Commercial Foreclosure (TX)

A Practical Guidance® Practice Note by Ian D. Ghrist, Ghrist Law Firm PLLC

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This practice note explains the process for the foreclosure of commercial real property in Texas, focusing on nonjudicial foreclosure under a deed of trust. The practice note also includes an overview of a property tax loans and condominium association liens with a matrix setting forth the statutes governing these foreclosures. This practice note focuses on commercial rather than residential loans and does not cover foreclosure procedures for Texas home equity loans, reverse mortgages, or the Texas Residential Property Owners Protection Act (Chapter 209 of the Texas Property Code).

For more information on foreclosure in Texas, see Residential Foreclosure (TX), Commercial Real Estate Loan Defaults and Remedies (TX), and Commercial Foreclosure Resource Kit (TX).

Overview

A deed of trust is the preferred security instrument in Texas and most foreclosures are conducted by a trustee under a deed of trust without the involvement of a court. However, some loans require the use of special procedures involving the Texas court system.

The three types of foreclosure sales used in Texas are:

- Nonjudicial sales
- Quasi-judicial sales –and–
- Judicial sales

Terminology and Timing

A nonjudicial foreclosure is accomplished through an auction that occurs without any court involvement. Quasi-judicial foreclosure auctions occur with limited court involvement by use of the court procedures in Rules 735 and 736 of the Texas Rules of Civil Procedure. Judicial sales generally require the filing of a lawsuit, usually in a district court, where the plaintiff/mortgagee asks the court to authorize and supervise a foreclosure auction.

Nonjudicial sales are the easiest and fastest. Not surprisingly, they are the most commonly used. Quasi-judicial sales are slower and involve a court order, however, the procedures for obtaining the court order are relatively simple and fast. In a quasi-judicial foreclosure, the issues that the court can determine are strictly limited and the court must follow strict timelines in making the court's decision. As noted, judicial sales involve a regular lawsuit, which means that, unless the defendants default by failing to file a written answer, the lawsuit must be set for trial, which will likely take several months or even years.

A typical nonjudicial foreclosure consists of at least a 20- or 30-day default notice and cure period followed by posting of the Notice of Trustee's Sale at least 21 days prior to the foreclosure auction, which is a total period of approximately 60 or so days. In reality, 75 to 90 days may be a better estimate when delays and cure or payment plan negotiations are factored in.

Lender's Frequently Asked Questions

Not all lenders are familiar with the foreclosure process, especially if the loan involves seller- financing. Below are some basic questions you may encounter if your client is considering foreclosure for the first time.

What Is a Foreclosure?

Many clients will know the term foreclosure, but they do not know what it means. A foreclosure is a public auction. Your client may even say, "I do not want do an auction, I just want to foreclose." A foreclosure and an auction, however, are the same thing. A foreclosure auction is a type of auction. Every foreclosure is an auction, but not all auctions are foreclosure auctions.

Inexperienced mortgage lenders sometimes ask questions like "If I start a foreclosure on this property, then when do I get my property back?" However, the lender can never be assured that they will receive title to the property. The purpose of the auction is to sell the property to the highest bidder so that the proceeds from the auction can go toward paying down the balance owed on the mortgage loan. The lender makes the opening bid at the foreclosure auction (referred to as the credit bid) and if no one outbids the opening credit bid, the lender will be the winning bidder. Although many lender's opening bids are winning bids (i.e., resulting in the lender getting the property back), this does not mean that all lender's opening credit bids are winning bids. To understand why many lender's opening credit bids are winning bids, you must understand the concept of real estate equity.

The equity in a piece of real estate is the difference between the value of the real estate and the amount owed on mortgage liens. So, if the real estate is worth $200,000 and the real estate is encumbered by a $100,000 mortgage lien, then the owner of the real estate, who is also the borrower on the mortgage loan, has $100,000 in equity in the real estate. Most landowners can do basic math. If their property is being foreclosed upon because they cannot pay a $100,000 mortgage, but the collateral is worth $200,000, the owner will just sell the collateral. The mortgage will be paid off when the collateral sells. The landowner will pocket $100,000. Thus, the real estate owner can convert their equity into cash.

Many foreclosures are initiated, but not consummated. The foreclosures that are consummated tend to be the foreclosures on the properties with very little equity. When there is equity, the landowner is motivated to capture the equity by one of the following methods:

- Selling the real estate
- Filing a bankruptcy case or a series of bankruptcy cases
- Refinancing the mortgage –or–
- Working out a bankruptcy-prevention payment plan and foreclosure deferral plan with the mortgage lender

All of the foregoing would result in the cancellation of the initiated foreclosure prior to the consummation of the foreclosure. The pool of purchasers that haunt the monthly foreclosure auction sites know that the high equity properties are the best to purchase because they present the least risk to the foreclosure sale purchaser. The foreclosure sale purchaser often cannot see the inside of the real estate, which makes determining an appropriate bid very difficult, unless the property consists of unimproved land. The credit bids may often prevail for the following reasons:

- The mortgage lender opens the foreclosure auction bidding with a credit bid.
- The consummated foreclosures tend to be the foreclosures on low equity collateral. –and–
- The foreclosure sale purchaser pool tends to have very little information on the condition of the inside of the real estate that is being auctioned.

However, on high equity foreclosures, the credit bid goes from being likely to prevail to being unlikely to prevail—except, possibly, for unique and difficult-to-use property such as expensive property, vacant land, or unique commercial property. Some counties in Texas also have a much more active foreclosure sale purchaser pool than others.

Sometimes mortgage lenders will say things like "Can I bid more than my loan amount so that no one else gets my property?" The answer is yes, of course you can. All the lender needs to do is bring cash or certified funds to the foreclosure auction. The lender can bid the full amount owed on the mortgage loan without paying anything out-of-pocket. This is referred to as a credit bid because in a credit bid, no money changes hands. The balance owed to the mortgage lender must be paid to the mortgage lender from the foreclosure auction proceeds. Accordingly, the mortgage lender can bid up to that balance without paying anything in cash-out-of-pocket because the funds would simply go to the lender anyways. The law does not require the doing of a useless thing and the lender does not need to pay itself. If, however, the mortgage lender bids more than the balance owed on the mortgage, the mortgage lender must pay the overage in cash or certified funds. The lender needs to raise some cash and bring the cash or certified funds to the foreclosure.

What about a Deed in Lieu of Foreclosure?

Lenders often ask this question as well. When it comes to taking a deed in lieu of foreclosure in Texas, the most important statute that the lender mortgagee needs to be aware of is Tex. Prop. Code § 51.006. Before reviewing this section, the lender must understand some basic lien priority concepts. "We recognize the well-established rule that following the valid foreclosure of a senior lien, junior liens, if not satisfied from the proceeds of sale, are extinguished." AMC Mortg. Services, Inc. v. Watts, 260 S.W.3d 582, 585 (Tex. App.—Dallas 2008, no pet.). "In a contest over rights or interests in property, the party that is first in time is first in right." Watts, 260 S.W.3d at 582, 585.

When a seller-financed mortgage lien forecloses, the foreclosure will extinguish junior liens such as mechanic's liens, judgment liens, or any other liens (subject to some notable exceptions) that arise after the date that the property was seller-financed. Notable exceptions include property tax liens—typically held by school districts, hospitals, and cities—and, to an extent, federal tax liens.

Based on the foregoing, the answer to the question "Should I take a deed in lieu of foreclosure?" is that you should probably do the following:

- Run a title search –and–
- If the title search reveals junior liens that would be extinguished by a foreclosure yet would not be extinguished by a deed-in-lieu, you should probably foreclose rather than take a deed-in-lieu so as to avoid paying junior liens that the mortgagor should be responsible for

Under Tex. Prop. Code § 51.006, a lender who qualifies and follows the proper procedures may get a mulligan. If the rules in Section 51.006 apply, then the lender can go ahead and foreclose so as to extinguish junior liens even after the deed-in-lieu has been taken. Section 51.006 does not give every mortgagee this right in every situation. You must read that law, evaluate whether it applies, and follow the required procedures.

Initial Steps in the Nonjudicial Foreclosure Process

Before proceeding to foreclosure, the lender should complete the steps discussed below.

Loan Default

The first step is to review the loan documents and confirm that a default exists. Most foreclosures occur because the borrower has failed to pay interest, principal, or other amounts that it owes to the lender under the loan documents. However, nonmonetary defaults can also lead to foreclosure. Common nonmonetary defaults include failing to maintain adequate insurance on the property, failing to maintain the property condition, violating zoning laws or municipal ordinances, and allowing additional liens to be placed on the property.

Borrower's Right to Cure

The minimum 20-day cure notice of Section 51.002 of the Texas Property Code does not apply to commercial property. Instead, any required default notice and opportunity to cure the default are whatever the loan documents state. Commercial loan documents in Texas commonly waive all default notice requirements, saying something like this:

> Grantor and each surety, endorser, and guarantor of the note waive, to the extent permitted by law, all (a) demand for payment, (b) presentation for payment, (c) notice of intention to accelerate maturity, (d) notice of acceleration of maturity, (e) protest, and (f) notice of protest.

For the most part, Texas law provides that this notice waiver is valid and enforceable. Lenders should, however, remain wary of arguments that the lender has waived the notice waivers by the lender's conduct. Regardless of whether these waiver-of-the-waiver arguments have merit, the arguments can result in temporary restraining orders and injunctions that prevent the lender from foreclosing. As a result, it is typically best practice to serve some notices even if all notices have been waived. Also, bear in mind that even if the lender can legally avoid providing various default or acceleration-related notices, the borrower can always file a bankruptcy.

With some limited exceptions, for the most part, borrowers cannot waive their right to file a bankruptcy case or to use the automatic stay of collections in bankruptcy to delay foreclosure. "[T]he Bankruptcy Code extinguishes the private right of freedom to contract around its essential provisions." Matter of Pease, 195 B.R. 431, 434 (Bankr. D. Neb. 1996).

In addition, the court in In re Madison stated:

> [S]everal sections of the [Bankruptcy] Code expressly provide that certain types of waivers of bankruptcy protections must be deemed unenforceable. See 11 U.S.C. § 365(b)(2) (invalidating defaults in executory contracts arising from ipso facto clauses); 11 U.S.C. § 522(e) (making of no effect waivers of exemptions and

avoiding powers); 11 U.S.C. § 524(c), (d) (establishing an exclusive set of requirements, including a rescission period, when borrowers may elect to waive their dischargeability rights by reaffirming debts); 11 U.S.C. § 541(c) (nullifying any effect of an ipso facto clause on the concept of "property of the estate"); and 11 U.S.C. § 1307(b) (making unenforceable waivers of the right to dismiss or convert a bankruptcy case to another Chapter).

184 B.R. 686, 691 (Bankr. E.D. Pa. 1995).

Given that even a lender with the most aggressive default waiver language in their loan documentation and who employs the most aggressive foreclosure strategy can be delayed by bankruptcy, the lender's best course of action often consists of providing some reasonable default and cure options to the borrower. Any scenario where the borrower cures a default is usually better for the lender than the hassle that a bankruptcy case would cause in terms of legal fees, paperwork, and administrative burden, together with the delays that occur when borrowers use bankruptcy as a dilatory tactic rather than in good faith to effectuate a successful reorganization.

Acceleration of the Underlying Debt

Some lenders do not fully understand the importance of the acceleration clause in the note and deed of trust. A typical promissory note provides for installment payments over time. Those payments are not due until the payment obligation matures by the passing of the payment due date. When a promissory note is accelerated, all of the remaining payments mature immediately. Unless a note has accelerated or matured, the lender cannot demand payment for the full remaining principal balance due on the note. They can only demand payment for the installments that have matured.

The statute of limitations on the debt begins to run upon each installment as the installment matures. Tex. Civ. Prac. & Rem. Code § 16.035(a), (b). The statute of limitations does not run on the remaining balance of the note until the note matures or is accelerated. Hammann v. H.J. McMullen & Co., 122 Tex. 476, 62 S.W.2d 59, 61 (1933); Burney v. Citigroup Global Markets Realty Corp., 244 S.W.3d 900, 903–04 (Tex. App.—Dallas 2007, no pet.); Tex. Civ. Prac. & Rem. Code § 16.035(e) (limitations, in Texas, do not start running until acceleration or final maturity of the note). The lender can, however, abandon or rescind acceleration any time, unilaterally, by notice. Tex. Civ. Prac. & Rem. Code § 16.038. Until Tex. Civ. Prac. & Rem. Code § 16.038 was enacted in 2015, there was some confusion about whether the statute of limitations could be reset by unilateral action of the lender. Leonard v. Ocwen Loan Servicing, L.L.C., 616 F. App'x 677, 678 (5th Cir. 2015); Callan v. Deutsche Bank, 93 F. Supp. 3d 725, 727 (S.D. Tex. 2015).

Acceleration is eminently important because every lender wants to credit bid at the foreclosure auction. If the loan is not matured or accelerated, then the lender is, at least arguably (depending on the terms of the note and deed of trust, conduct of the parties, and other circumstances), barred from credit bidding the full remaining balance due on the note at the foreclosure auction. Best practice for lenders is to always treat the acceleration process as a very important prerequisite to foreclosure.

Accepting the Arrearage to Cure Default before Foreclosure

Some lenders will accept the arrearage rather than the accelerated balance, plus attorney's fees, before the foreclosure sale and then reinstate the loan. While the lender, upon acceleration, may foreclose unless the entire note is paid off in full, the lender can also waive acceleration and reinstate the loan. Lots of case law exists regarding waiver of acceleration or loan workouts and other negotiations with the borrowers. Ensure that the lender puts any agreements with or offers to the borrower in writing and that the written agreement is drafted as clearly as possible. If, for example, the borrower raises half of the funds necessary to cure the arrearage and promises to raise the remaining funds within 30 days, and the lender agrees to accept the arrearage in lieu of the accelerated balance, but is willing to delay the foreclosure sale by only one month, then an agreement to delay the sale by one month in exchange for half of the arrearage now and the remaining arrearage within 30 days, without waiving acceleration, should be put into writing to avoid any confusion. In a wrongful foreclosure lawsuit, clarity and simplicity tend to help the lender. Confusion and complexity open the door for the borrower to make equitable arguments regarding waiver or estoppel or other legal theories for avoiding the terms of the promissory note, deed of trust, and acceleration notices. When negotiating, the lender should make clear to the borrower that the negotiations do not result in waiver of acceleration. Still, the lender should work with the borrower. The lender should not ignore the borrower or refuse to negotiate solely because the lender is worried about miscommunications or equitable arguments subsequently raised by the borrower. A lender who refuses to negotiate a default cure option with the borrower may put itself at greater risk of lawsuits than the lender who negotiates default cure in good faith.

Accelerating the Right Way

Notice of intent to accelerate must be unequivocal, and even stating that failure to cure breach "may result in acceleration" is insufficient. Ogden v. Gibraltar Sav. Ass'n, 640 S.W.2d 232, 234 (Tex. 1982). The notices must not only state that the account is in default, but also demand payment for the delinquent installments. Tamplen v. Bryeans, 640 S.W.2d 421, 422 (Tex. App.—Waco 1982, writ ref'd n.r.e.).

A proper acceleration notice should contain language tantamount to advising the borrower that the "entire debt [is] immediately due and payable." EMC Mortg. Corp. v. Window Box Ass'n, 264 S.W.3d 331, 337 (Tex. App.—Waco 2008). While the lender's best practice is always to give written notices, oral notice can still be effective. Dillard v. Freeland, 714 S.W.2d 378, 380 (Tex. App.—Corpus Christi 1986). Acceleration can also be accomplished without written notice of acceleration if the lender takes "some unequivocal action, such as filing suit, which indicates the entire debt is due." Burney v. Citigroup Global Mkts. Realty Corp., 244 S.W.3d 900, 903 (Tex. App.—Dallas 2008). Even a notice of a trustee's sale may be sufficient to constitute notice of acceleration if preceded by the required notice of intent to accelerate. Burney, 244 S.W.3d at 900, 904.

Waiver of Acceleration Notice Clauses Not Always Effective

"The exercise of the power of acceleration is a harsh remedy and deserves close scrutiny." Vaughan v. Crown Plumbing & Sewer Serv., Inc., 523 S.W.2d 72, 75 (Tex. Civ. App.—Houston [1st Dist.] 1975). In a case where the deed of trust provided that the entire indebtedness may, upon default, "be immediately matured and become due and payable without demand or notice of any character," the court held that the lender still needed to give notice of intent to accelerate. Bodiford v. Parker, 651 S.W.2d 338, 339 (Tex. App.—Fort Worth 1983). In Shumway v. Horizon Credit Corp., 801 S.W.2d 890 (Tex. 1991), the Texas Supreme Court reached a similar result, holding that when indebtedness could be accelerated "without prior notice or demand," notice of acceleration was waived, but notice of intent to accelerate was not waived. "Where the holder of a promissory note has the option to accelerate maturity of the note upon the maker's default, equity demands notice be given of the intent to exercise the option." Ogden v. Gibraltar Sav. Asso., 640 S.W.2d 232, 233 (Tex. 1982).

Best practice for lenders is to always give notice of intent to accelerate and notice of acceleration regardless of what the deed of trust or other instruments say. Giving the borrower an opportunity to cure default before acceleration is particularly important. Abraham v. Ryland Mortg. Co., 995 S.W.2d 890, 894 (Tex. App.—El Paso 1999); Allen Sales & Servicenter, Inc. v. Ryan, 525 S.W.2d 863, 866 (Tex. 1975).

Foreclosure Sale

The initial trustee named in the deed of trust is often the attorney who drafted the deed of trust for the title company or the lender. This initial trustee is often just a "placeholder" trustee, usually someone who regularly drafts deeds of trusts for lenders. This person may or may not have ever conducted a foreclosure auction, which is the essential function of the trustee. Furthermore, the initial trustee may reside on the other side of the state of Texas and may have no interest in driving all the way to the courthouse for the county that the property is located in so as to post the notice of trustee's sale or conduct the foreclosure auction on the courthouse steps. As a result, it is common, once a mortgage account is in default, for the lender, or the lender's loan servicer, to appoint a substitute trustee.

The appointment of the substitute trustee is typically filed in the county real property records so that there is no gap in the chain of title. In other words, the title would pass from the Grantor on the Deed of Trust (who is the borrower on the loan and the owner of the property) to the initial trustee, then to the substitute trustee, and finally to the foreclosure sale buyer (which may be the lender if the credit bid prevails). The lender is also typically the beneficiary of the deed of trust. Note that, despite the trustee being nominally vested with title to the property, the trustee is not treated, under Texas law, like the owner of the property. "[U]pon executing a deed of trust, the mortgagor retains legal title to the property, while the mortgagee acquires equitable title." In re Nguyen, No. 10-42499-DML13, 2011 Bankr. LEXIS 115 (Bankr. N.D. Tex. Jan. 13, 2011)). Instead, the trustee is treated as only having the right to conduct the foreclosure auction and sign a foreclosure sale deed (i.e., a "trustee's deed" at the conclusion of the auction). Please note that a mortgage loan servicer may usually appoint the substitute trustee for the lender:

> (c) Notwithstanding any agreement to the contrary, a mortgagee may appoint or may authorize a mortgage servicer to appoint a substitute trustee or substitute trustees to succeed to all title, powers, and duties of the original trustee. A mortgagee or mortgage servicer may make an appointment or authorization under this subsection by power of attorney, corporate resolution, or other written instrument.

(d) A mortgage servicer may authorize an attorney to appoint a substitute trustee or substitute trustees on behalf of a mortgagee under Subsection (c).

Tex. Prop. Code Ann. § 51.0075

As a result of Section 51.0075 of the Texas Property Code, the mortgage servicer or the mortgage servicer's attorney can typically appoint substitute trustees without needing to track down a corporate officer of the mortgage company to sign the appointment form.

Notice of Foreclosure Sale

Foreclosures always occur on the first Tuesday of the month unless that date would fall on a specified holiday. "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." Tex. Prop. Code Ann. § 51.002(a-1). To foreclose on a property on the first Tuesday of the month, the mortgage lender must have a notice of foreclosure sale (commonly referred to as a Notice of Trustee's Sale) posted and served at least 21 days before the date of sale. Tex. Prop. Code Ann. § 51.002(b). (The foreclosure notices must be sent to the borrower's last known address. Tex. Prop. Code § 51.002(e); Tex. Prop. Code § 51.0001(2) (defining last known address).) Look at a calendar for the first Tuesday of the month, and then count back three Tuesdays from that Tuesday. That date is the posting deadline if you want the collateral to be in the next monthly foreclosure auction.

Notice of Sale to the Internal Revenue Service (IRS)

Notice of sale to the IRS is potentially the most important component of a nonjudicial foreclosure sale in Texas, while also being the most easily overlooked. IRS tax liens arise under federal law, which means that these federal liens can supersede state lien laws. For example, "Under the Supremacy Clause of the United States Constitution, the IRS may obtain a valid federal tax lien and enforce its lien against a Texas homestead." Benchmark Bank v. Crowder, 919 S.W.2d 657, 660 (Tex. 1996); U.S. Const. Art. VI, cl. 2.

IRS liens can be discharged by foreclosure if proper notice of the foreclosure sale is given to the IRS. 26 U.S.C. § 7425 (April 2017); 26 C.F.R. § 301.7425-3 (April 2017); 26 C.F.R. § 400.4-1(a) (April 2017); IRS Publication 786, with IRS Form 14497. The notice should be in writing, to the correct place, and not less than 25 calendar days prior to the sale. The lien notice is generally required when the Notice of Federal Tax Lien has been filed more than 30 days prior to the sale. If the property is sold with the IRS lien, then the seller may consider rescinding the sale, if possible (see Tex. Prop. Code § 51.016), and redoing it, or looking at IRS Publication 783, which is an application to discharge the IRS lien.

Bidding at the Sale; Distribution of Proceeds

The trustee conducting the sale typically opens the bidding with a credit bid on behalf of the noteholder. While the trustee may credit bid for the mortgagee, the "trustee is only responsible to the mortgagee in the mortgagee's capacity as a lender interested in satisfying the debt out of the proceeds of the sale; he is not responsible to the mortgagee in the capacity as a purchaser seeking to purchase the property for less than its fair value in opposition to the mortgagor's interest." Bonilla v. Roberson, 918 S.W.2d 17, 22 (Tex. App.—Corpus Christi 1996). The noteholder's bid is referred to as a credit bid because the noteholder does not actually need to pay for the bid. The noteholder can bid up to the amount owed to the noteholder without needing to pay out-of-pocket since the funds would go to itself. If the credit bid wins the auction, the lender becomes the owner of the property. The purchaser at the sale should be prepared to pay in cash or certified funds on the spot. If a bidder wins the foreclosure auction, but does not immediately pay in cash or certified funds, the trustee will typically verbally void the auction and immediately reauction the property to a bidder that is prepared to pay on the spot. The trustee will usually do this up until the deadline specified in the Notice of Trustee's Sale, until a winning bidder makes good on a winning bid.

The purchaser at the sale acquires the property as is, without warranties, and at the purchaser's own risk. Tex. Prop. Code § 51.009. The purchaser is not considered a consumer for purposes of consumer-protection laws like the Texas Deceptive Trade Practices Act. Tex. Prop. Code § 51.009.

After the deadline, the trustee disburses the foreclosure sale proceeds in the following order:

- First, the trustee will pay off the mortgage lender.
- If the mortgage lender has been paid in full and there are funds left over, the trustee will search for junior lienholders, seek to confirm whether they have valid liens, and pay them using the foreclosure sale proceeds. –and–
- Finally, if there are no junior lienholders to pay, the trustee will disburse the overage funds to the borrowers on the mortgage loan (i.e., the former owners of the subject real estate).

The lender will never be paid more than what the lender is owed at a foreclosure auction. The equity in the property

does not belong to the lienholder. If the lender bids more than the credit bid, then the lender must pay in cash or certified funds and those funds, above and beyond the credit bid, will be disbursed to the junior lienholders and/or the former owners of the property (i.e., the borrowers on the mortgage loan).

If there is a dispute over who the foreclosure proceeds should be disbursed to, the trustee might file an interpleader. In an interpleader, the trustee deposits the disputed funds into the registry of the court, serves citations upon all interested parties, and lets those parties argue their case to the judge as to why they should receive the funds.

When foreclosing a wraparound note, there is an implied covenant obligating the trustee to apply the proceeds to the underlying note. Summers v. Consol. Capital Special Trust, 783 S.W.2d 580, 583 (Tex. 1989).

Deficiency Judgments

If there is a deficiency on the note after the foreclosure sale, the lender can bring a deficiency suit and the borrower has a statutory right to a fair market value determination and an offset against the deficiency. Tex. Prop. Code §§ 51.003, 51.004, 51.005. Section 51.003 of the Texas Property Code is, however, waivable in the loan documents. Moayedi v. Interstate 35/Chisam Rd., L.P., 438 S.W.3d 1, 8 (Tex. 2014). Deficiency suits have a two-year statute of limitations, starting on the date of the foreclosure. Tex. Prop. Code § 51.003(a).

Wrongful Foreclosure Suit

In a wrongful foreclosure suit, the borrower can elect one or the other, but not both, of the following remedies: "(1) set aside the void trustee's deed; or (2) recover damages in the amount of the value of the property less indebtedness." Diversified, Inc. v. Gibraltar Sav. Asso., 762 S.W.2d 620, 623 (Tex. App.—Houston [14th Dist.] 1988). If the borrower elects to recover monetary damages, the borrower can only do so if "(1) title to the property has passed to a third party; or (2) the property has been appropriated to the use and benefit of the mortgagee." Peterson v. Black, 980 S.W.2d 818, 823 (Tex. App.—San Antonio 1998); John Hancock Mut. Life Ins. Co. v. Howard, 85 S.W.2d 986, 988 (Tex. Civ. App.—Waco 1935). If the borrower does not leave the premises, the borrower has not suffered any compensable damages. If a foreclosure sale is void, the purchaser bid at their peril and may not recover damages for lost profits. Howard, 85 S.W.2d at 986, 988.

Grounds for Bringing Wrongful Foreclosure Suit

There are several grounds on which a borrower can bring a wrongful foreclosure suit.

Failure to Send Notice of Trustee's Sale

Failure to send notice of sale as per Tex. Prop. Code § 51.002 is sufficient reason for a trial court to set aside a foreclosure sale and hold the sale to be void. Shearer v. Allied Live Oak Bank, 758 S.W.2d 940, 942 (Tex. App.—Corpus Christi 1988); Houston First American Sav. v. Musick, 650 S.W.2d 764, 768 (Tex. 1983); WTFO, Inc. v. Braithwaite, 899 S.W.2d 709, 720–21 (Tex. App.—Dallas 1995, no writ). Junior lienholders are generally not entitled to receive notice of nonjudicial foreclosure sale in Texas. Elbar Invs., Inc. v. Wilkinson, No. 14-99-00297-CV, 2003 Tex. App. LEXIS 8182, at *6 (App.—Houston [14th Dist.] Sept. 23, 2003).

Some mistakes, like sending foreclosure notices to the wrong address, can be grounds for setting aside the foreclosure sale. Mills v. Haggard, 58 S.W.3d 164, 166 (Tex. App.—Waco 2001) (foreclosure sale set aside because loan servicing company had borrower's new address, yet notices went to borrower's old address and borrower did not receive them). The foreclosure notices must be sent to the borrower's last known address. Tex. Prop. Code § 51.002(e); Tex. Prop. Code § 51.0001(2) (defining last known address).

Incorrect Calculations

Calculating the amounts due incorrectly, may be insufficient grounds for rescinding the foreclosure sale. Powell v. Stacy, 117 S.W.3d 70, 75–76 (Tex. App.—Fort Worth 2003, no pet.).

Not Following the Deed of Trust

The terms of the deed of trust must be strictly followed in the conduct of the sale and notices in connection with the sale. Univ. Sav. Asso. v. Springwoods Shopping Ctr., 644 S.W.2d 705, 706 (Tex. 1982).

Failure to Send Required Notice to Cure in Conjunction with a Grossly Inadequate Price

Failure to send required notice to cure can invalidate a subsequent notice of sale, particularly when the property is sold for a grossly inadequate price. Mills v. Haggard, 58 S.W.3d 164, 167 (Tex. App.—Waco 2001).

> [T]he rule is well established that mere inadequacy of consideration is not grounds for setting aside a trustee's sale if the sale was legally and fairly made. Tarrant Savings Association v. Lucky Homes, Inc., 390 S.W.2d 473 (Tex. 1965). There must be evidence of

irregularity, though slight, which irregularity must have caused or contributed to cause the property to be sold for a grossly inadequate price. Sparkman v. McWhirter, 263 S.W.2d 832, 837 (Tex. Civ. App.—Dallas 1953, writ ref'd).

Am. Sav. & Loan Ass'n v. Musick, 531 S.W.2d 581, 587 (Tex. 1975); see also Diversified Developers, Inc. v. Tex. First Mortg. REIT, 592 S.W.2d 43, 45 (Tex. Civ. App.—Beaumont 1979).

For example, when properties were sold in bulk instead of individually and the individual sale may have resulted in repayment of the debt, the bulk sale constituted an irregularity that could have caused a grossly inadequate price and the foreclosure sale was void. Stanglin v. Keda Dev. Corp., 713 S.W.2d 94, 95 (Tex. 1986).

Requirement That Borrower Tender Amounts Due and Owing

When a borrower files a wrongful foreclosure lawsuit seeking rescission of the sale, the borrower must tender all amounts due and owing into the court's registry, and not merely plead that they will make a tender. Lambert v. First Nat'l Bank of Bowie, 993 S.W.2d 833, 835 (Tex. App.—Fort Worth 1999); French v. May, 484 S.W.2d 420, 426 (Tex. Civ. App.—Corpus Christi 1972) ("A mere offer to pay does not constitute a valid tender; it is required that the tenderer have the money present and ready, and produce and actually offer it to the other party. The tenderer must relinquish control over the funds for sufficient time and under such circumstances as to enable the tenderee without special effort on his part to acquire possession."). "Tender of whatever sum is owed on the mortgage debt is a condition precedent to the mortgagor's recovery of title from a mortgagee who is in possession and claims title under a void foreclosure sale." Fillion v. David Silvers Co., 709 S.W.2d 240, 246 (Tex. App.—Houston [14th Dist.] 1986).

Purchaser's Liability and Remedies in Wrongful Foreclosure Suit

The foreclosed-upon borrower, as a prerequisite to obtaining relief, may need to tender the winning bid to the purchaser at the sale. "A foreclosure sale to a good faith purchaser . . . will only be set aside if the one claiming equitable title tenders the amount of the bid." Goswami v. Metropolitan Sav. & Loan Ass'n, 713 S.W.2d 127, 130 (Tex. App.—Dallas 1986), rev'd on other grounds, 751 S.W.2d 487 (Tex. 1988); Bracken v. Haid & Kyle, Inc., 589 S.W.2d 501, 502 (Tex. Civ. App.—Dallas 1979). But see Tex. Prop. Code § 51.009(1) (enacted in 2003, effective in 2004); Henke v. First S. Properties, Inc., 586 S.W.2d 617, 620 (Tex. Civ. App.—Waco 1979) ("the doctrine of good faith purchaser for value without notice does not apply to a purchaser at a void foreclosure sale"); Diversified, Inc. v. Walker, 702 S.W.2d 717, 723 (Tex. App.—Houston [1st Dist.] 1985) ("Purchasers of land from a substitute trustee's sale are not relieved from the necessity of inquiring whether the trustee had been empowered to sell.").

If the foreclosure sale is later deemed void by a court, the purchaser does not generally have the benefits of being a good faith purchaser for value because the purchaser bids at their peril. Henke, 586 S.W.2d 617, 620–621; Tex. Prop. Code §51.009(1). If the sale is declared void, the purchaser may be subrogated to the debt and lien of the foreclosing mortgagee. In re Niland, 825 F.2d 801, 813 (5th Cir. 1987).

Rescission of Nonjudicial Foreclosure Sales

Tex. Prop. Code § 51.016 (Texas House Bill 2066 (84th Leg. (R) effective Sept. 1, 2015)) created procedures for a foreclosure trustee to rescind foreclosure sales in certain situations. The rules generally allow the trustee to rescind the sale up to 60 days after the date of sale if the statutory requirements of sale were not met, the default leading to the sale was cured before the sale, or for various other reasons. Before the 2015 law, the foreclosure trustee's authority ended with the sale and the trustee could not rescind the sale without the mortgagor's agreement. Bonilla v. Roberson, 918 S.W.2d 17, 22 (Tex. App.—Corpus Christi 1996).

Lawsuit Protections for Foreclosure Trustees

Under Section 51.007 of the Texas Property Code, a foreclosure trustee can be dismissed as a party from a wrongful foreclosure suit if "the trustee was named as a party solely in the capacity as a trustee under a deed of trust." The trustee must file a verified denial. Tex. Prop. Code § 51.007. The other parties must file a verified response within 30 days of the trustee's verified denial. However, if a trustee is dismissed pursuant to this section of the property code, the dismissal is without prejudice. Tex. Prop. Code § 51.007(c). A foreclosure trustee may also not be "held to the obligations of a fiduciary of the mortgagor or mortgagee" and may not be "assigned a duty . . . other than to exercise the power of sale in accordance with the terms of the security instrument." Tex. Prop. Code § 51.0074. Issues arising under Tex. Prop. Code § 51.007

tend to be litigated in context of disputes regarding federal diversity jurisdiction because the trustee is often a resident of the same state as the plaintiff in a wrongful foreclosure suit.

Property Tax Loans

Under Tex. Tax Code § 32.065(c), private property tax lenders are "prohibited from exercising a remedy of foreclosure or judicial sale where the transferring taxing unit would be prohibited from foreclosure or judicial sale." Accordingly, private property tax lenders must follow the same judicial procedures that the taxing municipalities must follow to foreclose on a private property tax loan.

The Type of Foreclosure for a Property Tax Lien Changes Depending on the Date That the Loan Was Originated

Property tax loans originated after May 29, 2013, can no longer be foreclosed by quasi-judicial procedures under Rules 735 and 736 of the Texas Rules of Civil Procedure because Senate Bill 247 (SB 247) of the 83rd Regular Legislative Session amended Section 32.06(c) of the Texas Tax Code to remove the provisions authorizing quasi-judicial sales, which has the effect of limiting private property tax lenders to the same judicial foreclosure procedures that the taxing municipalities must follow. A copy of SB 247 can be accessed here.

Before September 1, 2007, Tex. Tax Code § 32.06(c) provided that property tax lenders were "entitled to foreclose the lien . . . in the manner specified in Section 51.002, Property Code, and Section 32.065 of [the Tax Code]." Tex. Prop. Code § 51.002 governs regular nonjudicial trustee's sales. Tex. Tax Code § 32.065 contains various provisions related to tax lien foreclosures. Private tax loans that originated before September 1, 2007, could be foreclosed nonjudicially.

Senate Bill 1520 (SB 1520), of the 80th Regular Session of the Texas Legislature, available here, went into effect on September 1, 2007. Under SB 1520, Tex. Tax Code § 32.06(c) changed to say that property tax lenders were "entitled to foreclose the lien . . . in the manner specified in Section 51.002, Property Code, and Section 32.065 of [the Tax Code], after the transferee or a successor in interest obtains a court order for foreclosure under Rule 736, Texas Rules of Civil Procedure." (emphasis added) Additionally, Tex. Tax Code § 32.06(c-1) was added to provide a few extra requirements on property tax lien foreclosures under Rule 736 that did not apply to home equity loans.

From September 1, 2007, to May 29, 2013, private tax liens originated during that time could be foreclosed quasi-judicially through the expedited judicial foreclosure process in Rules 735 and 736 of the Texas Rules of Civil Procedure. Private tax loans originated before September 1, 2007, could be foreclosed nonjudicially.

The current procedures for foreclosing on a property tax lien are too complex and voluminous to explain in this practice note. Much of the time, private property tax lenders wait for the taxing authorities to start the foreclosure process and then file a petition in intervention in the judicial foreclosure tax suit filed by the municipalities' law firm. The private tax lenders then let the government's law firm handle the details of the foreclosure sale. For a private tax lender to foreclose, they must follow the same procedures that the municipalities must follow.

Condominium Association Liens

Unlike homeowner's association liens, condominium liens can be foreclosed nonjudicially by trustee's sale. Tex. Prop. Code § 82.113(d), (e). Condominium associations have greater statutory protections than homeowner's associations because, with condominiums, the shared ownership of the common areas causes a greater need for enforcement of shared maintenance and other obligations. The condominium association rules are found in Title 7, Chapters 81 and 82 of the Texas Property Code. Chapter 82 is the Texas Uniform Condominium Act, while Chapter 81 applies to condominiums created before the adoption of the Uniform Condominium Act (i.e., before January 1, 1994). Usually, the legal description in a condominium deed will refer to the property by a unit or building number rather than by a lot and block number for a subdivision. A condominium must have a declaration filed in the deed records, which typically references either the old Texas Condominium Act, the Texas Uniform Condominium Act, or some form of condominium regime. Tex. Prop. Code § 82.051(a).

Statutory Condominium Lien

Unlike homeowner's association liens, condominium liens can arise by statute even when the condominium declaration on file in the deed records fails to create a lien. Tex. Prop. Code § 82.113(a). The statutory lien is broad, defining assessments as including regular and special assessments as well as "does, fees, charges, interest, late fees, fines, collection costs, attorney's fees, and any other amount due to the association by the unit owner or

levied against the unit by the association." Tex. Prop. Code § 82.113. The lien encumbers not only the unit, but also any "rents and insurance proceeds received by the unit owner and relating to the owner's unit." Tex. Prop. Code § 82.113. Condominium associations "may not foreclose a lien for assessments consisting solely of fines." Tex. Prop. Code § 82.113(e). The association can bid on the unit at the foreclosure sale as a common expense. Tex. Prop. Code § 82.113(f).

Statutory Condominium Lien Priority

The statutory condominium lien has priority over any other lien except the following:

- Property taxes
- Encumbrances recorded before the condominium declaration is recorded
- A first vendor's lien or first deed of trust lien recorded before the date on which the assessment sought to be enforced becomes delinquent under the declaration, bylaws, or rules –and–
- Unless the declaration provides otherwise, a lien for construction of improvements to the unit or an assignment of the right to insurance proceeds on the unit if the lien or assignment is recorded or duly perfected before the date on which the assessment sought to be enforced becomes delinquent under the declaration, bylaws, or rules

Tex. Prop. Code § 82.113(b).

Condominium associations, unlike property owners associations, generally do not have to notify junior lienholders of foreclosure sale, unless the declaration contains such requirement, or the lienholder provides a written request for notice pursuant to Tex. Prop. Code § 82.113(h).

Foreclosure Type Matrix for Property Tax Loans and Condominium Association Liens

The matrix below sets forth the governing statutes and foreclosure type for property tax loans and condominium association liens foreclosures.

Lien Type	Foreclosure Type	Citation
Property Tax Loans Originated after May 29, 2013	Judicial	Tex. Tax Code § 32.06(c); Senate Bill 247 (SB 247), 83rd Regular Session
Property Tax Loans Originated between September 1, 2007 and May 29, 2013	Quasi-Judicial	Tex. Tax Code § 32.06(c); Senate Bill 1520 (SB 1520), 80th Regular Session
Property Tax Loans Originated before September 1, 2007	Nonjudicial	Tex. Tax Code § 32.06(c) prior to SB 1520, 80(R) and SB 247, 83(R)
Condominium Association Lien	Nonjudicial	Tex. Prop. Code § 82.113(d), (e)

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Ian practices general civil litigation, primarily in the areas of Debtor/Creditor, Real Estate, and Mineral Rights. Ian has handled cases involving deed restrictions, mechanic's liens, mortgages, lien subrogation, class actions, the Texas Mineral Interest Pooling Act, title disputes, fraud, deceptive trade practices, evictions, foreclosures, lift stay motions and bankruptcy-related matters, post-judgment collections, breach of contract, insurance claims, cases under the Uniform Fraudulent Transfer Act, contract-for-deed litigation, etc. Ian is certified in residential real estate law by the Texas Board of Legal Specialization.

Before law school, Ian spent about four years as a banker for J.P. Morgan Chase where he held a Series 7 license and served as both a stockbroker and a loan officer.

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