FORECLOSURE UPDATE WITH A TWIST

25TH ANNUAL ROBERT C. SNEED

TEXAS LAND TITLE INSTITUTE

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ST. MARY'S UNIVERSITY SCHOOL OF LAW

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I. INTRODUCTION

One of Yogi Berra's insightful malapropisms is, "It's hard to make a prediction – especially about the future".

Who would have predicted how much the foreclosure landscape has changed in the last few years. For example, the 5th Circuit in *Martins v BAC Home Loan Servicing, LP,* 722 F.3d 249, 255 [n. 2] (5th Cir. 2013) said, "*The issue [foreclosure] is made all the more difficult by the fact that few Texas courts have properly articulated Texas law in this area—most foreclosure cases are decided by the federal courts under diversity jurisdiction. Moreover, Texas courts routinely rely on federal court interpretations of Texas law"* citing *Bierwirth v. BAC Home Loans Servicing, L.P., No. 03–11–00644–CV, 2012 WL 3793190, at *1 n. 3 (Tex.App.–Austin Aug. 30, 2012, no pet.). ("Federal authority is persuasive here because a great amount of home-mortgage litigation in Texas is tried in its federal courts, applying Texas foreclosure law.").*

Who would have guessed Federal judges now decide most Texas foreclosure law issues because foreclosure suits filed in state court are generally removed to federal court.

In spite of all the media frenzy, who would have predicted the foreclosure crisis appears almost over. Nationwide, foreclosure sales are the lowest since 2005. According to the September 2015 CoreLogic National Credit Report, Texas along with Florida, Michigan, Georgia and California account for almost half of all completed foreclosures nationally. According to the Mortgage Banking Association, Texas ranked 36th nationwide in the lowest number of foreclosures at 0.62% of all Texas loans serviced in the 2nd Quarter of 2015.

Because loss mitigation may be one of the principal reasons for the decline in foreclosure, a portion of this paper will focus on the loss mitigation process regulated by the Consumer Financial Protection Bureau ("CFPB") created under the Dodd-Frank-Wall Street Reform and Protection Act. The CFPB is the regulatory agency that oversees all persons that engage in offering or providing a "consumer financial product or service" including bank and non-bank lenders and their service providers, e.g. mortgage servicers, attorneys, and title companies providing closing services. By special exception, the business of issuing title insurance is not subject to CFPB supervision.

In the final sections entitled "CURRENT FORECLOSURE CONUNDRUMS", "STATUTE OF LIMITATIONS", and "A 'CURE' FOR BREAKS IN THE CHAIN OF TITLE" the authors discuss 23 current foreclosure issues.

II. FORECLOSURE CIRCA 2007

Pundits and commentators claim the foreclosure crisis exploded because securitization of toxic loans and nontraditional subprime financing - beginning in the mid-2000s - enabled marginal borrowers and speculators to obtain loans based on the putative value of the secured property. The five "Cs" of traditional credit lending: character, capital, capacity, conditions and collateral were ignored. Builders were happy to build houses and condos to meet the demand caused by the new

money pouring into real estate based on property values. But by late 2006, overbuilding outstripped demand and the time tested consequences of a supply and demand imbalance caused the value of real estate secured by toxic mortgages to crash. When the housing bubble burst in 2007 and 2008, the American economy was crippled and foreclosures exploded.

In *Poor Charlie's Almanac*, Charlie Munger, Warren Buffett's indispensable financial partner and confident for 40 years, contends securitization caused the Lollapalooza Effect:

- The entire mortgage finance universe including real estate agents, appraisers, mortgage lenders, banks, Wall Street firms, ratings agencies and borrowers were seduced by easy money

- Blinded by free market ideology or the dream that all Americans should own their homes regulators and politicians:

    - Did nothing or fell asleep at the switch

    - Refused to put a lid on the candy jar, and

    - Let the financial industry bamboozle governmental regulators

- Personal debt became culturally acceptable and easy credit became ludicrously available

- Millions of Americans became speculators or took on more debt than they could afford

- Greenspan kept interest rates too low for too long

- Institutional investors didn't ask many questions, leveraged themselves to the hilt, and depended on credit ratings and credit enhancements for due diligence instead of competent analysis

- In general, everyone was indulged in irrational financial exuberance

The question in 2015 is whether the competing social, moral, business and legal issues raised by foreclose crisis have been addressed in a way that does not violate the often quoted observation made by Eric Sevareid, "*The chief cause of most problems is the solution*".

Many may think the mortgage crisis has gone away. Foreclosure start rates are now back to the levels seen before the toxic-loan era. Investors worldwide are pouring money into the mortgage marketplace, in part because of our low foreclosure levels, but nationwide, home prices remain below the 2007 peak if property values are adjusted for inflation and buying power of the dollar. According to Marina Walsh, the Vice President of Industry Analysis for the Mortgage Bankers Association "*Legacy loans continue to account for the majority of all troubled mortgages and 73% of the loans that are seriously delinquent, were originated before 2008*."

Hope Now, as reported in the National Mortgage News, says foreclosure sales in August 2015 fell to their lowest level in eight years. Compared to June 2015,

the number of foreclosed homes sold nationwide, fell 7% to 27,000; completed short sales fell 12% to 7,100; and completed loan modification, including Home Affordable Modification Program loans, fell 3% to 32,000.

Of the 670,881 loans serviced in Texas, the most recent foreclosure report of the Mortgage Banking Association states Texas ranks 36th nationwide with a foreclosure sale rate of 0.62% compared with 0.75% in 2014. New Jersey is the highest with a 4.97% foreclosure rate and Alaska the lowest at 0.34%. Interestingly, in nonjudicial foreclosure states like Texas the average foreclosure rate nationwide was 1.36% and in states with judicial foreclosure the rate was 3.41% nationwide in the second quarter of 2015.

Before negative headlines put a spotlight on loan servicing and foreclosure, most judges would accept without question a conclusionary affidavit in a Rule 736 home equity application from almost anyone if it stated the borrower was in default. Now many judges independently scrutinize the terms of the note and deed of trust and find anomalies caused by sloppy loan origination practices in the go-go years. Consequently, even when a borrower files no response, a judge will require a hearing regardless of Tex. R. Civ. Proc 736.6 stating *"a court must not conduct a hearing under this rule unless a response is filed"*.

Out of the 482 district judges that hear Rule 736 home equity foreclosure applications in the 254 Texas counties, the authors' law firm has identified 103 courts that by fiat require a hearing before a Rule 736 order by default will be entered. Judges seem to ignore the fact that after a Rule 736 order is entered the mortgagee cannot foreclose unless it meets all the terms and conditions of the borrower's loan agreement and comply with all the consumer foreclosure safeguards found in statutory, and case law. By entering a Rule 736 order, the judge does not extinguish any of the rights or protection found under 150 years of Texas law and contrary to popular belief, a Rule 736 order is not the same as an order of sale arising under Tex. R. Civ. Proc. 309.

This change in judicial attitude is similar to what happened under the Fair Debt Collection Practices Act (FDCPA) in the early 1990s. Initially, lawyers were not subject to the Act; however, because a few attorneys abused the debt collection exemption by employing egregious collection practices, Congress removed the attorney exemption and made FDCPA apply to attorneys. Judicial scrutiny of foreclosures seems to be following the same pattern. The abuses by a very few services and attorneys is causing all foreclosures to be placed under a microscope.

Until federal judges became involved in foreclosure lawsuits after removal from state court, the fact a borrower had the use and benefit of the secured property for a number of years without making a mortgage payment did not enter into the foreclosure analysis. Now federal judges' opinions in essence say:

> *"Borrower you got $$$$$ dollars when the loan closed to purchase or refinance the property based on your promise to repay the loan evidence by the note and deed of trust you signed. You've lived in the*

property for xxx months/years and not made a mortgage payment. Unless there is material legal defect recognized by law in the loan documents or foreclosure process, your reason for not paying your mortgage based on pseudo-lawyer internet pleadings and theories won't fly."

One final note. If you are a believer in Adam Smith's free market economic theory, then you will understand why lenders HATE to foreclose. A common foreclosure costs a lender on average, $50,000 per foreclosed home, or as much as 30 to 60 percent of the outstanding loan balance. Darryl E. Getter's "Understanding Mortgage Foreclosure: Recent Events, the Process, and Costs," Congressional Research Service Report for Congress (November 5, 2007), pp. 9, 11.

III. THE SERVICER AND SERVICING

The most important change in the foreclosure arena is the mortgage servicer who handles all the daily loan administration details of a borrower's loan agreement, administers the foreclosure process – not the lender, the investor, or the attorney. If a loan is securitized, which is the case for almost all residential home loans, there is only one entity that has any loan level information about a particular loan and that is the servicer to whom the borrower makes loan payments. Anyone with a legitimate reason for seeking information about a borrower's loan agreement is wasting time and energy trying to get information from anyone other than the servicer and that includes information from the borrower.

The other change is almost all real estate loans are pooled, securitized, and sold into the secondary market. In a typical securitization, a master servicer is usually affiliated with the originator or sponsor of the securitization, acts like a general contractor and hires all the entities that will actually manage the myriad functions related to a securitization – including the foreclosure process. The only information a master servicer generally has for an individual securitized loan is found on a spreadsheet that identifies the loan by name, number, address, principal and interest, and maturity date. The servicer *"remits"* [a word of art in securitization lingo] the principal and interest less a servicing fee of 25 to 75 basis point from each loan payment received from a borrower to the master servicer. The master servicer then *"distributes"* each investor's contractual share of the income stream of principal and interest received from the servicer from the pool of securitized loans.

Typically, the servicer, who is the authorized agent for loan service administration for all matters related to a borrowers loan agreement, has custody, control or physical possession of the borrower's "wet signature' note. Who has the note is a critical piece of information for anyone handling a foreclosure because possession of the note eliminates most of the issues about who has the authority to foreclose. The servicer typically also has the loan origination and collateral file with borrower's loan application and loan closing documents and the borrower's loan payment history. In addition, almost

all communications between the borrower and the servicer and all activities related to the daily management of the loan are noted in electronic "loan comment" file kept by the servicer.

The servicer's role is now recognized by the financial sector as being important. Servicers are now rated by the rating agencies – Standard & Poor's, Fitches, and Moody's – because the quality of loan servicing provided by servicer could mean a 10 to 25 basis point swing in the value of a loan pool.

Regulation AB ("Reg AB") which codifies twenty years of SEC ad hoc guidance on asset-backed securities, makes servicing an integral subject of security regulations. 17 C.F.R. §§ 229.1100 – 229.1123 and specifically 17 C.F.R. § 229.1108. The offering documents of all asset-backed security transactions must contain a clear description of the roles, duties, and oversight responsibilities of all persons involved in servicing securitized loans to include the master servicer and its affiliates and each unaffiliated sub-servicer that services at least ten percent (10%) or more of the securitization's pooled assets. This includes any servicer responsible for calculating or making distributions to investors and those performing workouts or foreclosures. The offering documents must also provide basic information about the servicer's experience, its servicing practices, and the agreement between the various parties controlling the securitization. A backup servicer must be identified should the current servicer default in performing its obligations. In addition, there must be a general discussion of the servicer's experience in servicing the type of assets included in the current ABS transaction; whether prior securitizations of the same type of asset went into default; and whether the servicer failed to comply with servicing criteria in other securitizations.

A. THE PROSPECTUS AND POOLING AND SERVICING AGREEMENT

For private label securitizations, the prospectus filed with the SEC contains a pooling and servicing agreement ("PSA") that discloses the duties and obligations of the servicer. Generally, the PSA is the written agreement between the servicer and mortgagee referred to in Tex. Prop. Code § 51.0025, that allows a mortgage servicer to administer the foreclosure process so long as the name of the mortgagee is disclosed in the notice of foreclosure sale. Tex. Prop. Code § 51.002(b).

If a loan is securitized into a Fannie Mae or Freddie Mac pool, the website of each of these government sponsored entities ("GSEs") provides examples of their standard securitization documents. The obligations imposed on a servicer servicing Fannie and Freddie loans are also disclosed in the GSEs' Single Family Guidelines found on their website or in collaboration with AllRegs, the AllRegs website. Under the "Mortgage-Backed Securities" section on the Fannie Mae website at *www.fanniemae.com* specific disclosure documents for a particular securitization can be obtained if the security's CUSIP number, pool number or trust number is available. Likewise, on the Freddie Mac website at *www.freddiemac.com* under "Mortgage Securities", the disclosure documents for specific Freddie Mac

security can be obtained if the "Series Number" of the securitizations is searched. Neither Freddie Mac nor Fannie Mae are regulated by the U.S. Securities and Exchange Commission ("SEC"), however, both GSEs file 10-Ks with the SEC and the 10Ks provide an excellent overview of how the GSEs operate. Note: Since September 2008, both Fannie Mae and Freddie Mac have been in conservatorship under the Federal Housing Finance Agency, their principal regulator.

A private label securitization's offering documents must be filed with the Securities and Exchange Commission. A search on the SEC website at www.sec.gov under "Search Company Filings" will reveal all the securities filed with the SEC by a particular entity. For example, to locate the documents filed for a specific Ameriquest securitization, search "Ameriquest" under "Company Name" and click on the listed securitization of interest. Generally, the first document filed with the SEC will be the prospectus. The prospectus can answer any general question an attorney might have about the nature of the collateral in an asset-backed security and the name and role of each person or entity that manages or administers the security.

Delinquent borrowers who challenge foreclosure with pseudo-lawyer internet pleadings and theories, typically allege "standing" as a defense based on violation of the pooling and servicing agreements. The 5th Circuit has ruled borrowers have no standing or capacity under Texas law to enforce the provisions of a pooling and servicing agreement - because borrowers are not parties or intended third-party beneficiaries of a PSA. *Ferguson v Bank of New York Mellon Corp,* 802 F.3d 777, 781(5th Cir. 2015). However, *Ferguson* does not stop borrowers who want to stay in their home without making a mortgage payment from filing an foreclosure appeal based on standing because an appellate court must review all standing issues *de nova* regardless of the facts plead and causes of action asserted. *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 226 (Tex. 2004) and *Everett v. TK-Taito, L.L.C.,* 178 S.W.3d 844, 853 (Tex.App.-Fort Worth 2005, no pet.).

From a legal standpoint, a plaintiff must have both standing and capacity to bring a lawsuit. However, in most foreclosure contexts, the standing defense is really a capacity defense. *Austin Nursing Home Center Inc. v Lavato*, 171 S.W. 3d 845, 849 (Tex. 2005). Standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a justiciable interest in its outcome; whereas capacity is a procedural issue dealing with the personal qualifications of a party to litigate. A plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority. A party has capacity when it has the legal right to act, regardless of whether it has a justiciable interest in the controversy and should not be confused with the question of whether a party has an enforceable right or interest. *Nootsie, Ltd. v. Williamson County Appraisal Dist.,* 925 S.W.2d 659, 661 (Tex.1996) and 6A CHARLES ALAN WRIGHT, ARTHUR MILLER, AND MARY KAY KANE, WRIGHT MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1559, AT 441 (2D ED.1990).

So in the final analysis, a borrower's delaying tactic founded on a PSA violation causing a standing issue is in reality a capacity issue because the borrower is not a party or privity to the PSA contract. *Nat'l Health Res. Corp. v. TBF Fin. LLC,* 429 S.W.3d 125, 129 (Tex. App.-Dallas 204, no pet.). Note: *Nat'l Health* also points out that to challenge standing or capacity the borrower must file a verified denial under Tex. R. Civ. Proc 93.

A review of the PSA is important because when a loan is securitized - which is the case for almost all residential loans – to eliminate needless hassle and the risk of litigation, the foreclosure professional should make every attempt to ensure the mortgagee initiating foreclosure is properly named or identified. In a typical private label securitization, this entity is a *"special person entity"* [a word of art in securitization lingo] that is a bankruptcy remote trust and can be usually recognized with a name like *Bank of New York Mellon fka Bank of New York as Trustee for HEL Series 2005.*

Except for eliminating specious "standing" and "proper party" foreclosure challenges – which happens often – or being technically correct, naming a special purpose entity as the mortgagee in a common Texas foreclosure is not legally necessary if the servicer and the role of the servicer is properly disclosed. Texas, unlike all other states, recognized securitization radically changed the origination and servicing of real estate loans. In 2004, the Texas legislature changed the foreclosure statutes to allow the mortgage servicer – which was the only entity that had any contact or loan level information related to the borrower's loan - to administer the foreclosure process instead of the traditional "owner of the note". A servicer can administer a Texas foreclosure if: (a) there is a written agreement - generally the PSA - between the servicer and the "mortgagee" and (b) the name and address of the mortgagee is disclosed in the Tex. Prop. Code §51.00(2) notice of foreclosure sale sent to the borrower. By definition, interestingly enough, a "mortgagee" can be six different entities at the same time, i.e. the grantee, beneficiary of the deed of trust, owner or holder of the note, a book entry system [MERS], or even the mortgage servicer. The legislature probably intended the term "mortgagee" to mean the person who ultimate receives the money from a borrower's mortgage payment ("the investor") or the holder of the note as defined in Tex. Bus. & Com. Code §3.301, but the ambiguity has allowed a certain amount of flexibility in foreclosure documentation. The best practice for ensuring there is no doubt about the role a named party plays in foreclosure is to simply state the party's role, i.e., investor, servicer, note holder, transferee, trustee, authorized agent or representative.

Because of deluge of litigation in other states based on who has standing or capacity to foreclose - and especially in the 28 judicial foreclosure states - most mortgage servicers require the "investor" be named as the mortgagee in the foreclosure proceedings. The investor is the person the servicer's accounting records name as the person who is to receive the income stream from the pooled mortgages. Fannie Mae and Freddie Mac require that the mortgage servicer be named as the foreclosing

mortgagee based on the fact the mortgage servicer has custody, control, or physical possession of the borrower note and therefore, is the GSEs' authorized agent, transferee, or holder of the borrower's note. ("Transferee" – Tex. Bus. & Com. Code § 3.203 and "holder" – Tex. Bus. & Com. Code § 3.301. (See Fannie Mae *Guideline Announcement* 08-12, May 2008)

B. THE SERVICER UNDER DODD-FRANK

Under Dodd-Frank Act, 12 U.S.C. §§ 5514(c), 5515(d), 5516(e), 5563, and 5564 the CFPB has supervisory and enforcement authority over any "covered person" meaning "any person or affiliate that engages in offering or providing a consumer financial product or service". 12 U.S.C. § 5481(5). "Financial product or service" is defined in 12 U.S.C. § 5481(15) and includes any person extending credit, servicing loans, and providing real estate settlement services – except title insurance. The CFPB has the authority to do onsite audits to ensure compliance by service providers with all "enumerated consumer laws" that prohibit unfair, deceptive, or abusive acts or practices." All "enumerated consumer laws" includes 15 separate omnibus Acts listed in alphabetic order in 12 U.S.C. § 5481(12), including the Electronic Fund Transfer Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Homeowners Protection Act, Subsection (b)- (f) of Section 43 of the Federal Deposit Insurance Act, Fair Debt Collection Act, Sections 502 - 509 of the Gramm-Leach Bliley Act, Real Estate Settlement Procedures Act, S.A.F.E. Mortgage Licensing Act, Truth in Lending Act, and the Truth in Savings, Act. In other words, nearly every law on the books that affects financial services. Under 12 U.S.C. §§ 5531(a) and 5536 the CFPB exercises immense regulatory and enforcement authority over all supervised service providers.

Due to resource constraints, most banks and non banks operating under CFPB supervision rely on outside service providers, like outsourcers, accountants, title agents, and attorneys, to provide specialized services or expertise that is not available without significant investment in time and money by the bank or non-bank. As would be expected both the principal and all of its service providers must comply with all the CFPB mandates on their own account. But in any business relationship regulated by the CFPB, the principal has the added responsibility of ensuring CFPB compliance by all its service providers and, should it fail to properly supervise its service providers, be accountable and suffer the consequences imposed by the CFPB – generally a large fine.

The CFPB rules require all financial service providers adopt policies and procedures that: (a) provide access to and dissemination of accurate and timely information; (b) properly evaluate loss mitigation applications; (c) ensure CFPB compliance by its outside service providers; (d) transfer information accurately and timely when servicing is transferred to a different servicer; and (e) inform borrowers of its error resolution and information request procedures. The CFPB rules also deal with record retention and what information and documents must be contained in a servicing file.

IV. LOSS MITIGATION REPLACING FORECLOSURE

A. INTRODUCTION

Under the new CFPB loss mitigation regulations requiring early intervention and continuity of contact, the incidents of foreclosure seem to be reduced - at least for now. We'll see whether loans that are modified stay modified or go into foreclosure again. While most loss mitigation rules apply only to delinquent borrowers, it should be noted a borrower can apply for loss mitigation relief whether the borrower is delinquent or not.

This section seeks to provide a broad overview of the new loss mitigation process under the CFPB rules that became effective January 10, 2015. Under the new rules, any borrower whose loan was delinquent before January 10, 2015 must be afforded the chance to re-apply or re-qualify for loss mitigation under the January 10, 2015 rules.

B. GENERAL REQUIREMENTS ON SERVICERS

A servicer has no duty "*to provide any borrower with any specific loss mitigation option*". *See* Code of Federal Regulations, Title 12, Banks and Banking, Chapter X – Bureau of Consumer Financial Protection, Part 1024, Subpart C, Mortgage Servicing [the loss mitigation procedures]. 12 C.F.R. §§1024.30-1024.41].

"Nothing creates a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, with respect to evaluating, or offering, any loss mitigation option, or to eliminate any such right that may exist pursuant to applicable law." 12 C.F.R. 1024.41].

However, a borrower may enforce any servicer violations under the RESPA provisions in 12 U.S.C. 2605(f). Under this section a borrower is entitled to actual damages, an amount not to exceed $2,000 if the violation is the result of a pattern of non-compliance, plus attorney fees. The attorney fee provision makes it worthwhile for consumer bar attorneys to file lawsuits for violation of CFPB regs.

C. KEY DATES FOR LOSS MITIGATION AND FORECLOSURE

Key dates must be identified in the loss mitigation process because the timing for modification *vis-a-vis* foreclosure are tied to certain dates depending on when the borrower became delinquent; whether a foreclosure sale has or has not been scheduled; and when the borrower submitted a **completed** (emphasis added) loss mitigation application. Unless a borrower submits a completed loan application in accordance with the servicer's requirements, the borrower is not entitled to any loss mitigation options under the CFPB regulations except under very limited circumstances.

The crucial dates are:

- The date of delinquency
- 36 days after a payment or partial payment is not made
- 45 days after a payment or partial payment is not made

- 120 days after a borrower becomes delinquent

- The date of the scheduled foreclosure sale

- 37 days before any scheduled foreclosure sale

- 45 days before any scheduled foreclosure sale

- 90 days before any scheduled foreclosure sale

- The date the servicer receives a completed or facially completed loss mitigation application.

- The date the servicer provides the borrower a loss mitigation offer.

There is no deadline for completing a loss mitigation application, however, the sooner a completed application is submitted the more loss mitigation options and rights the borrower receives. Borrowers who submit a completed loss mitigation application 37 days or less before a scheduled foreclosure sale are not entitled to CFPB rights under 12 C.F.R. §1024.41; however, the servicer must still comply with many investor guidelines that may be more liberal.

D. LOSS MITIGATION PROCESS

The steps in the loss mitigation process are described in great detail and surprisingly in plain, understandable English. 12 C.F.R. § 1024.41. In general, there are eleven steps or stages in the loss mitigation process. Because the loss mitigation procedures are so comprehensive and require meticulous attention to detail, it is best to have a copy of 12 C.F.R. § 1024.41 in hand to ensure compliance with each stage. A general overview follows.

- Servicer initiates live contact with borrower. 12 C.F.R. § 1024.39(a) & (d) and 12 C.F.R. § 1024 Supplement I Comment 39(a) & (d).

- General information about a loan work out or modification is provided – specific options are not required at this stage. 12 C.F.R. § 1024.39(a) and 12 C.F.R. § 1024 Supplement I Comment 39(a).

- The servicer assigns personnel who must be available by telephone in a timely manner and must have accurate and current information about the borrower's account and the status of the loss mitigation and foreclosure process. 12 C.F.R. § 1024.38(a) & (b) and 12 C.F.R. § 1024.40.

- Periodic statements with delinquency information must be sent to the borrower within 45 days of delinquency; however, these rules don't alter the periodic statement requirement for all borrower's accounts. 12 C.F.R. § 1026.41 generally and 12 C.F.R. § 1026.41(e). Unlike most CFPB rules that apply only to mortgage servicers, the periodic statement rule also applies to the mortgage owner or assignee servicing their own portfolio loans. 12 C.F.R. § 1026.41(a)(2). Compliance with the periodic statement rule is safe

harbored if the Sample Form of Periodic Statement in Appendix H-30 is used. 12 C.F.R. § 1026.41(c).

- The borrower applies for loss mitigation. A simple inquiry about loss mitigation is not considered an application unless the borrower provides certain specific information. 12 C.F.R. § 1024, Supplement 1, comment 41(b).

- If servicing of the borrower's account is transferred to another servicer, an application with the old servicer may make the new servicer responsible for complying with all triggering events. 12 C.F.R. Part 1024 Supplement 1, comment 41(i).

- The servicer acknowledges receipt of an application or helps the borrower complete an application properly. A servicer's responsibility at this stage depends on whether an application is received 45 days before or after a foreclosure sale is scheduled because there are specific duties imposed on the servicer depending on when the application is received and when the loan became delinquent. 12 C.F.R. § 1024.41(b) and 12 C.F.R. Part 1024 Supplement 1, comment 41(b).

- The CFPB commentary says that requiring a borrower to supply information or submit documents in less than seven days is "impractical." In other words, servicer doesn't require a seven day response. 12 C.F.R. Part 1024 Supplement 1, comment 41(b)(2)(ii)-1.

- The borrower completes the loss mitigation application. Though the rules don't impose a deadline on when a loss mitigation application must be completed, the borrower's rights depend on when a completed application was submitted in relationship to a foreclosure sale date. Until an application is properly completed according to the servicer's application process, the servicer is not required to evaluate the application. 12 C.F.R. § 1024.41)(b)(e)(h) and 12 C.F.R. Part 1024 Supplement I, Comment 41(b)(1)(-1); 12 C.F.R. § 1024.41(c)(2)(ii).

- The servicer evaluates the completed loss mitigation application depending on whether the application was received more than or less than 37 days before a scheduled foreclosure sale. Beginning January 10, 2014 a servicer must conduct a new evaluation even if an application was granted or denied before January 1, 2014. The servicer has discretion in how an application is reviewed but it requires meticulous conformance with the regulations. 12 C.F.R. § 1024.41(c) and 12 C.F.R. Part 1024 Supplement I, Comment 41(c).

- The servicer offers or denies a loss mitigation option. Within 30 days of receiving a completed

application the servicer must give the borrower a written notice that contains specific information depending on whether a mitigation offer is made or not. The servicer determines a date the borrower must accept or reject the offer which could be a loan modification or a short sale. If the application is denied, specific reasons must be given for the denial. Denying an application based on " investor's requirements" is not acceptable. Upon denial, the servicer must notify the borrower of the borrower's appeal rights. 12 C.F.R. Part 1024 Supplement I, Comment 41(d) and 12 C.F.R. § 1024.41(d) and §1024(c)(f)(ii).

- If a completed application was received by the servicer 90 days before a scheduled foreclosure sale, the servicer must give the borrower at least 14 days to accept or reject the offer. If the completed application was received less than 90 days but more than 37 days before a scheduled foreclosure sale, and the borrower does not respond to an offer but submits a payment that would be owed under the loss mitigation plan, the plan is considered accepted. If a borrower appealed a previous offer but received a new offer, the time to accept or reject is extended by 14 days. 12 C.F.R. § 1024.41(e) and 12 C.F.R. § 1024.41(c) & (h).

- If a servicer denies a loan modification application, the borrower can appeal but the borrower cannot appeal a short sale denial or other non-loan modification offer. An appeal must be conducted by someone who was not responsible for evaluating the borrower's loss mitigation application; however, a supervisor who was not "directly involved" in the evaluation process can determine the appeal. The servicer must notify the borrower in writing within 30 days of its decision. The servicer's decision is not appealable. 12 C.F.R. § 1024.41(h).

- A servicer must comply with all the loss mitigation evaluation rules in 12 C.F.R. § 1024.41 even if the borrower sent a "cease communication" demand under the Fair Debt Collection Practice Act. CFPB bulletin 12, 2013-12 at 6.

- Borrowers do not have a private right of action to enforce a loss mitigation rule violation under 12 C.F.R. § 1024.41 but do have a right to enforce a violation under the Real Estate Settlement Procedures Act 12 U.S.C. 2605(f) that provides for actual damages, no more than $2,000 in statutory damages for systemic violations, and attorney fees. The attorney fee provision gives the consumer bar an incentive to litigate *de minimis* violations of the loss mitigation process under 12 C.F.R. § 1024.41.

- Generally, a small servicer and its affiliates who service 5,000 loans or less as determined on

January 1st of each year, are exempt from many of the servicing requirements found in Reg Z (Truth in Lending) and Reg. X (RESPA) to include loss mitigation. However, the CFPB is continuing to request comments to clarify the responsibilities that are imposed - or are to be imposed - on small servicers so the rules applying to small servicers are not static.

E. FORECLOSURE PROHIBITIONS

The CFPB says it intends to "impose minimum foreclosure prohibition requirements" on servicers and let the states adopt consumer protection laws for the borrowers. Though a small servicer is not required to comply with the CFPB loss mitigation provisions, a small servicer must comply with the 120 day rule prohibiting the filing of a foreclosure within 120 days of the borrower going into default. "Filing a foreclosure" is determined under state law and means in a nonjudicial foreclosure state like Texas, the "earliest a document is required to be recorded to initiate foreclosure." 12 C.F.R. Part 1024 Supplement I, Comment 41(f)-1. In Texas this means the notice of foreclosure sale filed with the clerk under Tex. Prop. Code § 51.002(b).

A servicer, including a small servicer cannot file a foreclosure during the first 120 days a borrower is delinquent, unless delinquency is a result of violation of the due on sale clause or the servicer is joining the foreclosure of a subordinate lienholder. 12 C.F.R. § 1024.41(f)(1) & (2). If a borrower submits a complete loss mitigation application before a foreclosure is filed foreclosure cannot proceed. This prohibition lasts until:

- The servicer denies the loss mitigation application and all appeal rights have been exhausted; or

- The borrower rejected all loss mitigation options. 12 C.F.R. § 1024.41(f)(2).

As long as a borrower is performing under a loss mitigation or forbearance program not lasting more than six months, a servicer cannot file foreclosure. 12 C.F.R. § 1024.41(c) and 12 C.F.R. Part § 1024 Supplement I, Comment 41(c)(2).

If a borrower submits a complete application more than 37 days before the scheduled foreclosure sale date, a servicer cannot proceed. 12 C.F.R. § 1024.41(g). The servicer can continue with arbitration or mediation but can take no steps to directly conduce a sale. 12 C.F.R. Part § 1024 Supplement I, Comment 41(g).

If a foreclosure sale is scheduled and a completed loss mitigation application is filed less than 37 days before the sale date, the servicer does not have to follow the general foreclosure prohibition rule of 12 C.F.R. § 1024.41 and 12 C.F.R. Part 1024 Supplement I, Comment 41(g). However, if the investor or assignee of the deed of trust prohibits foreclosure if a completed application is received, the servicer must abide by the investor's rules. 12 C.F.R. § 1024.38(a) & (b)(2)(v).

F. REQUEST FOR INFORMATION (QWR)

1. Form of the Request

To obtain legitimate loan level information related to the borrower's account, the borrower or the borrower's agent, as defined in 12 C.F.R. Part 1024, Supplement I, Comment 36(a)-1, must send a written request to the servicer that must include the name of the borrower; sufficient information to allow the servicer to identify the borrower's account; and describe with specificity the information the borrower is requesting. The servicer doesn't have to respond if the requested information:

- Is the same information the servicer previously supplied unless it is information that changes over time and covers a different time period. 12 C.F.R. § 1024.36(f)(1).
- The request is for confidential, proprietary, or privileged information. 12 C.F.R. § 1024.36(f)(1).
- The request is for irrelevant information. 12 C.F.R. § 1024.36(f)(1)(iii).
- The request is overbroad or unduly burdensome. 12 C.F.R. § 1024.36(f)(1)(iv).
- However, the servicer must respond to an overbroad request if the servicer can "reasonably" identify a valid information request. 12 C.F.R. § 1024.36(f)(1)(iv).

2. Servicer May Designate the Address for Information Requests

The borrower must send a written request for information to the address the servicer clearly and conspicuously designates. If the servicer provides more than one address clearly and conspicuously, the borrower can send the request to any of the provided addresses even if it is not the address intended by the servicer. 12 C.F.R. § 1024.36(b) and 12 C.F.R. Part 1024 Supplement I, Comment 36(h)-3.

3. Acknowledgement of Request

The servicer must acknowledge a request for information within five days after receiving the request. Legal holidays and Saturday and Sunday are not counted when it comes to any response date under the mortgage servicing regulations. 12 C.F.R. § 1024.36(c). This is a big change from the former the 20 day business rule.

Even if the servicer determines it does not have to provide any information, the borrower's request must be responded to in the same five day period. The servicer can forego sending formal a written acknowledgement if the servicer sends its contact information including telephone number to the borrower within 5 days. 12 C.F.R. § 1024.36(e).

4. Timing

The timing for a servicer to respond to a borrower's request depends on the information requested.

- If the information requested is the identity, address, and relevant

contact information for the owner or assignee of the borrower's loan, the information must be supplied in 10 days. 12 C.F.R. § 1024.36(d)(2).

- All other requests must be responded to in 30 days which can be extended for 15 days if the reason for an extension is sent to the borrower's within the 30 day period. 12 C.F.R. § 1024.36(d)(2).

5. No Fee for Supplying Information

The servicer cannot charge the borrower a fee for supplying requesting information unless state law allows a fee to be charged. 12 C.F.R. § 1024.36(g).

G. Request For Payoff Information

A borrower or the borrower's agent [(defined in 12 C.F.R. Part 1024, as Supplement I, Comment 36(a)-1)] can send a written request for payoff information to the servicer, creditor or assignee of the mortgagee and get payoff information "within a reasonable time" but not later than seven business days after receiving a request. 12 C.F.R. § 1026.36(c)(3) and 12 C.F.R. Part 1026, Supplement I, Comment 36(c)(3). The provision also applies to a small servicer.

H. 120 Day Prohibition

A servicer, including a small servicer, cannot *file* for any judicial or nonjudicial foreclosure during the first 120 days that the borrower is delinquent.

Exceptions to the 120-day rule:

- A servicer CAN foreclose sooner than 120 for the borrower's violation of a due on sale clause.

- A servicer CAN foreclose sooner than 120 days after delinquency if the servicer joins in the foreclosure of a subordinate lienholder.

I. No Foreclosure Initiation during loss mitigation

A servicer, who is not a small servicer, cannot file for any judicial or nonjudicial foreclosure if the borrower submits a complete loss mitigation application before a foreclosure is filed. This prohibition applies whether the completed loss mitigation application was submitted during the first 120 days that the borrower was delinquent or any time after the first 120 days but before a foreclosure is filed.

A borrower is considered to have a performing loss mitigations alternative during the listing or marketing period of a short sale or similar agreement. However, if a short sale transaction is not approved at the end of the listing or marketing period, this loss mitigation alternative is considered non-performing.

The prohibition on filing a foreclosure lasts until one of the following happens:

- The servicer has denied the borrower's application for loss mitigation and
  - the time for appeal of the denial has expired; or

- the borrower has appealed a loss mitigation denial and the appeal was denied.

- The borrower rejected all loss mitigation options offered by the servicer;

- The borrower materially breached the borrower's loss mitigation obligations

J. NO FORECLOSURE IF BORROWER PERFORMING UNDER FOREBEARANCE AGREEMENT

A servicer cannot file for any judicial or nonjudicial foreclosure at any time if the borrower is performing pursuant to a short-term payment forbearance program. A short-term payment forbearance program is "a loss mitigation option for which a servicer allows a borrower to forgo making certain payments or portions of payments for a period of time – not longer than 6 months.

K. COMPLETE APPLICATION SUBMITTED 37 DAYS BEFORE SCHEDULED FORECLOSURE SALE

If a foreclosure has already been filed, AND it is more than 37 days before a foreclosure sale, AND the borrower submits a complete loss mitigation application, a servicer cannot "move for a foreclosure judgment [including a dispositive motion like a motion for default judgment, on the pleadings or summary judgment]. The servicer must "promptly" instruct its lawyers to stop the foreclosure process except to file any dispositive motion to protect the servicer's rights while the loss mitigation process proceeds.

The servicer can continue litigating, arbitrating, mediating, etc. the foreclosure during the loss mitigation process so long as this does "not cause or directly result in the issuance of a foreclosure judgment or order of sale, or the conduct of a foreclosure sale. 12 C. F.R. § 1024.41."

If the servicer has filed a dispositive motion at the time the borrower completes the loss mitigation application, the servicer has to "take reasonable steps to avoid a ruling on such motion or issuance of such order" until the loss mitigation procedures are completed. So long as the servicer takes affirmative action to stop the foreclosure process, it is not in violation of 12 C.F. R. §1024.41 even if the court grants the servicer's dispositive motion.

L. APPLICATION SUBMITTED LESS THAN 37 DAYS BEFORE SALE

If a foreclosure has already been filed, and the borrower submits a complete loss mitigation application **37 days or LESS** before a scheduled foreclosure sale, the servicer does NOT have to follow the loss mitigation requirements in 12 C.F.R. § 1024.41 with respect to that application.

If the investors or owner or assignee of the mortgage have requirements for dealing with loss mitigation applications that are received 37 days or less before a foreclosure sale, the servicer must maintain policies and procedure that are reasonably designed to abide by such requirements.

M. SMALL SERVICER RULES

Small servicers are exempt from the following provisions of the Mortgage Servicing Rules.

- The periodic statement provisions. (12 C.F.R. § 1026.41)
- The prohibition on purchasing force-placed insurance where a servicer could continue the consumer's existing hazard insurance coverage by advancing funds to escrow under certain circumstances (when the cost of force-placed insurance is less than the cost of advancing for hazard insurance). (12 C.F.R. § 1024.17)
- The general servicing policies, procedures, and requirements provisions. (12 C.F.R. § 1024.38)
- The early intervention provisions. (12 C.F.R. § 1024.39
- The continuity of contact provisions. (12 C.F.R. § 1024.40)
- Most loss mitigation provisions. (12 C.F.R. § 1024.41).

Small servicers must comply with the following provisions of the mortgage servicing rules regardless of the servicers' status as a small servicer:

- The ARMs disclosure provisions. (12 C.F.R. § 1026.20(c) and (d))
- The prompt crediting and payoff statement provisions. (12 C.F.R. § 1026.36(c)
- The force-placed insurance provisions. (12 C.F.R. § 1024.37).

V. CURRENT FORECLOSURE CONUNDRUMS

A. AUTHORITY TO FORECLOSE

Contrary to popular belief, a nonjudicial foreclosure sale is not authorized by Tex. Prop. Code § 51.002. Rather, it is the terms and conditions of the note and deed of trust - using the normal rules of contract construction - that provide the legal basis for foreclosure. *EMC Mortgage Corp v. Davis,* 167 S.W.3d 406, 413 (Tex. App.-Austin 2005 pet. den.) The terms of the note take precedent over the terms of the deed of trust. *Bowman v. Rutter,* 47 S.W. 52 (Tex. Civ. App. 1898). The deed of trust controls, however, if the note is silent. *Ward v San Antonio Life Ins. Co*., 164 S.W. 1043 (Tex. Civ. App. 1932). When the note, security instrument, and ancillary loan documents are executed at the same time and for the same purposes, all of the loan instruments are construed as a single document. *EMC Mortgage Corp v. Davis,* 167 S.W.3d 406, 413 (Tex. App.-Austin 2005 pet. den.) and *Vista Dev. Joint Venture II v. Pacific Mutual Life Ins. Co.,* 822 S.W.2d 305 (Tex.App.—Houston [1st Dist] 1992, writ den.).

The foreclosure statutes found in the Texas Property Code merely supplement the terms of the deed of trust with provisions the Legislature believes are important for due process and public policy reasons. While it may be hard to believe, at one time most deeds of trust did not require the lender to give notice to the borrower of a pending foreclosure

sale. So, to ensure a borrower had notice of a pending foreclosure sale, the Legislature made it mandatory to give a notice of foreclosure sale to the person obligated for the debt. Tex. Prop. Code §51.002(b)(3). Other examples of the Legislature overriding common contract terms in deeds of trust may be found in *Long v. NCNB – Tex. Nat. Bank*, 882 S.W.2d 861, 865 (Tex.App.– Corpus Christi, 1994, no writ) and *Roedenbeck Farms v. Broussard,* 124 S.W.2d 929 (1939), appeal dismissed, 308 U.S. 514, 60 S.Ct. 145, 84 L.Ed 438 (1939).

If provisions in the loan documents conflict with statutory law, the statute always controls. *Armenta v. Nussbaum, 519 S.W.2d 673* (Tex. App – Corpus Christi, 1975 reh. den.*)* and *Wylie v. Hays,* 114 Tex. 46, 263 S.W.563 (Tex.Com.App. 1924).

Until recently, courts held provisions contained in a security instrument had to be followed literally, even if the term or condition seemed unimportant or frivolous. *Clarkson v. Ruiz,* 108 S.W.2d 281, 285 (Tex.Civ.App.—San Antonio 1937, writ dism'd)*; American Sav. and Loan Ass'n of Houston v. Musick,* 517 S.W.2d 627 (Tex.Civ.App.—Houston [14th Dist.] 1974) reversed on other grounds, 531 S.W.2d 581 (Tex. 1975)*;* and *Lawson v. Gibbs,* 591 S.W.2d 292 (Tex.Civ.App.—Houston [14th Dist.] 1979, writ ref'd n.r.e).

Today, courts appear more inclined to use a balancing test between the rights of the borrower and lender especially if the borrower challenges a foreclosure on suspect legal theories while living in the secured property without making any attempt to pay the borrower's scheduled mortgage payments. For example, in a bankruptcy proceeding, the court found that the terms in the loan documents "could not be so rigidly construed as to prevent the enforcement of an honest obligation." *In re Davis Chevrolet, Inc.,* 135 B.R. 29 (Bankr. N.D.Tex.1992).

B. DEBTOR IS NEVER DEFINED - WHAT TO DO

Texas foreclosure statutes refer to the "debtor" but debtor is never defined in Tex. Prop. Code Chapter 51. Therefore, other Texas statutes must be consulted to obtain a definition of debtor as Tex. Bus. & Com. Code §9.102(a)(28) defines debtor "a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is the obligor." "Obligor" is then defined in Tex. Bus. & Com. Code §9.102(a)(60), as:

> *"a person that, with respect to an obligation secured by a security instrument or in an agricultural lien on the collateral, (i) owes payment or other performance of the obligation; ... (iii) or is otherwise accountable in whole or in part for payment or other performance of the obligation."*

In foreclosure notices and pleadings, it is a good practice to use the phrase, "*the person obligated for the debt*" instead of the word "*debtor*". The sloppy use of the term "debtor" can create a Fair Debt Collection Practices Act violation when a spouse signs a deed of trust *pro forma* and not the note, and the spouse is then called the debtor. A person cannot be the debtor unless the person signs the note.

C. AN IRS LIEN WITHOUT SUPERIOR LIEN PRIORITY

If an IRS tax lien against a delinquent taxpayer is recorded first in time to a purchase money security interest the delinquent taxpayer has executed to acquire the secured property, the IRS lien does not have superior lien status. *Slodov v. U.S.,* 436 U.S. 238, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978). 26 U.S.C.A. §§6321 – 6323 and see *U.S. By and Through I.R.S. v. McDermott,* 507 U.S. 447, 113 S.Ct. 1526, 123 L.Ed.2d 128 (1993). The reason is simple: but for the purchase money loan agreement used to acquire the secured property there would be no property of the taxpayer for the IRS lien to encumber.

D. DECEASED MORTGAGOR AFFECTS FORECLOSURE

In a recent opinion issued at the time of preparing this presentation that is still subject to revision or withdrawal, the Houston 1st District Court of Appeals held that in counties with statutory probate courts, all litigation involving a deceased mortgagor must be filed in the probate court because the statutory probate courts have exclusive subject matter jurisdiction under Tex. Estates Code § 32.005(a). *King v. Deutsche Bank Nation Trust*, No. 01-13-01091, 2015 WL 4929992 (Tex. App. Houston (1st Dist.) August 18, 2015).

King appears to mean that even Rule 736 home equity applications must be filed in a statutory probate court even if the deceased mortgagor's estate is an independent administration. Should a Rule 736 application be filed in district court, the case should be transferred to the statutory probate court because no probate court has dominant jurisdiction, even in those cases its shares concurrent jurisdiction with the district court under Tex. Estates Code § 34.001(a).

As a practical matter, a deceased mortgagor file, more commonly known as a "dead debtor" file, is not a default problem but rather a title problem because title to the secured property is immediately vested in devisees or the heirs at law. Tex. Estates Code § 101.001 or 101.051. If the mortgagee forecloses, the foreclosure extinguishes the note and security instrument that are the only tools the mortgagee has to obtain title and possession of the property from the heirs or devisees named in the will.

Since a dependent administration can be opened at any time within four years of the mortgagor's death, title companies are hesitant to issue a title policy if the mortgagee forecloses anytime within four years of the mortgagor's death. If a dependent administration is opened after a decedent's property is foreclosed, the personal representative can force the foreclosed property back into the probate estate and may even sue the mortgagee for conversion. *American Sav. & Loan Ass'n of Houston v. Jones,* 482 S.W.2d 62 (Tex.Civ.App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

If an independent administration is opened for the deceased mortgagor, the independent executor has six months to inventory and collect the assets of the estate from the date Letters of Testamentary were granted. Tex. Estates Code §403,059. Therefore, a security instrument can be foreclosed while an independent administration is pending pursuant to *Bozeman v. Folliott*, 556

S.W.2d 608 (Tex.Civ.App.—Corpus Christi 1977, writ ref'd n.r.e.).

The statute of limitation for any cause of action against an estate is also suspended for twelve months after the personal representative of the estate is appointed. Tex. Civ. Prac. & Rem. Code §16.062.

Rescission of the vendor's lien is an alternative to a creditor's administration, if the loan is in default and the mortgagor is deceased. *Lusk v. Mintz, 625* S.W.2d 774 (Tex.App.—Houston [14th Dist.] 1981, no writ) and *Walton v. First Nat. Bank of Trenton, Trenton, Texas*, 956 S.W.2d 647 (Tex.App.—Texarkana 1997, reh. den.). *See* other vendor's lien cases *Whiteside v. Bell,* 162 Tex. 411, 347 S.W.2d 568 (Tex. 1961) and *Dominey v. Unknown Heirs of Lokomski,* 172 S.W.3d 67 (Tex.App. – Ft. Worth 2005, no. pet.) The reservation clause granting the vendor's lien is usually found in the warranty deed and many times in a paragraph above the signature line of the deed of trust.

Because a mortgagee could rescind the vendor's lien and obtain title and possession of the property while the mortgagor was living, neither the decedent's estate nor heirs can prevent rescission of the vendor's lien if the loan remains in default after the mortgagor's death. *Hudson v. Norwood,* 147 S.W.2d 826 (Tex.Civ.App.—Eastland 1941, writ dism'd). Because enforcement of a vendor's lien requires a lawsuit, all the heirs must be made a party to the suit. As long as the purchase price for the property remains unpaid, the mortgagee has superior title to the property secured by a vendor's lien. As the Texas Supreme Court held in *Estes v. Browning*, 11 Tex. 237 (1853), "*no man shall claim title to the land of another without payment of the price agreed upon.*"

Until the debt used to acquire the decedent's property is paid, any co-maker of the note and the decedent's heirs have only equitable title to the property, that is, the use, benefit and enjoyment of the property—not legal title, which is held by the mortgagee. By exercising its right to rescind the vendor's lien, the mortgagee is not making a claim for money against decedent or decedent's putative estate; therefore, there is no necessity of administration of lender's claim under the Texas Estate Code. *Walton v. First Nat'l Bank of Trenton*, 956 S.W.2d 647, 652 (Tex.App.—Texarkana, 1997); and *Skelton v. Washington Mutual Bank F.A.,* 61 S.W.3d 56 (Tex.App.—Amarillo 2001).

For due process purposes, a suit to rescind the vendor's lien should allege that the foreclosure process in Tex. Prop. Code Chapter 51 be used as the *logistical* means to fairly and procedurally divest title out of the decedent and heirs into the lender. But it is not a foreclosure that divests the heirs of title, it is the judgment entered in the rescission of vendor's lien suit. However, the foreclosure – as is the normal case – will extinguish other obligors interest in the property.

E. A SUBSTITUTE TRUSTEE IS NOT APPOINTED BY TERMS OF DEED OF TRUST

The law related to the appointment of a substitute trustee has been radically changed under Tex. Prop Code §

51.0075(c) and (d); Tex. Prop Code § 12.0012; and Tex. Prop Code § 51.0076. Consequently much of the case law used to analyze appointment of trustee issues - which was always dependent on the words used in the security instrument – is no longer applicable. Few foreclosure and title professionals are aware of a or appreciate the radical change in the law.

With the words *"Notwithstanding any agreement to the contrary,"* the Texas Legislature changed the appointment process from one based on the appointment language contained in a deed of trust to provisions found in Tex. Prop. Code § 51.0075 which states:

> *"(a) 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 section by power of attorney, corporate resolution, or other written instrument.*
>
> *(b) A mortgage servicer may authorize an attorney to appoint a substitute trustee or substitute trustees on behalf of a mortgagee under subsection (c).*
>
> *(c) The name and a street address for a trustee or substitute trustee shall be disclosed on a notice required by* § *51.002(b)".*

The legislative history of Tex. Prop. Code § 51.0075 indicate the purpose of the legislative change was to take advantage of the technological changes in the mortgage banking industry by using electronic and other legitimate means of communication to designate a substitute trustee. The Legislature also recognized that because of securitization the mortgage servicer – NOT the owner of the note – should administer the foreclosure process because it was the mortgage servicer who was responsible for all loan level operations. Tex. Prop. Code § 51.0025. This legislation made pre-2005 appointment of trustee case law obsolete.

F. RECORDING APPOINTMENT OF SUBSTITUTE TRUSTEE

Most foreclosure and title professionals assume appointments must be recorded because "*that is the way it's always been done.*" Under Texas Prop. Code 51.0075, there is no requirement that the appointment of substitute trustee be recorded in the land title records. Prior to 1980, most appointments were recorded in the real property records - not because there was a statutory requirement to do so - but because most pre-1980 standard deed of trust forms required the appointment of substitute trustee be recorded in the real property records, e.g. *Barber v. Federal Land Bank,* 204 S.W.2d 74 (Tex. Civ. App. - Texarkana 1947, writ ref'd n.r.e). Since the 1980s, this clause has been dropped from standard deed of trust forms, but as an accommodation to title industry, most appointments are still recorded so that title examiners can determine whether the substitute trustee signing a trustee's deed was properly appointed.

Pursuant to Tex. Prop. Code § 51.0076, the appointment of a substitute trustee is evidenced by providing the name or

names of the substitute trustee(s), an address for the substitute trustee – this address is not necessarily the personal address of the trustee but rather an address, usual the foreclosure attorney's address where foreclosure information can be obtained - and a promulgated disclosure. Under Tex. Prop. Code §12.0012(a)(1), if the notice of foreclosure sale contains a legislative promulgated disclosure statement and is recorded and indexed - not just filed in the real property records - the notice of sale serves as the appointment of the substitute trustee as a permanent record in the land title records.

G. WHO APPOINTS SUBSTITUTE TRUSTEE

According to Tex. Prop. Code § 51.0075(c) and (d), the mortgagee, the mortgage servicer, or an attorney can appoint a substitute trustee by power of attorney, corporate resolution, other written instrument.

The customary business practice of the mortgage industry is to have the local law firm handling the foreclosure appoint the substitute trustee as part of the firm's legal services contract with the mortgage servicer client in accordance with Agency, GSE, and investor guidelines. Tex. Prop. Code § 51.0075(d).

The "written instrument" giving law firms the power to appoint substitute trustees, as required by Tex. Prop. Code § 51.0075(c), is the referral package that each law firm receives to initiate the foreclosure proceeding. A law firm's appointment of the substitute trustee, as provided in Tex. Prop. Code § 51.0075(d), is evidenced by a notice of foreclosure sale mandated by Tex. Prop. Code §51.002(b), that names the substitute trustee(s) and lists the law firm's address as the address of the trustee, as required by Tex. Prop. Code 51.0075(e). The fact that an appointment of substitute trustee is signed, notarized, and recorded in the name of the mortgage servicer is actually redundant. However, because of tradition and title company expectations, verbose appointment documents are still prepared, signed, notarized, and recorded.

H. PRIOR ACTS OF SUBSTITUTE TRUSTEE SUBSEQUENTLY RATIFIED

In *Benser v G. E. Capital Mortgage Services Inc.,* 1994 WL 156245 (Tex. App. - Dallas 1994*)* the court made two points: (a) *"when a party appoints the substitute trustee after the substitute trustee posted the notice of foreclosure, his later acts under the appointment ratify and affirms his prior acts as substitute trustee* citing *Chandler v Guaranty Mortgage Co*. 89 S.W.2d 250, 254 (Tex. Civ. App.-San Antonio 1935, no writ); and (b) minor irregularities in the conduct of a foreclosure sale will not invalidate the sale unless "*the irregularities caused injury to the mortgagor"*, citing *Charter Nat. Bank-Houston v Stevens* 781 S.W.2d 368, 371 (Tex. App.- Houston) [14th Dist.] 1989, writ denied.

The holding in *Benser* was recently followed in *Bernal-Bell v Saxon Mortgage Servicers Inc.* 2010 WL 3250115 (Tex. App.-San Antonio, 2010) where the court stated "*. . . as a general rule, a substitute trustee has no power to act prior to an appointment. However, a trustee's action after she is appointed*

ratify and affirm prior acts citing *Chandler v. Guaranty Mortgage Co*., 89 S.W.2d 250, 254(Tex. App. – San Antonio 1935, no w*rit)* and *Wilson v Armstrong*, 236 S.W. 755, 760 (Tex Civ. App.- Beaumont 1921, no writ on rehearing.)

The *Bernal-Bell* court also went on to state:

> *"The signing and posting of notice of sale or other ministerial acts, do not involve the exercise of discretion. Whether [the trustee] signed notices of sale before he was formally designated as substitute trustee or after his designation, at the time when he posted them, he ratified and affirmed his prior act of signing the notices. . . [T]o hold otherwise would require a substitute trustee, who had signed notices of sale prior to his formal designation as such substitute trustee, to do the foolish thing of erasing his name from the notices of sale and resigning them."*

I. Void Sale Because of Appointment Irregularity

Unless the appointment of a substitute trustee caused or contributed to the foreclosed property being sold for a grossly inadequate price, even a slight irregularity in the appointment process will not result in a wrongful foreclosure. When a substitute trustee was appointed by a law firm rather than the person designated in the deed of trust, the Texas Supreme Court, citing previous Texas Supreme Court decisions, held that that the *"well established rule"* is that an "*irregularity, though slight, must have caused or contributed to the cause of the property to be sold for a grossly inadequate price."* Otherwise the foreclosure sale is valid. *American Savings and Loan Association of Houston v. Musick,* 531 S.W.2d 581, 587 (Tex. 1976).

J. Owner Does Not Control Foreclosure Process

In a foreclosure, if a loan has been securitized, there is only one entity that has any loan-level information about a particular loan – the mortgage servicer. Most borrowers, and many judges, assume the servicer is the "owner" of the borrower's note because the servicer is the person to whom the borrower sends each mortgage payment. Tex. Prop. Code § 51.0001(3). The borrower also assumes the servicer is the owner of the borrower's note because the servicer handles all the day-to-day, loan-level administrative details related to the borrower's home loan.

Today the mortgage servicer is generally listed as the mortgagee of record to eliminate litigation risks associated with pseudo-lawyer pleadings and because a servicer is the proper party to administer foreclosure. Tex. Prop. Code § 51.0025.

Though there may be confusion in the borrower's mind as to who is the owner of the borrower's note, there is little confusion as to the person who services a borrower's loan. For any federally regulated loan – which includes most residential loans - when the servicing of a borrower's loan agreement is transferred, the borrower must be provided with the name, address, and toll-free phone number of the new servicer as well as very detailed disclosures required by 12 U.S.C. § 2605. In addition, when the creditor of a

borrower's loan agreement is sold or transferred, the borrower must receive a mandatory notice required by 15 U.S.C. § 1641. Consequently, the borrower of any federally regulated loan must be given formal notice under federal law of any mortgage servicer or creditor change. A servicer can generally produce a copy of these notices to alleviate any borrower's claim of ignorance of the who is the servicer or creditor of the borrower's loan.

When it comes to securitization, the role of every person or entity involved with the borrower's loan is as an agent of the investor. If a servicer is collecting money for its principle, the servicer can sue on behalf of the principle. *(See C.W. Capital Asset Management LLC v. Chicago Properties,* 610 F.3d 497 (7th Cir. 2010).

A master servicer, which is usually affiliated with the originator, issuer, sponsor, or depositor of the securitization, acts like a general contractor in a typical securitization and hires all the specialized entities that manage the myriad functions related to the securitization. The master servicer and each entity retained by the master servicer performs its designated role as an agent for the principal - the investor. The master servicer hires the mortgage servicer, which handles the day-to-day loan level administration activities of all the loans pooled in the securitization, so technically the mortgage servicer is really a sub servicer of the master servicer. The closest a master servicer comes to touching a borrower's individual loan is when it distributes the principal and interest, less the servicing fee, it receives from its sub-servicer who collected the loan payment from each borrower whose loan was pooled in the securitization.

Tex. Prop. Code § 51.0001(3), defines a "mortgage servicer" as:

> *"Mortgage servicer means the last person to whom a mortgagor has been instructed by the current mortgagee to send payment for the debt secured by a security instrument. A mortgagee may be a mortgage servicer."*

This definition, however, fails to mention the other loan administration activities a mortgage servicer provides on a daily basis in addition to collecting borrowers' payments. These include: responding to borrowers' inquiries and complaints, calculating and collecting escrow funds for taxes and insurance, and enforcing the security instrument if the borrower defaults.

It should be noted that the term "mortgage servicer" is also subsumed in the definition of "mortgagee" found in Tex. Prop. Code § 51.0001(4), which provides:

> *"'Mortgagee' means: (A) the grantee, beneficiary, owner, or holder of a security instrument; (B) a book entry system; or (C) if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record."*

The definition of "mortgagee" can mean six different entities are the mortgagee of a borrower's loan at the same time. Therefore, when a mortgage servicer must disclose the identity of the mortgagee for whom the mortgage

servicer is servicing the delinquent loan under Tex. Prop. Code § 51.0025, the "mortgagee" could be six different entities including the servicer. The key to the disclosure of the proper mortgagee - which is often ignored - is that the mortgage servicer must have a servicing agreement with the mortgagee. Tex. Prop. Code §51.0025 provides:

> *"A mortgage servicer may administer the foreclosure of property under Section 51.002 on behalf of the mortgagee if: (1) the mortgage servicer and the mortgagee have entered into an agreement granting the current mortgage servicer authority to service the mortgage; and (2) the notices required under Section 51.002(b) disclose that the mortgage servicer is representing the mortgagee under a servicing agreement with the mortgagee and the name of the mortgagee and: (A) the address of the mortgagee; or (B) the address of the mortgage servicer, if there is an agreement granting a mortgage servicer the authority to service the mortgage."*

Allowing a mortgage servicer to administer the foreclosure process is not a new development. For many years the Department of Housing and Urban Development ("HUD") has required that all Federal Housing Administration ("FHA") loans be serviced by "a mortgagee that is approved by HUD to service insured mortgages" and "the actions of its servicer shall be considered to be the actions of the mortgagee." 24 CFR § 203.502. Even so, Texas – with Michigan and California following Texas's lead - are the only states that have updated their foreclosure statutes to allow the mortgage servicer to administer the foreclosure process.

In litigation between the borrower and lender, the mortgage servicer may litigate in the servicer's name on behalf of the lender, so long as an assignment is filed in the court papers. Tex. Prop. Code § 12.014(b)*; Graco Robotics, Inc. v. Oaklawn Bank,* 914 S.W.2d 633 (Tex.App.—Texarkana 1995 reh. den.); and *Duke v. Brookshire Grocery Co.,* 568 S.W.2d 470 (Tex.Civ.App.—Texarkana 1978, no writ).

K. Foreclosure Enforces The Deed Of Trust Not The Note

When local banks or savings and loans originated, serviced, and foreclosed residential loans, all elements for a foreclosure were under the control of one entity – the local lender. Therefore, there was no need to analyze each element of the foreclosure process. The only issue was whether the borrower was in default. With securitization, many players perform specialized functions in the foreclosure process with seemingly no coordination and no transparency, so it became difficult for a foreclosure professional to accurately describe "who could do what" and "why they could do it."

Pre-securitization the local lender was both the owner of the note and the mortgagee of record so the issue of which loan instrument was being enforced in a foreclosure didn't come up. In the typical residential loan transaction the borrower makes two separate agreements: the note and the security agreement. Both are inseparably intertwined but are independent as to the enforcement

mechanisms. If the borrower fails or refuses to pay the obligation represented by the note, the holder or transferee can enforce the note, but the means of enforcement is limited to filing a suit on the note. On the other hand, if there is a material breach of any term of the deed of trust, as an independent contract between the grantor or mortgagor of the deed of trust and the lender - or its successors or assigns - the mortgage servicer can administer the foreclosure under terms of a deed of trust pursuant to Tex. Prop. Code § 51.0025 under contract law.

Pleadings – copied from the internet – that are flooding the courts have been very successful in attacking the foreclosure process by muddling the distinction between what is the base document authorizing foreclosure. This is commonly known as the "show me the note" argument discussed in Section "O" following. The deed of trust using normal rules of contract law is the base foreclosure document - not the note. So some background is necessary to understand the role of the note and the deed of trust in a foreclosure.

A note is the instrument evidencing the borrower's promise to pay a sum of money. Enforcement of a negotiable note is determined in accordance with Texas Business and Commerce Code Chapter 3. A person is not liable on a note unless the person, or his agent or representative with authority to do so, "authenticates" the debt instrument. Tex. Bus. & Com. Code §§3.401 and 6.402. Notes are now authenticated - instead of signed or executed – based on the assumption that most notes in the future will be originated electronically. Tex. Bus. & Com. Code §9.102(a)(7).

A borrower who assumes the payment of a note is estopped from contesting the validity of the original note and lien. *Criswell v. Southwestern Fidelity Life Ins. Co.,* 373 S.W.2d 893 (Tex.Civ.App.—Houston 1963, no writ). If an assumption deed recites that a certain debt is being assumed, the borrower is also estopped from claiming non-liability for payment of the note. *Green v. White,* 137 Tex. 361, 153 S.W.2d 575, 583 (1941). The fraud of the original maker does not absolve the borrower of liability on the note assumed. *Presidential Village, Ltd. v. Lone Star Gas Co.,* 585 S.W.2d 335 (Tex.Civ.App.—Dallas 1979, no writ).

With securitization, the originating lender has possession of the note and other loan agreement documents for only a brief period of time until the loan agreement can be sold into the secondary market. The originating lender negotiates and transfers the original note to the new owner by a specific endorsement or a blank endorsement. A specific endorsement uses the notation, "*Pay to the order of [the name of a specific person]*" and is authenticated or signed by the endorser. An endorsement in blank, which is the method used to transfer most notes that are securitized, uses the notation, "*Pay to the order*" without any reference to a named endorsee – hence blank endorsement. A note endorsed in blank means the bearer, i.e., the person who has possession of the note, is the holder of the note and the person who can enforce the note. Tex. Bus. & Com. Code § 3.301. It should be noted that nowhere in the negotiable note chapter of the Texas Business and Commerce Code is the word "owner" used to designate the person who can

enforce a note. Because a mortgage servicer generally has custody, control or physical possession of the borrower's "wet signature", the mortgage servicer is the holder of the note.

Another person who can enforce a negotiable note under the Texas Business and Commerce Code is the "transferee" to whom a note is delivered for the purpose of enforcement. Tex. Bus. & Com. Code § 3.203. In the era of securitization, the mortgage servicer is generally both the holder of the note because it has custody and control or physical possession of the note but is also the transferee of the note as the authorized agent for loan servicing administration who is tasked with enforcing the note. The agency status of the mortgage servicer can be found in the pooling and servicing agreement ("PSA") for a securitization regulated by the SEC or a written servicing agreement if the investor is a GSE, i.e., Fannie Mae, Freddie Mac, and Ginnie Mae.

That a security agreement is independent from the note is demonstrated by the fact that the beneficiary, or its properly identified mortgage servicer or agent, can foreclose even if the note is current. For example, if the borrower materially breaches the security agreement contract by failing to pay taxes or insurance or violates the due on sale clause, the lender can foreclose even though the borrower never missed a loan payment. In addition, a grantor of a deed of trust who is not the maker or obligated on the note can lose the encumbered property through foreclosure if there is a material breach of the deed of trust terms.
That the deed of trust is the source of the right to foreclose is further demonstrated by the fact that if the property is foreclosed, the net foreclosure proceeds are credited to the amount owed on the note. The maker remains obligated for any deficiency on the note which must be enforced by filing a deficiency lawsuit. The deed of trust is simply a contract that allows the property securing the debt to be sold and the proceeds of the foreclosure sale applied to the amount due under the note so as to reduce the borrower's debt obligation.

A default in payment of a note does not give the lender, or its successors or assigns, the right to nonjudicially foreclose the borrower's property. The reason is simple. It is power of sale clause authorizing a trustee to sell the property found in the deed of trust – not the note – that allows the lender or its successors or assigns by contract to nonjudicially foreclose. The deed of trust provides the mechanism for converting the collateral that secures the note into money that is credited to the borrower's account. If the deed of trust does not contain a power of sale clause, the borrower's property cannot be nonjudicially foreclosed because Texas Property Code Chapter 51 does not contain a power of sale provision.

L. FORECLOSURE DEMANDS AFTER BANKRUPTCY

Typically a borrower files bankruptcy the day of the scheduled foreclosure sale. After the bankruptcy is dismissed, the question arises whether a new demand to cure default foreclosure notice must be resent to the borrower. Tex. Prop. Code §51.002(d).

Case law makes it clear that this issue is a matter of state law not bankruptcy law. The United States Supreme Court in

Butner v. U.S., 440 U.S. 48, 99 S.Ct. 914 (1979*)* held that:

> *"Congress has generally left the determination of property rights in the assets of a bankruptcy estate to state law . . . state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress".*

These same principles have been applied in *Matter of Oxford Management, Inc.* 4 F.3d 1329 (5th 1993), *Matter of Haber Oil,* 12 F.3d 426 (5th 1994) and *Matter of Maple Mortgage,* 81 F.3d 592 (5th Cir. 1996*)*, and also acknowledged by the Texas Supreme Court in *Douglas v. Delp* 987 S.W. 2d 879 (Tex. 1999).

Because the Bankruptcy Code does not contain a provision specifically preempting state law as to real property foreclosure notices, Texas law applies.

Once a proper notice of default or acceleration is given to the person obligated for the debt, the notices remain valid until the borrower cures the default or the notice of default or acceleration is waived or abandoned.

Thompson v. Chrysler First Business Credit Corp., 840 S.W. 2d 25 (Tex. App.-Dallas, 1992, no writ*)* provides precedent for the question presented. In *Thompson,* Chrysler sent a notice of default in December 1987 and a notice of acceleration in January 1988 to the borrowers who filed bankruptcy in May 1988. The borrower, Marks Market Inc., made payments to Chrysler while the bankruptcy was pending. The bankruptcy was dismissed in August 1989 and Chrysler, without re-sending the demand letter or notice of acceleration sent two years earlier, foreclosed in October 1989.

Thompson, who was a guarantor of the Marks Market loan, was sued by Chrysler for the deficiency. Thompson defended by claiming new foreclosure notices had to be re-sent to the borrower after the bankruptcy was dismissed as a condition precedent for a valid foreclosure. The Court found that there was no legal authority requiring Chrysler to send new foreclosure notices post-bankruptcy and there no duty for Chrysler to do so.

Though unreported under Tex. R. App. Proc. 47.7, other cases upholding *Thompson* are *In Fitzgerald v. Henry* 2003 WL 22147557 (Tex. App.-Ft. Worth, 2003) and *Herrera v. Emmis Mortgage* 1995 WL 654561 (Tex. App.-San Antonio, 1995*).*

As to the argument that the automatic stay under 11 U.S.C.A. § 362 somehow rescinds any foreclosure notice given before bankruptcy, the automatic stay does not obviate Texas real property law, it simply stays collection efforts. In *Fitzgerald v. Harry* 2003 WL 22147557 (Tex. App.-Ft. Worth, 2003*)*, the Court held there is "*no authority for the proposition that bankruptcy restarts the time of notice of default and opportunity to cure under the Property Code."*

M. ATTORNEY QUALIFIED IMMUNITY IN FORECLOSURE

In most foreclosure litigation, the attorney or law firm handling the foreclosure is made a party to the borrower's lawsuit despite the fact the lawyers only involvement with the

borrower arises from representing the attorney's client.

Few attorneys seem to know that Texas law has long held that an attorney in representing a client has qualified immunity from being liable for damages to any non-client third party, e.g. a borrower. If sued, foreclosure attorneys should always claim the protection of the qualified immunity rule. *Taco Bell Corp. v. Cracken,* 939 F. Supp. 528 (N.D. Tex. 1996). The qualified immunity rule applies when an attorney represents a mortgage servicer in initiating foreclosure against a homeowner who has defaulted on payment of the note. *Guthrie v. Buckley,* 79 Fed. Appx. 637, 2003 WL 22455394, U. S. App. (5th Cir 2003).

Qualified immunity protects lawyers from civil liability from any third party while representing their clients except "*for a cause of action against an attorney who knowingly commits a fraudulent act outside the scope of his legal representation of the client*" or the lawyers' actions are "*foreign to the duties of an attorney*." *Alpert v. Crain, Caton & James, P.C.,* 178 S.W. 3d 398, 405 (Tex.App.-Houston [1st Dist.] 2005, pet. denied).

Because foreclosure lawyers always seem to get sued simply because they represent the client in a foreclosure proceeding, a stock attorney immunity response should be prepared for "cutting and pasting" into any pleading or brief. See *Alpert v. Crain, Caton & James, P.C.,* 178 S.W. 3d 398, 405 (Tex.App.-Houston [1st Dist.] 2005, pet. denied) that provides a succinct analysis of the attorney qualified immunity privilege beginning with *Bradt. v. West,* 892 S.W. 2d 56 (Tex.App.-Houston [1st Dist.] 1994, writ denied); *Bradt v. Sebek,* 14 S.W. 3d 756 (Tex.App.-Houston [1st Dist.] 2001, pet. denied); and *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests,* 991 S.W. 2d 787 (Tex. 1999). Also see *Smith v. National City Mortgage,* 2010 WL 3338537 (W.D. Tex. Aug 23 2010).

N. MERS

The MERS system is an electronic mortgage registration system and clearinghouse that tracks beneficial ownerships in, and servicing rights to, mortgage loans. The system is designed to track transfers and avoid recording and other transfer fees that are otherwise associated with the sale. *Calderon v. Bank of America*, 941 F.Supp. 753 (W.D. Tex. 2013). MERS is defined in Tex. Prop. Code § 51.0001(1) as a "book entry system." Along with the grantee, beneficiary, owner or holder of a security instrument, the person to whom a security instrument has been assigned, a book entry system is also considered a "mortgagee." Tex. Prop. Code § 51.001(4). Where a deed of trust expressly provides for MERS to have the power of sale as the "*nominee for lender or its successor or assigns*" – and almost all MERS deeds of trust have this language - then MERS has the power of sale. *Athey v. MERS,* 314 S.W.3d 161, 166 (Tex.App.-Eastland [11th Dist.] 2010, writ denied). This is contrary to lawsuits filed in many states challenging the ability of MERS**,** as the nominee for a lender, to execute assignments and consequently alleging lack of standing. While the availability of such pleadings online resulted in many "copycat" lawsuits being filed in Texas, this theory has been unanimously rejected by the

courts. *Richardson v. CitiMortgage, Inc.*, 2010WL 4818556 at *5 (E.D. Tex. 2010).

O. SHOW ME THE NOTE

During and after the housing crisis, a foreclosure defense colloquially termed "show me the note" or the "split note theory" began circulating through courts across the county. Advocates of this theory believe "that only the holder of an original wet-ink signature note has the lawful power to initiate a nonjudicial foreclosure."

Under this concept, the holder of the deed of trust must also own or hold the note, otherwise the deed of trust is ineffective and cannot be used to foreclose on the property encumbered by the deed of trust. *McCarthy v. Bank of Am., N.A.,* No. 4:11–CV–356–A, 2011 U.S. Dist. LEXIS 147685, at *8, 2011 WL 6754064 (N.D.Tex. Dec.22, 2011). This theory began circulating in American courts in 2009. *Reardean v. CitiMortgage, Inc.,* No. A–11–CA–420–SS, 2011 U.S. Dist. LEXIS 87567, at *7, 2011 WL 3268307 (W.D.Tex. July 25, 2011)(citing *Wells v. BAC Home Loans Servicing, L.P.,* No. W–10–CA–00350, 2011 U.S. Dist. LEXIS 61529, at *4–5, 2011 WL 2163987 (W.D.Tex. Apr.26, 2011); *Hornbuckle v. Countrywide Home Loans, Inc.,* No. 02–09–00330–CV, 2011 Tex.App. LEXIS 3857, at *9, 2011 WL 1901975 (Tex.App.-Fort Worth May 19, 2011, no pet.)(mem.op.) Since then, courts have routinely rejected the "show-me-the-note" theory and dismissed claims relying upon it because "foreclosure statutes simply do not require possession or production of the original note." *Reardean,* 2011 U.S. Dist. LEXIS 87567, at *7, 2011 WL 3268307; *Hornbuckle,* 2011 Tex.App. LEXIS 3857, at *9, 2011 WL 1901975.

Texas law differentiates between enforcement of a promissory note and foreclosure. Enforcement of the note is a personal action against the signatory and requires a judicial proceeding. On the other hand, foreclosure enforces the deed of trust, not the underlying note. Foreclosure is an independent action against the collateral and may be conducted without judicial supervision. Texas courts have refused to conflate foreclosure with enforcement of a promissory note. *Id.* at 7-8.

P. HOME EQUITY LOANS CANS BE MODIFIED

The Texas Supreme Court has ruled on an issue that was once thought to be nearly impossible: the modification of a home equity loan. *Sims v. Carrington Mortgage Services, LLC*, 440 S.W. 3d 10, (Tex. 2014). In *Sims*, the Court held that as long as a modification of a home equity loan only restructures the collection of monies already owed under the original loan (including principal, interest, escrow, and fees), and does not involve any new monies being loaned (*i.e.*, no new "extension of credit"), the loan modification does not have to comply with the restrictions contained in TEX. CONS. art XVI § 50. As demonstrated by Texas being the last state in the Union to authorize origination of home equity loans, and only by constitutional amendment, Texans have long taken pride in protecting their homesteads. Consequently, a laundry list of strict origination requirements surround the origination of a home equity loan in compliance with TEX. CONS. art XVI § 50(a)(6), including the "80/20"

requirement and "3%" rule. It was unclear as to whether these stringent origination requirements applied to modifications of home equity loans until *Sims*. Chief Justice Nathan Hecht distinguished the word "refinance" from the word "modification." A refinance involves a new extension of credit satisfying and replacing the original loan, while a modification of a home equity loan does not involve the satisfaction or replacement of the original loan. This holding should be beneficial to both lenders and borrowers going forward, allowing both parties the ability to modify delinquent loans and turn non-performing into performing loans.

The Texas Constitution requires that a home equity loan (combined with all other outstanding loans secured by the homestead property) not exceed 80% of the fair market value of the homestead at origination. Contained within the laundry list of origination requirements in the Texas Constitution is that the "lender will forfeit all principal and interest if the lender fails to comply with the lender's obligations unless the lender cures the failure to comply as provided by Section 50(a)(6)(Q)(x)." TEX. CONS. art XVI § 50(g)(Q)(10). The lender has 60 days to cure the alleged defect upon being notified by the borrower of the lender's failure to comply with the constitutional requirements. *Id*. at § 50(a)(6)(x). This provision was put to the test in *Wells Fargo Bank, N.A., v. Leath*, 425 S.W.3d 525 (Tex. App – Dallas [5th Dist.] 2014, writ denied).

Wells Fargo sought to foreclose the delinquent home equity lien under TEX. R. CIV. P. 736. Leath filed an answer to the foreclosure application and a separate declaratory judgment action to abate the foreclosure. In both pleadings, Leath alleged that the loan violated § 50(a)(6)(B) of the Texas Constitution because the outstanding debt exceeded 80% of the fair market value of the homestead property on the date of origination. Leath further alleged Wells Fargo had been "notified of this failure to comply more than sixty (60) days ago and ha[d] not corrected the failure to comply in any way." *Id*. at 529. Leath sought a declaration that Wells Fargo was not entitled to foreclose on the property because the loan violated the Texas Constitution and asked the trial court to order that all principal and interest under the extension of credit to be forfeited. The case went before the jury on a single question: to determine the fair market value of the homestead property on the date of origination. The jury returned a verdict of $421,000.00 and declared the lien void since it violated the constitution's "80/20" origination requirement. The Court of Appeals affirmed the trial court. However, a careful analysis of pleadings in *Leath,* raises a perplexing question. Wells Fargo never plead the safe harbor 80/20 protection found in TEX. CONS. art XVI § 50(a)(6)(Q)(14) that is included in all standard loan origination paper work prepared by competent "doc prep" lawyers. This provision provides "the owner of the homestead and the lender sign a written acknowledgement as to fair market value" which should eliminate all future challenges of an 80/20 rule violation.

Q. RESCISSION OF ACCELERATION

Acceleration of the debt, rescission of acceleration and the applicable statute of limitations to foreclosure has been the single most litigated issue in foreclosure litigation the last few years. In part, this

resulted from a decision in *Callan v. Deutsche Bank Trust Company Americas*. *Callan v. Deutsche Bank Trust Company Americas*; No. 4:13-cv-00247; 2015 WL 1296330, U.S. District Court, S.D, Texas, (March 27, 2014). The case revolved around the ability of the lender to foreclosure as a rescission of acceleration was sent just days before the running of the four year statute of limitation provided by Tex. Civ. Prac. & Rem. § 16.035. The parties agreed the loan was accelerated on November 6, 2007, resulting in a four year limitations period ending November 6, 2011. Deutsche argued the running of the statute was reset on November 3, 2011 by a notice of rescission resulting in the limitations period ending November 3, 2015. While initially ruling in favor of Callan, a motion to reconsider was filed and the court held as follows: "According to decisions by sister courts and the general right of an aggrieved party to waive default under Texas law, Deutsche was entitled to rescind, and its third application for foreclosure dated August 27, 2012 was not time-barred." *Id.* at 10.

It is important to note Governor Abbot signed HB 2067 in June 2015 that authorized mortgage servicers, lenders or their attorneys to unilaterally rescind accelerations in writing by placing them in the mail to the borrower. This is codified as Tex. Civ. Prac. & Rem. § 16.038 and is effective immediately. Furthermore, this clarifies the law as it relates to this subject and litigation should decrease accordingly.

R. EXCESS SALE PROCEEDS

Even well-settled common law principles became subject to challenge by borrowers during and after the "housing crisis." No case better demonstrates the litigious environment surrounding mortgages and foreclosure than *Patton v. Porterfield*. *Patton v. Porterfield*, 411 S.W.3d 147 (Tex. App. – Dallas [5th Dist.] 2013, pet. denied).

Porterfield took out a purchase money mortgage on his property followed a few years later by a subordinate home equity lien. After defaulting on the purchase money lien, the lender foreclosed this lien generating a substantial sum of excess proceeds. The terms of the purchase money deed of trust instructed the trustee ("Patton") to apply the proceeds of sale as follows: "(a) to all expenses of the sale, including, but not limited to, reasonable trustee's and attorneys' fees; (b) to all sums secured by the first security instrument; and (c) any excess to the person or persons legally entitled to it." *Id.* at 151. Accordingly, Patton distributed the proceeds of the sale to the servicer of the purchase money mortgage, paid the foreclosure attorneys' fees, waived the trustee fees, sent a check in the amount of $293,424.27 to the mortgage servicer of the home equity lien, with the remaining $70,375.33 to Porterfield. Porterfield filed suit claiming the excess proceeds should not have been distributed to the home equity lender because the constitution requires a court order to foreclose home equity liens and further because the home equity lien is solely against the homestead property and not against any excess proceeds. The trial court concluded that Patton and the foreclosure law firm "breached their contractual obligation to Porterfield" and awarded Porterfield $283,424.27 in damages. Upon appeal, the court saw no reason to retract or change the common law governing foreclosure sales and the disposition of excess proceeds. The trial

court's judgment was reversed and a take-nothing judgment was rendered on Porterfield's claims.

S. REGULATION OF FORECLOSURE CONSULTANTS

The Texas legislature reacted to the "housing crisis" and all that surrounded it. This includes placing restrictions on people who prey on individuals who are in default or involved in foreclosure proceedings. Effective September 1, 2011, the legislature created Tex. Bus. & Com. Code Chapter 21 titled "Regulation of Certain Residential Foreclosure Consulting Services." Among other things, actions of foreclosure consultants were not only defined, but also prohibited by statute. Foreclosure consultants, generally defined as those who offer a homeowner numerous services relating to the foreclosure of a property, such as the postponing the foreclosure sale, assisting the homeowner, curing the default, or assisting the homeowner in obtaining excess proceeds from a foreclosure sale for compensation. Tex. Bus. & Com. Code § 21.001.

T. NO MORE RELIABLE FORECLOSURE STATISTICS

Added in 2011, Tex. Prop. Code § 51.022 required the person posting the notice of sale of residential property to submit a form designed by the Texas Department of Housing and Community Affairs to the county clerk containing the zip code of the property to be foreclosed for tracking of foreclosure activity across the state. Buried in a Texas Department of Housing and Community Affairs ("TDHCA") omnibus clean-up bill, this provision was repealed by the 83rd Legislature in 2013**.** Consequently, reliable foreclosure statistics on the state level are no longer available to public policy makers.

U. FAILURE TO RETURN A HOME EQUITY NOTE WHEN PAID

An obscure and often ignored provision in Tex. Const. art XV § §50a(6)(Q)(vii) requires a lender to return a borrower's home equity promissory note within a reasonable time after the loan is paid in full. The question of whether the failure to return the note within the 60 day cure period after the borrower requests its return results in loss of all principal and interest is the subject of a case pending before the Texas Supreme Court on certified questions from the U.S. 5th Circuit Court of Appeals. *Garofolo v. Ocwen Loan Servicing L.L.C.*, 2015WL 3561295 (5th Cir. June 9, 2015). In *Garofolo*, Ocwen failed to return the Garofolo home equity promissory note when the loan was paid off. After Garofolo gave Ocwen notice that the note was not returned in accordance with Tex. Const. art XVI § §50a(6)(Q)(vii) and Ocwen failed to cure within the reasonable cure period of Tex. Const. art XVI § 50a(6)(Q), Garofolo sued claiming that Ocwen forfeited all principal and interest under the home equity loan.

The two certified questions the Texas Supreme Court will consider in *Garofolo v. Ocwen Loan Servicing,* Texas Supreme Court 15-0437 are:

1. *Does a lender or holder violate Article XVI § 50a(6)(Q)(vii) of the Texas Constitution, becoming liable for forfeiture of principal and interest, when the loan agreement incorporates the protections of Section*

50a(6)(Q)(vii), but the lender or holder fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or hold of the failure to comply?

2. *If the answer to Question 1 is "no", then, in the absence of actual damages, does a lender or holder become liable for forfeiture of principal and interest under a breach of contract theory when the loan agreement incorporates the protections of Section 50a(6)(Q)(vii), but the lender or holder, although filing a release of lien in the deed records, fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?*

One of the reason the 5th Circuit sought guidance from the Texas Supreme Court is that the 5th Circuit said this was a recurring issue and cited *Estes v. JPMorgan Chase Bank*, N.A. (No. 14-51103, 613 Fed. Appx. 277, 2015 WL 2386053 (5th Cir. May 20, 2015).

VI. STATUTE OF LIMITATION

As a result of the mortgage crisis, the federal government enacted several programs and regulations aimed at allowing borrowers to avoid foreclosure. While the success of these efforts is debatable, one thing is certain: all contributed to lengthy delays in the foreclosure. In turn, these delays brought statute of limitations to the forefront of foreclosure related litigation.

A. Controlling Law

Under Texas law, a sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. § 16.035(b). A real property lien and the power of sale to enforce it become void if a mortgagee does not seek to foreclose under a deed of trust within four years of the date the cause of action accrues. *Holy Cross Church of God in Christ v. Wolf,* 44 S.W.3d 562 (Tex. 2001).. Alternatively, a person must bring suit for the recovery of real property under a real property lien not later than four years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. § 16.035(a).

B. Acceleration

Acceleration formally accelerates the maturity of the entire debt and starts the ticking of the clock for statute of limitations purposes. A foreclosure action accrues when the note is accelerated. *Holy Cross Church of God in Christ,* 44 S.W.3d at 566. "Effective acceleration requires two acts: (1) notice of intent to accelerate, and (2) notice of acceleration." *Id.*

C. Abandonment

The actions of parties can constitute abandonment for statute of limitations purposes. If acceleration is abandoned, the statute of limitations resets and the original maturity date is restored. *Id* at 566-67; *Deutsche Bank Nat'l Trust Co. v. Ketmayura*, No. A-14-CV-00931-LY-

ML, 2015 WL 3899050 at *7 (N.D. Tex. June 11, 2015). A note holder who exercises its option to accelerate may abandon acceleration before the limitations period expires, restoring the contract to its original condition. *Denbina v. City of Hurst,* 516 S.W.2d460, 463(Tex. Civ. App.-Tyler 1974, no writ).

Mortgagees also may abandon acceleration through their own unilateral actions *Santibanez v. Saxon Mortg., Inc.,* No. 11-10-00227-CV, 2012 WL 3639814, at *3 (Tex. App.-Eastland, Aug. 23, 2012, no pet.). Voluntary dismissal without prejudice of an application for expedited foreclosure has been held to constitute abandonment of a prior notice of acceleration. *Bitterroot Holdings, LLC., v. MTGLQ Investors, L.P.*, No. 5:14-cv-862-DAE, 2015 WL 363196 at 6 (W.D. Tex. Jan. 27, 2015). However, there is authority that holds acceleration may not be abandoned unilaterally where the borrower has detrimentally relied upon the acceleration. *In re Rosas*, No. 13-52402-CAG 2014, WL 1779437 at 10 (BK S.D. Tex May 5, 2014).

D. NOTICES OF DEFAULT AND INTENT TO ACCELERATE POST-ACCELERATION

Several courts in Texas, as well as the 5th Circuit, have held that the sending of a subsequent notice of default and intent to accelerate or account statements requesting less than the total amount of the accelerated debt are adequate to constitute abandonment of acceleration. *Leonard v. Ocwen Loan Servicing, LLC*, No. 14020611, 2015 WL 3561333, at 3-4 (5th Cir. June 9, 2015); *Boren v. U.S. Bank Nat'l Ass'n*, No. H-13-2160, 2014 WL 5486100 at 2 (S.D. Tex. Oct. 29, 2014).

E. RECORDING RESCISSIONS OF ACCELERATION

Tex. Civ. Prac. & Rem. § 16.036 allows parties liable for a debt or obligation secured by a real property lien to suspend the running of the four year statute of limitations by written agreement, as long as the requirements of this sections are met, including recording of said document in the real property records of the county where the property is located. Recording a unilateral rescission of acceleration has also been held to reset the statute of limitations. *Clawson v. GMAC Mort.*, No. 3:12-cv-00212, 2013 WL 1948128 at 3 (S.D. Tex. May 9, 2013).

F. RESCISSION OF ACCELERATION

Beginning June 2015, mortgage servicers, lenders or their attorneys may rescind accelerations by sending a notice of rescission in writing by certified or regular mail to the borrower. The rescission is effective once placed in the mail. Tex. Civ. Prac. & Rem. § 16.038.

G. TOLLING EVENTS

Several event that occur throughout the duration of the foreclosure process can act as tolling event and add additional time to the requisite four year statute of limitations. Several of these events will be discussed below.

1. Bankruptcy

Texas courts have consistently held that when a claimant is prohibited from bringing suit by the bankruptcy code's automatic-stay provision, the statute of

limitations is tolled until the stay is lifted. *Peterson v. Tex. Commerce Bank – Austin, N.A.*, 844 S.W.2d 291, 294 (Tex. App – Austin 1992, no writ). Even when a suit isn't necessary, the automatic bankruptcy stay tolls the statute of limitations until it is lifted if it prevents the lender from foreclosing. *Cade v. Stone*, No. 13-12-00630-CV, 2013, WL 3009853, at 5 (Tex. App. – Corpus Christi, June 13, 2013, no pet.).

2. Death of the Mortgagor

The death of a person against whom or in whose favor there may be a cause of action suspends the running of an applicable statute of limitations for twelve months after the date of death. Furthermore, if an executor or administrator of a decedent's estate qualifies before the expiration of the twelve months, the statute of limitations begins to run at the time of qualification of the executor or administrator. Tex. Civ. Prac. & Rem. § 16.062.

a. Probate

When a formal probate proceeding is opened, the general statutes of limitation is tolled when a claim for money is filed or a suit is brought against the personal representative of an estate with respect to a claim of the estate that is not required to be presented to the representative. Tex. Estates Code § 355.008.

b. Agreement of the Parties

As alluded to previously, Tex. Civ. Prac. & Rem. § 16.036 allows parties liable for a debt or obligation secured by a real property lien to suspend the running of the four year statute of limitations by written agreement, as long as the requirements of this sections are met, including recording of said document in the real property records of the county where the property is located. Several courts have held oral extensions of a debt's maturity are valid and enforceable between parties to agreement. *C. & G. Coin Meter Supply Corp. v. First Nat'l Bank in Conroe,* 413 S.W.2d 151, 154 (Tex.Civ.App.—Eastland 1967, writ ref'd n.r.e.); *Mizell Construc. Co. & Truck Line, Inc. v. Mack Trucks, Inc.,* 345 S.W.2d 835, 837–38 (Tex.Civ.App.—Houston 1961, no writ); *see also McNeill v. Simpson,* 39 S.W.2d 835, 836 (Tex. Comm'n App.1931, holding approved); *Maceo v. Doig,* 558 S.W.2d 117, 119 (Tex.Civ.App.—Austin 1977, writ ref'd n.r.e.). Such agreements are enforceable between the parties despite their failure to comply with statutory provisions, *Yates,* 131 S.W.2d at 101, but extensions are binding against subsequent lienholders only if the prior lien did not appear to be barred of record when the later lien was acquired. *Mercer,* 676 S.W.2d at 582; *see also Hughes,* 172 S.W.2d at 304.

c. Litigation

As a general rule, Texas courts have held that where a person is prevented from exercising a legal remedy by the pendency of a legal proceeding, the time during which he is prevented should not be counted against him in determining whether limitations have barred this right. *Jackson v. Johnson*, 950 F.2d 265 (5th Cir. Tex. 1992). However, a suit for an injunction prohibiting nonjudicial foreclosure does not toll the statute of limitations [for judicial foreclosure] because it is not an impediment to the lender's ability to sue on the note or seek judicial foreclosure." *Ketmayura*, 2015 WL 3899050 at 9. *In Pioneer Bldg &*

Loan Ass'n v. Johnston, 117 S.W.2d 556, 559-60 (Tex. Civ. App. – Waco, 1938, writ dism'd), the court held that the statute of limitations for nonjudicial foreclosure was tolled during the time the lender was restrained by the injunction preventing exercising the power of sale in the deed of trust. The court further elaborated by confirming the injunction restraining the sale under the deed of trust did not prevent a suit for judicial foreclosure and thus the limitations period for judicial foreclosure was not tolled by the injunction. *Id.*

VII. A "CURE" FOR ASSIGNMENT BREAKS IN THE CHAIN OF TITLE

A. ASSIGNMENT OF DEED OF TRUST BY OPERATION OF LAW

Missing assignments in the chain of title are particularly vexing to title and foreclosure professionals!

Because of sloppy loan origination and lien assignment practices, the chain of title for many properties is a mess and curing the mess is acerbated even more so when large loan originators during the go-go years are no longer in business or disappeared – New Century, Ameriquest, Aegis Mortgage. In addition, even if a title or foreclosure professional could locate a lender or a mortgage servicer that could seemingly sign a missing assignment, getting an assignment executed by the appropriate person is often impossible.

But there may be an innovative cure that uses old law that has been around since 1872 to fix breaks in the chain of title caused by missing or defective deed of trust assignments.

Before one proceeds with reading this section, the assignment form at Appendix A (affectionately known as the "pixie dust" assignment) should be in hand because the analysis that follows is married to Appendix A. In fact, the analysis that follows is intended to be included as part of a pixie dust assignment whenever it is recorded in the real property records. Though it may cost an extra $10-15 in recording fees, the legal analysis explaining the legal concepts behind the pixie dust assignment, may be worth every penny if it cures an intractable break in the chain of title. Once the pixie dust assignment becomes acceptable – if it does – the Memorandum of Law would no longer be necessary.

The concept is really very simple. The assignment of a lien always follows the note. This has been the law according to the United States Supreme Court since 1872. *Carpenter v. Longan*, 83 US 271, 16, Wall 271, 21 L.Ed. 313 (1872). Whoever has custody, control, or physical possession of the borrower's "wet signature" note is the "holder" (Tex. Bus. & Com. Code § 3.311) or "transferee" (Tex. Bus. & Com. Code § 3.203) is the assignee or grantee of the deed of trust securing the note because the deed of trust follows the note.

The sworn affidavit that is made an integral part of the pixie dust document tells the world who has possession of the borrower's note and should meet any motion for summary judgment standard because it was patterned after the affidavit promulgated by the Texas Supreme Court for use in Rule 736 home equity foreclosures.

The affidavit also should satisfy a judge's desire to hold a person in contempt or make the person subject to a show cause hearing, if the judge should question the validity of the averment in the affidavit as to who has possession of a borrower's note.

Further, the statements made under oath in the pixie dust affidavit is immeasurably more creditable than most assignments currently found in the land title records when the "Return To" or "Prepared By" notation makes it clear some third party outsource prepared the assignment in widget factory fashion. Typical assignments contain no evidence that the preparer or the preparer's employer had any actual or personal knowledge of any of the facts contained in an assignment. Therefore, the pixie dust assignment eliminates a title professional having to take the information contained in an assignment purely on trust.

The only impediment for use of the pixie dust document is getting the large lenders and mortgage servicers to execute the affidavit. This should not be a problem – but it is - because the pixie dust affidavit is the same or similar to the affidavit the servicer must sign for a motion for summary in a lawsuit seeking to cure a break in the chain of title. However, anything new or if there is no pressure to sign, the pixie dust assignment will sit in someone's inbox forever. But – interestingly enough – the pixie dust affidavit always seems to get signed if a hearing or trial is set the next day.

Based on suggestions from several of the major underwriting counsels, the pixie dust form can become an acceptable method of curing assignment breaks in the chain of title without the need for litigation based on the premise that the deed of trust follows possession of the note.

B. DEFINITIONS

1. LOAN AGREEMENT is defined in Tex. Bus. & Com Code §26.02 and generally means the note signed by the maker of the note, the security instrument signed by the grantor of the deed of trust, riders, and other instruments evidencing the obligations secured by the property described in the deed of trust.

2. GRANTOR means the person(s) who executed the original referenced deed of trust.

3. GRANTEE means the current mortgagee of the loan agreement evidenced by its custody, control, or physical possession of the maker's original note that is secured by the referenced deed of trust currently recorded in the real property records of the county where the encumbered property is located.

4. MORTGAGEE is defined in Tex. Prop. Code §51.001(4)(A) and means the current grantee, beneficiary, owner, or holder of a security instrument.

5. MORTGAGE SERVICER is defined in Tex. Prop Code §51.001(3) and means the last person to whom a mortgagor has been instructed by the current mortgagee to send payments for the debt secured by a security instrument; is the duly authorized agent for loan servicing administration for its principal, the mortgagee; and may administer

foreclosure of the loan agreement pursuant to Tex. Prop. Code § 51.0025.

6. Maker is defined in Tex. Bus & Code § 3.103(a)(7) and generally means the person who executes and delivers a note representing the maker's promise to repay the payee of the note, or its successor or assign, for the loan proceeds plus interest advanced for the maker's benefit at closing.

7. OBLIGOR is the person obligated to pay the debt evidenced by the loan agreement and generally is the person who executed the note but may be the person who assumed the maker's obligation to pay the loan agreement debt evidence by the note and deed of trust.

8. TRANSFEREE is defined in Tex. Bus. & Com Code § 3.203 and means the person who receives a note and is vested with any right of the transferor to enforce the instrument, including any right as a holder in due course.

9. HOLDER is defined in Tex. Bus. & Com Code § 1.201(b)(21) and means the person in possession of a negotiable instrument that is payable either to an identified person or bearer in possession of the note and is the person who may enforce the note pursuant to Tex. Bus. & Com Code § 3.301.

C. TEXAS CASES - DEED OF TRUST FOLLOWS THE NOTE IT SECURES

1. *Pope v. Beauchamp,* 110 Tex. 271, 219 S.W. 447, 449 (Tex. 1920) citing *Perkins v. Sterne*, 23 Tex. 561, 563 (1859), "*Even in the case of a note made payable to A, or bearer, and transferable by delivery, without endorsement, any holder of such note could avail himself of the security afforded by a mortgage executed to secure its payment because the mortgage, as an incident, would follow the note into the hands of every holder. . . the executed contract of mortgage is an incident of the instrument assured. . .and the mortgage passes with it, ipso facto without assignment in words...*".

2. *West v. First Baptist Church,* 123 Tex. 388, 71 S.W.2d 1090, 1098-1099 (Tex. 1934),"*The trial court's finding and conclusion ignores the settled principle that a mortgage securing a negotiable note is but an incident to the note and partakes of its negotiable character . . . In the instant case the filing of the deeds of trust was a part of the closing of the loan, and the intention of the grantor undoubtedly was to create liens fully effective to secure the notes if and when they were effective*". Then citing *Carpenter v. Longan*, 83 US 271, 21 L.Ed. 313, 315 (1873), "*The note and mortgage are inseparable; the former as essential, the latter as an incident.*"

3. *Lawson v. Gibbs*, 591 S.W.2d 292, 294 (Tex.Civ.App.-Houston [14th Dist.] 1979, writ ref'd n.r.e.), "*The mortgage of the property is an incident of the debt; and as long as the debt exists, the security will follow the debt.*"

4. *Kirby Lumber Corp. v. Williams,* 230 F.2d 330, 333 (5th Circ. 1956), "*The note and mortgage are inseparable: the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.*"

5. *J.W.D., Inc. the Money Store, Inc. v Federal Insurance Company,* 806 S.W.2d 327, 329-330 (Tex. App.—Austin 1991, no writ), "*The following statement summarizes the general rule regarding the passage of a security with the assignment of the debt to which the security applies: The assignment of a debt ordinarily carries with it all liens and every remedy or security that is incidental to the subject matter of the assignment that could have been used or made available, by the assignor as a means of indemnity or payment, even though they are not specifically named in the instrument or assignment. . .*".

D. SIMILAR PROCEDURE FOUND IN TEX. BUS. & COM. CODE §9.607 A (B)

Tex. Bus. & Com. Code §9.607(b) provides that a secured party may record "*a copy of the security agreement that creates or provides for a security interest in the obligations secured by a mortgage*" with an accompanying sworn affidavit that allows the secured party to enforce the recorded mortgage nonjudicially. (*See* Official Comment 8)

E. OBLIGOR HAS NO STANDING TO CONTEST ONLY VOID ASSIGNMENT

The obligor of a note is not a third party beneficiary or privy to any assignment transaction between the payee or successor payee or purchaser of the obligor's note; therefore, the obligor has no standing to challenge an assignment unless the assignment transaction is void, not merely voidable. *See Miceli v. The Bank of N.Y.Mello*n, No.1:13-CV-1032-DAE, 2015 WL 300671 (W.D. Tex, Jan.21, 2015). This assignment is not based on the chain of assignments in deed records but rather on the current mortgagee's custody, control, or possession of the note secured by the deed of trust being assigned.

F. RECORDING DEED OF TRUST IS NOT NECESSARY FOR ENFORCEMENT

Recordation of the security instrument is for the purpose of providing notice to third parties of the existence of the deed of trust lien, but recording is not necessary for enforcement of the lien against the parties to the instrument. Tex. Prop. Code § 13.001 and *see Cervantes v. U.S. Bank Nat'l Ass'n.*, No. 3:12 CV-0661-D, 2012 WL 1605558 at *3 (N.D. Tex. May 8, 2012). Further, the doctrine of estoppel by contract or quasi estoppel forbids the obligor of the loan agreement from taking the loan proceeds at closing and then claiming the obligor is not required to pay the schedule loan payments to the current mortgagee or its mortgage servicer to whom the debt is owed. *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 240 (Tex. App.—Corpus Christi 1994, writ denied).

VII. THE AUTHORS WILL ANSWER YOUR FORECLOSURE QUESTION IF YOU CALL OR EMAIL

With the understanding that *"the more the authors know about foreclosure the more the authors know they don't know"*, if a reader has a foreclosure question, the authors will attempt to help the reader find a solution to the foreclosure problem. Many lawyers have assisted the authors with legal issues in the past and the authors would like to pass on that legacy to other lawyers.

NOTICE THAT BY OPERATION OF LAW *[Entity with custody, control or physical of possession of obligor's wet signature note]* IS THE CURRENT GRANTEE AND ASSIGNEE OF THE DEED OF TRUST *[add assignment of rents or other ancillary instruments secured by the obligors note*] BECAUSE THE GRANTEE POSSESS THE ORIGINAL NOTE SECURED BY INSTRUMENT REFERENCED BELOW THAT FOLLOWS POSSESSION OF THE NOTE.

The Deed of Trust securing the maker's original Note was recorded *[date]* at *[Clerk's recording information*] in [*Potter]* County, Texas.

LEGAL DESCRIPTION: [________________________]
PROPERTY ADDRESS: [_________________________]

INDEXING INFORMATION PROVIDED BELOW IS BASED ON THE AFFIDAVIT, MEMORANDUM OF LEGAL AUTHORITY ATTACHED, AND TEX. LOCAL GOV'T CODE § 193.003

DOCUMENT TYPE: ASSIGNMENT

ORIGINAL DEED OF TRUST SECURING NOTE: *[Clerk's recording information*]
ORIGINAL [*ANCILLARY INSTRUMENT]*: *[Clerk's recording information*]

CURRENT GRANTOR: *[Entity with custody, control or physical of possession of obligor's wet signature note*] "MORTGAGEE"
CURRENT GRANTEE: *[Mortgagor(s)]*

Note Maker or Obligor: *[Obligor(s) of note*]

Current Mortgage Servicer: [name]
Servicer's Address: [address]

STATE OF [______________] §
§
COUNTY OF [____________] §

BEFORE ME, THE UNDERSIGNED, on this day personally appeared *[Affiant]* and stated under oath:

1. My name is *[Affiant]*. I am an adult and of sound mind. I am a *[Title and Employer]* that is the current Mortgagee of the loan agreement evidenced by the original Note executed by [*name of current obligor(s)* – OR if original note maker and current obligor are different, use *{name of current obligor(s) assumed the Note and is the current Obligor of the loan agreement evidenced by the Note}* secured by the referenced deed of trust granted by the original mortgagor(s).

2. I am authorized to make this affidavit on behalf of the current Mortgagee of the Obligor's loan agreement account and my testimony is based on my job responsibilities and my personal review of the current mortgage servicing business records for the Obligors' account that includes electronic, computer generated, and data compilations that are relied upon for accuracy in the normal course of business by persons engaged in servicing and enforcing mortgage loan agreements. I am familiar with the manner in which the Obligor's records are created and maintained in the regular course of business. The records are made at or near the time of the event or communication recorded and made by or from information transmitted by persons with knowledge of the matter recorded in the records. The original Note secured by the referenced Deed of Trust is currently in the custody, control, or physical possession of the current Mortgagee of the Obligor's' loan agreement account. The servicing records of the Obligor's account indicate that at closing the Note Maker received the cash proceeds reflected in the Deed of Trust from the original mortgagee named in the Deed of Trust. The debt evidenced by the Obligor's loan agreement has not been paid off or released and the Obligor has acknowledged the debt by making scheduled mortgage payments to the Mortgage Servicer. The statements made in my affidavit are true and correct as of the date signing.

Executed this _____ day of ______________, 2015.

____
[Name and Title]

BEFORE ME, on this day personally appeared *[Name, Title], and Employer]* known to me to be the person whose name is subscribed to the foregoing instrument and who acknowledged to me that the instrument was executed for the purposes and consideration expressed.

Given under my hand and seal of office on _________________, 20__.

____
Notary Public in and for the State of _________
My commission expires: ___________

RETURN TO:
____

MEMORANDUM OF LAW

GENERAL LEGAL AUTHORITY PERTAINING TO
ASSIGNMENT OF DEED OF TRUST BY OPERATION OF LAW
`

DEFINITIONS

a. **LOAN AGREEMENT** is defined in *Tex. Bus. & Com Code §26.0*2 and generally means the note signed by the maker of the note, the security instrument signed by the grantor of the deed of trust, riders, and other instruments evidencing the obligations secured by the property described in the deed of trust.
b. **GRANTOR** means the assignor of the deed of trust and is the persons who originally executed the referenced deed of trust.
c. **GRANTEE** means the assignee of this instrument and is the current mortgagee of the loan agreement evidenced by its custody, control, or physical possession of the maker's original note that is secured by the referenced deed of trust currently recorded in the real property records of the county where the encumbered property is located.
d. **MORTGAGEE** is defined in *Tex. Prop. Code §51.001(4)(A)* and means the current grantee, beneficiary, owner, or holder of a security instrument.
e. **MORTGAGE SERVICER** is defined in *Tex. Prop Code §51.001(3)* and means the last person to whom a mortgagor has been instructed by the current mortgagee to send payments for the debt secured by a security instrument; is the duly authorized agent for loan servicing administration for its principal, the mortgagee; and may administer foreclosure of the loan agreement pursuant to *Tex. Prop. Code § 51.0025.*
f. **Maker** is defined in *Tex. Bus & Code § 3.103(a)(7)* and generally means the person who executes and delivers a note representing the maker's promise to repay the payee of the note, or its successor or assign, for the loan proceeds plus interest advanced for the maker's benefit at closing.
g. **OBLIGO**R is the person obligated to pay the debt evidenced by the loan agreement and generally is the person who executed the note but may be the person who assumed the maker's obligation to pay the loan agreement debt evidence by the note and deed of trust.
h. **TRANSFERE**e is defined in *Tex. Bus. & Com Code § 3.203* and means the person who receives a note and is vested with any right of the transferor to enforce the instrument, including any right as a holder in due course.
i. **HOLDE**R is defined in *Tex. Bus. & Com Code § 1.201(b)(21)* and means the person in possession of a negotiable instrument that is payable either to an identified person or bearer in possession of the note and is the person who may enforce the note pursuant to *Tex. Bus. & Com Code § 3.301.*

TEXAS CASES HOLDING A DEED OF TRUST FOLLOWS THE NOTE IT SECURES

a. Pope v. Beauchamp, 110 Tex. 271, 219 S.W. 447, 449 (Tex. 1920) citing Perkins v. Sterne, 23 Tex. 561, 563 (1859), "Even in the case of a note made payable to A, or bearer, and transferable by delivery, without endorsement, any holder of such note could avail himself of the security afforded by a mortgage executed to secure its payment because the mortgage, as an incident, would follow the note into the hands of every holder. . . the executed contract of mortgage is an incident of the instrument assured. . .and the mortgage passes with it, *ipso facto* without assignment in words...".
b. West v. First Baptist Church, 123 Tex. 388, 71 S.W.2d 1090, 1098-1099 (Tex. 1934),"The trial court's finding and conclusion ignores the settled principle that a mortgage securing a negotiable note is but an incident to the note and partakes of its negotiable character . . . In the instant case the filing

of the deeds of trust was a part of the closing of the loan, and the intention of the grantor undoubtedly was to create liens fully effective to secure the notes if and when they were effective". Then citing Carpenter v. Longan 83 US 271, 21 L.Ed. 313, 315 (1872), "The note and mortgage are inseparable; the former as essential, the latter as an incident.").

c. Lawson v. Gibbs, 591 S.W.2d 292, 294 (Tex.Civ.App.-Houston [14th Dist.] 1979, writ ref'd n.r.e.), "The mortgage of the property is an incident of the debt; and as long as the debt exists, the security will follow the debt".

d. Kirby Lumber Corp. v. Williams 230 F.2d 330, 333 (5th Circ. 1956), "The note and mortgage are inseparable: the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."

e. J.W.D.,Inc. the Money Store, Inc. v Federal Insurance Company 806 S.W.2d 327, 329-330 (Tex. App.—Austin 1991, no writ), "The following statement summarizes the general rule regarding the passage of a security with the assignment of the debt to which the security applies: The assignment of a debt ordinarily carries with it all liens and every remedy or security that is incidental to the subject matter of the assignment that could have been used or made available, by the assignor as a means of indemnity or payment, even though they are not specifically named in the instrument or assignment. . .".

A SIMILAR PROCEDURE FOR RECORDING A DEED OF TRUST BY THE SECURED PARTY IS FOUND IN TEX. BUS. & COM. CODE §9.607(b)

Tex. Bus. & Com. Code §9.607(b) provides that a secured party may record "a copy of the security agreement that creates or provides for a security interest in the obligations secured by a mortgage" with an accompanying sworn affidavit that allows the secured party to enforce the recorded mortgage nonjudicially. (*See* Official Comment 8)

THE OBLIGOR OF THE NOTE SECURED BY THE DEED OF TRUST HAS NO STANDING TO CONTEST AN ASSIGNMENT EXCEPT FOR A VOID ASSIGNMENT

The obligor of a note is not a third party beneficiary or privy to any assignment transaction between the payee or successor payee or purchaser of the obligor's note; therefore, the obligor has no standing to challenge an assignment unless the assignment transaction is void, not merely voidable. *See* Miceli v. The Bank of N.Y.Mellon, No.1:13-CV-1032-DAE, 2015 WL 300671 (W.D. Tex, Jan.21, 2015). This assignment is not based on the chain of assignments in deed records but rather on the current mortgagee's custody, control, or possession of the note secured by the deed of trust being assigned.

RECORDING THIS DEED OF TRUST IS NOT NECESSARY FOR ENFORCEMENT BY MORTGAGEE AGAINST MORTGAGOR

Recordation of the security instrument is for the purpose of providing notice to third parties of the existence of the deed of trust lien but recording is not necessary for enforcement of the lien against the parties to the instrument. *Tex. Prop. Code § 13.001* and *see* Cervantes v. U.S. Bank Nat'l Ass'n., No. 3:12 CV-0661-D, 2012 WL 1605558 at *3 (N.D. Tex. May 8, 2012). Further, the doctrine of estoppel by contract or quasi estoppel forbids the obligor of the loan agreement from taking the loan proceeds at closing and then claiming the obligor is not required to pay the schedule loan payments to the current mortgagee or its mortgage servicer to whom the debt is owed. Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236, 240 (Tex. App.—Corpus Christi 1994, writ denied).