# DOCUMENTING AND CONDUCTING NONJUDICIAL REAL ESTATE FORECLOSURE SALES; AND DEFICIENCY ACTIONS

**DAVID W. TOMEK,** *Dallas*
David Tomek PLLC

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**DAVID W. TOMEK**
*David Tomek PLLC*
214.205.8692
david@dtomeklaw.com
www.dtomeklaw.com

**EDUCATION**

Texas Tech University School of Law, J.D. *cum laude*, 1984
Texas A&M University, B.B.A. *summa cum laude*, 1981

**PROFESSIONAL ACTIVITIES/AFFILIATIONS**

Fellow of the American College of Real Estate Lawyers, 2008 to present
Board Certified in Commercial Real Estate Law, Texas Board of Legal Specialization, 1989 to present
Named to "Texas Super Lawyers" in real estate law, *Texas Monthly*, 2008-2009 and 2011-2022
2015 recipient of the Weatherbie Workhorse Award from TexasBarCLE
State Bar of Texas

- Real Estate, Probate and Trust Law Section
    - Chair from 2008 to 2009
    - Editor of quarterly *Reporter* from 2002 to 2006
    - Council Member from 1998 to 2002
    - Member of Legislative Developments Committee, Real Estate Division, from 1993 to 1999 (co-chair from 1997 to 1999)
    - Member of Lawyers Opinion Letters in Mortgage Loan Transactions Committee from 1994 to 1996
- Member of Real Estate Forms Committee from 2000 to 2011
- Contributing author to the third edition of the *Texas Foreclosure Manual* (published by TexasBarBooks)
- Director of 2014 Advanced Real Estate Drafting Course
- Director of 2008 Advanced Real Estate Strategies Course
- Director of 2003 Advanced Real Estate Law Course

**SELECTED SPEECHES/PUBLICATIONS**

Author/Speaker for TexasBarCLE 1993,1995,1997,1999, 2002, 2008, 2013, 2014, and 2018 Advanced Real Estate Law Course on topics including legislative updates, negotiating earnest money contracts, real property foreclosures, local counsel mortgage loan opinions, confidentiality and access and indemnity agreements, and letters of intent

Author/Speaker for TexasBarCLE 1992, 1995, 1999, 2000, 2002, 2007 2013, 2021, and 2022 Advanced Real Estate Drafting Course on topics including drafting earnest money contracts, updating forms based on legislative enactments, contracts for deed, commercial loan documents, negotiating earnest money contracts, legal drafting cases of note, and confidentiality and access and indemnity agreements

Author/Speaker for TexasBarCLE 2014 Handling Your First (or Next) HOA Assessment Lien Foreclosure for Condos and Subdivisions on Non-Judicial HOA Foreclosures: Legal Considerations and Documentation

Co-presenter for TexasBarBooks Webcast on Foreclosure Notices, Letters & Forms, December 2, 2010

Panelist for TexasBarCLE 2007, 2010, and 2021 Advanced Real Estate Strategies Course on topics including acquisitions and dispositions of commercial real estate, workouts of distressed commercial real estate loans, and legal and practical considerations in commercial real estate foreclosures

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# DOCUMENTING AND CONDUCTING NONJUDICIAL REAL ESTATE FORECLOSURE SALES; AND DEFICIENCY ACTIONS

## I. INTRODUCTION

There are many types of liens that can attach to Texas real estate and various means by which those liens may be foreclosed. This paper, however, primarily covers state law considerations for documenting and conducting the nonjudicial foreclosure of only the most pervasive type of lien against Texas real estate --- the consensual grant of a written power of sale, whether the encumbered real estate is residential (excluding, however, home equity loans) or nonresidential. This paper concludes with a discussion of the so-called Texas Deficiency Statutes (Sections 51.003-51.005 of the Texas Property Code) and certain significant reported cases related to the Deficiency Statutes.

## II. REAL PROPERTY FORECLOSURE STATUTES

This paper begins with an introduction of Chapter 51 of the Texas Property Code ("Chapter 51"), which sets forth the statutes that establish minimum requirements for nonjudicial real property foreclosures, and Chapter 22 of the Texas Business and Commerce Code, which became effective September 1, 2017, has remain unchanged since that date, and introduced the protocols and processes for foreclosure sales of residential real property only that are summarized in article II.C below.

### A. Chapter 51 of Texas Property Code

Any discussion of nonjudicial real property foreclosure sales in Texas must begin with a review of the governing Texas statutory provisions, especially Chapter 51. Chapter 51 has been amended and expanded in some notable ways over the last 20 years, a relatively very busy period for real property foreclosures in Texas. TPC 51.002[1] (*set forth verbatim below*), the longstanding 'core' statute for nonjudicial real property foreclosures, has itself been amended and expanded over that same period. The most notable of the changes to Chapter 51, effective January 1, 2004 and after, are summarized in article II.B below.

*Sec. 51.002. SALE OF REAL PROPERTY UNDER CONTRACT LIEN. (a) Except as provided by Subsection (a-1), 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.*

*(a-1) If the first Tuesday of a month occurs on January 1 or July 4, a public sale under Subsection (a) must be held between 10 a.m. and 4 p.m. on the first Wednesday of the month.*

*(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*

[1] Editorial note: In the interest of enhancing the brevity and readability of this paper, certain references hereafter to the current sections of the TPC will be made simply as, for example, "TPC 51.002." That streamlined citation convention will be used also for certain references hereafter to the current sections of the Texas Civil Practice and Remedies Code ("TCPRC") and the Texas Business and Commerce Code ("TBCC").

*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.*

*(f-1) If a county maintains an Internet website, the county must post a notice of sale filed with the county clerk under Subsection (b)(2) on the website on a page that is publicly available for viewing without charge or registration.*

*(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 county courthouse where public sales of real property under this section will take place that is in a public place within a reasonable proximity of the county courthouse as determined by the commissioners court 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 designation by a commissioners court under this section is not a ground for challenging or invalidating any sale. A sale must be held at an area designated under this subsection if the sale is held on or after 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.*

*(i) Notice served on a debtor under this section must state the name and address of the sender of the notice and contain, in addition to any other statements required under this section, a statement that is conspicuous, printed in boldface or underlined type, and substantially similar to the following: "Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately.*

## B. Summary of Significant Changes to Chapter 51 Since 2003 Legislative Session

1. <u>2003 Legislative Session</u>

- A 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. <u>2005 Legislative Session</u>

- 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 designation by a commissioners court 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 was 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 Servicemembers Civil Relief Act of 2003 are added as TPC 51.015.

5. 2011 Legislative Session

- All notices of sale and the predicate default/cure notice for debtor's residence collateral must each include (i) name and address of sender of notice and (ii) conspicuous, promulgated statement advising active duty military and spouses to assert their protections against collection actions and to send notice immediately to sender of active duty military status.
- Protections for active duty military and spouses against collection actions are expanded to include condominium and HOA lien collection and foreclosure actions.

6. 2013 Legislative Session

- If a county maintains a website, the county must post on the website all filed notices of sale on a publicly available page without charge or registration.

7. 2015 Legislative Session

- Adds a means by which a substitute trustee may be appointed in the notice of sale (in addition to being appointed in the customary separate (and usually filed of record) appointment of substitute trustee).
- Expands the authority of a mortgagee, trustee or substitute trustee to rescind nonjudicial foreclosures of residential real property.

8. 2017 Legislative Session

- If the first Tuesday of a month falls on January 1st or July 4th, the sale date for that month is the first Wednesday of that month.

### C. Chapter 22 of Business & Commerce Code

Employing the same definition for 'residential real property' as was used in Section 51.016 added to Chapter 51 in 2015 (to establish a qualified right for mortgagees and trustees to rescind foreclosure sales of residential real property), Chapter 22 was added to the TBCC effective September 1, 2017. With respect "only to a public sale of residential real property conducted under a power of sale in a security instrument," Chapter 22 (i) allows a trustee or substitute trustee conducting such a sale to contract with … an auction company "to arrange, manage, sponsor, or advertise a public sale;" (ii) requires a winning bidder at a sale (other than the foreclosing mortgagee or mortgage servicer) to provide to the trustee or substitute trustee upon completion of the sale certain specified information reasonably needed to allow either to complete his or her duties and functions concerning the sale; (iii) requires the trustee or substitute trustee to provide the winning bidder with a receipt for the sales proceeds tendered and deliver to the winning bidder or record a foreclosure deed within a reasonable time; and (iv) establishes requirements for disposition by the trustee or substitute trustee of sale proceeds to the person(s) entitled thereto and the means by which the trustee or substitute trustee may receive reimbursement of related costs (including attorney's fees) and a reasonable fee. Tex. Bus. & Com. Code Ann. §§ 22.001-.006.

## 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. App.—Fort Worth 1981, no writ)). 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 an uncured, unwaived 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; APPLICABLE LIMITATIONS PERIODS

### A. Type of Note

Essentially, there are four types of promissory notes that typically evidence a mortgage 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. 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). Negotiable term notes are subject to a six-year statute of limitations under state law. Tex. Bus. & Com. Code Ann. § 3.118(a).

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). 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). 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 will require that the installment note expressly permit acceleration of the debt on any default because, absent an express 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). Negotiable installment notes are subject to a six-year statute of limitation under state law. Tex. Bus. & Com. Code Ann. 3.118(a). Unlike the limitations period for foreclosure of a real property lien securing an installment note (which, according to TCPRC 16.035(e), 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) [as to negotiable installment notes]; See also Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 566 (Tex. 2001).

### 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 a holder's legitimate preference to be granted 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 to accomplish an accelerated maturity:

a. Demand for payment;
b. Notice of intent to accelerate; and
c. 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. 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.

5. Notice of Acceleration

After the debtor has had a "reasonable time" (at least the period of time, if any, required by the applicable loan documents) to make payment (and fails to do so), 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. 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. 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 in order to properly accelerate). 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. 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. Wolf, 44 S.W.3d 562, 569-70 (Tex. 2001).

6. Waiver

Ogden is clear that 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, however, 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.

Schuhardt Consulting Profit Sharing Plan v. Double Knobs Mountain Ranch, 468 S.W.3d 557 (Tex. App.—San Antonio 2014, pet. denied) highlights the ever-present importance, for the drafter of mortgage loan documents in particular, of avoiding ambiguity and conflict between terms of the note and of the deed of trust around the obligations of the noteholder to give the common law notices for acceleration detailed above and any waivers by the obligors of the right to receive such notices. The note in this case included an express waiver by the maker of, among other notices, the notice of intention to accelerate maturity even as the deed of trust securing the note provided that if "default continues after Beneficiary gives Grantor notice of the default and the time with which it must be cured, as may be required by law, or by written agreement, then Beneficiary may" accelerate the note. Id. at 570. The holder of the note argued that the 'or by written agreement' phrasing in the deed of trust referred to the express waiver of notice of intention to accelerate maturity in the note; thereby obviating the requirement for the holder to give that notice o the maker following default. Quoting Mathis v. DCR Mortg. III Sub I, L.L.C., 389 S.W.3d 494, 507 (Tex. App.—El Paso 2012, no pet.) (construing loan documents materially similar to those at issue in Schuhardt and holding, in relevant part "the note and the deed of trust must be construed together because they were executed by the same parties on the same day, they pertain to the same real property, each document references the other, and the deed of trust is identified as the security for the note."), the court in Schuhardt ruled in favor of the maker on this issue when it found that, when read together, the note and the deed of trust created "a reasonable doubt as to whether the parties clearly and unequivocally [the Shumway standard set forth above] intended to waive notice of intent to accelerate." Id. at 570-571.

7. Waiver of a Waiver

Although 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. 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, constitutes a waiver of its right to enforce its remedies or to accelerate the debt as a result of a subsequent default by the debtor.

## 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 consider a multitude of issues before making an informed decision whether to proceed with the foreclosure sale, including many (if not all) of those covered below in this article V.

## A. Assessing the Basics

### 1. Basic Elements for Recovery on Note

Although Chapter 51 provides a creditor with significant flexibility for enforcing and ultimately collecting on a debtor's promise to pay his indebtedness through nonjudicial foreclosure of a contract lien (power of sale), any creditor contemplating a foreclosure sale must confirm that the underlying debt instrument and the ownership thereof by the creditor can withstand threshold examination by the courts. Texas courts have consistently 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 usually 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 with submission of the original notes that were not marked paid, constituted prima facie proof that the notes remained unpaid). The creditor is not, however, 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 the outstanding balance on the note).

### 3. Legal Owner and Holder of a Note; Mortgage Servicer

One of the realities of the securitization (CMBS) structures and documentation for financing real estate 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 assigned several times before ultimately being assigned to Countrywide). Debtors and their counsel have, especially following the Great Recession (and the resulting tsunami of commercial and residential foreclosures across the country), seized on the often-convoluted assignment histories of these notes as grounds for challenging the validity of a proposed or even completed foreclosure sale. Mainstream-media reports in that era abounded with stories of homeowners who, facing foreclosure after becoming delinquent on their loans, challenged lenders to prove they actually owned the notes at issue. An example of a fairly representative case of such a challenge, made successfully, was brought in Ohio, where 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. See In re Foreclosure Cases, 521 F.Supp.2d 650 (S.D. Ohio 2007). 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); §§ 10.3:3-10.3:6 of the Texas Foreclosure Manual, third edition (last updated 2019) ["TFM"], available through the TexasBarBooks Department of the State Bar of Texas [texasbarpractice.com/texas-bar-books/ or 800-204-2222 ext. 1411].

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 previous series of assignments of the promissory note and deed of trust for a home repair loan, received all of the assigning entity's interest in the deed of trust but not the note. Id. 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.

The most important inquiries in determining whether a proper party is authorizing/administering a nonjudicial real estate foreclosure sale in Texas is whether that party is the 'mortgagee' or the 'mortgage servicer' (as defined in TPC 51.0001) and, if the latter, whether the mortgage servicer and the mortgagee have entered into an agreement granting the current mortgage servicer the authority to service the mortgage (including the right to initiate, authorize, administer the foreclosure process and sale). Tex. Prop. Code Ann. §§ 51.0001(3)-(4) and 51.0025.

For an excellent analysis of the interaction of the Uniform Commercial Code (principally, Articles 3 and 9) and state foreclosure law (which has too often been misunderstood by lawyers and judges alike) prompted by the dramatic increase in foreclosure litigation in the wake of the Great Recession, see the report of the Permanent Editorial Board for the Uniform Commercial Code released on November 14, 2011 entitled "Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes."

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 above for a discussion of when causes of action accrue for different types of notes), Tex. Civ. Prac. & Rem. Code Ann. § 16.035(b), following which the lien and power of sale become void. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(d). 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.

In a recent decision, the Texas Supreme Court brought clarity out of some confusion about the benefits and rights accruing to a refinance lender through equitable subrogation in the mortgage lending context. In PNC Mortg v. Howard, 66 Tex. Sup. Ct. J. 882, 2023 Tex. LEXIS 408 (May 12, 2023), PNC Mortgage, the refinancing lender that failed to foreclose its mortgage lien within four years after it had accelerated the note it held --- i.e., the applicable period in which to foreclose a mortgage lien under TCPRC 16.035(b), sought an interpretation of its equitable subrogation rights that would allow it to foreclose the lien that had secured the note that had been refinanced (and not accelerated, with a future maturity date). The Supreme Court referred to the interpretation sought by PNC as 'the accrual rule,' which had been supported by a few federal district court decisions. Id. at 8. Finding that the accrual rule in the mortgage loan context was "incompatible with 'the dual nature of a note and deed of trust' under Texas law," the Supreme Court concluded that the note that had been refinanced ceased to exist following its payment in full through refinancing and, therefore, no longer had a (future) maturity date. Id. at 8-9. Summarizing the effect of equitable subrogation in the mortgage lending context, the Supreme Court stated:

> What equitable subrogation actually transfers to a refinance lender is the original creditor's security interest, so the refinance lender has an alternative lien [referred to by the court in another place in its opinion as a "*back-up lien*"] if its own lien is later determined to be invalid. This transfer occurs automatically, by operation of law, when the refinance lender's money is used to pay off the original creditor's loan and discharge its lien.

Id. 9-10. Because PNC failed to foreclose the lien securing the note it held within four years after having accelerated the maturity of that note, the Supreme Court held that PNC's right to foreclose was barred (under TCPRC 16.035(d)). Id. at 12.

## 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). 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 in Texas, 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. App.—Amarillo 1932, no writ); Gandy v. Cameron State Bank, 2 S.W.2d 971 (Tex. 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

Another possible alternative to a nonjudicial foreclosure sale would be for the creditor to accept a deed in lieu of foreclosure from the debtor. The creditor should take care that the deed in lieu of foreclosure documents clearly provide that the fee ownership title being conveyed does 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)), thereby allowing the creditor to 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. 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

Because of the confusion and uncertainty engendered by the seminal case of Taylor v. Brennan, 621 S.W.2d 592 (Tex. 1981), Texas lawyers (and their lender clients) were in a quandary for nearly 30 years about how best to obtain a perfected lien or security interest in rents from mortgaged real estate, obtain possession of rents prior to foreclosure, and avoid the attendant risks. In response to the issues created by the Taylor decision and the problems that resulted from efforts to address those issues, an ad hoc committee (composed of Texas lawyers expert in this area of the law appointed by the Real Estate, Probate and Trust Law Section of the State Bar of Texas) worked for over two years to develop an assignment of rents act (derived from the Uniform Assignment of Rents Act, but with substantial deletions, additions, and other changes to better address existing law, custom, and practice in Texas) to present to the Texas Legislature for consideration. The work of this committee eventually resulted in the enactment of TPC Chapter 64 [Assignment of Rents to Lienholder] (commonly referred to as 'TARA'), effective June 17, 2011. Upon the enactment of TARA, all assignments of rents in Texas became collateral assignments, regardless of the form the assignment takes in the security instrument. Aside: Prior to TARA assignments of rent were habitually characterized as absolute assignments, with a revocable license in favor of the assignor to collect rents pre-default). Regrettably, purported absolute assignments of rents continue to pervade many Texas commercial loan documents seen by this author, even as there is no such assignment by virtue of the enactment of TARA.

Among the other notable provisions of TARA are the following: (i) an enforceable security instrument (e.g., a deed of trust or a separate assignment of rents, regardless of its form or type) automatically creates a presently effective security interest in accrued and unaccrued rents arising from the real property covered by the security instrument, which security interest is separate and distinct from the lien against the real property from which the rents arise; (ii) the concept that an (absolute) assignment of rents is a pro tanto repayment of the loan is eliminated; (iii) the recordation of a document creating an assignment of rents perfects the security interest in the rents; (iv) the manner of enforcement of the assignment of rents by notices to the assignor and to tenants and certain protections to tenants who pay rents to the assignee following notice are detailed; (v) a form of notice to tenants is prescribed; and (vi) the application of collected rents by the assignee to the obligations of the assignor is set forth. Security instruments signed and delivered before the effective date of TARA do not have the automatic assignment of rents provided in TPC 64.051(a). However, TARA is applied retroactively to enforcement of an assignment of rents, priority and perfection of a security interest in rents, and attachment and perfection of a security interest in proceeds, regardless of whether the security instrument was signed and delivered before TARA's effective date. For a very thorough discussion of TARA and its drafting implications for Texas security instruments, see Walker, Drafting Assignments of Rent Under the Texas Assignment of Rents Act, Advanced Real Estate Drafting Course, State Bar of Texas (2012).

5. Appointment of Receiver

Often, a Texas security instrument will include, among the remedies for default, the right to the appointment of a receiver for the mortgaged property. Receiverships for real estate collateral are available only where expressly provided by statute, See Tex. Civ. Prac. & Rem. Code Ann. §§ 64.001-.056, 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 Ann. § 64.004. 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. 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 Ann. § 64.001(a)(4). Note that 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). For a detailed presentation about receiverships in Texas, see Fiscus, Receiverships Revisited: An Old Remedy For New Problems?, Advanced Real Estate Law Course, State Bar of Texas (2010).

## 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, among potential issues of concern, there are any mechanic's liens, subordinate liens, subsequent transfers, tax liens (including ad valorem, federal, state and corporate franchise tax liens), full or partial releases of lien 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), 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. 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.

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 a 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 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. 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. Second, as to any leases that are subordinate to the deed of trust lien, a creditor may wish to handle the foreclosure of the superior lien of the deed of trust in a manner that does not result in the termination of "favorable" leases. 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.

## 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" (see discussion of these Sections in article X.A. below). A possible 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

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.

## F. Environmental Issues

Well beyond the scope of this paper are the myriad environmental issues under federal law and Texas law that potentially affect Texas commercial real estate collateral being considered for sale by nonjudicial foreclosure. Those issues include lender liability exemptions for properties with underground storage tanks under federal and state laws; secured creditor exemptions for Superfund liability under CERCLA and similar Texas laws; and assessing risks associated with collateral containing asbestos or lead-based paint (or both). However, Chapter 35 of the TFM offers a wealth of information and insight into the foregoing environmental issues and many more that may be relevant in a particular commercial property nonjudicial foreclosure sale under consideration by a secured lender.

## 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, 310-11 (Tex. 1956); however, an independent administration does not suspend the power of sale and the lender can proceed with the foreclosure sale, see Pearce, 291 S.W.2d at 310; Bozeman v. Folliott, 556 S.W.2d 608, 613 (Tex. 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. 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, Servicemembers Civil Relief Act of 2003, 50 U.S.C. §§ 3901-4043).

For guidance on a secured creditor's rights to pursue nonjudicial foreclosure of a lien after the debtor has deceased, see Dysart, Texas Probate Code Redefines Secured Creditor's Rights and Remedies (Clarified by 2011 Amendments), Advanced Real Estate Law Course, State Bar of Texas (2012); Chapter 26 of the TFM.

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 months after their active duty concludes, (ii) provides that a court may, during the same active duty period and the nine 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. TPC 51.015 includes many of the same protections for military servicemembers as does the federal Servicemembers Civil Relief Act of 2003 mentioned above in this article V.G. For an in-depth discussion of the Servicemembers Civil Relief Act of 2003 and TPC 51.015, see Chapter 33 of the TFM.

## VI. TRUSTEES/SUBSTITUTE TRUSTEES

The trustee or substitute trustee is the party responsible for conducting the nonjudicial foreclosure sale in Texas. Although the "legal fiction" is that the trustee named in the deed of trust is designated by the debtor, it is really the creditor, as beneficiary under the deed of trust, that 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, 21 (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. 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. App.—Austin 1962, writ ref'd n.r.e.). Following that date, a statutory right to appoint a substitute trustee or substitute trustee was created. 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). Even if the deed of trust does not so require, the customary practice in Texas for quite some time has been to record the standalone appointment of a substitute trustee so that a title company and other interested third parties may readily ascertain the identity of any substitute trustee. As of September 1, 2015, a new means for appointing a (substitute) trustee was added to Chapter 51. TPC 51.0076 provides for the appointment or authorization of a (substitute) trustee in a notice of sale if (i) it is signed by an attorney or agent of the mortgagee or mortgage servicer and (ii) contains a statement in all caps and boldface type to read as follows:

> **THIS INSTRUMENT APPOINTS THE SUBSTITUTE TRUSTEE(S) IDENTIFIED TO SELL THE PROPERTY DESCRIBED IN THE SECURITY INSTRUMENT IDENTIFIED IN THIS NOTICE OF SALE. THE PERSON SIGNING THIS NOTICE IS THE ATTORNEY OR AUTHORIZED AGENT OF THE MORTGAGEE OR MORTGAGE SERVICER.**

Tex. Prop. Code Ann. § 51.0076.

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). 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. 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. App. – Houston [14th Dist.] 1979, writ ref'd n.r.e.; Merit Homes, Inc. v. Alltex Mortgage Co., 402 S.W.2d 943 (Tex. 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. 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 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.

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).

## 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 applicable requirements set forth in the loan documents, including especially in the deed of trust.

### B. Statutory Requirements

In addition to contractual requirements, the following three actions (i.e., posting, filing, and serving) be performed "at least 21 days before the date of the sale" in order for proper notice of a foreclosure sale to be given. Tex. Prop. Code Ann. § 51.002(b). The day on which the notice of sale is given is included, and the day of the foreclosure sale is excluded, in computing the 21-day notice period. Tex. Prop. Code Ann. § 51.002(g). 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), 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.

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). 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).

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). 'Debtor' is not defined in TPC 51.0001 or anywhere else in 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 Bishop v. National Loan Investors, L.P., 915 S.W.2d 241, 245 (Tex. App.—Fort Worth 1995, writ denied), citing Long v. NCNB-Texas 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). 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). 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. 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). 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. 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 has been held to be sufficient. Martinez v. Beasley, 616 S.W.2d 689 (Tex. 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 proper official of the IRS Collection Advisory office responsible for the geographic area where the notice of federal tax lien was filed not less than 25 days before the anticipated foreclosure date. 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. 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. See 26 U.S.C. § 7425 and Treasury Regulations 26 C.F.R. §§ 301.7425 and 301.7502. For a wealth of information about how, if the lienholder or other purchaser at foreclosure believes that the taxpayer has/had no equity in the property (i.e., the right of redemption is valueless), to seek from the IRS an express consent to sell free of the federal tax lien, or a waiver or release of the right to redeem during the 120-day period or a discharge of the federal tax lien, see Section 4.3 of the TFM.

## C. Suggested Contents of Notice of Sale

The cases construing the relevant sections of Chapter 51 and its predecessor statutes tend to impose only general descriptive requirements and have upheld notices of sale deemed to have sufficiently informed the public of the nature and condition of the property so as to attract bidders. See Hutson v. Sadler, 501 S.W.2d 728, 732 (Tex. App.—Tyler 1973, no writ); Stone v. Watt, 81 S.W.2d 552, 555 (Tex. App.—Eastland 1935, writ ref'd).

With the foregoing caselaw latitude and the express requirements of Chapter 51 in mind, it is suggested that the notice of sale should contain at least the following (with no particular significance to the order listed): (1) accurate descriptions of the security instrument (including recording information), the matured debt, any assignment(s) of the debt and security instrument, the property to be sold at foreclosure (including any personal property in which a security interest is granted in the security instrument), and the terms of the sale (e.g., by public auction to the highest bidder for cash, but that the foreclosing lienholder may credit up to the amount of the secured indebtedness); (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 start time and date for, and the location (designated area) of, the foreclosure sale, in accordance with TPC 51.002(a) and (b); (5) the name and street address of the trustee or substitute trustee as required by TPC 51.0075(e); (6) for any security instrument that also constitutes a security agreement, a statement that, under the authority of TBCC 9.604(a), the foreclosure sale will cover both real property and personal property in which a security interest is granted under the security instrument; (7) 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, all in accordance with TPC 51.0025; (8) a reference to the 'as is' nature of the sale to be conducted in accordance with TPC 51.009; (9) a reference to the right of a trustee or substitute to set reasonable conditions for conducting the foreclosure sale in accordance with TPC 51.0075(a); (10) a reference to the requirement in TPC 51.0075(f) that the purchase price at the sale is due and payable without delay on acceptance of the bid or within such reasonable time as may be agreed upon by the purchaser and the (substitute) trustee if the purchaser makes such request for additional time to deliver the purchase price; (11) if the appointment of a substitute trustee is to be made in the notice of sale pursuant to the authority of TPC 51.0076 (instead of in a standalone (and recordable) appointment of substitute trustee, as has been done historically), the statutory statement of appointment (set forth verbatim in article VI above) and a signature on the notice by an attorney or agent of the mortgagee or mortgage servicer; (12) the name and address of the sender of the notice of sale and the military rights disclosure, each as required by TPC 51.002(i); and (13) if the property to be foreclosed is located in the covered area along the Gulf Coast, an open-beach disclosure.

Regarding clause (13) immediately above, an open-beach disclosure must be included if the interest in real property to be foreclosed is located seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12', 19" that runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel. This disclosure is required in all executory contracts for conveyance. Tex. Nat. Res. Code Ann. § 61.025. The Texas attorney general opined that this notice requirement is applicable to foreclosure sales and requires the trustee to give the statutory notice to third-party purchasers and to mortgagee-purchasers. Tex. Att'y Gen. Op. No. JM-834 (1987). This disclosure should be included in the publicly posted notice of foreclosure sale, in the foreclosure sale deed, and in a separate written statement, the receipt of which is acknowledged by each bidder at the foreclosure sale before bidding.

## 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). More on sale conditions in War Story #1 Digression below. To conduct the foreclosure sale, the trustee or substitute trustee, on the first Tuesday of a month (or the first Wednesday if the first Tuesday of the month is January 1st or July 4th, as provided in TPC 51.002(a-1)), at the earliest time stated in the notice of sale or within three hours thereafter, should begin the sale by reading 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). 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 by 4:00 p.m. See War Story #2 Digression below.

War Story #1 Digression

The author was appointed as one of the substitute trustees to conduct (but not document, except as described below) nine foreclosure sales for two affiliated lienholders in Travis County on June 1, 2021. The sales were initially scheduled to occur the preceding month, but the principal of the debtors and his associates created enough mayhem on that initial sale date at the designated area for the sales that none of the nine sales were concluded. In planning to be better prepared for the distinct possibility of more mischief in June, the foreclosure team turned its attention to making the conditions for conducting the nine sales as tight as possible, yet compliant with the subject deeds of trust and applicable law.

Even as the notices of sale for the June 1st sales were written in customary fashion for Texas commercial foreclosure sales, by legal counsel for the lienholders, the wider foreclosure team (lead by that legal counsel) focused attention on ways to write the reasonable conditions for sale authorized in general terms in TPC 51.0075(a) and the foreclosure sale scripts to be used by the substitute trustees to conduct all nine sales in ways that, while necessarily compliant with the subject deeds of trust and applicable law, would likely afford the substitute trustees the best likelihood that the sales could be conducted on June 1st regardless of what mischief the principal of the debtors and his associates might choose to instigate.

The aspects of the reasonable conditions announced before bidding on any sales and the foreclosure sale scripts that were, to this author at least, warranted to fit the very unique circumstances likely to be created at these sales by the principal of the debtors and his associates to try again to thwart the lawful conduct of these sales included the following:

- Purposefully availing the lienholders and the substitute trustees of the default requirement in TPC 51.0075(f) that the purchase price is due and payable without delay on acceptance of the bid. It was made clear that the substitute trustees had no authority from the lienholders to agree to any additional time for a third party high bidder to deliver the purchase price.
- The subject deeds of trust required the sales to be made "to the highest bidder for cash." The only cash equivalent that the substitute trustees were authorized by the lienholders to accept from a third party high bidder was a cashier's check made payable either to the proper lienholder or to the substitute trustee conducting that sale (i.e., no endorsed cashier's checks would be accepted), drawn on a reasonably acceptable financial institution having a physical presence in Austin (at which the validity of seemingly valid and conforming cashier's checks could be verified during adjournment of the sale for that purpose).
- With so many sales to conduct and with such a high likelihood that efforts would be made by the principal of the debtors and his associates to try to derail the sales, the requirement in TPC 51.002(c) that each sale 'begin' at the earliest time for the sale stated in the notice of sale or not later than three hours after that time meant it would be particularly

important to establish precisely when each sale began. Accordingly, the conditions of sale and foreclosure sale transcripts each provided that, for purposes of TPC 51.002(c), each sale began at the time a substitute trustee introduced himself and began reading the foreclosure script for that sale. The substitute trustees noted in writing the time of beginning on each sale transcript.

- The subject deeds of trust also included extensive provisions allowing the (substitute) trustee conducting the sale to question prospective third party bidders in order to assess in real time their financial ability and willingness to fully comply with the terms of the subject notice of sale and announced conditions of sale. See the relevant discussion in article VIII.B below. The announced conditions of sale specifically mentioned those deed of trust provisions and that the substitute trustee would avail himself of those provisions in case any third parties attempted to bid.
- A statement that a proper foreclosure deed for each sale would be prepared in due course after the foreclosure sale was concluded and any cashier's check accepted by the substitute trustee from a legitimate, qualified third party bidder was confirmed as paid.
- Acceptable bid increment amounts after an opening bid were set in amounts sufficiently high under the circumstances for each sale so as to reduce the opportunity for any third party bidder, whether the debtor's principal and his associates or otherwise, to purposefully protract the bidding with an intention to purposefully jeopardize the timely conclusion of all nine sales.

In the course of conducting these sales on June 1st, the author came to learn from the Travis County Sheriff's department of the existence and applicability to the clear efforts by the debtor's principal to disrupt the sales of Section 42.05 of the Texas Penal Code, set forth verbatim below. Ultimately, it was that particular statute that the Travis County Sheriff's department used to disperse the scores of antagonists brought to the sales by the debtor's principal for the express purpose of trying (unsuccessfully) to disrupt and prevent the lawful sales from being held that day.

> Sec. 42.05. DISRUPTING MEETING OR PROCESSION. (a) A person commits an offense if, with intent to prevent or disrupt a lawful meeting, procession, or gathering, he obstructs or interferes with the meeting, procession, or gathering by physical action or verbal utterance.
>
> (b) An offense under this section is a Class B misdemeanor.

Tex. Penal Code Ann. § 42.05.

War Story #2 Digression

The author was sued in federal court many 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; Qualified 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 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. App.—Austin 1961, no writ); Thornton v. Goodman, 216 S.W. 147 (Tex. Comm'n App. 1919, judgm't adopted).

Many commercial deeds of trust in circulation today include the provisions popularized in the Annotated Deed of Trust prepared and shared by the Winstead law firm --- an unbelievable gift to other practicing Texas lawyers --- that allow a (substitute) trustee to interview prospective third party bidders in real time at a foreclosure sale in order to assess a particular prospective bidder's ability and willingness to timely comply with the bid-entering and payment requirements of the deed of trust and any announced conditions of sale. See Erwin et al, Texas Annotated Deed of Trust, Advanced Real Estate Strategies Course, State Bar of Texas (2015). Those very provisions were included in all nine of the deeds of trust that the author helped foreclose in Travis County on June 1, 2021 (as detailed in War Story #1 Digression in article VIII.A above). The author believes that, even if such provisions are not specifically included in a deed of trust to be foreclosed, the lienholder, its counsel and/or the (substitute) trustee should strongly consider incorporating such provisions (or something rather similar) into the announced (reasonable) conditions of sale allowed by TPC 51.0075(a). Those provisions seem, to the author at least, to be eminently reasonable.

### 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.

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) was vitiated by the holding in BFP. 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).

### D. Sale to Highest Bidder for Cash

Chapter 51 does not require that a nonjudicial foreclosure sale be for cash, but commercial loan security instruments invariably require a sale thereunder to be made to the highest bidder for cash (as was the case with all nine of the deeds of trust that the author helped foreclose in Travis County on June 1, 2021 (as detailed in War Story #1 Digression in article VIII.A above)). See also Deed of Trust (Form 8-1) of the Texas Real Estate Forms Manual, 2021 Edition (State Bar of Texas) [which also provides, in D.2 thereof, that the collateral property be sold "to the highest bidder for cash"]. Such provisions requiring cash sales have been held enforceable by Texas courts. See Kirkman v. Amarillo Sav. Ass'n of Amarillo, 483 S.W.2d 302, 308 (Tex. App.—Amarillo 1972, writ ref'd n.r.e.). The author is unaware of any Texas statute or caselaw that limits the authority of a lienholder (or trustee appointed by the lienholder) to determine what cash equivalents, if any, will be acceptable from a prospective third party bidder under a deed of trust that includes the customary requirement (set forth above) to sell the property "to the highest bidder for cash" so long as each fulfills the duty to avoid affirmatively deterring third-party bids by acts or statements made before or during the foreclosure sale.

### E. 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). 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). 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).

TPC 12.0012 was enacted effective September 1, 2015 to authorize certain foreclosure-related documents such as appointments of substitute trustees, foreclosure sale notices, and notices of default to be attached as exhibits to a foreclosure deed or affidavit of a (substitute) trustee and filed of record. Allowing attachment of such documents as exhibits to recorded foreclosure deeds and affidavits is intended to facilitate the efforts of title examiners and title companies especially to ascertain from the public records the validity of foreclosure sales of properties for which they are being asked to issue title policies post-foreclosure.

As summarized in article II.B above, Chapter 22 of the TBCC imposes on a trustee or substitute trustee that conducts a foreclosure sale of residential real property the obligation to --- "within a reasonable time" --- either deliver the foreclosure sale deed to the winning bidder or file the foreclosure sale deed for recording. Tex. Bus. & Com. Code Ann. § 22.005(2).

### B. Distribution of Sale Proceeds

A trustee or substitute trustee must disburse proceeds of a foreclosure sale as provided by law. Tex. Prop. Code Ann. § 51.0075(f). The (substitute) trustee is bound to disburse foreclosure sale proceeds, including any surplus proceeds, in accordance with relevant provisions in the security instrument under which the foreclosure sale is conducted. The liens of junior lienholders attach to surplus sale proceeds in the same order of priority as their liens attach to the property foreclosed. Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, 576 S.W.2d 794, 807–08 (Tex. 1978); Jeffrey v. Bond, 509 S.W.2d 563, 565 (Tex. 1974). If there are conflicting demands between subordinate lienholders or between the mortgagor and a subordinate lienholder as to surplus sale proceeds, it is recommended that the trustee interplead the surplus sale proceeds in question into the registry of the court, rather than potentially assume personal liability for misdirection of those surplus proceeds. See Section 15.3.4 of the TFM. 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, when excess proceeds should be applied to the prior debt before being distributed to the debtor. Summers v. Consol. Capital Special Trust, 783 S.W.2d 580, 583 (Tex. 1989) (concerning a wraparound mortgage]; see Lee v. Key West Towers, Inc., 783 S.W.2d 586, 588 (Tex. 1989) (concerning a wraparound mortgage); Canfield v. Foxworth-Galbraith Lumber Co., 545 S.W.2d 583 (Tex. App.—Tyler 1976, writ ref'd n.r.e.).

As summarized in article II.B above, Chapter 22 of the TBCC imposes on a trustee or substitute trustee that conducts a foreclosure sale of residential real property the obligations to (i) hold the sale proceeds in a separate account until distributed and maintain a written record of deposits to and disbursements from the account and (ii) make reasonable attempts to identify and locate the persons entitled to all or any part of the sale proceeds. The trustee or substitute trustee may receive reimbursement of reasonable actual costs incurred in discharging the foregoing obligations, including attorney's fees, as well as a reasonable fee. Tex. Bus. Com. Code Ann § 22.006.

### C. Title Insurance Protection

The Texas Loan Policy of Title Insurance (Form T-2) affords continuing title insurance coverage to an insured lienholder that acquires title to the encumbered property through foreclosure or a conveyance in lieu of foreclosure. It is important to remember that the coverage of the Form T-2 continues in force as of the date the subject loan policy was issued, and that the coverage is not "downdated" to the date that the lienholder acquires title to the encumbered property.

Also, the loan policy does not, as some choose to 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 loan policy. The amount of insurance coverage in effect after the lienholder or other party afforded coverage acquires title to the encumbered property under the Form T-2 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.

## X. SELECTED ISSUES REGARDING DEFICIENCY ACTIONS

### A. The Deficiency Statutes

TPC 51.003, 51.004, and 51.005 (collectively, the "Deficiency Statutes") were signed into law on April 2, 1991 amidst an environment of perceived abuses by foreclosing lienholders (including FDIC and RTC receiverships and conservatorships) purposely bidding well below then fair market value at foreclosures for commercial properties sold at nonjudicial foreclosure sales, thereby resulting in allegedly artificially large deficiency claims against borrowers and guarantors. It is worth noting that The Deficiency Statutes have not been amended since their initial passage … over 32 years ago.

TPC 51.003 afforded new protections and processes to obligors sued for a deficiency after foreclosure. First, any action brought by a lender to recover a deficiency must be brought within two years after the foreclosure sale. Tex. Prop. Code Ann. § 51.003(a). Second, an obligor may request that the court determine the fair market value of the real property as of the date of the foreclosure sale. Tex. Prop. Code Ann. § 51.003(b). Third, the fair market value will 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. Tex. Prop. Code Ann. § 51.003(b). Fourth, if the court determines that the fair market value is greater than the foreclosure sales price, then the obligors are entitled to an offset against the deficiency equal to the amount by which the court's determination of fair market value, less any debt secured by the real property and not extinguished by the foreclosure, exceeds the foreclosure sales price. Tex. Prop. Code Ann. § 51.003(c). 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. Fifth, to protect a borrower from "double liability," a creditor may not make a claim against a borrower 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. Tex. Prop. Code Ann. § 51.003(d).

None of the Deficiency Statutes provides for 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 51.004 applies to deficiencies following a judicial foreclosure. Tex. Prop. Code Ann. § 51.004. Any person obligated to pay the indebtedness, including a guarantor, may file a suit in the district court in the county in which the property is located for a determination of the fair market value of the property as of the foreclosure date provided, however, that the suit must be brought not later than the 90th day after the date of the foreclosure, unless the suit is brought by a guarantor who did not receive actual notice of the foreclosure sale before the sale date, and in that case, the suit must be brought by the guarantor not later than the 90th day after the guarantor received actual notice of the foreclosure sale. Tex. Prop. Code Ann. § 51.004(b).

The determination of fair market value is made using the same evidence listed in §51.003(b), and if the fact finder determines that the fair market value is greater than the high bid at the foreclosure sale, any person obligated on the indebtedness, including any guarantors, are entitled to an offset against the deficiency "in the amount by which the fair market value, less the amount of any claim, indebtedness or obligation of any kind that is secured by the lien or encumbrance on the real property that was not extinguished by the foreclosure, exceeds the sale price." Tex. Prop. Code §51.004(b) & (c)

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 TPC 51.005 are virtually identical to the provisions of TPC 51.003.

### B. Case Law

Even as the Deficiency Statutes have remained totally unchanged since passage in 1991, they have been the subject of numerous reported cases over the years since. Some of the more significant of those cases are summarized below.

1. Constitutional Challenge

TPC 51.003 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.

2. Two Year Limitations Period Prevails

In a Texas case of first impression, the Dallas Court of Appeals considered whether a deficiency action against a guarantor was barred by the four year statute of limitations to sue on a debt in TCPRC 16.004 if the action was filed more than four years after the claim under the guaranty accrued but less than two years after the foreclosure sale (i.e., the two year limitations period in TPC 51.003(a)). Sowell v. International Interests, L.P., 416 S.W.3d 593 (Tex. App. – Houston [14th Dist.] 2013, pet. denied). Finding an irreconcilable conflict in this case between the application of the two year limitations period in TPC 51.003(a) (to file the deficiency action against the appellant guarantor) and the application of the four year limitations period in TCPRC 16.004 (to file an action against the appellant guarantor to collect under his guaranty], the court invoked Government Code section 311.026(b) [set forth verbatim below] to resolve the irreconcilable conflict. Id. at 599.

> (b) If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.

Tex. Gov't Code Ann. § 311.026. Because TCPRC 16.004 was enacted before TPC 51.003, the court concluded that the two year limitations period prevailed over the four year limitations period, making the deficiency action filed against the appellant guarantor a mere two days before the second anniversary of the foreclosure sale timely. Sowell, 416 S.W.3d at 600. See also Valdez v. Hollenbeck, 465 S.W.3d 217, 227 (Tex. 2015) (also concluding that an express limitations period with a specific time limit controls over a general limitations period).

3. Waiver of Deficiency Statutes

For more than 10 years after The Deficiency Statutes went into effect, it was uncertain whether waivers of these statutes, which waivers were commonly included by lenders in their commercial loan documents, were enforceable. Then two cases were decided that found such waivers to be enforceable. 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 an inconspicuous 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.

A slew of cases have been litigated in the years since the Great Recession (and the resulting flood of deficiency suits filed to collect on defaulted mortgage loans) about whether broad, inconspicuous waiver language, some might say boilerplate having nothing to do with the waiver of the valuable rights conferred under The Deficiency Statutes, is sufficient to effect a valid waiver. In the case of Interstate 35/Chisam Road, L.P. v. Moayedi, 377 S.W.3d 791 (Tex. App.--Dallas 2012) aff'd, 438 S.W.3d 1 (Tex. 2014), the Dallas Court of Appeals went further than even the LaSalle Bank case by holding that the language quoted below from the guaranty agreement at issue encompassed the right of offset provided for by TPC 51.003 and was, without more, legally sufficient to waive guarantor Moayedi's rights under TPC 51.003:

> 7. Guarantor further agrees that this Guaranty shall not be discharged, impaired or affected by … (b) *any defense (other than the full payment of the indebtedness hereby guaranteed in accordance with the terms hereof) that the Guarantor may or might have as to Guarantor's respective undertakings, liabilities, and obligations hereunder, each and every such defense being hereby waived by the undersigned Guarantor*." (Emphasis added; as emphasized, the "General Waiver.")

Moayedi, 377 S.W.3d at 794. The Texas Supreme Court issued its eagerly-awaited decision in the case on June 13, 2014. Moayedi v. Interstate 35/Chisam Road, L.P., 438 S.W.3d 1 (Tex. 2014).

Even though the parties to the case had not argued whether TPC 51.003 was, as a threshold matter, waivable, the Supreme Court opined in the affirmative (citing the LaSalle Bank and Segal cases and the absence of a prohibition of its waiver in TPC 51.003). Id. at 6.

The Supreme Court next opined that, even as the General Waiver is broad, relatively unspecific and all encompassing, it is not unclear or vague and is a sufficient waiver of Moayedi's rights under TPC 51.003. Id. at 6-8. Rejecting Moayedi's argument that an enforceable waiver of TPC 51.003 needs to meet the Shumway standard for waiver of common law notices discussed in article IV.B.6 above, the Supreme Court stated: "As the court of appeals concluded, the plain meaning of "any," "each," and "every" used in paragraph 7 [the General Waiver] results in a broad waiver of all defenses…. To waive all possible defenses seems to very clearly indicate what defenses are included: all of them." Id. at 8. [The Supreme Court had earlier in the opinion concluded that the offset rights under TPC 51.003 are properly characterized as a defense. Id. at 6.]

4. Waiver of Two Year Limitations Period

As a general rule, a blanket agreement in advance to waive or not plead all statutes of limitations is void as against public policy. Simpson v. McDonald, 142 Tex. 444, 179 S.W.2d 239, 243 (1944), which long-standing principle was reaffirmed in Godoy v. Well Fargo Bank, N.A., 575 S.W.3d 531, 533 (Tex. 2019). However, the Texas Supreme Court in Godoy also recognized an important qualification to this long-standing principle that had gained currency in a number of courts of appeals (and was said by the Supreme Court to have been already understood to be part of the law at the time Simpson was decided): that a waiver of a particular limitations period for a defined and reasonable amount of time may be enforced. Id. at 538.

Before turning to an analysis of how the relevant waivers in the subject guaranty fared under the qualified Simpson rule for pre-dispute waivers of statutes of limitation set forth above, the Supreme Court felt compelled to distinguish the statutes of limitation waiver issue in this case from the waiver of TPC 51.003 issue decided by the Supreme Court five years before in Moayedi. The fact that Moayedi did not consider waiver of statutes of limitation that could run afoul of Simpson is important because "[a] limitations bar differs materially from a debtor's or guarantor's rights to valuation and offset under chapter 51." (quoting Segal, 155 S.W.3d at 281). Godoy, 575 S.W.3d at 538. The valuation and offset rights under Chapter 51 are substantive rights held by a deficiency claim defendant and are waivable, under certain circumstances (see Moayedi), by that defendant alone. Statutes of limitation are, however, procedural bars to suit that protect defendants, the public, and the courts from having to adjudicate claims long after they have become stale. The legitimate interests of the two latter constituencies are such that even the long-revered and (often) judicially-recognized public policy in favor of preserving the freedom of contract is not sufficient to allow unqualified waivers of statutes of limitations. "Simpson continues to prohibit enforcement of open-ended pre-dispute waivers that eliminate the limitations period." Id.

Turning then to the analysis of the relevant waivers in the subject guaranty to decide the case, the Supreme Court identified three discrete sections therein that potentially waived statutes of limitation. The Supreme Court found first that that two of the three sections ran afoul of Simpson because neither was "specific" to a particular limitations period and neither had a "reasonable time" period limiting the waiver and, therefore, they purported to completely waive all limitations periods. Id. at 538-539.

The third section of the subject guaranty under consideration (so-called "Section (A)") is set forth verbatim below.

> Guarantor also waives any and all rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale ….

Id. at 539. Unlike the first two sections considered, the Supreme Court found Section (A) to be both "specific" and "for a reasonable time." As for specificity, Section (A) waived a particular, identifiable statute of limitations --- TPC 51.003(a) --- by waiving all "defenses" arising from any "anti-deficiency" law (citing Moayedi for the characterization of TPC 51.003 as Texas's "anti-deficiency law," 438 S.W.3d at 6). TPC 51.003(a)'s two year limitations was a "defense" arising from this "anti-deficiency" law. The Supreme Court concluded that Section (A) did not purport to waive all statutes of limitation or any other statute of limitations, but waived just the two year limitations period in TPC 51.003(a) and that it did so with sufficient specificity. Godoy, 575 S.W.3d at 539.

Section (A) also satisfied the "for a reasonable time" requirement because the four year limitations period applying to suits to collect a debt found in TCPRC 16.004(a)(3) --- once the two year limitations period in TPC 51.003(a) is waived by operation of Section A --- becomes applicable and a "backstop" limitations period of reasonable duration. Id.

The Supreme Court then concluded its holding as to the enforceability of Section A to waive the guarantor's right to assert the two year limitations period in TPC 51.003(a) by observing that Section A was enforceable under Simpson as such a waiver for the reasons above, the net effect being an agreement to move the limitations period for Wells Fargo's deficiency suit from two years to four years. Because Wells Fargo sued guarantor Godoy within that four year period, limitations did not bar the suit. Id. at 540.