NONJUDICIAL REAL PROPERTY FORECLOSURES: LEGAL CONSIDERATIONS AND DOCUMENTATION

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I. INTRODUCTION

This article addresses basic legal considerations and documents pertaining to nonjudicial foreclosure of deed of trust liens against real property in Texas. Initially, Chapter 51 of the Texas Property Code, which sets forth the statutes that establish minimum requirements for nonjudicial real estate foreclosures, including notable amendments passed in the last several Texas legislative sessions, is discussed. Then, the basics of default under debt secured by a deed of trust lien, and acceleration (or maturity) of that secured debt before foreclosure, will be discussed. This article will then review a number of considerations that should be dealt with before the decision to foreclose is made, as well as the more "technical" requirements for conducting a valid foreclosure sale (such as appointing substitute trustees, serving notice of the foreclosure sale and conducting the foreclosure sale itself). The effect of both valid and invalid foreclosure sales on all parties having a legal interest in the encumbered property will be discussed. This article will also touch on how to avoid liability in connection with foreclosure work and issues to consider in pursuing deficiency judgments. Although it is not the author's intent to present an exhaustive review of all case law, statutes and questions that may, in any way, affect the real property foreclosure area, this article will, hopefully, highlight the basic issues, concerns and considerations that are relevant to nonjudicial real property foreclosures conducted in Texas. In addition, samples of certain documents routinely used in connection with nonjudicial real property foreclosures are referred to in this article and attached as Appendices.

Specifically excluded from the coverage of this paper are legal considerations and documents related primarily to consumer and single-family residential loans, such as the federal Fair Debt Collection Practices Act, the Texas Debt Collection Practices Act, and notification of the availability of homeownership counseling under the federal Housing and Community Development Act of 1987.

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II. REAL PROPERTY FORECLOSURE STATUTES

A. Chapter 51 of the Texas Property Code

Any discussion of nonjudicial real property foreclosure sales in Texas must begin with a review of the governing Texas statutory provisions --- specifically, Sections 51.001-51.015 of the Texas Property Code (the "TPC"). Tex. Prop. Code Ann. §§ 51.001-51.015 (Vernon 2007 & Supp. 2009).

TPC Chapter 51 has been amended and expanded in some notable ways in the last several years. TPC § 51.002 (set forth verbatim below) has been supplemented with a couple of procedural subsections during that period and remains the 'core' statute for nonjudicial real property foreclosures, but significant changes have also been made to other parts of TPC Chapter 51. The most notable of these changes to TPC Chapter 51 effective January 1, 2004 and after are summarized in article II.B below.

> § 51.002. Sale of Real Property Under Contract Lien
>
> (a) A sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month. Except as provided by Subsection (h), the sale must take place at the county courthouse in the county in which the land is located, or if the property is located in more than one county, the sale may be made at the courthouse in any county in which the property is located. The commissioners court shall designate the area at the courthouse where the sales are to take place and shall record the designation in the real property records of the county. The sale must occur in the designated area. If no area is designated by the commissioners court, the notice of sale must designate the area where the sale covered by that notice is to take place, and the sale must occur in that area.
>
> (b) Except as provided by Subsection (b-1), 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.

(c) The sale must begin at the time stated in the notice of sale or not later than three hours after that time.

(d) Notwithstanding any agreement to the contrary, the mortgage servicer of the debt shall serve a debtor in default under a deed of trust or other contract lien on real property used as the debtor's residence with written notice by certified mail stating that the debtor is in default under the deed of trust or other contract lien and giving the debtor at least 20 days to cure the default before notice of sale can be given under Subsection (b). The entire calendar day on which the notice required by this subsection is given, regardless of the time of day at which the notice is given, is included in computing the 20-day notice period required by this subsection, and the entire calendar day on which notice of sale is given under Subsection (b) is excluded in computing the 20-day notice period.

(e) Service of a notice under this section by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address. The affidavit of a person knowledgeable of the facts to the effect that service was completed is prima facie evidence of service.

(f) Each county clerk shall keep all notices filed under Subdivision (2) of Subsection (b) in a convenient file that is available to the public for examination during normal business hours. The clerk may dispose of the notices after the date of sale specified in the notice has passed. The clerk shall receive a fee of $2 for each notice filed.

(g) The entire calendar day on which the notice of sale is given, regardless of the time of day at which the notice is given, is included in computing the 21-day notice period required by Subsection (b), and the entire calendar day of the foreclosure sale is excluded.

(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.

B. Summary of Significant Changes to TPC Chapter 51 in Recent Legislative Sessions

1. 2003 Legislative Session

- A new Section of Definitions, including 'mortgage servicer' and 'security instrument,' is added.

- A mortgage servicer may administer the foreclosure on behalf of a mortgagee if granted such authority under a servicing agreement and if certain

information about the servicing arrangement is disclosed in the notice of foreclosure sale.

- A debtor is obligated to inform the mortgage servicer in a reasonable manner of any change of the debtor's address.

- A trustee or substitute trustee may set reasonable conditions for conducting a nonjudicial foreclosure sale if the conditions are announced before bidding is opened for the first sale of the day held by the trustee or substitute trustee.

- A purchaser at foreclosure acquires the foreclosed property "as is" and without any expressed or implied warranties other than warranties of title and is not a "consumer" (for purposes of the DTPA).

2. 2005 Legislative Session

- A commissioners court may designate an area other than in the courthouse that is a public place, reasonably proximate to the courthouse, and as accessible to the public as the courthouse door at which to conduct foreclosure sales in that county.

- A mortgagee is authorized to appoint, or may authorize a mortgage servicer to appoint, a substitute trustee or substitute trustees, and such appointment or authorization may be made by power of attorney, corporate resolution or other written instrument. A mortgage servicer may further delegate the right of appointment to an attorney.

- The name and street address for the trustee or substitute trustee must be disclosed in the notice of foreclosure sale.

3. 2007 Legislative Session

- If the courthouse or county clerk's office is closed because of inclement weather, natural disaster or other act of God, a notice of foreclosure sale may be filed or posted up to 48 hours after the courthouse or county clerk's office reopens for business.

- A new designation of an area in which foreclosure sales are to be held is not effective before 90 days after such designation is recorded.

- Multiple persons may be authorized to exercise the power of sale under a security instrument.

- Neither a trustee nor a substitute trustee may be assigned a duty under a security instrument other than to exercise the power of sale thereunder nor may be held to the obligations of a fiduciary of the mortgagor or mortgagee.

4. 2009 Legislative Session

- The requirement for immediate payment to the trustee of the foreclosure sale purchase price added to TPC § 51.0075 in 2007 has been relaxed. The purchase price is now due and payable without delay on acceptance of the bid by the trustee or within whatever reasonable time thereafter agreed to by the purchaser and trustee upon request for additional time by the purchaser.

- Many of the same protections for military servicemembers against the exercise of creditor rights afforded in the federal Servicemember's Civil Relief Act are added as TPC § 51.015.

III. DEFAULT

The foreclosure process begins with a default of the secured debt (the existence of the debt has been assumed because, without a debt, no lien can be foreclosed on, Easy Living, Inc. v. Cash, 617 S.W.2d 781 (Tex. Civ. App.—Fort Worth 1981, no writ)). Although it may seem overly simplistic to start with this step, the most obvious requirements are the most often overlooked. Even though many events have, through time, arguably achieved the status of a "universal default" (for example, failure to pay sums when due, breach of representations or warranties, breach of covenants, etc.), it is important to note that, generally speaking, a default is whatever the parties agree will be a default. As a result, loan agreements, promissory notes, deeds of trust, security agreements and any other documents relating to the secured debt must be reviewed collectively to determine if a true default exists. In addition, the debtor-creditor relationship must be examined to determine if (1) any existing default has been effectively waived, (2) the creditor is estopped from asserting a default, or (3) the original terms of the loan documents have been effectively modified by written or oral agreement or by implication arising out of the conduct of the parties.

IV. MATURITY/ACCELERATION OF DEBT

A. Type of Note

Essentially, there are four types of promissory notes that typically evidence a secured debt -- a term note, a demand note, a demand/term note and an installment note.

1. Term Note.

A term note simply provides that a certain sum is payable by a certain maturity date. It is important to point out that a term note can expressly define certain defaults that could occur before the stated maturity date and result in the acceleration of the debt (in other words, that could eventually result in the debt becoming due before the stated maturity date). Non-negotiable term notes are subject to a four-year statute of limitations under state law. Tex. Civ. Prac. & Rem. Code Ann. §16.004(a)(3) (Vernon 2002). Negotiable term notes are subject to a six-year statute of limitations under state law. Tex. Bus.& Comm. Code Ann. §3.118(a) (Vernon 2002).

2. Demand Note.

A demand note is, as its name indicates, a note that matures on demand by the holder. Although a notice to the debtor of the holder's intent to demand payment under a demand note is currently not required under Texas case law, unless there are other compelling reasons for not doing so, the giving of such a notice could only assist the holder in demonstrating that it acted reasonably and in good faith in its attempts to collect the debt. Non-negotiable demand notes are subject to a four-year statute of limitations under state law. Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(3) (Vernon 2002). Negotiable demand notes are subject to a six-year statute of limitations under state law from and after the date of demand; provided, however, an action is barred if no principal or interest has been paid for a continuous period of 10 years. Tex. Bus. & Com. Code Ann. §3.118(b) (Vernon 2002). It is important to note that the four-year limitations period applicable to a non-negotiable demand note begins to run from the date of execution of the note, not from the date of demand. Stavert Prop., Inc. v. Republic Bank of N. Hills, 696 S.W. 2d 278 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.)

3. Term/Demand Note.

A term/demand note will typically provide that the debt evidenced by the note is payable by a certain date, unless sooner demanded. The same general principles of maturity/acceleration of a term note and demand of a demand note are equally applicable to the term/demand note depending, of course, on the manner in which the creditor is attempting to enforce payment.

4. Installment Note.

An installment note is characterized by a certain sum that is payable in smaller, periodic payments before and on its stated maturity date. The creditor should insist that the installment note expressly permit acceleration of the debt on any default because, absent an expressed right to accelerate under the installment note (or the deed of trust securing that debt), the holder has no right to accelerate. Without an acceleration right, the holder of an installment note that is in default can only (1) sue the debtor periodically for portions of the debt, as they accrue, (2) foreclose periodically on only a part of the encumbered property to the extent necessary to satisfy the matured portion of the debt (if the deed of trust so provides), or (3) wait until the entire debt has become due and payable to fully exercise its remedies for payment. Non-negotiable installment notes are subject to a four-year statute of limitation under state law. Tex. Civ. Prac. & Rem. Code Ann. §16.004(a)(3) (Vernon 2002). Negotiable installment notes are subject to a six-year statute of limitation under state law. Tex. Bus. & Com. Code Ann. §3.118(a) (Vernon 2002). Unlike the limitations period for foreclosure of a real property lien securing an installment note (which, according to Section 16.035(e) of the Civil Practice and Remedies Code, does not begin to run until the maturity date of the last installment), the limitations period to sue to enforce an installment note begins to run on the due date of each installment. Tex. Bus. & Com. Code Ann. § 3.118(a) (Vernon 2002) (as to negotiable installment notes); Gabriel v. Alhabbal, 618 S.W.2d 894, 897 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.); Lufkin Nursing Home, Inc. v. Colonial Inv. Corp., 491 S.W.2d 459, 463 (Tex. Civ. App.—Amarillo 1973, no writ) (as to non-negotiable installment notes). But see Palmer v. Palmer, 831 S.W.2d 479 (Tex. App.—Texarkana 1992, no writ).

B. Requisites for Acceleration; Waiver

1. Contractual Requirements

The foreclosing lienholder (or its attorney) must carefully review all relevant loan and collateral documents to determine if there are any contractual notice, grace or cure provisions that must be complied with or recognized in order to establish a default and/or validly accelerate the debt.

2. Common Law Notice Requirements

Although courts recognize the necessity of a holder to have an acceleration right, because of the harsh effect that such a remedy has on the debtor, courts will insist that any acceleration be accomplished in strict accordance with all requirements established both by the loan documents and at common law. A right of acceleration must be stated in "clear and unequivocal" terms to be enforceable. Motor & Indus. Fin. Corp. v. Hughes, 302 S.W.2d 386 (Tex. 1957). The common law obligates the holder to provide the following three distinct notices to the debtor:

(i) Demand for payment;

(ii) Notice of intent to accelerate; and

(iii) Notice that the debt has been accelerated.

Although the common law notices would not be required if the note or deed of trust provided for the automatic acceleration of the debt, the holder usually has an option to accelerate the debt and, in that event, the requirement for proper service of these common law notices, unless effectively waived (as discussed in article IV.B.6 below), must be satisfied.

3. Demand for Payment

Initially, the holder must comply with any requirements set forth in the note, deed of trust or other loan documents in making demand for payment and giving the debtor an opportunity to cure. Even without express notice requirements in the loan documents, it is clear that, unless properly waived, the holder must demand payment from the debtor in such a way as to "bring home to the [debtor] that failure to cure will result in acceleration of the note and foreclosure under the power of sale." Ogden v. Gibraltar Sav. Ass'n, 640 S.W.2d 232, 233 (Tex. 1982).

4. Notice of Intent to Accelerate

The holder must also give notice to the debtor of the holder's intent to accelerate that states explicitly that failure to cure the default will result in acceleration of the entire debt and could lead to a foreclosure and, possibly, a deficiency judgment against the debtor if the proceeds from the foreclosure sale do not fully extinguish the secured debt. Id.; Crow v. Heath, 516 S.W.2d 225 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). Although demand for payment and notice of intent to accelerate are distinct common law requirements, they are not separate requirements. The notice of intent to accelerate can be incorporated with the demand for payment. A sample form of a combined demand for payment and notice of intent to accelerate letter is attached to this article as Appendix A.

5. Notice of Acceleration

After the debtor has had a "reasonable time" to make payment, the holder may accelerate the entire debt. Although it is not clear what constitutes a "reasonable time" to make payment, there do not appear to be any Texas cases specifically holding that the expressed cure period, if any, under the relevant loan documents was unreasonable. See Investors Realty Trust v. Carlton Corp., 541 S.W.2d 289 (Tex. Civ. App.—Dallas 1976, no writ). Because "the intention to accelerate maturity must be evidenced by clear and unequivocal acts followed by affirmative action towards enforcing the declared intention," Curtis v. Speck, 130 S.W.2d 348, 351 (Tex. Civ. App.—Galveston 1939, writ ref'd), the required notice of acceleration must be separate and distinct from, and given after, the notice of intent to accelerate (that is, a minimum of two notices must be given). Ogden, 640 S.W.2d at 233-34. The holder's "affirmative action towards enforcing the declared intention" can be evidenced in many ways, such as the holder's institution of a suit against the debtor. See Shepler v. Kubena, 563 S.W.2d 382 (Tex. Civ. App.—Austin 1978, no writ). A notice of foreclosure has been held to be sufficient notice of acceleration. McLemore v. Pac. Sw. Bank, FSB, 872 S.W.2d 286 (Tex. App.—Texarkana 1994, writ dism'd by agr.). The Texas Supreme Court noted that requiring the holder to undertake affirmative action towards enforcing the declared intention, thereby accelerating the note when such acceleration is optional, need not be interpreted as requiring an affirmative action towards foreclosure

when the parties' agreement does not require such action; acceleration may be accomplished "by either declaring the entire debt due or taking some other unequivocal action indicating debt is accelerated." Burney v. Citigroup Global Markets Realty Corp., 244 S.W.3d 900, 903 (Tex. App.—Dallas 2008, no pet.) citing Holy Cross Church of God in Christ v. Wolfe, 44 S.W.3d 562, 569-70 (Tex. 2001). A sample form of notice of acceleration letter (contemplating the simultaneous service of the notice of foreclosure sale, although such simultaneous service is not required) is attached to this article as Appendix B. (The notice of foreclosure sale requirements are discussed in article VII below).

6. Waiver

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

The Shumway court saw no reason why the waiver of presentment, notice of intent to accelerate and notice of acceleration should not have to meet the same clear and unequivocal standard imposed by the Hughes case for creating an optional right to accelerate and the Ogden case for giving the common law notices. Accordingly, the Supreme Court held that a waiver of presentment, notice of intent to accelerate and notice of acceleration is effective if and only if it is clear and unequivocal. Offering specific guidance on how to satisfy this standard, the Supreme Court stated:

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

Id. at 893-894.

Because the Shumways had agreed in their note to acceleration "without prior notice or demand," they waived presentment and notice of acceleration, but not notice of intent to accelerate.

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

7. Waiver of a Waiver

Although, if properly drafted, waiver provisions are enforceable, a holder should be careful not to be held to have "waived the waiver" by a course of conduct (for example, the regular acceptance of late payments) that could mislead the debtor into believing that the holder would not strictly enforce payment of the debt. See Dhanani Inv., Inc. v. Second Master Bilt Homes, Inc., 650 S.W.2d 220 (Tex. App.—Fort Worth 1983, no writ). If the holder has any doubts about a potential waiver of the waiver, the holder should immediately give debtor written notice that, despite the prior course of dealing, the holder will thereafter insist on performance in strict accordance with the loan documents. Vaughan v. Crown Plumbing & Sewer Serv., Inc. 523 S.W.2d 72 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) Another protection that the holder may rely on in avoiding waiver of a waiver is to expressly provide in the loan documents

that neither the holder's failure to exercise its remedies for a default, nor its failure to accelerate the debt, shall constitute a waiver of its right to enforce its remedies or to accelerate the debt as a result of a subsequent default by the debtor.

C. Additional Statutory Requirement When Collateral is Debtor's Residence

TPC § 51.002(d) requires service of written notice of default, by certified mail, on any debtor in default under a deed of trust lien against the debtor's residence, and at least twenty (20) days to cure the default before the entire debt is due and notice of a foreclosure sale is given. Tex. Prop. Code Ann. § 51.002(d) (Vernon Supp. 2009). This section expressly provides that this requirement cannot be waived by agreement of the parties. The day on which the notice is given is included in calculating the 20-day period and the day the foreclosure notice is given is excluded. Id.

V. INITIAL FORECLOSURE CONSIDERATIONS

After a default has been established and the secured debt (or at least the portion of the secured debt that is to be satisfied, in whole or in part, from the proceeds of the foreclosure sale) has either matured or been accelerated, the creditor must address a multitude of issues before making an informed decision whether to proceed with the foreclosure sale.

A. Assessing the Basics

1. Basic Elements for Recovery on Note

Although TPC Chapter 51 provides a creditor with significant flexibility for enforcing and ultimately collecting on a debtor's promise to pay his indebtedness, any creditor contemplating a foreclosure sale must ensure its claim can withstand threshold examination by the courts. Texas courts have always held that, in order to recover under a promissory note, a creditor must prove (1) the note in question exists, (2) the debtor signed the note, (3) the creditor is the legal owner and holder of the note, and (4) a balance is due and owing under the note. Scott v. Commercial Serv. of Perry, 121 S.W.3d 26, 29 (Tex. App.—Tyler 2003, pet. denied); Cadle Co. v. Regency Homes, Inc., 21 S.W.3d 670, 674 (Tex. App.—Austin 2000, pet. denied); Commercial Serv. of Perry, Inc. v. Wooldridge, 968 S.W.2d 560, 564 (Tex. App.—Fort Worth 1998, no pet.); Cockrell v. Republic Mortgage Ins. Co., 817 S.W.2d 106, 111 (Tex. App.—Dallas 1991, no writ.).

2. Note Existence, Note Balance, and Outstanding Debt

A creditor can prove the existence of the note, verify an outstanding balance on the note, and prove the debtor signed the note by submitting proper summary judgment evidence with its petition or its answer. Producing the original promissory note is always sufficient to prove the note, see Scott, 121 S.W.3d at 29 (holding that submission of the original promissory note conclusively established the absence of any genuine issue of material fact regarding existence and ownership of the note); however, Texas courts have held that a photocopy of the note attached to affidavits by persons swearing the photocopy is a true and correct copy of the note will also establish the evidence of the note as a matter of law. Cockrell, 817 S.W.2d at 111. Although the original note or verified photocopies of the note will also establish that the debtor signed the note, the debtor's acknowledgement that she executed the note is better evidence. See Cadle, 21 S.W.3d at 675 (noting that appellees' acknowledgement of executing the notes, along submission of the original notes that were not marked paid, constituted prima facie proof that the notes remained unpaid). Finally, the creditor is not required to submit detailed calculations showing a remaining debt on the note. An affidavit by an employee of the creditor showing the balance is enough. See Scott, 121 S.W.3d at 29 (explaining that an affidavit from a bank employee setting forth a balance due on the note was sufficient evidence for a lender to provide the court and establish a outstanding balance on the note).

3. Legal Owner and Holder of a Note

One of the realities of securitization structures and documentation is the occasionally complicated chain of ownership of the notes and the deeds of trust encumbering the real property that is collateral for the repayment of the notes. It is not uncommon for a note included in pooled loan structure to have been transferred, assigned, or sold many times (at least from an economic, if not legal documentation, perspective). See Austin v. Countrywide Home Loans, 261 S.W.3d 68, 72 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (explaining that the note at issue was executed payable to Harbor Financial Mortgage Corporation and

reassigned several times before ultimately being assigned to Countrywide). Debtors and their counsel are increasingly seizing on the often convoluted assignment histories of these notes as fertile ground for challenging the validity of a proposed or even completed foreclosure sale. Mainstream-media reports abound with stories of homeowners, who, facing foreclosure after becoming delinquent on their loans, challenge lenders to prove they actually own the notes at issue. MSNBC.com, New Foreclosure Defense: Prove I owe you, Feb. 17, 2009, http//www.msnbc.msn.com/id/29242063. In Ohio, twenty-seven foreclosure actions were dismissed without prejudice when the lenders failed to show standing by proving they were the legal holders of the notes and mortgages when the foreclosure actions were initiated. In re Foreclosure Cases, 2007 WL 4589765, at 1 (S.D.Ohio). The affidavits submitted to the court in support of the foreclosure complaints either (1) never showed that an assignment of the note ever took place, (2) indicated the assignment of the note was completed after the complaint was filed, or (3) were submitted after the complaint was filed. Id. at 2. In dismissing the complaints, the Court spurned the plaintiffs' explanation that the condition of their documentation was standard for the industry saying, "[c]ounsel's "that's the way I've always done it" argument is not persuasive." Id. at 11.

For a very thorough discussion of the pervasive legal and practical issues associated with the requisite authority, especially in the securitized loan context, of properly proceeding to enforce lien rights, see Ayers Mortgage Foreclosure In An Age of Securitization: Missing Original Notes And Other Problems For Creditors, Advanced Real Estate Law Course, State Bar of Texas (2009).

Shepard v. Boone shows that Texas courts are not averse to finding that the creditor has not met its basic evidentiary burden in order to collect on a promissory note. 99 S.W.3d 263 (Tex. App.—Eastland 2003, no pet.). In Shepard, the creditor, after a series of assignments of the deed of trust and promissory note for a home repair loan, received all of the assigning entity's interest in the deed of trust but not the note. 99 S.W.3d at 264. The Court of Appeals sustained the lower court's ruling setting aside the foreclosure sale because the creditor's assignment did not assign the note signed by the debtors. Id. at 266. Without an assignment of the note, the court found that the creditor submitted no proof of any transfer that would vest in it ownership rights sufficient to enforce the note. Id.

4. Period to Foreclose Lien

A foreclosure pursuant to a power of sale in a mortgage or deed of trust must be conducted within four years after the cause of action accrues (see article IV.A for a discussion of when causes of action accrue for different types of notes), Tex. Civ. Prac. & Rem. Code Ann. § 16.035(d) (Vernon 2002), following which the lien and power of sale become void. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(b) (Vernon 2002). The limitations period may be extended by execution of a written extension agreement by the party or parties primarily liable for the secured debt and its recordation in the real property records of the county in which the property is located. See Tex. Civ. Prac. & Rem. Code Ann. § 16.036, 16.037 (Vernon 2002).

B. Enforcement Alternatives

1. Suit on Note or Guaranty

The creditor should consider whether it would be preferable to first sue the debtor on the note or a guarantor of the secured debt on its guaranty, or both. For example, some guarantors may have been able to negotiate a guaranty of only a percentage of the outstanding balance of the secured debt from time to time existing. As a result, depending on the exact language of the guaranty agreement, the creditor may be reducing its ability to collect as much of the debt as possible by conducting a foreclosure sale and applying the foreclosure sale proceeds to the secured debt before judgment is obtained against the guarantor. Another instance when the creditor may prefer suit on the note and/or guaranty is when the creditor does not want to become owner of the property covered by its deed of trust lien (for example, the existence of environmental problems on the property, as more particularly discussed in article V.F below). Creditors should be especially careful about suing on the note or guaranty when dealing with property outside of Texas because many other jurisdictions have "election of remedies" rules and statutory prerequisites for suit on the debt.

2. Judicial Foreclosure

Although rarely the preferred option, creditors can seek foreclosure of deed of trust liens through judicial

proceedings. This option may be important to a creditor possessing a defective or unenforceable power of sale. In Texas, the creditor should be aware that it will not be able to pursue a nonjudicial foreclosure sale while a judicial foreclosure action is pending, and that it will be deemed to have abandoned its nonjudicial foreclosure remedy if it obtains a judgment for judicial foreclosure. Coffman v. Brannen, 50 S.W.2d 913 (Tex. Civ. App.—Amarillo 1932, no writ); Gandy v. Cameron State Bank, 2 S.W.2d 971 (Tex. Civ. App.—Austin 1927, writ ref'd.). A creditor considering judicial foreclosure as a collection alternative must consider the effect of TPC § 51.004 and, to the extent it pertains to judicial foreclosures, TPC § 51.005.

3. Deed in Lieu of Foreclosure

An additional alternative to a nonjudicial foreclosure sale would be for the creditor to accept a deed in lieu of foreclosure from the debtor. At a minimum, the creditor should ensure that the deed in lieu of foreclosure documents clearly recite that the fee ownership title being conveyed shall not merge with the creditor's interest as the first lienholder against the property (see Smith v. United States Nat'l Bank of Galveston, 767 S.W.2d 820 (Tex. App.—Texarkana 1989, writ denied)); therefore, the creditor can later foreclose its deed of trust lien if it is necessary to extinguish subordinate liens and encumbrances against the property.

Although the case of Flag-Redfern Oil Co. v. Humble Exploration Co., Inc., 744 S.W.2d 6 (Tex. 1987) introduced uncertainty about the availability of deeds in lieu of foreclosure in Texas, they remain available in Texas and are recognized by statute. Tex. Prop. Code Ann. § 51.006 (Vernon 2007). TPC § 51.006 makes it clear that there is no merger of the fee estate and the lien estate – at least for four years after the deed in lieu is executed – thereby preserving the right to foreclose the deed of trust within that period.

Although the same perils of ownership (for example, liability for clean-up of environmental hazards) should be considered by the creditor before accepting a deed in lieu of foreclosure, that alternative might be attractive to the extent that a creditor's secured position or the collateral would be adversely affected during the pendency of the requisite notice and cure periods preceding a nonjudicial foreclosure sale (for example, if the debtor is poorly managing and operating an income-producing property).

4. Collection of Rents

With respect to income-producing collateral, the lienholder should carefully review its loan documents to determine its rights in the rents from the property prior to foreclosure. Currently, Texas law recognizes several types of assignments of rent, most notably collateral assignments and absolute assignments (oftentimes coupled with a license back to the debtor to collect rents prior to default). Taylor v. Brennan, 621 S.W.2d 592 (Tex. 1981). For public policy reasons, Texas courts have been reluctant to construe an assignment of rents clause as absolute. However, the ultimate determination as to the character of the assignment is to be based on the intent of the parties as expressed in their agreement.

Under a collateral assignment, the collateral assignee/lender is not entitled to rents without first taking possession of the property or taking some other action (for example, instituting sequestration, receivership or injunction proceedings) to legally dispossess the borrower of its right, as the landowner, to collect rents. On the other hand, an absolute assignment of rents transfers the right to rents automatically upon the happening of a specified event (such as default) and does not create a security interest. Rather, actual title to the rents passes which, in turn, constitutes a pro tanto payment of the underlying obligation.

In FDIC v. Int'l Prop. Mgmt., Inc., 929 F.2d 1033 (5th Cir. 1991), the Fifth Circuit found the assignment of rents clause at issue to be an absolute assignment based on the unambiguous language of the assignment. The court reaffirmed that parties to an assignment of rents can agree to an assignment of rents that operates to transfer the right to rents automatically upon the happening of a specified condition, and therefore, creates an "absolute assignment" rather than a security interest. The analysis in International Property Management highlights the importance of precise and careful drafting of assignment of rents clauses. International Property Management clearly stands for the proposition that parties can, if their intent is made clear and unambiguous in an assignment of rents, create an absolute assignment that transfers the right to rents automatically upon default. For an excellent article on this subject, see Danley and Jillson, Absolute Assignments of Leases and Rents: Has The Unicorn Been Found Or Is It Still Myth, Real Estate, Probate & Trust Law Reporter, April 1992 at 28.

It is clear under Texas law that, following foreclosure, a collateral assignee of rents is entitled to all rents that accrue from the date of sale onward even if the rents for the month of foreclosure have been collected by the borrower prior to foreclosure. Summers v. Consol. Capital Special Trust, 783 S.W.2d 580 (Tex. 1989). Under a collateral assignment, rents that accrued prior to the foreclosure sale are not the property of the collateral assignee/lender unless it has legally dispossessed the borrower of them prior to foreclosure.

5. Appointment of Receiver

Often, a security instrument will include, among the remedies for default, the right to the appointment of a receiver for the mortgaged property. Receiverships are available only where expressly provided by statute. See Tex. Civ. Prac. & Rem. Code §§ 64.001-.108 (Vernon 2008 & Supp. 2009), or where equity demands. Where a receivership is sought on the basis of equity alone, considerations such as the harshness and necessity of the remedy and the interest of the applicant in the property are relevant. Even where a receiver is sought pursuant to statutory authority, the rules of equity govern all related matters where not inconsistent with relevant statutory provisions. See Tex. Civ. Prac. & Rem. Code § 64.004 (Vernon 2008). A receivership is generally available only where the application is ancillary to pending litigation in which the applicant is attempting to establish a right other than the mere appointment of a receiver. Theatres of Am., Inc. v. State, 577 S.W.2d 542 (Tex. Civ. App.—Tyler 1979, no writ). For instance, the judicial foreclosure of a lien is such a right recognized by statute. See Tex. Civ. Prac. & Rem. Code § 64.001(a)(4) (Vernon 2008). The author has seen a number of CMBS special servicers (based outside Texas) recently pursue the appointment of receivers for apartment projects to be foreclosed on that were in such disrepair and afflicted by criminal activity that the special servicers dared not wait even for the Texas summary foreclosure process to run before securing the property through appointment of a receiver. Invoking the jurisdiction of a court for the appointment of a receiver means, however, that court approval is required to proceed with a nonjudicial foreclosure of a lien encumbering property in the custody of the court-appointed receiver. First S. Prop., Inc. v. Vallone, 533 S.W.2d 339, 341 (Tex. 1976).

C. Title Review

A creditor should conduct a title search on the property encumbered by its deed of trust lien in an attempt to ascertain whether there are any mechanic's liens, subordinate liens, subsequent transfers, tax liens (including ad valorem, federal, state and corporate franchise tax liens), or leases affecting or relating to the property.

1. Mechanic's Liens

Assuming that the creditor's deed of trust lien was prior to all other liens and encumbrances at the time it was created (and would, if foreclosed on, usually "wipe out" inferior liens, as discussed in article X.C below), that deed of trust lien would still be subordinate to valid mechanic's lien claims arising after the creation of the deed of trust lien to the extent of removable improvements. William Cameron & Co. v. Trueheart, 165 S.W. 58 (Tex. Civ. App.—Austin 1914, no writ); See First Nat'l Bank v. Whirlpool Corp., 517 S.W.2d 262 (Tex. 1974); See generally, Tex. Prop. Code Ann. §§ 53.001 et seq. (Vernon 2007); Comment, Texas Mechanic's and Materialman's Liens and the Scope of the Preferential Lien on Removables, 15 Tex. Tech. L. Rev. 673 (1984).

2. Subordinate Lienholders; Subsequent Purchasers

Even though subordinate lienholders and subsequent purchasers that have acquired property "subject to" a prior deed of trust lien typically have no liability for the prior-lien debt, it may still be useful to identify those parties because their vested interest in the property could be "wiped out" by a valid foreclosure sale, and they may wish to protect that interest by either (a) negotiating a purchase of the prior-lien debt owed to the creditor and receiving an assignment of the creditor's priority under the deed of trust lien before the foreclosure sale is conducted, or (b) bidding for the property at foreclosure sale.

3. Tax Liens

a. Federal

Although there is no "super-priority" attached to federal tax liens, the existence of federal tax liens will obligate the creditor to send special notices to the Internal Revenue Service (the "IRS") before foreclosure, and the IRS will have certain redemption

rights following foreclosure. (The special notice requirements for federal tax liens are discussed in article VII.B.3.b below.)

b. State

With respect to state tax liens, ad valorem tax liens will have priority (and, therefore, will be satisfied first out of the foreclosure sale proceeds) over the creditor's deed of trust lien. Similarly, a lien imposed by the Texas Workforce Commission to secure unpaid wages owed by an employer has priority over any other lien on real property except for a lien for ad valorem taxes, regardless of when the notice of administrative lien is recorded. Tex. Lab. Code Ann. § 61.0825 (Vernon 2006). The priority of state general tax liens will be determined in the same manner as the priority of other liens of record -- that is, state general tax liens filed after the deed of trust lien will be subordinate to that deed of trust lien.

4. Leases

Although notice of existing leases will sometimes appear of record, the determination of whether leases exist could require an on-site inspection or other approach. The existence of leases is important for several reasons. First, a creditor considering purchase at foreclosure sale should attempt to ascertain what "landlord" obligations will be assumed as the new owner of the property (as discussed in article X.D below). Second, as to any leases that are subordinate to the deed of trust lien, a creditor may attempt to take steps to ensure that the foreclosure of the superior lien of the deed of trust does not result in the termination of "favorable" leases (as discussed in article X.D below). Finally, in some instances, a major tenant or a single-tenant occupant may have some incentive to either attempt to acquire the creditor's position as lienholder or bid for the property at foreclosure sale.

5. Pre-Foreclosure Policy/Endorsement

The Texas Department of Insurance adopted in 1997 a "Limited Pre-Foreclosure Policy" (Form T-40) and a "Limited Pre-Foreclosure Policy Downdate Endorsement" (Form T-41). These products provide foreclosing lenders with downdated title insurance protection regarding the status of title immediately prior to foreclosure. Rule P-43A of the Procedural Rules promulgated under the Texas Title Insurance Act sets forth eleven requirements for issuance of a Limited Pre-Foreclosure Policy.

Rule P-43B sets forth the requirements for issuance of a Limited Pre-Foreclosure Policy Downdate Endorsement.

The premium for the Limited Pre-Foreclosure Policy, set forth in Rate Rule R-26, is roughly forty percent (40%) of the regular premium, but no less than the then minimum basic premium. The premium for each Limited Pre-Foreclosure Policy Downdate Endorsement is $50.

In the author's experience, the Limited Pre-Foreclosure Policy has been judged in the marketplace to be of very little value for the cost and is rarely issued. Especially if the foreclosing lienholder plans to aggressively market the foreclosed property (assuming the foreclosing lienholder acquires it at foreclosure), many lienholders/owners will simply rely on the continuing coverage of its mortgagee policy after foreclosure (discussed in article IX.C below).

D. Appraisal

A creditor should obtain an updated appraisal of the encumbered property to aid the creditor not only in negotiating a potential workout with the debtor, but also in determining what, if anything, the creditor would be willing to bid for purchase of the property at the foreclosure sale. A current appraisal prepared by a competent appraiser who will make a good witness in support of the appraisal is critical because of the right of the debtor to contest the foreclosure sales price in a deficiency suit under TPC §§ 51.003 and 51.005, the so-called "deficiency statutes." One caveat to obtaining an updated appraisal would be that such appraisal, and any preliminary drafts thereof, would presumably be discoverable by the debtor in connection with any dispute as to the sufficiency of the bid price at foreclosure or application of TPC §§ 51.003 and 51.005.

E. Bid Price

1. Adequacy

Although the general rule is that foreclosure sales cannot be invalidated solely because of an inadequate bid price (as discussed in article VIII.C below), the determination of an "appropriate" bid price is of special importance in light of TPC §§ 51.003 and

51.005 (see discussion of these Sections in article X.A below).

2. Wraparound Debt

If the secured debt is evidenced by a wraparound note (that is, a note that includes the balance of a prior note from the debtor to a third party and an additional amount of new consideration given by the creditor to the debtor), then the prior debt will be secured by a prior lien, and that prior lien will not be affected by the foreclosure of a subordinate wraparound deed of trust lien. The actual task of determining an appropriate bid price may seem to be more of an art than a true science, especially in light of Texas case law regarding the application of proceeds from the foreclosure of liens securing wraparound debt. See Summers, 783 S.W.2d at 582-3; see also Hampton v. Minton, 785 S.W.2d 854 (Tex. App.—Austin 1990, writ denied); Lee v. Key West Towers, Inc., 783 S.W.2d 586 (Tex. 1989).

In deciding how foreclosure proceeds from a wraparound deed of trust foreclosure sale were to be distributed, the court in Summers adopted the "outstanding balance" approach and rejected the "true debt" approach. The outstanding balance approach provides for a credit against the wraparound note of only the amount of the foreclosure bid. For example, assume the wraparound note is in the amount of $75,000.00; $50,000.00 represents the prior debt and $25,000.00 represents the new credit extended. A foreclosure bid of $30,000.00 will be credited against the $75,000.00 note, leaving a deficiency of $45,000.00. The defaulter is liable for this deficiency. The true debt approach provides for a credit against the wraparound note in the amount of the foreclosure bid and the amount of the prior liens included in the wraparound note. Applying the true debt approach to the foregoing hypothetical would give the following result. The foreclosure bid plus the amount of the prior liens would be subtracted from the amount of the note.

Wraparound Note	$75,000.00
Less foreclosure bid	$30,000.00
Less prior liens	$50,000.00
Credit	$(5,000.00)

The credit would then be applied to any inferior liens or if no inferior liens exist, the credit would go to the defaulter. See Goren & Meyer, Foreclosing the Wraparound Mortgage: Practical Considerations and the Emergence of Texas Case Law, 51 Tex. B.J. 1051 (1988).

In Summers, however, the Texas Supreme Court went beyond the traditional outstanding balance approach by creating an implied covenant that, absent an express agreement in the wraparound loan documents, the foreclosing trustee/substitute trustee is obliged to apply the net sales proceeds to discharge the entire wrapped indebtedness reflected in the wraparound note to the fullest extent possible.

F. Environmental Concerns

1. Underground Tanks

a. Federal Law

While the Resource Conservation and Recovery Act ("RCRA") has contained a "lender liability exemption" for underground storage tanks ("UST") since it was passed in 1984, the statutory provision was broadened and elaborated by the EPA's "Underground Storage Tanks Lender Liability Rule" that became effective December 6, 1995. Among the more important provisions of the rule, a lender does not become obligated to perform any of the obligations of an "owner" of a UST by performing an inspection or assessment of the UST prior to making a loan, by requiring a clean up of contamination from the UST during the loan term or by requiring compliance with UST regulations during the loan term. A "holder" (of a security interest) does not become an "owner" by the action of foreclosing on a UST or a UST site so long as the ownership that is acquired by the foreclosure continues to be maintained "primarily as protection for a security interest." In order to remain within the safe harbor created by the rule, a lender who acquires title to a UST or a UST site must seek to divest itself of the UST or the UST site in a commercially reasonable, expeditious manner and must not participate in management of the site during its period of involuntary ownership. A lender loses the protection of this safe harbor if it outbids, rejects or fails to act upon a written bona fide offer of fair consideration for the UST or UST site. The lender must also list the property for sale with a dealer within 12 months following foreclosure or advertise the property for sale at least monthly, starting within 12 months following foreclosure. The lender must respond within 90 days

to a cash offer to purchase the UST or UST site received after six months following foreclosure if the offer would cover the debt, attorneys' fees, investigation costs, corrective action costs, etc. incurred in connection with the loan.

b. State Law

The Texas Legislature added a lender liability exemption for USTs to the Water Code in 1995. Tex. Water Code Ann. § 26.3514 (Vernon 2008). Conforming changes to the TNRCC regulations are published at 20 Tex. Reg. 8800. This lender liability exemption excludes lenders from liability if they do not participate in the management of the UST site and if they establish that their ownership after foreclosure continues to be consistent with holding the property primarily to protect their security interest. Under the foreclosure protocol established by this legislation, a lender who forecloses on a UST or a UST site must list the property for sale within 12 months of foreclosure and accept or consider bona fide offers made for the property that would permit the lender to recover its losses, but no more. If a lender refuses to sell property acquired by foreclosure to a purchaser who offers the full amount of the lender's original debt, the lender will lose the protection of this new safe harbor and will be considered to be holding the property for investment purposes, not primarily for purposes of protecting its security interest.

2. CERCLA Liability

In response to the uncertainty created by the case of United States v. Fleet Factors Corp. 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S.Ct. 752 (1991), the EPA issued a final rule effective April 29, 1992 entitled "Lender Liability Under CERCLA" that afforded lenders relief from the concerns prompted by Fleet Factors by establishing a range of permissible actions that could be taken within the bounds of the statutory lender defense. The EPA final rule was subsequently invalidated by a federal appeals court on the basis that the EPA lacked statutory authority to define, through the final rule, the scope of lender liability under CERCLA. Due to the successful efforts of groups seeking to amend CERCLA to address the problems created by Fleet Factors and the invalidation of the EPA's final rule, the "Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996" was enacted on September 30, 1996. Pub.L. 104-208, Div. A, Title II, Subtitle E, September 30, 1996, 110 Stat. 3009, 42 U.S.C.S. § 6911(b) (Lexis Nexis 1994), §§ 9601, 9607 (Lexis Nexis 1997 & Supp. 2009). Among the more important provisions added by the new statute, fiduciaries are not liable for clean up of a contaminated property held in trust beyond the assets of the trust, unless actions taken by the fiduciary independent of ownership have made it liable. The legislation describes actions of a fiduciary that are within a "safe harbor" and broadly defines the term "fiduciary" to include trustees, executors, and receivers. The legislation adds a provision to CERCLA that basically adopts the EPA's final rule referenced above. The legislation also makes this lender liability rule applicable to events from April 29, 1992 unless a claim had already been adjudicated prior to the effective date of the legislation.

G. Status of the Debtor

In addition to the exercise of a power of sale being automatically stayed by a bankruptcy proceeding involving the debtor, the creditor's attempt to exercise the power of sale may also be restricted if the debtor (1) dies (when, without consent of the probate court, the power of sale will be temporarily suspended while any dependent administration of the debtor's estate is pending), see Pearce v. Stokes, 291 S.W.2d 309 (Tex. 1956); however, an independent administration does not suspend the power of sale and the lender can proceed with the foreclosure sale, see Bozeman v. Folliott, 556 S.W.2d 608 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.), (2) is under guardianship (a deed of trust lien given on property owned by a minor by the minor's guardian may be foreclosed only under court supervision, Crowley v. Redmond, 41 S.W.2d 274 (Tex. Civ. App.—Fort Worth 1931) aff'd, 70 S.W.2d 1113 (Tex. 1934)), or (3) is in the armed forces or has been discharged within nine months before the proposed foreclosure sale date and the debtor owned that property before entering the service (when foreclosure is prohibited without a court order or a properly executed waiver, Servicemember's Civil Relief Act, 50 U.S.C.S. app. § 533 (Lexis Nexis Supp. 2009)).

A new TPC §51.015, effective June 19, 2009 (i) prohibits any nonjudicial foreclosure of a dwelling owned by military personnel on active duty or within nine (9) months after their active duty concludes, (ii) provides that a court may, during the same active duty period and the nine (9) months subsequent, either (a) stay a proceeding to judicially foreclose or enforce a

mortgage lien; or (b) modify the terms of any such mortgage, as necessary to preserve the interests of the parties, (iii) authorizes the court to also issue similar orders of stay or take other actions to protect dependents of active duty personnel and third party guarantors of the loan obligation, and (iv) imposes a criminal penalty (Class A misdemeanor) on any person who knowingly causes a foreclosure or seizure of property protected as set forth above. A borrower or guarantor may voluntarily waive these protections by written agreement contained in an instrument separate from the loan obligation. Tex. Prop. Code Ann. § 51.015 (Vernon Supp. 2009). This TPC §51.015 includes many of the same protections for military servicemembers as does the federal Servicemember's Civil Relief Act mentioned in above in this article V.G.

VI. TRUSTEES/SUBSTITUTE TRUSTEES

The trustee or substitute trustee is the party responsible for conducting the foreclosure sale. Although the "legal fiction" is that the trustee named in the deed of trust is designated by the debtor, the creditor, as beneficiary under the deed of trust, usually determines the identity of the trustee. However, the trustee becomes a special agent for both parties and must act with absolute impartiality and with fairness to all concerned in order to achieve the objective of the trust. Bonilla v. Roberson, 918 S.W.2d 17, (Tex. App–Corpus Christi 1996, no writ). Unless the deed of trust provides otherwise, only the designated trustee or a duly appointed substitute trustee (or more than one of each) is authorized to enforce the creditor's power of sale. Hazelton v. Holt, 285 S.W. 1115 (Tex. Civ. App.—Amarillo 1926, writ dism'd w.o.j.). Prior to September 1, 2005, the right of a mortgagee to appoint a substitute trustee was conferred exclusively by the terms of the deed of trust, and the mortgagee had to comply with all of the relevant terms contained in the deed of trust for an appointment to be effective. See Johnson v. Koenig, 353 S.W.2d 478 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.). As of September 1, 2005, a mortgagee is authorized to appoint, or may authorize a mortgage servicer to appoint, a substitute trustee or substitute trustees, and such appointment or authorization may be made by power of attorney, corporate resolution or other written instrument. A mortgage servicer may further delegate the right of appointment to an attorney. Tex. Prop. Code Ann. §§ 51.0075(c, d) (Vernon Supp. 2009). Unless the deed of trust so requires, the appointment of a substitute trustee made pursuant to a right of appointment in the deed of trust need not be written or recorded. Stone v. Watt, 81 S.W.2d 552 (Tex. Civ. App.—Eastland 1935, writ ref'd), but the recommended practice is to record the appointment so that a title company may readily ascertain the identity of any substitute trustee. There is authority for the proposition that, once a notice of foreclosure sale has been properly filed and posted by a duly-appointed trustee or substitute trustee, the appointment of a subsequent substitute trustee prior to foreclosure does not require the notice of sale to be re-filed and re-posted. Koehler v. Pioneer Am. Ins. Co., 425 S.W.2d 889 (Tex. Civ. App.—Fort Worth 1968, no writ). However, all notices for the foreclosure of deeds of trust executed on or after September 1, 2005 must include the name and street address for the trustee or substitute trustee. Tex. Prop. Code Ann. §§ 51.0075(e) (Vernon Supp. 2009). With respect to foreclosure of deeds of trust executed on or after September 1, 2005, the appointment of a substitute trustee after a notice of sale properly signed, filed, and posted by a prior trustee or substitute trustee may require that the sale be postponed and conducted at the next opportunity pursuant to a notice that discloses, among other information, the name and street address of the then substitute trustee. If there are multiple holders of the secured debt, any provision allowing the "holder" of the debt to appoint a substitute trustee would require all holders to agree to the appointment. Rogers v. Boykin, 298 S.W.2d 199 (Tex. Civ. App.—Eastland 1956, writ ref'd n.r.e.). If the secured note and deed of trust have been collaterally assigned and the note has been duly endorsed to the collateral assignee, the collateral assignee is the proper party to (i) request the trustee or substitute trustee to act and (ii) appoint a substitute trustee. Lawson v. Gibbs, 591 S.W.2d 292 (Tex. Civ. App. – Houston [14th Dist.] 1979, writ ref'd n.r.e.; Merit Homes, Inc. v. Alltex Mortgage Co., 402 S.W.2d 943 (Tex. Civ. App. – Texarkana 1966, writ ref'd n.r.e.) (no endorsement to collateral assignee). It is not uncommon for a deed of trust to allow appointment of two or more individuals to act as trustee in an attempt to achieve flexibility if one (or more) of the individuals is not available to satisfy the notice requirements and conduct the foreclosure sale. TPC § 51.0074(a) expressly authorizes the appointment of multiple persons to serve as substitute trustees. Tex. Prop. Code Ann. § 51.0074(a) (Vernon Supp. 2009). There is no prohibition on the appointment of a corporation or partnership as the trustee, but, similar to the appointment of a substitute trustee by a corporation or partnership acting as the beneficiary under the deed of

trust, all of the acts of such corporation or partnership as trustee must be done with appropriate corporate or partnership approval. Even an officer, employee or other party related to a corporate or partnership beneficiary can act as trustee, See Tarrant Sav. Ass'n v. Lucky Homes, Inc., 390 S.W.2d 473 (Tex. 1965). A sample form of appointment of substitute trustee is attached to this article as Appendix C.

TPC §51.007 provides a procedure whereby a trustee or a substitute trustee under a deed of trust can seek his/her dismissal from the lawsuit where the trustee or substitute trustee is named solely in his/her capacity as trustee or substitute trustee and is not a necessary party to the lawsuit. Tex. Prop. Code Ann. § 51.007 (Vernon 2007).

Neither a trustee nor a substitute trustee may be assigned a duty under a security instrument other than to exercise the power of sale thereunder or may be held to the obligations of a fiduciary of the mortgagor or mortgagee. Tex. Prop. Code Ann. § 51.0074(b) (Vernon Supp. 2009).

VII. NOTICE OF SALE

A. Contractual Requirements

Similar to the establishment of a default and acceleration of the secured debt, notice of a proposed foreclosure sale, to be effective, must comply with all of the requirements set forth in the loan documents, including the deed of trust.

B. Statutory Requirements

In addition to contractual requirements, TPC § 51.002(b) requires that the following three things be performed "at least 21 days before the date of the sale" in order for proper notice of a foreclosure sale to be given. The day on which the notice of sale is given is included, and the day of the foreclosure sale is excluded, in computing the 21-day notice period. Tex. Prop. Code Ann. § 51.002(g) (Vernon Supp. 2009). As a result, notice given on the Tuesday three weeks before the foreclosure sale is timely (even if not the preferred practice).

1. Posting

Satisfaction of the requirement to post a notice of sale "at the courthouse door of each county in which the property is located," Tex. Prop. Code Ann. §51.002(b)(1) (Vernon Supp. 2009), can be accomplished by someone designated by the trustee or substitute trustee; provided, however, that, if the trustee or substitute trustee does not personally accomplish that task, an affidavit should be obtained from the individual posting the notice that includes a certification as to the time, date, place and manner of the posting. A sample form of affidavit regarding posting (as well as filing, discussed in article VII.B.2 below) of the notice of sale by someone other than the trustee or substitute trustee is attached to this article as Appendix D.

2. Filing

A copy of the notice of sale must be filed with the county clerk of each county in which the property is located. Tex. Prop. Code Ann. §51.002(b)(2) (Vernon Supp. 2009). The county clerk is required to keep all such notices in a convenient file available to the public for examination during normal business hours until after the date of sale specified in the notice has passed. Tex. Prop. Code Ann. § 51.002(f) (Vernon Supp. 2009).

3. Serving

a. Debtors

The notice of sale must be served by certified mail on each debtor who, according to the records of the mortgage servicer, is obligated to pay the debt. Tex. Prop. Code Ann. §§ 51.002(b)(3) (Vernon Supp. 2009). 'Debtor' is not defined in TPC § 51.0001 or anywhere else in TPC Chapter 51. Although the party who signs the promissory note as a maker and a party who assumes liability to pay the promissory note as an assumptor indisputably are 'obligated to pay the debt,' a guarantor of the debt has been held not to be entitled to the statutory notice of a nonjudicial foreclosure sale. See Long v. NCNB-Texas Nat'l Bank, 882 S.W.2d 861, 866 (Tex. App.—Corpus Christi 1994, no writ). Other parties held not to be entitled to the statutory notice of a nonjudicial foreclosure sale include (i) junior lienholder, see Hampshire v. Greeves, 143 S.W. 147, 150 (Tex. 1912); (ii) owner of the property who is not the borrower, including an owner who purchases subject to the debt, see Lawson, 591 S.W.2d at 295; and (iii) maker of a separate note which is cross-defaulted and cross-collateralized with the defaulted note, see Nat'l Commerce Bank v. Stiehl, 866 S.W.2d 706, 708 (Tex. App.—Houston [1st Dist.] 1993, no

writ). Notwithstanding the case authority cited above, the author believes it is advisable to serve a notice of foreclosure sale on a guarantor in the same fashion as the notice is served on the debtor(s) who, according to the records of the mortgage servicer, is/are obligated to pay the debt. Service of the notice of sale is complete when deposited in the United States mail, postage prepaid, certified mail, and addressed to each debtor at the debtor's last known address. Tex. Prop. Code Ann. § 51.002(e) (Vernon Supp. 2009). For property other than a debtor's residence, 'debtor's last known address' means the debtor's last known address as shown by the records of the mortgage servicer unless the debtor provided the current mortgage servicer a written change of address before the date the mortgage servicer mailed the notice of foreclosure sale. Tex. Prop. Code Ann. § 51.0001(2) (Vernon Supp. 2009). A debtor is obligated to inform the mortgage servicer in a reasonable manner of any change of the debtor's address. Tex. Prop. Code Ann. § 51.0021 (Vernon 2007). The affidavit of a person knowledgeable of the facts to the effect that service was completed is prima facie evidence of service. Tex. Prop. Code Ann. § 51.002(e) (Vernon Supp. 2009). A sample form of affidavit regarding mailing is attached to this article as Appendix E. If properly mailed, the fact that a debtor did not actually receive notice does not render the notice of sale invalid. If not properly mailed, actual notice may be sufficient if timely received. See Forestier v. San Antonio Sav. Ass'n, 564 S.W.2d 160 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.); cf. Mitchell v. Texas Commerce Bank-Irving, 680 S.W.2d 681 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.). Although notice of sale is not statutorily required to be served on any non-debtor, similar to the discussion in article V.C.2 above concerning the benefits of a pre-foreclosure title review, the creditor may benefit from service of the notice of sale on other interested parties (for example, subsequent owners and subordinate lienholders). If the mortgage servicer's records indicate husband and wife debtors have the same residence, a single letter to both spouses is sufficient. Martinez v. Beasley, 616 S.W.2d 689 (Tex.Civ. App.—Corpus Christi 1981, no writ).

b. IRS

As discussed in article V.C.3.a above, if a creditor's pre-foreclosure investigation reveals that a federal tax lien has been filed against the property more than 30 days before the proposed sale, then notice of sale should also be served (by registered or certified mail or by personal service) on the District Director of the Internal Revenue Service where the property is located not less than 25 days before the anticipated foreclosure date. 26 U.S.C. § 7425 (2002). If notice to the IRS is required and not given, the foreclosure sale is not rendered void, but the tax lien survives the foreclosure sale. Id. If the notice is properly given, the IRS has the right to redeem the property from the purchaser at the foreclosure sale for 120 days after the date of the foreclosure. Id. One way to avoid this 120-day redemption period would be to obtain, before foreclosure, formal consent from the IRS to the sale of the property free of the federal tax lien (essentially, requiring an acknowledgment from the IRS that there is no equity in the property in excess of the debt secured by the lien that is being foreclosed on). Id. The practical problem in this approach is that it often takes more than 120 days to obtain that formal acknowledgment from the IRS. A sample form of notice of sale letter to be sent to the IRS is attached to this article as Appendix F.

C. Form and Contents of Notice of Sale

The notice of sale should, at a minimum, contain the following: (1) a description of the security instrument, including recording information, the matured debt and the property to be sold at foreclosure, including any personal property in which a security interest is granted in the deed of trust; (2) a statement that a default under the secured debt exists; (3) a statement that the mortgage servicer has authorized the enforcement of the power of sale granted in the deed of trust; (4) a statement of the earliest time and date for, and the location of, the foreclosure sale; (5) the name and street address and signature of the trustee or substitute trustee; (6) a statement that the described property will be sold by public auction to the highest bidder for cash; (7) for any security instrument that also constitutes a security agreement, a statement that, under the authority of Section 9.604(a) of the Texas Business and Commerce Code, the foreclosure sale will cover both real property and personal property in which a security interest is granted under the security instrument; and (8) if the security instrument is being serviced by a mortgage servicer, disclosure of the existence of a servicing agreement between the mortgagee and the mortgage servicer, the name of the mortgagee, and either the address of the mortgagee or the address of the mortgage servicer if there is a servicing agreement for the security instrument. A sample form of such a

notice of foreclosure sale is attached to this article as Appendix G.

VIII. FORECLOSURE SALE

A. Conducting the Foreclosure Sale

TPC § 51.002(a) includes requirements for conducting a foreclosure sale. Also, a trustee or substitute trustee may set reasonable conditions for conducting a nonjudicial foreclosure sale if the conditions are announced before bidding is opened for the first sale of the day held by the trustee or substitute trustee. Tex. Prop. Code Ann. §§ 51.0075(a) (Vernon Supp. 2009). To conduct the foreclosure sale, the trustee or substitute trustee, on the first Tuesday of a month (even if a holiday, Koehler, 425 S.W.2d at 891 (noting that the sale of real property exercised under a regular power is equivalent to a court proceeding that, if occurring on a federal holiday, is void only if so provided by statute)), between 10:00 a.m. and 4:00 p.m. and at the time stated in the notice of sale or within three hours thereafter, TPC § 51.002(c), should read a copy of the notice of sale in the area designated by the commissioners court (or if none, the area designated in the notice of sale), open the bidding for the property and "strike off" the sale of the property to the highest bidder. The purchase price is due and payable without delay on acceptance of the bid by the trustee or substitute trustee or within such reasonable additional time as may be agreed upon by the high bidder and the trustee or substitute trustee if the high bidder makes such request for additional time. Tex. Prop. Code Ann. § 51.0075(f) (Vernon Supp. 2009). If the foreclosure sale is adjourned to allow the high bidder a reasonable time to obtain the cash sum, then the trustee or substitute trustee should announce to all prospective purchasers the time that the foreclosure sale will reconvene so that, if the high bidder is not able to obtain the cash before the reasonable time period expires, the other potential purchasers can again have an opportunity to bid for the property. See Mitchell, 680 S.W.2d at 683. Although there is little guidance as to what period of time is "reasonable" for the high bidder to obtain the cash sum, it appears that all of the facts and circumstances surrounding the foreclosure sale will be considered, including the recognition that the foreclosure sale must occur before 4:00 o'clock p.m. (See Sharp, 359 S.W.2d at 902).

As an aside, the author was sued in federal court many years ago in his capacity as substitute trustee by a bidder who had entered the highest bid initially, but who arrived back at the courthouse with his cash purchase price well after the sale was reconvened by the author (because of this bidder's failure to return with cash by the designated time) and concluded shortly before 4:00 p.m. The sole issue in the case was whether a nonjudicial real property foreclosure sale must be concluded by 4:00 p.m. on the first Tuesday (which is the belief that the author held when he refused to allow the late-arriving bidder to have the foreclosure deed for the property). For reasons seemingly unrelated to the author's credibility on the witness stand, the author prevailed in the case because the federal district court judge who rendered the opinion concluded, rightly in the author's estimation, that a nonjudicial real property foreclosure sale must be concluded by 4:00 p.m. In addition to interrupting the foreclosure sale to allow the high bidder to obtain cash, a trustee or substitute trustee may temporarily halt the foreclosure sale at any time; provided, however, that, if the sale is to be properly conducted thereafter pursuant to the existing notice of sale, then the time that the foreclosure sale will reconvene should be announced to all prospective purchasers, and the sale must be conducted within the permitted times. Obviously, the notice of sale requirements can again be satisfied (or, as it is said, the creditor can simply "re-post") for a foreclosure sale on a future date.

B. Permitted Bidders

A beneficiary under the deed of trust may bid and purchase the property at foreclosure, even if that party is also the trustee, provided there is no unfairness or fraud in the transaction. Tarrant, 390 S.W.2d at 476. Notwithstanding the usual cash requirement, a creditor, as purchaser at foreclosure, may simply apply the purchase price as a credit against the debtor's secured debt. Thomason v. Pac. Mut. Life Ins. Co., 74 S.W.2d 162 (Tex Civ. App.—El Paso 1934, writ ref'd). A trustee who is not also the creditor cannot bid on its own behalf, but can bid for disinterested parties. Casa Monte Co. v. Ward, 342 S.W.2d 812 (Tex. Civ. App.—Austin 1961, no writ); Thornton v. Goodman, 216 S.W. 147 (Tex. Comm'n App. 1919, judgm't adopted).

C. Adequacy of Bid Price

In Texas, the general rule is that the inadequacy of the bid price alone does not render a real property foreclosure sale invalid. Am. Sav. & Loan Ass'n v.

Musick, 531 S.W.2d 581 (Tex. 1975). However, courts may set aside foreclosure sales if an inadequate purchase price is obtained at a foreclosure sale that might be defective in other ways (see discussion of remedies for wrongful foreclosure in article XI below).

From 1980 through 1994, Texas lenders were required to consider the effect of Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980) in formulating real property foreclosure bid prices, especially if the lender believed that there was a likelihood that the debtor would file bankruptcy within one year after the foreclosure sale. In Durrett, the Fifth Circuit for the first time held that a regularly conducted foreclosure sale otherwise valid under state law could be set aside as a fraudulent transfer under applicable bankruptcy law if an insufficient percentage of the then fair market value of the property was bid at foreclosure. Many Texas lenders construed *dicta* in the Durrett case as requiring a successful foreclosure bid of at least 70% of the then fair market value of the collateral property. In BFP v. Resolution Trust Corp., 114 S.Ct. 1757 (1994), the United States Supreme Court, in effect, overruled the Durrett case by holding that a fair and proper price, or a "reasonably equivalent value" under § 548 of the Bankruptcy Code (11 U.S.C. § 548) for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of a state's foreclosure law have been complied with. Accordingly, the so-called "Durrett rule" (minimum bid of 70% of fair market valued required) is no longer in effect. As a result of BFP, the price in fact received at a regularly conducted foreclosure sale in compliance with the requirements of Texas law will be deemed to be the "reasonably equivalent value" under § 548 of the Bankruptcy Code for the foreclosed property. The holding in BFP is consistent with the Uniform Fraudulent Transfer Act enacted in Texas that provides that a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale. Tex. Bus. & Com. Code Ann. § 24.004(b) (Vernon 2009).

Of particular note in this area of the law is the recent ruling in Villarreal v. Showalter (In re Villarreal), 413 B.R. 633 (S.D. Tex., 2009), which held, in a Chapter 13 adversary proceeding, that a properly conducted foreclosure sale was nevertheless a preferential transfer because the lienholder received dramatically more than it would have received in a hypothetical Chapter 7 liquidation. After concluding that BFP did not apply in this case --- because the BFP court was considering whether a mortgage foreclosure sale that produced less than fair market value was a fraudulent conveyance under § 548 of the Bankruptcy Code, not a challenge under § 547(b)(5) of the Bankruptcy Code (11 U.S.C. § 547(b)(5)) --- the court undertook its own comparison of the net value for the property obtained by the lienholder at foreclosure (found to be at least $3,250,000) and the amount the lienholder would have received in a hypothetical Chapter 7 liquidation (found to be approximately $100,000) and avoided the sale as a preferential transfer under § 547(b)(5). The court refused to follow other bankruptcy court decisions that had applied the holding in BFP in cases where the challenges were asserted under § 547, claiming that the plain language of § 547(b)(5) did not allow comparison of values at the moment of the foreclosure (which is the very comparison that the BFP court made to determine 'reasonably equivalent value' under § 548 of the Bankruptcy Code).

D. Duties Owed to Debtor

Texas courts have held that there is: (1) no general duty of good faith owed by a creditor to a debtor or a guarantor, FDIC v. Coleman, 795 S.W.2d 706 (Tex. 1990); (2) no duty owed to the debtor to use reasonable efforts in obtaining bids, Waite v. BancTexas-Houston, Nat'l Ass'n, 792 S.W.2d 538 (Tex. App.—Houston [1st Dist.] 1990, no writ); (3) no duty on the part of the creditor to mitigate damages, Cocke v. Meridian Sav. Ass'n, 778 S.W.2d 516 (Tex. App.—Corpus Christi 1989, no writ); (4) no duty to produce the highest possible price, Pentad Joint Venture v. First Nat'l Bank of La Grange, 797 S.W.2d 92 (Tex. App.—Austin 1990, writ denied); and (5) no "special trust" or fiduciary relationship between a debtor and a creditor, Greater Sw. Office Park, Ltd. v. Texas Commerce Bank Nat'l Ass'n, 786 S.W.2d 386 (Tex. App.—Houston [1st Dist.] 1990, writ denied). However, this does not excuse the creditor from its obligations to provide for an orderly disposition of the property and to not take affirmative acts that would "chill" bidding at a foreclosure sale. Charter Nat'l Bank-Houston v. Stevens, 781 S.W.2d 368 (Tex. App.—Houston [14th Dist.] 1989, writ denied). Texas law recognizes that a mortgagee is under a duty to avoid affirmatively deterring third-party bids by acts or statements made before or during the foreclosure sale, but is under no duty to take affirmative action, beyond that required by statute or deed of trust, to secure a fair sale. Sanders v. Shelton, 970 S.W.2d 721 (Tex. App.—Austin 1998,

pet. denied). The trustee owes no duty to the borrower or to third parties to provide the payoff amount of the underlying obligation. Id. With respect to actually conducting the sale, the trustee is charged only with following the provisions of the deed of trust and the governing statutes, including TPC §51.002. Id.

IX. POST-SALE MATTERS

A. Trustee's Deed

As soon as possible after the foreclosure sale, the trustee or substitute trustee should deliver a deed to the purchaser (if a bankruptcy proceeding involving the debtor is filed after the foreclosure sale but before recordation of the trustee's deed, then the automatic stay may prevent recordation of the trustee's deed). The trustee's deed conveys whatever interest the debtor held (or is deemed to have held by operation of "after-acquired property" principles) in the property sold at the foreclosure sale at the time the deed of trust was executed. A purchaser at a foreclosure sale acquires the foreclosed property "as is" without any expressed or implied warranties, except as to warranties of title, and at the purchaser's own risk. Tex. Prop. Code Ann. § 51.009(1) (Vernon 2007). A sample form of foreclosure sale deed (with affidavit) is attached to this article as Appendix H. The recitals in a trustee's deed are prima facie evidence of the validity of the foreclosure sale, including evidence of timely service of notice on the debtor. Deposit Ins. Bridge Bank, Nat'l Ass'n, Dallas v. McQueen, 804 S.W.2d 264 (Tex. App.—Houston [1st Dist.] 1991, no writ).

A brief mention of an emerging practice in Texas (and, presumably, elsewhere) of lienholders directing trustee's deeds to be issued directly to affiliated entities, especially in cases where the collateral has, or may have, environmental problems. Back in the day, it was not uncommon for a lender holding a loan secured by one or more pieces of Texas real estate that have varying degrees of environmental problems to transfer the loan and liens in advance of the foreclosure sale(s) to a special purpose affiliate in order to isolate potential liability for environmental remediation in that affiliate (see article V.F for a discussion of a lienholder's environmental concerns). The transfer of the loan and liens meant that the affiliate became the insured under the mortgagee policy(ies) insuring the transferred liens. As more and more loans secured by real estate collateral in multiple jurisdictions (e.g., CMBS loans; portfolio loans) go into default, portfolio lenders and CMBS special servicers still want the lienholder not to appear in the chain of title to contaminated or potentially contaminated property, but are less inclined to assign the loan(s) --- for a variety of tax, accounting, and deal structure considerations. Portfolio lenders and CMBS special servicers also may want to use a special purpose affiliate to insulate the lienholder from non-environmental liability, and not expose other assets of the lienholder to claims related to ownership of foreclosed property. As a result, some such lenders and special servicers have begun to assign the right to their successful credit bids and to the trustee's deeds to which they would otherwise be entitled as the high bidder to special purpose affiliates. If you are representing the lender or special servicer in such a case, you should determine that the deed of trust either expressly authorizes, or at least does not prohibit, the direction by the lienholder of delivery of the trustee's deed directly to its designated affiliate. A written assignment of the lienholder's rights in the successful credit bid and the right to receive the trustee's deed signed by the lienholder is recommended so that inquiring trustees and title companies can see the basis upon which the trustee's deed was delivered to a party other than the foreclosing lienholder. As discussed in article XI.C below, this emerging practice shouldn't result in the loss of continuing title insurance coverage for the affiliate grantee under the trustee's deed --- as long as that grantee is a parent or wholly-owned subsidiary of the lienholder.

B. Distribution of Sale Proceeds

If proceeds of the foreclosure sale remain after the secured debt is extinguished, then the trustee or substitute trustee is to distribute the excess proceeds to all junior lienholders in the order of their seniority. If proceeds still remain after all subordinate liens have been extinguished, the excess should be distributed to the debtor, unless the foreclosure involves a wraparound mortgage (as discussed in article V.E.2 above), when excess proceeds should be applied to the prior debt before being distributed to the debtor. Summers, 783 S.W.2d at 582-3 (concerning a wraparound mortgage); see Lee, 783 S.W.2d at 588 (concerning a wraparound mortgage); Canfield v. Foxworth-Galbraith Lumber Co., 545 S.W.2d 583 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). Because there is often confusion and dispute as to the priority of claims to the proceeds, trustees and substitute trustees often interplead the funds so that a

court can determine the respective rights of all claimants.

C. Title Insurance Protection

The 1992 Texas mortgagee policy and the 2008 Texas loan policy each afford continuing title insurance coverage to an insured lienholder that acquires title to the encumbered property through foreclosure or a conveyance in lieu of foreclosure. With the expanded definition of 'Insured' in the 2008 Texas loan policy, even more more entity transactions are included in the continuation of coverage following a foreclosure sale or conveyance in lieu of foreclosure, but both the 2008 Texas loan policy and the 1992 Texas mortgagee policy continue in favor of a parent or wholly-owned subsidiary of the lienholder. The author has confirmed with two major title insurance underwriters recently --- as the practice of the foreclosing lienholder directing issuance of the trustee's deed directly to a wholly-owned subsidiary has emerged as described in article IX.A above --- that coverage continues in favor of such a wholly-owned subsidiary under both the 2008 Texas loan policy and the 1992 Texas mortgagee policy. It is important to remember that the coverage of the mortgagee policy continues in force as of the date the mortgagee policy was issued, and that the coverage is not "downdated" to the date that the lienholder acquires title to the encumbered property (see, however, the discussion of the Limited Pre-Foreclosure Policy and Endorsement in article V.C.5 above and in the next paragraph). Also, the mortgagee policy does not, as some believe, truly "convert" into an owner policy, but merely protects title from defects that would have otherwise affected the insured lien and constituted a valid claim under the existing mortgagee policy. The amount of insurance coverage in effect after the lienholder or other party afforded coverage acquires title to the encumbered property under the 1992 Texas mortgage policy is the least of (i) the amount of insurance stated in Schedule A or (ii) the balance of the indebtedness secured by the insured deed of trust as of the date of policy, plus interest and expenses of foreclosure. The amount of insurance coverage in effect after the lienholder or other party afforded coverage acquires title to the encumbered property under the 2008 Texas loan policy is the least of (i) the Amount of Insurance, (ii) the Indebtedness, or (iii) the difference between the value of the Title as insured and the value of the Title subject to the insured risk.

The Limited Pre-Foreclosure Policy discussed in article V.C.5 above will also afford continuing coverage to the insured after foreclosure or deed in lieu of foreclosure. The amount of insurance available in such a case is limited to the least of: (i) the amount of the Limited Pre-Foreclosure Policy, (ii) the unpaid principal secured by the Foreclosing Mortgage at the time of any covered loss, plus interest, or (iii) the difference between the value of the land encumbered by the Foreclosing Mortgage without and with the defect.

X. EFFECT OF FORECLOSURE

A. Debtor

1. No Right of Redemption

Although the debtor has the right to prevent the foreclosure sale from taking place by paying off the secured debt before the sale is conducted, Mills v. Moore, 5 S.W.2d 263 (Tex. Civ. App.—Dallas 1928, no writ), the debtor has no right under Texas law to redeem the property after a valid foreclosure sale is consummated. See Thornton, 216 S.W. at 148.

2. Texas Property Code §§ 51.003 and 51.005

TPC §§ 51.003 and 51.005 were signed into law on April 1, 1991 and afforded new protections to debtors sued for a deficiency after foreclosure. First, any action brought by a lender to recover the deficiency must be brought within two years after the foreclosure sale. Second, the debtor/defendant may request that the court determine the fair market value of the real property as of the date of the foreclosure sale. Third, the fair market value shall be determined by the finder of fact and that "competent evidence of value" includes (a) expert opinion testimony; (b) comparable sales; (c) anticipated marketing time and holding costs; (d) cost of sales; and (e) the necessity and amount of any discount to be applied to the future sales price or the cash flow generated by the real property to arrive at the current fair market value. If the court determines that the fair market value is greater than the foreclosure sales price, then the borrower is entitled to an offset against the deficiency equal to the amount by which the court's determination of fair market value exceeds the foreclosure sales price. If no party requests a determination of the fair market value, then the sale price at the foreclosure sale will be used to compute the deficiency. Finally, to protect a debtor from

"double liability," this section provides that a creditor may not make a claim against a debtor for any amount that the creditor has received from a private mortgage insurance company pursuant to a policy covering the real property that has been sold at foreclosure. Lenders believe that the term "offset" used in TPC § 51.003 (and in TPC § 51.005) is intended to mean that an obligor against whom a deficiency is sought may not obtain an affirmative recovery from a lender in a deficiency suit---even if the finder of fact determines that the fair market value of the foreclosed property as of the date of the foreclosure sale exceeded the debt secured by the foreclosed property.

TPC § 51.003 has survived a constitutional challenge that it violated the contract clause of the Texas Constitution. Lester v. First Am. Bank, 866 S.W.2d 361 (Tex. App.—Waco 1993, writ denied). In Lester, the court based its holding on three U.S. Supreme Court cases interpreting the contract clause of the U.S. Constitution as allowing legislatures to enact measures to assure that lenders don't realize more than borrowers are obligated to pay under contract (i.e., unjust enrichment from underbidding at foreclosure and collecting on resulting deficiency). Id. at 367.

In the context of a nonjudicial foreclosure sale, TPC § 51.005 applies when a deficiency is sought against a guarantor after the real estate collateral has been sold pursuant to a nonjudicial foreclosure sale in partial satisfaction of a judgment against the guarantor. The guarantor may bring an action in the district court in the county in which the real property is located for a determination of the fair market value of the real property as of the date of the foreclosure sale. The suit must be brought within 90 days after the foreclosure sale or the date the guarantor receives actual notice of the foreclosure sale, whichever is later. Otherwise, the provisions of this section are virtually identical to the provisions of TPC § 51.003.

For more than 10 years after TPC §§ 51.003 and 51.005 went into effect, it was uncertain whether waivers of these sections, which waivers were commonly included by lenders in their commercial loan documents, were enforceable. Then two cases were decided that did away with the uncertainty --- such waivers are enforceable, especially if these sections are expressly mentioned and waived in the documents. First, the United States Court of Appeals for the Fifth Circuit decided in LaSalle Bank Nat'l Ass'n v. Sleutel, 289 F.3d 837 (5th Cir. 2002) that a waiver of a general right of offset by a guarantor was sufficient to waive the benefits of TPC § 51.003. Then, the case of Segal v. Emmes Capital, L.L.C., 155 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2004, pet dism'd) held that a specific waiver of TPC §§ 51.003 and 51.005 by a guarantor in its guaranty was also enforceable.

B. Creditor

The creditor's deed of trust lien against the property sold at foreclosure is extinguished at the time of the sale. See Alkas v. United Sav. Ass'n of Texas, Inc., 672 S.W.2d 852 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.). One established exception to this general rule would be if the deed of trust expressly permits the creditor to foreclose only with respect to the matured portion of the secured debt and sell the property subject to the unmatured portion of the secured debt, in which event the creditor will maintain a lien against the property. See Borah v. Young, 129 S.W.2d 782 (Tex. Civ. App.—San Antonio 1939, writ ref'd); Motor & Indus. Fin. Corp., 302 S.W.2d at 395.

C. Subordinate Lienholders

Subordinate lienholders have no right of redemption for the property sold at foreclosure sale, and their liens, to the extent not satisfied from excess proceeds of the foreclosure sale, are, except to the extent of removables secured by valid mechanic's liens (see the discussion in article V.C.1 above), extinguished. Mortgage & Trust, Inc. v. Bonner & Co., 572 S.W.2d 344 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

D. Tenants

Leases of which the creditor has actual or constructive notice (for example, if the tenant has taken possession of all or part of the encumbered property, see generally Texas Life Ins. Co. v. Texas Bldg. Co., 307 S.W.2d 149 (Tex. Civ. App.—Fort Worth 1957, no writ), or has filed a memorandum of lease in the appropriate real property records) before the creation of the deed of trust lien, and that have not been subordinated to that lien, remain in full force and effect after foreclosure, and any purchaser at foreclosure takes the property subject to those leases. Tex. Prop. Code Ann. §§ 13.001-.002 (Vernon 2004); F. Groos & Co. v. Chittum, 100 S.W. 1006 (San Antonio 1907, no writ). Subordinate leases (i.e., leases of which the creditor

has no notice before the creation of the deed of trust lien, or that have been subordinated to that lien), like any other interest subordinate to the mortgage being foreclosed, are extinguished/terminated by the foreclosure, Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc., 938 S.W.2d 102 (Tex. App–Houston [14th Dist.] 1996, no writ); ICM Mortgage Corp. v. Jacob, 902 S.W.2d 527 (Tex. App.—El Paso 1994, writ denied) (distinguishing and clarifying United Gen. Ins. Agency of Midland, Inc. v. Am. Nat'l Ins. Co., 740 S.W.2d 885 (Tex. App. —El Paso 1987, no writ), which held that a subordinate lease was not terminated by foreclosure, and that the foreclosure purchaser could either terminate the lease or continue it in effect with the tenant's consent (which consent could be implied by the parties' conduct)). In Jacob, the court explained that, while the foreclosure terminated the subordinate lease, it did not preclude the post-foreclosure formation of a new landlord-tenant relationship between the foreclosure purchaser and the tenant. Id. at 532-3. If a purchaser of a building at a foreclosure sale chooses not to continue the subordinate lease of a residential tenant who is not in default after foreclosure, the purchaser must give the residential tenant at least 30 days' written notice to vacate before being entitled to file a forcible detainer action to evict the tenant. Tex. Prop. Code Ann. § 24.005(b) (Vernon Supp. 2009).

A brief mention of a federal law that went into effect on May 20, 2009 and that will expire on December 31, 2012. The Protecting Tenants at Foreclosure Act of 2009 (Title VII of the Helping Families Save Their Homes Act of 2009), a copy of which is attached as **Error! Reference source not found.**, provides that, with respect to foreclosures of any 'federally related mortgage loan' or on any dwelling or residential real property, 'any immediate successor in interest' (e.g., a bank foreclosing against a house) takes the property subject to the rights of any 'bona fide tenant' and must comply with certain notice requirements, including a 90-day notice to vacate. Additionally, bona fide tenants must be permitted to stay in the residence until the end of their lease except (i) when the residence is sold after foreclosure to a purchaser who will occupy it as a primary residence or (ii) when there is no lease or the lease is terminable at will under state law; however, even when these exceptions apply, bona fide tenants must still receive 90 days notice before they may be evicted.

XI. REMEDIES FOR WRONGFUL FORECLOSURE

A. Rescission

1. Equitable Remedy

If the foreclosure process was defective, the debtor may attempt to rescind the foreclosure sale and cancel the trustee's deed. Because this is an equitable remedy, the debtor must first "do equity" -- that is, the debtor must, at a minimum, either pay off the secured debt or reimburse the bid price paid for the property by the purchaser at foreclosure. See Grella v. Berry, 647 S.W.2d 15 (Tex. App.—Houston [1st Dist.] 1982, no writ). The payment by the debtor must be made in currently available funds. Fillion v. David Silvers Co., 709 S.W.2d 240 (Tex. App.—Houston [14th Dist] 1986, writ ref'd n.r.e.).

2. Inability to Exercise

Obviously, the debtor's right of rescission is not often exercised because, as a practical matter, if the debtor had sufficient funds to pay off the secured debt, then the debtor could have prevented the foreclosure sale simply by making full payment to the creditor before the sale was conducted.

a. Statute of Limitations

The debtor must bring its action for rescission within four years after the foreclosure sale in order to be able to rescind the voidable trustee's deed. Tex. Civ. Prac. & Rem. Code Ann. § 16.051 (Vernon 2008).

b. Subsequent Good Faith Purchaser

A good faith purchaser for value acquiring property after the foreclosure sale takes title free of unknown foreclosure defects. Phillips v. Latham, 523 S.W.2d 19 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); Slaughter v. Qualls, 149 S.W.2d 651 (Tex. Civ. App.—Amarillo 1941), aff'd, 162 S.W.2d 671 (Tex 1942). This protection is not available for the purchaser at a foreclosure sale (which purchaser bids on the property at its own risk). Henke v. First S. Prop., Inc., 586 S.W.2d 617 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.). However, any sale to a subsequent purchaser with notice of a foreclosure irregularity is void, See White v. Lakewood Bank & Trust Co., 438 S.W.2d 129 (Tex. Civ. App.—Dallas 1969, no writ), even if that purchaser acquired the property from a good faith

subsequent purchaser whose title was free of unknown foreclosure defects. Slaughter, 149 S.W.2d at 657.

c. Compulsory Counterclaim

Failure of the debtor to properly counterclaim for wrongful foreclosure in any deficiency suit brought by the creditor against the debtor (a "compulsory counterclaim" under Texas Rule of Civil Procedure 97(a)) will bar the debtor's subsequent attempts to assert that claim. Tex. R. Civ. P. 97(a).

B. Damages

1. Nature of Remedy

As an alternative to suit for rescission, the debtor may sue the creditor for damages resulting from a wrongful foreclosure in an amount up to the excess of the fair market value of the property over the secured debt at the time of the foreclosure sale. Farrell v. Hunt, 714 S.W.2d 298 (Tex. 1986); Charter, 781 S.W.2d at 374. If the secured debt is in excess of the fair market value of the property at the time of the foreclosure sale, then the debtor is entitled to receive a credit against the secured debt in the amount of the fair market value, rather than just the bid price. Maupin v. Chaney, 163 S.W.2d 380 (Tex. 1942). The debtor may also be entitled to receive exemplary damages to the extent they bear a reasonable relationship to the debtor's actual damages. See Nolan v. Bettis, 577 S.W.2d 551 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

2. Statute of Limitations

The statute of limitations applicable to an action for damages for wrongful foreclosure is four years. See Gonzales v. Lockwood Lumber Co., 668 S.W.2d 813 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

3. Causal Relationship

Although the damage remedy may be more attractive to a debtor than recision because the debtor will not be required to "do equity" (as discussed in article X.A.1 above), the burden of establishing a right to receive damages is more difficult than establishing a right to rescission in that, unlike an action for rescission, the debtor must prove that the debtor's damages resulted from the foreclosure defects. Univ. Sav. Ass'n v. Springswood Shopping Ctr., 644 S.W.2d 705 (Tex. 1982); See Am. Sav. & Loan, 531 S.W.2d at 587. As a result, if the debtor cannot establish a causal link between the foreclosure defects and the debtor's alleged damages, then the debtor's only available remedy would appear to be rescission. Because the debtor's suit for damages for wrongful foreclosure precludes the bringing of a later action for rescission, the debtor must choose its remedies wisely, or risk losing any meaningful remedy that it may have.

C. Trespass to Try Title

If the foreclosure defect is of such a degree so as to render the trustee's deed void (for example, failure to comply with the deed of trust provisions governing the power of sale), the debtor may bring an action in trespass to try title at any time before limitations title (that is, title by adverse possession) has matured in the purchaser at foreclosure. Tex Civ. Prac. & Rem. Code Ann. §§ 16.021-.037 (Vernon 2002 & Supp. 2009); Slaughter v. Qualls, 162 S.W.2d 671 (Tex. 1942); Phillips, 523 S.W.2d at 24 (no default had occurred). The two general statutory provisions enabling a purchaser at foreclosure to acquire limitations title are (a) Texas Civil Practice and Remedies Code § 16.025 (providing a five year limitations period if the possessor of the property has paid taxes and claims the property under a duly recorded deed), Tex. Civ. Prac. & Rem. Code Ann. § 16.025 (Vernon 2002), and (b) Texas Civil Practice and Remedies Code § 16.026 (requiring continuous, adverse possession for ten years). Tex. Civ. Prac. & Rem. Code Ann. § 16.026 (Vernon 2002).

D. Deceptive Trade Practices Act

Although the debtor may have a separate action against the creditor under the Deceptive Trade Practices Act (the "DTPA"), as long as the creditor had the right under the lien documents to commence foreclosure proceedings, no DTPA violation occurs solely because of the creditor's commencement of foreclosure proceedings. Ogden v. Dickinson State Bank, 662 S.W.2d 330 (Tex. 1983) (considering the foreclosure of a contractual lien assigned to the creditor by a contractor that later breached its home construction obligations). TPC § 51.009(2), effective January 1, 2004, provides that a purchaser at a nonjudicial foreclosure sale is not a consumer. Tex. Prop. Code Ann. § 51.009(2) (Vernon 2007). However, there is authority for finding a DTPA violation in connection with a void foreclosure sale. See Diversified, Inc. v.

Gibraltar Sav. Ass'n, 762 S.W.2d 620 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

E. Standing

As a general rule, only the debtor and those parties whose property interests or rights are affected by a foreclosure sale (for example, subordinate lienholders) have standing to bring suit attacking a foreclosure sale. Goswami v. Metro. Sav. and Loan Ass'n, 751 S.W.2d 487 (Tex. 1988).

APPENDIX A

DEMAND FOR PAYMENT AND NOTICE OF INTENT TO ACCELERATE

[date]

[Grantor]
_____
_____

CERTIFIED MAIL # _____
RETURN RECEIPT REQUESTED
AND FIRST CLASS MAIL

[General Partner(s)
of Grantor]
_____
_____

CERTIFIED MAIL #_____
RETURN RECEIPT REQUESTED
AND FIRST CLASS MAIL

[Guarantor(s)]
_____
_____

CERTIFIED MAIL #_____
RETURN RECEIPT REQUESTED
AND FIRST CLASS MAIL

[Assumptor(s) of Note]
_____
_____

CERTIFIED MAIL #_____
RETURN RECEIPT REQUESTED
AND FIRST CLASS MAIL

Re: DEMAND FOR PAYMENT AND NOTICE OF INTENT TO ACCELERATE regarding the following instruments, among others (collectively, the "Loan Documents"):

Deed of Trust [use exact title] ("Deed of Trust"):

Dated:	_____, _____
Grantor:	_____[, a _____]
Trustee:	_____
Lender:	_____[, a _____]
Recorded in:	Volume _____, Page _____, of the Real Property Records of _____ County, Texas
Secures:	Promissory note [use exact title] ("Note") in the original principal amount of $_____, executed by [Grantor] and payable to the order of Lender [, and all other indebtedness of [Grantor] to Lender]
[Modifications and Renewals:	[describe at least most recent document, using exact title(s)] (as used herein, the terms "Note" and "Deed of Trust" mean the Note and Deed of Trust as so modified, renewed and/or extended)]

[Assignment: The Note [and][,] the liens and security interests of the Deed of Trust [, and the Guaranty] were transferred and assigned to _____ ("Beneficiary") by an instrument dated _____, recorded in Volume _____, Page ____, of the Real Property Records of _____ County, Texas]

[Guaranty: The Note [and all other indebtedness of [Grantor] to Lender] is guaranteed by a guaranty [use exact title] dated _____, and executed by _____ in favor of Lender]

Dear _____:

This letter is written at the request and on behalf of our client, [Lender/Beneficiary]. According to the records of [Lender/Beneficiary], [Grantor] is in default under the terms of the Deed of Trust and the indebtedness secured thereby (the "Indebtedness") in that [Grantor] has failed to _____. [Lender/Beneficiary] has advised us that as of the date hereof, the following amounts are due and payable with respect to the Indebtedness: _____. Grantor and any other party obligated on the Note are given notice that Grantor's failure to pay the amounts due constitutes a monetary default under the terms of the Note and the Deed of Trust. Demand is hereby made for payment in full of the past due amounts, together with all lawful accrued and unpaid interest due until the date of payment, on or before _____ __.m. on _____, _____ [at least 20 days from the date of this letter for residential property that is the debtor's residence] by cashier's check at the offices of [Lender/Beneficiary], Attention: _____.

If payment of all amounts that are then currently due and owing under the Note are not received by [Lender/Beneficiary] by the time and date stated above, [Lender/Beneficiary] will accelerate the Indebtedness, and will:

(1) Enforce payment of the Note against Grantor and each other person or entity obligated therefor (except to the extent that the Note is non-recourse or any party's liability has been limited by contract);

(2) Commence nonjudicial proceedings to foreclose the liens and security interests existing under the Deed of Trust; foreclosure of such liens and security interests would be by a sale of the real property and personal property, if any, described in the Deed of Trust, pursuant to the power of sale existing under the Deed of Trust; [and]

[(3) Revoke Grantor's license to collect rent to the extent provided in the assignment of rents [use exact title] and applicable law, and demand that all such sums be paid directly to [Lender/Beneficiary] pursuant thereto; and]

[(4)] Exercise some or all of the other rights and remedies available to it under the Loan Documents, at law, or in equity.

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

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

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

You may contact _____ of [Lender/Beneficiary] at _____, regarding any questions that you may have, including the outstanding balance of the past due amounts on the Note as of any particular date. If you have any questions that you believe I can answer, you or, if you are represented by an attorney, your attorney may contact me at the above direct telephone number or address.

Very truly yours,

cc: [Lending Officer]
[Grantor's Counsel]
[General Partner's Counsel]
[Guarantor's Counsel]
[Assumptor's Counsel]

APPENDIX B

NOTICE OF ACCELERATION AND FORECLOSURE NOTICE LETTER

[date]

[Grantor]
_____
_____

CERTIFIED MAIL # _____
RETURN RECEIPT REQUESTED
AND FIRST CLASS MAIL

[General Partner(s)
of Grantor]
_____
_____

CERTIFIED MAIL #_____
RETURN RECEIPT REQUESTED
AND FIRST CLASS MAIL

[Guarantor(s)]
_____
_____

CERTIFIED MAIL #_____
RETURN RECEIPT REQUESTED
AND FIRST CLASS MAIL

[Assumptor(s) of Note]
_____
_____

CERTIFIED MAIL #_____
RETURN RECEIPT REQUESTED
AND FIRST CLASS MAIL

Re: NOTICE OF ACCELERATION AND FORECLOSURE SALE regarding the following instruments, among others (collectively, the "Loan Documents"):

Deed of Trust [use exact title] ("Deed of Trust"):

Dated:	_____, _____
Grantor:	_____[, a _____]
Trustee:	_____
Lender:	_____[, a _____]
Recorded in:	Volume _____, Page _____, of the Real Property Records of _____ County, Texas
Secures:	Promissory note [use exact title] ("Note") in the original principal amount of $_____, executed by [Grantor] and payable to the order of Lender [, and all other indebtedness of [Grantor] to Lender]
[Modifications and Renewals:	[describe at least most recent document, using exact title(s)] (as used herein, the terms "Note" and "Deed of

Trust" mean the Note and Deed of Trust as so modified, renewed and/or extended)]

[Assignment: The Note [and][,] the liens and security interests of the Deed of Trust [, and the Guaranty] were transferred and assigned to _____ ("Beneficiary") by an instrument dated _____, recorded in Volume _____, Page ____, of the Real Property Records of _____ County, Texas]

[Guaranty: The Note [and all other indebtedness of [Grantor] to Lender] is guaranteed by a guaranty [use exact title] dated _____, and executed by _____ in favor of Lender]

[Substitute] Trustee: _____

Dear _____:

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

According to the records of [Lender/Beneficiary], Grantor has not cured the Defaults. Therefore, [Lender/Beneficiary], by this letter, accelerates the maturity of the Indebtedness (including all unpaid principal of, and all lawful accrued and unpaid interest under, the Note), and declares the entire Indebtedness immediately due and payable. [Lender/Beneficiary] makes demand on Grantor, and on all persons and entities obligated on the Note (except to the extent that that obligation is expressly limited by written contract or applicable law), for payment in full of the entire Indebtedness. [Further, the license granted to Grantor under the terms of the assignment of rents [use exact title] to collect rents from the property covered by the Deed of Trust has been revoked, and all rents from such property received by Grantor should be immediately forwarded to [Lender/Beneficiary].]

[Lender/Beneficiary] has instructed [Substitute] Trustee to sell the Property (as defined in the Notice below) at a nonjudicial foreclosure sale ("Foreclosure Sale"). A copy of the Notice of Foreclosure Sale ("Notice") specifying the date, time, place and terms of the Foreclosure Sale is enclosed with this letter. If all amounts due and owing have not been paid [or if other arrangements satisfactory to [Lender/Beneficiary] have not then been made] by the Foreclosure Sale, [Substitute] Trustee will conduct the Foreclosure Sale on the date and at the time and place specified in the Notice, as authorized by and in accordance with the provisions of the Deed of Trust and applicable law.

If the proceeds of the Foreclosure Sale are insufficient to repay the Indebtedness, then, except to the extent that the Indebtedness is expressly non-recourse or any party's liability is expressly limited by written contract or applicable law, each person and entity obligated to repay the Indebtedness will be jointly and severally liable for the deficiency.

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

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

You may contact _____ of [Lender/Beneficiary] at _____ regarding any questions that you may have, including information on the amount due on the Note on a particular date. If you have any questions that you believe I can answer, you or, if you are represented by an attorney, your attorney may contact me at the above direct dial telephone number or address.

Very truly yours,

Enclosure: Notice of Foreclosure Sale

cc: [Lending Officer]
[Grantor's Counsel]
[General Partner's Counsel]
[Guarantor's Counsel]
[Assumptor's Counsel]

APPENDIX C

APPOINTMENT OF SUBSTITUTE TRUSTEE

STATE OF TEXAS §
§
COUNTY OF _____ §

APPOINTMENT OF SUBSTITUTE TRUSTEE

Date: _____, _____

Deed of Trust [use exact title] ("Deed of Trust"):

Dated:	_____, _____
Grantor:	_____[, a _____]
Trustee:	_____
Lender:	_____[, a _____]
Recorded in:	Volume _____, Page _____, of the Real Property Records of _____ County, Texas
Secures:	Promissory note [use exact title] ("Note") in the original principal amount of $_____, executed by [Grantor] and payable to the order of Lender [, and all other indebtedness of [Grantor] to Lender]
[Modifications and Renewals:	[describe at least most recent document, using exact title(s)] (as used herein, the terms "Note" and "Deed of Trust" mean the Note and Deed of Trust as so modified, renewed and/or extended)]
[Original] Property:	The real property [, improvements and personal property] described in the attached Exhibit A
[Released Property:	The real property described in the attached Exhibit B]
[Property:	The Original Property SAVE AND EXCEPT the Released Property]

[Assignment: The Note and the liens and security interests of the Deed of Trust were transferred and assigned to _____ ("Beneficiary") by an instrument dated _____, recorded in Volume _____, Page _____, of the Real Property Records of _____ County, Texas]

Substitute Trustee: _____

Substitute Trustee's Street Address: _____
_____
_____

[Lender/Beneficiary], the owner and holder of the indebtedness secured by the Deed of Trust, removes Trustee and any prior substitute trustees under the Deed of Trust, and appoints Substitute Trustee to act in the place and stead of Trustee and any prior substitute trustees in accordance with the terms of the Deed of Trust and applicable law. [Lender/Beneficiary] requests Substitute Trustee to sell the Property pursuant to the Deed of Trust and applicable law. [Lender/Beneficiary] ratifies any prior acts taken by Substitute Trustee in connection with the sale of the Property.

[Add signature for Lender/Beneficiary and acknowledgment]

AFTER RECORDING, RETURN TO:

_____
_____
_____

Exhibit A: [Original] Property Description
[Exhibit B: Released Property Description]

APPENDIX D

AFFIDAVIT OF FILING AND POSTING

STATE OF TEXAS §
§
COUNTY OF _____ §

AFFIDAVIT OF FILING AND POSTING

Date: _____, _____

Affiant: _____

Deed of Trust [use exact title] ("Deed of Trust"):

Dated:	_____, _____
Grantor:	_____[, a _____]
Trustee:	_____
Lender:	_____[, a _____]
Recorded in:	Volume _____, Page _____, of the Real Property Records of _____ County, Texas
Secures:	Promissory note [use exact title] ("Note") in the original principal amount of $_____, executed by [Grantor] and payable to the order of Lender [, and all other indebtedness of [Grantor] to Lender]
[Modifications and Renewals:	[describe at least most recent document, using exact title(s)] (as used herein, the terms "Note" and "Deed of Trust" mean the Note and Deed of Trust as so modified, renewed and/or extended)]
[Assignment:	The Note and the liens and security interests of the Deed of Trust were transferred and assigned to _____ ("Beneficiary") by an instrument dated _____, recorded in Volume _____, Page _____, of the Real Property Records of _____ County, Texas]
[Substitute Trustee:	_____]

Notice of Foreclosure Sale: The Notice of Foreclosure Sale filed with the County Clerk of _____ County, Texas, in compliance with Section 51.002 of the Texas Property Code and the Deed of Trust. A true and correct copy of the Notice of Foreclosure Sale is attached as Exhibit A.

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared Affiant, a person well known to me, who upon oath stated:

I am over the age of 18 years, have never been convicted of a felony or a crime of moral turpitude and have personal knowledge of the facts set forth herein. I am an agent of [Substitute] Trustee with respect to matters set forth herein. On _____, _____ I performed the following actions at the request of [Substitute] Trustee:

(a) Filed the Notice of Foreclosure Sale with the County Clerk of _____ County, Texas, at approximately ____.m.; and

(b) Posted a file-stamped signed original Notice of Foreclosure Sale at the courthouse door of the _____ County courthouse at approximately ____.m.

_____
_____, Affiant

SUBSCRIBED AND SWORN TO before me by _____, on _____, _____.

_____
Notary Public, State of Texas
Commission Expires: _____
Printed Name: _____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me by _____ on _____, _____.

_____
Notary Public, State of Texas
Commission Expires: _____
Printed Name: _____

Exhibit A: Notice of Foreclosure Sale

APPENDIX E

AFFIDAVIT OF MAILING

STATE OF TEXAS §
§
COUNTY OF _____ §

AFFIDAVIT OF MAILING

Date: _____, ____

Affiant: _____

Deed of Trust [use exact title] ("Deed of Trust"):

Dated: _____ ___, 20__

Grantor: _____[, a _____]

Trustee: _____

Lender: _____[, a _____]

Recorded in: Volume ____, Page ____, of the real property records of _____ County, Texas

Secures: Promissory note [use exact title] ("Note") in the original principal amount of $_____, executed by [Grantor] and payable to the order of Lender [, and all other indebtedness of [Grantor] to Lender]

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

[Assignment: The Note and the liens and security interests of the Deed of Trust were transferred and assigned to _____ ("Beneficiary") by an instrument dated _____, recorded in Volume ___, Page ___, of the real property records of _____ County, Texas]

[Substitute Trustee: _____]

Notice of Foreclosure Sale: The Notice of Foreclosure Sale filed with the County Clerk of _____ County, Texas, in compliance with Section 51.002 of the Texas Property Code and the Deed of Trust. A true and correct copy of the Notice of Foreclosure Sale is attached as Exhibit A.

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared Affiant, a person well known to me, who upon oath stated:

I am over the age of 18 years, have never been convicted of a felony or a crime of moral turpitude and have personal knowledge of the facts set forth herein. I am an agent of [Substitute] Trustee with respect to matters set forth herein. On _____, 20____ I performed the following actions at the request of [Substitute] Trustee:

Served or caused to be served a true and correct copy of the Notice of Foreclosure Sale on the following persons at the following addresses at approximately _____ __.m., by causing the Notice of Foreclosure Sale to be deposited in a wrapper, postage pre paid, certified mail, return receipt requested, in a post office or official depository under the care and custody of the U. S. Postal Service:

(i) _____
_____
_____

(ii) _____
_____
_____

(iii) _____
_____
_____

_____
_____, Affiant

SUBSCRIBED AND SWORN TO before me by _____ on _____, ____.

_____
Notary Public, State of Texas
Commission Expires: _____
Printed Name: _____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me by _____ on _____, 20___.

_____
Notary Public, State of Texas
Commission Expires: _____
Printed Name: _____

Exhibit A: Notice of Foreclosure Sale

APPENDIX F

NOTICE TO IRS OF PENDING SALE

[date]

[District Director
Internal Revenue Service
_____
_____
_____, ____ _____]
Attention: Chief, Special Procedures Staff

CERTIFIED MAIL #_____
RETURN RECEIPT REQUESTED
AND REGULAR MAIL
[AND HAND DELIVERY]

Re: Notice of Nonjudicial Sale of Property

Gentlemen:

This letter constitutes notice in accordance with Sections 7425(b) and (c) of the Internal Revenue Code and appropriate Regulations. The real property ("Property") described below will be posted for foreclosure in accordance with Section 51.002 of the Texas Property Code and [is] [may be] subject to a Notice of Federal Tax Lien ("Notice"). A copy of the Notice is attached as Exhibit A.

1. Information Submitted by: _____
_____
_____
_____

2. Information Submitted on Behalf of: _____ ("Bank"),
_____, Texas

3. IRS District: [Austin] [Houston] [Dallas], Texas

4. Taxpayer Name and Address: _____
_____
_____

5. Date of Filing of Notice: _____, _____

6. Place of Filing of Notice: County Clerk
_____ County Courthouse
_____, Texas

7. Property Location: [MUST INCLUDE STREET ADDRESS], _____, Texas, [described as Lot _____, Block _____, _____ addition, in the City of _____, _____ County, Texas, according to plat thereof recorded in Volume _____, Page _____, Deed and Plat Records of _____ County, Texas] [described in the attached Exhibit B]

8.	Date of Foreclosure:	_____, _____
9.	Time and Place of Foreclosure:	To begin at _____.m., or not later than three (3) hours after that time, at the [e.g., south steps of the Bexar] County Courthouse, _____, Texas (as designated by the _____ County Commissioners Court)
10.	Terms of Foreclosure:	The property will be sold to the highest bidder for cash.
11.	Abstract of Title:	[Not available/enclosed]
12.	Amount (Approximate) of Outstanding Principal with Accrued But Unpaid Interest:	$_____
13.	Estimated Additional Expenses:	$_____
[14.	Comments:	Bank believes the taxpayer has no equity in the Property.]

Pursuant to Internal Revenue Regulation Section 301.7425-3(d)(4), I hereby request that you inform me whether the notice of sale contained herein is in all respects adequate.

Please acknowledge your receipt of this Notice by marking the enclosed counterpart of this Notice and returning it to me in the enclosed stamped, pre-addressed envelope. If I have directed this Notice to the wrong person or wrong department at the Internal Revenue Service, please forward this Notice to the appropriate person or department. Please call me at the above telephone number if you have any questions.

Respectfully submitted,

[Name and capacity of signer]

RECEIVED this _____ day of _____, _____.

District Director's Office
_____ Division
Internal Revenue Service

By: _____
Title: _____

___/___/
Enclosure
cc: [CLIENT]

Exhibit A

[Attach a copy of Notice of Federal Tax Lien]

Exhibit B

[Legal Description of Property]

APPENDIX G

NOTICE OF FORECLOSURE SALE

STATE OF TEXAS §
§
COUNTY OF _____ §

NOTICE OF FORECLOSURE SALE

Date: _____, _____

Deed of Trust [use exact title] ("Deed of Trust"):

Dated:	_____, _____
Grantor:	_____[, a _____]
Trustee:	_____
Lender:	_____[, a _____]
Recorded in:	Volume _____, Page _____, of the Real Property Records of _____ County, Texas
Secures:	Promissory note [use exact title] ("Note") in the original principal amount of $_____, executed by [Grantor] and payable to the order of Lender [, and all other indebtedness of [Grantor] to Lender]
[Modifications and Renewals:	[describe at least most recent document, using exact title(s)] (as used herein, the terms "Note" and "Deed of Trust" mean the Note and Deed of Trust as so modified, renewed and/or extended)]
[Original] Property:	The real property [, improvements and personal property] described in the attached Exhibit A
[Released Property:	The real property described in the attached Exhibit B]
[Property:	The Original Property SAVE AND EXCEPT the Released Property]
[Assignment:	The Note and the liens and security interests of the Deed of Trust were transferred and assigned to _____ ("Beneficiary") by an instrument dated _____,

recorded in Volume _____, Page _____, of the Real Property Records of _____ County, Texas]

Substitute Trustee: _____

Substitute Trustee's Street Address: _____

[Mortgage Servicer: _____]

[Mortgage Servicer's Address: _____]

Foreclosure Sale:

Date: Tuesday, _____, _____

Time: The sale of the Property ("Foreclosure Sale") will take place between the hours of ___.m. and _____ p.m. local time; the earliest time at which the Foreclosure Sale will begin is _____ __.m. The sale will be completed by no later than 4:00 p.m.

Place: _____ County Courthouse in _____, Texas, in the area designated by the County Commissioners Court [if no area has been designated by the commissioners court, then designate the area of the courthouse where the Foreclosure Sale will occur]

Terms of Sale: The Foreclosure Sale will be conducted as a public auction and the Property will be sold to the highest bidder for cash, except that [Lender/Beneficiary]'s bid may be by credit against the indebtedness secured by the lien of the Deed of Trust.

Default has occurred in the payment of the Note and in the performance of the obligations of the Deed of Trust. Because of that default, [Lender/Beneficiary], the owner and holder of the Note, has requested [Substitute] Trustee to sell the Property.

The Deed of Trust may encumber both real and personal property. Formal notice is hereby given of [Lender/Beneficiary]'s election to proceed against and sell both the real property and any personal property described in the Deed of Trust in accordance with [Lender/Beneficiary]'s rights and remedies under the Deed of Trust and Section 9.604(a) of the Texas Business and Commerce Code.

[Mortgage Servicer is representing Beneficiary in connection with the loan evidenced by the Note and secured by the Deed of Trust under a servicing agreement with Beneficiary. The respective addresses of Beneficiary and Mortgage Servicer are set forth above.]

Therefore, notice is given that on and at the Date, Time and Place of Sale described above, [Substitute] Trustee will sell the Property by public sale to the highest bidder for cash in accordance with the Deed of Trust.

The Deed of Trust permits the [Lender/Beneficiary] to postpone, withdraw, or reschedule the sale for another day. In that case, the [Substitute] Trustee need not appear at the Date, Time, and Place of Sale described above to announce the postponement, withdrawal, or rescheduling. Notice of the date of any rescheduled foreclosure sale will be reposted and refiled in accordance with the posting and filing requirements of the Deed of Trust and the Texas Property Code. The reposting or refiling may be after the date originally scheduled for this sale.

Those desiring to purchase the Property will need to demonstrate their ability to pay cash on the day the Property is sold.

The Foreclosure Sale will be made expressly subject to any title matters set forth in the Deed of Trust, but prospective bidders are reminded that by law the Foreclosure Sale will necessarily be made subject to all prior matters of record affecting the Property, if any, to the extent that they remain in force and effect and have not been subordinated to the Deed of Trust. The Foreclosure Sale will not cover any part of the Property that has been released of public record from the lien and/or security interest of the Deed of Trust. Prospective bidders are strongly urged to examine the applicable property records to determine the nature and extent of such matters, if any.

Pursuant to Section 51.009 of the Texas Property Code, the Property will be sold in "as is, where is" condition, without any express or implied warranties, except as to the warranties of title (if any) provided for under the Deed of Trust. Prospective bidders are advised to conduct an independent investigation of the nature and physical condition of the Property.

Pursuant to Section 51.0075 of the Texas Property Code, the [Substitute] Trustee reserves the right to set further reasonable conditions for conducting the Foreclosure Sale. Any such further conditions shall be announced before bidding is opened for the first sale of the day held by the [Substitute] Trustee.

Notice is given that before the Foreclosure Sale [Lender/Beneficiary] may appoint another person as Substitute Trustee to conduct the Foreclosure Sale.

[Add signature for[Substitute] Trustee and acknowledgment]

Exhibit A: [Original] Property Description
[Exhibit B: Released Property Description]

APPENDIX H

FORECLOSURE SALE DEED

STATE OF TEXAS §
§
COUNTY OF _____ §

FORECLOSURE SALE DEED

Date: _____, _____

Deed of Trust [use exact title] ("Deed of Trust"):

Dated:	_____, _____
Grantor:	_____[, a _____]
Trustee:	_____
Lender:	_____[, a _____]
Recorded in:	Volume _____, Page _____, of the Real Property Records of _____ County, Texas
Secures:	Promissory note [use exact title] ("Note") in the original principal amount of $_____, executed by [Grantor] and payable to the order of Lender [, and all other indebtedness of [Grantor] to Lender]
[Modifications and Renewals:	[describe at least most recent document, using exact title(s)] (as used herein, the terms "Note" and "Deed of Trust" mean the Note and Deed of Trust as so modified, renewed and/or extended)]
[Original] Property:	The real property [, improvements and personal property] described in the attached Exhibit A
[Released Property:	The real property described in the attached Exhibit B]
Property:	The Original Property SAVE AND EXCEPT the Released Property]
[Assignment:	The Note and the liens and security interests of the Deed of Trust were transferred and assigned to _____ ("Beneficiary") by an instrument dated _____,

recorded in Volume _____, Page _____, of the Real Property Records of _____ County, Texas]

Substitute Trustee: _____

Foreclosure Sale:

Date: Tuesday, _____, _____

Time: ____.m., local time (that time being within three hours of the earliest time of the sale of the Property at public sale ("Foreclosure Sale") as stated in the Notice of Foreclosure Sale)

Place: _____ County Courthouse in _____, Texas, in the area designated by the County Commissioners Court [if no area has been designated by the commissioners court, then designate the area of the courthouse where the Foreclosure Sale occurred]

Grantee: _____[, a _____]

Grantee's Mailing Address: _____
_____
_____

Purchase Price: $_____ [(which payment, in accordance with applicable law and the terms of the Deed of Trust, was made by crediting the Purchase Price against amounts due on or with respect to the indebtedness secured by the Deed of Trust, including the Note)]

Grantor conveyed to Trustee the [Original] Property for the purposes of securing and enforcing payment of, among other things, the Note.

[Lender/Beneficiary] is the owner and holder of the Note and of all liens and security interests, assignments and encumbrances securing it, including, without limitation, those under the Deed of Trust.

[[Lender/Beneficiary] appointed Substitute Trustee under the circumstances and in the manner set forth in the Deed of Trust.]

*** OPTION 1: NOTE ACCELERATED ***

[Grantor defaulted under the terms of the Note and the Deed of Trust, and the maturity of the entire principal balance of the Note has been accelerated by [Lender/Beneficiary] in accordance with the terms thereof, and the same remains due and payable as of the date hereof.]

*** OPTION 2: NOTE MATURED BY ITS TERMS ***

[The Note matured and became fully due and payable by its terms on _____, _____ and the same remains due and payable as of the date hereof.]

[Lender/Beneficiary] instructed [Substitute] Trustee, as authorized by and provided in the Deed of Trust, to enforce the trust due to the occurrence of the foregoing events and sell the Property at the Foreclosure Sale.

As evidenced by the Affidavit of Giving Notice attached hereto and incorporated herein [(a) [Lender/Beneficiary] served or caused to be served on _____, _____ written notice of default and an opportunity to cure the same by certified mail, return receipt requested, on each debtor obligated to pay the Note according to the records of [Lender/Beneficiary] [and as required by law], and (b)] at the request of [Lender/Beneficiary], [Substitute] Trustee or an agent of [Substitute] Trustee, on _____, _____ (i) filed written notice ("Notice") of the earliest time, place and terms of the Foreclosure Sale with the county clerk of _____ County, Texas, (ii) posted the Notice at the courthouse door of _____ County, Texas, the county in which the Property is situated, and (iii) served the Notice by certified mail, return receipt requested, on each debtor obligated to pay the Note according to the records of [Lender/Beneficiary] and as required by law.

All prerequisites required by law, the Deed of Trust and/or other documents creating, evidencing, describing or securing the Note have been duly satisfied by [Lender/Beneficiary] and by [Substitute] Trustee.

The Foreclosure Sale was held by [Substitute] Trustee pursuant to the terms of the Deed of Trust and in accordance with the laws of the State of Texas on and at the Date, Time and Place of Foreclosure Sale.

Grantee, being the highest bidder at the Foreclosure Sale, did purchase the Property for the Purchase Price.

[Substitute] Trustee, in consideration of the foregoing and of the payment to [Substitute] Trustee of the Purchase Price, by the authority conferred on [Substitute] Trustee by the Deed of Trust, GRANTS, SELLS and CONVEYS to Grantee, its [heirs,] legal representatives, successors and assigns, the Property, together with, all and singular, the rights, privileges, and appurtenances thereto [, subject, subordinate and inferior to the matters set forth on Exhibit [C] attached hereto and made a part hereof for all purposes (the "Permitted Exceptions")].

TO HAVE AND TO HOLD the Property, together with the rights, privileges and appurtenances thereto, [subject, subordinate and inferior to the Permitted Exceptions,] to Grantee, its [heirs,] legal representatives, successors and assigns, forever. Substitute Trustee binds Grantor and Grantor's [heirs,] legal representatives, successors and assigns to warrant and defend the Property to Grantee, its [heirs,] legal representatives, successors and assigns forever, against the claims or claims of all persons claiming or to claim the same or any part thereof.

[Add signature for [Substitute] Trustee and acknowledgment]

AFTER RECORDING, RETURN TO:

_____

_____

_____

Attachment: Affidavit of Giving Notice
Exhibit A: [Original] Property Description
[Exhibit B: Released Property Description]
[Exhibit [C]: Permitted Exceptions]

STATE OF TEXAS §
§
COUNTY OF _____ §

AFFIDAVIT OF GIVING NOTICE
(attach to Foreclosure Sale Deed)

Date: _____, _____

Affiant: _____

All capitalized terms not defined herein shall have the meanings assigned to them in the attached Foreclosure Sale Deed.

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared Affiant, a person well known to me, who upon oath stated:

I am over the age of eighteen years, have never been convicted of a felony or a crime of moral turpitude and have personal knowledge of the facts set forth herein. [Lender/Beneficiary], [(a) on _____, _____, which date was at least 20 days prior to the date on which [the maturity of the Note was accelerated and] notice of a foreclosure sale under the Deed of Trust was served on each debtor ("Debtor") obligated to pay the Note according to the records of [Lender/Beneficiary], served or caused to be served written notice of default under the Note and the Deed of Trust by certified mail, return receipt requested, to the Debtor and provided Debtor an opportunity to cure that default and (b)] on _____, _____, which date was at least 21 days preceding the date on which the Sale was held by [Substitute] Trustee, did or caused [Substitute] Trustee or [Substitute] Trustee's agent to (i) file the Notice with the County Clerk of _____ County, Texas, (ii) post the Notice at the courthouse door of _____ County, Texas, and (iii) serve the Notice by certified mail, return receipt requested, on [Debtor/each debtor ("Debtor") obligated to pay the Note according to the records of [Lender/Beneficiary]], by deposit of the Notice, enclosed in a post-paid wrapper, properly addressed to Debtor at each Debtor's most recent address as shown by the records of [Lender/Beneficiary], in a post office or official depository under the care and custody of the United States Postal Service.

_____
_____, Affiant

SUBSCRIBED AND SWORN TO before me by _____ on _____, _____.

_____
Notary Public, State of Texas
Commission Expires: _____
Printed Name: _____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me by _____ on _____, ____.

_____
Notary Public, State of Texas
Commission Expires: _____
Printed Name: _____

APPENDIX I

PROTECTING TENANTS AT FORECLOSURE ACT

Public Law 111-22, Effective Date May 20, 2009

TITLE VII--PROTECTING TENANTS AT FORECLOSURE ACT

SEC. 701. SHORT TITLE.

This title may be cited as the 'Protecting Tenants at Foreclosure Act of 2009'.

SEC. 702. EFFECT OF FORECLOSURE ON PREEXISTING TENANCY.

(a) In General- In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to--

(1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and

(2) the rights of any bona fide tenant, as of the date of such notice of foreclosure--

(A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or

(B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1),

except that nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

(b) Bona Fide Lease or Tenancy- For purposes of this section, a lease or tenancy shall be considered bona fide only if--

(1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;

(2) the lease or tenancy was the result of an arms-length transaction; and

(3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.

(c) Definition- For purposes of this section, the term `federally-related mortgage loan' has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602).

SEC. 703. EFFECT OF FORECLOSURE ON SECTION 8 TENANCIES.

Section 8(o)(7) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(7)) is amended--

(1) by inserting before the semicolon in subparagraph (C) the following: `and in the case of an owner who is an immediate successor in interest pursuant to foreclosure during the term of the lease vacating the property prior to sale shall not constitute other good cause, except that the owner may terminate the tenancy effective on the date of transfer of the unit to the owner if the owner--

(i) will occupy the unit as a primary residence; and

(ii) has provided the tenant a notice to vacate at least 90 days before the effective date of such notice.'; and

(2) by inserting at the end of subparagraph (F) the following: `In the case of any foreclosure on any federally-related mortgage loan (as that term is defined in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)) or on any residential real property in which a recipient of assistance under this subsection resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit, except that this provision and the provisions related to foreclosure in subparagraph (C) shall not shall not affect any State or local law that provides longer time periods or other additional protections for tenants.

SEC. 704. SUNSET.

This title, and any amendments made by this title are repealed, and the requirements under this title shall terminate, on December 31, 2012.

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ022.111.pdf
123 STAT. 1632, 1660