§ KNOWN ALL PERSONS BY THESE PRESENTS:

COUNTY OF _____ §

Before me, the undersigned authority, personally appeared _____ (Affiant) a person whose identity is known to me, and after I administered an oath to Affiant, Affiant testified:

1. My name is _____, and I am the Affiant herein. I am older than twenty-one (21) years of age, of sound mind, and capable of making this Affidavit. I have read the Home Equity Foreclosure Application to which my Affidavit is made a part thereof and verify that the facts contained in the Application are within my personal knowledge and are true and correct.

2. «Note_Holder» is either the original mortgagee or is an assignee or a successor in interest to the original mortgagee of «Borrower_Name»'s loan. The Home Equity Security Instrument attached to the application is a duplicate of the original filed in the official real property records of the county where the property is located.

3. I am presently employed by «Client_Label_Name», which is the mortgage servicer for «Borrower_Name»'s loan. «Note_Holder» retained «Client_Label_Name» to be its duly authorized agent for loan service administration for a portfolio of loans that includes the loan made by «Borrower_Name». The facts stated in this Affidavit are also within my personal knowledge and based on my employment with «Client_Label_Name» and my responsibilities in said position.

4. I am a custodian of records for «Client_Label_Name». Any documents attached to this Affidavit are records from «Client_Label_Name». These records are kept by «Client_Label_Name» in the regular course of doing business, and it was the regular course of doing business of «Client_Label_Name» for an employee or representative of

«Client_Label_Name» with knowledge of the acts or events to make the record or to transmit information thereof to be included in such record. Each record is made at or near the time of the act, event or condition recorded, or reasonably soon thereafter. The records attached are duplicates of the original. Attached to the application and this Affidavit are true and correct copies of the Home Equity Security Instrument and other documents evidencing the debt owed by «Borrower_Name».

5. As part of my duties for «Client_Label_Name» on behalf of «Note_Holder», I am knowledgeable about the loan servicing activities related to «Borrower_Name»'s home equity loan agreement, as well as enforcing any breach of the loan agreement on the «Note_Holder»'s behalf. Whenever «Borrower_Name» submit(s) a mortgage payment, the payments are posted to «Borrower_Name»'s servicing records maintained by «Client_Label_Name» and the loan payment is then remitted to «Note_Holder»'s account. «Note_Holder» is the party who suffers the monetary loss when «Borrower_Name» fail(s) to make mortgage payments or otherwise breach(es) the loan agreement.

6. «Borrower_Name» executed a Home Equity Security Instrument on «DOTExecuted» in the amount of \$«OPB» granting «Original_Note_Holder» or its successor in interest a lien on the property commonly known as «Property_Address», «Property_City», «STATE» «Zip_Code» and legally described as follows:

INSERT LEGAL

7. According to «Client_Label_Name»'s records related to «Borrower_Name»'s account, the unpaid principal balance on the loan is \$«UPB».

8. The amount required to pay off the loan in full before «C81_Completed» is \$PAYOFF Amt. The pay-off balance is comprised of all monies owed, including but not limited to the unpaid principal balance, interest, escrow advances for taxes and insurance, unpaid late charges, and attorneys' fees. The payoff balance of the loan will continue accruing late charges, interest, attorneys' fees, and escrow advance fees each month that a payment is not made.

9. «Borrower_Name» has/have failed to pay timely according to the terms and conditions of the loan agreement. «Borrower_Name» failed to remit the monthly payment which became due in «As_of_Date» and every monthly installment which has become due since that date. As of the date of this Affidavit, the loan is XXX monthly payments in arrears.

10. The required notice of default and notice of acceleration were sent to the appropriate parties by certified mail after the breach of the loan agreement.

11. Because «Borrower_Name»'s loan agreement is in default and «Borrower_Name» has/have failed or refused to cure the default after proper notice, «Note_Holder» seeks to enforce the loan agreement as provided under Texas law. «Note_Holder», through «Client_Label_Name» as the duly authorized agent for all loan servicing administration activities related to «Borrower_Name»'s account and under my direction, has performed all the conditions precedent for enforcement of the loan agreement.

FURTHER AFFIANT SAYETH NOT.

SIGNED THIS ____ day of _____, 2007.

[NAME]
AFFIANT

By: _____

Title _____

STATE OF _____ §
COUNTY OF _____ §

SUBSCRIBED and SWORN TO before me on this ____ day of _____, 2007, to certify which witness my hand and seal of office.

Notary Public, State of _____
[Stamp or Seal here]

VERIFICATION

STATE OF _____ §
COUNTY OF _____ §

BEFORE ME, the undersigned authority on this day personally appeared _____ ("Affiant") of «Client_Label_Name», as servicing agent for «Note_Holder», who after being duly sworn stated upon oath that he/she has read the foregoing Application for Order for Foreclosure Concerning «Borrower_Name» and «Property_Address», «Property_City», «STATE» «Zip_Code» and AFFIDAVIT IN SUPPORT OF HOME EQUITY APPLICATION SEEKING FORECLOSURE ORDER CONCERNING «BORROWER_NAME» AND «PROPERTY_ADDRESS», «PROPERTY_CITY», «STATE» «Zip_Code» and that all facts contained therein are within his/her personal knowledge and are true and correct to the best of his/her information and belief.

[NAME]
AFFIANT

«Client_Label_Name» as authorized agent for «Noteholder_Abbreviated»

By: _____

Title: _____

SUBSCRIBED and SWORN TO before me on this ____ day of _____, 2007, to certify which witness my hand and seal of office.

Notary Public, State of _____
[Stamp or Seal here]

**CERTIFICATE OF LAST KNOWN MAILING ADDRESS AND
SERVICEMEMBER’S CIVIL RELIEF ACT AFFIDAVIT**

CERTIFICATE OF LAST KNOWN MAILING ADDRESS

Pursuant to Tex. R. Civ. P. 239a, «Note_Holder» (“Applicant”), its successors and assigns, by and through its undersigned counsel, hereby certifies that the last known address for Respondent «Borrower_Name», is as follows:

«Borrower_Name»
«Property_Address», «Property_City», «State»
«Zip_Code»
«Borrower_Name»
«Mailing_Address», «Mailing_City_State_Zip»

SERVICEMEMBER'S CIVIL RELIEF ACT

Before me, the undersigned notary, on this day personally appeared NAME, a person whose identity is known to me. After I administered the oath, upon that oath, she said:

“My name is NAME. I am capable of making this affidavit. I understand that if I make or use a military status affidavit, knowing it to be false, I may be fined, imprisoned for not more than one year, or both. See 50 U.S. C. App. Section 521 (c). The facts stated in this affidavit are within my personal knowledge and are true and correct.

- Respondent(s) is/are not in the military. In Support, attached are the papers showing military status from the Department of Defense Manpower data center database.
- Applicant asks the court to appoint an attorney to represent the Respondent(s) because:
 - Applicant is unable to determine if the Respondent(s) is/are in the military. The Servicemember’s Civil Relief Act, 50 U.S.C. App. Section 521(b)(2), requires the trial court to appoint an attorney to represent Respondent before a judgment may be rendered against him/her.

- Respondent(s) is/are in the military. The Servicemember’s Civil Relief Act, 50 U.S.C. App. Section 520 (1), requires the court to appoint an attorney to represent Respondent before a judgment may be rendered against him/her.

I understand that costs for the attorney ad litem may be assessed against the Applicant as costs of court unless otherwise ordered by the court.

Name, Attorney at Law

SWORN TO AND SUBSCRIBED before me the undersigned notary public by _____ on _____, 2007.

Notary Public in and for
The State of Texas

Respectfully submitted,

[NAME]

ATTORNEYS FOR APPLICANT

E. HOME EQUITY JUDICIAL FORECLOSURE

CAUSE NO. _____

| | | |
|--------------------------------|---|---------------------------------|
| MORTGAGEE | § | IN THE DISTRICT COURT OF |
| Plaintiff | § | |
| v. | § | |
| | § | |
| MORTGAGOR | § | CITY, COUNTY, TEXAS |
| Defendant(s) | § | |
| | § | |
| IN RE: PROPERTY ADDRESS | § | |
| CITY, TEXAS, ZIP | § | NO. JUDICIAL DISTRICT |

PLAINTIFF’S ORIGINAL PETITION

SYNOPSIS: Plaintiff seeks to enforce its home equity security interest against the secured Property because the Defendant obligated for the debt has failed to cure the Loan Agreement default.

NOW COMES THE [NAME OF MORTGAGEE], its successors and assigns (“Plaintiff” or “Mortgagee” as the context implies) and would respectfully show the Court the following:

DISCOVERY

1. Discovery is intended to be conducted under Level 2, *Tex. R. Civ. P. 190*

PROPERTY

2. This proceeding concerns a certain loan agreement, as the term is defined in *Tex. Bus. & Com. Code §26.02(2)* (“Loan Agreement”), secured by the real property and improvements commonly known as ADDRESS, (“Property”), and more particularly described as follows:

[PROPERTY DESCRIPTION]

PARTIES

Plaintiff acquires loans that are evidenced by Loan Agreements that are secured by real property located in

the State of Texas. If a loan goes into default and if necessary, Plaintiff will seek to enforce the Loan Agreement according to its terms against the secured property. With respect to the Property and Loan Agreement made the subject of this cause, Plaintiff is the mortgagee as “mortgagee” is defined in *Tex. Prop. Code §51.0001(4)(A)* as the owner or holder of the Loan Agreement debt **OR** *Tex. Prop. Code §51.0001(3)* and is the duly authorized agent for loan service administration for the owner, holder or bearer of the Loan Agreement debt as provided in *Tex. Prop. Code §51.0075*. **ADD IF MERS IS BENEFICIARY** Mortgage Electronic Registration Systems, Inc. (“MERS”) is a “book entry system” as defined in *Tex. Prop. Code §51.0001(4)(B)*. With regard to the loan agreement made the subject of this proceeding: (a) MERS is the beneficiary; (b) MERS is acting solely as nominee for a Lender and Lender’s successor and assigns; (c) MERS is mortgagee of record in the official real property records of this county or purposes of the recording statutes, *Tex. Prop. Code §§13.001 and 13.02*. [NAME OF INVESTOR] is the owner, holder or bearer of the loan agreement debt – not MERS.

3. Defendant MORTGAGOR (“Mortgagor”) is obligated for the Loan Agreement debt and may be served with process at ADDRESS. Defendant MORTGAGOR whereabouts is unknown. Plaintiff will seek service of process by citation by publication and appointment of an attorney ad litem to represent Defendant’s interests. All Defendants are collectively referred to as “Defendant”.

4. Defendant GRANTOR is a grantor of the Loan Agreement security instrument but is not personally obligated for the debt. Because Grantor's interest in the Property may be lost due to foreclosure, as a courtesy Grantor is given notice of the proceeding. Grantor may be served with process at ADDRESS.

5. All Defendants are collectively referred to as "Defendant."

JURISDICTION and VENUE

This Court has subject matter jurisdiction over the controversy in accordance with TEX. CONST. art. V, §8 and art. VI, §50a(6). Venue is proper in this County because this is where the Property securing the Loan Agreement is located. Plaintiff does not seek personal liability against any Defendant.

FACTS

8. The documents attached to this petition are made a part of this proceeding for all purposes and are true and correct copies of the relevant original documents pertaining to the Loan Agreement and Property made the subject of this proceeding.

9. Defendant, as obligor or assumptor of the debt created under the terms of the Loan Agreement, used funds advanced by the original lender to either purchase the Property, extinguish a prior mortgage or tax lien, or obtain cash from the equity in the Property. The debt was created as a Texas home equity loan under the provisions of TEX. CONST. art. XVI §50(a)(6). A grantor of the Loan Agreement security interest, who is not obligated for the debt, is made a party for purpose of due process because their interest in the Property may be affected by this proceeding.

10. According to the Mortgagee's records and the terms of the Loan Agreement, there has been a material breach of the Loan Agreement because the loan has been in default since Date. As a consequence of the failure to cure the default, Plaintiff accelerates the maturity of the Loan Agreement debt. As of Date, the Loan Agreement payoff, as "pay-off" is defined in *Tex. Prop. Code §12.017*, was at least \$ Amount; however, this sum increases daily according to the terms of the Loan Agreement to include, but not limited to, earned interest, collection costs, to include attorney fees, taxes, insurance and other legally authorized expenses. All conditions precedent up to this stage of foreclosure have been performed or have occurred.

CAUSES OF ACTION

Judicial Foreclosure

11. Because of a material breach and failure to cure the Loan Agreement default, Plaintiff seeks to enforce its security interest against the Property pursuant *Tex. R. Civ. P. 309*. Plaintiff seeks a judgment for foreclosure against the Property together with an order of sale issued to the sheriff or constable of the county where the Property is located directing the sheriff or constable to seize and sell the Property in satisfaction of the judgment. The judgment amount for purposes of determining Plaintiff's creditor's bid against the property on the date of the sheriff or constable sale, will be the pay-off of the debt as calculated under the terms of the Loan Agreement on the date of sale. Defendant has no personal liability for the Loan Agreement debt.

Non-Judicial Foreclosure

12. Because of a material breach and failure to cure the Loan Agreement default, Plaintiff seeks non-judicial, in rem foreclosure against the Property pursuant to: TEX. CONST. art. XVI §50(a)(6); *Tex. R. Civ. P. 735(2)* or *735(3)*; the terms of the Loan Agreement; and *Tex. Prop. Code Chapter 51*, as applicable. Plaintiff does not seek personal liability against Defendant.

13. Plaintiff appoints name, name, name or a successor or successor, as the substitute trustees to exercise the powers of the original Trustee under the terms of the Loan Agreement.

WRIT OF POSSESSION

14. If any person ("Occupant") occupies or claims possession of the Property after transfer of all right, title and interest in the Property by sheriff, constable or trustee's deed, Plaintiff requests a writ of possession from this court in accordance with *Tex. R. Civ. P. 310*.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that, upon final hearing, the court enter judgment that:

Plaintiff shall enforce its security interest against the Property under the terms of the Loan Agreement by an order directing the sale of the Property pursuant to *Tex. R. Civ. P. 309* or foreclosure in accordance with *Tex. R. Civ. P. 735 (2) or 735(3)* and *Tex. Prop. Code Chapter 51*.

Defendants have no personal liability for the Loan Agreement debt.

A writ of possession against any person who fails or refuses to leave the Property after foreclosure;

All other relief, in law and in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

[NAME]

ATTORNEY FOR APPLICANT

F. FORECLOSURE SALE FORMS
SCRIPT TO READ BEFORE FIRST SALE OF THE DAY

Good morning/afternoon ladies and gentlemen. My name is _____, and I am the Substitute Trustee on the cases noticed for sale today under my name. Please be advised that all sales conducted by me are held under the following terms. The properties for sale today will be sold "AS IS" in their present condition and subject to any federal, state, municipal or other government liens or encumbrances and any ad valorem taxes for the current or prior years.

TERMS OF SALE

All property offered for sale today will be sold to the highest bidder for cash unless prior arrangements have been made. You should examine the chain of title of any property you hope to purchase prior to making a bid. No representations or warranties are made with respect to the title of any property offered for sale.

All property sold is subject to the following:

- 1) 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;
- 2) The death of or initiation of a probate proceeding of debtor(s), or any person who claims a legal or equitable interest in the property;
- 3) Reinstatement or payoff of the loan secured by the property or any other presale arrangement between the Mortgagor and the Mortgagee or their agents or representative cure the default; and
- 4) 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.

All sales **MUST** be paid for and finalized within 30 minutes of purchase. If the sale is not finished within 30 minutes, the property will be re-auctioned without prior notification. Your purchase of the property is subject to signing and receiving an acknowledgment evidencing your purchase of the property and the conditions of sale. If you do not wish to execute this acknowledgment, the sale will be reconvened and the property will be re-auctioned.

Cash will not be accepted in excess of \$10,000 unless you are prepared to comply with the IRS Regulations required for any cash transactions in excess of \$10,000. Please have cashiers checks for the bid price and very little cash.

If you purchase a property you **MUST** have the funds with you to pay for the property immediately on making the highest bid which is accepted by the trustee. The trustee has the right to request funds from the purchaser at the time of the sale.

I repeat again. No representations of any kind or nature, either expressed or implied, are made 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 will be identified by legal description. Any preprinted street address appearing on the Notice of Sale or Substitute Trustee's Deed may or may not match the subject property.

A Trustee's deed will be prepared and recorded after the funds you tendered have been paid by the issuing bank, usually within eight (8) business days of the sale.

In the event a defect or other problem with the sale is discovered prior to the issuance of the Deed, your money will be returned 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.

Are there any questions?

AUCTION TERMS

On or about the ____ day of _____, _____, **(name of original mortgagors)** executed a note and deed of trust filed for record in the Real Property Records of _____ County, Texas, appearing at Volume _____, Page _____, covering that property known as **(Trustee then reads legal description)**.

The interest of the mortgagee in said property and deed of trust is hereby offered to the highest bidder for cash according to the terms of sale as hereinafter set out. On behalf of *_____, I enter an opening bid of _____. Are there any other bids?

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

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

In the event you have a successful third party high bidder, the Trustee should then indicate to the successful bidder when the exchange of money will take place, i.e., either immediately or after the remaining sales have been concluded. Trustee should also indicate that the exchange of money and receipts will be handled either by the Trustee or by the Trustee's assistant. In the event of a third party sale, the Trustee should continue as follows with the Trustee's speech (if it is a sale back to the mortgagee, you need do nothing further except announce "**and the next case is...**").

To anyone interested and/or 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 _____ a.m./p.m. **(expected time of day at which remaining sales will end so that bidders will know when to return for any resale of unclosed transactions)**.

And the next case is ...

This concludes the sale. **(End of speech.)**

*The bid should be entered in the name of the Grantee shown on the Substitute Trustee's Deed. If the property does not sell to a third party, the trustee should announce that the property is sold to the Grantee shown on the Substitute Trustee's Deed.

BUYER'S RECEIPT FOR FUNDS

**BUYER'S RECEIPT FOR FUNDS AND ACKNOWLEDGEMENT
AND SUBSTITUTE IRS FORM 8300**

FILE NO.: _____ DEBTOR: _____
(Last) (First) (M.I.)

PROPERTY: _____

On this date, the undersigned as Trustee or Substitute Trustee conducted a Trustee's Sale of the Property referenced above subject to the exceptions stated below. Time of Sale _____ A.M./P.M.; Amount of Sale \$ _____.

| AMOUNT OF CASHIER'S CHECK(S) | CASHIER'S CHECK NUMBER(S) | NAME OF BANK | AMOUNT OF CASH RECEIVED |
|------------------------------|---------------------------|--------------|-------------------------|
| | | | |
| | | | |
| | | | |
| | | | |

RECEIVED: _____ DATE: _____
SUBSTITUTE TRUSTEE

THE SALE PRICE WAS MADE AND TENDERED BY THE INDIVIDUAL DESCRIBED BELOW: (PLEASE PRINT)

NAME: _____
(Last) (First) (M.I.)

ADDRESS: _____ CITY: _____ STATE: _____

ZIP: _____

The following information is required if CASH in excess of \$10,000.00 is tendered.

COUNTRY: _____ SOCIAL SECURITY NO.: _____

OCCUPATION: _____ DATE OF BIRTH: _____ PHONE NO.: _____

DOCUMENT USED TO VERIFY IDENTITY (describe identification i.e., driver's license, passport) _____

ID ISSUED BY (state): _____ ID NUMBER: _____

IF THE ABOVE INDIVIDUAL MADE THIS TRANSACTION ON BEHALF OF ANOTHER INDIVIDUAL OR ORGANIZATION — PLEASE COMPLETE THE FOLLOWING:

NAME OF INDIVIDUAL OR ORGANIZATION: _____

DOING BUSINESS AS: _____

ADDRESS: _____ CITY: _____ STATE: _____

ZIP CODE: _____ COUNTRY: _____ PHONE NO.: _____ OCCUPATION: _____

SOCIAL SECURITY NO.: _____ EMPLOYER ID (or Tax ID) NO.: _____

DOCUMENT USED TO VERIFY IDENTITY (describe identification i.e., driver's license, passport) _____

ID ISSUED BY (state): _____ ID NUMBER: _____

This transaction may be reported to the IRS

BUYER'S SIGNATURE BELOW ACKNOWLEDGES THAT BUYER PURCHASES THIS PROPERTY AT BUYER'S RISK AND FURTHER ACKNOWLEDGES THAT THE SALE IS SUBJECT TO THE REASONABLE CONDITION ANNOUNCED BY THE SUBSTITUTE TRUSTEE BEFORE BIDDING WAS OPENED FOR THE FIRST SALE OF THE DAY, SAID CONDITIONS BEING AS FOLLOWS:

1. 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.
2. The death or initiation of a probate proceeding of Debtor(s), or any person who claims a legal or equitable interest in the property.
3. Reinstatement or payoff of the loan secured by the property or any other presale arrangement between the Substitute Trustee and the Mortgagee to satisfy the default.
4. 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.
5. In the event of an overpayment of the bid price, all refunds will be made by the Mortgagee. The Substitute Trustee is not responsible for any refunds.
6. In the event a defect or other problem with the foreclosure sale is discovered, the purchase price paid by the Buyer will be returned to the Buyer 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.
7. A Substitute Trustee's Deed will be prepared and recorded by the law firm after the funds tendered have been paid by the issuing bank, usually within 8 business days of the sale. A copy of the deed is NOT available prior to the time that your cashier's check(s) have been paid. Refunds will not be processed until verification with the bank that the funds have been paid.
8. Title does not transfer until delivery of the Substitute Trustee's Deed; any direct activity with the property or Substitute Trustee is at Buyer's risk.
9. Any changes made to these exceptions and conditions are not valid unless initialed by the Substitute Trustee.

BUYER ACKNOWLEDGES THAT THE PROPERTY IS PURCHASED "AS IS" IN ITS PRESENT CONDITION AND THAT THERE HAVE BEEN NO REPRESENTATIONS, EITHER EXPRESSED OR IMPLIED, REGARDING THE NATURE OR STATUS OF EITHER THE CONDITION OF OR TITLE TO THE PROPERTY, OR THE PERFECTION OF THE PROCEDURAL REQUIREMENTS NECESSARY TO EFFECTUATE A PROPER FORECLOSURE SALE. BUYER TAKES THE PROPERTY SUBJECT TO ANY SUPERIOR INTEREST AS WELL AS ANY DEFECTS.

ACCEPTED: _____ DATE: _____
BUYER

**APPOINTMENT OF SUBSTITUTE TRUSTEE
BY MORTGAGE SERVICER TO ATTORNEY(S)**

**APPOINTMENT OF SUBSTITUTE TRUSTEE(S)
RE: TEXAS PROPERTY CODE §51.0075(c)
and (d)**

[NAME]
[ADDRESS]
[CITY, STATE, ZIP]

In accordance with Texas Property Code §51.0075(d) and pursuant to a written servicing agreement with its Mortgagee client [MORTGAGEE], (Mortgagee”) as well as Tex Prop Code §51.0075(c), [NAME OF MORTGAGE SERVICER] (“Mortgagee Servicer”) by and through [NAME OF OFFICER AND TITLE] and by this written instrument authorizes [LAW FIRM], its partners, attorneys and LAW FIRM’S designated representatives (“Firm”) to appoint substitute trustees to exercise the powers of the original trustee, now removed, under all loan agreements referred to the Firm by Mortgage Servicer, or its agents or representatives, to conduct a foreclosure or other default-related legal procedure on behalf of Mortgage Servicer its Mortgagee client. The authorization contained herein eliminates a paper document to evidence the appointment of substitute trustees for each individual loan file referred to the Firm by Mortgage Servicer, or its agents or representatives, as long as this authorization to appointment substitute trustees is in effect. The Firm has full and complete discretion to designate the substitute trustees exercising the power of appointment under Tex. Prop. Code §51.0075(d) as authorized by Mortgagee to Mortgage Servicer under Tex. Prop. Code §51.0075(c).

Mortgage Servicer agrees that termination of this authorization is not effective as to a third party until the third party receives actual notice of termination. Subject to title company requirements, a copy of this instrument may, but is not required, to be recorded in the real property records of any Texas county.

Signed this ____ day of _____, 200____.

[NAME OF MORTGAGE SERVICER]

By: **NAME**

CORPORATE ACKNOWLEDGMENT

STATE OF _____ §

COUNTY OF _____ §

Before me, the undersigned Notary Public, on this day personally appeared _____, who is the _____ of [NAME OF MORTGAGE SERVICER], a corporation, on behalf of said corporation, 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 on this ____ day of _____, 200____.

My Commission Expires:

Notary Public for the State of _____

Printed Name of Notary Public

ADOPTION OF UNIFORM ELECTRONIC TRANSACTION ACT

Mortgage Servicer and the Firm have agreed to conduct their default related transactions, to include but not limited to appointment of substitute trustees, by electronic means in accordance with Tex. Bus. & Com. §§43.001 – 43.019 and the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001 *et. seq.*

TERMINATION

This authorization shall be effective on [DATE] and shall remain in full force and effect until specifically terminated in writing by any duly authorized officer of Mortgage Servicer subject to at least thirty days written notice of termination given by certified mail to:

G. "QUALIFIED WRITTEN REQUEST" RESPONSE

REAL E. STATE, L.L.P.
51.002 FORECLOSURE STREET
DEFAULT, TX 00100

Date DATE

| | |
|----------------------|---|
| Firms File Number: | FIRM'S FILE ID NUMBER |
| Original Mortgagee: | ORIGINAL LENDER NAMED IN DEED OF TRUST |
| Current Mortgagee: | NAME OF CURRENT OWNER OR HOLDER OF DEBT |
| Mortgage Servicer: | NAME |
| Loan Agreement Debt: | LOAN NUMBER |
| Property Address: | PROPERTY ADDRESS |

Dear NAME

Attached please find the request which is classified as a Qualified Written Request (QWR) under the Real Estate Settlement Procedures Act, 12 U.S.C. §2605(e) (RESPA) with regard to the above-referenced loan. This request is neither a foreclosure or bankruptcy issue and is being forwarded to you as the Servicer to respond.

Pursuant to RESPA, if any Servicer of a federally related mortgage loan receives a QWR, the Servicer must provide a written response acknowledging receipt of the correspondence within 20 days, unless the action requested is complete within the 20 day time period.

Within 60 business days after the receipt of the QWR, the Servicer shall investigate and provide a written response to the borrower, which must include the following:

- (1) The name and telephone number of a representative of the Servicer who can provide assistance to the borrower; and a
- (2) Written explanation that:
 - (a) Corrects the account of the borrower, including the crediting of late charges and penalties;
 - (b) Contains a statement of the reasons for which the Servicer believes the account of the borrower is correct;
 - (c) Contains the information requested by the borrower or an explanation of why the information requested is unavailable and cannot be obtained by the Servicer.

It is important that the attached QWR be responded to within the required timeframe and guidelines set forth above as the law provides for damages and penalties for failure to comply. If the above loan is in bankruptcy, the response should be forwarded to the debtor's attorney.

Additionally, please be advised that during the 60-day period beginning on the date of the receipt of the QWR, a Servicer may not provide information regarding any overdue payments owed by the borrower relating to such period of QWR, to any consumer-reporting agency.

RESPA does have a "safe harbor" provision as well. If you discover an error after the written explanation is provided to the borrower, you must notify the borrower within 60 days of discovery of the error and make the necessary corrections to the borrower's account.

Please be advised that we will not be monitoring your response, however, we would appreciate you to provide our firm with a copy of your response. If you should have any questions or concerns regarding this matter, please contact NAME at PHONE NUMBER.

Sincerely,

ATTORNEY

| |
|--|
| H. FDCPA DEMAND FIRST COMMUNICATION WITH DEBTOR |
|--|

**REAL E. STATE, L.L.P.
51.002 FORECLOSURE STREET
DEFAULT, TX 00100**

NOTICE TO CURE LOAN AGREEMENT DEFAULT

| | | | |
|----------------------|------|---|--|
| Date | DATE | | |
| Certified Mail No.: | | CM # | |
| Original Mortgagee: | | ORIGINAL LENDER NAMED IN DEED OF TRUST | |
| Current Mortgagee: | | NAME OF CURRENT OWNER OR HOLDER OF DEBT | |
| Mortgage Servicer: | | NAME | |
| Loan Agreement Debt: | | LOAN NUMBER | |
| Property Address: | | PROPERTY ADDRESS | |
| Firms File Number: | | FIRM'S FILE ID NUMBER | |

THIS FIRM IS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

TO MORTGAGOR(S) OR DEBTOR(S) NAMED BELOW:

NAME OF PERSON(S) OBLIGATED FOR DEBT
LAST KNOWN ADDRESS
CITY, STATE AND ZIP

You are receiving this notice because this firm represents the Mortgagee or its duly authorized Mortgage Servicer referenced above. This firm relies on the information provided by our client to be correct. According to our client you are: (a) obligated for the debt created by the Loan Agreement reference above; or (b) you are receiving this letter as a courtesy because your interest in the property securing the debt may be lost due to foreclosure, even though you are not obligated for the debt.

Federal law requires that a person owing a consumer debt be given notice of the statement quoted below. This statement serves as the required notice of your rights. [Note: The highlighted text below describes your personal account].

"15 U.S.C. §1692g(a) ... a debt collector [NAME OF DEBT COLLECTOR, I.E. LAW FIRM] ... shall send the consumer [NAME OF MORTGAGOR hereafter "you, your or Mortgagor"] a written notice containing:

(1) The amount of the debt; [According to the records of our client, the amount of your debt that is due under the loan agreement is \$ 0000 {reinstatement amount} as of DATE]; (2) The name of the creditor to whom this debt is owed; [NAME OF MORTGAGEE]; (3) A statement that unless the consumer, within thirty (30) days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (4) A statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (5) A statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor."

This notice makes a demand upon the person(s) named above that is obligated for the debt, to cure default which has arisen under the terms of the Loan Agreement. According to our client, as of the date of this notice, the default is [DESCRIBE THE DEFAULT, e.g. “failure to pay taxes or insurance” or “payment was not timely made in the amount of \$ 0000” as required under the terms of the Loan Agreement. Additional interest and other legal charges payable under the Loan Agreement may become due between: (a) the time this firm prepared this notice; and (b) the time you receive this notice. To obtain the proper dollar amount required to cure the default as of the date you intend to bring the Loan Agreement current, you must request this information by (a) calling [800-111-5100] between 10 a.m. and 2 p.m., except for weekends and holidays; or (b) by email to [reale@state.com]. Please reference your name, phone number, loan number, mortgage servicer, and property address. You will receive either verbal or written instructions on the amount to pay as well as method of payment and place of payment.

Failure to cure the default by [INSERT DATE – preferred choice or WITHIN 30 DAYS OF RECEIPT OF THIS NOTICE] will cause the amount due under the Loan Agreement to be ACCELERATED, which means payment of all principal and legally accrued interest and other charges are payable under the terms of the Loan Agreement.

After acceleration, you have the right to reinstate the Loan Agreement according to its terms and have the right to bring a court action to assert the nonexistence of a default or any defense to acceleration, foreclosure or other rights reserved to you by the Loan Agreement.

The default and any legal action that may occur as a result of Mortgagor’s or Debtor’s default may be reported to one or more credit reporting agencies. If the person obligated for the Loan Agreement debt referenced above has been legally discharged in bankruptcy, no attempt will be made to impose personal liability on you, even though your interest in the Property is subject to foreclosure.

The Mortgage Servicer may administer the foreclosure of the Property under Texas Property Code 51.002 on behalf of the current Mortgagee referenced above, because they have entered into an agreement granting the current Mortgage Servicer authority to service the Mortgagor or Debtor’s mortgage or Loan Agreement. The address of the Mortgage Servicer is INSERT ADDRESS.

No person in this firm can give you legal advice; therefore, you should consider hiring an attorney.

I. HOUSE BILL 2738

AN ACT

relating to liens on real property.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 51.0001(8), Property Code, is amended to read as follows:

(8) "Trustee" means a person or persons authorized to exercise the power of sale under the terms of a security instrument in accordance with Section 51.0074.

SECTION 2. Section 51.002, Property Code, is amended by amending Subsections (b) and (h) and adding Subsection (b-1) to read as follows:

(b) Except as provided by Subsection (b-1), notice [Notice] of the sale, which must include a statement of the earliest time at which the sale will begin, must be given at least 21 days before the date of the sale by:

(1) posting at the courthouse door of each county in which the property is located a written notice designating the county in which the property will be sold;

(2) filing in the office of the county clerk of each county in which the property is located a copy of the notice posted under Subdivision (1); and

(3) serving written notice of the sale by certified mail on each debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt.

(b-1) If the courthouse or county clerk's office is closed because of inclement weather, natural disaster, or other act of God, a notice required to be posted at the courthouse under Subsection (b)(1) or filed with the county clerk under Subsection (b)(2) may be posted or filed, as appropriate, up to 48 hours after the courthouse or county clerk's office reopens for business, as applicable.

(h) For the purposes of Subsection (a), the commissioners court of a county may designate an area other than an area at the courthouse where sales under this section will take place that is in a public place within a reasonable proximity of the county courthouse and in a location as accessible to the public as the courthouse door. The commissioners court shall record that designation in the real property records of the county. A sale may not be held at an area designated under this subsection before the 90th day after the date the designation is recorded. The posting of the notice required by Subsection (b)(1) of a sale designated under this subsection to take place at an area other than an area of the

courthouse remains at the courthouse door of the appropriate county.

SECTION 3. Chapter 51, Property Code, is amended by adding Section 51.0074 to read as follows:

Sec. 51.0074. DUTIES OF TRUSTEE. (a) One or more persons may be authorized to exercise the power of sale under a security instrument.

(b) 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.

SECTION 4. Section 51.0075, Property Code, is amended by adding Subsection (f) to read as follows:

(f) The purchase price in a sale held by a trustee or substitute trustee under this section is payable immediately on acceptance of the bid by the trustee or substitute trustee. The trustee or substitute trustee shall disburse the proceeds of the sale as provided by law.

SECTION 5. (a) Section 51.002(b-1), Property Code, as added by this Act, applies only to a notice required to be posted or filed on or after the effective date of this Act. A notice required to be posted or filed before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

(b) Section 51.002(h), Property Code, as amended by this Act, applies only to a designation of an area for sales made on or after the effective date of this Act. A designation made before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

(c) Section 51.0074, Property Code, as added by this Act, applies only to the designation of a trustee under a security instrument executed on or after the effective date of this Act. The designation of a trustee under a security instrument executed before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

(d) Section 51.0075(f), Property Code, as added by this Act, applies only to a public sale conducted on or after the effective date of this Act. A public sale conducted before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 6. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2007.

President of the Senate

Speaker of the House

I certify that H.B. No. 2738 was passed by the House on April 25, 2007, by the following vote: Yeas 126, Nays 0, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 2738 on May 25, 2007, by the following vote: Yeas 142, Nays 0, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2738 was passed by the Senate, with amendments, on May 23, 2007, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____
Date

Governor

IV. THE OFFER

The forms presented deal with foreclosure or foreclosure situations for which there are a few forms available, but which are needed on a regular basis. These forms are not perfect but should provide the harried legal practitioner with a sample to modify as necessary.

Many of the nuances of foreclosure are not readily apparent. Because the allowable foreclosure fee authorized by Fannie Mae, Freddie Mac, HUD, and VA is less than \$600, which caps the fee most lenders will pay for

a standard Texas foreclosure, generally it is not economically feasible to justify legal research for a vexing foreclosure question. Therefore, this author makes the offer that if you have a foreclosure problem, feel free to call and together we will attempt to solve the problem. It won't cost you anything except the price of a phone call. As long as this offer for advice is not abused, I'll be glad to assist any lawyer who needs advice because other lawyers have helped me in the past, and I want to pass on the favor.

SPEAKER BIOGRAPHY

G. TOMMY BASTIAN
 Barrett Burke Wilson Castle Daffin & Frappier, L.L.P.
 15000 Surveyor Blvd., Ste. 100
 Addison, Texas 75001
 (972) 341.0500 Telephone
 (972) 341.0734 Facsimile
 tommyb@bbwcdf.com

BIOGRAPHICAL INFORMATION**EDUCATION**

B.A., Howard Payne University
 J.D., Texas Tech Law School
 U.S. Army Command & General Staff College
 U.S. National Defense University

PROFESSIONAL ACTIVITIES

Board Certified: Residential Real Estate Law, Texas
 Board Legal Specialization
 Member: American Bar Association: Real Property &
 Probate; Litigation Sections
 Member: Texas Bar Association: Real Property &
 Probate; Litigation Sections
 Member: Mortgage Bankers Association: Legislative
 Committee
 Member: Texas Mortgage Bankers Association:
 Director and member of Executive Committee;
 Member: American Land Title Association: Education
 Committee
 Member: Texas Land Title Association: Seminar,
 Judiciary and Legislative Committee; Master
 Indemnity Task Force
 Member: Supreme Court Reverse Mortgage Task
 Force
 Member: House Bill 1582 Foreclosure Task Force

**LAW RELATED PUBLICATIONS, ACADEMIC
 APPOINTMENTS, AND HONORS**

Author: National Mortgage Service Reference
 Directory: Texas Edition 1991-Present
 Author: Texas Mortgage Lending Law & Practice
 Deskbook: Servicing Edition 1998-Present
 Author: "Trouble Stirs for Debt Collectors," *Servicing
 Management*, Vol. 15, No. 3, Oct. 2003
 Author/Speaker: "Probate When the Mortgagor is
 Deceased," Texas Land Title and St. Mary's Law
 School Institute, Dec. 1992

Author/Speaker: "Mortgage Foreclosure in Texas,"
 Texas Land Title and St. Mary's Law School
 Institute, Dec. 1993
 Author: "Fair Debt Collection Practices Act," State
 Bar of Texas Bankruptcy Advanced Course, 1997
 Author/Speaker: "The Republic of Texas," 27th
 Annual County & District Clerk Continuing
 Education Seminar, March 1999
 Author/Speaker: "Practical Foreclosure Tips for Texas
 Real Estate Loans," Mortgage Lending
 Institute, Univ. of Texas, Sept. 1999
 Author/Speaker: "Republic of Texas Liens," Texas
 Land Title & St. Mary's Law School Institute,
 Dec. 1999
 Author/Speaker: "The Republic of Texas," 28th
 Annual County & District Clerk Continuing
 Education Seminar, Mar. 2000
 Author/Speaker: "How to Avoid Liability as a
 Substitute Trustee," South Texas College of Law
 Real Estate Law Conference, May 2000
 Author/Speaker: "Black Mold and the Mortgage
 Servicer," Texas Mortgage Bankers Seminar,
 Apr. 2002
 Author/Speaker: "10 Ways to Avoid a Wrongful
 Foreclosure," South Texas Real Estate Law
 Conference
 Author/Speaker: "MERS: What Is It?" Texas Land
 Title and St. Mary's Law School Institute, Dec.
 2002
 Author/Speaker: 78th Session Legislative Change:
 Texas Mortgage Bankers Association, Feb. 2003
 Author/Speaker: "From Demand to Sale and
 Everything in Between," Texas Saving &
 Community Bankers Associates & Independent
 Bankers Association, Mar. 2003
 Author/Speaker: "Remedies in Foreclosure,"
 Advanced Real Estate Remedies Workshop,
 May 2003
 Author/Speaker: "Mortgage Electronic Registration
 System," South Texas College of Law Real Estate
 Conference, May 2003

- Author/Speaker: "Real Estate Remedies," Law Seminar International, May 2003
- Author/Speaker: "Texas Rules of Civil Procedure 735 & 736," Texas Association for Court Administration, Sept. 2003
- Author/Speaker: "Mobile Homes in Texas," Carolina Mortgage Banking Seminar, Sept. 2003
- Author/Speaker: "Does Foreclosure Require Bankruptcy?" State Bar of Texas Advanced Consumer Bankruptcy Course, Sept. 2003
- Author/Speaker: "Foreclosure and Workouts Involving Farm & Ranch Issues," Texas Land Title and St. Mary's Law School Institute, Dec. 2003
- Author/Speaker: "Farm and Ranch Foreclosures," State Bar of Texas Real Estate Advanced Course, Dec. 2003
- Author/Speaker: "Bankruptcy and Foreclosure," Texas Land Title DFW Regional Seminar, 2003
- Author/Speaker: "Manufactured Housing," Mortgage Bankers Association National Servicing Conference, Feb. 2004
- Author/Speaker: "Title Cures," Texas Land Title School, Mar. 2004
- Author/Speaker: "MERS," REOMAC Education Conference, Mar. 2004
- Author/Speaker: "MERS," Fidelity National Title Agents Education Seminar, June 2004
- Author/Speaker: "Servicemember Civil Relief Act," UT Mortgage Lending Institute, Sept. 2005
- Author/Speaker: "Foreclosure Primer," Texas Association of Bank Counsel, Oct. 2005
- Author/Speaker: "Mortgage Elimination Scams," "Tax Liens," "MERS," Texas Land Title Association, Oct. 2005
- Author/Speaker: "Foreclosure Forms," State Bar of Texas Advanced Real Estate Drafting Course, March 2006
- Course Director: Advanced Real Estate Course, State Bar of Texas, June 2006
- Author/Speaker: "Foreclosure Process and Forms," State Bar College "Summer School", July 2006
- Author/Speaker: "Legislative Projections," Residential Real Estate Construction Law, State Bar of Texas, February 2007
- Author/Speaker: "Foreclosures: The Full Spectrum Law," Texas Land Title Advanced Closing Seminar, March 2007
- Author/Speaker: "Foreclosure Law," State Bar of Texas Law Center Webcast, May 2007